

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: FOUR PENNSYLVANIA SKILL : No. 761 CD 2023
 AMUSEMENT DEVICES AND ONE TICKET :
 REDEMPTION TERMINAL CONTAINING :
 \$18,692.00 IN U.S. CURRENCY :
 :
 :
 :
 APPEAL OF: COMMONWEALTH OF :
 PENNSYLVANIA, MONROE COUNTY :

BRIEF OF *AMICI CURIAE*, GREENWOOD GAMING AND ENTERTAINMENT, INC., D/B/A PARX CASINO; GW CUMBERLAND OP CO., D/B/A PARX CASINO SHIPPENSBURG; DOWNS RACING, L.P., D/B/A MOHEGAN SUN POCONO; MOUNTAINVIEW THOROUGHBRED RACING ASSOCIATION, LLC, D/B/A HOLLYWOOD CASINO AT PENN NATIONAL RACE COURSE, HOLLYWOOD CASINO MORGANTOWN AND HOLLYWOOD CASINO YORK; WASHINGTON TROTTING ASSOCIATION, LLC, D/B/A HOLLYWOOD CASINO AT THE MEADOWS; CHESTER DOWNS AND MARINA, LLC, D/B/A HARRAH’S PHILADELPHIA CASINO & RACETRACK; WIND CREEK BETHLEHEM, LLC, D/B/A WIND CREEK BETHLEHEM HOLDINGS ACQUISITION CO. L.P. D/B/A RIVERS CASINO PITTSBURGH; SUGARHOUSE HSP GAMING, LP D/B/A RIVERS CASINO PHILADELPHIA; MOUNT AIRY #1, LLC D/B/A MOUNT AIRY CASINO RESORT; WOODLANDS FAYETTE, LLC D/B/A LADY LUCK CASINO; STADIUM CASINO RE, LLC D/B/A LIVE! CASINO & HOTEL PHILADELPHIA; and STADIUM CASINO WESTMORELAND RE, LLC D/B/A LIVE! CASINO PITTSBURGH

Appeal from the Order of the Court of Common Pleas of Monroe County, entered February 8, 2023, at No. 6673 CV 2021

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I. STATEMENT OF INTEREST

Amici Curiae are the operators of licensed and regulated Pennsylvania casinos, who file this *amicus curiae* brief in support of the Brief of the Appellant, the Commonwealth of Pennsylvania, Monroe County, and to oppose the position of Appellees, L&M Music Company, Inc. and Smokin' Joes Tobacco Shop, Inc., that the four Pennsylvania Skill Amusement Devices at issue, manufactured by POM of Pennsylvania, LLC ("POM") (hereinafter the "POM Machines") are so-called skill games and not unlawful slot machines and/or unlawful devices to be used for gambling under Section 5513 of the Crimes Code, 18 Pa.C.S. § 5513.

Amici Curiae further file this brief due to their specialized interest in protecting legal gambling in Pennsylvania. As slot machine licensees, *Amici Curiae* are authorized by law to place and operate slot machines consistent with the Commonwealth's mandated comprehensive legal and regulatory scheme. *Amici Curiae* have heavily invested in order to legally offer slot machine gaming in Pennsylvania, each paying multi-million dollar slot machine license fees,¹ completing a costly and extensive criminal background, financial and operational suitability review and application process, and further investing hundreds of

¹ The Category 1 and Category 2 properties paid license fees of \$50,000,000; the Category 3 properties paid license fees of \$30,000,000; and the Category 4 properties paid license fees ranging between \$7,500,000 and \$50,100,000. Thus, collectively *Amici Curiae* have paid hundreds of millions of dollars in license fees.

millions of dollars in the development and expansion of their casinos in order to offer state-of-the-art, compliant facilities.

Since the enactment of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§ 1101 *et seq.* (the “Gaming Act”), in 2004, which authorized slot machine gaming for the first time in Pennsylvania, Pennsylvania’s licensed casinos have been an unqualified boon to the Commonwealth and its citizens. Their operations have generated billions of dollars for the Commonwealth and its citizens, in the form of license fees, tax revenue, local share funding and fees, and other financial benefits, as well as tens of thousands of jobs for Pennsylvania residents.

Despite the Crimes Code criminalizing the offering of any slot machine except those authorized by the Gaming Act, POM has facilitated the offering of such unlawful slot machines, hidden in plain sight behind the self-created “skill games” misnomer, in restaurants, social clubs, convenience stores, gas stations and similar establishments across the Commonwealth, including that operated by the Appellee here. A far cry from Appellee Smokin’ Joes Tobacco Shop’s seemingly isolated mom-and-pop operation, the POM Machines are found in hundreds—possibly thousands—of establishments across Pennsylvania, each brazenly flouting the Gaming Act’s comprehensive regulatory framework and tax generation scheme. This both threatens the continued vitality of the legal gaming industry our

Legislature so carefully crafted and permitted in 2004, and clearly violates prohibitions of the Crimes Code that same Legislature established as far back as 1972.

Amici Curiae submit this brief in order to protect their established property interest in their slot machine licenses and licensed casino facilities, as well as protect the Commonwealth and its citizens—which benefit extensively from Pennsylvania’s licensed casino operations—against the continued proliferation of unlicensed, unregulated, unlawful slot machines in Pennsylvania.

Pursuant to the requirements of Pa.R.A.P. 531(b)(2), *Amici Curiae* hereby advise the Court that no person or entity other than *Amici Curiae* paid in whole or in part for the preparation of this *amicus curiae* brief, and no person or entity other than *Amici Curiae* and undersigned counsel for *Amici Curiae* authored in whole or in part this *amicus curiae* brief.

II. ARGUMENT

A. **Because The POM Machines Are Slot Machines, The Trial Court Erred In Holding That Appellees Did Not Violate Section 5513 Of The Crimes Code**

1. **Under the Crimes Code, all slot machines are illegal *per se* unless legalized elsewhere under Pennsylvania law**

The Pennsylvania Crimes Code makes it a misdemeanor of the first degree if a person

(1) intentionally or knowingly makes, assembles, sets up, maintains, sells, lends, leases, gives away, or offers for sale, loan, lease or gift, **any** punch board, drawing card, **slot machine** or any device to be used for gambling purposes, except playing cards;

18 Pa.C.S. § 5513(a)(1) (emphasis added). The Crimes Code makes an exception for conduct made lawful by other Pennsylvania statutes, such as the lottery and licensed gaming under the Gaming Act. 18 Pa.C.S. § 5513(e.1) (“Nothing in this section shall be construed to prohibit activity that is lawfully conducted under ... (4) [the Gaming Act].”).

Section 5513 broadly declares that it is unlawful to assemble, sell, maintain or make available “any ... slot machine”. The term “any” is all-inclusive. “The word ‘any’ is generally used in the sense of ‘all’ or ‘every’ and its meaning is most comprehensive.” *In re Estate of Belefski*, 196 A.2d 850, 855 (Pa. 1964). The Supreme Court has also recognized that “any” has two commonly accepted alternative meanings in the English language: “any” could mean “all” or “every”,

as well as “one”, and has held that the meaning of the term “any” is dependent on the context in which it is used in the particular statute under review. *Snyder Bros. v. Pennsylvania Pub. Util. Comm’n*, 198 A.3d 1056, 1072 (Pa. 2018). Here, when viewed in the context of the Crimes Code, the term “any” is not ambiguous: the General Assembly intended for unauthorized conduct involving all slot machines to be unlawful, as opposed to targeting a singular slot machine. Thus, reading Sections 5513(a) and (e.1) together, the prohibited conduct with respect to **any** slot machine is illegal unless it is made legal elsewhere under Pennsylvania law, including in the Gaming Act.

Section 5513 does contain certain definitions, but it does not define the term “slot machine”. Section 5513 does, however, contain a provision relating to “construction” that specifically exempts from the crimes established in Section 5513(a) any activity that is lawfully conducted under the Gaming Act. 18 Pa.C.S. § 5513(e.1)(4). In addition, before lawful gaming was exempted from the Crimes Code under Section 5513(e.1), the original Gaming Act contained a provision that expressly repealed Section 5513(a) of the Crimes Code if it is “inconstant with this part.” 4 Pa.C.S. § 1903(a)(2). Therefore, the Crimes Code’s prohibitions relating to “**any** ... slot machine” must include those slot machines defined by the General Assembly in the Gaming Act or the cross-referenced exemption would be unnecessary.

2. The common law “skill versus chance” test cannot be used to determine whether a device is a slot machine

As quoted above, the Crimes Code applies to “any . . . **slot machine** or any **device to be used for gambling purposes**”. 18 Pa.C.S. § 5513(a)(1), (e.1) (emphasis added). Pursuant to the Statutory Construction Act, 1 Pa.C.S. §§ 1501 *et seq.*: “Every statute shall be construed, if possible, to give effect to all its provisions.” 1 Pa.C.S. §1921(a). Thus, when construing a statute, a court “must attempt to give meaning to every word in a statute, as we cannot assume that the legislature intended any words to be mere surplusage.” *City of Philadelphia Fire Dep’t v. Workers’ Comp. Appeal Bd. (Sladek)*, 195 A.3d 197, 207 (Pa. 2018). Accordingly, the test to determine whether an object is a “slot machine” under Section 5513 may not be the same as that used to determine whether an object is a “device to be used for gambling purposes”,² as the alternative would render the words “slot machine” “mere surplusage” within the statute.

That the Legislature intended “slot machine[s]” and “device[s] to be used for gambling purposes” to require different inquiries is further supported by its choice to include the disjunctive “or” between them. 18 Pa.C.S. § 5513(a)(1)

² In determining whether a device is one “to be used for gambling purposes,” Pennsylvania courts look to the “three elements of gambling: consideration, chance, and reward.” *Commonwealth v. Dent*, 992 A.2d 190, 192 (Pa. Super. 2010) (citing *Commonwealth v. Two Elec. Poker Game Machs.*, 465 A.2d 973, 977 (Pa. 1983)). Regarding the second element, a machine constitutes a gambling device if chance predominates rather than skill. *Two Elec. Poker Game Machs.*, 465 A.2d at 977. It is the latter inquiry that is sometimes referred to as the “skill versus chance” test and drove the decision being appealed.

(criminalizing the offering of any “slot machine **or** any device to be used for gambling purposes”). In the phrase “slot machine **or** any device to be used for gambling purposes” of Subsection 5513(a)(1) ‘or’ is a disjunctive particle and means one or the other of two propositions; never both.” *Commonwealth v. Bretz*, 433 A.2d 55, 58 (Pa. Super. 1981) (internal citations omitted). Because “slot machine” and the catchall phrase are separated by the disjunctive “or”, the catchall phrase does not modify the term “slot machine”. *See id.* (distinguishing between a “slot machine”, which “need not” be in “actual use in a gambling operation” versus “any device to be used for gambling purposes”, which is a catchall phrase that refers to all other gambling devices not specifically named in Section 5513(a)).³

Cases applying Section 5513 have agreed, interpreting the phrase “slot machine **or** any device to be used for gambling purposes” in the disjunctive. For example, in *Commonwealth v. Gerulis*, 616 A.2d 686, 693-94 (Pa. Super. 1992), the Superior Court held that the Commonwealth need only prove that the device in question was a slot machine; it need not also show “actual use in a gambling operation.” Similarly, this Court has held that mere possession of a slot machine,

³ *Bretz* involved a defendant accused of possessing slot machines that he used to lure a child into his apartment. 433 A.2d at 57. The Superior Court held that the defendant’s mere possession of the slot machines did not constitute any of the prohibited acts in Section 5513(a), including the prohibition against “maintaining” a slot machine. Nevertheless, the defendant’s slot machines could still be seized and forfeited, as Section 5513(b) permits forfeiture proceedings based solely on possession, regardless of whether the slot machines were used for gambling purposes.

regardless of why it is possessed, is sufficient grounds for seizure and forfeiture, and “the legality or propriety of the seizure is not dependent upon the conviction of the owner under Section 5513(a).” *Commonwealth v. 9 Mills Mech. Slot Machs.*, 437 A.2d 67, 69-70 (Pa. Cmwlth. 1981); *see also* 18 Pa.C.S. § 5513(b) (although mere possession of a slot machine is not criminal under subsection (a), possession is enough for a slot machine to “be seized and forfeited to the Commonwealth,” even if not used for gambling).

Accordingly, the trial court erred by evaluating the legality of the POM Machines under Section 5513 based solely upon the skill versus chance test, therefore only analyzing whether those machines were “devices to be used for gambling devices”, without also analyzing whether the POM Machines were “slot machines” within the purview of the Crimes Code.

3. The Legislature’s definition of “slot machine” in the Gaming Act informs the definition of “slot machine” in the Crimes Code, and the POM Machines satisfy that definition

While the Crimes Code does not define “slot machine,” the Gaming Act does. Under the Gaming Act’s definition, a slot machine includes any computerized terminal that upon payment of consideration is available to be played and “**whether by reason of skill or application of the element of chance or both**” may entitle the player to cash or credits to be exchanged for cash as well as **any “skill slot machine, hybrid slot machine** and the devices or associated

equipment necessary to conduct the operation of a skill slot machine or hybrid slot machine.” 4 Pa.C.S. § 1103.⁴

This Court in *POM of Pa., LLC v. Commonwealth of Pa., Dep’t of Revenue*, 221 A.3d 717, 725 (Pa. Cmwlth. 2019) (*en banc*) (“*POM v. Revenue*”), found that, based on POM’s own averments, the POM Machines met the definition of a “skill slot machine”, a type of “slot machine” under the Gaming Act.

a. The Statutory Construction Act requires the Crimes Code and the Gaming Act to be read *in pari materia*

“When interpreting the Gaming Act [the] paramount objective must be to ascertain and effectuate the intention of the General Assembly.” *POM v. Revenue*, 221 A.3d at 730 (citing 1 Pa.C.S. §1921(a) (“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.”)). The Statutory Construction Act codifies the doctrine of *in pari materia* (meaning “upon the same subject”), a tool of statutory construction which states: “Statutes in *pari materia* shall be construed together, if possible, as one statute”, and “[s]tatutes or parts of statutes are in *pari materia* when they relate to the same persons or things or to the same class of persons or things.” 1 Pa.C.S. § 1932(a)-(b). Thus, “[l]aws which apply to the same persons or things or the same

⁴ Because the Gaming Act includes both “skill slot machines” and “hybrid slot machines” under the broader term “slot machine”, a slot machine is a slot machine, regardless of whether skill or chance predominates.

class of persons or things ... should be read together where reasonably possible.”

DeForte v. Borough of Worthington, 212 A.3d 1018, 1022 (Pa. 2019).

This doctrine of statutory construction has been used in prior cases to construe undefined terms in Section 5513. In *Commonwealth v. Betres*, the Superior Court was tasked with construing the terms “unlawful gambling” and “unlawful gambling place” in Sections 5513(a)(2), (a)(3) and (a)(4) of the Crimes Code. 352 A.2d 495 (Pa. Super. 1975). In construing the term “unlawful” in those provisions, the Superior Court utilized the definition of “unlawful” from Section 5512 of the Crimes Code, 18 Pa.C.S. § 5512:

When the term **unlawful gambling** was used by the legislature they **could have intended no other meaning than gambling not specifically authorized by the Commonwealth.** This reasonable common sense interpretation is supported by Section 5512 of the Crimes Code. That section which deals with lotteries defines the term ‘unlawful’ as follows, ‘As used in this section the term ‘unlawful’ means not specifically authorized by law.’ There is no reason why the legislature would have intended ‘unlawful’ to have any different meaning in Section 5513 than it was given in Section 5512.

Id. (footnote omitted) (single quotation marks in original) (emphasis added); *see also Commonwealth v. Dent*, 992 A.2d 190, 197 (Pa. Super. 2010) (noting that “use of slot machines” is among the forms of gambling regulated by the Legislature, specifically in Title 4, and among the forms of unlawful gambling falling within the holding in *Betres*).

b. The Statutory Construction Act requires Section 5513 of Crimes Code and the Gaming Act to be read together because both relate to the same things and class of things

Under the Statutory Construction Act, “[s]tatutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things.” 1 Pa.C.S. § 1932. There is little doubt that Section 5513 of the Crimes Code and the Gaming Act relate to the same things and class of things.⁵

Broadly speaking, the purpose of the Crimes Code is “[t]o forbid and prevent conduct that unjustifiably inflicts or threatens substantial harm to individual or public interest.” 18 Pa.C.S. § 104(1). Similarly, the Gaming Act states that its “primary objective ... to which all other objectives and purposes are secondary is to protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful.” 4 Pa.C.S. § 1102(1). The Gaming Act also grants the “authorization of limited gaming by the installation and operation of slot machines” to “enhance live horse racing, breeding programs, entertainment and employment in this Commonwealth”, to “provide a

⁵ Pennsylvania Courts apply this doctrine regardless of whether the statutes in question are criminal statutes, civil statutes, or a combination of both, so long as both statutes relate to the same class of persons. *Commonwealth v. Guilford*, 861 A.2d 365, 374-75 (Pa. Super. 2004) (both criminal statutes relate to the same class of persons and shall be construed together); *In re 171.481 Acres to Borough of Millersville, Lancaster County*, 290 A.2d 102, 105 (Pa. 1972) (reading two civil statutes *in pari materia* to apply definition of “freeholders” from one to the other); *Commonwealth v. Dodge*, 599 A.2d 668, 672 (Pa. Super. 1991) (using definition of “firearm” from a different section of the Crimes Code to interpret statute in which “firearm” was not defined); *Commonwealth v. Jezzi*, 208 A.3d 1105, 1114 (Pa. Super. 2019) (reading in harmony the criminal Controlled Substance Act and Vehicle Code with the civil Medical Marijuana Act); *Commonwealth v. Dabney*, 274 A.3d 1283, 1291 (Pa. Super. 2022) (same).

significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives”, and to “maintain the integrity of the regulatory control and legislative oversight over the operation and play of slot machines, table games and interactive gaming in this Commonwealth.” 4 Pa.C.S. § 1102(2), (3), (11).

Specifically, Section 5513 of the Crimes Code makes it a crime to sell, lease, or maintain “any ... slot machine” and otherwise outlaws gambling. The Gaming Act, through its licensing scheme, authorizes the limited and highly regulated use of slot machines at certain approved locations.

Simply put, the Crimes Code makes it illegal to sell, lease, or maintain “any ... slot machine”, and the Gaming Act instructs how to legally sell, lease, or maintain any slot machine. One cannot be read without the other. Indeed, Section 5513 of the Crimes Code broadly outlaws most conduct concerning “any ... slot machine” except if such conduct is “lawfully conducted under any of the following”: (1) “the State Lottery Law”; (2) “the Bingo Law”; (3) “the Local Option Small Games of Chance Act”; and (4) “4 Pa.C.S.,” which includes the Gaming Act and all its amendments.⁶ 18 Pa.C.S. § 5513(e.1). Thus, to determine

⁶ “A reference in a statute to a statute or to a regulation issued by a public body or public officer includes the statute or regulation with all amendments and supplements thereto and any new statute or regulation substituted for such statute or regulation, as in force at the time of application of the provision of the statute in which such reference is made” 1 Pa.C.S. § 1937(a). Therefore, the Crimes Code’s reference to the Gaming Act includes all its amendments.

whether conduct is permitted under the Crimes Code, the Gaming Act necessarily must be read.

When construing a statute, “statutory language must be read in context, that is, in ascertaining legislative intent, every portion of statutory language is to be read together and in conjunction with the remaining statutory language,” as well as “construed with reference to the entire statute as a whole.” *Commonwealth v. Office of Open Records*, 103 A.3d 1276, 1285 (Pa. 2014) (citation and quotations omitted). Moreover, there is a legal presumption that the Legislature, when enacting a statute, “does so with full knowledge of existing statutes relating to the same subject.” *Hutskow v. Washowich*, 628 A.2d 1202, 1207 (Pa. Cmwlth. 1993). Given that the Crimes Code explicitly references Title 4 of the Pennsylvania Code, which contains the Gaming Act, and because the Gaming Act explicitly references Section 5513(a) of the Crimes Code, *see* 4 Pa.C.S. § 1903(a)(2), the Gaming Act should be consulted when construing the Crimes Code in the absence of a Crimes Code definition of “slot machine”.

c. The Pennsylvania Supreme Court has sanctioned the use of *in pari materia* to fill a void in a statutory scheme

Our Supreme Court has used *in pari materia* “to fill what it perceived to be a procedural void in a statutory scheme.” *Oliver v. City of Pittsburgh*, 11 A.3d 960, 965 (Pa. 2011). The Supreme Court in *Oliver* cited its prior decision in *State Ethics Comm’n v. Cresson*, 597 A.2d 1146 (Pa. 1991), where the State Ethics

Commission sought to set aside nomination petitions because the candidates did not file statements of financial interests as required by the Ethics Act. *Oliver*, 11 A.3d at 965. Although the Commission filed its challenges nearly a month after they were due as required by the Election Code, the Commission argued that it was subject only to the Ethics Act. *Cresson*, 597 A.2d at 1148. The Supreme Court rejected this argument, finding that: (1) the Ethics Act was “silent” on when petitions to set aside must be filed; (2) the Ethics Act and Election Code were *in pari materia* because “aspects of these statutes relate to the same subject matter, i.e., requirements for filing of nomination petitions”; and (3) “in light of the expressed time limit contained within the provision of the Election Code with respect to challenging nomination petitions, and the absence of a temporal framework in the Ethics Act, there is no conflict and the Election Code must apply.” *Id.* at 1149.

Likewise, in *DeForte v. Borough of Worthington*, 212 A.3d 1018 (Pa. 2019), two police officers brought suit under the Borough Code and Police Tenure Act for being dismissed without process. The borough argued that the officers had no cause of action under the Borough Code, as the code did not offer protections to borough police departments with fewer than three full-time “members” of the police force, and the Borough of Worthington had only four part-time officers. *Id.* at 1022. However, the Police Tenure Act gave protections to officers employed by

boroughs with fewer than three “members”. The Supreme Court found that “[t]hese close similarities suggest the General Assembly intended for the Tenure Act to fill the gap created by virtue of the Borough Code’s failure to extend its protections to borough police forces with fewer than three members” *Id.* at 1023. The Supreme Court in *DeForte* also found that, “while meaning of ‘member’ is not given in the Tenure Act, recognition of the *in pari materia* status of the two enactments allows us to resolve any uncertainty along these lines by consulting the definition of ‘member’ under the Borough Code.” *Id.* at 1026. The Supreme Court further stated:

As a general matter, where, as here, statutory language is not explicit, resort to precepts of statutory construction is warranted. In the present matter, the most salient rule is contained in Section 1932(b) of the Statutory Construction Act, setting forth the mandate to construe, “as one statute,” multiple pieces of legislation which are *in pari materia*.

Id. at 1026 n.10. This analysis applies here.

Thus, the lack of a definition of “slot machine” in the Crimes Code could be characterized as such a “void” or “gap” in the Crimes Code that can only be filled by reading the Gaming Act and the Crimes Code *in pari materia*. Reading those statutes *in pari materia* makes clear that the reference to “any slot machine” in Section 5513 of the Crimes Code encompasses the slot machines defined in the Gaming Act.

d. The Gaming Act and the Crimes Code explicitly modify each other

The Gaming Act contains a provision that expressly **repealed** Section 5513(a) of the Crimes Code if it is “inconstant with this part.” 4 Pa.C.S. § 1903(a)(2).⁷ Under well-established statutory construction principles, the repealer provision cannot be construed to be unnecessary surplusage. *Moonlight Café, Inc. v. Department of Health*, 23 A.3d 1111, 1114 (Pa. Cmwlth. 2011) (“Thus, no provision of a statute shall be ‘reduced to mere surplusage.’”) (quoting *Walker v. Eleby*, 842 A.2d 389, 400 (Pa. 2000)). Unless the “slot machines” referenced in Section 5513 include and/or are the same “slot machines” defined in the Gaming Act, the repealer provision would have been without effect, a result that Pennsylvania’s statutory construction principles do not countenance. *See* 1 Pa.C.S. § 1922(2) (when construing a statute, it is presumed that “the General Assembly intends the entire statute to be effective and certain.”).

e. The holding urged here is consistent with this Court’s decision in POM v. Revenue

This Court’s 2019 decision in *POM v. Revenue* concerned the Department of Revenue’s application for summary relief in the nature of a motion for partial judgment on the pleadings. The Department claimed that: (1) the POM Machines

⁷ The Gaming Act’s Section 1903 repealer provision was expressly upheld by the Supreme Court in *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 412 (Pa. 2005). In a subsequent amendment, lawful gaming was exempted from the Crimes Code under Section 5513(e.1)(4).

are slot machines under the Gaming Act; (2) POM is a manufacturer and/or a supplier of slot machines under the Gaming Act; and (3) POM is in violation of the Gaming Act. This Court denied the Department's request for relief, and *Amici Curiae* anticipate that Appellees will use that decision to argue that the Gaming Act does not apply to the POM Machines. However, this Court's holding in *POM v. Revenue* clearly is much more limited and nuanced than that.

In *POM v. Revenue*, this Court looked to the Gaming Act to determine whether the body given power to regulate licensed gaming, the Pennsylvania Gaming Control Board (the "PGCB"), had jurisdiction over the POM Machines. After reviewing the entire Gaming Act, this Court held that "the Gaming Act does not give the [PGCB] the jurisdiction or authority it now claims." *POM v. Revenue*, 221 A.3d at 731. This Court found that several sections in the Gaming Act indicated that it "was intended to license slot machine operations at racetracks, casinos, hotels, and established resort hotels", and the legislative history behind the Gaming Act also demonstrated "that the General Assembly only intended the Gaming Act to regulate legal and licensed gaming." *Id.* at 732. Further, the Gaming Act bestowed upon the PGCB powers related to the granting and denial of slot machine licenses, not law enforcement authority. *Id.* at 732-33.

Thus, the Commonwealth Court's decision in *POM v. Revenue* only concerned the PGCB's jurisdiction, **not** whether the Gaming Act's definition of

“slot machines” should be used to interpret whether the POM Machines are “slot machines” under the Crimes Code. Indeed, this Court unequivocally confirmed that it did “not answer the separate question of whether the [POM Machines] qualif[y] as [] illegal gambling device[s] under section 5513 of the Crimes Code ...” *Id.* at 735 n.17.

f. Failing to read the Crimes Code and the Gaming Act *in pari materia* would cause an absurd result

Because this Court ruled in *POM v. Revenue* that the PGCB lacks jurisdiction over the POM Machines, only law enforcement can hold Appellees accountable pursuant to the Crimes Code. Thus, if “slot machine” under the Crimes Code does not include “slot machine” as provided under the Gaming Act, the POM Machines would be completely unregulated, allowing an operator to evade **both** the Gaming Act’s regulatory framework and prosecution under the Crimes Code simply by not obtaining a license to make, sell or operate the slot machine. In construing statutes, it is presumed that “the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.” 1 Pa.C.S. § 1922(1). Given the broad prohibition on all gambling devices in the Crimes Code, the highly-regulated licensing scheme in the Gaming Act, and the Gaming Act’s extremely broad definition of “slot machine”, it would be absurd to find that the legislature intended to allow slot machines that would be subject to a

54 percent tax inside the highly regulated atmosphere of licensed casino to also be operated untaxed and unregulated at the convenience store next door.

4. In the alternative, the POM Machines are “slot machines” under the term’s plain meaning when Section 5513 was drafted in 1972

If this Court finds that the Gaming Act and Section 5513 of the Crimes Code should not be read *in pari materia* in order to inform the definition of slot machine within the latter, this Court nonetheless still cannot apply the skill versus chance test to determine whether the POM Machines are slot machines. *In re J.W.B.*, 232 A.3d 689, 699 (Pa. 2020) (“When interpreting a statute, ‘we must always read the words of a statute in context, not in isolation, and give meaning to each and every provision’ and ‘our interpretation **must not render any provision extraneous** ...””) (quoting *Gavin v. Loeffelbein*, 205 A.3d 1209, 1221 (Pa. 2019) (emphasis added)).

Rather, in the absence of a definition provided by the Legislature, the Court is to then turn to the ordinary meaning of the phrase when it was used by the Legislature in enacting the statute. 1 Pa.C.S. § 1903(a) (directing courts to construe words and phrases “according to rules of grammar and according to their common approved usage.”). As stated by the Supreme Court:

To discern the legislative meaning of words and phrases, this Court has on numerous occasions engaged in an examination of dictionary definitions. *See, e.g., Greenwood Gaming & Entertainment, Inc. v. Commonwealth*, 263 A.3d 611, 620-21 (Pa. 2021) (consulting dictionary definitions to ascertain meaning of phrase “personal

property”); *Chamberlain v. Unemployment Compensation Board of Review*, 114 A.3d 385, 394 (Pa. 2015) (determining meaning of term “incarcerated” by use of dictionaries); *Bruno v. Erie Insurance Co.*, 106 A.3d 48, 75 (Pa. 2014) (offering that, in determining a term’s meaning, it is proper to consult dictionaries); *Commonwealth v. Hart*, 28 A.3d 898, 909 (Pa. 2011) (exploring meaning of “lure” through review of various dictionaries); *Fogle v. Malvern Courts, Inc.*, 722 A.2d 680, 682 (Pa. 1999) (approving of use of dictionaries to determine common and approved usage of a term)).

Commonwealth v. Gamby, 283 A.3d 298, 307 (Pa. 2022). If the meaning of a word is clear, that meaning controls. *See* 1 Pa.C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”).

As recently directed by the Supreme Court in *Gamby*, the dictionary to be used in examining the Legislature’s meaning in enacting the Crimes Code in 1972,⁸ is the then-current dictionary, Webster’s Third New International Dictionary. 283 A.3d at 307 n.11 (“In defining a statutory term, we strive to determine its meaning at the time the General Assembly enacted the legislation.”). In that tome, “slot machine” is defined as: “A coin-operated gambling machine that pays off according to the matching of symbols on wheels spun by a handle – called

⁸ The language at issue—“slot machine”—is unchanged from the statute’s original enactment.

also a one-armed bandit.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1961).⁹

Given the long history of illegal slot machine operators such as POM knowingly evading criminal repercussions for their illicit slot operations through various pretenses designed to dodge too narrow definitions of "slot machine",¹⁰ the Legislature may have intentionally and wisely chosen not to specifically define the term in order to allow the statute the flexibility to adapt to innovation over time. In

⁹ The second definition of “slot machine” found in Webster’s Third New International Dictionary (“A machine (as a vending machine) whose operation is started by dropping a coin into a slot.”) can be disregarded, as it reflects a usage that was obsolete by the time the Crimes Code was written in 1972. *Video Gambling Devices*, 37 UCLA L. REV. 555, 559 (1990).

¹⁰ See *Video Gambling Devices*, 37 UCLA L. REV. 555, 559 (1990) (“Most interesting, however, were the ways in which gambling operators disguised or modified their machines in order to stay one step ahead of the legislature’s definition of gambling devices Slot machine manufacturers would create and market new devices that technically did not fall within the existing legal definition of gambling devices. In response, legislators passed new laws aimed at covering the new devices. Thus, the manufacturers and lawmakers played a game of “leap frog,” with new legislation continually being directed at recently modified gambling devices.); *The Technological And Business Evolution Of Machine-Based Gambling In America*, 14 WAKE FOREST J. BUS. & INTELL. PROP. L. 237, 254-60 (2014) (“Thus, slot machine manufacturers maintain a long history of tailoring their devices to respond to changes in the gaming environment that may occur from statutes or regulations that attempt to limit their existence[.]”).

Ironically, a summary of the history of this innovative evasion reads like an account of POM’s own conduct in Pennsylvania over the course of the last decade:

While the authorities ultimately succeeded in eliminating these “disguised” machines, machine operators realized great profit in the interim. As soon as authorities took action to close them down, slot machine operators would customarily apply to the local courts for injunctions against seizure. The operators would then flood the territory with the targeted devices while their lawyers fought all the way through the appellate process. Presumably, the profit derived during the course of litigation more than offset the loss incurred once the devices were ultimately confiscated.

Video Gambling Devices, 37 UCLA L. REV. at 561-62; see also generally *id.* at 558-62. The Casinos urge this Court to likewise “ultimately succeed[.]” here in eliminating POM’s slot-machines-disguised-as-skill-games.

its most current edition, Webster continues to define “slot machine” using substantially the same language, but also adding a note reflecting that “slot machines” may today be electronic and accept forms of currency other than coin. *Slot Machine*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/slot%20machine> (last visited Aug. 15, 2023) (“An originally coin-operated gambling machine that pays off according to the matching of symbols on wheels spun by a handle; also: an electronic version of this machine.”).

Webster’s Third’s definition, combined with its contemporary update, gives the Legislature’s clear meaning in including the term “slot machine” in Section 5513 in 1972 and therefore controls the inquiry into whether a device is a “slot machine” today. Combining these sources, “slot machines” are: (1) machines; (2) operated via the insertion of currency or an equivalent; (3) as part of which there is a wheel or electronic equivalent (e.g. a video display) bearing symbols; (4) that when matched or manipulated; (5) may “pay off” (i.e., deliver currency or other property of value back to the player).¹¹

The record evidence below demonstrates that the machines seized from Appellees most certainly are “slot machines” according to this ordinary meaning

¹¹ Utilizing this definition avoids the fearmongering by POM that applying the definition of “slot machine” to its games would also outlaw classic games of skill and other small amusements traditionally found in arcades, restaurants, and bars (e.g. pinball, skee-ball, and video games such as Ms. Pac-Man), as such games do not include a “payoff” when won. Even those that may award a winning player tickets or credits that can be exchanged for prizes fail to meet this definition, as the *de minimus* token value of those prizes is not a “payoff”.

definition. They are indisputably: (1) machines; (2) into which players insert currency or currency equivalents; (3) in order to play a game on a video display bearing symbols; (4) that, when matched three in a row in the first round and when matched in sequence in the second round; (5) entitle the player to a pay out of currency or currency equivalents. Thus, these machines are unlawful slot machines, the offering of which is criminalized under Section 5513(a).

B. Affirming the Trial Court’s Decision Will Eviscerate The Statutory Scheme Legislatively Mandated To Regulate And Tax Gaming In The Commonwealth

1. If this Court were to rule that games such as the POM Machines are legal, nothing would limit such games to corner stores and neighborhood bars

Legalizing these machines would allow unlimited skill games much like the POM Machines to be placed anywhere. Nothing will prevent unregulated casinos and slot machines from being set up wherever a profit can be made throughout the Commonwealth, from small towns to large cities.

This is already happening. As seen on the website www.thekeystoneklub.com, there are already two unregulated mini-casinos near the Commonwealth’s capital filled with what that website calls “skilled games”. That website advertises that customers don’t have to “sit at the back of a gas station or a loud smoke filled bar or casino” and can instead play these games in the Keystone Klub’s “game room”. The website advertises “progressive jackpots”

(linked slot machines with pooled jackpots that pay significant sums), offers patron complimentary beverages and snacks, and claims to have the “best payouts.” Similar slot parlors have been established in New Castle, Scranton and elsewhere in the Commonwealth.

2. Taxed, regulated gaming would be unable to compete with unregulated untaxed slot parlors

Casinos operating under the Gaming Act could not compete with an industry that pays no gaming tax when legal casinos pay more than fifty cents of every dollar to the Commonwealth. On top of gaming taxes, legal casinos absorb the cost of complying with the Gaming Act’s regulatory protections (e.g. property-wide surveillance, security personnel to prevent underage persons and self-excluded patrons from gambling, anti-money laundering procedures, internal audits, licensing of casino employees, vendors and owners). If unregulated casinos are allowed to proliferate, operating under the Gaming Act would become so significantly less profitable than operating unregulated slot machines that casinos could face the choice of either closing or joining the business of operating untaxed unregulated slot machines.

This is already happening. At least one truck stop that previously offered regulated and taxed video gaming terminals (“VGTs”) has given up its VGT license to offer unregulated and untaxed skill games instead.

3. Permitting statewide unregulated slot machines to displace regulated, taxed gaming will hurt the Commonwealth and its citizens

The Commonwealth's tax coffers will be hurt if statewide unregulated slot machines are permitted to continue operating. Pennsylvania currently collects the highest amount of tax revenue from gaming over any other state in the country. These funds are used for property tax relief, open space preservation in rural Pennsylvania through support of the racing industry, and senior citizen programs. The funding of these programs would cease if legalized gaming is replaced with untaxed skill game machines, and the Commonwealth will lose billions.

Pennsylvania's consumers will be hurt. No governmental testing of any kind is required for unregulated skill games, unlike the extensive inspection and certification procedures required for current legal slot machines to ensure that they are fair to the customer. Unlike licensed slot machines which are required to pay a minimum of 85% of moneys taken to customers, skill slots, if left to proliferate, could be manipulated to benefit the operator, and no one—the Commonwealth or the customer—would know or have any recourse against it. Similarly, there is no agency dedicated to resolve disputes between operator and customer or to force a skill slots operator to actually pay out a player's winnings.

Pennsylvania's vulnerable populations will be hurt. If the Court determines the POM Machines are legal, no law or oversight prevents children from playing

them, like any video game or pinball machine. In addition, Pennsylvania’s legal gambling regulatory scheme allows those with problem gambling tendencies to sign up for the state’s self-exclusion list, the result of which prohibits an individual from gaming in licensed casinos. Not only would there be no law to prevent skill slot operators from welcoming and taking advantage of these problem players if this Court declares the POM Machines to be lawful, but operators of unregulated “skills games” by definition could not comply with the protections afforded to individuals who are excluded or self-excluded from gambling in Pennsylvania, as only licensed and regulated casinos have access to those lists. Absent this Court’s intervention, every time they have the misfortune of unknowingly entering a convenience store with a POM machine inside, those vulnerable individuals would be subjected to the very temptation they carefully sought to avoid. Further, advertising for skill slot parlors would proliferate with no regulation. The 1-800-GAMBLER help line that is required on casino ads would not be required, and people who need help will not know where to turn.¹²

No regulations are in place to address the criminal element and other bad actors in unregulated gambling. To the contrary, licensed casinos are subject to reporting requirements regarding suspicious transactions to help identify money

¹² The Council on Compulsive Gambling of Pennsylvania (CCGP)’s Year-to-Date Helpline Data Report indicates that CCGP has received 71 calls in the first half of 2023 alone from individuals identifying “skill machines” as their “most problematic gambling” or the “gambling activity that the caller/subject has the most difficult time controlling.”

laundering and are required to withhold federal taxes from any jackpot exceeding \$3,000. Without such procedures, those who have income from illegal sources can launder their money more easily in skill slot parlors with no similar oversight. Today, operators and vendors of legal gaming are thoroughly vetted to ensure that organized crime is not profiting from gaming in our Commonwealth. Licensing is an intrusive investigative process that ensures the money is not flowing to unsavory individuals. Because skill operators are not investigated for suitability, nothing would prevent organized crime or individuals subject to improper financial pressures from operating slot parlors or otherwise having unfettered access to reap the money from this cash business. Pennsylvania could become a beacon for this illegal activity if the law is not found to prevent it.

This Court must give force to what the Legislature wrote when it enacted the Gaming Act nearly two decades ago and three decades before that when it enacted the Crimes Code—all slot machines, of any kind or character whatsoever, are unlawful under Section 5513, except for those slot machines made legal and lawfully operated under the Gaming Act.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, *Amici Curiae* respectfully request that the Commonwealth Court of Pennsylvania VACATE the February 8, 2023 Order of the Court of Common Pleas of Monroe County, and REMAND for the entry of an Order DENYING the Joint Omnibus Petition to Return Seized Property and to Suppress Evidence filed by Appellees, L&M Music Company, Inc. and Smokin' Joe's Tobacco Shop, Inc.

Respectfully submitted,

LAMB McERLANE PC

Dated: August 16, 2023

By: /s/ Joel L. Frank

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Pa.R.A.P. 531(b)(3) and 2135(d) CERTIFICATE OF COMPLIANCE

It is hereby certified that the foregoing Brief of *Amicus Curiae* complies with the word count limit contained in Pa.R.A.P. 531(b)(3) because it contains 6,969 words, as computed by the “Word Count” function in Microsoft Word 2013, excluding the parts exempted by Pa.R.A.P. 2135(b).

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Pa.R.A.P. 127(a) CERTIFICATE OF COMPLIANCE

It is hereby certified by the undersigned that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Four Pennsylvania Skill : 761 CD 2023
Amusement Devices and One Ticket :
Redemption Terminal Containing :
\$18,692.00 in U.S. Currency :

Appeal of: Commonwealth of
Pennsylvania, Monroe County

PROOF OF SERVICE

I hereby certify that this 16th day of August, 2023, I have served the attached document(s) to the persons on the date(s)
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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