

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**IN RE: THREE PENNSYLVANIA  
SKILL AMUSEMENT DEVICES,  
ONE GREEN BANK BAG  
CONTAINING \$525.00 IN U.S.  
CURRENCY, AND SEVEN  
RECEIPTS.**

**APPEAL OF: COMMONWEALTH  
OF PENNSYLVANIA**

Case No.: 707 CD 2023

Appeal from the Order of the Court  
of Common Pleas of Dauphin  
County, entered March 23, 2023, at  
No. 2022-CV-06333-MD

**AMICUS CURIAE BRIEF OF THE AMERICAN GAMING ASSOCIATION**

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

The American Gaming Association (“AGA”) is a non-profit trade association whose members participate in the Pennsylvania and U.S. commercial and tribal gaming industry, a highly regulated, \$261 billion industry that supports 1.8 million jobs and provides \$41 billion in tax revenue across the Commonwealth of Pennsylvania and 43 other States. On behalf of its members, the AGA works with law enforcement, elected officials, regulatory agencies, and tribal leaders to combat illegal gambling and to promote next-generation regulatory regimes.

As explained in the Brief, the AGA urges this Court to reverse and remand the decisions of the Courts of Common Pleas of Dauphin and Monroe Counties<sup>1</sup> because these courts incorrectly found the gaming machines at issue in both cases are games of skill and, therefore, not subject to Pennsylvania’s carefully crafted regulatory scheme for gambling within the state. A failure to reverse will cause harm to Pennsylvania residents, the Commonwealth as a whole, and AGA’s members, who have invested heavily to create thousands of jobs in Pennsylvania and to ensure that individuals who desire to gamble in the Commonwealth may do so in a fair and safe manner.<sup>2</sup>

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<sup>1</sup> The AGA is submitting identical Amicus Briefs in both appeals as these matters have yet to be formally consolidated.

<sup>2</sup> No one other than the AGA, its members, or its counsel paid in whole or in part for the preparation of this brief or authored in whole or in part this brief. *See* Pa. R.A.P. 531(b)(2).

## **INTRODUCTION AND SUMMARY**

Unless reversed and remanded for further proceedings, the decisions of the Courts of Common Pleas of Dauphin and Monroe Counties risk encouraging further schemes to evade Pennsylvania’s carefully crafted legal gambling system, which will result in unregulated gambling machines flooding the market, including the opening of unregulated “casinos” containing hundreds or even thousands of these machines. The result will be fewer protections for Pennsylvania residents, substantially less tax revenue for Pennsylvania, and unfair competition for long-time law abiding Pennsylvania businesses that have invested millions in the Commonwealth and employ over 33,000 citizens.<sup>3</sup>

Pennsylvania, like many states throughout the country, has developed a comprehensive system to regulate gambling within its borders. A central goal is to ensure legal gambling is fair and safe for Pennsylvania citizens and visitors. This is accomplished in a number of ways, including through extensive licensing screening requirements and ongoing obligations, robust consumer protection requirements, regular oversight (including extensive testing and monitoring), and significant civil

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<sup>3</sup> American Gaming Association, *Gaming by the Numbers: Pennsylvania* (December 31, 2022), <https://www.americangaming.org/wp-content/uploads/2019/07/AGA-2021-State-Economic-One-Pagers-Pennsylvania.pdf> (last accessed Aug. 13, 2023).

and criminal penalties for non-compliance. The result is a regulated and safe market that operates openly and in full view of Pennsylvania regulators.

These cases involve a fast-growing market that is operating in the shadows and without a safety net to protect Pennsylvania citizens and visitors, competing businesses, or the Commonwealth itself. Suppliers of the gambling machines at issue here are evading Pennsylvania's legal gambling system and its vast societal benefits by purporting to create games of "skill" rather than chance. This is nothing but a thinly-veiled disguise. A pig wearing lipstick remains a pig, and a gambling device dressed up to resemble a "skill" device remains a gambling device.

In finding that the games at issue are "skill" games, the lower courts misapplied the relevant legal standard by focusing on the individual components of the games in isolation, rather than evaluating the games as a whole, including the manner in which they are routinely played by consumers. Although it is undisputed that *the only feature of these games played by everyone* is based on chance, the lower courts instead focused on a rarely used feature tacked on to the end that has a veneer of skill but is intentionally designed to be undesirable and difficult to use, and thus is seldom played. By closing their eyes to the reality of how these games operate in practice, the lower courts ignored the fact that the overall odds of these games—dictated in large part by the primary chance-based feature—are stacked against the players, the vast majority of whom lose money. In doing so, the courts failed to

adequately consider the actual practical operation of the games, which is precisely what the Superior Court of Pennsylvania warned against in another gambling case more than 80 years ago. *See Commonwealth v. Lund*, 15 A.2d 839, 844 (Pa. Super. 1940) (quoting *State v. Eames*, 87 N.H. 477, 183 A. 590 (1936)) (“In answering this question [of whether these games are gambling], we do not propose to close our eyes to reality. The test ... is not to inquire into the theoretical possibilities of the scheme, but to examine it in actual practical operation.”).

This Amicus Brief first explains the important protections and benefits created by Pennsylvania’s legal gambling scheme, and why it would be contrary to the intent of the Legislature for unregulated “skill” games to undermine Pennsylvania law. Second, the Amicus Brief explains that the lower courts misapplied the predominant factor test, and that even if they applied the proper test, the lower courts still mislabeled these games as predominantly games of skill.

## **ARGUMENT**

### **I. Pennsylvania’s Legal Gambling Regime Was Designed to Protect the Public and Provide Important Benefits to Pennsylvania Citizens**

Pennsylvania has a strong interest in developing and enforcing a comprehensive approach to gambling. Like many jurisdictions nationwide that have authorized what was previously a criminal activity, gambling has been legalized in



Pennsylvania thoughtfully and with specific objectives in mind.<sup>4</sup> In so doing, Pennsylvania, like other states, has implemented demanding regulatory standards that the legal gambling industry must meet.<sup>5</sup> Casino companies and employees must be licensed after extensive background investigations, machines must be tested for safety and fairness, casino operators and suppliers of gambling machines must comply with extensive regulations (including with respect to game design and average pay-outs to consumers), and operators and suppliers must report on revenue and compliance matters to state regulators.<sup>6</sup> These standards promote consumer confidence and keep unsavory elements out of the industry.

Unregulated and illegal gambling machines threaten the economic benefits and consumer protections provided by Pennsylvania’s regulatory scheme. Illegal machines, which have proliferated throughout Pennsylvania, do not undergo testing to ensure each game operates with integrity, are not manufactured or operated by individuals or companies that have been subject to Pennsylvania’s licensing regime, and are not subject to regulations relating to game play mechanics and pay-out obligations. Moreover, the companies that design these machines and the

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<sup>4</sup> American Gaming Association, *Skilled at Deception: How Unregulated Gaming Machines Endanger Consumers and Dilute Investments in Local Economies* 1, 2 (2021), <https://www.americangaming.org/wp-content/uploads/2021/04/Unregulated-Gaming-Machines-White-Paper-Final.pdf> (last accessed Aug. 13, 2023) [hereinafter “*Skilled at Deception*”].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

establishments that host them are not paying tax revenue to Pennsylvania under the Commonwealth's tax laws governing gambling revenue, while at the same time diverting revenue away from regulated gambling operators who are contributing this vital tax revenue.<sup>7</sup> Because these gambling machines are not subject to regulation and licensing, they proliferate in non-casino locations throughout the state, including local convenience stores where they can more easily target with impunity vulnerable populations, including children.<sup>8</sup> Indeed, there is nothing to prevent the gambling machines from appearing in convenience stores down the street from schools, which lack essential protections, including something as basic as a person sitting by the front door checking identifications and preventing children from playing the games. Given the lack of regulations, licensing, and oversight, it is not surprising that these machines are often tied to criminal activity, including money laundering, drug trafficking, and violent crime.<sup>9</sup>

For Pennsylvania, the dangers posed by the state's estimated 67,000 unregulated gaming machines is particularly acute.<sup>10</sup> Pennsylvania's legal

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> American Gaming Association, *Sizing the Illegal and Unregulated Gaming Markets in the U.S.* 1, 12 (2022), <https://www.americangaming.org/wp-content/uploads/2022/11/Sizing-the-Illegal-and-Unregulated-Gaming-Markets-in-the-US.pdf> (last accessed Aug. 13, 2023) [hereinafter "*Unregulated Gaming Markets*"].

commercial gaming operators support an estimated 33,171 jobs, have an annual economic impact of \$6.34 billion, and bring in \$2.48 billion in tax revenue at all levels of government—monies which fund key tourism and local economic development projects.<sup>11</sup> The Commonwealth has fostered this job creation and tax growth through a highly regulated gambling system, that in conjunction with its criminal law is designed to eliminate the negative consequences caused by unregulated gambling.

For the Court’s benefit, and to understand the stakes at issue in the event that the floodgates are opened to unregulated gambling machines, the pillars of the regulated market are briefly explained below.

**A. Licensing regimes are the bedrock of a regulated, safe market.**

Gambling licenses are a privilege that must be earned. The Pennsylvania Gaming Control Board issues licenses only after conducting extensive and burdensome background checks—including interviews by law enforcement and gaming regulators—designed to evaluate “the financial fitness, good character, honesty, integrity and responsibility of the applicant.”<sup>12</sup> Entities and individuals must go through this process; background investigations (including analysis of tax

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<sup>11</sup> *Gaming by the Numbers: Pennsylvania* at 1.

<sup>12</sup> See generally Rules and Regulations. Title 58. Recreation. Part VII Gaming Control Board. [https://gamingcontrolboard.pa.gov/files/regulations/Final\\_Regulations\\_Master.pdf](https://gamingcontrolboard.pa.gov/files/regulations/Final_Regulations_Master.pdf) (last accessed Aug. 13, 2023).

returns and fingerprints) are required for key corporate officers, directors, and certain employees.<sup>13</sup>

In addition to imposing numerous obligations on the holder, a license also constitutes real, tangible value, akin to a property interest. It allows licensed entities to participate in a marketplace where the government limits the number of competitors. The trade-off for this exclusivity is that these limited market participants must pay substantial taxes on gambling revenue and must meet the same high standards of financial fitness, good character, honesty, integrity and responsibility. This benefits both the licensees, by ensuring a uniform playing field, and the public, by ensuring significant tax revenue and ongoing integrity protections.<sup>14</sup> In reliance on these principles and rules, casinos have invested heavily in the Commonwealth and employ tens of thousands of Pennsylvania residents.<sup>15</sup>

Pennsylvania's entire licensing scheme and the value of its licenses are negatively impacted by unregulated gambling. Unregulated games cannibalize regulated casino gaming revenue, jobs, and public tax revenue, especially when the unregulated version has no limit on the locations of venues in which they operate or

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<sup>13</sup> See 58 Pa. Code § 423a.3(a)(3) (requiring Pennsylvania State Police to conduct a background check, the Department of Labor to do a tax clearance and unemployment compensation review, and "any agencies" to conduct other investigations as necessary).

<sup>14</sup> *Unregulated Gaming Markets* at 7.

<sup>15</sup> *Gaming by the Numbers: Pennsylvania* at 1.

the number of gambling machines in each venue.<sup>16</sup> The public also cannot be expected to make distinctions between licensed, regulated slot machines and their unlicensed counterparts. This consumer confusion, combined with the lack of protections for unregulated “skill” games, undermines public confidence in Pennsylvania’s legal gambling system.

**B. Unregulated gambling machines cannibalize Pennsylvania’s tax base.**

As noted above, Pennsylvania’s legal commercial gaming operators supply jobs and substantial tax revenue that funds key Pennsylvania priorities.<sup>17</sup> A proliferation of unregulated gambling machines will result in substantial reductions in this important source of revenue for the Commonwealth. As one example, mini or satellite casinos, known as Category 4 casinos, pay a 50% tax on gross revenues from slot machines, *and* an additional 4% local share assessment.<sup>18</sup> This revenue stream would be directly at risk in such a scenario. After all, if given a choice, it is reasonable to expect more companies will pursue a business without a 54% tax burden, which will drive more companies to unregulated gambling machines. In

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<sup>16</sup> *Unregulated Gaming Markets* at 7.

<sup>17</sup> *Gaming by the Numbers: Pennsylvania* at 1.

<sup>18</sup> Pa. Cons. Stat. § 4.1403; *see* American Gaming Association, *Gaming Regulations and Statutory Requirements: Pennsylvania*, [https://www.americangaming.org/wp-content/uploads/2022/02/AGAGamingRegulatoryFactSheet\\_Pennsylvania-2022.pdf](https://www.americangaming.org/wp-content/uploads/2022/02/AGAGamingRegulatoryFactSheet_Pennsylvania-2022.pdf) (last accessed Aug. 13, 2023).

addition to making the playing field uneven, this will result in a significant erosion of the tax base in Pennsylvania.

**C. Unregulated gambling machines do not undergo rigorous game testing and reporting requirements.**

Regulated games must meet testing standards set out by law and regulators, including numerous regulations designed to protect consumers, such as a theoretical minimum payout percentages.<sup>19</sup> Manufacturers and suppliers also must comply with minimum technical standards, submit machine hardware and software for independent testing, and adhere to ongoing compliance and reporting requirements.<sup>20</sup> These standards are designed to ensure games work properly and comply with the regulatory requirements.

Unregulated games, on the other hand, do not undergo the same testing requirements, are not subject to reporting obligations, and are not required to comply with minimal technical standards. Indeed, these games are not required to meet minimum payout percentages, meaning that the odds of the games can be stacked unfairly against the players.<sup>21</sup> The result is that there is no certainty that members of the public are playing games that are operating properly and giving players a fair shot at winning.

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<sup>19</sup> 58 Pa. Code § 461a.7.

<sup>20</sup> *Skilled at Deception* at 4.

<sup>21</sup> *Id.*; see 58 Pa. Code § 461a.7.

**D. Unregulated gambling machines lack responsible gaming protections for consumers.**

Regulated gambling markets also include critical responsible-gaming programs that unregulated gaming markets lack. These programs are required by Pennsylvania's laws and regulations, including rules related to funding and delivery of problem gambling services and programs intended to prevent underage gambling.<sup>22</sup>

For example, licensed entities work with state regulators to operate a self-exclusion list, which allows patrons to remove themselves from gambling activities at licensed facilities.<sup>23</sup> State gaming laws require licensees to submit problem gambling plans to regulators.<sup>24</sup> These plans are often required to address multiple aspects of problem gambling, including promotion of problem gambler assistance programs, training of floor employees to identify and address symptoms of compulsive gamblers or underage gamblers, and programs to allow patrons to self-limit their gambling spending.<sup>25</sup> Failure to comply with responsible gaming obligations can result in fines and other sanctions for operators.<sup>26</sup> None of these

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<sup>22</sup> *Id.* at 5.

<sup>23</sup> 58 Pa. Code § 503a.

<sup>24</sup> *Skilled at Deception* at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

critical public safety protections are required, or even possible in some cases, for unregulated gambling operators.

Responsible gaming protections are also a critical means by which the Commonwealth and the regulated gambling industry work together to prevent underage gambling. The lack of these protections at locations where unregulated gambling machines are located—*e.g.*, gas stations, convenience stores, and other similar types of locations—leaves the door wide open for underage gambling, undermining the efforts to protect many of the Commonwealth’s most vulnerable citizens.

**E. The legal gambling regulatory system helps ensure criminal enterprises do not profit from gambling.**

All licensed gambling operations are subject to federal anti-money laundering requirements<sup>27</sup> and are defined under the federal Bank Secrecy Act as “financial institutions.”<sup>28</sup> Casinos are required to have comprehensive risk based compliance policies and procedures, and must file currency transaction reports and suspicious activity reports.<sup>29</sup>

Licensed casinos undertake comprehensive programs to comply with these requirements and to identify and mitigate problematic activity. Casinos also partner

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<sup>27</sup> 31 C.F.R. § 1021.210.

<sup>28</sup> 31 U.S.C. § 5312(a)(2)(X).

<sup>29</sup> 31 C.F.R. § 1021.320.



with local, state, and federal law enforcement to learn about current money laundering trends, train and educate staff on anti-money laundering compliance, and to coordinate investigations.<sup>30</sup>

Unregulated gambling entities operate outside this comprehensive system and, not surprisingly, do not maintain the same systems as regulated entities. Allowing such unregulated gambling entities free reign to grow is an open invitation to criminal enterprise to take advantage of lax oversight.

## **II. The Lower Courts Misapplied the Predominant Factor Test**

Both Courts of Common Pleas committed legal error in their application of the predominant factor test by failing to properly consider the reality of how the games are played and instead focusing on the mere existence of a rarely utilized “skill” feature that *may* allow some players to earn back money they lost playing the indisputably chance-based primary feature of the games. Courts in Pennsylvania and elsewhere have been clear that, when determining whether a game is gambling, it is error to simply inquire into the theoretical possibilities of the particular game at issue without also examining the practical operation of the game.<sup>31</sup> Because the

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<sup>30</sup> *Skilled at Deception* at 6.

<sup>31</sup> *See, e.g., Commonwealth v. Lund*, 15 A.2d 839, 845 (Pa. Super. Ct. 1940) (explaining that whether a scheme qualifies as gambling “is to be determined by the character and practical operation of the scheme as a whole, and not by rare instances of departure from the general scheme and practice”); *State v. Eames*, 87 N.H. 477, 183 A. 590, 592 (1936) (“The problem presented by ‘Bank Night[s]’ and similar schemes is to determine whether it is an evasion of the statute or an avoidance of it, and this question is essentially one of fact. In answering this question, we do not propose to close our eyes to reality. The test by which to determine the answer to this question is

lower courts here failed to do so, both cases should be remanded for further proceedings, including a more fulsome development of the factual record and proper application of the predominant factor test.<sup>32</sup>

**A. The predominant factor test requires consideration of the practical operation of the games.**

Courts evaluating whether certain games or conduct qualifies as gambling consistently have evaluated both the overall design of the games and how that design impacts the practical operation of the games by players. Considering both elements is necessary. Otherwise, game developers are able to skirt the critical regulatory and tax obligations discussed above by including a perfunctory skill-based veneer on a chance-based game. The mere presence of a skill-based feature—without regard to how often that feature is actually played, the extent to which players can succeed at that feature (to the extent they ever play it), and the overall payout of the game and its various features, among other factors—is like a movie director burying scenes

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not to inquire into the theoretical possibilities of the scheme, but to examine it in actual practical operation.”); *State v. La Crosse Theaters Co.*, 232 Wis. 153, 286 N.W. 707, 710 (1939) (“Others base their ruling upon the fact, or at least place emphasis upon it, that the furnishing free chances is only a means taken to evade the point of necessary consideration and thus save the scheme from being held a lottery. We agree with the majority of the courts and hold that the instant scheme constitutes a lottery.”); *State ex rel. Hunter v. Fox Beatrice Theatre Corp.*, 275 N.W. 605, 606-07 (1937) (“They made a contribution to increased income out of which a prize could be paid, a fund created by many to be drawn by the holder of a single lucky number on a tiny card. This contribution, under the practical operation of “bank night,” is the consideration actually paid . . . . The lottery laws are directed against these and other evils and it is the duty of courts to give effect to the remedies when properly invoked by prosecuting officers.”).

<sup>32</sup> The AGA is aware that others may argue the games at issue meet the definition of “slot machine” and therefore are illegal. If the Court agrees with that argument (as the AGA believes it should), it will be unnecessary for the Court to remand for further proceedings.

after the credits of a movie where few people will ever see them. So too can a game designer tack on a rarely used—and even more rarely successful—skill-based feature to the end of a game. The lower courts erred by elevating to a starring role content buried after the main feature that few in reality see or play and, therefore, has minimal impact on the practical operation of the game. The courts then compounded the error by rejecting out of hand testimony that attempted to quantify how rarely the skill-based feature is played.<sup>33</sup>

Courts in Pennsylvania have recognized the importance of looking at the practical operation of games for more than 80 years. In *Commonwealth v. Lund*, for example, the Pennsylvania Superior Court determined that a theater operator, who claimed to be running a “bank night,” was, in fact, operating a lottery in violation of Pennsylvania law.<sup>34</sup> The theater maintained a list of persons who requested, at no cost, to be included as potential winners of a cash prize, and assigned each person a

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<sup>33</sup> *In re: Four Pennsylvania Skill Amusement Devices and One Ticket Redemption Terminal Containing \$18,692 in U.S. Currency*, No. 6673-CV-2021, slip op. at 17 (Pa. Commw. Ct. June 8, 2023) (“[T]he Commonwealth’s witnesses testified that the devices were games of chance based upon their own playing of the devices and their watching of others play the game . . . . We do not find the Commonwealth’s evidence compelling or even relevant as the central issue in this case is the design of the games, not how individuals may choose to play them.”); *In re: Three Pennsylvania Skill Amusement Devices, One Green Bank Bag Containing \$525.00 in U.S. Currency, and Seven Receipts*, No. 2022-CV-06333, slip op. at 10 (Pa. Commw. Ct. Nov. 30, 2022) (“[Officer Schoppe] observed approximately 100 people playing the subject POM Machines. Although we believe that Officer Schoppe did not observe any of those players playing the Follow Me Feature, we find that this is too small a sample size to make any determinations as to how the average player plays these machines.”).

<sup>34</sup> *Commonwealth v. Lund*, 15 A.2d 839 (Pa. Super. Ct. 1940).

different number.<sup>35</sup> People could also purchase proxy cards the day of the drawing by buying a theater admission ticket, which allowed them to win a prize even if they were not at the theater when the drawing occurred.<sup>36</sup> Proxy cards were also given away for free to those who asked, but the availability of the free proxy cards was not advertised.<sup>37</sup>

Although the dispositive issue was whether the element of consideration was present, the court's analysis turned on whether the bank night operator deceitfully evaded gambling laws. The court determined that the "primary question . . . [is] whether the owner is maintaining and operating a lottery," which "is to be *determined by the character and practical operation of the scheme as a whole*, and not by rare instances of departure from the general scheme and practice."<sup>38</sup> The court cautioned that the "general character of the system is not to be determined by splitting it up into individual contracts between the theater owner and his patrons" because such a "theory . . . is a misleading one, since it diverts attention from the general public effect of the practice which is the evil the law seeks to prevent."<sup>39</sup>

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<sup>35</sup> *Id.* at 841.

<sup>36</sup> *Id.* at 842.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 845 (emphasis added).

<sup>39</sup> *Id.*

With these principles in mind, the *Lund* court considered whether rare instances of free admission—akin to the rarely-used “skill” component of the games at issue here—was sufficient to take the “bank night” scheme outside the scope of the gambling laws. In finding it was not sufficient, the court observed that the evidence “clearly demonstrate[d] that the system carried on by defendant is as a whole a gambling device, a lottery, and that the very few instances of free admissions and of attendance by proxy, are not essential or substantial parts of the system, but subterfuges only, adopted in an attempt to clothe the system with innocence.”<sup>40</sup>

The *Lund* court’s insistence on considering the gambling scheme as a whole is consistent with the approach other courts have taken when analyzing similar issues.<sup>41</sup> For example, in *Affiliated Enterprises, Inc. v. Waller*, the Delaware Superior Court rejected a claim that the bank night scheme at a different theater was not a lottery because it offered free participation.<sup>42</sup> In so doing, the Delaware Court stated that, “Motion picture theatres *are not charitable enterprises*. In holding out offers of an award of the kind and in the manner disclosed by the contract, they are not moved by a spirit of brotherly love, sympathy for the poor, . . . or warmth of heart in any degree. With them it is a cold blooded business device[.]”<sup>43</sup> The

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<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., *State v. Eames*, 87 N.H. 477 (1936); *State v. La Crosse Theaters Co.*, 232 Wis. 153 (1939); *State ex rel. Hunter v. Fox Beatrice Theatre Corp.*, 275 N.W. 605, 606-07 (1937).

<sup>42</sup> *Affiliated Enterprises, Inc. v. Waller*, 5 A.2d 257 (Del. Super. Ct. 1939).

<sup>43</sup> *Id.* at 260 (emphasis added).

Delaware Court focused on the goal of the enterprise, explaining that the “deceit in schemes of this nature lies in the pretense of allowing free participation . . . [.] Looking behind the pretense, and disregarding legalism, nothing is given away. All of the prizes, disarmingly called gratuities, are supported by a mass contribution. The opportunities to participate in the drawing are paid for collectively by the general body of paying patrons . . . and the profits of the theatre come, is created thereby.”<sup>44</sup>

Courts in non-lottery gambling cases also have considered the practical operation of the overall scheme rather than focusing on only one aspect. In *Lindey v. Pennsylvania State Police, Bureau of Liquor Control Enforcement*, coupon game distributors brought an action to preliminarily enjoin state law enforcement from confiscating coupons and coupon dispensers as alleged “gambling devices” pursuant to 18 Pa.C.S. § 5513.<sup>45</sup> The coupons at issue contained product discounts as well as a rub-off section offering the chance to win cash prizes.<sup>46</sup> In deciding that the coupons constituted gambling, the *Lindey* Court looked to a decision from a court in North Carolina in which it noted “that where the legal product offered for sale is a ‘mere subterfuge’ for an otherwise unlawful gambling activity, the Court will ‘strip

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<sup>44</sup> *Id.* at 260–61.

<sup>45</sup> 916 A.2d 703, 704 (Pa. Commw. Ct. 2006).

<sup>46</sup> *Id.* at 704-05.

the transaction of all its thin and false apparel and consider it in its very nakedness [and] look to the substance and not to the form of [the transaction] in order to disclose its real elements[.]”<sup>47</sup>

The *Lindey* court denied the preliminary injunction, finding that it could not conclude “that the [rub-off section] is ‘incidental’ to the sales of discount coupons” because the “record supports a finding that the coupons are a subterfuge for the gambling devices.”<sup>48</sup> In reaching this conclusion, the court noted the “significance” of testimony from state agents that they “observed that purchasers would typically throw away ‘losing’ coupons in large numbers.”<sup>49</sup> This testimony indicated that, in practice, these coupons were being used as illegal gambling devices.

The approach taken by each of these courts, including consideration of the practical operation of the alleged gambling schemes or games, makes sense since it focuses attention on evasive ploys by game developers. Otherwise, game developers can escape gambling laws—thereby undermining Pennsylvania’s regulatory systems—by tacking on at the end of a chance-based game a rarely used feature with the theoretical possibility that someone with sufficient skill can avoid losing money. Such “skill” features would be nothing more than a magician’s feint—a cloak to

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<sup>47</sup> *Id.* at 706 (quoting *American Treasures, Inc. v. State of North Carolina*, 173 N.C. App. 170, 177 (2005)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

conceal the truth that it is really a chance-based game, and thus an illegal gambling device.

**B. Both lower courts failed to properly account for the practical operation of the games.**

The Courts of Common Pleas of Dauphin and Monroe Counties both failed to evaluate the games under the proper standard. In both cases, the courts focused primarily on the *availability* of a skill-based feature, *i.e.*, the game’s design, without regard to the practical operation of that feature, including the extent to which the feature is actually used. Both courts did so based on the mistaken assumption that the game designer has no control over how users play their games.

Specifically, the Monroe court stated that “the central issue in this case is the design of the games, not how individuals may choose to play them” because “[t]he manufacturer, owner, or possessor of the devices cannot control how an individual chooses to play the game.”<sup>50</sup> Likewise, the Dauphin court explained that the game designer does “not have any control over how a given player plays the game.”<sup>51</sup> For that reason, the court found that “the question of whether these machines are games of skill or games of chance depends solely on the machines themselves and not on how a player plays them.”<sup>52</sup>

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<sup>50</sup> *In re: Four Pennsylvania Skill Amusement Devices*, slip op. at 17.

<sup>51</sup> *In re: Three Pennsylvania Skill Amusement Devices*, slip op. at 10.

<sup>52</sup> *Id.*



Looking at the design of the games, both courts relied heavily on the fact that the “follow me” feature is “*available* every time a player wins the same as or less than their wager,” which “eliminates the element of chance by giving a player the *opportunity* to win more than they wagered by utilizing skill each and every play of the device.”<sup>53</sup> But this ignores the reality of how these games are played, since the mere presence of such a feature does not mean that it is used in the practical operation of the games. In fact, the games are designed such that the vast majority of players do not play this feature or, even if they do, are unable to do so successfully.

Both courts failed to offer support for their conclusions, and the Monroe court even acknowledged that game designers can make certain aspects of the game more “tantalizing” to play.<sup>54</sup> Game designers plainly can do more than simply make certain aspects more “tantalizing.” As a few examples, they can make certain aspects of the game difficult to find (*e.g.*, by making the link to the feature small and blending it in with other images on the screen), difficult to play, or time consuming to play. Indeed, taking the lower court’s approach to a logical extreme, as long as game designers include something similar to the “follow me” feature the games will be deemed skill-based, even if they buried the feature in the fine print such that few users ever saw it, let alone played it, and that the feature then led to a 5000-piece

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<sup>53</sup> *In re: Four Pennsylvania Skill Amusement Devices*, slip op. at 20; see also *In re: Three Pennsylvania Skill Amusement Devices*, slip op. at 8.

<sup>54</sup> *In re: Four Pennsylvania Skill Amusement Devices*, slip op. at 17.

jigsaw puzzle that could in theory be solved all the time and result in a possible 105% return on a player's wager. This would effectively eviscerate Pennsylvania's gambling laws.

The design of the actual "follow me" feature here is a good example, as the feature is difficult, time-consuming, and unfavorable to the player. The feature is not mentioned in the "help" screens where players can learn to play the game.<sup>55</sup> The feature entails *20 rounds* that take 12 to 15 minutes to play.<sup>56</sup> And even if a player wins, there is no guarantee the player will actually receive 105% of their original wager, because when the player cashes out, if the total remaining is below \$.50 the machine rounds down to the nearest dollar interval.<sup>57</sup> As such, the lower courts' exclusive focus on design, while disregarding evidence of their practical operation, constituted legal error.

**C. Both cases should be remanded for development of a more fulsome record and proper application of the predominant factor test.**

These cases should be remanded to apply the appropriate legal standard, which must include an analysis of the practical operation of the games. Although it is appropriate for the lower courts to consider the design of the games—indeed the predominant factor test cannot be applied without considering the design of the

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<sup>55</sup> Commonwealth Brief at 5, *In re: Three Pennsylvania Skill Amusement Devices*, slip op. at 10.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 6.

games—the analysis cannot stop there. It must also include an analysis of how that design impacts the practical operation of the games, including how often users actually play the purported skill-based “follow me” feature (the “fall-off” rate), how users perform when they do play that feature (the “failure” rate), what the overall return-to-player (or “payout rate”) is for all the games, and other important metrics. Focusing on these core elements will reveal the true nature of the games at issue. This includes the fact that 100% of the players use the chance-based feature of the games (the slot machine-style puzzle game), whereas only a very small percentage of people play, let alone win, the purported skill-based feature of the games (the “follow me” feature), resulting in chance being the predominant factor for the *games as a whole* for the vast majority of people who play the games.

### **III. Even if the Court Decides That Design is Paramount in the Predominant Factor Test, the Lower Court Cases Were Still Incorrectly Decided**

Even if the Court decides that the only relevant consideration is the design (without consideration of the practical operation) of the games, the lower courts still erred by holding that an *optional* “skill”-based secondary feature can predominate over a *mandatory* chance-based primary feature. It is undisputed that the games at issue in these cases were designed such that all players must play the chance-based slot machine-style puzzle games and that no one is required to play the “skill”-based secondary “follow me” game, which is designed to be difficult to play and time-consuming. Players who elect not to play the “follow me” game simply play the

chance-based game again. Nonetheless, under the lower courts' approach, the optional secondary "follow me" feature is allowed to swallow the mandatory primary feature, which indisputably is a game of chance. This flips reality on its head and should not be allowed to stand.

### **CONCLUSION**

For the aforementioned reasons, *Amicus Curiae* respectfully urge this Court to remand the matter to the lower courts for development of a more fulsome factual record regarding the practical operation of the games and a proper application of the predominant factor test.

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**CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 127(a)**

I hereby certify, pursuant to Pa. R.A.P. 127, 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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**CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 531(3)**

I hereby certify that this brief contains 5,622 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this brief.

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