

NO. P23-518

SIXTEENTH-B JUDICIAL DISTRICT

NO LIMIT GAMES, LLC,
Plaintiff-Appellee

v.

SHERIFF OF ROBESON COUNTY,
NORTH CAROLINA, BURNIS
WILKINS, in his official capacity;
SECRETARY OF THE NORTH
CAROLINA DEPARTMENT OF
PUBLIC SAFETY, EDDIE M.
BUFFALOE JR., in his official capacity;
DIRECTOR OF THE NORTH
CAROLINA STATE BUREAU OF
INVESTIGATION, BOB
SCHURMEIER, in his official capacity;
DIRECTOR OF THE ALCOHOL LAW
ENFORCEMENT BRANCH OF THE
NORTH CAROLINA DEPARTMENT
OF PUBLIC SAFETY, BRYAN
HOUSE, in his official capacity; TOWN
OF PEMBROKE and COUNTY OF
ROBESON,

Defendant-Appellants

From Robeson County
23-CvS-1337

**PLAINTIFF-APPELLEE'S RESPONSE IN OPPOSITION TO STATE
DEFENDANTS' PETITION FOR WRIT OF SUPERSEDEAS**

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Defendant-Appellants

From Robeson County
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**PLAINTIFF-APPELLEE'S RESPONSE IN OPPOSITION TO STATE
DEFENDANTS' PETITION FOR WRIT OF SUPERSEDEAS**

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

INTRODUCTION

No Limit's video sweepstakes are lawful because—unlike all other games that have ever been analyzed by our Courts—no game play is involved in a participant's entry into the sweepstakes. With regard to winning cash prizes, game play is only used to *reveal* the prize and, in those games, skill predominates. Accordingly, No

Limit's video sweepstakes is legal because it does not use any video game of chance in either the entry or reveal of a sweepstakes. *See, generally*, N.C.G.S. § 14-304.6.

Video sweepstakes are legal as long as they do not use video games of chance in either the entry or reveal of a sweepstakes prize. N.C.G.S. § 14-304.6(b). This case requires the courts to determine whether No Limit's video kiosks use video games of chance in either of those two phases of the YouBux sweepstakes. The relevant test is whether, "viewed in its entirety," the results of video games "in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity." *Crazie Overstock Promotions, LLC v. State*, 377 N.C. 391, 2021-NCSC-57, ¶ 23 ("*Crazie Overstock*").

This analysis must be done on a game-by-game basis. Petitioners have not done this game-specific analysis but have, instead, relied on their erroneous position that *all* video sweepstakes are inherently illegal. Possibly because of this belief, Petitioners conducted no discovery. They have neither played nor in any other way examined the actual games at issue. Instead, their one witness (a lay witness) merely assumed that these games are, in all material ways, similar to games that have been previously found to be illegal. As the trial court found, the State's witness lacked a basis for his opinions.

In contrast, the trial court conducted a detailed analysis of the evidence regarding *these games* and correctly found that: (1) no entertaining display is used in the entry phase of the sweepstakes, (2) an entrant can win a prize without any

game play through the instant reveal function, (3) if a player chooses to use game play to reveal his entry through a “nudge” game, no element of chance can thwart whether the player wins his prize, and (4) through repeated successful completions of the “follow me” game, a player’s skill controls his relative winnings over all.

State Defendants’ Petition is built entirely on several fundamental mischaracterizations of law. Most pervasively, Petitioners operate from the false premise that “North Carolina has expressly banned the operation of video sweepstakes machines.” (Petition p 3). This is categorically false. By its unambiguous terms, the statute only prohibits video sweepstakes that use games of chance in either the entry or reveal phase of the sweepstakes. *See* N.C.G.S. § 14-304.6(b). Accordingly, under this criminal statute, video sweepstakes that ***do not*** use games of chance in either the entry or reveal phase of the sweepstakes are permissible.

In Petitioner’s second most significant and pervasive error of law, they consistently argue that the prizes in a video sweepstakes must be determined by skill. (*See, e.g.*, Petition pp 17, 19, 26-27; *see also* Petition App. p 486-87 (Poole Affidavit ¶ 21) (averring his opinion that North Carolina law bans sweepstakes where prizes are determined by chance)). This entirely ignores the unambiguous terms of the statute and misapprehends our Supreme Court’s decisions. Under the statute, the prizes in a sweepstake ***must*** be determined by chance. N.C.G.S. § 14-304.6(a)(5). Accordingly, any game in which the prizes are not determined by chance (i.e., they are determined by skill) is ***not a sweepstakes***.

Our Supreme Court has never held that the prizes in a video sweepstakes must be determined by skill, nor could it do so. Obviously, even the Supreme Court cannot ignore the unambiguous terms of a statute. *See State v. Bates*, 348 N.C. 29, 34-35, 497 S.E.2d 276, 279 (1998) (“When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded ... under the guise of construction.”). Accordingly, if at all possible, every decision of the Supreme Court must be read in a way that would allow it to be consistent with those terms. Here, that is possible when the Court’s statements are viewed in context of the cases in which they were presented. Specifically, in each of those cases, both the reveal **and entry** into the sweepstakes were conducted through game play. In the present action, no game play is ever used in any participant’s entry into the sweepstakes.

Petitioners also rely on two other erroneous assumptions. First, they argue that “each turn” of a video sweepstakes should be viewed in isolation. (*See* Petition pp 4, 12, 26-31). No Court has ever held such a thing. Rather, it would be entirely inconsistent with the Supreme Court’s direction that each sweepstakes must be viewed “in its entirety.” Second, Petitioners seem to argue that, in order to be a legal video sweepstakes, **every entrant** needs to be able to win the **top prize** on **every turn**. (*See* Petition pp 27-31). Again, no Court has ever held such a thing. And—also again—any such rule would be a violation of the statute’s requirement that sweepstakes prizes be determined by chance.

In addition to their errors of law, Petitioners have also constructed their arguments on four mischaracterizations of the actual games at issue. These errors are discussed more at length below. In short, though, contrary to Petitioners' assertions:

1. The instant reveal function does not use an entertaining display because it does not take the form of actual or simulated game play;
2. There is never a time when the entry pool has no winning entries remaining;
3. A nudge game player can always win a cash prize; and
4. There is no "one sitting" requirement for a player to make multiple attempts to win a cash prize

Petitioners would not have made these errors if they had performed the game-specific analysis that is required. Fortunately, the trial court did. As a result of that analysis, Judge Michael A. Stone correctly found that No Limit had shown a reasonable likelihood of success in establishing the legality of its games, as well as irreparable harm. His order is well-reasoned and the injunction appropriate. Accordingly, the State Defendants' Petition for Writ of Supersedeas should be denied.

BACKGROUND

A. The Video Sweepstakes Statute

This case concerns N.C. Gen. Stat. § 14-306.4, which is often (but unofficially and imprecisely) referred to as the "video sweepstakes statute."

As implied by the statute, the conduct of a sweepstakes has two *separate* components, which are the “entry” into the sweepstakes and the “reveal of a prize.” *See* N.C. Gen. Stat. §§ 14-306.4(a)(1)(e), (a)(1)(f), (a)(1)(l), (a)(1)(m), (a)(2), (a)(3)(i), (a)(5), (b)(1), and (b)(2). “‘Enter’ or ‘entry’ means the act or process by which a person becomes eligible to receive any prize offered in a sweepstakes.” N.C. Gen. Stat. §§ 14-306.4(a)(2). “Reveal” is not defined, but clearly has its ordinary meaning, i.e., the act by which the prize is shown or made known to the player.

Section 14-306.4 makes it a crime, *inter alia*, “for any person to operate, or place into operation, an electronic machine or device” to “[c]onduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize.” N.C.G.S. § 14-306.4(b).

The statute “prohibits the operation of sweepstakes conducted through video games of chance.” *Gift Surplus, LLC v. State ex rel. Cooper*, 380 N.C. 1, 2022-NCSC-1, ¶ 1 (“*Gift Surplus I*”). It is intended “to prohibit any mechanism that seeks to avoid [its] application . . . through the use of any subterfuge or pretense whatsoever.” *Id.* at ¶ 34 (citing N.C.G.S. § 14-306.4(c)).

Plaintiff uses video sweepstakes to promote its goods and services. Petitioners are governmental entities with the power to enforce this statute. They have taken the position, for enforcement purposes, that, through the statute, “North Carolina has expressly banned the operation of video sweepstakes machines.” (Petition p 3). This interpretation is contrary both to the statute itself and the binding precedence of this State’s highest court.

Section 14-306.4 is a *criminal* statute. Petitioners may not enforce the statute beyond the bounds expressly set out by the legislature regardless of Petitioners' preferences or any social policy benefits they might envision. Rather, the statute must be limited to its actual terms, which include the following:

- “Electronic machine” means a “mechanically, electrically or electronically operated machine or device, that is owned, leased or otherwise possessed by a sweepstakes sponsor or promoter, or any of the sweepstakes sponsor’s or promoter’s partners, affiliates, subsidiaries or contractors, that is intended to be used by a sweepstakes entrant, that uses energy, and that is capable of displaying information on a screen or other mechanism.” N.C.G.S. § 14-306.4(a)(1).
- A “**sweepstakes**” is “any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive **any prize, the determination of which is based upon chance.**” N.C.G.S. § 14-306.4(a)(5) (emphasis added).
- An “**entertaining display**” is “visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual **game play, or simulated game play,**” which includes any “video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes.” N.C.G.S. § 14-306.4(a)(3) (emphasis added).

Two things become immediately clear upon reviewing the actual terms of the statute. *First*, in order to be a sweepstakes, the prize a player becomes eligible for *must* be determined based on chance. By statutory definition, if the prize is *not* determined by chance, then the game is *not a sweepstakes!* N.C.G.S. § 14-306.4(a)(5). This statutory requirement is consistently ignored by Petitioners.

Second, the statutory definition of “entertaining display” does not encompass every audio/visual display on an “electronic device.” Rather, it only covers visual

information that takes the form of actual or simulated game play. N.C.G.S. § 14-306.4(a)(3). Put another way, if an electronic audio/visual display doesn't involve actual or simulated game play, then it is not covered by the statute no matter how "entertaining" it may be.

Interpreting the statute as a whole, the North Carolina Supreme Court has held that a "sweepstakes conducted through the use of an entertaining display" is only prohibited "when the electronic display takes the form of actual game play, or simulated game play where the game in question is not dependent on skill or dexterity." *Gift Surplus I*, 380 N.C. at 9 (cleaned up). If a video-sweepstakes participant plays a video game of chance "while revealing a prize as the result of an entry into a sweepstakes," then the video sweepstakes is unlawful. *See* N.C.G.S. § 14-306.4(a)(3)(i).

To determine whether a video game used in the operation of a video sweepstakes is one of chance or of skill or dexterity, the North Carolina Supreme Court applies the "predominant-factor" test. *See Gift Surplus I*, 380 N.C. at 11–12; *Crazie Overstock*, 377 N.C. at 403; *Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91, 773 S.E.2d 55 (2015) (*adopting Judge Ervin's dissent in Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty.*, 236 N.C. App. 340, 369–70, 762 S.E.2d 666, 685–86 (2014)); *see also State v. Stroupe*, 238 N.C. 34, 38, 76 S.E.2d 313, 316–17 (1953) (discussing the test to determine if a type of a game of pool is a game of chance).

In the context of N.C.G.S. § 14-306.4, the "predominant-factor" test asks "whether, viewed in its entirety, the results produced by [the electronic gaming

device] in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity." *Crazie Overstock*, 377 N.C. at 403; *see also Gift Surplus I*, 380 N.C. at 10.

Our Supreme Court has "necessarily held that [a] sweepstakes conducted through an 'entertaining display' under the statute is only prohibited when the game or simulated game is not 'dependent on skill or dexterity.'" *Gift Surplus I*, 2022-NCSC-1, ¶ 18 (discussing its adoption of Judge Ervin's dissent in *Sandhill Amusements*, 236 N.C. App. at 368, 762 S.E.2d at 685) (emphasis added)).

Where the electronic game play is used to determine whether a participant may win or become eligible to win a prize, the only basis upon which [p]laintiffs' equipment and activities can avoid running afoul of [N.C.G.S.] § 14-306.4(b) is in the event that ***the game or simulated game involved*** is 'dependent on skill or dexterity.'" *Id.* (emphasis added).

In *Crazie Overstock*, the Supreme Court summarized the predominant-factor test under N.C.G.S. § 14-306.4 as follows:

[T]he relevant test for use in determining whether the operation of an electronic gaming device does or does not violate N.C.G.S. § 14-306.4(a) is whether, viewed in its entirety, the results produced by that equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity.

Crazie Overstock, 2021-NCSC-57, ¶ 23.

In *Gift Surplus I*, the Supreme Court “reaffirm[ed] that the predominant-factor test is the applicable test for determining whether a video sweepstakes is conducted through a game of chance as prohibited under N.C.G.S. § 14-306.4.” *Gift Surplus I*, 2022-NCSC-1, ¶ 21, 380 N.C. at 10. To be clear, “the North Carolina Supreme Court has never held that skill and dexterity must be the *sole basis* for winning a game or for winning a prize.” *Gift Surplus, LLC v. N. Carolina ex rel. Cooper*, 605 F. Supp. 3d 711, 732 (M.D.N.C. 2022) (“*Gift Surplus II*”).

Again, the skill/chance analysis applies to the “electronic games,” not to the sweepstakes itself. Where game play is used to enter or reveal a prize, chance in such games “cannot predominately determine whether a sweepstakes player wins or loses or the relative amount of the player’s winnings or losses.” *Id.* (citing *Gift Surplus I*, 380 N.C. at 10). “[S]o long as chance is a factor, a game is a sweepstakes under the statute, and if chance does not predominate, it can be lawful.” *Id.*

In *Gift Surplus I*, 380 N.C. at 13–14, and *Crazie Overstock*, 377 N.C. at 404, the North Carolina Supreme Court held that the video sweepstakes operators’ particular games were unlawful because, regardless of the skill or dexterity exhibited by players in the game, they were ineligible for certain prizes. In *Gift Surplus I*, 75% of video sweepstakes players were automatically ineligible for more than a nominal prize, 380 N.C. at 13–15, and in *Crazie Overstock*, the results of a randomized reel-spinning game determined the prizes for which a player could play. 377 N.C. at 393, 404. Thus, chance would always predominate over skill and dexterity in both video sweepstakes. ***But those holdings do not stand for the proposition that any video sweepstakes with a prize influenced by an element of chance is illegal.***

Id. (emphasis added).

B. The Meaning of the Terms “Skill” and “Chance” Under North Carolina’s Gambling Laws

As noted, a “sweepstakes conducted through the use of an entertaining display” is only prohibited “when the electronic display takes the form of actual game play, or simulated game play where the game in question is not dependent on skill or dexterity.” *Gift Surplus I*, 380 N.C. at 9 (cleaned up). Accordingly, where game play is used, the use of an entertaining display in a sweepstakes is legal as long as “skill predominates” with regard to whether the player wins or loses and the relative amount of the player’s winnings or losses. *See Gift Surplus II*, 605 F. Supp. 3d at 731 (citing *Gift Surplus I*, 380 N.C. at 10).

While there is no easily-applied definition of “skill” and “chance,” the general concept is that:

“A game of chance is ‘such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance.’ *State v. Eisen*, 16 N.C. App. 532, 535, 192 S.E.2d 613, 615 (1972) (citation omitted). ‘A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory.’” *Id.* at 535, 192 S.E.2d at 615–16 (citation omitted).

Sandhill Amusements, 236 N.C. App. at 368, 762 S.E.2d at 685 (Ervin, dissenting).

The most workable definitions seem to come from this Court’s decision in *Joker Club, L.L.C. v. Hardin*, 183 N.C. App. 92, 643 S.E.2d 626 (2007). Essentially, no matter how much skill (however defined) is involved, the question is “whether or not the element of chance is present in such a manner as to **thwart** the exercise of skill

or judgment.” *Joker Club, L.L.C. v. Hardin*, 183 N.C. App. 92, 97 (2007) (emphasis added).

In *Joker Club*, this Court held that poker is a game of chance even though, in the long run, a skilled player will *usually* win more than an unskilled player. That is because “[n]o amount of skill can change a deuce into an ace. Thus, the instrumentality for victory is not entirely in the player’s hand.” *Id.* at 99. In contrast, bowling and billiards are games of skill because “the player’s skill determines whether he picks up the spare; or with billiards, where the shot will find the pocket or not according to its author’s skill.” *Id.*

The *Joker Club* court made, or adopted, the following important holdings:

- [T]he test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment. *Id.* at 96 (*quoting State v. Stroupe*, 238 N.C. 34, 38 (1953)).
- A game of chance is a game that is determined “entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance.” *Id.* at 98 (*quoting State v. Gupton*, 30 N.C. 271, 273–74 (1848)).

- In contrast, in a game of skill, each player is “presented with an *equal* challenge, with each determining his fortune by his own skill.” *Id.* (emphasis added). That is, there is no instrumentality beyond the player’s control that can defeat whether that player wins.
- “[W]hile all games have elements of chance, games which can be determined by superior skill are not games of chance. For example, bowling, chess, and billiards are games of skill because skill determines the outcome. The game itself is static and the only factor separating the players is their relative skill levels. In short, the instrumentality for victory is in each player’s hands and his fortunes will be determined by how skillfully he use that instrumentality.” *Id.* at 98.

C. No Limit’s Games

The Complaint contains a lengthy, detailed, description of the actual operation of the games at issue. (*See* Petition App. pp 6-13, 15-19, 19-22). This response will, therefore, seek to focus only on the most salient details. First and foremost, though, it must be understood that No Limit’s games system actually consists of two separate games. (*See* Petition App. pp 20-21; *see also id.* pp 8-12). Each of these games is a skill-based game under any objective analysis. Successful completion of one game (i.e., the “nudge” game) ***always*** results in cash prizes. (*See id.* pp 8-10; *see also id.* pp 20). Successful completion of the second game (i.e., the “follow me” game) results in the award of new sweepstakes entries, which have no independent cash value. (*See id.* p 21). Unlike other games that have been found to be illegal, the outcome of the

two games are independent of each other. Second, it must also be understood that no game play whatsoever is *required* to win any cash prize. (*See, e.g., id.* pp 7 (¶ 24), 8 (¶ 28), 21 (¶ 121); *see also, for example* the Injunction Order, Petition App. pp 8 (¶ 28), p (¶ 33), 26 (¶ 4), 27 (¶ 12).

No Limit's games utilize a vending kiosk that includes a touch screen, bill acceptor and printer. (Petition App. p 6, ¶ 17). This kiosk sells YouBux gift certificates that can be redeemed for merchandise on the YouBux website. (*Id.* ¶ 18). The sale of these YouBux gift certificates is the sole for-profit purpose of this vending kiosk. (*Id.* ¶ 19). Like many businesses throughout the State of North Carolina, No Limit offers free promotions with prize opportunities (such as sweepstakes) in order to increase customer traffic and encourage customers to purchase for profit merchandise. (*Id.* ¶ 22).

No game play is involved in a customer's **entry** into the sweepstakes. Rather, for every dollar of YouBux gift certificates the patron purchases, they automatically receive 100 free sweepstakes entries. (Petition App. p 7, ¶ 23). To be clear, in the case of No Limit's games, each sweepstakes "entry" is associated with a specific outcome. That is, like in any sweepstakes, many of the entries are not associated with any prize. Colloquially, on those entries, the participant "lost." Some entries, however, are "winners." That is, each of those entries *is* associated with a specific cash prize. For those prizes, the participant "wins" the prize upon entry. That is, upon entry, the participant has already secured the right to receive the prize *if* the

participant elects to reveal and redeem the prize. Game play is not *required* to do so. (See, e.g., Injunction Order, Petition App. pp 8 (¶ 28), p (¶ 33), 26 (¶ 4), 27 (¶ 12)).

This process can accurately be likened to sweepstakes that have been routinely used by beverage makers such as Snapple, Coca Cola, and (most infamously) Pepsi.¹ In those games the inside of the bottle caps have a code that can be looked up or state whether or not the participant won a prize. A participant “enters” the sweepstakes by purchasing a bottle of the beverage. Upon entry, the participant has either won or not won. That is because, when purchased, each cap is already a winner or a loser. Some players will be lucky enough to pick bottles with winning caps; others won’t. Accordingly, *chance* dictates whether each purchaser wins and, if so, what prize. However, not every winning entry will be revealed and redeemed. Some bottles may simply go unopened. In other cases, beverage purchasers may simply open the bottle for its contents and discard the cap without ever realizing they had a winning entry. Their failure to reveal and redeem their winning cap, however, does not change that they did, in fact, have a winning entry.

In No Limit’s case, whether a customer chooses to reveal and redeem their sweepstakes entries has no effect whatsoever on the value of the customer’s YouBux gift certificates. (Petition App. p 9 (¶ 27).

¹ See “The bottle cap snafu that nearly cost Pepsi \$32 billion,” <https://www.cbc.ca/radio/undertheinfluence/the-bottle-cap-snafu-that-nearly-cost-pepsi-32-billion-1.6305749>.

The YouBux sweepstakes entries can be revealed through the vending kiosk with *or without* game play. Without engaging in any “game or simulated game play,” the sweepstakes participant may use a kiosk to “instant reveal” whether he has won or lost, and, if a winner, what prize he has won. To use the instant reveal function, a player chooses a visual theme. He then inputs how many of his available entries he wishes to reveal and presses the “instant reveal” button. Then, without any game play, he receives a graphic display revealing what prizes, if any, he has won. He may then redeem those prizes. (*See, e.g.*, Petition App. pp 7 (¶ 24), 8 (¶ 28), 21 (¶ 121); *see also, for example* Petition App. pp 8 (¶ 28), p (¶ 33), 26 (¶ 4), 27 (¶ 12).

Participants *may*—but are not required to—reveal their *winning* entries through skill-based “nudge” games on the kiosk. (Losing entries are *always* revealed without game play.) Here, the participant chooses a game and chooses how many sweepstakes entries they would like to redeem utilizing the entry revealer function. If one or more of the entries are winning entries, the participant will be presented with a “nudge” challenge. In these games, three reels of various symbols spin. When the reel stops, the player is presented with nine symbols in three rows of three. Players then have a short amount of time (five seconds) to align the three symbols in the middle row into a winning combination. They do this by “nudging” one of the symbols in the top or bottom row up or down into the middle row. (Petition App. pp 8-10).

At the conclusion of the nudge game: (a) all losing entries that were redeemed and (b) all potentially winning entries that were redeemed and the prize actually won,

are removed from the available prizes in the finite prize pool. As with any sweepstakes, this prize pool is shared by all participants. So, as other participants are also playing, they are also eliminating losing entries from the prize pool. When all *winning* entries have been removed from the prize pool, the entire prize pool is refreshed. As a result, there is ***never*** a time when the prize pool contains only losing entries. (*See, e.g.*, Petition App. pp 10-12, 23-24, 499-501).

In the nudge game, each prize is associated with a specific combination of symbols. These combinations, and their relative values, do not change and are made known to the player by the game itself. In the short time allowed, the player must identify what patterns could be made, identify which pattern would be the most profitable (where there are multiple possible winning patterns), and make a successful nudge. As in chess, a skilled player who can better recognize patterns will be more successful. (*See, e.g.*, Petition App. p 10).

As noted above, the game play does not determine what prize(s) the participant is playing for in the nudge game. Rather, those prizes were determined in the entry phase *prior* to any game play. In the nudge phase, the player will always receive combinations that make it possible for him to obtain the largest winning entry among those revealed. Furthermore, as noted above, the nudge games are *only* made available to a player when one or more of their revealed entries is a winner. Accordingly, there is ***never*** a situation where a person playing a nudge game would be unable to obtain a cash prize regardless of the amount of skill demonstrated. Put

another way, *every person* who successfully plays the nudge game *will receive a cash prize*.

The YouBux sweepstakes is a cash-prize sweepstakes only. At the end of the reveal (either through instant reveal or the nudge game), the participant's play of that sweepstakes is over. If they have won a prize, nothing that follows will have any effect on whether or not they can keep that prize. Further, participants are aware that the next phase does not, under any circumstances, award any cash prizes.

Following the sweepstakes reveal, each player is given a chance to play a skill-based "follow me" game to earn *new* free sweepstakes entries. (See, e.g., Petition App. pp

The "follow me" games are similar to the children's game "Simon" in which the player must use their memory to repeat increasingly complex sequences. Here, the participant is shown a circular display with eight (8) different colored buttons. The buttons illuminate in a random sequence that the participant must repeat. The patterns start with only one button being lit. The participant must correctly repeat the sequence for 14 rounds, with each sequence adding another button, until all sequences are successfully completed. Each round must be completed within 20 seconds. If the participant successfully completes the configured number of sequences, he receives a number of new sweepstakes entries equal to the nonwinning entries he previously revealed. Like the original entries, the additional sweepstakes entries received have no independent cash value. (See., e.g., Petition App. pp 11-13, 16-21, 499-505).

D. Petitioners' Errors of Fact Concerning No Limit's Games

Petitioners mischaracterize four material aspects of No Limit's Games. Petitioners' errors in this regard are pervasive and essential to their entire misevaluation of the games. When No Limit's games are characterized accurately, it becomes clear that, unlike others' games, these games present a legitimate sweepstakes where prizes are revealed through games of skill.

1. The instant reveal function does not use an entertaining display because it does not take the form of actual or simulated game play

The statute prohibits sweepstakes that use an electronically displayed game of chance in either the entry or reveal of a sweepstakes prize. N.C.G.S. § 14-306.4(b). No Limit's games do not use games of chance in either phase.

The use of skill games is permitted in the reveal phase of a video sweepstakes. However, to be a sweepstakes, the prize **cannot** be determined by the player's actions. Rather, as is unambiguous from N.C.G.S. § 14-306.4(a)(5), a player's prize **must** be determined by chance. "Entry" is the process by which a player becomes eligible to win a specific prize. The statute, therefore, effectively precludes *any video sweepstakes* wherein any game play (regardless whether based on skill or chance) is used to determine what prize will be revealed.

Petitioners erroneously claim that the instant reveal feature uses an "entertaining display." (*See, e.g.*, Petition pp 32-33). This is false because the instant reveal feature does not involve any game play. The cash prize reveals are done through only two ways: (1) the instant reveal or (2) the nudge games. Again, a

contestant is entered into the sweepstakes automatically when they purchase YouBux. To reveal their prize(s), they choose a theme or skin with a game they *could play* if they chose. That choice brings up artwork and visual information. The player elects how many entries they wish to reveal. They then make a choice whether to play a game to reveal those entries *or* to reveal them *without any game play*, i.e., to “instant reveal” them.

Petitioners appear to get to their erroneous conclusion by tacitly conflating “video display” with “entertaining display,” or, put another way, to use the phrase “entertaining display” in a familiar sense rather than in its statutory sense. The visual information displayed is, admittedly, intended to engage the entrant’s attention. It could be said to be “entertaining.” However, many visual representations are entertaining (e.g., plays, movies, television), but that doesn’t make them “games.”

Petitioners have not identified what “game play” is supposedly involved in the instant reveal. Nor can they, because there is none. An instant reveal entrant is not posed with any challenge, regardless of skill or luck. There is no game (other than the sweepstakes itself) simulated or real. An entrant wishing to reveal his prize(s) without game play simply pushes the “instant reveal” button and his prize(s) is/are revealed without any further action.

2. There is *never* a time when the entry pool has no winning entries remaining

Petitioners also give a false impression concerning the “finite” pool of prizes as that term is used in relation to No Limit’s games. (*See, e.g.*, Petition pp 18, 26, 29). In doing so, they fail to understand or acknowledge the material differences in how No Limit’s games’ prize pool is managed.

In sharp contrast to games that have been found to be illegal, No Limit’s prize pool is automatically *refreshed* whenever all winning entries have been won. (*See, e.g.*, Petition App. pp 10-12, 23-24, 499-501). For example, in *Sandhill Amusements*, the machines “only permitted a predetermined number of winners.” *Sandhill Amusements*, 236 N.C. App. at 369, 762 S.E.2d at 686 (Ervin, J., dissenting). Once that number had been reached, a player would be “unable to win a prize no matter how much skill or dexterity he or she exhibit[ed].” *Id.* That is, in other games, at some point, the “prize pool” would effectively become a “dry well.”

In No Limit’s games, at the start of each sweepstakes cycle, there is a “finite” prize pool. That is, it contains a predetermined (and “finite”) number of winning and losing entries. Further, each winning entry is for a specific cash prize. All losing entries are removed from the prize pool as they are revealed. Winning entries are only removed when they are actually won. When the last winning entry has been won, the prize pool is refreshed or restored back to its original configuration. Put another way, it is a “finite” set of numbers that is being *infinitely* reproduced.

Accordingly, unlike in other games, there is never a time when an entrant has no actual chance of winning a cash prize.

3. A nudge game player can *always* win a cash prize

Petitioners also allow the misimpression (whether intentionally or through imprecise drafting) that an entrant could successfully complete the nudge game but still not win a cash prize. (*See, e.g.*, Petition p 26, asserting that on some turns, a player will be unable to win cash prizes “no matter how much skill players show in nudging.”) This is categorically false.

As previously noted, there is *never* a time when the prize pool is empty. Further, an entrant is only given the chance to reveal their entries by playing the nudge game *if they have a winning entry*. If they demonstrate the requisite level of skill to successfully complete the game, they *always* win the cash prize associated with that winning entry. There is absolutely no circumstance wherein an entrant could win the nudge game but not receive the cash prize associated with his/her entry.

4. There is no “one sitting” requirement for a player to make multiple attempts to win a cash prize

Based on the fact that: (a) each cash prize is consistently associated with a specific combination of symbols in the nudge game, which combinations are posted on the machine and (b) the prize pool is constantly being refreshed, *any entrant* could win the top prize if he/she *successfully* played both games long enough. That is, if someone plays the follow me game successfully long enough he will eventually get a

chance at the top prize. Then, if that person plays the nudge game successfully, he wins that prize. And this is true for *every single entry*.

In gambling, the “house” always wins. If you play long enough, you will lose no matter how much skill you exhibit. In contrast, in No Limit’s sweepstakes, if you play long enough and skillfully enough, you will always win. This, really, is the biggest difference between gambling and No Limit’s games.

Petitioners attempt to avoid this reality (which, again, is unlike other games), by claiming that “No Limit’s argument was that players can ensure that they play for the top prize by potentially playing its games *thousands of times in one sitting*.” (Petition p 28 (*emphasis in the original*)). Despite Petitioners’ emphasis, there is no such “one sitting” requirement. To the contrary, as the *verified* complaint explicitly alleges, if an entrant successfully completes the follow me challenge, “he receives the appropriate number of new Sweep E’s, which he can redeem at that time ***or at a later time***.” (Petition App. p 12 (§ 59) (*emphasis added*)).

LEGAL STANDARD

As the United States Supreme Court has cautioned appellate courts, “[a] stay is an intrusion into the ordinary processes of administration and judicial review and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant.” *Nken v. Hunter*, 556 U.S. 418, 427 (2009) (internal citations omitted). Given the extraordinary relief requested by Petitioners, they bear the burden of producing clear, unequivocal evidence that they are likely to succeed on the merits in their appeal and the extent to which a failure to issue supersedeas would

result in irreparable injury. *See Craver v. Craver*, 298 N.C. 231, 237-38, 258 S.E.2d 357, 362 (1979). Petitioners have not met this test and their request should be denied.

REASONS THE PETITION SHOULD BE DENIED

I. Petitioners Are Not Likely to Succeed on Appeal Because Plaintiff Has Standing to Obtain a Declaratory Judgment Establishing the Lawfulness of Its Video Sweepstakes Game

A. No Limit Has Standing to Bring Equitable Claims to Challenge the Threat of Unlawful Enforcement

Petitioners' argument that Plaintiffs lack standing to assert claims for declaratory and injunctive relief relies on a clear misinterpretation of well-settled law.

In *Comm. to Elect Forest v. Emps. PAC*, 376 N.C. 558, 563, 853 S.E.2d 698, 714 (2021), the primary case on which Petitioners rely, the jurisdictional question at issue was whether a plaintiff who sues under a statutory private right of action must have suffered direct injury to have standing. Our Supreme Court's answer to this question was a clear "no." *Id.* at 608, 853 S.E.2d at 733. The Court explained that "when the legislature exercises its power to create a cause of action under a statute," a plaintiff has standing "even where a plaintiff has no factual injury." *Id.* But the Court did not say, as Petitioners contend, the inverse: that a statutory private right of action is required before a party can seek to vindicate its rights.

Indeed, just last year, the North Carolina Supreme Court adjudicated a request for declaratory and injunctive relief under the identical provision of the state gaming and sweepstakes statute from which Plaintiffs seek relief. *See Gift Surplus I*,

380 N.C. at 5, 868 S.E.2d at 23 (denying request for declaratory and preliminary and permanent injunctive relief that plaintiffs' operation of sweepstakes through videogame kiosks did not violate N.C.G.S. § 14-306.4); *see also Crazie Overstock*, 2021-NCSC-57 (same). If Petitioners' interpretation of *Forest* were correct, the Supreme Court could not have reached the merits of the equitable claims in these cases, both of which post-dated *Forest*. The Court did reach the merits and should do so again here.

This is especially true because, as this Court has explained, "when a plaintiff has a property interest which may be adversely affected by the enforcement of [a] criminal statute, he may maintain an action under the Declaratory Judgment Act to determine the validity of the statute in protection of his property rights." *Sandhill Amusements*, 236 N.C. App. at 356-57, 762 S.E.2d at 678 (Ervin, J., dissenting). Consistent with this principle, North Carolina courts routinely adjudicate requests for declaratory judgments as to the applicability of state gaming and sweepstakes statutes to a particular promotion. *Gift Surplus I*, 380 N.C. at 5; *see also, e.g., T & A Amusements, LLC v. McCrory*, 251 N.C. App. 904, 914, 796 S.E.2d 376, 383-84 (2017) (determining legality of promotional rewards program offered in connection with gaming kiosks in retail establishments); *Sandhill Amusements*, 236 N.C. App at 351, 762 S.E.2d at 675 (same); *Am. Treasures, Inc. v. State*, 173 N.C. App. 170, 175-76, 617 S.E.2d 346, 349-50 (2005). In *American Treasures*, for example, this Court considered whether a plaintiff could bring a declaratory judgment action to determine whether its promotion violated state gambling laws. 173 N.C. App. at 176, 617 S.E.2d

at 350. In affirming jurisdiction, this Court explained that “the declaratory judgment procedure is the only way plaintiff can protect its property rights and prevent ALE from foreclosing the sale of its product in convenience stores.” *Id.*

So too here. Plaintiffs seek a declaration determining the legality of their sweepstakes under the looming threat of criminal prosecution. Petition App. 11-12 (Verified Complaint). And like in other sweepstakes cases, the threat of criminal enforcement directly impacts Plaintiffs’ property rights and “ability to operate a business going forward.” *T & A Amusements*, 251 N.C. App. at 914, 796 S.E.2d at 382; *see, also, e.g.*, 26-28 (Verified Complaint at ¶¶ 156-164).

For years, sweepstakes operators have had standing to determine whether their machines satisfy the predominance test—both before and after *Forest*. Not only is Petitioners’ request for a dramatic narrowing of this well-settled standing doctrine unlikely to succeed on the merits, but it should be flatly rejected.

B. No Limit’s Games Are Lawful Video Sweepstakes

Contrary to Petitioners’ assertions, North Carolina has not banned the operation of video sweepstakes machines. Rather, the statute only bans certain video sweepstakes; specifically, those that use games of chance in the entry or reveal of a sweepstakes prize. Had the Legislature wished to simply ban outright all video sweepstakes games, it easily could have drafted a statute that did so. That is, but for the two references to skill and dexterity in G.S. § 14-306.4(a)(3)(h) and (a)(3)(i), the statute would prohibit any sweepstakes that uses video game play or simulated game

play. Petitioners cannot expand their enforcement authority under this *criminal* statute by “reading out” key phrases.

To reiterate, the statute provides that:

- The actual prize an entrant may win in any sweepstakes must be “based upon chance.” N.C.G.S. § 14-304.6(a)(5). Simply put, if the prize is determined in any way other than by chance (e.g., by skill) then the game is not a sweepstakes.
- Sweepstakes have two relevant components, the entry and the reveal. *See* N.C.G.S. § 14-304.6(b).
- Entry is the process by which an entrant becomes eligible to receive a specific prize. N.C.G.S. § 14-304.6(a)(2).
- The reveal is the process by which the specific prize the entrant has won, or may win, is revealed to the entrant.
- To be legal, a video sweepstakes may not use an entertaining display in either the entry process or the reveal of a prize. N.C.G.S. § 14-304.6(b).
- An “entertaining display” is a video display that uses game play or simulated game play. N.C.G.S. § 14-304.6(a)(3). Put another way, a video display that does not use game play or simulated game play is not, under the statute, an “entertaining display.” Further, games that are dependent on “skill or dexterity” are also excluded from the definition of entertaining display.

The statute's provisions were, initially, the source of potential confusion for operators and enforcement authorities. However, at this point, through a series of decisions, the law on *most* issues has become well-established. Specifically, as our Supreme Court explained in *Crazie Overstock*, 2021-NCSC-57, ¶ 2.

[T]he relevant test for use in determining whether the operation of an electronic gaming device does or does not violate N.C.G.S. § 14-306.4(a) is whether, viewed in its entirety, the results produced by that equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity.

See also Gift Surplus I, 380 N.C. at 10, 868 S.E.2d at 27 ("We reaffirm that the predominant-factor test is the applicable test for determining whether a video sweepstakes is conducted through a game of chance as prohibited under N.C.G.S. § 14-306.4.").

No court has ever held that video sweepstakes are, *per se*, illegal. To the contrary, video sweepstakes are legal in North Carolina *if* they comply with the requirements of the statute. *See, e.g., Crazie Overstock*, 2021-NCSC-57, ¶ 2, n. 4 ("[N]othing in this opinion . . . should be interpreted as an indication that a gaming enterprise in which skill or dexterity actually predominate . . . would violate N.C.G.S. § 14-306.4.").

As U.S. District Court Judge Eagles held in a prior case last year, this is not some illusory, unattainable, standard. In *Gift Surplus II*, No Limit Games joined with its competitor (Gift Surplus, LLC) to challenge the constitutionality of the statute. Specifically, those plaintiffs argued, in part, that our Supreme Court's

precedents were “internally irreconcilable” because they simultaneously “ruled that not all video sweepstakes are prohibited while also establishing a standard that makes it impossible to offer a legal video sweepstakes.” *Gift Surplus II*, 605 F. Supp. at 732. As a result, the statute, as interpreted by North Carolina’s courts, was unconstitutionally vague and overbroad.

Judge Eagles rejected plaintiffs’ argument and found that:

[Plaintiffs’] argument overstates the holdings in *Gift Surplus I* and *Crazie Overstock*—the North Carolina Supreme Court has never held that skill and dexterity must be the sole basis for winning a game or for winning a prize. Chance cannot predominately determine whether a sweepstakes player wins or loses or the relative amount of the player's winnings or losses. *Gift Surplus I*, 380 N.C. at 10, 868 S.E.2d 20. And so long as chance is a factor, a game is a sweepstakes under the statute, and if chance does not predominate, it can be lawful.

Id.

Judge Eagles further opined that:

In *Gift Surplus I*, 380 N.C. at 13–14, 868 S.E.2d 20, and *Crazie Overstock*, 377 N.C. at 404, 858 S.E.2d 581, the North Carolina Supreme Court held that the video sweepstakes operators’ particular games were unlawful because, regardless of the skill or dexterity exhibited by players in the game, they were ineligible for certain prizes. In *Gift Surplus I*, 75% of video sweepstakes players were automatically ineligible for more than a nominal prize, 380 N.C. at 13–15, 868 S.E.2d 20, and in *Crazie Overstock*, the results of a randomized reel-spinning game determined the prizes for which a player could play. 377 N.C. at 393, 404, 858 S.E.2d 581. Thus, chance would always predominate over skill and dexterity in both video sweepstakes. But those holdings do not stand for the proposition that any video sweepstakes with a prize influenced by an element of chance is illegal. While the North Carolina Supreme Court's standard—chance may not predominately determine whether a video sweepstakes player wins or loses or the relative amount the player wins or loses—may make it hard for the plaintiffs to profitably offer such a video sweepstakes, it is not vague.

Id.

1. **In The Entry Phase of The Games, Prizes Are Determined by Chance Without the Use of Any Entertaining Display**

No Limits joined *Gift Surplus II* because: (a) it appeared (initially) that the Supreme Court seemed to be saying that chance couldn't be a factor in determining the prizes in a video sweepstakes and (b) in order to be a sweepstakes, the prizes *must* be determined by chance. Judge Eagles' decision caused No Limits to go back to the statute and our Supreme Court's decisions to find a way through this conundrum. The answer was the recognition that game play where "skill predominates" is permissible in the *reveal* of any prize. However, as a practical matter, the statute effectively bans *any game play* (regardless whether based on skill or chance) in the *entry* of the sweepstakes, i.e., the process where the specific prize an entrant is competing for is determined. The key to legality, then, is for the prize to be determined without, and prior to, any game play. In this way, a player's *entry* into the sweepstakes does not use an entertaining display because there is no game play involved. As a result, the player's prize may be determined by chance as required by the statute.

To date, all prior cases have considered games where both the entry and reveal processes are conducted through game play. No prior case has addressed a game like this where the player's entry into the sweepstakes and determination of the specific prize is determined by chance *and without game play*. Accordingly, this will be a case of first impression to resolve a major issue. Resolution of this issue in favor of

Plaintiff will not only clarify this issue but will resolve it in a way that gives *all* provisions of the statute effect while also rendering the statute coherent and internally reconcilable.

2. Skill Predominates in the Game Play Phases of No Limit's Games

The trial court correctly found a high likelihood that skill predominates in the game play phases of Plaintiffs' sweepstakes. (*See* Petition App. pp 502, 515-516). As previously noted, in the entry phase, prizes are determined without any game play. Entrants may then elect to either reveal their prize(s): (i) without any game play through the instant reveal feature or (ii) through a "nudge" game, as previously described above. Players then may play the "follow me" game to obtain one new free entry for every losing entry the player revealed.

Plaintiffs submitted affidavits and reports from two expert witnesses during the preliminary injunction hearing below: Nicola "Nick" Farley, a national gaming expert with Nick Farley & Associates, Inc., d/b/a Eclipse Compliance Testing (*see* Petition App. 34-364 (Farley Report) and *id.* pp 436-453 ("Farley Affidavit")); and Neil W. Mulligan, a full professor of Psychology and Neuroscience at the University of North Carolina, Chapel Hill (*see* Petition App. pp 365-390 (Mulligan Report) and *id.* pp 454-478 ("Mulligan Affidavit")).

Farley looked "under the hood" (so to speak) of the games by examining the source code. Based on that examination, he confirmed that an entrant can reveal the results of an entry without any gameplay. (Petition App. 46, 59-60). If, however, the entrant elects to reveal through a video game (what he refers to as "artwork themes"),

the entrant's success or failure is determined solely by the player's skill at the nudge game. Further, the entrant's success or failure in acquiring new free entries through the follow me game is also determined by the player's skill. (*See* Farley Report, pp 15-27 (Petition App. pp 49-61); *see also* Injunction Order ¶¶ 77-95 (Petition App. pp 502-504)).

While Mr. Farley's opinions are informative, the evaluation by Dr. Mulligan is likely more significant. In any event, the level of academic rigor applied by Dr. Mulligan is unique to this case. Specifically, because Dr. Mulligan did not base his conclusions on either the source code or a mere description of the games. (*See, generally*, Mulligan Report, Petition App. pp 365-391).

Despite Petitioners' repeated suggestion to the contrary, our Courts have never held that "each turn" of a game must be evaluated in isolation. (*See* Petition pp 4, 12, 26-31). Additionally, the statute does not require, and no Court has held, that every player must be able to compete for the top prize on every turn. (*See id.* pp 27-31). Again, if that were the case, the games would not be sweepstakes because, in a sweepstakes, the prizes must be determined by chance. To the contrary, the test is whether, "***viewed in its entirety***, the results produced by [the] equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity." *Crazie Overstock*, 2021-NCSC-57, ¶ 23 (emphasis added). The "***viewed in its entirety***" standard applies to both parts of the test, i.e., whether an

entrant wins on any given play and the relative amount of a player's winnings over the long haul. That is the standard that Dr. Mulligan was retained to evaluate.

Dr. Mulligan designed and conducted a behavioral assessment of whether, in actual practice, skill would predominate in the nudge and follow me games. (*See* Mulligan Report, Petition App. pp 365-390; *see also* Injunction Order, Petition App. pp 504-507). In conducting his analysis, he utilized definitions of "skill" and "dexterity" that could be objectively measured and are consistent with definitions provided by various courts. (*See id.* pp 367-368).

Dr. Mulligan and his associates designed and analyzed a laboratory study which examined performance on a game system that operated in the same way as the nudge challenges of the No Limit's games. In that study, a sample of adults played the games while being videotaped. Dr. Mulligan then analyzed the videotapes to assess the players' accuracy. He found the resulting data to be statistically accurate and reliable. (*See, id.* pp 377-380).

Based on his evaluation and definitions given above, he concluded that skill predominates over chance in the nudge challenge. In particular, the only basis for winning comes on those plays when a winning pattern can be formed. On these plays, the player must act to implement the winning pattern under stringent time limits, and the actions required have the hallmark of skill. Without exercising skill in the game (and quickly), no winnings can be obtained. (*See* Mulligan Report, Petition App. pp 366, 380-382).

Dr. Mulligan further opines that skill also predominates in the follow me challenge. To win, the player must remember and implement an increasingly long sequence of responses under strict time limits, and the abilities required for this have the hallmarks of skill. Without exercising skill in the game, no winnings can be obtained. Thus skill predominates over chance. (*See id.* pp 366, 383-385).

Dr. Mulligan developed significant statistical and analytical data to support his conclusions. (*See id.* pp 377-80). His study showed, to a reasonable degree of certainty, that skill predominates in both game components and that the system exhibits no element of chance that would serve to thwart a participant's exercise of skill.

Mulligan's study confirms that, since skill predominates in the nudge games, whether or not an entrant wins is not illegally determined by chance. Further, since: (a) a player can continue to receive an unlimited number of new entries as long as the player successfully completes the follow me game and (b) the prize pool is constantly being refreshed when all prizes have been won, the relative amount any player can ultimately win from his initial entry is determined by that player's combined skill in the nudge and follow me games. Although the prize in each entry is determined by chance (as required for a sweepstakes), that determination is done *prior* to the reveal and *without any game play*. But once the prize has been determined, there is no element of chance in *any game* that could thwart the entrant's exercise of skill. (See Injunction Order, Petition App. pp 504-507, 516).

Despite the strong empirical evidence provided by Plaintiff, Petitioners provided no expert testimony, relying instead on Christopher Poole, a lay witness employed by the Alcohol Law Enforcement Division. (*See* Petition App. pp 479-488; *see also id.* pp 490, 506-08, 516). Furthermore, his opinions were essentially worthless due to the demonstrable errors (both legal and factual) on which they were based.

First, there is an old expression that “to a hammer, everything looks like a nail.” As the Special Agent in Charge of a Gaming Team, Special Agent Poole is biased against any video sweepstakes. Specifically, his stated bias is that it is impossible for anyone to develop a legal video sweepstakes. Consistent therewith, his opinions were based entirely on his belief that “North Carolina law bans sweepstakes games where chance determines the prizes for which players may play.” (Petition App. pp 486-487 (§ 21)). Again, this is an incorrect statement of the law. Sweepstakes prizes *must—by statute—*be determined by chance. However, as long as a video sweepstakes does not use game play in the entry or reveal of the prize, the sweepstakes is legal.

Special Agent Poole’s factual errors likely stemmed from that same erroneous bias. Since he started from the premise that all video sweepstakes are illegal, there was no need to look beyond the fact that the case concerns a video sweepstakes. To that end, despite having weeks between the commencement of the case and the preliminary injunction hearing, Special Agent Poole *never* examined one of the actual games at issue. Instead, he merely assumed that No Limit’s games were the same as

Gift Surplus' illegal games and made numerous, critical, errors. As the trial court found:

111. During the hearing, Agent Poole testified as follows: (a) that he has never seen in operation Plaintiff's video skills challenge game; and (b) that he believed that a sweepstakes that had an element of chance was illegal.

112. Agent Poole also testified that he believed that the NLG system was similar to the system evaluated in the Gift Surplus I case, as well as the system that he recently evaluated in Randolph County, called the "Cadillac One" System. However, the details about the similarities of the game were rebutted as follows: (a) the NLG system is not connected to a server; (b) in the NLG system, the customer does not purchase game plays; instead, the customer purchases some amount of YouBux Gift Cards, which have independent value to purchase products, and the customer receives a number of sweepstakes entries; (c) in the NLG system, at the time the YouBux are purchased, the number of winning entries (if any) and the prize for each winning entry is determined without any game play or simulated game play; (d) in the NLG system, the actual prize that an entrant can compete for is not determined by game play; (e) in the NLG system, chance does not control the symbols that appear for the players to "nudge"; (f) in the NLG system, the number of entries an entrant reveals at any one time has no effect whatsoever on the amount that an entrant can or will win; (g) in the NLG system, through the "Follow Me" game, every entrant always has the chance to obtain new entries as long as they meet the skill challenge; (h) in the NLG system, every entrant will have the opportunity to compete for every prize in the prize pool.

113. Agent Poole also testified that the Nudge aspect of the NLG system was a secondary game; however, the description of the Nudge aspect in the Amended Complaint and the expert reports of Dr. Mulligan and Mr. Farley all belie and contradict the testimony of Agent Poole that it is a "secondary game."

114. Though, Agent Poole was designated as an expert in General Law Enforcement of Gaming Machines and General Knowledge of Gaming Machines, based upon: (a) Agent Poole's lack of knowledge as to the actual game at issue, including whether and how it differs from prior games, and (b) his misapplication/misunderstanding of the law as shown by his belief stated that any sweepstakes that has an element of

chance is illegal, the Court does not find persuasive Agent Poole's testimony that NLG's games are an illegal video sweepstakes. In addition, Agent Poole's pre-judgment of the NLG system is without basis and evidences that he and the other agents with whom he works will not properly assess whether the NLG system, in its actual operation, violates North Carolina law.

(Petition App. pp 506-507). Based on these errors, the trial court did not credit Petitioners' witness. Neither should this Court. Petitioners' lack of rebuttal evidence alone forecasts that Plaintiffs are likely to prevail on the merits. Accordingly, the Petition should be denied.

3. No Limit's Games Are Critically Different Than All Games that Have Been Found to Be Illegal

To date, the North Carolina Supreme Court has examined the legality under N.C.G.S. § 14-306.4 of various video sweepstakes systems in three cases, specifically; *Sandhill Amusements*, *Crazie Overstock*, and *Gift Surplus I*.

Although the games in each case had differences, ultimately, in each case, the Supreme Court found that chance taking place in the game itself predominated in whether a player won any prize, what prize a player could win, or both. In designing its new video sweepstakes, No Limit has successfully addressed or avoided the illegal characteristics identified in those three cases, as well as cases in this Court.

Sandhill Amusements:

The games in *Sandhill Amusements* were found to be illegal because:

- "The machines and equipment at issue here only permitted a predetermined number of winners. For that reason, a player who plays after the predetermined number of winners has been reached will be

unable to win a prize no matter how much skill or dexterity he or she exhibits.”

- “In addition, use of the equipment at issue here will result in the playing of certain games in which the player will be unable to win anything of value regardless of the skill or dexterity that he or she displays.”
- “In light of these inherent limitations on a player’s ability to win based upon a display of skill and dexterity, an individual playing the machines and utilizing the equipment at issue simply does not appear to be able to “determine or influence the result over the long haul.”

Sandhill Amusements, 236 N.C. App. at 369, 762 S.E.2d at 685 (Ervin, J., dissenting).

In contrast to the games in *Sandhill Amusements*, the video games here do not permit only a predetermined number of winners. Cash prizes are only won through the nudge challenge. The follow me challenge is not necessary to win a cash prize and does not change the prize available in the nudge challenge.

Whether an individual entry is a potential winner or loser, and the prize that may be won for that entry, are determined at the time the entry is obtained through the purchase of YouBux. The prizes come from a finite pool of prizes. Each time a participant redeems entries, all losing entries are removed from the prize pool. Winning prizes are removed from the prize pool only when they are actually won. The prize pool is replenished whenever all prizes have been won. Accordingly, there is never a situation where a player would be unable to win anything of value regardless of the skill or dexterity that he or she displays.

Additionally, the system gives every participant the opportunity to ultimately win the largest available prize (i.e., the largest prize remaining in the finite prize pool after other winning prizes have been eliminated). As noted, all losing entries are removed from the prize pool when redeemed. A participant who consistently exhibited the requisite skill at the follow me challenge would, ultimately, eliminate all losing entries. The prize(s) any participant could win through play, therefore, would be based solely on: (1) what prizes had not already been won, (2) the skill exhibited by the participant, and (3) whether the participant chose to play until he won.

Crazie Overstock:

In *Crazie Overstock*, in order to win any cash prize, every participant was required to play *one sweepstakes game* that had two ***necessary*** components, referred to as the “Reward Game” and the “Dexterity Test.” Whether or not the participant “won” was determined by the participant’s successful completion of a game of skill. *However*, the actual prize was determined by the Reward Game, which was a game of chance. Specifically, the results derived from playing the Reward Game were “drawn randomly” by the electronic game with “some results [being] associated with Reward Points while others are not.” As a result, a participant could exhibit perfect skill on the Dexterity Text but “win” nothing because of a negative outcome in the Reward Game, but the participant would be unaware that his attempts were effectively futile until after playing both games. *See Crazie Overstock*, 2021-NCSC-57, ¶¶ 5, 6, 7, 17, 19, 25.

In contrast, in No Limit's games, a sweepstakes participant is not required to play *any* game to redeem a winning prize. Rather, as noted, each entry's available prize is determined when the entries are issued, which is prior to any game play. Each participant can choose to "instant reveal" their sweepstakes results without game play. However, if they choose to use the kiosk to electronically redeem their entries, they are posed with one of two scenarios. If they have a potentially winning entry, they play only *one game* to win the prize associated with that entry, i.e., the nudge challenge. If they are successful in that skill-based task, they win the associated prize.

It is also important to note that, unlike in the *Crazie Overstock* case, the second game on the system (i.e., the follow me challenge) is never involved in a potentially winning entry and, accordingly, has no impact on what prize the participant can win. The follow me challenge is an entirely separate skill-based game, and every participant competes for the same prize, i.e., new sweepstakes entries equal to their redeemed losing entries.

Gift Surplus I

These were essentially the same games that were found illegal in *Sandhill Amusements*, with minor modifications to attempt to (unsuccessfully) address the issues identified in *Sandhill Amusements* and *Crazie Overstock*. Specifically, the games were modified to award more nominal money prizes and to allow players to "double nudge" game symbols into place to win. These minor changes did not alter the chance-based character of the games because, even with such changes, "in 75% of

turns, players will not be eligible to play for the top prize and, indeed, cannot play for anything more than mere cents.” *Gift Surplus I*, 2022-NCSC-1, ¶¶ 27- 35.

No Limit’s games avoid these problems for the reasons already stated above concerning the *Sandhills Amusements* and *Crazie Overstock* games. Briefly, No Limit’s sweepstakes does not permit only a predetermined number of winners. The prize an entrant is eligible to win is determined by chance, but without any game play. Cash prizes are only won through the nudge challenge. The follow me challenge is not necessary to win a cash prize and does not change the prize available in the nudge challenge. However, by consistently successfully completing follow me challenges, every participant will, ultimately, have the opportunity to play the skill-based nudge challenge for a chance to win the largest available prize.

Fun Arcade

In *Fun Arcade, LLC v. City of Hickory*, No. COA22-557, 2023 WL 4874501, at *4 (N.C. Ct. App. Aug. 1, 2023), this Court rejected a game that had multiple fatal infirmities. The player had to wager credits (i.e., when played, the credits were lost). The player had to destroy sea creatures by shooting at them. The player was awarded a credit value based on the sea creature that was destroyed. However, there was “no pattern for the number of shots required to destroy a sea creature. For example, a sea creature requiring thirty shots to be destroyed may require only five shots to be destroyed at a later point in the game.” “[T]here was no specific strategy or advantage that a player could learn to receive a better outcome in the game.” *Fun Arcade, LLC v. City of Hickory*, No. COA22-557, 2023 WL 4874501, at *1 (N.C. Ct. App. Aug. 1,

2023). Furthermore, the game was programmed to ensure that the machine *always* retained from 1% to 3% of what was wagered. This is a classic component of casino games.

No Limit's games contain none of the features that were found to be illegal in *Fun Arcade*. Entrants do not "wager" anything. Whether or not they play the video sweepstakes has no effect on the value of their YouBux. Further, as noted repeatedly, prizes are not at all determined or influenced by game play. Prizes may be revealed without game play or through the nudge games. Unlike in *Fun Arcade*, the combination associated with each prize is fixed, constant, and posted on the machines. Entrants can increase their likelihood of winning prizes by increasing their ability to spot the best combinations and by successfully completing the nudge and follow me challenges.

BST USA, LLC

This Court recently granted Petitioners a Writ of Supersedeas in regard to a preliminary injunction obtained by BST USA, LLC and Victory Vending Company, LLC. The pleadings in that case show that it is substantially different from this case in at least two material respects. First, unlike in this case, BST's evidence did not show that prizes are determined by chance as required by the statute, but without any game play or simulated game play. Second, in that case, the trial court did not note the numerous errors in Special Agent Poole's testimony with regard to the function and operation of the game at issue. Accordingly, unlike in this case, there does not appear to be evidence of a dispute in how the game operates. Finally, as

noted, in this case, the trial court's findings were based in significant part on the empirical results of Dr. Mulligan's controlled studies into the skill and chance aspects of the game in actual play. BST, however, provided no similar evidence.²

II. The Injunction Order Poses No Harm to Petitioners, While Staying That Order Will Cause Severe and Irreparable Harms to Plaintiff

Denying the Petition is necessary to prevent the severe irreparable harm that will befall Plaintiff if the injunction is stayed. A stay will force Plaintiff to shutter lawful commercial activities or face imminent criminal prosecution. This Hobson's choice will cause Plaintiff to suffer economic loss and will violate Plaintiff's constitutional right to "work and earn a livelihood." *Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957).

The comparative harm to Petitioners is minimal, if any. The order does not enjoin enforcement of the video sweepstakes statute itself. Rather, Judge Stone's order is narrowly limited to only Plaintiff's YouBux/video sweepstakes kiosks. Law enforcement may continue enforcing N.C.G.S. § 14-306.4 and other gaming statutes against any and all operators except Plaintiff. Petition App. 243 (Preliminary Injunction Order) (enjoining criminal enforcement against Plaintiff' sweepstakes

² Nothing contained in this section should be interpreted as a conclusion or assertion by No Limit that BST's games are illegal. No Limit and BST are competitors in the industry and No Limit has not examined the games at issue in that case. The observations contained herein are based solely on the public record and offered only to show how No Limit has presented a much stronger case to sustain its preliminary injunction.

only). Further, if Plaintiff were to introduce new games, or materially alter its present games, this injunction would not bar enforcement action against those games.

A. A Stay Will Force Plaintiff to Suffer Unlawful Prosecution and Economic Loss

A stay will cause Plaintiff to suffer imminent irreparable harm in the form of unlawful prosecution and forced economic loss.

The North Carolina Constitution endows all citizens with a “fundamental” constitutional right “to conduct a lawful business.” *Treants Enters., Inc. v. Onslow Cty.*, 83 N.C. App. 345, 354, 350 S.E.2d 365, 371 (1986), *aff’d*, 320 N.C. 776, 360 S.E.2d 783 (1987). When law enforcement violates these “constitutional guarantees,” an injunction is proper. *Roller*, 245 N.C. at 518, 96 S.E.2d at 854. Plaintiff has invested significant capital resources to develop a sweepstakes that complies with N.C.G.S. § 14-306.4. (Petition App. p 30 (¶ 174), p 510 (¶ 129(b))). If the injunction is now stayed, it will cause immediate irreparable harm by forcing Plaintiff to abandon its lawful business and thus infringe on its constitutional right to work and earn a livelihood. *Roller*, 245 N.C. at 518, 96 S.E.2d at 854.

B. Plaintiff Has Not Sought to Enjoin Enforcement of the Statute. It Is Simply Being Enjoined From Taking Action Specific Games That Have Made a Prima Facie Showing of Legality

Petitioners contend that “[t]he State is irreparably harmed whenever one of its statutes is enjoined” and that the trial court’s decision “enjoin[s] the sweepstakes statute” in a manner that is “unchecked.” (See Petition pp 35-36). These arguments reach too far. First, unlike in *Maryland v. King*, 567 U.S. 1301, 1302 (2012), cited by

Petitioners, the order on appeal does not “enjoin a statute.” That is, unlike in the *King* case, the lower court’s order did not enjoin application of the statute to any and all persons. Rather, it merely limited Petitioners’ ability to presently enforce the state against *No Limit Games* in light of the fact that Petitioners had made a showing that this otherwise valid statute *should be* enforced against No Limit.

The preliminary injunction entered below has no impact on Petitioners’ enforcement authority against any other sweepstakes operator in North Carolina. The trial court’s order is not “unchecked,” but rather is narrowly drawn, enjoining Petitioners from engaging in criminal enforcement only against Plaintiff and only against the specific video sweepstakes system at issue. *See* Petition App. 243 (Preliminary Injunction Order). All other sweepstakes and gaming machines remain subject to law enforcement action under the trial court’s order. Accordingly, the alleged harm to Petitioners’ enforcement efforts is minimal, if any.

By contrast, in *King*, the lower court found the state’s DNA collection program unconstitutional, prohibiting law enforcement from collecting DNA samples from nearly 11,000 individuals a year. In staying the lower court’s ruling, the United States Supreme Court found significant that “Maryland would be disabled from employing a valuable law enforcement tool for several months.” *King*, 567 U.S. at 1302.

This situation is dissimilar. Here, under the trial court’s order, state and local law enforcement may continue enforcing North Carolina’s gambling laws statewide against any and all sweepstakes except the specific version operated by Plaintiff.

With respect to Petitioners' policy-based arguments, Petitioners cite no evidence in the record whatsoever in support of those claims against Plaintiff's specific sweepstakes. *See* Writ Petition at 29-31. For this reason alone, those arguments fail. Moreover, because clear appellate jurisprudence instructs that sweepstakes can operate lawfully so long as skill predominates, Petitioners' policy arguments are better directed to the General Assembly, especially as that body considers omnibus gaming legislation. Currently pending House Bill 512, for example, proposes legalizing "video gaming terminal[s]" and, in return, taxing gaming revenue at 32% to raise appropriations for North Carolina's HBCUs. *See* H.B. 512, 2023-2024 Session (N.C. 2023), available at <https://www.ncleg.gov/BillLookUp/2023/H512>. The General Assembly's pending action counsels in favor of maintaining the trial court's injunction as that body evaluates and clarifies our State's sweepstakes regime.

C. Petitioners' Fears Are Unfounded and Do Not Justify a Stay

Finally, the highly speculative—and overblown—possible collateral effects of the injunction posited by Petitioners do not support a stay of the trial court's injunction. Petitioners argue, for example, that denying their writ "may well lead to the issuance of additional injunctions protecting additional sweepstakes operators." Petition at 38 (citing BST's recent injunction for which this Court granted a stay). As this Court is aware, in that case, Petitioners were granted a writ of supersedeas. Rather, what denying the present petition would show is that this Court—unlike Petitioners—is performing its duty to conduct a game-specific analysis of each game

as it is required to do under our Supreme Court's precedence. If other courts enjoin enforcement of N.C.G.S. § 14-306.4, it is not because a stay was entered in the instant case, but because the specific sweepstakes at issue in those other cases also satisfy the requirements of the statute.

Thus, Petitioners cannot show that they will be irreparably harmed absent a stay of the injunction, whereas Plaintiff will be severely and imminently harmed if the Writ is issued.

CONCLUSION

Plaintiff respectfully requests that the Court deny Petitioners' request for a Writ of Supersedeas and leave the trial court's preliminary injunction order in place pending a full review of the merits of Plaintiff's innovative sweepstakes under N.C.G.S. § 14-306.4.

Respectfully submitted, this 27th day of August, 2023.

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N.C. R. App. P. 33(b) Certification:

I certify that the attorney listed below authorized me to list his name on this document as if he had personally signed it:

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CERTIFICATE OF SERVICE

I hereby certify that I have, this day, served the foregoing response to petition by electronic mail, addressed to the parties as follows:

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