VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 13th day of October, 2023.

Commonwealth of Virginia, et al., Petitioners,

against Record No. 230610
Circuit Court No. CL21-207

Sadler Brothers Oil Company, d/b/a
Sadler Travel Plaza, et al., Respondents.

Upon a Petition Under Code § 8.01-626
Justices McCullough, Chafin, and Russell

This matter comes before the Court on a petition for review pursuant to Code § 8.01-626.

Petitioners, the Commonwealth of Virginia, Governor Glenn Youngkin, Attorney General Jason Miyares, and the Virginia Alcoholic Beverage Control Authority (collectively "the Commonwealth"), request that we review an injunction entered by the Circuit Court of Greensville County preliminarily enjoining the Commonwealth "from enforcing the ban on skill games as defined in Va. Code §§ 18.2-325(6) and 18.2-334.6." For the reasons that follow, we grant the Commonwealth's petition for review and vacate the injunction.

I. Background

In 2020, the General Assembly criminalized playing, or offering for play, "skill games." A "skill game" was defined as

> an electronic, computerized, or mechanical contrivance, terminal, machine, or other device that requires the insertion of a coin, currency, ticket, token, or similar object to operate, activate, or play a game, the outcome of which is determined by any element of skill of the player and that may deliver or entitle the person playing or operating the device to receive cash or cash equivalents, gift cards, vouchers, billets, tickets, tokens, or electronic credits to be exchanged for cash; merchandise; or anything of value whether the payoff is made automatically from the device or manually.

See 2020 Acts ch. 1217 & 1277.

The General Assembly provided an exemption that allowed skill games to be played so long as the prizes for the games were limited in specified ways and the games were located at a "family entertainment center," which was defined as

> an establishment that (i) is located in a building that is owned, leased, or occupied by the establishment for the primary purpose of providing amusement and entertainment to the public; (ii) offers coin-operated amusement games and skill games pursuant to the exemption created by this section; and (iii) markets its business to families with children.

Id.

On June 21, 2021, Sadler Brothers Oil Company, d/b/a Sadler Travel Plaza, Slip-In Food Mart, Inc., and CHN, LLC (collectively "Respondents"), who operate truck stops and convenience stores that profit from offering customers skill game machines to play, filed suit to enjoin the enforcement of the statutes banning skill games.

Respondents' complaint alleged that, as enacted, the statutes violated the free speech clause of the Virginia Constitution.[1] Specifically, Respondents alleged that the exemption for family entertainment centers was unconstitutionally vague and unconstitutionally discriminated against Respondents' speech based on the nature of their businesses. Respondents also asserted that the statutory scheme constituted an unconstitutional content-based restriction of their speech and further alleged that the definition of "skill game" was "unconstitutionally vague and overbroad[.]"

On December 6, 2021, the circuit court, using the four-factor injunction test set forth in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), granted Respondents' motion for a temporary injunction.[2] From the bench, the circuit court stated that it had entered the injunction for "the reasons articulated by [Respondents'] counsel, both in their pleadings, their memoranda of law, which have been submitted over the course of time I've been with this case, and for the

[1] The complaint asserted other claims not relevant to our review.

[2] The then defendants filed a petition for review seeking to have this Court vacate the injunction. By order entered January 10, 2022, a panel of this Court, without addressing the merits, refused the petition for review. *Commonwealth v. Sadler Brothers Oil Co.*, Rec. No. 211198 (Jan. 10, 2022).

oral arguments made today[.]" The injunction was extended by consent order until November 2, 2022. (*Id*. at 1666-71).

Aware of the injunction, the General Assembly amended the relevant statutes in June 2022. *See* 2022 Acts ch. 2 (Spec. Sess. I). Specifically, the General Assembly altered the statutory definition of "skill game," which is now defined as

> an electronic, computerized, or mechanical contrivance, terminal, machine, or other device that requires the insertion of a coin, currency, ticket, token, or similar object to operate, activate, or play a game, the outcome of which is determined by any element of skill of the player and that may deliver or entitle the person playing or operating the device to receive cash or cash equivalents, gift cards, vouchers, billets, tickets, tokens, or electronic credits to be exchanged for cash; ~~merchandise; or anything of value~~ *or cash equivalents* whether the payoff is made automatically from the device or manually. *"Skill game" includes (i) a device that contains a meter or measurement device that records the number of free games or portions of games that are rewarded and (ii) a device designed or adapted to enable a person using the device to increase the chances of winning free games or portions of games by paying more than the amount that is ordinarily required to play the game. "Skill game" does not include any amusement device, as defined in § 18.2-334.6.*

Id.; Code § 18.2-325(6).

Additionally, the General Assembly eliminated the exemption for games at family entertainment centers in its entirety, replacing it with an exemption for "amusement device[s.]" *See* 2022 Acts ch. 2 (Spec. Sess. I). As a result of the amendments, an "[a]musement device" is defined as

> a game that is activated by a coin, token, or other object of consideration or value and that does not provide the opportunity to (i) enter into a sweepstakes, lottery, or other illegal gambling event or (ii) receive any form of consideration or value, except for an appropriate reward.

Code § 18.2-334.6. An "[a]ppropriate reward" is

> a noncash, merchandise prize (i) the value of which does not exceed the cost of playing the amusement device or the total aggregate cost of playing multiple amusement devices, (ii) that is

> not and does not include an alcoholic beverage, (iii) that is not eligible for repurchase, and (iv) that is not exchangeable for cash or cash equivalents.

Id.

Apparently recognizing that the statutes they had sought to challenge were no longer in effect due to the General Assembly's amendments, Respondents sought and were granted leave to file an amended complaint in August 2022. In their amended complaint, Respondents challenged the new statutory scheme, seeking both a declaration that it was unconstitutional and injunctive relief to prevent it from being enforced.[3] Respondents asserted in the amended complaint that, even as amended, the statutory scheme violated the free speech clause of the Virginia Constitution.

The Commonwealth demurred, asserting that the statutory scheme regulated conduct not speech, and therefore, did not violate Respondents' free speech rights. The Commonwealth noticed a hearing on its demurrer for October 25, 2022.

At the outset of the October 25 hearing, the circuit court stated the following:

> I believe it was December of last year I entered an injunction, and that injunction was continued over until next week by agreement and an order signed by me. And we're here today on motions in order to prepare for that day or two days next week that we have scheduled. . . . And we are here today on the [Commonwealth's] . . . demurrer[.]

The circuit court did not rule on the Commonwealth's demurrer from the bench, but rather, took the matter under advisement and informed the parties that it would announce its ruling at a hearing on December 5, 2022. At the end of the October 25 hearing, Respondents, assuming that there would still be a trial, asked the circuit court to extend the temporary injunction through trial. The Commonwealth objected, noting that the injunction then in effect was tied to the statutory scheme as it existed before the scheme was amended and did not address the current statutory scheme. The circuit court extended the injunction until at least the December 5

[3] Respondents asserted other defects in the statutory scheme, but only the free speech claims were relied upon by the circuit court in granting the injunction that is the subject of the petition for review. Accordingly, we limit our discussion to Respondents' free speech claims.

hearing, noting that if it "rule[d] in favor of the Commonwealth, [the case would be] dismissed[and t]he injunction [would be] over."

On December 5, 2022, the circuit court partially sustained the Commonwealth's demurrer, striking all of Respondents' claims except for their free speech claim. The circuit court also stated that it would "continue[] the injunction as to the [statutory scheme both] as originally enacted and as amended."

On August 11, 2023, the circuit court issued an order memorializing its December 5, 2022 ruling and temporarily enjoined the Commonwealth's enforcement of the amended statutory scheme until trial, which is set for December 2023. The Commonwealth timely filed a petition for review, challenging the circuit court's issuance of the injunction and asking that the injunction be vacated. We granted the petition for review.

II. Analysis

A. Jurisdiction

Before turning to the merits of the petition for review, we first address our jurisdiction to consider it. *See Comcast of Chesterfield Cnty., Inc. v. Board of Supervisors*, 277 Va. 293, 299 (2009). Citing Code § 8.01-626, Respondents assert we lack jurisdiction to consider the petition for review. We disagree.

Code § 8.01-626 provides, in part, that

> [w]hen a circuit court (i) grants a preliminary injunction, (ii) refuses such an injunction, (iii) having granted such an injunction, dissolves or refuses to enlarge it, . . . an aggrieved party may file a petition for review with the clerk of the Supreme Court within 15 days of the circuit court's order.

Citing the circuit court's oral statement from the bench, Respondents contend that we lack jurisdiction because the circuit court merely continued an existing injunction and neither dissolved it nor refused to enlarge it. Although Respondents accurately quote the circuit court's oral statement from the bench, their argument largely ignores both the text of the circuit court's written order and the substance of what the circuit court actually did.

In its written order, the circuit court unequivocally stated "[t]hat *a temporary injunction is GRANTED* as to [the Commonwealth defendants], who are hereby temporarily enjoined until trial on December 18-20, 2023 from enforcing the ban on skill games as defined in Va. Code

§§ 18.2-325(6) and 18.2-334.6." Thus, the circuit court's written order expressly granted a preliminary injunction, which is one of the acts that triggers our jurisdiction to consider petitions for review filed pursuant to Code § 8.01-626 (providing that a party may file a petition for review with this Court "[w]hen a circuit court (i) grants a preliminary injunction").

It is not just the circuit court's written characterization of what it did that supports our conclusion that we have jurisdiction; a review of the substance of what the circuit court did also supports that conclusion. Although the circuit court orally characterized its actions as a continuation of a prior injunction, the reality is that the injunction is a new injunction. After all, the circuit court's original injunction enjoined enforcement of the statutory scheme adopted in 2020. The Commonwealth was enjoined from enforcing the 2020 statutes based upon what the statutes said in 2020, and thus, the injunction was tied, at least in part, to the family entertainment center exemption and the definition of "skill game" that the General Assembly adopted in 2020.

Although the circuit court formally has not vacated that injunction in an order, it is effectively moot because no one can enforce the 2020 skill games ban because that statutory scheme no longer exists. *Cf. Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 121 (4th Cir. 2000) (affirming, in part, district court order declaring case moot and vacating injunction because the pertinent "statutory provisions that were declared unconstitutional either no longer exist or have been substantially revised"); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 430-32 (1855) (substantive change in statutes that gave rise to injunction required dissolution of the injunction because "it is quite plain the decree of the court cannot be enforced"). In practical effect, it is no longer an order of the circuit court but rather the General Assembly's replacement of the 2020 statutory scheme that prevents the Commonwealth from attempting to enforce those now superseded statutes.

Thus, despite its oral statement, there was, in effect, no injunction for the circuit court to continue. Rather, there was a new statutory scheme being challenged and a new request to enjoin the new statutory scheme. To do so, the circuit court was required to consider the new statutory scheme and base any injunctive relief on the new language as opposed to the superseded statutes. Thus, its decision to enjoin the current statutory scheme constituted the granting of a new preliminary injunction.

The conduct of *Respondents* is consistent with this conclusion. After all, once the statute was amended, Respondents did not rest on their original pleading. Recognizing that obtaining a declaratory judgment and a permanent injunction against the 2020 statutory scheme, which no longer existed, was pointless, they sought and obtained leave to file an amended complaint so that they could challenge the *new* statutory scheme. Thus, Respondents, in seeking to stop enforcement of the current statutory scheme, sought a *new* preliminary injunction.

For these reasons, we are satisfied we have jurisdiction to consider the petition for review. We now turn to the merits of the circuit court's injunction ruling.

B. Standard of review

In general, we review a circuit court's judgment regarding a temporary injunction for an abuse of discretion. *See Commonwealth* ex rel. *Bowyer v. Sweet Briar Inst.*, Rec. No. 150619, 2015 WL 3646914, at *2 (2015) (considering a petition for review under Code § 8.01-626 and reviewing the denial of a temporary injunction for an abuse of discretion). A court abuses its discretion when it (1) does not consider a relevant factor that should have been given significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) considers proper factors but commits a clear error of judgment while weighing those factors. *Lawlor v. Commonwealth*, 285 Va. 187, 263 (2013).

Such deference, however, does not extend to the portions of a circuit court's judgment that rest upon its interpretation of statutory or constitutional provisions. Issues of statutory and constitutional interpretation are questions of law that we review *de novo*. *See Virginia Dep't of Tax'n v. R.J. Reynolds Tobacco Co.*, 300 Va. 446, 454 (2022) (statutory interpretation); *Montgomery Cnty. v. Virginia Dep't of Rail & Pub. Transp.*, 282 Va. 422, 435 (2011) (constitutional interpretation). Accordingly, we determine whether a circuit court's legal conclusions are correct and note that "[a circuit] court by definition abuses its discretion when it makes an error of law. . . . The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Porter v. Commonwealth*, 276 Va. 203, 260 (2008) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

C. Injunction standard

Although this Court has not definitively delineated the factors that guide granting the equitable relief of a temporary injunction, we have recognized that an "injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case."[4] *Bowyer*, 2015 WL 3646914 at *2; *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008). Further, "[n]o temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity[,]" Code § 8.01-628, and whether to grant a "temporary injunction requires consideration of the requesting party's allegations and the veracity and magnitude of the asserted harm." *Bowyer*, 2015 WL 3646914 at

[4] As noted above, the circuit court utilized the four-factor test for injunctive relief set out by the United States Supreme Court in *Winter* to determine whether Respondents were entitled to a preliminary injunction. Like most Virginia courts that have elected to utilize *Winter*'s four factors, the circuit court followed the lead of the United States Court of Appeals for the Fourth Circuit, which has concluded that, under *Winter*, a balancing of the four factors is inappropriate and each of the four factors must be satisfied for a party to be entitled to a preliminary injunction. *Real Truth About Obama, Inc. v. Federal Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009), *cert. granted, judgment vacated*, 559 U.S. 1089 (2010), and *adhered to in part sub nom. The Real Truth About Obama, Inc. v. F.E.C.*, 607 F.3d 355 (4th Cir. 2010). Although multiple federal circuits have agreed with the Fourth Circuit's conclusion that *Winter* requires a party seeking a preliminary injunction to establish all four factors, *see, e.g.*, *Defense Distributed v. United States Dep't of State*, 838 F.3d 451, 456-57 (5th Cir. 2016); *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1245-47 (10th Cir. 2017); *Swain v. Junior*, 961 F.3d 1276, 1284-85 (11th Cir. 2020), others have determined that a balancing or "sliding scale" approach survives *Winter*. *See, e.g.*, *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010); *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 527 (6th Cir. 2017); *Doe v. University of S. Ind.*, 43 F.4th 784, 791 n.4 (7th Cir. 2022); *D.M.* ex rel. *Xiong v. Minnesota State High Sch. League*, 917 F.3d 994, 999-1000 (8th Cir. 2019). To decide the matter before us, we need not resolve the federal circuit split nor address whether Virginia precedent sets forth a wholly separate standard making reliance on federal precedent questionable at best. *See* Stuart A. Raphael, *What is the Standard for Obtaining a Preliminary Injunction in Virginia?*, 57 U. Rich. L. Rev. 197 (2022); *but see* David W. Lanetti, *The Test—Or Lack Thereof—for Issuance of Virginia Temporary Injunctions: The Current Uncertainty and a Recommended Approach Based on Federal Preliminary Injunction Law*, 50 U. Rich. L. Rev. 273 (2015). For the reasons stated below, we conclude that Respondents are unlikely to succeed on the merits of their free speech claim. Given the significance of that conclusion in this case, Respondents are not entitled to an injunction regardless of which of the standards referenced above applies.

*2. Similarly, a court may contemplate the substance and adequacy of factual support for a plaintiff's allegations. *See Deeds v. Gilmer*, 162 Va. 157, 269-70 (1934).

D. Respondents' free speech claim is unlikely to succeed on the merits

Central to the circuit court's granting Respondents' request for a preliminary injunction was its conclusion that they were likely to succeed on the merits of their free speech claim. As is often the case when parties challenge the enforcement of statutes, whether the claim is likely to succeed on the merits is the linchpin of the decision-making process regardless of the specific injunction standard applied. *See, e.g.*, *Joelner v. Village of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004) ("When a party seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the determinative factor.").[5] This is such a case, and therefore, we address the likelihood that Respondents' free speech claim will succeed on the merits.

A party challenging the constitutionality of an enactment of the General Assembly is faced with a daunting task. *Harrison v. Day*, 200 Va. 764, 770 (1959) ("When the constitutionality of an act is challenged, a heavy burden . . . is thrust upon the party making the challenge."). A court faced with such a challenge must begin its analysis by acknowledging that "all actions of the General Assembly are presumed to be constitutional." *Montgomery Cty.*, 282 Va. at 435 (quoting *Copeland v. Todd*, 282 Va. 183, 193 (2011)). The presumption is difficult to overcome because, as we have recognized on multiple occasions, "[t]here is . . . no stronger presumption known to the law." *Id.* (citing *FFW Enters. v. Fairfax Cnty.*, 280 Va. 583, 590 (2010); *Reynolds v. Milk Comm'n of Va.*, 163 Va. 957, 966 (1935); *Whitlock v. Hawkins*, 105 Va. 242, 248 (1906)). As a result, a court may "not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions[,]" *Marshall v. Northern Va.*

[5] This is so because commonly used injunction factors often "merge when the Government is the . . . party" opposing a stay or a preliminary injunction. *Nken v. Holder*, 556 U.S. 418, 435 (2009). For example, there is a significant public interest in protecting the constitutional rights of the citizenry from being transgressed by an unconstitutional statute. Yet there is also a significant public interest in valid laws being enforced as written. Thus, whether a preliminary injunction is in the public interest often turns on whether the constitutional claim appears valid or not.

Transp. Auth., 275 Va. 419, 427 (2008), "and every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity." *Id.* at 428.

To meet this burden, Respondents argue that video games are entitled to the free speech protections provided by Article I, Section 12 of the Virginia Constitution, and that the statutory scheme violates those protections. Although the *content* of video games and other expressive media fall within the ambit of the free speech clause of the Virginia Constitution, *cf. Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (recognizing that the content of video games are within the scope of the First Amendment's speech guarantee because they often "communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)"), Respondents, at this stage of the proceeding, have not shown that the statutory scheme regulates the content of video games. To the contrary, as drafted, the statutory scheme does not appear to regulate the *content* of skill game machines at all, but rather, regulates only *conduct*.

Respondents argue that the skill games that they seek to offer to customers contain expressive content with some "depict[ing] ghost stories, pirate ship battles, adventures in the old west, . . . medieval dragon hunting," and other themes. Although true, nothing in the text of the relevant statutes regulates this content. Nothing in the statutory scheme prohibits video games from containing exactly the same themes and messages of "ghost stories, pirate ship battles, adventures in the old west, and medieval dragon hunting[.]" In fact, nothing in the statutory scheme prohibits Respondents from charging customers to play games with these very themes and messages. Rather, the statutory scheme only prohibits the ability of Respondents to offer customers a chance to wager on the outcome of the games—that is, it prohibits the *conduct* of gambling.

Courts faced with free speech challenges have long recognized that there can be elements of expression in almost any form of conduct. As the Supreme Court of the United States has stated, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *see also Texas v. Johnson*, 491

U.S. 397, 404 (1989) (noting that the Supreme Court has "rejected 'the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea'") (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

In general, the protections of Article I, Section 12 of the Virginia Constitution do not insulate from regulation conduct that involves such incidental speech or expression so long as the regulation actually is a viewpoint neutral regulation of conduct and not a targeted attempt to regulate the incidental speech or expression. Whether a regulation is valid often turns on where an activity subject to regulation resides on the speech/conduct continuum. The closer the activity is to pure speech or expression, the more likely it is that the Commonwealth's attempts at regulation will offend Article I, Section 12.

Although at times it is difficult to determine where a particular activity falls on the speech/conduct continuum, no such difficulty is present when the activity being regulated is gambling. We long have viewed gambling as conduct that may be heavily regulated and even banned by the Commonwealth as an exercise of its police powers. *See, e.g.*, *Lacey v. Palmer*, 93 Va. 159 (1896); *Justice v. Commonwealth*, 81 Va. 209 (1885); *Dismal Swamp Canal Co. v. Commonwealth*, 81 Va. 220 (1885). At least as it pertains to the statutes at issue and the record before us at this stage in the proceeding, we agree with the United States Supreme Court that "the activity [of] . . . gambling . . . implicates no constitutionally protected right[,]" and thus, "falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

Because nothing in the record before us at this stage in the proceeding suggests that the General Assembly seeks to regulate the content of the expression contained within Respondents' video games, but rather, only seeks to prevent the promise (and the ultimate execution) of a payout if a game ends in a particular fashion, Respondents are unlikely to succeed on the merits of their free speech claim.[6] The circuit court abused its discretion when it concluded otherwise.

[6] If criminalizing promises of monetary winnings as determined by the outcome of a game violated free speech rights, the Commonwealth would be unable to prohibit unregulated bookmakers from taking bets on sporting events or citizens from running private "numbers" games because such activities involve the same basic promise. Virginia's historic banning of

III. Conclusion

For the foregoing reasons, we vacate the preliminary injunction entered by the circuit court in this matter.

This order shall be certified to the circuit court.

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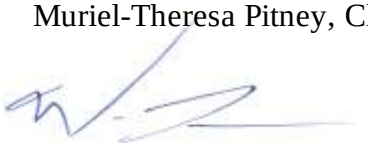
Muriel-Theresa Pitney, Clerk

By: 

Deputy Clerk

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such activities supports the conclusion that regulating or banning activities with similar promises does not violate Article I, Section 12.