IN THE SUPREME COURT OF IOWA

No. 17–1300

BANILLA GAMES, INC.,

Appellant,

vs.

IOWA DEPARTMENT OF INSPECTIONS & APPEALS,

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE MARY PAT GUNDERSON, JUDGE

APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

The Iowa Department of Inspections & Appeals (DIA) recommends retention. Although the court of appeals interpreted the relevant language from Iowa Code chapter 99B in *D2 Enterprises, Inc. v. Department of Inspections & Appeals*, No. 06–2086, 2008 WL 373637, at *1–2 (Iowa Ct. App. Feb. 13, 2008), no published appellate opinion in Iowa has directly addressed the issue. Moreover, the legislature has amended and reorganized chapter 99B since *D2 Enterprises* was decided in 2008. *See generally* 2015 Iowa Acts ch. 99. Accordingly, this case presents an issue of first impression. *See* Iowa R. App. P. 6.1101(2)(*c*); *see also Sanon v. City of Pella*, 865 N.W.2d 506, 511 (Iowa 2015) (retaining a case involving an issue the court of appeals had previously addressed, but only in an unpublished opinion). Retention would enable the Court to provide authoritative guidance, both for DIA in its administration of chapter 99B, and for amusement device proprietors in determining the law and rules applicable to their proposed devices.

STATEMENT OF FACTS & PROCEDURAL BACKGROUND

Banilla Games touts its Superior Skill 1 and Superior Skill 2 devices as unlike any "other known game or device." (Banilla Games Br. at 33.)

The district court, however, correctly looked past that sales pitch and concluded the devices' various features do not exempt Banilla Games from the Iowa Code's registration requirement. The district court did so because the machines feature a programmable payout percentage preventing *any* player from coming out ahead in the long run, no matter how skillful or knowledgeable they are; because any skill the player exerts does not influence the result more than chance does; and because the player's knowledge does not influence the result at all. This Court should affirm.

A. Regulatory framework.

DIA is responsible for administering and enforcing the laws governing amusement devices, which are codified in Iowa Code chapter 99B. *See* Iowa Code § 10A.104(9) (2015 Supp.) (requiring the director of DIA to administer and enforce several code chapters, including 99B); *id.* § 99B.2(4) (requiring DIA to adopt administrative rules to carry out chapter 99B, including rules that define "unfair or dishonest games, acts[,] or practices").[1] An amusement device is "an electrical or mechanical device

[1] DIA cites the 2015 Code Supplement because the legislature reorganized chapter 99B in 2015, effective July 1, 2015. *See* 2015 Iowa Acts ch. 99; *see also* Iowa Code § 3.7(1) (presuming all session laws become effective the following July 1, unless the enactment specifies otherwise).

possessed and used in accordance with" chapter 99B. *Id.* § 99B.1(2). Chapter 99B permits Iowans to own, possess, or offer amusement devices only if the devices meet specific criteria. *Id.* §§ 99B.52–.53, .56. Additionally, even if it meets those criteria, an amusement device that awards a prize must be registered with DIA if the outcome of that device "is not primarily determined by skill or knowledge of the operator." *Id.* § 99B.53(1). The heart of the dispute in this appeal is whether the registration requirement applies to the Superior Skill devices.

On April 15, 2016, Banilla Games filed an Amended Petition for a Declaratory Ruling with DIA. (Stipulated Record [SR] at 102–09; App. 116–23.) *See id.* § 17A.9(1)(*a*) (permitting any person to "petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency"). Declaratory orders under chapter 17A are "a practical alternative to judicial declaratory judgments." *Iowa Ins. Inst. v. Core Grp.*, 867 N.W.2d 58, 65 (Iowa 2015). Banilla Games's petition asked DIA to determine whether Banilla Games's Superior Skill devices are subject to the registration requirement contained in Iowa Code section 99B.53(1). (SR at 108–09, App. 122–23.)

Banilla Games was not required to specify *why* it filed the petition for declaratory order, but the statutory framework for amusement devices illuminates a possible reason. If an amusement device must be registered, it may be placed only at locations where the owner holds a particular class of liquor license—which are usually bars and taverns. *See id.* § 99B.53(2)–(3). However, if registration is not required, the device may be placed "at any location," including premises such as laundromats or convenience stores where the owner usually does not hold such a liquor license. *Id.* § 99B.52(1). Thus, the ruling Banilla Games sought from DIA would inform how widely Banilla Games could distribute its machines in Iowa. Importantly, however, no part of chapter 99B or of DIA's administrative rules prevents Banilla Games from immediately placing Superior Skill games around the state; the only limitation is the company's apparent unwillingness to submit the devices to registration first.

B. The Superior Skill devices' display and operation.

1. *General concepts.* Superior Skill 1 and Superior Skill 2 offer both "nudge" games and "hot swap" games.[2] (Dist. Ct. Ruling at 1, App. 242.)

[2] The district court found that "all [Superior Skill 1] games are nudge games and all [Superior Skill 2] games are hot swap games." (Dist. Ct. Ruling at 1–2, App. 242–43.) Based on the Stipulated Record, it appears

The devices' digital display appears similar to a slot machine, with multiple "reels," but unlike slot machines, the Superior Skill devices do not contain a random number generator. *See* Iowa Admin. Code r. 491—11.10(2) (requiring all slot machines at Iowa casinos to utilize "a random number generator to determine the results of the game symbol selections"). Instead, the Superior Skill devices present to the player a preordered series of game screens that are elaborately revealed through spinning reel graphics. The screens are revealed in the preset order as a player cycles through them.

2. *Gameplay specifics.* Superior Skill players may select from multiple thematic options. For example, one possible hot swap theme is "Spooky's Loot," which "is based primarily on Halloween symbols." (SR at 170, App. 184.) Another is "Baththime Bucks," which features bath-themed symbols, including rubber ducks. (SR at 130, App. 144.) Players can also select a play level, which determines both the amount of one-cent credits the player must spend and the possible prize the player can win. (SR at 128, 168; Dist. Ct. Ruling at 1–2, App. 142, 182, 242–43.) The play levels range from 25 to 2000 credits, which equals a range of twenty-five cents to twenty

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that factual conclusion was incorrect. Both devices contain both types of games. (SR at 130–35, 170–74; App. 144–49, 184–88.) However, the factual error is neither material nor prejudicial.

dollars. Regardless of theme and play level, however, each nudge game and each hot swap game works the same way.

Nudge games animate three spinning reels for the player, and when the reels stop, the player has a finite time to nudge one reel up or down to align a pattern of winning symbols. (SR 172, App. 186; Dist. Ct. Ruling at 1, App. 242.) Hot swap games reveal a screen of five reels, and offer the player a limited amount of time to swap in one of two available "replacement symbols" to create a winning symbol combination. (SR 171–72, App. 185–86; Dist. Ct. Ruling at 1, App. 242.) In hot swap games, it is possible that both available replacement symbols could create a winning symbol combination, but generally one of the two replacement symbols would, if placed correctly, generate a more lucrative prize.

Not every screen allows the player to create a winning symbol combination; indeed, *most* of the available screens offer zero potential prize value. (SR at 211–12, App. 225–26.) Game payouts are instead governed by a preselected and finite pool of game screens for each game theme and play level; some game themes feature 75,000 possible screens and others feature 100,000. (SR at 129, 169; App. 143, 183.) The first game screen is selected randomly from a table of starting indices. (SR at 129, 169; App.

143, 183.) Once a starting point is selected, each screen is then sequentially presented for play in a predetermined order, regardless of player, until all possible screens have been exhausted. (SR at 129, 169; App. 143, 183.) A player cannot skip a particular screen or otherwise alter or change the order of play screens the device presents. (SR at 212, App. 226.) In other words, the player "can never affect in any way whether a possible winning combination will be displayed." (SR at 212, App. 226.)

3. *Additional programming features.* The device owner or distributor may set a payout percentage on each machine at 92%, 94%, 96%, or 98%. (SR at 143, 183, 210–12; App. 157, 197, 224–26.) The payout percentage means that the aggregate universe of all Superior Skill players will *always* expend more total credits to play than they will redeem in prizes, no matter how skillful or knowledgeable they are. The payout percentage is quantifiable because, regardless of play level, at least two-thirds of the game screens in any given theme are zero-value screens that do not allow the player to create a winning symbol combination. (SR at 211–12, App. 225–26.)

The devices contain two other notable features. First, if the player recognizes that a particular screen offers zero prize potential or cannot

decipher the correct reel to nudge or the correct symbol to swap, he or she can instead "Take a Penny" and receive one cent. This means that, even if a player wagers twenty dollars per screen, for more than two-thirds of the available play screens (which would otherwise be zero value screens), the maximum prize is one cent. (SR at 211–12, App. 225–26.) Therefore, the "Take a Penny" feature merely reduces the minimum wager per screen from 25 cents to 24.

Second, the devices feature a "prize viewer" that allows the player to preview the upcoming game screen before expending credits to play it. (SR at 139, 179; App. 153, 193.) A player need not expend any credits to see what the next screen will look like. (SR at 139, 179; App. 153, 193.) However, no means exist for a player to bypass or skip that screen (within the same game theme) if he or she determines it offers low or no prize potential. (SR at 212, App. 226.) Instead, the player must either play a screen he or she knows offers little prize potential in hopes of getting a more advantageous screen next; switch game themes and hope for a better starting point in the predetermined screen order; or abandon the device until another player advances the game further into the predetermined sequence.

C. Administrative proceedings and judicial review.

Banilla Games's petition for declaratory order contended that section 99B.53(1) does not apply to its machines because in its view, the outcome of the Superior Skill devices *is* "primarily determined by skill or knowledge." (SR at 108–09; App. 122–23.) Iowa Code § 99B.53(1). Banilla Games also submitted a brief and two third-party analyses in support of its petition and request. (SR at 115–207; App. 129–221.) It asserted that the prize viewer feature *completely eliminates* chance from the game. (SR at 119, App. 133.) Instead of chance, Banilla Games continued, the prize viewer option means the outcome of the game is fully due to both knowledge (what prize, if any, is available) and skill (correctly nudging a reel or swapping a symbol). (SR at 121, App. 135.)

Before ruling on the petition for declaratory order, DIA sought additional information about the devices from Banilla Games, and Banilla Games provided it. (SR at 208–12; App. 222–26.) Following a notice and public comment period during which DIA received no public comment, Banilla Games demonstrated the devices for DIA staff during a July 2016 videoconference. (SR at 214–15; App. 228–29.)

After developing an understanding of the devices through the written materials and the videoconference, DIA issued a declaratory order on October 31, 2016, in which it concluded that the Superior Skill devices must be registered. (SR at 226–27; App. 240–41.) DIA relied in part upon *D2 Enterprises* and concluded that section 99B.53(1) applies to the Superior Skill devices because the outcome is not primarily determined by a player's skill or knowledge. (SR at 224–26, App. 238–40.) DIA further concluded that because the player cannot affect which screens appear in which order, chance plays a greater part in the outcome than skill or knowledge:

> The ordering and value of the games is really the deciding factor in determining which of the games' players will be awarded a prize at the conclusion of play. Because it is not possible to collect sufficient credits playing [the Superior Skill devices] to win a prize unless the player is fortuitous enough to encounter one of the high value prize screens during play of the game, player skill or knowledge is relegated to, at best, a secondary role in producing a successful outcome to the game.

(SR at 227; App. 241.) In other words, DIA concluded that the player's skill or knowledge does not and cannot affect the outcome more than the play screens' predetermined ordering and the limited prize potential that most of the screens offer.

Banilla Games sought judicial review of DIA's declaratory order in district court under Iowa Code chapter 17A, contending DIA erroneously

interpreted chapter 99B and committed an unreasonable or arbitrary abuse of discretion. (Pet. for Judicial Review, App. 6–8.) The district court affirmed DIA's order, concluding "[t]here were no errors of law in DIA's interpretation of the statute." (Dist. Ct. Ruling at 17; App. 258.) Banilla Games now appeals.

ARGUMENT

I. THE SUPERIOR SKILL DEVICES' OUTCOME IS NOT PRIMARILY DETERMINED BY PLAYER SKILL OR KNOWLEDGE.

Error Preservation: Banilla Games does not state how it preserved error. *See* Iowa R. App. P. 6.903(2)(*g*)(1). Nonetheless, it preserved error on three contentions: whether DIA erroneously interpreted chapter 99B; whether DIA's application of law to fact was irrational, illogical, and wholly unjustifiable; and whether DIA acted unreasonably, arbitrarily, or capriciously, or abused its discretion. (Dist. Ct. Ruling at 14–15, App. 255–56.) *See* Iowa Code § 17A.19(10)(*c*), (*l*)–(*n*). Because the district court ruled on them, Banilla Games has preserved error on those three contentions, but only those three.

Standard of Review: This case arises from other agency action. *See Allegre v. Iowa State Bd. of Regents*, 349 N.W.2d 112, 114 (Iowa 1984)

(establishing that "other agency action" is a residual category). Accordingly, the Court's review "turns on errors of law or the presence of unreasonable, arbitrary, or capricious action." *Sindlinger v. Iowa State Bd. of Regents*, 503 N.W.2d 387, 390 (Iowa 1993).

With respect to the errors at law prong, DIA asserted below that it is entitled to *Renda* deference because DIA must necessarily interpret chapter 99B in carrying out its statutory duties and because the word "outcome" has a specialized meaning in the context of regulating amusement devices. *See Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010) (noting an agency may have interpretive authority "when the statutory provision being interpreted is a substantive term within the [agency's] special expertise"). The district court did not grant deference but concluded that regardless, DIA's interpretation of section 99B.53 is correct. (Dist. Ct. Ruling at 4, 17; App. 245, 258.)

This Court has rarely granted deference to agencies' statutory interpretation after *Renda*. *See, e.g.*, *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179, 185 (Iowa 2016); *SZ Enters., LLC v. Iowa Utils. Bd.*, 850 N.W.2d 441, 451–52 (Iowa 2014); *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 343 (Iowa 2013). And even before *Renda*, the court of

appeals granted DIA "only limited deference in matters of law, including statutory interpretation." *H & Z Vending v. Iowa Dep't of Inspections & Appeals*, 593 N.W.2d 168, 170 (Iowa Ct. App. 1999). Thus, the Court should reach the question of deference only if it first concludes DIA's interpretation of section 99B.53 is legally erroneous. *See Myria Holdings Inc. v. Iowa Dep't of Revenue*, 892 N.W.2d 343, 347 (Iowa 2017) (declining to reach the deference question because the agency's interpretation of a statute was correct).

With respect to the grounds other than DIA's interpretation of section 99B.53(1), Banilla Games bears a heavy burden. To demonstrate DIA acted unreasonably or abused its discretion, Banilla Games must show DIA took "action in the face of evidence as to which there is no room for a difference of opinion among reasonable minds." *Arora v. Iowa Bd. of Med. Exam'rs*, 564 N.W.2d 4, 7 (Iowa 1997); *see also Sioux City Cmty. Sch. Dist. v. Iowa Dep't of Educ.*, 659 N.W.2d 563, 566 (Iowa 2003) ("An abuse of discretion is synonymous with unreasonableness."). Notably, this Court's inquiry is not whether DIA "could easily have reached the opposite conclusion" (Banilla Games Br. at 28), but instead whether the determination DIA made was reasonable. *Cf. Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 525

(Iowa 2012) (reminding readers that when a court reviews agency action, the appellate inquiry is not whether the agency could have reached a different conclusion, but whether the conclusion reached should be affirmed).

Argument: Banilla Games raises three issues: DIA's statutory interpretation, DIA's application of law to fact, and whether DIA's action was otherwise arbitrary, unreasonable, or an abuse of discretion. As the district court noted, resolving the first actually resolves all three; if DIA correctly interpreted chapter 99B, its application of law to fact was not illogical or irrational. *Cf. AOL LLC v. Iowa Dep't of Revenue*, 771 N.W.2d 404, 409–10 (Iowa 2009) (finding an illogical and irrational application of law to fact because the agency utilized the wrong legal standard). And if DIA committed no legal error, no abuse of discretion occurred either. (Dist. Ct. Ruling at 14–15, App. 255–56.) *Cf. Willard v. State*, 893 N.W.2d 52, 58 (Iowa 2017) (noting an erroneous application of law constitutes an abuse of discretion).

This case hones in on several words within section 99B.53—but the most significant one is "primarily." That word establishes a dominant factor test for measuring chance against skill or knowledge. Applying the dominant factor test demonstrates that DIA's interpretation of section

99B.53(1) is correct, because under any reasonable definition of "outcome," the outcome is not *primarily* determined by skill or knowledge. In other words, under section 99B.53, skill or knowledge must actually affect the result, and here, despite the devices' name, neither skill nor knowledge affects the outcome of any Superior Skill game more than chance does. *See State v. Wiley*, 232 Iowa 443, 449, 3 N.W.2d 620, 624 (1942) ("[C]ourts have, in general, looked behind the name . . . of the device to ascertain its true character."). Instead, skill has only minimal effect, and knowledge has no effect whatsoever. Banilla Games must register its Superior Skill devices with DIA.

A. The word "primarily" establishes a dominant factor test for measuring chance against skill or knowledge in the amusement device context.

Section 99B.53(1) requires registration if the outcome of an amusement device "is not primarily determined by skill or knowledge" as opposed to chance. Iowa Code § 99B.53(1). The word "primarily" is the litmus test for determining whether the registration requirement applies. *See D2 Enters.*, 2008 WL 373637, at *1–2. In administering that litmus test and measuring chance against skill or knowledge, courts generally use one of two tests:

> (1) the pure chance doctrine, under which a scheme is considered [gambling] when a person's judgment plays no part in the selection and award of the prize, [or] (2) the dominant factor doctrine, under which a scheme constitutes [gambling] where chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment. Most jurisdictions favor the dominant factor doctrine.

Morrow v. State, 511 P.2d 127, 129 (Alaska 1973); *see also* Anthony N. Cabot et al., *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 Drake L. Rev. 383, 390–93 (2009) [hereinafter Cabot et al.] (referring to both tests by slightly different names but noting that "[t]he predominance test, also known as the dominant factor test, is the prevailing test when assessing the existence of . . . chance").

The word "primarily" in section 99B.53 establishes a dominant factor test in this context. "[T]he threshold for predominance is the point at which either skill or chance crosses the 50% mark." Cabot et al., 57 Drake L. Rev. at 391–92. That formulation is consistent both with dictionary definitions of "primary" and with caselaw analyzing the word "primarily" or one of its variants. *See, e.g.*, *Iowa Ag Constr. Co. v. Iowa State Bd. of Tax Review*, 723 N.W.2d 167, 176 (Iowa 2006) (mentioning a rule that defined primary use as more than fifty percent of the time); *Remer v. Bd. of Med. Exam'rs*,

576 N.W.2d 598 (Iowa 1998) (utilizing dictionary definitions of "primarily" that include "fundamentally" and "principally"); *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 686 (Iowa 1990) (equating predominant and primary when evaluating factors bearing on an employment decision); *Black's Law Dictionary* at 1383–84 (10th ed. 2014) (listing many legal terms using the word "primary" that describe the item as being the chief consideration or the main reason).

Under the dominant factor test, a game is not primarily skill-based "merely 'because its result may be affected to some slight extent by the exercise of judgment.' If the result . . . depends, in the end, on chance, then skill does not predominate." J. Royce Fichtner, *Carnival Games: Walking the Line Between Illegal Gambling and Amusement*, 60 Drake L. Rev. 41, 50 (2011) [hereinafter Fichtner] (quoting *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y. 1904)). And the Court must be careful. "For some games, skill *appears* to control the outcome, but upon closer inspection, the amount of skill required is minimal and the game is truly determined by chance." *Id.* at 57 (emphasis added).

B. Applying the dominant factor test, chance predominates over skill or knowledge for the Superior Skill devices under any reasonable definition of "outcome."

An amusement device must be registered with DIA if "the outcome is not primarily determined by skill or knowledge of the operator." Iowa Code § 99B.53(1). Having established that the word "primarily" creates a dominant factor test, the next question is what "outcome" means. DIA's declaratory order equated outcome with actually winning a prize over an entire play session consisting of multiple play screens. But even if the Court concludes the analysis is more compartmentalized, the skill and knowledge components of the Superior Skill devices do not predominate.

At the outset, the Court should reject out of hand the contention that the outcome of an amusement device is an intangible and subjective sense of fun. As one court noted almost ninety years ago, that standard is simply unworkable and implausible when it comes to quasi-gambling devices:

> It is contrary to reason that players would continue to idle away their time and waste their money operating the machine merely for the so-called amusement; if the playing is for the purpose of seeing the pictures or reading the humorous remarks, or of having a pretended "fortune" told, it must be admitted that such entertainment—which is of the most elementary type—must necessarily soon grow monotonous and fail of its purpose. It is almost inconceivable that persons of any intelligence could be induced to spend money for something . . . through the prospect of getting something of no value. Such contention does

> violence to every conception of reason, and is contrary to man's natural inclination.

Harvie v. Heise, 148 S.E. 66, 68 (S.C. 1929). Furthermore, if the outcome is merely whether the player enjoys themselves, any slot machine—even one with a random number generator—would be permitted outside of licensed casinos (as long as it is registered with DIA) because the player knows he or she will have fun playing it. That can't be what the legislature meant in drafting section 99B.53(1).

Nor can a device's "outcome" mean simply that the player chooses not to play. The choice not to play is a *player* outcome, not a device outcome, and section 99B.53(1) focuses on device outcomes. *See* Iowa Code § 99B.53(1) (regulating any "device . . . where the outcome is not primarily determined by skill or knowledge"). Further, if "outcome" includes choosing not to play, even slot machines could be knowledge-based amusement devices because each casino patron can access slot machine game rules and overall payout percentages before expending any money. *See* Iowa Admin. Code r. 491—11.9(4) (requiring casinos to post "[t]he actual aggregate payout percentage . . . of all slot machines in operation"); *McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 520–21 (Iowa 2015) (describing how a player accesses the rules of an individual slot machine

game). A player could view the rules of a slot machine game or see the aggregate payout percentage and decide he or she doesn't want to play for any number of reasons—but under Banilla Games's theory, if the player does so, the "outcome" of that slot machine is now a knowledge-based choice *not to* play, not a chance event. That is an untenable result the legislature could not have intended.

Ruling out those facially implausible meanings of "outcome" leaves DIA's holistic interpretation: "outcome" includes considering a player's gain or loss over an entire play session, from when the player deposits money to when they redeem any remaining credits. The outcome does not turn solely on solving a puzzle, but on both the puzzle task *and* what prize is awarded. That view is reasonable and should lead the Court to affirm DIA's declaratory order.

1. *"Outcome" measures the result of an entire play session.* Chapter 99B's context and purpose support DIA's interpretation: that the word "outcome" in section 99B.53 measures an entire play session. *See Den Hartog v. City of Waterloo*, 847 N.W.2d 459, 462 (Iowa 2014) (exemplifying the Court's holistic approach to statutory interpretation that includes considering context and purpose).

Unquestionably, the Court's task is to interpret section 99B.53 in accordance with the legislature's intent. *Myria Holdings*, 892 N.W.2d at 348. The legislature illuminated its intent by subjecting amusement devices to three important restrictions. First, section 99B.53 requires any device where chance predominates to be registered. Iowa Code § 99B.53(1). Second, the number of permissible registered amusement devices statewide is capped, and the universe of possible device locations is limited. *Id.* § 99B.53(2), (6). Finally, only individuals over the age of twenty-one may participate, just as with other forms of gambling in Iowa. *See id.* § 99B.57(1)–(2); *see also id.* §§ 99D.11(7) (pari-mutuel wagering at racetracks), 99F.9(4)–(5) (casino gambling), 99G.30(3) (lottery). The registration requirement, the registration cap, and the age limitation demonstrate the legislature intended to be cautious about allowing amusement devices that resemble gambling to proliferate. Interpreting the word "outcome" to encompass an entire play session is consistent with that concern.

Another important reason why "outcome" measures more than one play screen is that few if any players end their interaction with the machine that soon. *Cf. City of Moberly v. Deskin*, 155 S.W. 842, 844 (Mo. Ct. App.

1913) ("[I]n the vast majority of instances the dealings between the player and the machine . . . consist of more than a single play."). Over a century ago, a Missouri court considering whether a particular machine was an illegal gambling device held "as unsound the view . . . that each play constituted a separate and distinct transaction in the sense of ending the relation of the player to the machine." *Id.* Instead, the court recognized the machine "was designed and intended to include a number of plays," thereby convincing the player to make more than one wager "in the hope that the *next* time [it] . . . would bring him something for nothing." *Id.* at 844–45 (emphasis added); *accord Harvie*, 148 S.E. at 68 (adopting the rule that a player does not count on "immediate returns for the coin deposited but on the chance that a profit will be shown on the next play").

Iowa, too, encountered some devices in the early twentieth century that were constructed with "[g]reat ingenuity" in an attempt to avoid relevant law at the time. *State v. Doe*, 263 N.W. 529, 529 (Iowa 1935); *see also Wiley*, 232 Iowa at 444–45, 3 N.W.2d at 621 (noting inventors' ingenuity in constructing a device "so as to cloak [its] real character"); *State ex rel. Manchester v. Marvin*, 233 N.W. 486, 486–87 (Iowa 1930) (pointing out "a near approach to the prohibitive line"); *State v. Ellis*, 206 N.W. 105, 106

(Iowa 1925) (describing a machine with an additional feature that "furnish[ed] the allurement of the game"). Machines were commonly designed to induce multiple plays or multiple coin deposits in succession.

Two Iowa cases from that era specifically addressed the likelihood of repeated play. In *Marvin*, the Court concluded an independent accessory to what was otherwise just a vending machine served only one apparent purpose: "to induce a larger deposit of nickels in the slot than would otherwise ensue." *Marvin*, 233 N.W. at 486. Likewise, in *Ellis*, the Court discussed a machine that allowed players to preview what would be dispensed next—which induced players to deposit multiple coins because a larger return was "sure to come if the lever is pulled and the nickel dropped a few times successively." *Ellis*, 206 N.W. at 106. In other words, players did not play just for the first opportunity but for the ones that followed. *See id.*

Over the generations since *Marvin* and *Ellis*, technology has advanced significantly and society has grown more tolerant of some forms of gambling. *Compare* Iowa Const. art. III, § 28 (1857) (prohibiting all lotteries in Iowa), *and Wiley*, 232 Iowa at 452, 3 N.W.2d at 625 (concluding a pinball machine was an illegal gambling device because the relevant

statute at the time prohibited any amount of chance),[3] *with* Iowa Code § 99F.3 (providing gambling is legal at licensed facilities), *and* Iowa Code § 99G.4 (creating the Iowa Lottery Authority).[4] In other words, the state of the law is no longer "all gambling is illegal," as it was in 1925. Instead, the state of the law is "all gambling is illegal, with limited exceptions." *See* Iowa Code §§ 725.7(1), 725.14–.15 (outlawing gambling except as provided in chapters 99B, 99D, 99F, and 99G); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 438 (8th Cir. 2007).

Nonetheless, the historical context surrounding early gambling devices—and the related questions of legality that arose in the 1970s regarding carnival amusements, *see* Fichtner, 60 Drake L. Rev. at 62—form part of the backdrop for current chapter 99B. That backdrop should inform the Court's reading of section 99B.53(1). *See* Iowa Code § 4.6(2), (4) (permitting courts interpreting statutes to consider both "[t]he circumstances

[3] When *Wiley* was decided in 1942, "pinball machines were only a few years removed from their slot machine heritage." *City of Ferndale v. Palazzolo*, 233 N.W.2d 216, 218 (Mich. Ct. App. 1975). Unlike early pinball machines, modern pinball machines "involve skill to a much greater extent because of the addition of 'flippers'." *Id.*

[4] The constitutional prohibition against lotteries was repealed in 1972. Iowa Const. amend. 34.

under which the statute was enacted" and "common law or former statutory provisions, including laws upon . . . similar subjects").

Measuring outcome in the aggregate also finds support in dictionaries and in other legal contexts. For example, a dictionary definition of "outcome" establishes it is the consequence or result of an activity or process. *Webster's Third New Int'l Dictionary* 1601 (unabridged ed. 1993). Similarly, the outcome of a football game means the final score of the game, not one individual player's statistics or the individual result of each snap or each quarter. *Abernethy v. State*, 545 So. 2d 185, 188 (Ala. Crim. App. 1988). The same logic, applied to section 99B.53, leads to the same conclusion: "outcome" measures an entire play session, not each individual play within it.[5]

It's true that section 99B.53 does not make "outcome" and "prize" strictly synonymous. But the registration requirement only applies to devices "that award[] a prize." Iowa Code § 99B.53. Thus, the legislature

[5] At least one court has measured chance against skill at a higher, individual-event level of abstraction, although the game at issue was not electronic. *See Three Kings Holdings, L.L.C. v. Six*, 255 P.3d 1218, 1225–27 (Kan. Ct. App. 2011) (measuring a game similar to poker by each individual hand rather than in the long run). In this case, a more granular view of "outcome" would evaluate each individual play screen in isolation. However, that definition of outcome would not change either the dominant factor analysis or the result in this case.

has connected (although not necessarily equated) outcome and prize. The outcome of a device "that awards a prize" necessarily includes a consideration of the prize. *See id.*

The court of appeals recognized as much in *D2 Enterprises*, concluding "outcome" refers to the results of the game—specifically, the appearance of high value screens over the course of play. *D2 Enters.*, 2008 WL 373637, at *1–2. That simply acknowledges the reality of amusement devices; the possibility of winning a prize that exceeds the amount wagered is the reason most players choose to play. *See Ferguson v. State*, 99 N.E. 806, 807 (Ind. 1912) ("[What] attracted the player was the chance that . . . he would receive something for nothing."); *In re Cullinan*, 99 N.Y.S. 1097, 1099 (App. Div. 1906) ("It is the hazard—the chance of winning more than the sum ventured—which draws people to the machine . . . ."). In contrast to Banilla Games's utopian view that winning a prize may be an afterthought (Banilla Games Br. at 24), one commentator has more realistically noted that with respect to carnival games, "The ultimate outcome . . . *is* the prize." Fichtner, 60 Drake L. Rev. at 58 (emphasis added).

At least two other courts have concluded that in determining whether skill predominates over chance, the word "outcome" can involve

consideration of what prize the player earns. *See Opinion of the Justices*, 795 So. 2d 630, 642 (Ala. 2001) (equating "ultimate outcome" with whether a player wins "more money than he or she has wagered" over continuous play); *Pace-O-Matic, Inc. v. N.Y. State Liquor Auth.*, 898 N.Y.S.2d 295, 297 (App. Div. 2010) ("[T]he best definition, and the one most commonly used in the academic literature, is 'the magnitude of the award, gross or net of consideration.' Thus, the outcome includes both whether the player correctly solves the puzzle *and* what prize is awarded."). A similar definition is also appropriate here; indeed, DIA relied on *Pace-O-Matic* in concluding that evaluating "outcome" includes determining whether the player comes out ahead. (SR at 225, App. 239.)

To be clear, DIA does not contend that chapter 99B and the word "outcome" mandate that all amusement device players win prizes exceeding the credits wagered. Instead, section 99B.53 asks whether the outcome—positive or negative—is primarily determined by the player's skill or knowledge rather than how much money and time the player has available to spend and where in the preset screen order they start playing. Iowa Code § 99B.53(1); *see also* Cabot et al., 57 Drake L. Rev. at 412 (noting a game where skill predominates over chance does not necessarily require that the

"more skilled person win[s] virtually every time, but instead only a statistically relevant number of times").

2. *The preset screen order and frequent zero value screens predominate.* The Superior Skill devices involve some modicum of both skill (nudging or swapping correctly) and knowledge (ability to preview the next play screen). But in the end, skill and knowledge do not overpower chance, regardless of whether the word "outcome" is aggregate or granular. *Cf. Commonwealth v. Two Elec. Poker Game Machs.*, 465 A.2d 973, 978 (Pa. 1983) ("While . . . some skill is involved in the playing of Electro-Sport, we believe that the element of chance predominates and the outcome is largely determined by chance."). More than two-thirds of the available screens on the Superior Skill devices offer the player no opportunity to create a winning symbol combination. (SR at 211–12, App. 225.) Because zero value screens are so frequent, the main factor affecting the outcome is where the player starts and ends in the predetermined screen order (and what that order is)—which the player can never influence with skill or knowledge. In other words, neither skill nor knowledge influences the result of a play session or a play screen *more* than the luck of the draw. Furthermore, neither skill nor knowledge can actually influence the prize that is available.

Because section 99B.53(1) asks which element is dominant, both DIA and the district court got it right. The infrequent presentation of high value screens over the course of an entire play session overpowers any impact skill or knowledge has on the outcome. And even if the outcome measures each individual screen in isolation, neither the player's skill nor the player's knowledge can actually influence the screen that is displayed. *Cf. Three Kings Holdings, L.L.C. v. Six*, 255 P.3d 1218, 1223, 1225–27 (Kan. Ct. App. 2011) (affirming the trial court's conclusion that "[b]ecause the distribution of cards is a chance event, chance is the dominant factor in determining who wins any hand"). Just as in *Three Kings Holdings*, chance is the dominant factor in determining winners of Superior Skill games.

The Superior Skill devices' programmable payout percentage solidifies the conclusion that chance predominates. "If a game has predetermined odds such that the payout is consistent over time, regardless of the player, then the game is one of chance." Cabot et al., 57 Drake L. Rev. at 404; *accord* Ronald J. Rychlak, *Video Gambling Devices*, 37 UCLA L. Rev. 555, 570 (1990) ("The ability to control the pay-out . . . clearly shows that the machine is based on chance, not skill. If skillful players were being rewarded, the operator would have little or no control over how often

a player could win."). An operator can set the Superior Skill devices to pay out at 92%, 94%, 96%, or 98%. (SR at 210–11, App. 224–25.) The programmable payout percentage is a strong indication that chance predominates over skill or knowledge because, over time, *no* skillful player could come out ahead. *See Opinion of the Justices*, 795 So. 2d at 642 ("[N]o amount of skill will ever determine the ultimate outcome . . . . [E]ven the most skilled player will, over time, be unsuccessful in winning more money than he or she has wagered."); *Collins Coin Music Co. v. N.C. Alcoholic Beverage Control Comm'n*, 451 S.E.2d 306, 308–09 (N.C. Ct. App. 1994) (concluding chance dominated over skill for a particular device because the game "allow[ed] only a set percentage of winning hands to be dealt" and so "over time even the astute player [could not] defeat the retention ratio"); Cabot et al., 57 Drake L. Rev. at 404. Instead, a Superior Skill player can only recover more game credits than they expended to play if a high value screen happens to come up in the predetermined order at an advantageous time.

The Tag Balloon Dart game provides an instructive analogy. *See* Fichtner, 60 Drake L. Rev. at 57–58 (analyzing Tag Balloon Dart). In this common carnival game, the player aims darts at balloons and receives prizes

that are listed on a tag concealed beneath whichever balloons he or she pops. *See id.* However, despite *appearing* to be based primarily on skill—whether the player can aim the dart correctly and throw it with enough velocity at the right angle—chance actually predominates in Tag Balloon Dart because "the *quality* of the prize" is determined entirely by where the player happens to hit, not the exercise of their skill. *Id.* at 58 (emphasis added). The same is true for Superior Skill—perhaps even more so, because the player's skill in nudging or swapping symbols affects the result much less than the skill required to aim and throw a dart. Despite exercising some modicum of skill, the magnitude of a player's award (in other words, its quality) depends entirely on where he or she happens to begin and end in the finite pool of game screens. When "the player's skill has no impact on the quality of the prize received . . . the result is determined by chance." *Id.*

But the analogies don't end with a carnival balloon game. The North Carolina appellate courts recently addressed a nudge device similar to Superior Skill. *Sandhill Amusements, Inc. v. Brown*, 762 S.E.2d 666, 670 (N.C. Ct. App. 2014). Two judges on the panel affirmed an injunction that concluded the machines were likely dependent on skill or dexterity. *See id.* at 671, 679. However, a third judge (Judge Ervin) dissented. In particular,

Judge Ervin asserted the nudge machines were *not* dependent on skill or dexterity:

> Assuming for purposes of argument that th[e] "nudging" process does involve skill or dexterity, I am unable to see how this isolated opportunity for such considerations to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the impact of the player's skill and dexterity on the outcome. 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." As a result, . . . I am compelled by the undisputed evidence to "conclude that the element of chance dominates the element of skill in the operation" of Plaintiffs' machines . . . .

Id. at 686 (Ervin, J., dissenting) (quoting *Collins Coin*, 451 S.E.2d at 309). The North Carolina Supreme Court summarily reversed the intermediate appellate court opinion and adopted Judge Ervin's reasoning. *Sandhill Amusements, Inc. v. Miller*, 773 S.E.2d 55, 56 (N.C. 2015) (per curiam) ("For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.").

The nudge aspect of the Superior Skill devices is the same. One of the devices' features—the majority number of zero value or nonwinning screens—"affect[s] and significantly limit[s] the impact of the player's skill . . . on the outcome." *Sandhill Amusements*, 762 S.E.2d at 686 (Ervin, J.,

dissenting). The player can never affect which game screen is presented for play or alter the predetermined order. (SR at 212, App. 226.) Instead, the main factor in the outcome—the feature that allows two players to receive vastly different awards for aligning the same number of play screens in the same amount of time—is the predetermined order of game screens. *Cf. Pace-O-Matic*, 898 N.Y.S.2d at 298 ("The prize amount . . . could be different for two players winning the perfect play phase, or even for one player winning that phase at different times."). Like the machines at issue in *Sandhill Amusements*, chance predominates over skill for the Superior Skill games.[6]

The North Carolina statute at issue in *Sandhill Amusements* evaluated skill or *dexterity*, not knowledge. Ostensibly the Superior Skill devices' prize viewer is intended to address the unique "knowledge" option in Iowa Code section 99B.53(1). *Cf. State v. Spruill*, 765 S.E.2d 84, 87 (N.C. Ct. App. 2014) (acknowledging testimony establishing that a "pre-reveal

[6] The machines at issue in *Sandhill Amusements* did not contain a "hot swap" type game, but the additional game type here does not materially change the analysis. The exercise of skill, though not exactly the same action, still has a marginal effect (at best) on the outcome. Instead, for hot swap games and nudge games alike, the predominant factor in the outcome remains the predetermined screen order, the rare appearance of high value screens, and the (much more) frequent appearance of zero value screens.

feature" was instituted "specifically[] to operate in compliance with" a North Carolina law). However, the prize viewer does not compel a different result.

C. The prize viewer feature does not cause either skill or knowledge to predominate over chance.

The prize viewer is Banilla Games's proudest feature—the silver bullet that, it says, staves off the registration requirement in section 99B.53(1) by purportedly eliminating chance in favor of knowledge. (SR at 119, App. 133.) DIA acknowledges that players need not expend any credits to use the prize viewer and can therefore know, before playing, exactly the reward they can earn on the next game screen. However, the prize viewer doesn't exempt Banilla Games from registering the devices because section 99B.53 demands more.

Because section 99B.53(1) establishes a dominant factor test, to avoid the registration requirement, the player's knowledge must influence or affect the result *more* than chance does. In other words, the player's knowledge must be capable of controlling or directing the game's result, not just of informing the player's own decisions while playing (or their decision not to play). Knowledge truly affects the result in, for example, timed trivia contests where the player's ability to answer questions correctly is the biggest influence on the prize, or a Boggle-type game involving both skill

(ability to type words quickly) and knowledge (a sufficiently large vocabulary upon which to draw in formulating words). The Superior Skill devices don't meet that threshold because even with the prize viewer, the player's knowledge cannot influence which game screens appear when. Furthermore, the prize viewer does not allow any player to see more than one screen in advance or to bypass a screen that player determines is unappealing or not lucrative enough.

Device operators have utilized a prize viewer before. In *Ellis*, the Court considered a vending machine that dispensed a package of mints for a nickel but sometimes dispensed alongside the mints one or more "chips" that could be redeemed for merchandise. *Ellis*, 206 N.W. at 105. The device also featured "an indicator . . . which indicates to the purchaser in advance just what he will receive by a pull of the lever and a deposit of a nickel." *Id.* The Court recognized that the machine contained this feature "to avoid the appearance of chance in the game." *Id.*

However, the Court rejected the notion (which tracks closely with Banilla Games's assertion in this case) that the prize indicator meant the outcome of pulling the lever was no longer determined by chance:

> The argument of the defendant is that, because the indicator always indicates to the player just what the next pull

> of the lever will produce, then the element of chance is entirely eliminated, and the player gets what he knew he would get before he put his nickel in the slot. . . . In order to support his argument, the defendant must address it and confine it to one deposit and to one pull of the lever. If a player were necessarily confined to one deposit and one pull of the lever, the argument could be accepted. But under such a rule the game would lose its appeal. Nobody would care to play except when the indicator was set to promise "chips" in addition to the mints. The player is not so much seeking the package of mints that is promised him on the first play as he is the set of the indicator for the second play. If, after the first pull of the lever, the indicator still promises only a package of mints, the player may risk a third, fourth, or fifth play. But whenever the prize is promised by the indicator the player naturally claims it with another nickel and another pull. The set of the indicator as left for the next player usually promises no prize. This is perhaps a sufficient description and indication of the lure that is hidden in the operation of this device. The player pulls the lever, not simply for the package of mints promised him by the indicator, but for his supposed option on the next pull . . . .

Id. at 106. The same reasoning applies to the Superior Skill devices.[7]

There are cosmetic differences between the device in *Ellis* and the Superior Skill devices; the device in *Ellis* was principally a vending

[7] The analyses from Nick Farley & Associates concluded chance plays no role in the outcome of the Superior Skill devices because, by using the prize viewer, the player knows which prize is available. (SR at 137, 177; App. 151, 191.) Because that conclusion conflicts with *Ellis*, a binding Iowa Supreme Court decision, it was well within DIA's discretion to afford the Farley analysis little weight. *See G2, Inc. v. Midwest Gaming, Inc.*, 485 F. Supp. 2d 757, 766 (W.D. Tex. 2007) (concluding that even though a report from Nick Farley & Associates may be "helpful to th[e C]ourt in its understanding of how the [game] . . . actually functions, his opinion alone is not sufficient" to answer the disputed legal question).

machine, whereas the Superior Skill devices are not. Further, the law in 1925 forbade all devices with an element of chance rather than merely regulating them as section 99B.53 does. However, those differences don't destroy the point for which *Ellis* stands in this case—that a prize viewer feature does not remove chance from the equation to a material enough degree such that knowledge predominates instead. The prize viewer merely advances the element of chance ahead one screen. *See id.*

Though each case was decided decades ago, many courts that considered devices featuring a preview or "pre-reveal" feature concluded that feature neither sufficiently reduced nor eliminated the device's reliance on chance. *See, e.g.*, *id.* at 106–07; *Ferguson*, 99 N.E. at 807 ("[T]he fact that the machine would indicate the reward before it was played makes no difference."); *City of Moberly*, 155 S.W. at 844 (comparing two devices, one with a prize viewer and one without, and concluding the prize viewer was "a distinction without a substantial difference"); *State v. Apodoca*, 251 P. 389, 389 (N.M. 1926) (finding it "clear . . . from every standpoint" that a device with a preview feature was nonetheless a game of chance); *Nelson v. State*, 256 P. 939, 940 (Okla. Crim. App. 1927) ("The fact that the indicator on the machine would show before the player deposits his coin what it would pay

does not prevent it from being a gambling device."); *Harvie*, 148 S.E. at 68 ("[E]ven if the machine indicates in advance exactly what it will dispense, it is none the less obnoxious to the law . . . ."). The principles from these cases remain applicable even though the regulatory landscape has changed and such devices are no longer completely outlawed.

The prize viewer cannot conceal the fact that for any given player, the outcome of the Superior Skill devices primarily relies upon chance. Because the outcome relies primarily on chance, registration is required under section 99B.53(1).[8]

CONCLUSION

The fate of all Superior Skill players, no matter their experience and skill level, is dependent on the unpredictable (and highly infrequent) appearance of high value play screens. A skillful player is not guaranteed a prize, but a novice player can blindly strike it rich. Indeed, two players with exactly the same skill level could play two Superior Skill devices side by side, in the same game theme, at the same play level, and come away with

[8] The "Take a Penny" feature does not cause skill or knowledge to predominate either. The player utilizes no skill in deciding to Take a Penny. And the player's knowledge that he or she *can* Take a Penny has zero influence on which play screen appears. All the Take a Penny feature accomplishes is reducing the minimum cost to play an unsolvable screen (in hopes that the next one will be better) from 25 credits/cents to 24.

vastly different prizes despite encountering and solving the same number of game screens in the same amount of time. Thus, in its current configuration, the outcome of any Superior Skill game is primarily determined not by skill or knowledge, but by chance—the predetermined but blind screen sequence. This Court should affirm.

REQUEST FOR ORAL ARGUMENT

DIA requests oral argument. Allowing the parties to present their positions orally may aid the Court both in navigating the intricacies of chapter 99B and in understanding how the Superior Skill devices work.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 8,231 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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PROOF OF SERVICE

I, David M. Ranscht hereby certify that on the 19th day of January, 2018, I or a person acting on my behalf did serve Appellee's Final Brief and Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, David M. Ranscht, hereby certify that on the 19th day of January, 2018, I or a person acting on my behalf filed Appellee's Final Brief and Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

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