COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 23-CI-00282

ARKK PROPERTIES, LLC; *et al.*, **PLAINTIFF**

v. **ORDER GRANTING SUMMARY JUDGMENT**

RUSSELL COLEMAN, in his official capacity as Attorney General of the Commonwealth of Kentucky; *et al*., **DEFENDANTS**

This action is before the Court on the Attorney General's *Cross-Motion for Summary Judgment*, filed October 11, 2023. On November 13, 2023, this Court entered an *Order Denying Motion for Temporary Injunction* sought by the Plaintiff. Subsequently, on November 29, 2023, this Court issued a Scheduling Order with deadlines and a briefing schedule.

Following the briefing deadlines imposed in the Scheduling Order, the Plaintiffs filed their *Response to the Attorney General's Cross-Motion for Summary Judgment and Amicus Briefs and Reply in Support of Summary Judgment of Motion for Summary Judgment* on December 30, 2023. (hereafter, "Plaintiffs' Response and Reply for Summary Judgment") On January 30, 2024, the Attorney General filed its *Reply in Support of Cross-Motion for Partial Summary Judgment*.[1] The Court held oral arguments on March 12, 2024.

[1] *See fn. 1, Def.'s Reply in Supp. Of Cross-Mot. for Summ. J.*, at 1. The AG's footnote explains that it does not seek summary judgment on the Plaintiffs' claims related to Senate Bill (SB) 126 (the "Venue Transfer Amendment"), which constitute Counts VIII-XIII in the Plaintiff's Amended Complaint. The Kentucky Supreme Court has ruled the Venue Transfer Amendment unconstitutional, *Arkk Properties, LLC v. Cameron*, 681 S.W.3d 133 (Ky. 2023), and those issues have been finally adjudicated on the merits. The Plaintiffs' Amended Complaint was filed April 10, 2023.

Upon review of the record, the Court **GRANTS SUMMARY JUDGMENT** to the Attorney General, on the issues of the **free speech, arbitrariness, equal protection, special legislation, impairment of contracts, takings, and separation of powers claims**. The rationale supporting the Court's ruling is set forth below.

ARGUMENTS RAISED BY THE PARTIES

1. Free Speech

Plaintiffs' Arguments

The Plaintiffs argue that HB 594 violates its Free Speech rights under §1 and 8 of the Kentucky Constitution. *See Pls.' Response and Reply*, at 37. Pointing to the language in the Court's earlier Order Denying the Temporary Injunction (hereafter, "T.I."), the Plaintiffs maintain there are genuine issues of material fact as to whether the Burning Barrel game is the functional equivalent of a slot machine, and whether the Burning Barrel game is a game of *total skill* that falls outside the HB 594 statutory definition of gambling. *Id*. (internal citation to *Order Denying TI Motion*, at 12)

The Plaintiffs again point to the Court's language in the Order Denying the Temporary Injunction, where the analysis of a substantial question explained the *Brown*[2] factors that would qualify a video game for free speech protections, with particular emphasis placed on the **communication of ideas** through **factors** like **literary devices** and **features distinctive to the medium – especially** the **player's interaction with the virtual world**. *Id*. (internal citation to *Order Denying T.I. Motion, supra* at 11) The Plaintiffs assert that they can satisfy the *Brown* standard at trial to demonstrate the Burning Barrel game qualified for free speech protections in the same way as a video game for entertainment. *See Pls.' Resp. and Reply*, *supra* at 37.

[2] *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790-91 (2011).

According to the Plaintiffs, Burning Barrel satisfies the *Brown* standard and should qualify for the same free speech protections as video games for entertainment, especially because of the **audio-visual themes in the game's titles**, and the fact the **game's content and result are controlled** by the **exchange of expressive activity between** the **game** and **player**. *Id*. The Plaintiffs liken the Burning Barrel game to a game of chess, explaining that in both, "… there are several critical junctures during which the players use their own **expression to affect the game's result.**" *Id*. at 38.

Focusing on the features of Burning Barrel games that apparently involve expressive interaction qualifying as speech, the Plaintiffs frame that expression occurs at every step of the game. *Id*. At the outset, the players may express their choice to play by previewing the games at each level before "assessing" their commitment to play through the provision of credits. *Id*. Further, the Plaintiffs allege expressive activities – which they define as a, "… player's skillful choices that affect what happens during the game…" exist at each stage of gameplay. *Id*.

Further, the Plaintiffs argue that "… the employment of skill itself is an expressive activity: players come to the game with their own strengths and weaknesses and make decisions on whatever grounds they subjectively choose that ultimately affect the game's outcome." *Id*. Then, the Plaintiffs make the logical leap that because the player's expression of skill is involved at every step of the game, "… the **outcome of the game is wholly dependent upon that player's skill."** *Id*. Ultimately, the Plaintiffs seek to distinguish the Burning Barrel game from a game of chance on the basis that games of chance do not have outcomes affected by the expressive deployment of a player's decisions and choices.

Finally, the Plaintiffs assert that the "… **expression conveyed by, through, and with the Burning Barrel game** amounts to **entertainment**." *See Pls.' Resp. and Reply*, *supra* at 38.

(Court's bolded emphasis added) The crux of the argument that Burning Barrel qualifies for speech protections is the "…**entertaining** combination…" of "…**audio-visual elements** as **affected** by the **players' decisions and ability to employ skill**, which **interact** to **determine** the ultimate **outcome** of the game." *Id*. at 39. Because the Burning Barrel games involve a player's expressive interactions and provide entertainment through audio-visual elements, the Plaintiffs ultimately argue Burning Barrel is essentially the same as a video game for entertainment that qualifies as protected speech. *Id*.

Ultimately, the Plaintiffs seek strict scrutiny review of its Free Speech challenge to HB 594, under §1 and §8 of the Kentucky Constitution, on the basis the law engages in impermissible **content-based** restrictions on speech. *Id*. at 42.

Defendant's Arguments

The Attorney General raises two arguments to rebut the Plaintiffs' free speech claims. First, the Defendant argues the Burning Barrel games are not the kind of games that qualify as speech under *Brown v. Entertainment Merchants Ass'n*. Second, the Attorney General asserts that even if the Burning Barrel games qualified as speech, HB 594 regulates the conduct of *gambling* and not the underlying content of its *speech*. *See Def.'s Reply*, *supra* at 25.

Framing the Plaintiffs' arguments, the Defendant posits that the Plaintiffs' theory, "… appears to be that constitutional speech protections prohibit any governmental regulation anywhere some combination of outcome determinative skill and entertainment coexists." *Id*. However, the Attorney General submits that the Plaintiffs have **failed to allege** "… any **specific communicative or expressive content** in their Burning Barrel **game** that the **Act prohibits**." *Id*. (Court's bolded emphasis added) Further, the Attorney General rebuts the facial constitutional

challenge to HB 594 because, "… the **Act on its face** does **not regulate gambling devices based** on any **communicative or expressive content** that such games may include." *Id*.

The Attorney General attacks the implications of the Plaintiffs' free speech theory by suggesting ridiculous outcomes that would logically follow should the Court accept the argument that any combination of skill and entertainment *ipso facto* creates speech beyond the limits of the police power. *Id*. at 26. To wit, the Attorney General suggested that under the Plaintiffs' theory of free speech, the Commonwealth would have no authority to regulate unarmed combat competitions (e.g., martial arts competitions) because those events would be both entertaining and involve outcomes dictated by the skill of its participants. *Id*. Consequently, the Attorney General urges the Court to dismiss the Plaintiffs' free speech theory because regardless of the skill (e.g., manual dexterity or ability to problem-solve) and level of entertainment involved in the playing of Burning Barrel, it is not protected speech. *See Def.'s Reply*, *supra* at 26.

Further, the Attorney General distinguished the instant facts from *Brown*. First, the AG explained that *Brown* dealt with a statute involving a ban on the sale to minors of violent video games. *Id*. at 27. The law in *Brown* was struck down because the Supreme Court ruled it sought to regulate the *content* (violent speech) of the video game. *Id*. However, the AG explained that **HB 594 does not regulate the content** of the **Burning Barrel game** – which the AG highlights as "… the sequence of shapes or graphics displayed in an array on the game screen that determines whether or not the player has won the game…" – but rather **regulates** the **conduct of gambling/wagering.** *Id*. The AG posits HB 594 only regulates the conduct of gambling, which here involves the critical elements of "… the placement of a wager on the outcome of a gameplay, and the payout of cash or cash equivalents for a winning gameplay." *Id*. Clearly, the Defendant argues, "On its face, the Act does not regulate speech at all." *Id*.

The AG asserts the Court should consider traditional casino card-games like poker or blackjack, especially the scenario where a casino operator commissions an artist to design casino-exclusive playing cards. *Id*. The AG posits that under the Plaintiffs' theory of free speech, the legislature could not ban the games of poker or blackjack that use those expressive casino-exclusive gaming cards. *Id*. at 27-28. Such a result could not stand, according to the AG, because bans on poker (which the court notes may involve at least some element of skill, even if it is grossly outweighed by chance) regulate the *conduct* of gambling, not the expressive *content* found on the playing card design. *Id*. at 28. Applying its playing card analogy to the instant facts, the AG argues the Burning Barrel machines are similarly regulated for the conduct of gambling and not the communicative or expressive content the game may contain. *See Def.'s Reply, supra* at 28.

Critically, because HB 594 does not regulate the *content* of speech, only the *conduct* of gambling, the AG's preferred **standard of review is rational basis**, rather than the Plaintiff's proposed review under Strict Scrutiny.

2. Arbitrariness

Plaintiffs' Argument

The Plaintiffs argue that HB 594 arbitrarily bans games of skill in violation of §2 of the Kentucky Constitution. *See Pls.' Response and Reply, supra* at 6. Specifically, they argue HB 594 exceeds the scope of the legislature's police power authority. *Id*. The Plaintiffs' arbitrariness challenge relies heavily on *Jasper v. Commonwealth*, 375 S.W.2d 709, 711 (Ky. 1964). In *Jasper*, the Plaintiffs highlight an aspect of the ruling that explains the scope of the police power is fluid and "… must keep pace with changing concepts of the public welfare." *Id*. (internal citation to *Jasper, supra* at 711.) Under the *Jasper* case law, the "… real question is whether *in*

the light of the current conditions the [challenged enactment] constitutes a reasonable regulation of business in the furtherance of a *substantial public purpose*." *Id*. (emphasis taken from Plaintiff) (Internal citation to *Jasper*, *supra* at 711.)

Bolstering the merits of its reliance on *Jasper*, the Plaintiffs also direct the Court's attention to several other cases holding that the public welfare justification of exercising the police power must be evaluated in light of the current demands of society. First, the Plaintiffs highlight to the Court that the demands of "public welfare" change with the times. *See Pls.' Response and Reply*, *supra* at 6. *See* also, *Bruner v. City of Danville*, 394 S.W.2d 939, 943. Second, the Plaintiffs emphasize that when Courts determine the scope of the police power by looking at the current demands of society, judicial review must focus on pragmatic application to the instant case and with reference to the actual demands of society. *Id*. *See* also, *McGuffey v. Hall*, 557 S.W.2d 401, 413 (Ky. 1977).

The Plaintiffs argue that the Legislature failed to put forward a "substantial public purpose," as required under *Jasper*. *Id*. at 7. Further, the Plaintiffs complain that the General Assembly enacted HB 594 to advance economic protectionism of favored opponents of game of skill (such as race tracks), rather than to advance the public interest considering current conditions as instructed by *Bruner*. *Id*. Developing its *Bruner* argument, the Plaintiffs highlight that the present-day conditions in Kentucky allow for gambling through the historical activity of wagering on horse races, the state lottery, and sports betting. *See Pls.' Response and Reply*, *supra* at 8. Ultimately, the Plaintiffs' arbitrariness claim revolves around the argument the General Assembly failed to pass HB 594 for a substantial public purpose - as defined in light of current circumstances – because in the same legislative session it passed mobile sports betting.

Id. Thus, the Plaintiffs contend the Legislature did not perform a rational exercise of the police power.

On the issue of the police power, the Plaintiffs highlight Kentucky cases instructing that to survive judicial review for arbitrariness the challenged law banning a commercial activity must have a "substantial relation" to the health, safety, morals, or general welfare of the public. *See Pls.' Response and Reply, supra* at 9-14. (internal citation to *McGuffey, supra* at 413; *see* also *Bond Bros. v. Louisville & Jefferson County Met. S. Dist.,* 211 S.W.2d 867, 872 (Ky. 1948); *see* also *Motor Vehicle Comm'n v. Hertz Corp.*, 767 S.W.2d 1, 2 (Ky. App. 1989); *see* also *Maze v. bd. Of Directors for Commonwealth Postsecondary Educ. Prepaid Tuition Tr. Fund*, 559 S.W.3d 354, 371 (Ky. 2018); *see* also *Jamgotchian v. Kentucky Horse Racing Commission*, 488 S.W.3d 594, 604 (Ky. 2016); *see* also *City of Mt. Sterling v. Donaldson Baking Co.*, 155 S.W.2d 237, 239 (Ky. 1941)).

To that end, the Plaintiffs expressly argue HB 594's ban on Burning Barrel games (which the Plaintiffs assert is also an outright facial ban on all skill games) exceeds the constitutional scope of the police power. *See Pls.' Response and Reply, supra* at 18. According to the Plaintiffs' theory of arbitrariness, the Legislature could choose to rationally regulate, but not outright ban, "games of skill" because those types of games had been legal prior to the enactment of HB 594, under the "dominant factor" test which evaluated whether the outcome of a game turned more on skill or chance. *Id*. at 19-21. Further extending their facial challenge to HB 594, the Plaintiffs imply that the police power does not extend to games of skill, because gambling only occurs in games of chance. *Id*. at 26. Consequentially, the Plaintiffs assert that Burning Barrel, as a game of skill (where skill determines the outcome more than chance), may not be

regulated as gambling (which only occurs in a game of chance – where chance determines the outcome more than skill) or as a gambling device. *Id*.

Defendant's Argument on Arbitrariness

The Defendant frames the Plaintiff's Arbitrariness argument as based on the premise that HB 594 was not a rational exercise of the police power, because it passed in the same session the Legislature legalized mobile sports betting. *See Def.'s Reply*, *supra* at 4. However, the Attorney General defended HB 594 against the charge it is an arbitrary act of hypocrisy. *Id*. at 5. Just because the legislature legalizes one form of gambling, it is not compelled to legalize all forms of gambling.

First, the Attorney General highlighted case law instructing that analysis of legislative arbitrariness turns on whether there is a rational connection between the action and the purpose for which the body's authority to act exists (i.e., the police power). *Id*. at 5. (internal citation to *City of Louisville v. McDonald*, 470 S.W.2d 173, 178 (Ky. 1971)) Importantly, where the existence of such a rational connection is "fairly debatable," the law will stand. *Id*. *See McDonald*, *supra* at 178. Further, the Defendant pointed to case law instructing that Arbitrariness challenges review whether a statute is rationally related to a legitimate state objective. *Id*. *See Commonwealth v. Louisville Atlantis Cmty./Adapt, Inc.*, 971 S.W.2d 810, 816 (Ky. App. 1997); *see* also *Lost Mountain Mining v. Fields*, 918 S.W.2d 232, 233 (Ky. App. 1996). Last, the Defendant pointed to case law holding that Kentuckians are harmed by the act of illegal gambling. *Id*. *See* also *Commonwealth v. Stars Interactive Holdings (IOM) Ltd.*, 617 S.W.3d 792, 804 (Ky. 2020)

The Attorney General asserts that the purpose for which HB 594 was enacted was to clarify the definition of a gambling device, since unregulated gambling devices are harmful to

the public regardless of whether the machines require some degree of skill. *Id*. Specifically, Burning Barrel – like other unregulated gambling devices – "… operate untaxed and unregulated, without taking the mandatory precautions to protect problem gamblers or to prevent underage gambling that are required of all legal gambling operators in the Commonwealth." *Id*. at 5-6.

The Attorney General further asserts the police power has been traditionally used by the Kentucky Legislature to define gambling and regulate its various forms. *Id*. at 6. The Defendant highlights case law holding the Legislature has the power to prohibit, regulate, and classify all forms of gambling. *See Def.'s Reply*, *supra* at 6. *See Commonwealth v. Ky. Jockey Club*, 38 S.W.2d 987, 993-994 (Ky. 1931). (hereafter, "Jockey Club") *Jockey Club* specifically held that the General Assembly, "…possesses the power to prohibit all the multitudinous forms of gambling, which includes the power to regulate, as well as the right to prohibit in part and regulate in part…" *Id*. *See* also *Jockey Club*, *supra* at 994. Additionally, *Jockey Club* held that, "… **the whole subject of betting and gaming [are] within the power of the [General Assembly] to prohibit, regulate, or classify."** *Id*. (Emphasis added). *See* also *Jockey Club*, *supra* at 993-994.

In addition to relying on *Jockey Club*, the Defendant cites several cases dealing with the General Assembly's historical regulation of games like pinball, which is arguably based predominantly based on skill. *See Def.'s Reply*, *supra* at 6. First, the Defendant drew the Court's attention to a previous gambling statute that made illegal a laundry list of machines used in betting. *Id*. *See A.B. Long Music Co. v. Commonwealth*, 429 S.W.2d 391, 394 (Ky. 1968). (hereafter, "A.B. Long Music Co.") The statute at issue in *A.B. Long Music Co.* excepted specific pinball machines from the scope of the betting machine ban, if those pinball machines only gave

as a reward a free game, or games, based on the skill of the player playing the pinball machine. *See Def.'s Reply, supra* at 6. *See Three One-Ball Pinball Machines v. Commonwealth*, 249 S.W.2d 144, 146 (Ky. 1952). The Defendant highlights that if the pinball machines awarded a prize, other than free games, based on the skill of the player, then those pinball machines would be prohibited under KRS §436.230 as an illegal gambling device. *Id*. at 7. The Attorney General asserts that the General Assembly has maintained these restrictions on pinball machines - regardless of skill - through the present day in KRS §528.010(7)(b)(3). *Id*.

The Attorney General further points out that the ban on certain types of pinball machines is underpinned by the rationale that, "… articles which lend themselves to illegal uses are subject to the police powers of the state and municipalities." *See Def.'s Reply, supra* at 7. *See City of Owensboro v. Smith,* 383 S.W.2d 902, 904 (Ky. 1964). (hereafter, "City of Owensboro") The Defendant relies on the *City of Owensboro* ruling to assert that the General Assembly determined these Burning Barrel "gray machines," like pinball machines, can lend themselves to illegal uses and consequently chose to regulate them as gambling devices. *Id*. To regulate "gray machine" games like Burning Barrel that lend themselves to illegal uses, the AG contends that the General Assembly used HB 594 to clarify the definition of a gambling device to include those devices that pay out money or property as the result of any element of chance. *Id*. Consequentially, the AG argues HB 594 is rationally related to the governmental interest in preventing the social ills related to illegal and unregulated gambling, which further allows the Legislature to classify the Burning Barrel games and other "gray machines" as gambling devices and prohibit them. *Id*. at 9.

The AG criticizes the Plaintiffs' argument that the General Assembly has only limited police powers authority to ban certain forms of gambling since it has legalized other forms of

regulated gambling. *See Def.'s Reply*, *supra* at 9-10. Further, the Defendant attacks the Plaintiffs' reliance on *Jasper*. While the AG concedes that *Jasper* deals with the relationship between the police power and the changing concepts of public welfare, it emphasizes that Court's ruling that the "… right to conduct business is subordinate to the police power of the state reasonably exercised in the public interest." *Id*. at 710. *See Jasper*, *supra* at 711. Importantly, the AG rebuts the Plaintiff's position that *Jasper* necessarily implies the Legislature abrogated or severely limited its authority to prohibit certain forms of gambling when it authorizes others. Instead, the AG argues *Jasper* clearly rules that the Legislature's police power is "as broad and comprehensive as the demands of society make necessary." *See Def.'s Reply*, *supra* at 10.

The AG relies on *Jasper* to argue that the demands of society required the General Assembly to act, by expanding the definition of gambling device in HB 594 to include gray machines like Burning Barrel, because the Plaintiffs (who do not appear to be the sole operators or proprietors of 'gray' machines in Kentucky)[3] operated 3,086 gray machines free of any taxation or regulation. *Id*. at 11. The AG further attacks the Plaintiffs' interpretation of *Jasper* it relied on to argue HB 594 was merely a form of economic protectionism and therefore beyond the scope of the police powers. *Id*. As part of its economic protectionism argument, the Plaintiff introduced the affidavit of a legislator, Steven Doan. *See Ex. 1*, *Pls.' Resp. and Reply*. The opinion and observations of one legislator do not constitute legislative history. Most, if not all, legislation burdens some groups and benefits others. Yet the concept of economic protectionism cannot invalidate legislation unless there is no rational basis for the burdens imposed. The remedy for the groups who are burdened by the legislation is to engage the political process to change the law.

[3] The Court remains cognizant the Plaintiffs have launched a facial challenge to HB 594, not an 'as applied' challenge.

The AG persuasively argues the instant case does not require or allow the introduction of any legislative history. *See Def.'s Reply, supra* at 11. Bolstering its point that the Court should not consider the legislative history of HB 594, the AG cites caselaw holding that, "Only if the statute is ambiguous or otherwise frustrates a plain meaning, do we resort to extrinsic aids such as the statute's legislative history…" *Id*. *See Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011) On this point, the AG argues HB 594 is not ambiguous so the Court should not consider any legislative history when construing the Act.[4] *Id*. at 11-12. However, even if the Court did find the need to consider the legislative history of HB 594, the AG asserts the Court should not consider the post-enactment statements of Affidavit of a single legislator. *See Def.'s Reply, supra* at 12. Ultimately, the AG argues the Plaintiffs' theory that HB 594 is economic protectionism without a rational connection to the health, safety, morals, or general welfare of the public is unsupported and should be treated as little more than a grievance with the Legislature's policy choices. *Id*. at 13.

Finally, the AG defends against the Plaintiffs' argument that HB 594 engages in arbitrary – and incorrect – labeling of "skills games" as gambling devices. *Id*. The AG again points to the *Jockey Club* jurisprudence that the Legislature has the sole authority to prohibit, regulate, or

[4] The AG cited two cases to preclude the Court from relying on the Affidavit of the single legislator when deciding whether HB 594 was economic protectionism outside the scope of the police power. First, the AG explained Kentucky Courts may interpret legislative history using, "… reports of legislative committees, prior pre-enactment drafts of the statute that show where its meaning was intentionally changed in the legislative process, bills filed but not enacted, and the words spoken by legislators during floor debates." *See Fiscal Ct. of Jefferson Cnty. v. City of Louisville*, 559 S.W.2d 478, 480 (Ky. 1977). Second, Courts may interpret legislative history that shows how the enacted text in a statute has changed over time, using an inquiry which, "… focuses on the actual language adopted as law by the legislature through the years, and thus avoids the nuances and biases that might appear in extra-statutory materials such as committee reports or a single legislator's post-enactment comments." *See Jefferson Cnty. Bd. Of Educ. V. Fell*, 391 S.W.3d 713, 723 (Ky. 2012)

classify gambling,[5] and to Kentucky's robust history of regulating pinball machines - which are arguably classified as games of skill – to demonstrate that the Plaintiffs' arbitrariness labeling challenge is just a disguised policy grievance. *Id*. at 13-14.

Consequently, the AG urges the Court to grant its Cross-Motion for Partial Summary Judgment on the §2 Arbitrariness claim.

3. Equal Protection

Plaintiffs' Arguments

The Plaintiffs next raise their Equal Protection claim. *See Pl.'s Resp. and Reply*, *supra* at 27. First, the Plaintiffs cite caselaw holding that similarly situated persons must receive equal treatment from the government. *Id*. at 27-28. *See Zuckerman v. Bevin*, 565 S.W.3d 580, 594 (Ky. 2018); *see* also *Commonwealth Nat. Res. & Env't Prot. Cabinet v. Kentec Coal Co.*, 177 S.W.3d 718, 725 (Ky. 2005) (quoting *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003); *see* also *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 465 (Ky. 2011).

The Plaintiffs note that the Defendant Attorney General seeks rational basis review because it defends that HB 594 – which classified certain games of skill, like Burning Barrel, as illegal gambling devices – was rationally related to the legitimate governmental interest in limiting the social harms of illegal and unregulated gambling. *Id*. (internal citation to *Defs.' Resp.*, *supra* at 30.) The Plaintiffs assert there is no rational basis to justify allowing some games of skill - while completely banning others like Burning Barrel – when the Legislature legalized gambling (the Plaintiffs define "gambling" as "wagering on games of chance"). *Id*. at 28-29.

The Plaintiffs' Equal Protection claim is based on the notion that their game, Burning Barrel, is within the scope of the gambling device prohibition in HB 594, while "e-sports"

[5] *See Jockey Club*, *supra* at 993-994.

devices and "coin-operated amusement machines" that similarly require a player to use their skill are excluded. *See Pl.'s Resp. and Reply*, *supra* at 29.[6] The Plaintiffs bemoan that an equal protection violation has occurred since a child can go to Malibu Jack's or Chuck E. Cheese and spend unlimited amounts to play games – so long as those devices only reward non-cash prizes capped at $25 for a single play - but an adult may not choose to play Burning Barrel at the local gas station because it rewards skillful play with cash or cash equivalents.[7] *Id*. The Plaintiffs argue gray machines like Burning Barrel and the coin-operated amusement machines at Malibu Jack's or Chuck E. Cheese are similarly-situated because they each use the ability, or skill, of a natural person. *Id*. at 29-30.

The Plaintiffs further attempt to define Burning Barrel as similarly situated to "e-sports" competitions. *Id*. at 30. The Plaintiffs explain that "e-sports" competitions require an entry fee and award cash prizes for skillful play.[8] *Id*. However, the Plaintiffs complain that "e-sports" competitions are permitted to charge an entry fee of an unlimited amount and frame e-sports competitions as awarding cash prizes of unlimited amounts. *Id*. The Plaintiffs assert that there is no rational basis for the distinction between the similarly situated gray machines and the e-sports/coin-operated amusement machines because there is no legitimate government interest in limiting the social harms of illegal and unregulated gambling. *Id*.

Specifically, the Plaintiffs contend there is no legitimate governmental interest served by the classification between Burning Barrel gray machines and e-sports competitions and devices,

[6] The Plaintiffs included an internal citation to the provisions in the statute that provide the exception for e-sports devices and coin-operated coin machines. *See* KRS §528.010(7)(b).
[7] The ban on rewards providing cash or cash equivalents was cited to as KRS §528.010(7)(a)(4).
[8] The Plaintiffs highlight the language in the statute that e-sports competitions require entry fees and allow for cash prizes. *See* KRS §528.010(5).

because the Legislature contemporaneously passed HB 551 – which legalized mobile sports betting and is alleged to have turned every cell phone into possible gambling devices. *Id*. The Plaintiffs pointed to case law holding that to comply with the right of equal protection, legislative distinctions must not be arbitrarily created to grant special privileges. *Pls.' Resp. and Reply*, *supra* at 31. *See Burrow v. Kapfhammer*, 145 S.W.2d 1067, 1070-71 (Ky. 1940).

The Plaintiffs argue it is an arbitrary legislative classification to distinguish between "coin-operated amusement machines" and other skill-based games (like Burning Barrel), by making one a gambling device and the other not a gambling device, based arbitrarily on the *nature and value* of the prize awarded for successful play. *Id*. Further, the Plaintiffs contend it is an arbitrary classification to distinguish between the e-sport competitor who pays $10,000 for an entry fee to a game with a $1,000,000 prize, and the person competing against Burning Barrel for a prize worth 105% of the $4 consideration. *Id*. at 32.

The Plaintiffs argue that HB 594 unconstitutionally distinguished between the e-sports competitor as a non-gambler and the Burning Barrel player as a gambler, comparing the $4 consideration to play Burning Barrel as akin to the entry fee an e-sport competitor. *Id*. Under the Plaintiffs' theory, this classification violated Equal Protection because it treats differently members of the class of skill games that require consideration to be paid and award a prize as the result of skillful play. *Id*. Ultimately, the Plaintiffs assert this arbitrary and irrational classification between games of skill was created to confer *special privileges* and not to further a legitimate governmental purpose. *Id*.

Defendant's Equal Protection Arguments

The Defendants rebut the Plaintiffs' argument that HB 594 violates the Equal Protection guarantees in §3 of the Kentucky Constitution. The Defendant highlights the Plaintiffs' position

that HB 594 violated Due Process by prohibiting games like Burning Barrel, while the Legislature simultaneously authorized sports wagering and carved out exceptions to the gambling device definitions for "coin-operated amusement machines" and "devices used in e-sports competitions." *See Defs.' Reply*, *supra* at 17.

However, the Defendant persuasively argued that the Plaintiffs' Equal Protection argument "**presupposes** that the Plaintiffs' games are identical to "coin-operated amusement machines" and "devices used in e-sports competitions." *Id*. (Court's bold emphasis added) The Attorney General explained that it does not logically follow that the Legislature's choice to authorize and regulate some forms of gambling precludes the General Assembly from any longer prohibiting other forms of gambling. *Id*.

The AG concurs with the Plaintiffs that the traditional §3 Equal Protection test in Kentucky asks whether a legislative classification is arbitrary or unreasonable. *Id*. *See, e.g.*, *Sanitation Dist. No. 1 of Jefferson Cnty. v. City of Louisville*, 213 S.W.2d 995, 999-1001 (Ky. 1948); *see* also *City of Louisville v. Klusmeyer*, 324 S.W.2d 831, 834 (Ky. 1959). However, the AG points to case law holding that a reviewing Court must presume the constitutionality of a legislative classification. *Id*. Specifically, it pointed to the language of a ruling that held, "A classification by the legislature should be affirmed unless it is positively shown that the classification is so arbitrary and capricious as to be hostile, oppressive and utterly devoid of rational basis." *See Defs.' Reply*, *supra* at 17-18. *See Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet*, 689 S.W.2d 14, 19 (Ky. 1985). Further, the Attorney General highlighted more case law holding that, "Our General Assembly, under the Equal Protection Clause, has great latitude to enact legislation that may appear to affect similarly situated people differently." *Id*. at 18. *See Commonwealth ex rel. Stumbo v. Crutchfield*, 157 S.W.3d 621, 624 (Ky. 2005)

(upholding law imposing nepotism restrictions for public hiring from challenge to classifications with allegedly arbitrary distinctions).

Applying its cited caselaw to the facts, the Attorney General expressly argues gray machines like the Plaintiffs' Burning Barrel games are not similar to the coin-operated amusement machines one would encounter at a Malibu Jack's or Chuck E. Cheese restaurant. *See Defs.' Reply, supra* at 18. The Attorney General attacks the Plaintiffs' position that their Burning Barrel games are identical to the games at Chuck E. Cheese's because both require skill of their players. *Id*. (internal citation to *Pls.' Resp.*, *supra* at 29-30) Pointedly, the Attorney General argues that the "Plaintiffs ignore the fact that their gray machines do not limit their rewards to items "worth not more than $25 per 'single play.'" *Id*. at 19. Consequently, because HB 594 constitutionally distinguishes between coin-based amusement machines - that limit their prizes to values not exceeding $25 per single play - and gray machines like the Plaintiff's Burning Barrel game with no limits on cash prizes, the Attorney General contends the Legislature rationally differentiated these devices. *Id*.

The Attorney General similarly argues the Plaintiffs' Burning Barrel games are not similar to devices used in e-sports competitions. Primarily, devices used in e-sports competitions are different because the players "… do not pay entry fees in an unlimited amount. They pay a single fee that "shall be collected from all participants before the competition begins." KRS 528.010(5)(a)4." *Id*. Instead of competing for unlimited cash prizes, e-sports competitions require, "…the value of any prize shall be predetermined before the competition begins." KRS 528.010(5)(a)6." *Id*. Further, it is mandatory in an e-sport competition that at "least one (1) participant shall receive something of value based on the results of the competition." KRS

528.010(5)(a)5." *Id.* at 19-20. Finally, participants in e-sports competitions must ""… compete directly against each other for… prizes." KRS 528.010(5)(a)1." *Id.* at 20.

The AG clearly spells out how the Plaintiffs' Burning Barrel games and devices in e-sports competitions are distinguished:

> None of the requirements applicable to devices used in e-sports competitions similarly limit the Plaintiffs' Burning Barrel games. Burning Barrel players do not compete against one another, the value of a prize is not predetermined before competition begins, there is not a fixed number of competitors, and there is no guarantee that at least one Burning Barrel player will receive something of value based on the results of his or her play. Accordingly, the Plaintiffs cannot reasonably argue that their games are similarly situated to the devices used in e-sports competitions. Thus, it is rational for the General Assembly to treat these devices differently.

See Defs.' Reply, *supra* at 20. Beyond these noted differences, the Attorney General highlights how the Plaintiffs also treat their devices differently than coin-operated amusement machines and devices used in e-sports competitions.

The Attorney General emphasized the Plaintiffs' representations that "Burning Barrel operators and locations are required [by the Plaintiffs] to prohibit play by persons under the age of eighteen." *Id*. at 21. (internal citation to *Pls.' Resp.*, *supra* at 29, n. 30) Pointedly, the Attorney General explained that those who play a coin-operated amusement machine or engage a device in an e-sports competition are **not required to be at least 18 years old**. *Id*. This different level of treatment the Plaintiffs give their own game indicated to the Attorney General that the Plaintiffs believe their games cannot be safely played by children, further bolstering the reasonable classifications made by the General Assembly not to treat the Burning Barrel games (and other gray machines) like games played by children. *Id*.

Finally, the Attorney General rebuts the Plaintiffs' argument that the legislative decision to authorize sports wagering nullifies any governmental interest in limiting the social harms of illegal unregulated gambling. *See Def.'s Reply*, *supra* at 21. (internal citation to *Pls.' Resp.*, *supra* at 30). First, the AG notes how the Plaintiffs' arguments ignore the regulations the Legislature placed upon sports wagering, while also ignoring the difference between any device that may be used for sports wagering and the Plaintiffs' Burning Barrel devices and other gray machines. *See Def.'s Reply*, *supra* at 21-22.

To wit, devices used for sports wagering are not similarly situated to the Plaintiffs' Burning Barrel games for several reasons. First, entities offering sports wagering must be licensed by the Kentucky Racing Commission, under KRS 230.811(1). *Id*. at 22. To obtain that license, under KRS 230.811(2), that person or entity must be licensed as a racing association under KRS 230.300. *Id*. Additionally, that licensed person must pay an initial fee of $500,000 to the State, followed by an annual renewal fee of $50,000, per KRS 230.811(3), (4). *Id*.

Any website offering sports wagering is required to pay the State an initial fee of $50,000, then an annual renewal fee of $10,000, per the terms of KRS 230.814(2), (4). *Id*. These fees are allotted to the sports wagering administration fund that was established by KRS 230.817, KRS 230.811(5), and KRS 230.814(7). *Id*. According to the Attorney General, "Money that is deposited into that fund is used to finance the Kentucky problem gambling assistance account and the Kentucky permanent pension fund. KRS 230.817(1)(b)." *Id*. Finally, the Attorney General noted how "sports wagering providers must "implement commercially and technologically reasonable procedures to prevent

access to sports wagering by any person under the age of eighteen (18)." KRS 230.805(3)(b)3." *Id*. However, the Attorney General notes no such requirements apply to the providers of gray machines, so the difference in these requirements between mobile wagering devices and the Plaintiffs' Burning Barrel games made HB 594's expanded definition of a gambling device reasonable. *See Def.'s Reply*, *supra* at 22.

4. Special Legislation

Plaintiffs' Arguments

The Plaintiffs challenge HB 594 as impermissible special legislation under §59 of the Kentucky Constitution. *See Pls.' Resp.*, *supra* at 55. To test whether HB 594 passes constitutional muster, the Plaintiffs cite to the *Woodall* Kentucky Supreme Court case to explain that Kentucky Courts have recently returned to the state's original test for special legislation. *Id*. *See Calloway Cty. Sherriff's Dep't v. Woodall*, 607 S.W.3d 557, 572 (Ky. 2020).[9] According to the Plaintiffs, "The test is simply "whether the statute applies to a particular individual, object, or locale."" *Id*. *See* also *Woodall*, *supra* at 573.

Applying *Woodall* to its claim that HB 594 is special legislation, the Plaintiffs accuse the law of targeting their Burning Barrel game. *Id*. The Plaintiffs allege the Burning Barrel game was the *clear object* of HB 594, making it impermissible special legislation. *Id*. Further, the Plaintiffs allege that HB 594 both directly and indirectly targets the Plaintiffs' businesses "… for the benefit of specific politically connected entities in the Commonwealth's gaming industries. This is confirmed by the amicus parties[10], whose actions in this litigation evince their belief the Plaintiffs' games threaten their gaming profits." *See Pls.' Resp.*, *supra* at 57.

[9] The Plaintiffs also contained an internal citation to *Singleton v. Commonwealth*, 175 S.W. 372, 373 (Ky. 1915).

[10] Internal Citation to CDI [Churchill Downs] Br., at 1. ("Unlawful or unregulated gambling operations directly and unfairly compete with lawful gaming businesses"). Internal Citation to

Defendant's Arguments

The Defendant asserts that HB 594 is not unconstitutional special legislation in violation of §59 of the Kentucky Constitution. *See Def.'s Reply*, *supra* at 42. The Attorney General also cited to the *Woodall* case to highlight the test of special legislation. *Id*. (internal citation to *Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 567, 573 (Ky. 2020)) It notes that special legislation "applies exclusively to special or particular places, or special and particular persons, and is distinguished from a statute intended to be general in its operation and that relating to classes of persons or subjects." *Id*. (internal citation to *Woodall, supra* at 567)

The Attorney General argues that HB 594 does not single out any specific person or any particular game, nor does it only apply in some counties and not in others *Id*. Instead, "the Act applies equally to any machine that meets the definition of a gambling device, wherever it is located in the Commonwealth. Thus, the statute cannot be said to apply only "to a particular individual, object or locale." *Woodall*, 607 S.W.3d at 573." *Id*. HB 594 functioned as an amendment to KRS 528.010, was a law intended to be general in operation, and also relates to classes of persons or subjects, so the Attorney General asserts it is general legislation that could not be classified as special legislation. *Id*. (internal citation to *Woodall* at 567)

Specifically, the Attorney General criticizes the assumption in the Plaintiffs' argument that, "… because the legal status of their Burning Barrel machines was changed by HB 594, their games must have been specifically targeted." *Id*. The Attorney General attacks this assumption because it ignores that the Plaintiffs are not the sole provider[11] of gray machines in the state. *Id*.

Ky. Downs/ECL Corbin Mot. to Intervene, at 4. ("asserting a purported "right to protect their business interests from unfair or illegal competition")

[11] The AG buttresses its claim that the Plaintiffs in the instant action are not the sole providers of gray machines in Kentucky by pointing out another group of Plaintiffs who bring similar claims in the Jefferson County Circuit Court. *See Prominent Techs., LLC v. Cameron,* No. 23-CI-02819 (Jefferson Cir. Ct.)

Next, the Attorney General dispatches with the allegation that HB 594 favors certain parties, such as the amici horse race tracks, while disfavoring the Plaintiffs to such an extent to classify it as special legislation. *Id*. The Attorney General notes that §59 does not outlaw as special legislation the rational, non-arbitrary singling out of certain industries in given legislation. *Id*. at 43-44. (internal citation to *Commonwealth v. E.H. Taylor, Jr. Co.*, 41 S.W. 11, 15 (1897)) Ultimately, the Attorney General argues HB 594 is constitutional under §59 because it "applies equally to any machine that meets the definition of a gambling device." *Id*. at 44.

5. Impairment of Contracts

Plaintiffs' Argument

The Plaintiffs explain that the elements of an impairment of contracts claim are: (1) The challenged statute operates as a **substantial impairment** of the plaintiff's existing contractual rights, and (2) the challenged statute has **no legitimate public purpose**. (Court's bolded emphasis) *See Pls.' Resp.*, *supra* at 43. *See* also *Maze v. Bd. Of Directors for Commonwealth Postsecondary Educ. Prepaid Tuition Tr. Fund*, 559 S.W.3d 354, 369-371 (Ky. 2018). Moving to the instant facts, the Plaintiffs assert the Court should not grant Summary Judgment to the Attorney General on the Contract Impairment claim because:

> (a) the undisputed facts establish that HB 594 operates as a substantial impairment of Plaintiffs' existing contractual rights in their Burning Barrel operating contracts, and (b) there exists genuine issues of material fact as to whether there is a legitimate public purpose for HB 594's ban on games like Burning Barrel.

Id.

First, on the substantial impairment element, the Plaintiffs cite caselaw holding that the challenged law must render the Plaintiffs' contractual rights "invalid, released or extinguished." *Id*. at 43-44. *See* also *Williams v. City of Kuttawa*, 466 S.W.3d 505, 511 (Ky. App. 2015)

(internal citation to *Adams v. Associated Gen. Contractors, Inc.*, 656 S.W.2d 729, 730 (Ky. 1983)) Then, the Plaintiffs offer a mere conclusory statement that the "rights in their Burning Barrel operating contracts have been substantially impaired because of HB 594's ban on skill games. Contracts related to Burning Barrel game devices are now **invalid, released, and extinguished because of HB 594**." *See Pls.' Resp.*, *supra* at 44. (Court's bolded emphasis)

Next, the Plaintiffs assert that there is a genuine issue of material fact whether there is a legitimate public purpose for HB 594's ban on games of skill. *Id*. at 45. The Plaintiffs explain that the analysis for this element will be almost identical to the police powers analysis for the §2 Arbitrariness claim, where they argue there are genuine issues of material fact whether Burning Barrel is a game of skill, and whether HB 594's ban on games of skill exceeds the scope of the police power by failing to substantially relate to the health, safety, morals, or general welfare of the public. *Id*.

Defendant's Argument

The Defendants' rebuttal of the Impairment of Contract claim relies heavily on the *Maze* case from the Kentucky Supreme Court. *See Def.'s Reply*, *supra* at 30. Under *Maze*, the Court first determines "… whether the legislation operates as a substantial impairment of a contractual relationship." *See Def.'s Reply*, *supra* at 30. (internal citation to *Maze v. Bd. of Dirs. For Commonwealth Postsecondary Educ. Prepaid Tuition Tr. Fund*, 559 S.W.3d 354, 369-370 (Ky. 2018)) Second, the Court must evaluate "… whether there is a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Id*. (internal citation to *Maze*, *supra* at 369-370). Pre-existing contracts are always subject to the police power of the state to regulate to protect the health, welfare and economic security of the public.

The Defendants argue the Plaintiffs are unable to satisfy either element of the Impairment of Contracts analysis from *Maze*. *Id*. Initially, the Plaintiffs failed to show they had contractual relationships because they did not produce the contracts in discovery or explain what the contracts required of them, and further neglected to explain which portions of their contracts were rendered invalid by HB 594. *See Def.'s Reply*, *supra* at 31. Consequently, the Attorney General asserts that without the benefit of the contracts produced in discovery, it is "impossible to determine whether the contracts could still be fulfilled if the Burning Barrel games were modified to limit or remove payouts or to allow free play (and thus no longer qualify as gambling devices)." *Id*.

Further, the Attorney General relies on *Maze* to explain that the analysis of the first element of a substantial impairment claim is often informed by the extent to which the industry in the contract has been regulated in the past. *Id*. at 32. (internal citation to *Maze*, *supra* at 370.) The Attorney General asserts that the Plaintiffs ignore Kentucky's long history of gambling regulation, especially expressed in *Jockey Club*, which further weighs in support of the conclusion the Plaintiffs have failed to show their contracts (operating in the highly regulated gambling industry) were substantially impaired.[12] *Id*.

Next, the Attorney General rebuts the Plaintiffs' argument that there remain questions of material fact whether Burning Barrel is a game of skill and, further, whether HB 594 is a proper exercise of the Legislature's police power. It explains these arguments fail for the same reasons the Plaintiffs' §2 arbitrariness claims failed. *Id*. Consequently, the Attorney General asserts the Court should dismiss the Plaintiffs' claim for impairment of contract.

[12] In the Attorney General's Reply, filed January 30, 2024, they included an internal citation to the previous Cross-Motion for Summary Judgment they filed on October 11, 2023. In the previous Cross-Motion for Summary Judgment, at page 37, the Defendant cited to the *Jockey Club* case.

6. Unconstitutional Takings

Plaintiffs' Arguments

The Plaintiffs note several cases holding that §13 of the Kentucky Constitution prevents the government's taking of private property without just compensation. *See Pls.' Resp.*, *supra* at 45-46. *See* also *Kentucky State Park Comm'n v. Wilder*, 84 S.W.2d 38, 39 (1935); *See* also *Stathers v. Garrard Cnty. Bd. Of Educ.*, 405 S.W.3d 473, 485 (Ky. App. 2012). Further, the Plaintiffs highlight several cases holding that the federal takings clause of the Fifth Amendment of the United States Constitution and Kentucky's takings clause in §13 of the state Constitution proceed under the same analysis. *Id*. at 46, n. 41.[13]

For their Takings Claim to prevail, the Plaintiffs assert they will have to satisfy three elements. *See Pls.' Resp.*, *supra* at 46. First, they will have to show that a government action rose to the level of a 'taking' of the Plaintiffs' property; second, the taking must not have advanced a legitimate governmental interest; and last, there must have been no just compensation for the taking. *Id*. *See Golden Rule Ins. Co. v. Stephens*, 912 F. Supp. 261, 268 (E.D. Ky. 1995). The Plaintiffs assert there are genuine issues of material fact with respect to the first two elements. *Id*.

First, the Plaintiffs rely on case law holding that contract rights are one of the property rights subject to the protection of the takings clause. *Id*. *See* also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984); *see* also *Lynch v. United States*, 292 U.S. 571, 579; *see* also *Zuckerman v. Bevin*, 565 S.W.3d 580, 604 (Ky. 2018). Next, they attack the defendant's reliance upon the *Bobbie Preece Facility* case to argue the Plaintiffs have no constitutionally protectable property interest in operating contracts and game devices. *Id*. at 47. *See Bobbie Preece Facility v.*

[13] The footnote contained internal citations to *Zuckerman v. Bevin*, 565 S.W.3d 580, 603 (Ky. 2018); *Paducah Indep. Sch. Dist. v. Putnam & Sons, LLC*, 520 S.W.3d 367, 376 (Ky. 2017). These cases support the notion that there is no meaningful difference in analysis between the Kentucky and federal takings clauses.

Com., Dep't of Charitable Gaming, 71 S.W.3d 99 (Ky. App. 2001). (internal citation to *Def.'s Mot./Resp.*, *supra* at 39-41)

The Court in *Bobbie Preece Facility* held that there was no constitutionally protected property interest in the renewal of a charitable gaming license because, "a property interest which depends totally on regulatory licensing is not a property interest that is compensable under the Takings Clause." *See Bobbie Preece Facility*, *supra* at 104. The Plaintiffs attempt to distinguish this action from the decision in *Bobbie Preece Facility* by saying their property rights are related to operating contracts and gaming devices, not state-issued gambling licenses. *See Pls.' Resp.*, *supra* at 47.

However, the Plaintiffs also rely on *Bobbie Preece Facility* to provide the basis for their claim of a regulatory taking. *Id*. Specifically, the Plaintiffs explain that, "A "regulatory taking" occurs where the government enacts a statute or regulation that diminishes the value or usefulness of private property." *Id*. at 47-48. (internal citation to *Bobbie Preece Facility*, *supra* at 103) The Plaintiffs expressly assert a regulatory taking has occurred because, "HB 594's regulatory ban on games of skill, which prevents enforcement of Plaintiffs' operating contracts and prohibits operation of their game devices, has destroyed the economically beneficial use of their property." *Id*. at 48.

The Plaintiffs vigorously dispute the Defendant's argument that the Court ought to conduct the regulatory taking analysis under the multi-factor *Penn Central* test.[14] *Id*. Instead, the Plaintiffs urge the Court to declare HB 594 is a taking *per se*. *Id*. The Plaintiffs emphasize United States Supreme Court cases holding the *Penn Central* test is inapplicable when the government regulation deprives a property owner of "all beneficial or productive use" of their

[14] *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1979).

property, and instead only applies when the regulated property still retains some amount of economic value in spite of the regulation. *Id*. (internal citation to *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)) Further, the Plaintiffs cite case law holding that a taking *per se* occurs where the regulation deprives the owner of all economically beneficial or productive uses of their property. *Pls.' Resp.*, *supra* at 48. (internal citation to *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005))

However, in the event the Court decides to apply the *Penn Central* test because some economically beneficial or productive use remains for the property, the Plaintiffs also argue HB 594 constitutes a regulatory taking that exceeds the limits of the Constitution for a permissible taking. *Id*. at 49. To prevail on a claim for an unconstitutional regulatory taking under the *Penn Central* test, the Plaintiffs point out that the Court must consider three factors. *Id*.

The first factor for judicial review under *Penn Central* is the extent or degree of the economic impact of the regulation on the value of the owner's property. *See Pls.' Resp.*, *supra* at 49. *See* also *Penn Central v. City of New York*, 438 U.S. 104, 124 (1979). Second, the reviewing Court must consider the extent or degree to which the regulation has interfered with the investment-backed expectations of the property owner. *Id*. Last, the Court considers the character of the governmental action. *Id*.

On the **first factor** – the "extent of the economic impact" – the Plaintiff argues that HB 594's economic impact is substantial, despite the notion Burning Barrel devices may still be played in Kentucky by disabling the monetary prize element of the game, or can still be operated outside of Kentucky because the operating contracts have seen a diminution in value. *Id*. at 51.

On the **second factor** – the "investment-backed expectations" – the Plaintiffs point to case law holding that the expectations of the property owner must be evaluated in light of the

conditions as they existed at the time they acquired the property, to ask whether they would have expected the government to enact a new regulation which subsequently deprived them of the continued use of their property. *See Pls.' Resp.*, *supra* at 51-52. *See* also *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003).

Applying these case law notions of reasonable expectations to its analysis of a regulatory taking, the Plaintiffs claim to have placed 3,086 Burning Barrel terminals at locations around the state. *See Pls.' Resp.*, *supra* at 52. (internal citation to *Plaintiffs' Responses to Defendant's First Set of Interrogatories*, at Interrogatory No. 2) Under the Plaintiffs' theory, there were no reasonable grounds to anticipate regulation of games of skill like Burning Barrel. *Id*. Specifically, it alleged "over two centuries of Kentucky jurisprudence had firmly established that only games of chance were subject to regulation. The enactment of HB 594 during the 2023 General Assembly represented a complete reversal of this longstanding position." *Id*.

However, the Court notes that the Legislature's authorization of other forms of gambling did not occur until 2023, multiple years after the Plaintiffs began placing Burning Barrel devices in Kentucky, so it would be almost impossible for the Plaintiffs to claim that the existence of other forms of legalized gambling existed in the state at the time (in 2019) it began acquiring its alleged property interests in Kentucky related to the game devices and operating contracts. Despite this hole in the Plaintiffs' logic, they ultimately contend that this second *Penn Central* factor of "investment-backed expectations" weighs heavily in their favor for a finding of an unconstitutional regulatory taking. *Id*.

Finally, the Plaintiffs argue a regulatory taking has occurred based on the **third factor** in the *Penn Central* analysis, which focuses on the **character of the governmental action**. *Id*. at 53. *See* also *Penn Central*, *supra* at 124. The Plaintiffs assert the **character of the governmental**

action factor weighs in favor of finding the severity of the economic impact from HB 594 rises to the level of an unconstitutional regulatory taking. *Id*.

Moving beyond the three-factor analysis required by *Penn Central* in making a finding of a regulatory taking, the Plaintiffs highlight case law holding that the Court must next determine whether the regulatory taking is a valid exercise of the police power. *Id*. at 54-55. *See* also *Dep't for Nat. Res. & Envtl. Prot. V. Stearns Coal & Lumber Co.*, 363 S.W.2d 471, 473.[15] The Plaintiffs submit that the Court only need conduct the same analysis it employed for the arbitrariness claim raised under §2. *See Pls.' Resp.*, *supra* at 55.

Defendant's Takings Arguments

The Defendant rebuts the notion that HB 594 constitutes a taking of property interests in both the operating contracts and the Burning Barrel machines. *See Def.'s Reply*, *supra* at 32. (internal citation to *Pls.' Resp.*, *supra* at 45-55) To do this, it asserts the Plaintiffs have no valid property interest "in a particular definition of a gambling device." *Id*. at 33. Additionally, it asserts the Plaintiffs do not have enforceable property interests in either gray machines or their underlying contracts. *Id*.

The Attorney General relies heavily on the *Bobbie Preece* case from the Kentucky Court of Appeals that a "taking claim against the [government] cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control." *Id*. (internal citation to *Bobbie Preece Facility v. Commonwealth*, 71 S.W.3d 99, 104 (Ky. App. 2001)) The defendant urges the Court to adopt the reasoning from *Bobbie Preece* to conclude

[15] In addition to citing *Stearns Coal*, the Plaintiffs included internal citations to *Com. ex rel. Dep't for Nat. Res. & Env't Prot. v. Stephens*, 539 S.W.2d 303, 305-306 (Ky. 1976); *see* also *Adams, Inc. v. Louisville & Jefferson Cnty. Bd. of Health*, 439 S.W.2d 586, 590-591 (Ky. 1969); *Siding Sales, Inc v. Warren Cnty. Water Dist.*, 984 S.W.2d 490, 494-495 (Ky. App. 1998); *Rieke v. Louisville*, 827 S.W.2d 694, 697 (Ky. App. 1991).

that the Plaintiffs failed to allege a valid taking claim, due to the fact that they willingly entered the gambling industry with the hope the Legislature would never amend the definition of a gambling device to include machines like their Burning Barrel game. *Id*. Under this interpretation of *Bobbie Preece,* the Plaintiffs' "ability to provide and operate their gray machines "is more akin to a privilege than" an enforceable property right." *See Def.'s Reply*, *supra* at 33. (internal citation to *Bobbie Preece*, *supra* at 104.)

Consequently, the AG further relies on *Bobbie Preece* to argue "the Plaintiffs "could reasonably expect that the privilege could be taken away or encumbered as a means of meeting the legitimate goals of the legislature."" *Id*. at 33-34. (internal citation to *Bobbie Preece*, *supra* at 104.) The AG asserts that *Bobbie Preece* turned on the Court's conclusion that a "valid taking claim cannot arise in areas historically "subjected to strict governmental regulation."" *Id*. (internal citation to *Bobbie Preece*, *supra* at 104.)

Moving to the instant facts, the Attorney General asserts the Legislature possesses a "high degree of control over" the whole field of gambling. *Id*. Consequently, it argues legislation passed under the authority of regulating gambling is not a taking. *Id*. Bolstering this point, the Attorney General attacks that the Plaintiff does not address the portion of the *Zuckerman* case holding that the police power may validly infringe on the right to contract. *See Def.'s Reply, supra* at 34-35. (internal citation to *Zuckerman v. Bevin*, 565 S.W.3d 580, 604 (Ky. 2018)) The AG's interpretations of *Zuckerman* (that the police power may infringe on the right to contract) and *Jockey Club* (that the Legislature has the sole authority to prohibit, regulate, or classify the whole subject of betting and gambling) are persuasive to the Court that HB 594 is a valid exercise of the police power authority to define gambling and subsequently regulate it. *See Def.'s Reply*, *supra* at 35.

The Defendant concurs with the Plaintiff that there are two types of regulatory takings: categorical or *per se* takings, and partial regulatory takings. *Id*. at 36. (internal citation to *Lucas*, *supra* at 1017.) The former requires the taking leave the affected property with no productive or economically beneficial use, while the latter occurs where there is still some beneficial value remaining in the property as regulated. *See Def.'s Reply*, *supra* at 36. However, moving to the instant analysis, the defendant criticizes the Plaintiffs' theory of a per se taking because they have only alleged a mere claim that their contracts have zero economically beneficial or productive use, without alluding to any specific contractual language requiring this conclusion. *Id*.

Further, the Attorney General relies on the hearing testimony of the Plaintiffs' expert to demonstrate that the expert was able to test the game for free. *Id*. (internal citation to *Hearing Tr.*, at 98:23 – 101:5) Consequently, it asserts the testimony is undisputed fact proof that the Plaintiffs' Burning Barrel machines "may be played in a manner that does not bring them within the current definition of a gambling device." *Id*. Furthermore, the Plaintiffs still have the opportunity to relocate the Burning Barrel games to another state where they are entirely legal. *Id*. Ultimately, these two reasons provide the basis for the defendant to argue that HB 594 did not represent a categorical, or *per se*, taking of either the machines or the contracts.

Instead, the defendant urges the Court to use the partial regulatory takings analysis from the *Penn Central* case. *See Def.'s Reply*, *supra* at 36-37. The Defendant again concurs with the Plaintiffs that regulatory takings analysis is guided by the *Penn Central* factors. *Id*. at 37. On the first factor, which looks to the economic impact of the regulation, the AG asserts that even if HB 594 deprives the Burning Barrel gams of the *most* beneficial use, that does not make it

unconstitutional. *Id*. (internal citation to *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962))

Further, the defendant criticizes that the Plaintiffs' takings claim focuses solely on the underlying contracts without considering the remaining economic value in the machines. *Id*. (internal citation to *Pls.' Resp.*, *supra* at 51) This argument of the Plaintiffs is misplaced, so argues the Attorney General, because they have failed to allude to specific contractual terms requiring them to produce "both consideration on the front end and a payout on the back end." *Id*. Consequently, the defendant asserts this is fatal to the takings claim because there has not been a showing of which specific contractual terms are now valueless. *Id*. at 38.

Ultimately, the AG argues that under the first *Penn Central* factor of a regulatory taking – the economic impact of the regulation on the claimant – the mere diminishment of value to the Plaintiffs' machines brought about by HB 594 does not result in a taking. *See Defs.' Reply*, *supra* at 38.

Then, on the second *Penn Central* factor of the extent to which the regulation has interfered with distinct investment-backed expectations, the defendant asserts that potential regulation of the machines should not have been surprising to the Plaintiffs where they designed the machines to operate in an allegedly gray area of the law. *Id*.

Further, the Attorney General attacked the Plaintiffs' reliance on *Cienega Gardens* to develop their argument that they still retain investment-backed expectations in their Burning Barrel machines despite entering a highly-regulated gambling and gaming industry in Kentucky. The defendant argues the "Plaintiffs should have expected that the General Assembly might exercise its longstanding authority to regulate gambling and clarify the gray area in which they sought to operate." *Id*. at 39. It also points to Kentucky's long history with regulation of pinball

machines as gambling devices if they pay out money, regardless of the proportion of skill employed, to demonstrate the Plaintiffs should have held distinct investment-backed expectations that their machines were subject to potential regulation, regardless of the proportion of skill their games allegedly require. *See Defs.' Reply*, *supra* at 40. Consequently, the defendant asserts the second *Penn Central* factor does not support the Plaintiffs' takings claim.

Finally, on the third *Penn Central* factor, the Attorney General asserts "HB 594 does not have the character of a government action that amounts to a taking." *Id*. The AG quotes *Penn Central* to explain that a government action with a character that amounts to a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government rather than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *See Defs.' Reply*, *supra* at 40. (internal citation to *Penn Central, supra* at 124.)

The Attorney General argued that the character of the governmental action expressed by HB 594 was a legislative attempt to protect Kentuckians from the ills of unregulated gambling by clarifying the definition of a gambling device." *See Defs.' Reply*, *supra* at 40. Consequently, the AG couches the character of the government action in HB 594 as "merely a "public program adjusting the benefits and burdens of economic life to promote the common good." Such action does not have the character of a taking." *Id*.

Moving out of its analysis of the *Penn Central* factors, the AG last rebuts the Plaintiffs' arguments that there remains a factual dispute whether their game is a game of skill and whether HB 594 was a proper exercise of the police power. *Id*. at 41. The AG restated its reliance on the *Jockey Club* case to explain the Legislature has the sole authority to prohibit, regulate, or classify the entire subject of betting and gambling. *Id*. (internal citation to *Ky. Jockey Club*, *supra* at 993-

994) Consequently, the Attorney General again argued that there is no factual dispute of the Legislature's police power so the Court should dismiss the Plaintiffs' takings claim. *Id*.

7. Separation of Powers

Plaintiffs' Arguments

In their Amended Complaint, the Plaintiffs asserted that the Skill Game Amendment violated the Separation of Powers provision in Kentucky Constitution §27, 28, and 29. *See Pls.' Am. Compl.*, at 20. (¶80-83) To support this point, they merely state that the Kentucky Constitution prohibits unintelligible legislation and the delegation of power of one government department to another. *Id*. (¶81-82) Upon review of the Plaintiffs' Response and Reply in Support of its Motion for Summary Judgment, as well as the Motion for Temporary Injunction[16] and the Reply Brief Supporting Injunctive Relief[17], the Plaintiffs appear to reiterate their argument that the legislation lacks a rational basis, that improperly delegates the power to regulate these devices, and that it leaves too much discretion to the executive branch to define the parameters of its prohibitions.

Defendant's Arguments

The Attorney General relies on its earlier argument[18] in its original Cross-Motion for Summary Judgment that the "… Plaintiffs' separation of powers claim failed to allege facts entitling them to relief and failed to provide any legal grounds overcoming the presumption of constitutionality." *See Def.'s Reply*, *supra* at 45. However, the Defendants highlight that the Plaintiffs appear simply not to have responded and specifically, "… also did not raise this

[16] Filed with the Court on July 29, 2023.
[17] Filed with the Court on October 31, 2023.
[18] The Defendant raised its original Separation of Powers arguments and defenses in its original cross-motion for Summary Judgment, filed October 11, 2023. *See Def.'s Cross-Mot. for Summ. J.*, at 47-50.

argument in their combined motion for a temporary injunction and motion for summary judgment." *Id*. Consequently, the Defendant asserts it is entitled to summary judgment on the separation of powers claim because of the Plaintiffs' failure to raise facts related to the separation of powers claim. Defendant argues there is no factual basis to overcome HB 594's presumption of constitutionality. *See Def.'s Cross-Mot. for Summ. J., supra* at 50.

BURDEN OF PROOF

Summary Judgment is appropriate when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.01.

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to affirmatively show that there is a genuine issue of material fact for trial. *Jones v. Abner*, 335 S.W.3d 471, 475 (Ky. Ct. App. 2011). The movant should not succeed unless it has shown "with such clarity that there is no room left for controversy." *Steelvest, Inc. v. Scansteel Service Ctr.*, 807 S.W. 2d 476, 482 (Ky. 1991). "The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). In reviewing Motions for Summary Judgment, the Court views all facts in the light most favorable to the non-moving party and resolves all doubts in its favor, and summary judgment should only be granted when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelvest,* 807 S.W. 2d at 480.

The Court recognizes that the summary judgment is a device that should be used with caution and is not a substitute for trial. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Jones v. Abner*, 335 S.W.3d at 480. Thus, this Court finds that summary judgment will be proper when it is shown with clarity from the evidence on record that the adverse party cannot prevail, as a matter of law, under any circumstances.

ANALYSIS

1. Free Speech

The Court **GRANTS summary judgment to the Defendant** on the issue of the **free speech challenges to HB 594**. The Plaintiffs have not raised genuine issues of material fact that the Burning Barrel game qualifies as a video game for entertainment under the *Brown* factors. Specifically, the Plaintiffs have not shown that HB 594 targets Burning Barrel *because* it communicates ideas the legislature does not like through literary devices or features distinctive to the medium of gaming, especially the player's interaction with the virtual world. Although the Plaintiffs assert gray machines like Burning Barrel qualify as a video game for entertainment, and are thus considered protected free speech, the Court is not persuaded Burning Barrel should be classified that way simply because the game contains distinct audio-visual themes or because players can choose which game title they would prefer to play.

The Plaintiffs argue that a player expresses skill in choosing which game title to play, in support of their theory of Burning Barrel as free speech. However, the Court is not persuaded that HB 594 targeted Burning Barrel *because* of its expressive content, but rather enacted HB 594 to target the *conduct* of unregulated wagering. Therefore, the Court also **holds that the free**

speech challenge shall proceed under rational basis scrutiny, not strict scrutiny. In fact, there is no evidence that the content of this game has anything whatsoever to do with the legislation, which is focused entirely on its potential for gambling, with all of the valid social and economic concerns surrounding unregulated gambling.

Consequently, the **Court need only review HB 594 to see whether it is rationally related to a legitimate purpose**. The Court is persuaded by the arguments of the Attorney General that gray machines like Burning Barrel games do not qualify as speech under the *Brown* factors. Further, HB 594 is not a content-based regulation but is instead aimed at regulating conduct. The Court agrees with the reasoning of the Attorney General that ridiculous outcomes would arise should the Court accept the Plaintiff's theory of free speech protections necessarily arising *ipso facto* from the intersection of entertainment and skill. Specifically, the Court was persuaded that the Plaintiffs' theory of free speech based on the combination of expression and skill would preclude the Commonwealth of authority to regulate expressive activities like combat competitions or, arguably, poker played with exclusively-designed playing cards. A theory of free speech that would compel these results simply can not stand.

It is clear that HB 594 targets the conduct of *gambling*, more specifically *wagering*, and does not single out the Burning Barrel games on the basis of unfavored speech content. HB 594 rationally distinguishes between illegal gambling devices (which now provide results/prizes on the basis of any element of chance) and legal devices that remain lawful based on the size of money or prizes awarded. There remain **no genuine issues of material fact on the issue of the free speech challenge**, because the Plaintiffs cannot show that the legislature sought to ban it on the basis of the *content* of speech it expressed, and also because there are no facts showing the Burning Barrel qualifies as a video game for entertainment under the factors from *Brown*.

Consequently, the Attorney General is entitled to summary judgment on the free speech challenge as a matter of law.

2. Arbitrariness

The Court **GRANTS summary judgment to the Defendant** on the issue of the **Arbitrariness challenges to HB 594**. The Plaintiff asserts HB 594 arbitrarily exceeds the scope of the legislature's police powers authority because it engages in economic protectionism rather than being rationally related to any substantial public purpose. Relying on the reasoning from *Bruner* and *Jasper*, the Plaintiffs assert that no substantial public purpose was served by the banning of their games when the legislature simultaneously authorized mobile sports betting. Further, the Plaintiffs assert that the police power can never be used to ban any game of skill, since gambling can only occur in games of chance.

However, the Court is reluctant to endorse the reasoning that the police powers can never extend to games of skill. The term 'game of skill' is a term of art specifically defined by the legislature. The legislature certainly had the authority to previously enact the 'dominant factor' test that classified games of skill and chance based on which element predominantly determined the game's outcome. It stands to reason that if the legislature had the authority to enact the previous dominant factor test, it also has the authority to amend or clarify its definition of a game of skill. The Court rejects the idea that the plenary police powers of the legislature to define and regulate games of skill have been abrogated simply because it previously enacted a different definition.

The Court is further persuaded by the arguments of the Attorney General that HB 594 was not an arbitrary exercise of the police powers simply because the definition of a game of skill was amended in the same session the General Assembly passed mobile sports betting. The

Attorney General correctly highlights that the Court's police powers analysis for arbitrariness will turn on whether there is a rational relation between HB 594's exercise of the police power and some legitimate governmental interest. Here, the Attorney General clearly argues the legislature exercised its police powers to amend the definition of a gambling device for the legitimate purpose of preventing the harmful effects to society that result from unregulated gambling devices.

Specifically, the Attorney General highlighted how Burning Barrel and other unregulated gambling devices are harmful as a matter of law[19] and fact. It further explained how gray machine games like Burning Barrel operate untaxed and unregulated, and further fail to provide mandatory precautions to prevent underage gambling or problem gambling. This stands in stark contrast to legal gambling operators who are obligated to abide by the strict precautions related to underage and problem gambling.

Most importantly, however, the Attorney General persuasively cited to the *Jockey Club* case that held the legislature has the power to prohibit, regulate, and classify all forms of gambling. The AG persuasively explained that the Legislature has a long history of regulating pinball games under state gambling laws, even though there were plenty of arguments to be made that pinball was predominantly based on skill rather than chance.

It is of no consequence to the Court's analysis that the legislature decided to enact mobile sports betting in the same legislative session it enacted HB 594. *Jockey Club* reaffirms the authority of the legislature to prohibit, regulate, and classify all forms of gambling, and the legislature was not acting arbitrarily in exercising its long-standing authority to regulate gambling when it enacted HB 594. The public welfare at the time of this action is served by HB

[19] *See Commonwealth v. Stars Interactive Holdings (IOM) Ltd.*, 617 S.W.3d 792, 804 (Ky. 2020)

594's clarification of the definition of a gambling device, the legislature properly exercised its police powers to amend the gambling device definition, and the clarification of the definition was rationally related to the legitimate interest in preventing the harms of unregulated gambling.

The Court is persuaded by *Jockey Club,* and the long history of regulating pinball machines, that HB 594 is not an arbitrary exercise of the police power. Further, the Court **rules there are no genuine issues of material fact** related to the **Arbitrariness** challenge and that **the defendant is entitled to summary judgment on the issue of Arbitrariness**. It is clear that **HB 594 is a lawful exercise of the police power because it is rationally related to the legitimate governmental interest in preventing the social harms of illegal and unregulated gambling**.

3. Equal Protection

The Court **GRANTS summary judgment to the Defendant on the issue of the Equal Protection challenge to HB 594**. Gray machines, like the Burning Barrel devices operated by the Plaintiffs, are *not* similarly-situated to lawful gambling devices video games for entertainment, e-sports devices, or coin-operated amusement machines. Further, this equal protection analysis must be conducted under rational basis review, and not the strict scrutiny sought by the Plaintiffs, because HB 594 was passed under the Legislature's police power authority and it is rationally related to addressing the negative social impacts of unlawful gambling.

The Plaintiffs correctly argued that similarly-situated persons must receive equal treatment. The Attorney General also highlighted the test of equal protection which asks whether a legislative classification is arbitrary or unreasonable. As explained earlier, HB 594 survives the Plaintiffs' initial Arbitrariness challenge as being rationally related to the legitimate objective of addressing the harms of unregulated gambling. For the purposes of the Equal Protection

challenge, the Court must review whether the distinction is arbitrary between gray machines and video games for entertainment, e-sports devices, and mobile sports betting devices by asking whether gray machines are similarly situated to those other categories.

The Court is persuaded by the arguments of the Attorney General that the Plaintiffs' equal protection theory is based on the false proposition that gray machines like Burning Barrel are identical to coin-operated amusement machines and devices used in e-sports competitions. This reasoning is fatal to the arguments of the Plaintiff that the legislature's choice to legalize some forms of gambling precludes it from outlawing it in other forms.

Specifically, gray machines are not similarly-situated to the coin-operated amusement machines one might encounter at Malibu Jack's or Chuck E. Cheese even though both categories of machines allegedly require the use of player skill. The Attorney General correctly pointed out that coin-operated amusement machines limit their prizes to values not exceeding $25 per single play, while gray machines provide no such limit on the value of their prizes. Consequently, the legislature acted rationally in distinguishing between gray machines and coin-operated amusement machines that are not similarly-situated.

Further, gray machines like Burning Barrel are not similarly-situated to devices used in e-sport competitions. The AG effectively argued that the distinguishing factors for devices used in e-sports competitions were the payment of a single entry fee prior to competition rather than entry fees in an unlimited amount, the e-sports prizes are not unlimited cash prizes but have values predetermined before competition begins, the mandatory requirement in e-sports competitions that at least one participant must receive a prize of value based on the competition's results, and the fact that e-sports participants must compete directly against each other (not the

game itself) for prizes. Consequently, the Court is persuaded that it was rational for the Legislature to treat gray machines differently from devices used in e-sports competitions.

Beyond these distinguishing factors between gray machines and coin-operated amusement machines and devices used in e-sports competitions, the Plaintiffs also treat their gray machines in a manner not similarly-situated to the other categories of machines. First, the Plaintiffs represent that Burning Barrel operators are required (by the Plaintiffs) to prohibit play by persons under 18. However, e-sports competitions and consumers at Chuck E. Cheese of coin-operated amusement machines are not required to be 18. The Plaintiffs' own disparate treatment of their gray machines indicate they know their games cannot be safely played by children, distinguishing them from these other lawful devices, and supporting the reasoning that the Legislature made a reasonable classification not to treat gray machines in the same way as those often played by children.

Finally, gray machines like Burning Barrel are not similarly-situated to mobile sports betting devices, so it was rational for the legislature to distinguish between them in classification of lawful gambling devices. To summarize, the legislature subjected entities offering sports wagering to several regulations, including licensure under the Kentucky Horse Racing Commission, and initial registration and annual renewal fees. Further, websites offering mobile sports betting are subject to smaller initial and renewal fees. Funds generated by these fees are earmarked for the Kentucky problem gambling assistance account and the permanent pension fund. Last, providers of sports wagering must take precautionary steps to prevent access to those under the age of 18. However, the Court notes none of these licensure restrictions for mobile sports betting apply to gray machines like Burning Barrel.

Ultimately, the Plaintiffs have not raised any genuine issues of material fact to show that gray machines like Burning Barrel are similarly-situated to devices used for mobile sports wagering, devices used in e-sports competitions, and or coin-operated amusement machines. Consequently, the legislature acted rationally in distinguishing between the non-similarly-situated gambling devices in furtherance of the legitimate government interest in limiting the negative social effects of gambling. Therefore, it is appropriate to grant Summary Judgment to the Attorney General on the issue of the Equal Protection challenge to HB 594.

4. Special Legislation

The Court **GRANTS summary judgment to the Defendant on the issue of the Special Legislation challenge to HB 594.** Both parties point to the *Woodall* test of whether legislation unlawfully applied exclusively to special individuals, locales, or objects. The Plaintiffs' theory of special legislation focuses on the alleged benefits bestowed upon the horse racing industry who are amicus parties in this action, based on the notion that proceeds from gray machines threaten the profits of these politically-connected entities. However, the Attorney General correctly points out these Plaintiffs are not the only parties to challenge HB 594 through litigation – nor are they the sole providers of gray machines in Kentucky - which demonstrates that HB 594 was not designed as special legislation only applying to these specific Plaintiffs.[20] Rather, HB 594 was general legislation that applies equally to any machine that meets the definition of a gambling device in any location inside the state. HB 594 treats these machines as a class of subjects treated the same, and so it does not run afoul of the prohibition on Special Legislation in §59 of the Kentucky Constitution.

[20] *See Prominent Techs., LLC v. Cameron*, No. 23-CI-02819 (Jefferson Cir. Ct.)

The Court is further persuaded that, even though the amici horse race tracks appear to benefit from HB 594, that does not make it special legislation. Here the law differentiates between gray machines and lawful gambling devices using a rational, non-arbitrary classification. Consequently, because HB 594 applies generally to a class of machines (gray machines) and differentiates from the class of lawful gambling devices on the rational basis of their distinct features, the **Attorney General is entitled as a matter of law to summary judgment on this issue. There are no genuine issues of material fact the Plaintiff can produce to show that HB 594 singled out Burning Barrel specifically, or that HB 594 applied only to particular people, objects, or locales.**

5. Impairment on Contracts

The Court **GRANTS summary judgment to the Attorney General on the issue of the Impairment of Contracts claim**. The Plaintiffs argue there are genuine issues of material fact that HB 594 is a substantial impairment of their existing contract rights in Burning Barrel operating contracts, and there are genuine issues of material fact whether HB 594 was enacted for a legitimate public purpose. However, the Plaintiffs offer the mere conclusory statement that their existing contract rights have been rendered invalid, released, or extinguished, but neglect to explain how. The Plaintiffs cite to no facts or possible material facts that could demonstrate their contracts have been rendered invalid or extinguished. Further, the Attorney General emphasizes that the Plaintiffs refused to produce in discovery any factual information showing what the contracts required of them or which portions were rendered invalid by HB 594. The Attorney General asserts this refusal to produce discovery makes it impossible to show the Plaintiffs' contract rights have been substantially impaired, and suggests it is entirely possible the contract

rights would be undisturbed should Burning Barrel games be modified to limit or remove payouts or accept free plays.

The Attorney General also argues that analysis of a substantial impairment on contracts must consider the extent to which an industry has been regulated in the past. Ultimately, the Court agrees with the Defendant that the Plaintiffs have failed their burden to show their contracts were substantially impaired by HB 594. The Plaintiffs point to no genuine issues of material fact they can or plan to produce to show their contracts have been substantially impaired, so the Defendant is entitled to summary judgment on this issue as a matter of law.

The contracts for the devices in question were *always* subject to the police power of the state to regulate or prohibit gambling activity to protect the public welfare. In this heavily regulated field of gaming, the parties to the contract knew that this activity was subject to government oversight, and regulation (including prohibition). Just as contracts to manufacture, sell and distribute alcoholic beverages or hemp were subject to termination by the enactment of prohibition laws, the contracts to manufacture, sell, distribute and operate these devises are subject to the police power of the state.

Further, the Court rules there are no genuine issues of material fact whether there is a legitimate public purpose of HB 594. This issue was dispositively ruled on earlier in this Order when the Court found that HB 594 survived the arbitrariness challenge and was rationally related to the legitimate public purpose of limiting the social harms of illegal gambling. Consequently, the **Attorney General is entitled to summary judgment as a matter of law on the contract impairment claim**.

6. Unconstitutional Taking

The **Court GRANTS summary judgment to the Attorney General on the challenge to HB 594 as an unconstitutional taking**. Here, no regulatory taking has occurred. The *Bobbie Preece Facility* case is instructive in holding that a property interest totally dependent on regulatory licensing is not a compensable property interest under the Takings Clause. *See Bobbie Preece Facility, supra* at 104. The Plaintiffs' argument that they've suffered a taking of their property rights in their operating contracts, rather than a taking of property rights related to state-issued gambling licenses, is of no avail because HB 594 has not destroyed the economically beneficial use of their property. Indeed, the Plaintiffs still retain the option of relocating their Burning Barrel machines to jurisdictions where they are legally played and operated, or may keep them in their Kentucky locations and modify the devices to remove the payout function without clearly running afoul of the provisions in their operating contracts. The Plaintiff has no vested right to be free from government regulation or prohibition of the components of their game that are properly within the scope of the police power.

Further, the Court agrees with the Attorney General that the takings analysis must proceed under the *Penn Central* multi-factor analysis rather than under the analysis of a taking *per se*. *Penn Central* here provides the proper analysis because, as explained in the preceding paragraph, there still remain economically productive or beneficial uses of gray machines like Burning Barrel devices. The first *Penn Central* factor weighs in favor of the Attorney General because the economic impact of HB 594 on the value of the Plaintiffs' property is such that economic value remains by either relocating the machines to another jurisdiction or modifying them to avoid payout prizes. The Commonwealth has not and is not seeking to confiscate the

machines, which would be more in line with the notion of a taking depriving the property of all beneficial use.

The second *Penn Central* factor also weighs in favor of the Attorney General because HB 594 did not unreasonably interfere with the investment-backed expectations of the property owner. Gray machines like Burning Barrel appear designed to fit into a gray area of the law that always made the legal status of these games somewhat murky. It was entirely unreasonable, based on Kentucky's long history of regulating gambling and the *Jockey Club* decision, for an investor to expect that any machine operating on the fringe zones of legality as a gambling device would be exempt from subsequent regulation or prohibition by the Legislature. Statutes and case law evolve over time in our democratic process, and no one acquires a vested right to be free of government regulation, even if the activity was initially unregulated. *See Ward v. Harding,* 860 S.W.2d 280 (Ky. 1993) ("To grant immunity from change is to concede that one may acquire a vested interest in the decision of a court [*or legislature*], a proposition universally rejected." *Id.* at 288). Consequently, the second *Penn Central* factor weighs in favor of the Attorney General that there has not been a regulatory taking.

Last, the third *Penn Central* factor which considers the character of the governmental action weighs heavily in favor of the Attorney General. Here, HB 594 was a lawful exercise of the Legislature's police power to regulate gambling for the legitimate governmental interest in addressing the social harms of unregulated forms of gambling. Ultimately, the Attorney General persuasively argued that HB 594 did not function as a taking of property interests in either the Plaintiffs' operating contracts or Burning Barrel devices. The Court agrees that the Plaintiffs do not have enforceable property interests in either the operating contracts or the Burning Barrel machines based on its decision to enter into the highly regulated field gaming industry. Further,

the Court rules that no regulatory taking has occurred because the value of the operating contracts have not been extinguished and that the machines have not been deprived of all economically beneficial use, which might have been the case had the machines been confiscated and seized.

Consequently, the **Attorney General is entitled to Summary Judgment as a matter of law on the takings challenge, because the Plaintiff cannot show any genuine issues of material fact that would demonstrate HB 594 was an unconstitutional taking of the Plaintiffs' operating contracts or Burning Barrel devices.**

7. Separation of Powers

The Court **GRANTS summary judgment to the Defendant on the issue of the Separation of Powers challenge to HB 594**. The Attorney General contends the Plaintiffs failed to allege facts entitling them to relief on this issue or to overcome the presumption of constitutionality of HB 594. Further, the Attorney General points to the Plaintiffs' failure to raise the issue in their combined motion for a temporary injunction and motion for summary judgment and claims this entitles them to summary judgment. Because the Court has held the statute is a proper exercise of the police power, and that it is not arbitrary, the Plaintiffs cannot prevail on the separation of powers issue. The Plaintiffs have failed to identify any genuine issue of material fact that would show HB 594 was a violation of the separation of powers, nor have they provided any legal basis to find a violation of separation of powers. The Attorney General is entitled to Summary Judgment as a matter of law on this issue.

IT IS HEREBY ORDERED that:

1. The **Attorney General is entitled to summary judgment on the Free Speech challenge** to HB 594.

2. The **Attorney General is entitled to summary judgment on the Arbitrariness challenge** to HB 594.
3. The **Attorney General is entitled to summary judgment on the Equal Protection challenge** to HB 594.
4. The **Attorney General is entitled to summary judgment on the Special Legislation challenge** to HB 594.
5. The **Attorney General is entitled to summary judgment on the Impairment of Contracts challenge** to HB 594.
6. The **Attorney General is entitled to summary judgment on the Unconstitutional Takings challenge** to HB 594.
7. The **Attorney General is entitled to summary judgment on the Separation of Powers challenge** to HB 594.

For the reasons stated above, the Court **GRANTS SUMMARY JUDGMENT TO THE ATTORNEY GENERAL** on all issues set forth above. This is a final and appealable judgment and there is no just cause for delay in the entry of this Order.

SO ORDERED this 28th day of June, 2024.

/s/ HON. PHILLIP J. SHEPHERD
electronically signed
6/28/2024 9:29:14 AM ET

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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