



## COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

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### *Attorney General Advisory:*

#### *Status of “Gray Machines” litigation*

On June 29, 2023, 2023 House Bill 594<sup>2</sup> took effect. The Act amended the definition of “gambling device” in KRS 528.010 to include, *inter alia*, any mechanical or electronic device where the outcome of the game is determined by “any element of chance, regardless of whether the result is also partially or predominantly based on skill.”<sup>3</sup> These devices have popularly been referred to as “gray machines,” though the manufacturers and owners of the devices refer to them as “skill games.”

Two lawsuits were filed to challenge the constitutionality of House Bill 594, one in Jefferson County<sup>4</sup> and the other in Franklin County.<sup>5</sup> The Office of the Attorney General has vigorously defended House Bill 594 in both actions. On June 26, 2024, the Jefferson County plaintiffs voluntarily dismissed their case. Then two days later, the Franklin Circuit Court granted our motion for summary judgment and dismissed the plaintiffs’ case, holding that House Bill 594 is constitutional in every respect. The Franklin County plaintiffs have appealed the circuit court’s decision to the Kentucky Court of Appeals,<sup>6</sup> where our Office will continue to vigorously defend the law.

#### *What this means for you*

There currently is no stay of the Franklin Circuit Court’s judgment in effect pending the outcome of the plaintiff’s appeal. Therefore, House Bill 594 is valid, constitutional, and may be enforced. This means that “gray machines” are illegal gambling devices under KRS 528.010(7)(a). Possession of a gambling device is a Class A misdemeanor under KRS 528.080. You and your office are free to investigate and

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<sup>1</sup> The Office issued an earlier version of this Advisory on August 9, 2024. This version has been updated to address questions that the Office has received regarding so-called “risk-free play” machines.

<sup>2</sup> 2023 Ky. Acts ch. 4.

<sup>3</sup> See *id.* § 1(7)(a)2.

<sup>4</sup> *Prominent Technologies, LLC, et al. v. Cameron*, No. 23-CI-2819 (Jefferson Cir. Ct.).

<sup>5</sup> *ARKK Properties, LLC, et al. v. Cameron, et al.*, No. 23-CI-282 (Franklin Cir. Ct.).

<sup>6</sup> *ARKK Properties, LLC, et al. v. Coleman*, No. 2024-CA-0875 (Ky. App.).

prosecute any violations of the Commonwealth's gambling laws, including the laws related to "gray machines."

Further, please know that the Office of the Attorney General is committed to continuing our defense of House Bill 594, which the General Assembly enacted to protect our communities from the evils associated with unregulated gambling. To that end, we are prepared to provide whatever assistance your office may need if your investigation or prosecution of illegal "gray machines" is challenged in court or results in additional constitutional challenges to the law or litigation against your office.

### **New "risk-free play" style of gambling device**

At least one "gray machine" manufacturer has created a new style of game it calls "Risk-Free Plays." These games are starting to appear in communities throughout the Commonwealth. The distinctive feature of these games is that, before each game play, the games communicate to the player what the outcome of the next single game play will be. Thus, a player will always know whether the next game play will be a win or a loss. The manufacturer believes this format eliminates all element of chance, and so argues that these games do not fit within the statutory definition of "gambling device."

This style of game is not new to Kentucky. Kentucky's highest court previously found that this type of game is, in fact, gambling. In *Welch v. Commonwealth*,<sup>7</sup> the defendant operated a slot machine which, for a nickel, would always provide the player with each game play a stick of gum worth five cents. Thus, there was no chance that the player could "lose," as every nickel play always returned a product worth a nickel. But the game also included an up-side chance of returning to the player a redeemable "chip" worth between five cents and a dollar. Before every game play, the machine told the player if he would receive a redeemable chip and what it would be worth. The court concluded that these games constituted gambling because what "attracts the player is the chance that, ultimately, he will receive something for nothing."<sup>8</sup> That "chance" lured players "into continuing to play in the hope that the next" play would result in more money than they had paid into the machine.<sup>9</sup>

Similarly, the "Risk-Free Plays" game is designed to lure players into continuing play after play, in an effort to receive over time more money than is paid into the machine. Initially, although the player will know the result of the first game play, he will not know the result of each subsequent game play. But he still will not know what the outcome will be after repeated game plays. Thus, the game lures the player into continuing to play on the chance that the next game play will result in a win worth more than he will have to pay for the current play. This hope that the

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<sup>7</sup> *Welch v. Commonwealth*, 200 S.W. 371 (Ky. 1918).

<sup>8</sup> *Id.* at 373.

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

subsequent game play will be a winner is the “element of chance” that makes these so-called “Risk-Free Plays” games illegal gambling devices. There is no safe harbor in Kentucky’s gambling laws for this kind of game.

Should you require any further assistance regarding any litigation related to “gray machines” or House Bill 594, please contact Aaron J. Silletto, Executive Director of the Attorney General’s Office of Civil and Environmental Law, at (502) 696-5439 or [aaron.silletto@ky.gov](mailto:aaron.silletto@ky.gov).