

FEB - 4 2013

OFFICE OF THE CLERK

In the
Supreme Court of the United States

SANDHILL AMUSEMENTS, INC.,
CAROLINA INDUSTRIAL SUPPLIES,
J&F AMUSEMENTS, INC., J&J VENDING, INC.,
MATTHEWS VENDING CO., PATTON BROTHERS, INC.,
TRENT BROTHERS MUSIC CO., INC., S&S MUSIC CO.,
INC., OLD NORTH STATE AMUSEMENTS, INC.,
and UWHARRIE FUELS, INC.,
Petitioners,

v.

STATE OF NORTH CAROLINA,
GOVERNOR BEVERLY PERDUE, in her
official capacity, NORTH CAROLINA DEPARTMENT OF
CRIME CONTROL AND PUBLIC SAFETY, SECRETARY
OF CRIME CONTROL AND PUBLIC SAFETY,
BRYAN BEATTY, in his official capacity,
ALCOHOL LAW ENFORCEMENT DIVISION
and DIRECTOR OF ALCOHOL LAW ENFORCEMENT
DIVISION WILLIAM CHANDLER, in his official capacity,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

Kelly Daughtry
Counsel of Record
DAUGHTRY, WOODARD,
LAWRENCE & STARLING
405 East Market Street
Smithfield, NC 27577
(919) 934-5012
kellydaughtry@msn.com

Counsel for Petitioners

QUESTION PRESENTED FOR REVIEW

N.C. Gen. Stat. § 14-306.4 (West 2010), entitled “An Act to Ban the Use of Electronic Machines and Devices for Sweepstakes Purposes” (hereinafter, the “Entertaining Sweepstakes Display Prohibition Act”) prohibits any person from operating, or placing into operation, an electronic machine or device to promote a sweepstakes that is conducted, or to conduct a sweepstakes, through the use of an *entertaining display*. “Entertaining Display” is defined as “visual *information*, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play.” N.C. Gen. Stat. § 14-306.4(3) (emphasis added). The question presented is:

Whether the Entertaining Sweepstakes Display Prohibition Act is an unconstitutional restriction of speech protected under the First Amendment.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 14(1)(b), the Petitioners certify the following parties to the proceeding:

1. The Petitioners are:

Sandhill Amusements, Inc., Carolina Industrial Supplies, J&F Amusements, Inc., J&J Vending, Inc., Matthews Vending Co., Patton Brothers, Inc., Trent Brothers Music Co., Inc., S&S Music Co., Inc., Old North State Amusements, Inc., And Uwharrie Fuels, Inc.,

2. The Respondents are:

State Of North Carolina, Governor Beverly Perdue, In Her Official Capacity, North Carolina Department Of Crime Control And Public Safety, Secretary Of Crime Control And Public Safety, Bryan Beatty, In His Official Capacity, Alcohol Law Enforcement Division And Director Of Alcohol Law Enforcement Division William Chandler, In His Official Capacity.

3. With respect to this Appeal, there are no corporate entities for purposes of disclosure.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
I. Proceedings in the trial court	4
II. The decision of the Court of Appeals of North Carolina	8
III. The decision of the Supreme Court of North Carolina	12
REASONS FOR GRANTING THE PETITION	12
I. The Supreme Court of North Carolina impermissibly created a “new” category of unprotected speech	13

II. The Supreme Court of North Carolina ignored this Court's well-settled precedent regarding speech-versus-conduct regulation	15
III. The Supreme Court of North Carolina ignored this Court's well-settled precedent regarding an assessment of content neutrality	17
CONCLUSION.....	21
APPENDIX:	
Opinion	
<i>Sandhill Amusements v.</i>	
<i>State of North Carolina,</i>	
North Carolina Supreme Court No. 170A11-2	
entered December 14, 2012.....	1a
Opinion	
<i>Sandhill Amusements v. State of North Carolina,</i>	
North Carolina Court of Appeals No. COA11-301	
entered March 6, 2012.....	3a
Order of	
The Honorable Paul C. Ridgeway	
North Carolina General Court of Justice,	
Superior Court No. 09 CVS 5719	
Re: Granting Defendants' Motion to Dismiss	
and Dissolving Preliminary Injunction	
entered November 29, 2010	15a
Opinion	
<i>Hest Technologies v. State of North Carolina,</i>	
North Carolina Supreme Court No. 169A11-2	
entered December 14, 2012.....	17a

Opinion

Hest Technologies v. State of North Carolina,

N.C. Ct. App. No. CA11-459

entered March 6, 2012 40a

N.C. Gen. Stat § 14-306 59a

2009 N.C. Sess. Laws (Reg. Sess. 2010),

408 (preamble) 62a

Plaintiffs' Motion to Amend Complaint,

With Attached Amended Complaint,

[North Carolina General Court of Justice,

Superior Court No. 09 CVS 5719]

entered September 27, 2010 64a

Defendants' Response to

Plaintiffs' Motion to Amend Complaint

[Wake County General Court of Justice

No. 09 CVS 5719]

Entered October 7, 2010 91a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>44 Liquormart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1996).....	13, 14
<i>Am. Treasures, Inc. v. State</i> , 173 N.C. App. 170, 617 S.E.2d 346 (2005).....	4
<i>Brown v. Entm't Merch. Ass'n</i> , ___ U.S. ___, 131 S. Ct. 2729 (2011)	10, 12, 14, 16
<i>City Cyber Cafe, LLC v. Coakley</i> , No. 12-4194-BLS1, 2012 WL 6674481 (Mass. Super. Dec 17, 2012).....	16
<i>City of Cincinnati v.</i> <i>Discovery Network, Inc.</i> , 507 U.S. 410 (1993).....	13, 17, 18
<i>Clark v. Community for Creative Non-Violence</i> , 468 U.S. 288 (1984).....	17
<i>Dun & Bradstreet, Inc. v.</i>	
<i>Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985).....	14
<i>Gitlow v. People of the State of New York</i> , 268 U.S. 652 (1925).....	3
<i>Hest Technologies, Inc., et al. v.</i> <i>State of North Carolina, et al.</i> , 724 S.E.2d 614 (2012).....	<i>passim</i>

<i>Rubin v. Coors Brewing Co.</i> , 514 U.S. 476 (1995).....	14
<i>Sandhill Amusements, et al. v.</i>	
<i>State of North Carolina</i> , 724 S.E.2d 614 (N.C. App. 2012).....	1, 8, 11
<i>Telesweeps of Butler Valley, Inc. v. Kelly</i> , No. 3:12-CV-1374, 2012 WL 4839010 (M.D. Pa. Oct 10, 2012).....	16
<i>U.S. v. O'Brien</i> , 391 U.S. 367 (1968).....	<i>passim</i>
<i>U.S. v. Stevens</i> , ___ U.S. ___, 131 S. Ct. 1577 (2010).....	12, 14
<i>Va. State Bd. of Pharmacy v.</i>	
<i>Va. Citizens Consumer Council, Inc.</i> , 425 U.S. 748, 761–70 (1976).....	14
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989).....	17
STATUTES	
28 U.S.C. § 1257(a).....	2
N.C. Gen. Stat. § 7A-30(2)	12
N.C. Gen. Stat. § 14-306.1A.....	5, 6
N.C. Gen. Stat. § 14-306.3	5, 6
N.C. Gen. Stat. § 14-306.4	<i>passim</i>
N.C. Gen. Stat. § 14-306.4(3)	<i>passim</i>

N.C. Gen. Stat. § 14-306.4(a)	8
N.C. Gen. Stat. § 14-306.4(a)(3)	3, 4, 6
N.C. Gen. Stat. § 14-306.4(a)(3)(a)-(e)	4, 7
N.C. Gen. Stat. § 14-306.4(a)(3)(f)	7
N.C. Gen. Stat. § 14-306.4(a)(3)(a)-(g)	7
N.C. Gen. Stat. § 14-306.4(a)(3)(i)	8
N.C. Gen. Stat. § 14-306.4(b)	3, 6, 18

RULES

N.C. R. App. P. 32(b)	2
S. Ct. R. 14(1)(b)	ii

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I	<i>passim</i>
U.S. Const. Amend. XIV	2, 3

OTHER AUTHORITIES

2009 N.C. Sess. Laws (Reg. Sess. 2010) 408 (preamble)	<i>passim</i>
3 Peter E. Rodson, <i>et al.</i> , <i>The Law of Advertising</i> § 55.02 <i>et seq.</i> (2007)	4
Anthony N. Cabot, <i>et al.</i> , <i>Economic Value, Equal Dignity and the Future of Sweepstakes</i> , 1 UNLV Gaming L.J. 1 (2010)	4

Mark Fridman, <i>Primetime Lotteries</i> , 10 Tex. Rev. Ent. & Sports L. 123 (2009)	4
Merriam Webster Online Dictionary, available at http://www.merriam-webster.com/ dictionary/videogame	7

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the decision of the Supreme Court of North Carolina filed on December 14, 2012, and entered on January 3, 2013, in this case.

OPINIONS BELOW

The order of the trial court dismissing Petitioners' declaratory judgment action is unpublished and is reproduced in the Appendix to this Petition ("App") at App15a-16a.

The decision of the Court of Appeals of North Carolina, reversing the trial court's dismissal of Petitioners' declaratory judgment action in light of the Court of Appeals' holding in a companion case that the Entertaining Sweepstakes Display Prohibition Act is unconstitutional under the First Amendment, is reported at 724 S.E.2d 614 (2012) and is reproduced at App3a-14a. The decision of the Court of Appeals of North Carolina in the companion case, *Hest Technologies, Inc., et al. v. State of North Carolina, et al.*, that the Entertaining Sweepstakes Display Prohibition Act is unconstitutional under the First Amendment, is reported at 725 S.E.2d 10 (2012) and is reproduced at App40a-58a ("*Hest*").

The decision of the Supreme Court of North Carolina in this case, reversing the Court of Appeals of North Carolina for the reasons stated in its decision of the same date in *Hest*, is unpublished and is reproduced at App1a-2a. The decision of the Supreme Court of North Carolina in *Hest* is unpublished and reproduced at App40a-58a.

JURISDICTION

The Supreme Court of North Carolina filed its decision on December 14, 2012 and, pursuant to North Carolina Rule of Appellate Procedure 32(b), the clerk of the Supreme Court of North Carolina is deemed to have entered the decision no later than twenty days thereafter (January 3, 2013) (“Decision”). Pursuant to 28 U.S.C. § 1257(a), the Decision may be reviewed by this Court by writ of certiorari because the constitutionality of the Entertaining Sweepstakes Display Prohibition Act is in question.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the Constitution of the United States of America provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Section 1 of the Fourteenth Amendment of the Constitution of the United States of America provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The First Amendment of the Constitution of the United States of America applies to the states through Section 1 of the Fourteenth Amendment. *Gitlow v. People of the State of New York*, 268 U.S. 652, 666 (1925).

The Entertaining Sweepstakes Display Prohibition Act is set forth verbatim at App89a-93a due to its length. In relevant part, the Entertaining Sweepstakes Display Prohibition Act provides:

(b) Notwithstanding any other provision of this Part, it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to do either of the following:

- (1) Conduct a sweepstakes through the use of an *entertaining display*, including the entry process or the reveal of a prize.
- (2) Promote a sweepstakes that is conducted through the use of an *entertaining display*, including the entry process or the reveal of a prize.

N.C. Gen. Stat. § 14-306.4(b) (West 2010) (emphasis added). “Entertaining display” is defined by the Act as “visual *information*, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play.” N.C. Gen. Stat. § 14-306.4(a)(3) (West 2010) (emphasis added). Examples given by the North Carolina General

Assembly include video poker, video bingo, video craps, video keno and video lotto. N.C. Gen. Stat. § 14-306.4(a)(3)(a)–(e) (West 2010). These examples are “by way of illustration and not exclusion.” N.C. Gen. Stat. § 14-306.4(a)(3) (West 2010).

STATEMENT OF THE CASE

I. Proceedings in the trial court

This case involves promotional activities known as “sweepstakes.” Sweepstakes are legal in North Carolina and many other states. *See Am. Treasures, Inc. v. State*, 173 N.C. App. 170, 176-77, 617 S.E.2d 346, 350-51 (2005); *see generally* Anthony N. Cabot, *et al.*, *Economic Value, Equal Dignity and the Future of Sweepstakes*, 1 UNLV Gaming L.J. 1 (2010); Mark Fridman, *Primetime Lotteries*, 10 Tex. Rev. Ent. & Sports L. 123 (2009); 3 Peter E. Rodson, *et al.*, *The Law of Advertising* § 55.02 *et seq.* (2007). Examples of popular promotional sweepstakes include McDonald’s Monopoly, Publishers Clearinghouse Sweepstakes, and Coke Rewards Sweepstakes.

Like McDonald’s and Coke, Petitioners market their product, long distance telephone time, through agreements with retail outlets throughout North Carolina using a promotional sweepstakes. The only difference between traditional sweepstakes like McDonald’s Monopoly (with its paper game pieces) and modern sweepstakes like those used by Petitioners is the use of video games to reveal the sweepstakes results. The purpose of using video games is to reveal the sweepstakes results in a way that entertains customers and, like all promotional activities, encourages them to purchase the promoted product. Many of these video games are

story-driven, arcade-style video games (such as *Penguin Ball*, one of the video games at issue in *Hest*, in which customers slide a cartoon penguin on ice in an attempt to knock down bowling pins) that bear no resemblance to gambling activities.

While recognizing that a promotional sweepstakes is a legitimate and valuable marketing tool, North Carolina's General Assembly has also attempted to protect its citizens from exposure to the "immoral vice" of gambling. To that end, North Carolina long ago prohibited public gaming and slot machines. See 2009 N.C. Sess. Laws (Reg. Sess. 2010), 408 (preamble) (App42a-47a). As new technology has emerged, the North Carolina General Assembly has attempted to combat gambling via computers or the Internet. For instance, in 2006, the North Carolina General Assembly banned video gaming machines. N.C. Gen. Stat. § 14-306.1A (West 2007). In 2008, the North Carolina General Assembly went further and banned all computer server-based electronic sweepstakes, whether or not the sweepstakes took the form of a game that simulated gambling (or even, for that matter) took the form of a game, although the stated concern was that simulated gambling created the "same encouragement of vice" as actual gambling. N.C. Gen. Stat. § 14-306.3 (West 2008); 2009 N.C. Sess. Laws (Reg. Sess. 2010), 408 (preamble).

In February of 2009, the Alcohol Law Enforcement Division of the North Carolina Department of Crime Control and Public Safety confiscated three sweepstakes terminals from one retail outlet and began advising others that Petitioners' promotional sweepstakes were illegal.

Petitioners filed a Complaint in Wake County Superior Court on March 19, 2009 seeking a declaration that N.C. Gen. Stat. § 14-306.1A was unlawful and enjoining its enforcement.¹

On June 26, 2009, the trial court entered an order preliminarily enjoining Respondents from enforcing N.C. Gen. Stat. § 14-306.1A as it relates to Petitioners' promotional sweepstakes, finding that Petitioners' video game sweepstakes are used "solely for the purpose of marketing and promoting the sale of telephone time" and are not a "server-based electronic game promotion."

Subsequent, and partly in reaction, to the issuance of this preliminary injunction, the North Carolina General Assembly passed the Entertaining Sweepstakes Display Prohibition Act. *See* 2009 N.C. Sess. Laws (Reg. Sess. 2010), 408 (preamble) ("Companies using electronic machines and devices for sweepstakes have sought, and received, declaratory relief from courts").² This Act prohibits conducting a sweepstakes, including revealing prizes, through the use of "any visual information" that "takes the form of actual game play, or simulated game play." N.C. Gen. Stat. § 14-306.4(a)(3) and (b) (West 2010). Video games are by definition "visual information . . . that takes the

¹ On March 25, 2009, Petitioners amended their Complaint to include jurisdictional allegations relating to Petitioner UWharrie Fuels, LLC that were inadvertently omitted from the original Complaint.

² The plaintiffs in the companion case, *Hest*, also obtained a preliminary injunction enjoining the defendants from enforcing N.C. Gen. Stat. § 14-306.3 (prohibiting video games that simulate traditional gambling games).

form of actual game play, or simulated game play.” *See, e.g.* Merriam Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/videogame> (defining “video game” as “an electronic game played by means of images on a video screen and often emphasizing fast action”). Although it is apparent from both the preamble to the Act and the examples provided by the North Carolina General Assembly within the Act that it is aimed at prohibiting the use of video games that simulate gambling to conduct a legal sweepstakes, the Act is not limited to only those video games. *See* 2009 N.C. Sess. Laws (Reg. Sess. 2010), 408 (preamble); N.C. Gen. Stat. § 14-306.4(a)(3)(a)–(g) (West 2010).

On September 27, 2010, Petitioners moved for leave to amend their Complaint to include a claim that the Entertaining Sweepstakes Display Prohibition Act is unconstitutional under the First Amendment of the United States Constitution. [App64a-90a]. Respondents consented to this motion. [App91a-93a]. On November 19, 2010, Respondents moved to dismiss Petitioners’ amended complaint based on the purported failure to state a claim, asserting that the Entertaining Sweepstakes Display Prohibition Act is constitutional and Petitioners were clearly in violation of the Act.

On November 29, 2010, the trial court granted Respondents’ motion to dismiss and dissolved the preliminary injunction (the “Dismissal Order”). [App15a-16a]. Petitioners timely noticed an appeal from the Dismissal Order.

II. The decision of the Court of Appeals of North Carolina

The Court of Appeals of North Carolina reversed the Dismissal Order based on its holding in the companion case, *Hest*, that the Entertaining Sweepstakes Display Prohibition Act is void because it is unconstitutionally overbroad. *Sandhill Amusements, et al. v. State of North Carolina*, 724 S.E.2d 614 (N.C. App. 2012) [App3a-14a]. In *Hest*, the plaintiffs (sellers of long-distance telephone time and high-speed internet services who developed their own video sweepstakes games) filed a complaint in the Guilford County Superior Court against the defendants (Respondents in this case), asserting a claim that the Entertaining Sweepstakes Display Prohibition Act is an unconstitutional regulation of protected speech. *Hest*, 725 S.E.2d at 12. On the defendants' motion to dismiss the complaint and the plaintiffs' motion for summary judgment as to their First Amendment claim, the trial court held that the "catch-all" provision of the Entertaining Sweepstakes Display Prohibition Act³ was unconstitutionally overbroad but upheld the constitutionality of the remainder of the Act. *Id.* The plaintiffs and the defendants each appealed. *Id.*

³ The "catch-all" provision includes within the examples of an "entertaining display" as defined in the Act "any other video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes." N.C. Gen. Stat. § 14-306.4(a)(3)(i) (West 2010). The term "entertaining display," however, is specifically not limited by the examples set forth in the Act. N.C. Gen. Stat. § 14-306.4(a).

On appeal, the defendants argued that the Entertaining Sweepstakes Display Prohibition Act does not implicate the First Amendment because it only regulates conduct, not speech. *Hest*, 725 S.E.2d at 12-13. The Court of Appeals of North Carolina rejected this argument. It held that, while the Entertaining Sweepstakes Display Prohibition Act attempts to regulate some conduct (*i.e.*, the use of an electronic machine or device in conjunction with a sweepstakes), it also regulates protected speech (*i.e.*, video games). *Id.* at 13. In doing so, the Court of Appeals noted:

While it is true that plaintiffs are free to allow anyone to play their video games so long as the video games are not used to conduct or promote sweepstakes, it is equally true that plaintiffs remain free to conduct or promote sweepstakes so long as they do not involve the use of plaintiffs' video games. *[The Entertaining Sweepstakes Display Prohibition Act] does not forbid the conducting or promotion of sweepstakes provided that the result of the sweepstakes entry is conveyed through any method other than an entertaining display.* For example, if the sweepstakes conducted by plaintiffs were exactly the same in all respects, except that the results were conveyed by means of a scratch off ticket, a motion picture, a cartoon, or a simple verbal acknowledgment, the sweepstakes would be permitted by North Carolina law. Ultimately, North Carolina law permits players to learn the result of their sweepstakes entries by using the exact same computer terminals which display plaintiffs'

video games, so long as the result is conveyed by words displayed on the monitor, rather than by an entertaining display. *Thus, it is the specific method of disseminating sweepstakes results through an entertaining display that is criminalized* by [the Entertaining Sweepstakes Display Prohibition Act].

Id. (emphasis added). Recognizing this Court's recent holding in *Brown v. Entm't Merch. Ass'n*, __ U.S. __, 131 S. Ct. 2729 (2011) that video games, like the "protected books, plays, and movies that preceded them," are protected by the First Amendment, the Court of Appeals of North Carolina concluded that the Act "cannot be characterized as merely a regulation of conduct." *Id.* Instead, that portion of the Entertaining Sweepstakes Display Prohibition Act which forbids "the reveal of a prize" by means of an "entertaining display" regulates "plaintiff's right to communicate the results of otherwise lawful sweepstakes by means of a specific category of protected speech." *Id.* at 13-14. As such, the Act must be reviewed "under established First Amendment doctrine." *Id.* at 13. The Court of Appeals then held that the Entertaining Sweepstakes Display Prohibition Act was unconstitutionally overbroad because, in the North Carolina General Assembly's attempt to regulate video games that constitute, or *simulate*, gambling, it "swept within [the Act's] ambit" video games that bear no resemblance whatsoever to gambling and categorically forbid sweepstakes operators from conveying the results of an otherwise legal sweepstakes in a constitutionally protected manner. *Id.* at 14-15. The Court of Appeals of North Carolina

further held that the trial court erred by invalidating only the “catch-all” provision of the Entertaining Sweepstakes Display Prohibition Act where the definition of “entertaining display” was not limited by the examples, including the catch-all provision and, thus, the trial court’s action did not cure the overly broad definition of “entertaining display.” *Id.* at 14.

The Honorable Robert C. Hunter dissented, concluding that the Entertaining Sweepstakes Display Prohibition Act regulates conduct rather than speech. *Hest*, 725 S.E.2d at 15. Justice Hunter noted that the Act prohibited the plaintiffs from “conducting or promoting” their sweepstakes through the use of a video game, not from “allowing a customer to play plaintiffs’ video games.” *Id.* at 16. Because Justice Hunter concluded the Act regulates conduct, not speech, he further concluded that the Act did not “include[] within its prohibition the practice of a protected constitutional right.” *Id.* at 17. Based on these conclusions, Justice Hunter would have applied a rational basis review to the Act (a test he concluded the Act met). *Id.* at 16-17. Justice Hunter would have reversed the trial court’s order holding the “catch-all” provision unconstitutional and affirmed the trial court’s order that the remainder of the Act was constitutional. *Id.* at 17. Justice Hunter also wrote a separate dissent in this case, rejecting Petitioners’ First Amendment claim for the same reasons as set forth in his dissent in *Hest* and addressing additional arguments raised by Petitioners that were not reached by the majority in light of their holding that the Act was unconstitutional. *Sandhill Amusements, et al. v. State of North Carolina, et al.*, 724 S.E.2d 614, 615-18 (N.C. App. 2012) [App3a-14a].

Pursuant to N.C. Gen. Stat. § 7A-30(2), which provides for an appeal as of right to the Supreme Court of North Carolina from decisions of the Court of Appeals where there is a dissent, Respondents (as well as the defendants in *Hest*) appealed.

III. The decision of the Supreme Court of North Carolina

The Supreme Court of North Carolina reversed the Court of Appeals' decision in this case for the reasons stated in its decision in the *Hest* appeal before it. [App1a-2a]. In *Hest*, the Supreme Court of North Carolina concluded that the Entertaining Sweepstakes Display Prohibition Act regulated “noncommunicative conduct rather than protected speech.” [App17a, 28a]. It thus held that the Act did not violate the First Amendment.

REASONS FOR GRANTING THE PETITION

This court should grant review of the Decision for three reasons. In order to reach the conclusion that the Entertaining Sweepstakes Display Prohibition Act regulated non-communicative conduct rather than protected speech, the Supreme Court of North Carolina:

1. “startlingly and dangerously”⁴ announced a new class of speech that is unprotected by the First Amendment – words that do not convey “ideas” but merely state facts (*i.e.*, announcing the results of a sweepstakes). The Supreme Court of North Carolina’s requirement that

⁴ *Brown v. Entm’t Merc. Assoc.*, ___ U.S. ___, 131 S. Ct. 2729, 2734 (2011) (quoting *United States v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577, 1585 (2010)).

words must convey “ideas” before being accorded protection by the First Amendment is in direct conflict with decisions of this Court protecting communications of even the most mundane information. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996);

2. held that the Entertaining Sweepstakes Display Act regulates conduct, not speech (by reading out of the Act the speech at issue), despite the fact that the Act arose from the North Carolina General Assembly’s perception that speech, not the conduct, was harmful. The Supreme Court of North Carolina’s holding conflicts with this Court’s holding in *U.S. v. O’Brien*, 391 U.S. 367, 382 (1968).
3. held that legislation restricting a particular kind of speech was “content-neutral” and subject to lower scrutiny despite the fact that the Act specifically precludes only the use of video games to conduct a sweepstakes, by displaying information such as the entry process or the reveal of a prize, in violation of this Court’s precedent explicating and requiring strict scrutiny of “content-based” prohibitions against speech. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

I. The Supreme Court of North Carolina impermissibly created a “new” category of unprotected speech

The Supreme Court of North Carolina held that the Entertaining Sweepstakes Display Prohibition Act was not an unconstitutional infringement of

Petitioners' First Amendment rights because "telling a sweepstakes participant that he or she has won or lost" is not protected speech where these words do not convey an "idea." [App33]. This Court has repeatedly held that the creation and dissemination of information, however mundane, is speech within the meaning of the First Amendment. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (communication of liquor prices is protected speech); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (information on beer labels is protected speech); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (plurality opinion) (credit report is protected speech); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–70 (1976) (communication of drug prices is protected speech). Informing a sweepstakes contestant of the rules of entry or that she has won the sweepstakes is akin to informing customers about product prices and no less protected by the First Amendment. The Supreme Court of North Carolina is not at liberty to create a "new" category of unprotected speech. *See Brown v. Entm't Merch. Ass'n*, __ U.S. __, 131 S. Ct. 2729, 2734 (2011); *U.S. v. Stevens*, __ U.S. __, 131 S. Ct. 1577, 1585 (2010).

As it did in *Brown* and *Stevens*, this Court should grant review of the Decision where it sets precedent for "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."⁵

⁵ *Stevens*, __ U.S. __, 131 S. Ct. at 1586.

II. The Supreme Court of North Carolina ignored this Court's well-settled precedent regarding speech-versus-conduct regulation

A second fundamental flaw in the Supreme Court of North Carolina's analysis is that it held that the Entertaining Sweepstakes Display Prohibition Act regulates conduct and not protected speech. [App17a, 27a]. A statute does not regulate conduct alone "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *U.S. v. O'Brien*, 391 U.S. 367, 382 (1968). The North Carolina General Assembly did not simply make conducting sweepstakes illegal. Rather, the Act, on its face, criminalizes sweepstakes only when conducted through video games, and does so specifically because the General Assembly considered the video games themselves to be harmful. 2009 N.C. Sess. Laws (Reg. Sess. 2010) 408 (preamble).

The Supreme Court of North Carolina's erroneous conclusion that the Act does not regulate speech flows from its failure to analyze the actual language employed by the North Carolina General Assembly. As the Supreme Court explained, its conclusion "turns on how we describe what [the Act] *does*." [App28a-29a (emphasis added)]. As the Supreme Court next acknowledged, the Act makes it "unlawful for any person to operate, or place into operation, an electronic machine or device" to "[c]onduct a sweepstakes through the use of an entertaining display. [App29a]. However, in describing what the Act does, the Supreme Court stated that "operating or placing into operation an

electronic machine is clearly conduct, not speech.” *Id.* It then stated that “the act of running a sweepstakes is conduct rather than speech.” *Id.* The next necessary step was for the Supreme Court to determine whether “the use of an entertaining display” is conduct or speech. Plainly, under the holding of *Brown*, it is the latter.

In doing so, the Supreme Court of North Carolina claims that Petitioners have attempted to “skillfully disguise[]” conduct with a façade of speech. . .” and the Court has “strip[ped] the transaction of all its thin and false apparel and consider[ed] it in its very nakedness. . .” [App39a]. In fact, the Supreme Court has “stripped” the Act of the very language that demonstrates that the transaction at issue is protected speech. The Supreme Court of North Carolina’s failure to address the plain language of the Act in its entirety runs afoul of this Court’s long-standing principles of statutory construction.

Justice Hunter’s dissent in *Hest*, essentially adopted by the Supreme Court and issued less than one year ago, has already been relied upon in two other jurisdictions to hold that similar statutes regulate conduct, not protected speech. See *Telesweeps of Butler Valley, Inc. v. Kelly*, No. 3:12-CV-1374, 2012 WL 4839010 (M.D. Pa. Oct 10, 2012); *City Cyber Cafe, LLC v. Coakley*, No. 12-4194-BLS1, 2012 WL 6674481 (Mass. Super. Dec 17, 2012). Left unchecked, legislatures nationwide will be emboldened to prohibit disfavored types of speech (*i.e.*, video games) under the auspices of regulating otherwise legal conduct.

III. The Supreme Court of North Carolina ignored this Court's well-settled precedent regarding an assessment of content neutrality

While the Supreme Court of North Carolina created a “new” class of unprotected speech, it implicitly recognized that the vehicle for delivering this speech (*i.e.*, a video game) is protected by discussing whether the Entertaining Sweepstakes Display Prohibition Act is content-based. [App33a-39a]. However, it ignored this Court's directives regarding such a determination.

This Court has held that government may impose reasonable restrictions on protected speech provided that they are adequately justified “without reference to the content of the regulated speech.” *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984))). In *Discovery Network*, the city, concerned about “the safety and attractive appearance of its streets and sidewalks,” banned “commercial handbills” from city newsracks but did not ban ordinary newspapers and other media. *Id.* at 412-15. The city argued that this was a content-neutral restriction because it did not care about the subject matter or viewpoint of any particular commercial handbill. *Id.* at 417. This Court rejected that argument, holding that “whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is ‘content based.’” *Id.* at 429.

The Supreme Court of North Carolina found that the Entertaining Sweepstakes Display Prohibition Act applies regardless of the content of the video game. This is plainly not so. On its face, the Act applies only to electronic machines that use video games to conduct a sweepstakes. N.C. Gen. Stat. § 14-306.4(b) (West 2010). To determine whether a particular electronic machine (the equivalent, here, of the newsrack in *Discovery Network*) falls within the Act's ban, one must determine the content of the electronic machine (*i.e.*, whether it uses an entertaining display or, as that term is defined, a video game (the equivalent, here, of the commercial handbill in *Discovery Network*)). Beyond that, one must determine if the video game "conducts" a sweepstakes. If, for example, an electronic machine uses pictures or movie clips to display sweepstakes results, the Act does not apply. But, if the display uses video games, the Act does apply. Under *Discovery Network*, this is precisely the sort of case-by-case examination of speech that "by any commonsense understanding of the ... term is 'content based.'" 507 U.S. at 429. Because the Act is a categorical ban on the use of video games to conduct a sweepstakes, including displaying entry information or disseminating sweepstakes results, the Supreme Court of North Carolina should have subjected the Act to strict scrutiny.

Instead, the Supreme Court of North Carolina erroneously applied the less stringent standard of review for content-neutral statutes articulated in *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968). Under *O'Brien*, a regulation of conduct that incidentally burdens speech

Is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. It is undisputed that North Carolina has the constitutional power to prohibit, and a substantial interest in prohibiting, gambling (and, arguably, activities that implicate the same concerns). However, the North Carolina General Assembly's express interest in passing the Act was to suppress the "vice and dissipation" that it perceived flowed from "video poker machines and other similar simulated game play video games conducting sweepstakes." See 2009 N.C. Sess. Laws (Reg. Sess. 2010) 408 (preamble). This interest is not "unrelated to the suppression of free expression" but, instead, specifically targets a particular content of free expression. Indeed, the Supreme Court acknowledges that the Act "burdens only sweepstakes conducted in a manner that encourages repeated, addictive, gambling-like play through the video display." [App37a]. It is non-sensical to suggest that "even the specific means of achieving th[e

interest in combatting gambling and gambling-like activities] here are unrelated to the suppression of free expression” precisely because the Act “targets the running of a particular type of sweepstakes operation” where that “particular type” is a protected form of free speech – video games. Thus, the third requirement of the *O’Brien* test was clearly not satisfied.

Moreover, the Act imposes restrictions that are clearly greater than necessary to the North Carolina General Assembly’s interest in suppressing the “vice and dissipation” that it perceived flowed from “video poker machines and other similar simulated game play video games conducting sweepstakes.” The Act bans the use of all video games to conduct a sweepstakes, without *regard for whether they resemble traditional gambling games*. Even under the Supreme Court’s expansive reformulation of the North Carolina General Assembly’s articulated interest (“combatting the social ills of gambling and gambling-like activities”), the Act imposes restrictions on the use of video games that is greater than is essential to the furtherance of that interest. It “sweeps within its ambit” video games that bear no resemblance to gambling.

The Supreme Court of North Carolina’s myopic view of a content analysis (focused not on the content of the video game but the content of the announcement within the video game) is patently inconsistent with this Court’s precedent and this Court’s review is needed to re-establish the proper standard.

CONCLUSION

For the reasons set forth above, Petitioners Sandhill Amusements, Inc., Carolina Industrial Supplies, J&F Amusements, Inc., J&J Vending, Inc., Matthews Vending Co., Patton Brothers, Inc., Trent Brothers Music Co., Inc., S&S Music Co., Inc., Old North State Amusements, Inc. and Uwharrie Fuels, LLC respectfully request that this Court grant their petition for writ of certiorari.

February 4, 2013

Respectfully submitted,

/s/ Kelly Daughtry

Kelly Daughtry

Counsel of Record

DAUGHTRY, WOODARD,

LAWRENCE & STARLING

405 East Market Street

Smithfield, NC 27577

(919) 934-5012

Kellydaughtry@Msn.Com

Counsel for Petitioners