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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2025-_____

Opinion No. 6098 (S.C. Ct. App. filed February 5, 2025)

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1 Dragon's Ascent Video Gaming Machine;
SC Games of Skill, LLC, ... Petitioners,

v.

South Carolina Law Enforcement Division, ... Respondent.

PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR EXPEDITED CONSIDERATION

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 12, 2025.

QUESTION PRESENTED

Did the Court of Appeals err in holding that this Court's plurality opinion in *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), nullified decades of court rulings, administrative decisions, statutes, and Attorney General opinions, ***all*** of which recognize the core principle that "gambling" or "gaming" requires three distinct elements: consideration, ***chance***, and reward?

INTRODUCTION

South Carolina has long recognized a critical distinction between participating in games of skill like golf, tennis, turkey shoots, Dragon's Ascent, etc. and games of chance like slot machines, pull tabs, and video poker. If a game contains three essential elements—payment of consideration, to play a game predominantly based on ***skill***, to win a prize—the game is legal. But if the outcome is predominantly based on ***chance***, the game is illegal. The Court of Appeals' gross misreading of the divided plurality opinion[1] in *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), reduced these three critical elements to only two by erasing the distinction between ***skill*** games and ***chance*** games. The Court of Appeals' decision is contrary to decades of court decisions and legislatively enacted statutes that prohibit "gaming" and "gambling" which is defined as giving consideration to play a game of ***chance*** to win a prize while distinguishing this illegal activity from the legal activity of giving consideration to play a game of ***skill*** to win a prize. Accordingly, this Court should grant certiorari and reverse.

By redefining "gambling" and "gaming," the Court of Appeals has reversed decades of decisions rendered ***before and after*** *Chimento* by courts at ***every*** level of South Carolina's judicial system, has attempted to rewrite numerous South Carolina statutes, and has nullified many Attorney General opinions. Under its new, novel definition, any activity in which a player pays to play to win a prize is now illegal in South Carolina. It matters not whether the activity is playing games of chance like video poker or slot machines—both of which are indisputably illegal—or playing games of skill like Dragon's Ascent or golf in local and professional tournaments—both of which were indisputably legal—that is, before this decision.

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[1] Chief Justice Toal agreed with Justices Hearn and Kittredge that the designation of "a house used as a place of gaming" in S.C. Code Ann. § 16-19-40 was unconstitutionally void for vagueness but nevertheless concurred in the result reached in Justice Pleicones' opinion which Justice Beatty joined.

STATEMENT OF THE CASE

Background

On November 19, 2021, Respondent South Carolina Law Enforcement Division ("SLED") seized a Dragon's Ascent Video Machine from a restaurant and sports bar named LG's By The Creek, located in Berkeley County, South Carolina. (App. 181 (Order of Destruction at 1).) After examining the machine, the magistrate court made a preliminary finding that it was an illegal gambling device under S.C. Code Ann. § 12-21-2710 and ordered its destruction pursuant to S.C. Code Ann. § 12-21-2712. (*Id.*) A post-seizure hearing was conducted on February 4, 2022. (App. 307-517 (Hr'g Tr. 1-211).)

The testimony and evidence at the post-seizure hearing established that Dragon's Ascent is an aim-and-shoot video game in which the player attempts to capture dragons of varying sizes, colors, and point values as they move across a screen. (App. 335-337 (Hr'g Tr. 29:22-31:20); App. 618-620 (Pl. Exs. 7-9); App. 559 (Expert Report of Nick Farley ("Farley Report") at 3).) Game play in Dragon's Ascent occurs according to rules that are established in advance, fully disclosed to the player, and do not change over the course of the game. (App. 577 (Farley Report at 21).) To begin playing, the player[2] inserts currency into a bill acceptor, establishing the credits the player uses to play the game. (App. 343 (Hr'g Tr. 37:15-22).) For example, if the player inserts a ten-dollar bill, the game will show that the player has $10 worth of credits. (App. 559 (Farley Report at 3).) Using a "Shot Cost" button, the player selects a value of between 10¢ and $2 for each shot. (App. 398, 434 (Hr'g Tr. 92:20-23, 128:15-17).) Between each shot, the player can adjust the shot value higher or lower. (App. 398-399, 434 (Hr'g Tr. 92:24-93:3, 128:10-24).) The shot value has no

[2] Players must manually confirm that they are age 18 or older in order to play Dragon's Ascent. (App. 398 (Hr'g Tr. 92:5-7; App. 559 (Farley Report at 3).)

bearing on the number of shots needed to capture a dragon. (App. 577 (Farley Report at 21).) A session of play begins when the player, without any time limit, decides to take the first shot at a dragon. (App. 470 (Hr'g Tr. 164:5-10).)

Game play occurs by the use of a panel on which is located various controls. The player uses a turret controlled by a joystick to aim and a shot button for firing. (App. 577-578 (Farley Report at 3-4).) "Shot Power" is a graphic representation of five small vials, each filled with a different color of fluid. The player uses the level of fluid in each vial to determine the power of a shot when shooting in order to maximize the reward for capturing the targeted dragon. (*Id.*) The dragons are of different sizes, shapes, and most importantly colors. Brock Smith, who designed Dragon's Ascent and who was also recognized as an expert[3] at the post-seizure hearing, testified that a key aspect of success in the game is the player's ability to match the color of his or her turret, which rotates through a repeating cycle of colors, to the color of the targeted dragon. (App. 467 (Hr'g Tr. 166:20-24); *see* App. 561 (Farley Report at 5).) The closer the color match at the moment a shot is accurately fired, the fewer shots will be required to capture the dragon and the greater the reward to the player. (App. 363, 473 (Hr'g Tr. 57:9-11, 167:9-12).) The amount awarded for capturing each dragon is determined according to a formula that is set in advance, involves no algorithms or random number generators, and is fully disclosed on the Help Screen[4] available to the player at all times, including prior to depositing any currency into the bill acceptor. (App. 340 (Hr'g Tr. 34:12-24); App. 577-580 (Farley Report at 21-24).) Finally, the game also features a "Ticket Button" that the player uses to print a redeemable receipt which the player can

[3] Although SLED's primary position was that Dragon's Ascent was primarily a game of chance, SLED did not offer any expert testimony to support it.

[4] The Help Screen provides detailed instructions on how to successfully play Dragon's Ascent. (App. 559 (Farley Report at 3).)

exchange for cash. (App. 560 (Farley Report at 4).)

Magistrate Court's Order

The magistrate court issued its order on August 11, 2022. (App. 183-195 ("Mag. Ct. Order").) The magistrate court reasoned that Dragon's Ascent would be prohibited by § 12-21-2710 if it fell into any of the categories of prohibited devices:

> [(1)] "a machine (vending, slot, or video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value) for the play of poker, blackjack, keno, lotto, bingo, or craps";
>
> [(2)] "[a] machine or device licensed by the State of South Carolina under S.C. Code § 12-21-2720 and used for gambling"; or
>
> [(3)] "[a] device pertaining to games of chance of whatsoever name or kind."

(App. 185-186 (Mag. Ct. Order at 3-4).)[5] The magistrate court easily rejected (1), holding that "[t]he evidence presented in the instant case with respect to the Dragon's Ascent machine does not support a finding that the machine was operated for the play of poker, slot machines, blackjack, keno, lotto, bingo, or craps." (App. 186 (Mag. Ct. Order at 4).)

To analyze legality under (2) and (3), the magistrate court first turned to the critical question of "whether the Dragon's Ascent game . . . is a game of chance or skill in the context of § 12-21-2710" under the "dominant factor" test identified in Justice Burnett's dissent in *Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 112, 508 S.E.2d 575, 583 (1998).[6] (App. 186 (Mag. Ct. Order at 4).) Based on the evidence and expert testimony presented at the post-seizure hearing, the magistrate court concluded that Dragon's Ascent is a game of skill:

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[5] The magistrate court also noted that S.C. Code Ann. § 12-22-1040 prohibits a machine that "simulates a bingo or slot machine" but easily concluded that "Dragon's Ascent does not simulate a bingo or slot machine." (App. 186 (Mag. Ct. Order at 4).)

[6] This test is also referred to as the "skill vs. chance test" or "the predominant factor test."

> [J]ust as with any game of skill, a player may successfully play Dragon's Ascent using keen hand/eye coordination, memorization, and recognition of learned patterns, timing, accuracy in aiming, reflexes and reaction time, manual dexterity, mental aptitude, concentration, and deductive analysis. Based on the evidence presented at the hearing, the Court finds that Dragon's Ascent is a game in which skill predominates over chance.

(App. 190 (Mag. Ct. Order at 8).)[7] Thus, the machine is not illegal under (3).

The magistrate court then considered the legality of Dragon's Ascent under (2), as a machine required to be licensed under S.C. Code Ann. § 12-21-2720 "and used for gambling." (App. 191-194 (Mag. Ct. Order at 9-12).) According to the magistrate court, § 12-21-2710 "logically prevents the owners of machines … for the play of a game based entirely in skill, from being used for gambling." (App. 191 (Mag. Ct. Order at 9).) Therefore, the magistrate court reasoned, "the key issue" is "whether any machine required to be licensed pursuant to § 12-21-2720 ***is used for gambling***." (App. 191-192 (Mag. Ct. Order at 9-10 (emphasis in original)).)

In answering this question, the magistrate court completely disregarded established precedent and looked to *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012). The magistrate court acknowledged that *Chimento* "interpreted South Carolina's 'statutory' definition of gambling ***in the context of*** S.C. Code Ann. § 16-19-40," but nevertheless relied upon *Chimento* for the proposition that in ***all*** circumstances, not just under the limited circumstances of § 16-19-40, "gambling/gaming depends not on the skill/chance ratio, but rather on the wager." (App. 192 (Mag. Ct. Order at 10 (emphasis added)).) Based upon this novel "wagering" test, the magistrate court held that despite being a game of skill, Dragon's Ascent violates § 12-21-2710

[7] The court appended to this analysis a lengthy footnote noting "that Dragon's Ascent is a game played predominantly in establishments that serve alcohol" and comparing "the successful play of Dragon's Ascent to the successful completion of standardized field sobriety tests in the DUI context." (App. 190 (Mag. Ct. Order at 8 n.3).) Whether this observation and comparison impacted the magistrate court's ultimate decision is unknown, but what is clear is that it was not based on any evidence presented during the post-seizure hearing.

because a player wagers to win money, "and . . . the amount of money the player stands to win directly correlates to the amount wagered." (App. 193 (Mag. Ct. Order at 11).)[8] Based on this reasoning, the magistrate court concluded:

> [A]lthough Dragon's Ascent ***is a game in which skill predominates***, a person "gambles" when money is ***wagered*** in so playing. To hold otherwise would effectively legalize wagering and payouts for all games of skill, including ***golf, basketball, and the like***.

(App. 194 (Mag. Ct. Order at 12) (emphasis added).)[9] The magistrate court therefore held Dragon's Ascent illegal under § 12-21-2710.

Reversal by Circuit Court

Petitioners timely appealed the magistrate court's order. (App. 215-216 (Notice of Appeal).) After the parties filed their respective briefs, the circuit court heard oral argument on December 12, 2022. (App. 518-545 (Tr. of Oral Arg.).) The circuit court subsequently entered a written order reversing the decision of the magistrate court. (App. 196-211 (Cir. Ct. Order).)

The circuit court began its analysis by "agree[ing] with, and adopt[ing] in full, the magistrate court's determination that Dragon's Ascent is a game of skill." (App. 201 (Cir. Ct. Order at 6).) The circuit court noted that although SLED devoted "a substantial portion of its Respondent's Brief to its argument that Dragon's Ascent is not a game of skill," that issue was not before the court "[b]ecause SLED did not file a notice of cross-appeal" and thus could not

[8] There is nothing nefarious or hidden about this fact. As Mr. Farley explained in his expert report, the amount awarded for capturing a dragon is determined by a set formula: "(Color Match Value * Shot Cost) = Actual Reward." (App. 577 (Farley Report at 21).) The "Color Match Value" is also determined by a set formula. (App. 563 (Farley Report at 7).)

[9] In a brief paragraph, the magistrate court also found the Dragon's Ascent machine illegal under S.C. Code Ann. § 16-19-50, which prohibits ***a person*** from setting up, keeping, or using "[a] machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes." (App. 194 (Mag. Ct. Order at 12).) In addition to this finding being incorrect as a matter of law, Section 16-19-50 is not relevant to this *in rem* proceeding.

challenge the finding. (*Id.*) The circuit court cited *Buckner v. Preferred Mutual Insurance Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970), for the proposition that an unappealed ruling, "right or wrong, is the law of this case and requires affirmance." (App. 201 (Cir. Ct. Order at 6).)

The circuit court further stated that "[e]ven if SLED had filed a notice of cross-appeal, it would make no difference because the magistrate court's finding that Dragon's Ascent is a game of skill is manifestly correct and is fully supported by the testimony of experts and evidence presented at the post-seizure hearing." (*Id.*) After carefully and thoroughly reviewing the testimony and evidence presented during the post-seizure hearing, the circuit court concluded that "this Court fully agrees with and therefore affirms the magistrate court's finding that Dragon's Ascent is a game of skill." (App. 204 (Cir. Ct. Order at 9).) The circuit court thus affirmed this portion of the magistrate court's order.

The circuit court next turned to the magistrate court's holding that despite being a game of skill, Dragon's Ascent was nevertheless illegal under the novel "wagering" test advocated by SLED. (App. 205-209 (Cir. Ct. Order at 10-14).) The circuit court held that the magistrate court erroneously "interpreted *Chimento* as abandoning the longstanding 'skill vs. chance' test applicable under § 12-21-2710 and adopting a novel 'wagering' test, under which any consideration paid to participate in any game constitutes illegal gambling, regardless of the degree of skill involved." (App. 196-197 (Cir. Ct. Order at 1-2).)

The circuit court carefully considered, and rejected, each of SLED's arguments in support of affirmance. (App. 205-209 (Cir. Ct. Order at 10-14).) The circuit court concluded that the magistrate court erred in reading *Chimento* as creating a novel "wagering" test under which even games of skill are illegal and, accordingly, reversed the magistrate court's holding that Dragon's Ascent is illegal despite being a game of skill. (App. 209 (Cir. Ct. Order at 14).)

SLED filed a motion to alter or amend the circuit court's ruling on March 9, 2023, which

was denied on April 3, 2023. (App. 290-304 (Motion); App. 212-214 (Order).) SLED received notice of the denial the same day. (App. 305-306 (Notice of Appeal).) SLED timely served its Notice of Appeal on May 2, 2023, and filed the notice on May 11, 2023. (*Id.*)

Reversal by Court of Appeals

The Court of Appeals issued its decision reversing the circuit court on February 5, 2025. (App. 1-10.) It began by noting that it is undisputed that Dragon's Ascent is a game of skill. (App. 4 (Opinion at 4).) The Court then considered whether it was illegal under § 12-21-2710 because it was "used for gambling." (App. 5 (Opinion at 5).) Noting that § 12-21-2710 does not define "gambling," the Court "readily acknowledge[d] that most previous cases evaluating potential gambling devices focused on whether particular games were games of chance." (*Id.*) Nevertheless, based on "our legislature's longstanding prohibition against gambling," the Court concluded that § 12-21-2710 "includes in its prohibition any licensed device used for gambling." (App. 6-7 (Opinion at 6-7).) To find the definition of "gambling," the Court looked to the *Chimento* plurality opinion, concluding that it ***redefined*** "gambling" or "gaming" as any game "when something of value is wagered on the outcome." (App. 7 (Opinion at 7).) On the basis of this new definition, the Court held that playing Dragon's Ascent, despite being a game of skill, is illegal under § 12-21-2710 because under this new, novel definition it is "used for gaming." (App. 9 (Opinion at 9).)

Petitioners timely filed a Petition for Rehearing on February 19, 2025. Upon a request from the Court of Appeals (App. 24-25), SLED filed a Return to the Petition for Rehearing on March 3, 2025. (App. 26-30.) Petitioners filed a Reply in support of rehearing on March 10, 2025. (App. 33-37.) The Court of Appeals denied rehearing on March 12, 2025. (App. 38-39.)

SUMMARY OF ARGUMENT

This Court should grant certiorari because the Court of Appeals' decision erroneously relies on a novel wagering pay-to-play test derived from this Court's plurality opinion in *Chimento*, which involved a criminal conviction under S.C. Code Ann. § 16-19-40 and which did not cite § 12-21-2710. *See* Rule 242(b)(3), SCACR. Although *Chimento* is clearly limited to the context of § 16-19-40, the Court of Appeals interpreted that divided plurality opinion to accomplish a result that effectively rewrites § 12-21-2710 and nullifies decades of court rulings, administrative decisions, statutes, and Attorney General opinions, ***all*** of which recognize that "gaming" or "gambling" requires three distinct elements: consideration, ***chance***, and reward.

Certiorari is also appropriate because this is a matter of significant public interest and importance. The "dominant factor" skill vs. chance test has long been recognized and applied in South Carolina, including in at least one decision by this Court,[10] and is codified in multiple South Carolina statutes. Moreover, it is the test applied by the great majority of our sister states. *See In re Request of Governor for Advisory Opinion*, 12 A.3d 1104, 1112 (Del. 2009) (recognizing "that a majority of jurisdictions in the United States apply the dominant factor rule" to define what is "gaming" or "gambling"); *In re Advisory Opinion to Governor*, 856 A.2d 320, 328 (R.I. 2004) ("The majority of jurisdictions adhere to the 'dominant factor' doctrine."); *Opinion of the Justices*, 795 So. 2d 630, 635 (Ala. 2001) (same; citing numerous cases adopting the "dominant factor" or "American" rule).[11] However, although universally recognized and applied by South Carolina

[10] *See Richland County Sheriff's Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam), discussed *infra*.

[11] Although these decisions are not binding, this Court has previously considered sister states' decisions in deciding questions of South Carolina law. *See, e.g.*, *State v. German*, 439 S.C. 449, 467–68, 887 S.E.2d 912, 921 (2023); *Matter of Kern*, 423 S.C. 567, 572, 816 S.E.2d 574, 577 (2018); *Braten Apparel Corp. v. Bankers Tr. Co.*, 273 S.C. 663, 667–68, 259 S.E.2d 110, 113 (1979).

courts, the Attorney General, and SLED, this Court has never issued a published opinion stating that South Carolina recognizes the dominant factor test. Although this Court in *Chimento* did not purport to decide this question, the Court of Appeals interpreted *Chimento* as rejecting any consideration of skill or chance in determining whether an activity is "gaming" or "gambling," such that ***any*** contest where participants pay consideration to play and compete for a prize is illegal, including, for example, a multitude of activities like golf tournaments that are indisputably determined predominantly by the players' skill.

ARGUMENT

I. *Chimento* Is Limited to S.C. Code Ann. § 16-19-40

No question of a machine's legality under § 12-21-2710 was presented in *Chimento*. Rather, the appellants in *Chimento* challenged their convictions for violating S.C. Code Ann. § 16-19-40 by playing "cards" in a "house used as a place of gaming." In a divided plurality opinion, this Court reversed the circuit court order setting aside their convictions. Tracing the history of § 16-19-40, the Court concluded that § 16-19-40 applied to the playing of certain ***specified, enumerated games*** (such as cards, dice, any roley-poley table, rouge et noir, or faro bank) in certain ***specified, enumerated locations*** (such as a kitchen, a barn, stable, open space, or a house used as a place of gaming), regardless of whether the games were games of chance or skill. *See id.* at 531, 737 S.E.2d at 836.

The *Chimento* plurality repeatedly made clear that it was construing "gambling" or "gaming" within the specific context of § 16-19-40. *See Chimento*, 401 S.C. at 531, 737 S.E.2d at 836 ("The circuit court . . . [held] that 'gaming' ***as used in § 16-19-40*** applies only to betting on games of chance[.]" (emphasis added)); *id.* at 532, 737 S.E.2d at 837 (describing issue as "whether . . . betting on a card game . . . is unlawful gaming" and citing, *inter alia*, § 16-19-40); *id.* ("Under the

plain language ***of § 16–19–40***, gambling on a game of skill is a violation if that gambling is being done ***in a prohibited location***." (emphasis added)); *id.* ("A violation ***of the gaming prohibition of § 16–19–40*** does not depend on whether the particular game involves more skill than chance." (emphasis added)); *id.* at 533, 737 S.E.2d at 837 ("[T]here is precedent that indicates ***§ 16–19–40 is concerned with wagering*** regardless of the skill involved in the game wagered upon." (emphasis added)); *id.* ("We hold that one 'games' ***within the meaning of § 16-19-40*** when money is wagered on Texas Hold'em, even though it is a game in which skill predominates." (emphasis added)).

In extending *Chimento* to the context of § 12-21-2710, the Court of Appeals noted that "section 16-19-40 similarly [to § 12-21-2710] criminalizes playing 'any machine or device . . . used for gambling purposes.'" (App. 8 (Opinion at 8).) This is immaterial, however, because the "any machine or device" language was not at issue in *Chimento*. The primary question presented in *Chimento* was whether a person's residence was a "house used as a place of gaming" under S.C. Code Ann. § 16-19-40 and thus a specifically identified prohibited location when used for the playing of a game of cards. *See Chimento*, 401 S.C. at 527, 737 S.E.2d at 832. In affirming the defendants' convictions, this Court held that it is the enumerated "prohibited location," not the character of the game being played, that determines illegality under § 16-19-40. *Chimento*, 401 S.C. at 532, 737 S.E.2d at 837. The *Chimento* plurality made no reference whatsoever to the fact that both § 16-19-40 and § 12-21-2710 contain the phrase "any machine or device licensed . . . and used for gambling." In fact, the *Chimento* plurality referenced the "any machine or device" language in § 16-19-40 only in quoting the statute as a whole, and it ***did not even cite § 12-21-2710***. In short, there is nothing at all in *Chimento* to support any kind of connection between the meaning of "gaming" in "a house used as a place of gaming" and the meaning of "machine or device . . . used for gambling."

Moreover, it was wrong for the Court of Appeals to accord such a broad, sweeping

reading to what was a mere plurality opinion. As previously noted, the opinion authored by Justice Pleicones, joined by Justice Beatty, was not fully embraced by Chief Justice Toal, who clearly stated in her separate writing that she joined "the majority in result only." *Chimento*, 401 S.C. at 538, 737 S.E.2d at 840. Indeed, she criticized § 16-19-40 as "hopelessly outdated, as it applies to *any* gaming activity (including *all* card games) played in a residential house whether wagering occurs or not." *Id.* at 538, 737 S.E.2d at 840 (emphasis in original). She stated that she "agree[d] wholeheartedly with the constitutional analysis contained in the excellently researched and beautifully written dissenting opinion" that § 16-19-40 is unconstitutionally void for vagueness because it delegates too much discretion to law enforcement to decide whether the statute has been violated. *Id.* at 536, 737 S.E.2d at 839; *see id.* at 547-52, 737 S.E.2d at 845-847 (Hearn, J., dissenting). In her view, it was only because of "the unique circumstances of this case" that she did not join Justice Hearn's writing.

Nevertheless, the Court of Appeals treated this plurality opinion as though it were a true majority decision and applied it broadly to a completely different factual scenario. This is the exact opposite of what the law requires when plurality opinions are used as precedent. *See, e.g.*, *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 479, 892 S.E.2d 121, 129 (2023) (noting stare decisis is of limited value in part where the precedent originates from a fragmented decision); *McLeod v. Starnes*, 396 S.C. 647, 654-55, 723 S.E.2d 198, 203 (2012) ("[S]tare decisis is far more a respect for a body of decisions as opposed to a single case standing alone."); *Langley v. Boyter*, 284 S.C. 162, 180, 325 S.E.2d 550, 560 (Ct. App. 1984), quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985) ("The doctrine of stare decisis says that where a principle of law has become settled by a ***series*** of court decisions, it should be followed in similar cases.") (emphasis added); *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 525, 506 S.E.2d 497, 509 (1998) ("First, *Dun & Bradstreet* was supported by a slim plurality of the Court; as such, its future viability is questionable.") (Toal,

J., concurring).[12]

In *Chimento*, Chief Justice Toal wrote that she concurred in the result reached by the plurality because "we cannot sever the language, 'a house used as a place of gaming,' from section 16-19-40 without striking the provision in its entirety," which she feared would "open the door wide to *all* heretofore illegal gaming practices in this state, ***including video poker***." *Id.* at 537, 737 S.E.2d at 839-40 (Toal, C.J., concurring) (second emphasis added). However, Justice Hearn explained why this concern was misplaced:

> The prohibition of video poker is found in Section 12–21–2710 of the South Carolina Code (2000). This is a ***completely separate section (and title) of the code*** and makes no reference at all to section 16–19–40. In fact, ***it is entirely independent and separate from the general gambling prohibitions involved here***. Striking section 16–19–40 in whole or in part would have no impact on section 12-21–2710.

Id. at 552, 737 S.E.2d at 848 (Hearn, J., dissenting) (emphasis added). Notably, the plurality opinion did not challenge Justice Hearn on this important point. Indeed, § 12-21-2710 is not even cited in the plurality opinion.

The Court of Appeals cited *State v. Red*, 41 S.C.L. (7 Rich.) 8 (1853), in an attempt to support its conclusion that, post-*Chimento*, an activity is gambling even when skill determines the outcome. (App. 8 (Opinion at 8).) In *Red*, the defendant had been convicted of operating a bank for the play of a shell game called "Thimbles and Balls."[13] The defendant argued that the game

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[12] This Court has also relied on federal authority holding that when there is "no single rationale explaining the result" of a fragmented court, the court's holding is the position "by those Members who concurred in the judgments on the narrowest grounds." *State v. Key*, 431 S.C. 336, 345 n.2, 848 S.E.2d 315, 319 n.2 (2020) (citing federal cases) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)); *State v. Harrison*, 402 S.C. 288, 298, 741 S.E.2d 727, 732 (2013) (quoting *Hawkins v. Hargett*, 200 F.3d 1279, 1282 n.1 (10th Cir. 1999)).

[13] *See Shell Game*, WIKIPEDIA, https://en.wikipedia.org/wiki/Shell_game ("The shell game (also known as thimblerig, three shells and a pea, the old army game) is a public gambling game that challenges players to follow the movement of a marker hidden under one of several covers

was actually "an exhibition of his dexterity," and therefore was not illegal. *Id.* at 10. The court rejected this argument:

> If the prohibited games be confined to those alone in which the stake is won or lost by chance, the result would follow, that the gambler who relied on the practiced legerdemain of a juggler, ***whilst he professed that the stake depended on fortune***, will escape punishment by ***playing falsely.***

Id. (emphasis added). In other words, the court's concern was that the game was actually a fraud: the defendant falsely ***claimed*** that the outcome was determined by chance, when in reality he used skilled sleight of hand to ensure that the unsuspecting player/victim would guess wrong most of the time. The holding in *Red* thus stands for the common sense proposition that skillful cheating based on false pretenses is still cheating and thus unlawful.

The Court of Appeals further noted that the *Chimento* plurality cited S.C. Code Ann. § 32-1-10 and *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993), as suggesting that the "statutory meaning of the word 'gambling' in South Carolina includes games in which skill outweighs chance." *Chimento*, 401 S.C. at 533, 737 S.E.2d at 837. Such a suggestion is totally misplaced. *Berkebile* construed § 32-1-10, a remedial statute that allowed for recovery of gambling losses, as applying to video poker losses even though video poker was then legal. *Berkebile*, 311 S.C. at 55, 426 S.E.2d at 763. The issue of legality in *Berkebile* did not involve a skill vs. chance analysis because at that time ***all*** video gambling devices, including games of chance, were legal.

II. The Court of Appeals' Ruling Violates Rules of Statutory Construction and Leads to Unintended Consequences

The Court of Appeals sought to support its misinterpretation of *Chimento* by incorrectly maintaining that abandonment of the skill vs. chance analysis is necessary as a matter of statutory

(shells). In practice, the game is almost always run as a confidence trick that uses sleight of hand to transfer the marker between covers.") (last visited April 1, 2025).

construction, stating that "[i]f the legal definition of 'gambling' under [§ 12-21-2710] is limited to games of chance, there would be no conceivable reason for the clause prohibiting licensed machines used for gambling." (App. 6 (Opinion at 6).) The Court of Appeals also stated that its ruling merely "recogniz[ed] the common-sense fact that a game of chance *and* a game of skill can both be 'used for gambling.'" (App. 9 (Opinion at 9 (emphasis in original)).) However, the rule adopted by the Court of Appeals is not necessary to give content to the statutory prohibition on devices "used for gambling." Moreover, the Court of Appeals' erroneous interpretation of "used for gambling" makes the remainder of § 12-21-2710 superfluous, in violation of settled rules of statutory construction. *See USAA Casualty Ins. Co. v. Rafferty*, 439 S.C. 130, 136, 886 S.E.2d 222, 225 (2023) (stating rule).

First, abandonment of the long-recognized rule that games of skill are not illegal under § 12-21-2710 is not necessary to give meaning to the separate prohibition of devices "used for gambling." For example, many machines licensed under § 12-21-2720 may be games of chance, but they are allowed because they are played only for amusement. But if the owner of such a machine began making cash payouts based on players' scores, the machine would be "used for gambling" and thus illegal.[14] Alternatively, a skill-based game would be "used for gambling" if ***non-players*** bet on the outcome. *See* Op. Atty. Gen., 2002 WL 31341812, at *3 (S.C.A.G. Aug. 28,

[14] The South Carolina Department of Revenue has relied on exactly this reasoning. *See* S.C. Revenue Ruling No. 16-3, 2016 WL 8794170, at *2 n.1 (S.C. Dept. Rev. May 5, 2016) (recognizing that an electronic tablet used for ordering and paying at a restaurant, which also offered "applications, puzzles, cartoons, videos, and/or games" for patrons' amusement, could be "used for gambling" in violation of § 12-21-2710); *see also State v. 26 Gaming Machines*, 145 S.W.3d 368, 374–75 (Ark. 2004) ("In short, these countertop machines are more akin to video arcade machines intended for amusement, because a player inserts money and can play gambling-like games but never receives anything in return except amusement. We agree with the circuit court that these machines are not actually used for gaming due to the absence of any payoff mechanism or reward.").

2002) ("Of course, placing a wager on the outcome of any skill-based activity is illegal (i.e. betting on the outcome of a sporting event).").[15] Both of these scenarios give content to the phrase "used for gambling" in § 12-21-2710 without requiring the Court of Appeals' overly broad and incorrect reading of *Chimento*.

Second, the Court of Appeals' interpretation of "used for gambling" makes § 12-21-2710's prohibition of games of chance, as well as its enumeration of specific prohibited games, superfluous. The Court of Appeals held that a game is "used for gambling" whenever there is consideration (pay to play) and reward (a prize), ***regardless*** of whether skill or chance predominates in determining the outcome. Under this incorrect reading of the statute, the separate prohibitions on games of chance and specifically listed games no longer serve any purpose. Thus, the Court of Appeals' ruling creates the very problem—superfluous statutory language—it purports to avoid.

The Court of Appeals "hasten[ed] to add that we do not read *Chimento* as abolishing the skill versus chance analysis." (App. 9 (Opinion at 9).) However, that is the actual effect of the Court of Appeals' ruling. The Court of Appeals construed *Chimento* as holding that whether participating in an activity is "gaming" or "gambling" turns solely on "whether there is money or something of value wagered on the game's outcome," even if the result is determined predominantly, or even entirely, by the skill of the player. (App. 8 (Opinion at 8 (emphasis omitted).) Under this reasoning, a skill-based game is legal only ***so long as no one plays it***. But, according to the Court of Appeals, the moment someone inserts money into the machine and begins playing for a prize, the machine becomes illegal because it is being "used for gambling."

[15] *Cf. Midwestern Enters., Inc. v. Stenehjem*, 625 N.W.2d 234, 240 (N.D. 2001) (phone-card vending machine was "used for gambling" because it dispensed a chance to win $500 along with each phone card purchased).

An interpretation of § 12-21-2710 that leads to such an obviously absurd result must be rejected. *See State v. Taylor*, 436 S.C. 28, 34, 870 S.E.2d 168, 171 (2022) (holding that courts "must reject a statutory interpretation if it leads to an absurd result that could not possibly have been intended by the legislature").

Moreover, the Court's interpretation of *Chimento* as defining gambling for all purposes as including "games of skill when something of value is wagered on the outcome" has potentially far-reaching consequences. Based on the Court's reasoning, all skill-based contests that require a pay-to-play entry fee and offer something of value to the winner are illegal, including events such as the following, just to name a few:

- Golf tournaments:
  - Local golf tournaments, such as that conducted by the Berkeley County Country Club, *see* https://www.berkeleycc.com/25-uncategorized/40-invitational-3;
  - The Heritage Classic Golf Tournament, *see* https://www.heritageclassicfoundation.com/;
- Auto racing:
  - The Southern 500, *see* https://www.darlingtonraceway.com/events/2022-fall-nascar-race/;
- Skill-based promotional games:
  - A "Chuck-A-Puck" promotion for the South Carolina Stingray Hockey Team, *see Op. S.C. Atty. Gen.*, 2006 WL 3522434, at *4 (S.C.A.G. Nov. 1, 2006) ("The object of the 'Chuck-A-Puck' promotion . . . is to come as near as possible to a target. As a general proposition, such a contest—whether it be golf or horseshoes—involves skill, based upon strength, agility or practice.");
  - A "closest to the pin" contest promoting local golf courses, *see Op. S.C. Atty. Gen.*, 2011 WL 3918174, at *1 (S.C.A.G. Aug. 17, 2011) (stating that a golf promotion with $5.00 entry fee, where the player who landed a golf ball closest to the pin would win up to $10,000 "is not violative of South Carolina's gambling laws" because the outcome was determined by skill);
- Other skill-based contests:
  - Dart tournaments like the Blue Ridge Open, *see* https://darthub.net/event/the-blue-ridge-open;

- Billfishing tournaments like the Governor's Cup Series, *see* https://govcup.dnr.sc.gov/Schedule/;
- Drag racing events like the ET Bracket Series, *see* https://www.southcarolinamotorplex.com/ihrapoints;
- Turkey shoots, *see, e.g.* https://www.americanlegionpost48chesnee.com/TurkeyShoot/FallTurkeyShoot/Fall_Turkey_Shoot.html;
- Chess tournaments like the Carolina Senior Championship, *see* https://new.uschess.org/2025-south-carolina-senior-championship-1;
- Bowling tournaments, *see, e.g.* https://www.myrtlebeachbowl.com/TOURNAMENTS;
- Pickleball tournaments, *see, e.g.* https://southernpickleball.com/tournaments/25clay; and
- Esports tournaments, *see, e.g.* https://www.start.gg/tournament/boost-on-the-beach-2025/details.

In fact, other courts have pointed to such consequences as grounds for rejecting the rule adopted by the Court of Appeals. *See Arizona v. American Holiday Ass'n, Inc.*, 727 P.2d 807, 809 (Ariz. 1986) ("If the combination of entry fee and prize equals gambling, then golf tournaments, bridge tournaments, local and state rodeos or fair contests, and even literary or essay competitions are all illegal gambling operations[.]"); *Faircloth v. Central Fla. Fair, Inc.*, 202 So. 2d 608, 609 (Fla. Dist. Ct. App. 1967) (rejecting argument that paying to play a game of skill is "gambling," reasoning, "To adopt defendant's construction we would have to find all contests of skill or ability in which there is an entry fee and prizes to be gambling. The list could be endless: golf tournaments, dog shows, beauty contests, automobile racing, musical competition, and essay contests, to name a few. ***No one seriously considers such activities to be gambling***." (emphasis added)); *Hawai'i v. Prevo*, 361 P.2d 1044, 1049 (Haw. 1961) ("Defendant argues . . . that if the element of skill or chance is of no moment in determining whether a game [is gambling] . . . every golf tournament, bowling tournament, pistol match, stock car race, track meet, swimming meet, football game, and a host of other activities, in which a prize or trophy or something of value is awarded to the participants, would also be . . . forbidden by our gambling statute. We agree with

the defendant that such patent absurdity was clearly not intended by our legislature.").

In opposing the Petition for Rehearing, SLED contended that because this case only involves the legality of a machine under § 12-21-2710, the Court of Appeals' reasoning would not apply outside of that context. (App. 29 (Return at 4).) This contention ignores that the only question in *Chimento* was whether a residence was a "house used as a place of gaming" under S.C. Code Ann. § 16-19-40, not whether a machine or device was "used for gambling" under § 12-21-2710. Thus, the Court of Appeals reached its decision in this case by applying *Chimento* outside of its context, holding that *Chimento* redefined "gambling in South Carolina" to mean "betting money on the outcome of any 'game' whatsoever," even if the player's skill is the predominant factor in determining the outcome. (App. 8 (Opinion at 8 (emphasis omitted).)) There is no rational way to limit the Court of Appeals' reasoning solely to the context of § 12-21-2710.

III. The Dominant Factor Test Is Widely Recognized and Applied in South Carolina

That *Chimento* does not impact the application of § 12-21-2710 is supported by this Court's ruling in *Richland County Sheriff's Department v. Awde*, No. 2014-MO-024, 2014 WL 3016205 (S.C. July 2, 2014) (per curiam), decided by the ***same*** five Justices who decided *Chimento* two years earlier. Although admittedly an unpublished decision not normally to be cited as precedent, *Awde* is worthy of mention here because it unanimously affirmed a magistrate court's "finding that two 'Chess Challenge II' devices before it were legal games of skill." *Id.* The parties' briefs raised arguments concerning, *inter alia*, the "used for gambling" prong of § 12-21-2710.[16] Additionally, the Attorney General submitted a letter of supplemental authorities specifically reminding the Court of its decision in *Chimento*. It stands to reason that if this Court had intended for *Chimento*

[16] The briefs and other case materials are available through C-Track Public Access link on the main page of the website for the South Carolina Judicial Branch, https://www.sccourts.org/.

to apply when determining the legality of a machine under § 12-21-2710, it would not have issued an affirmance in *Awde*. The fact that the Court affirmed confirms that the Court of Appeals erred in ruling that *Chimento* applies to the analysis of whether a game is legal under § 12-21-2710. Notably, the Court of Appeals' decision did ***not*** mention *Awde* or explain how its decision comported with that ruling.

Importantly, the General Assembly has enacted multiple South Carolina statutes explicitly defining "gambling" using only the word ***chance***. *See* S.C. Code Ann. § 3-11-100(2) (defining "Gambling" and "gambling device" to mean "any game of ***chance***"); S.C. Code Ann. § 12-21-3920(1) (defining "bingo" or "game" as "a specific game of ***chance***"); S.C. Code Ann. § 12-21-4130 (authorizing seizure of bingo cards that have been altered so that they are ***not*** games of ***chance***); S.C. Code Ann. § 37-21-20(5)(a) (defining "prize promotion" as "a sweepstakes or other game of ***chance***"); S.C. Code Ann. § 52-1-20 ("No carnival to which games of ***chance*** or gambling devices are attached shall exhibit in this State."); S.C. Code Ann. § 59-150-20(7) ("'lottery', 'lotteries', 'lottery game', or 'lottery games' means a game of ***chance***…."). The General Assembly has thus repeatedly defined "gambling" as a game involving chance. This necessarily means that when chance does not determine the outcome—*i.e.*, when skill predominates—an activity is not "gambling" or "gaming."

The Court of Appeals also failed to address the fact that the Attorney General,[17] as well as courts at ***every*** level of South Carolina's court system,[18] have ***all*** consistently applied ***the***

[17] *See* Op. S.C. Atty. Gen., 2017 WL 4707542 (S.C.A.G. Oct. 11, 2017) (stating that "South Carolina gambling laws" prohibit "games of chance").

[18] *See* **Administrative Law Court**: *S.C. Dep't of Revenue v. Chestnut*, 2021 WL 4822858, at *6 (S.C. Admin. Law Ct. Oct. 8, 2021) (stating that "games of chance [are] prohibited by [S.C. Code Ann.] § 12-21-2710"); **Court of Common Pleas**: *Smith v. S.C. Law Enf't Div.*, 2013 WL 8477943, at *2 (S.C. Ct. Com. Pl., Anderson Cty., Nov. 6, 2013) ("[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance[.]" (internal quotation marks

dominant factor skill vs. chance test to determine the legality of a video game like Dragon's Ascent, not only before but ***after*** *Chimento* was decided in 2012. Simply put, *Chimento* has ***never*** been cited for the proposition that ***all*** video games that involve consideration and a potential prize or reward are illegal, even if the outcome is determined by the player's skill. Rather, South Carolina courts at ***every*** level have ***only*** cited *Chimento* for the entirely unrelated subject of standards for constitutional challenges to statutes.[19] Notably, one of these cases involved a determination of whether a video machine was legal under § 12-21-2710, which the circuit court decided under ***the dominant factor test*** and ***did not*** hold that the machine was illegal under *Chimento* simply because it involved payment of consideration. *See Smith v. S.C. Law Enf't Div.*, 2013 WL 8477943, at *2-3 (S.C. Ct. Com. Pl., Anderson Cty., Nov. 6, 2013) (finding game illegal under § 12-21-2710 as a device "pertaining to games of chance").

IV. The *Chimento* Plurality Did Not Overrule Decisions Applying the Dominant Factor Test to Determine Legality Under § 12-21-2710

The Court of Appeals recognized (App. 9 (Opinion at 9)) that its prior decision in *South Carolina Law Enforcement Division v. 1-Speedmaster S/N 00218* held that if skill predominates over

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omitted)); **Court of Appeals**: *S.C. Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 658, 790 S.E.2d 792, 802 (Ct. App. 2016) ("[T]he Department showed the Products Direct and Gift Surplus machines contained games of chance in violation of section 12–21–2710[.]"); **Supreme Court**: *Richland Cty. Sheriff's Dep't v. Awde*, No. 2014-MO-024, 2014 WL 3016205, at *1 (S.C. July 2, 2014) (affirming magistrate court's finding "that two 'Chess Challenge II' devices before it were legal games of skill").

[19] **Supreme Court:** *S.C. Human Affairs Comm'n v. Zeyi Chen*, 430 S.C. 509, 531, 846 S.E.2d 861, 872 (2020) (vagueness); *State v. Legg*, 416 S.C. 9, 14 n.4, 785 S.E.2d 369, 371 n.4 (2016) (facial challenge); *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506–07, 757 S.E.2d 388, 392–93 (2014) (facial challenge). **Court of Appeals:** *Rutter v. City of Columbia Design/Dev. Rev. Comm'n*, 2021 WL 2701549, at *3 (S.C. Ct. App. June 30, 2021) (vagueness). **Circuit Courts:** *Retail Servs. & Sys., Inc. v. S.C. Dep't of Rev.*, 2014 WL 12692755, at *2 (S.C. Ct. Com. Pl., Aiken Cty., May 29, 2014) (as-applied challenge); *Smith v. S.C. Law Enf't Div.*, 2013 WL 8477943, at *11 (S.C. Ct. Com. Pl., Anderson Cty., Nov. 6, 2013) (citing vagueness). **Administrative Law Courts:** *Hyndman v. Charleston Cty. Assessor*, 2013 WL 1786476, at *3 (S.C. Admin. Law Ct. Apr. 18, 2013) (as-applied challenge).

chance, no further inquiry is necessary to determine the legality of the machine under § 12-21-2710. *See* 397 S.C. 94, 99-100, 723 S.E.2d 809, 812 (Ct. App. 2011). *Speedmaster* clearly held that "the term gambling" as used in § 12-21-2710 "***necessarily*** encompasses the element of chance." *Id.* (emphasis added). Because the Speedmaster game was predominantly one of skill, "we conclude the circuit court properly affirmed the magistrate's ruling ***the Speedmaster was not 'used for gambling***.'" *Id.* at 100, 723 S.E.2d at 812 (quoting § 12-21-2710; emphasis added).

The Court of Appeals declined to follow its ruling in *Speedmaster* on the basis that *Chimento* was decided later, even though *Chimento* did not explicitly overrule *Speedmaster* or address legality of a machine under § 12-21-2710. (App. 9 (Opinion at 9).) When this Court overrules precedent, it clearly states that it is doing so. *See, e.g.*, *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 564, 861 S.E.2d 774, 775 (2021) ("We overrule precedent that requires the pleading of special damages and return to the traditional definition of civil conspiracy in this state."); *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 320, 778 S.E.2d 888, 890 (2015) ("We find our Legislature has enacted specific gambling loss statutes as the exclusive remedy for a gambler seeking recovery of losses sustained by illegal gambling. Accordingly, we now overrule our decisions that have implicitly authorized recovery beyond these statutes."); *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 477, 527 S.E.2d 763, 765 (2000) (stating "we overrule our cases which apply the traditional approach" and listing specific cases in a footnote); *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196–97, 525 S.E.2d 872, 883 (2000) ("We overrule *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932), to the extent it permits the destruction of allegedly illegal property without any opportunity for the owner to contest the magistrate's determination of illegality."). *Chimento* did not state or even imply that it was overruling *Speedmaster* or any other case applying the skill vs. chance test. Moreover, the same five Justices ***applied*** the skill vs. chance test a mere two years later in deciding *Awde*.

V. Expedited Consideration Is Warranted Because the Court of Appeals' Decision Drastically Alters the Landscape of Gaming Law in South Carolina and Creates Uncertainty in a Multitude of Sporting, Community, and Charitable Events

The Court of Appeals' decision is a sea-change in gaming jurisprudence in this State and has left great confusion in its wake. A panoply of different events that have existed for decades—sporting, community, and charitable—are now illegal or certainly can be perceived to be illegal. One of the most important functions of a court system is to foster certainty and predictability in the law so that ordinary citizens will know how to conduct their daily business. However, the Court of Appeals' decision does precisely the opposite: it produces chaos rather than certainty. In addition, in improperly relying on a plurality opinion of this Court, the Court of Appeals jettisoned years of jurisprudence, ignored procedural norms, and has placed South Carolina in a clear minority of our sister states on this issue. Because of the significant number of business and other entities that may suffer until this confusion is resolved, this matter should be expedited.

CONCLUSION

The dominant factor skill vs. chance test has historically been recognized and applied in South Carolina and is reflected in numerous statutes and court decisions. By erroneously extending the narrow plurality opinion in *Chimento* to the context of § 12-21-2710, the Court of Appeals effectively eliminated the second element—skill or chance—from the established law. Instead of consideration, chance, and reward, it is now just consideration and reward. But there is nothing whatsoever in *Chimento*—which was expressly limited in application to specific games being played in specific places, all specifically enumerated in § 16-19-40—to suggest such a sweeping change in the law. Moreover, the Court of Appeals' application of *Chimento* to § 12-21-2710 violates rules of statutory construction. Finally, it completely ignores the longstanding precept that plurality opinions should be read to support only their narrowest ground. This Court should grant certiorari, order an expedited schedule, and reverse the Court of Appeals.

Respectfully submitted,

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