Received 4/3/2018 4:47:32 PM Supreme Court Middle District

Filed 4/3/2018 4:47:00 PM Supreme Court Middle District
216 MM 2017

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 216 MM 2017

SANDS BETHWORKS GAMING, LLC,

Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF REVENUE; C. DANIEL HASSELL IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF REVENUE; and THE PENNSYLVANIA GAMING CONTROL BOARD,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE VERIFIED PETITION

JOSH SHAPIRO
Attorney General

BY: ANTHONY THOMAS KOVALCHICK
Deputy Attorney General

J. BART DELONE
Acting Chief Deputy Attorney General

KAREN M. ROMANO
Deputy Attorney General

Office of Attorney General
6th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219
Phone: (412) 565-2543
FAX: (412) 565-3019

Date: April 3, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES

STATEMENT OF JURISDICTION

This Court has original and exclusive jurisdiction over this constitutional challenge pursuant to 4 Pa. C.S. § 1904.

STATEMENT OF STANDARD AND SCOPE OF REVIEW

Statutory provisions enacted by the General Assembly will be invalidated on constitutional grounds only if the challenging party carries the "heavy burden" of demonstrating that those provisions "clearly, palpably, and plainly violate[] the Constitution" of either the United States of America or the Commonwealth of Pennsylvania. *League of Women Voters v. Commonwealth of Pennsylvania*, 178 A.3d 737, 801 (Pa. 2018), quoting *West Mifflin Area School District v. Zahorchak*, 4 A.3d 1042, 1048 (Pa. 2010). This Court is empowered to "take such action as it deems appropriate" in order to "expedite a final judgment" in this case. 4 Pa. C.S. § 1904. The "justiciable controversy" existing at the time that declaratory relief is sought automatically terminates when the Court declares the respective rights and obligations of the adverse parties. *Madden v. National Association of Basketball Referees*, 518 A.2d 853, 854 (Pa. Super. 1986). Under the present circumstances, "the absence of a developed factual record will not impede [this Court's] resolution of the purely legal challenges" brought by the Petitioner. *Mount Airy #1, LLC v. Pennsylvania Dept. of Revenue*, 154 A.3d 268, 272 (Pa. 2016).

ORDER IN QUESTION

Since the Court has original jurisdiction in this case, no order is presently under review.

STATEMENT OF THE QUESTIONS INVOLVED

1. Does this Court lack original jurisdiction to entertain the Petitioner's request for injunctive relief?

2. Does the grant distribution scheme violate the Uniformity Clause of the Pennsylvania Constitution?

3. Does the grant distribution scheme violate the Special Law Clause of the Pennsylvania Constitution?

4. Does the grant distribution scheme violate the Due Process Clause of the Fourteenth Amendment?

5. Does the grant distribution scheme violate the Equal Protection Clause of the Fourteenth Amendment?

6. Are the provisions creating the grant distribution scheme severable from the remaining statutory provisions?

STATEMENT OF THE CASE

Procedural History

This is a constitutional challenge to three statutory provisions that recently went into effect. The Petitioner, Sands Bethworks Gaming, LLC ("Sands"), filed a verified petition in the nature of a complaint on December 28, 2017, seeking both declaratory and injunctive relief. The named Respondents were the Pennsylvania Department of Revenue, Secretary of Revenue C. Daniel Hassell (in his official capacity), and the Pennsylvania Gaming Control Board. On January 16, 2018, Sands filed an application for special relief in the nature of a preliminary injunction. The Respondents subsequently answered both filings in a timely manner. They filed a new matter with their answer to the verified petition.

The pleadings in this case closed on February 23, 2018, when Sands filed its reply to the Respondents' new matter. Five days later, the parties filed a proposed stipulation to resolve Sands' request for a preliminary injunction and provide for an expedited briefing schedule. In an order dated March 5, 2018, the Court denied Sands' application for relief to the extent that it sought a preliminary injunction. The Court also denied the parties' request for an order approving their joint stipulation, thereby leaving all parties free to "present arguments in the[ir] briefs regarding possible remedies." In a separate order, the Court established an

expedited briefing schedule in order to provide Sands and the Respondents with appropriate opportunities to articulate their respective positions.[1]

Names of the Judges Whose Decision is to be Reviewed

Because this constitutional challenge falls within the Court's original jurisdiction, there is no underlying decision for the Court to review.

The Statutory Scheme

The Pennsylvania Race Horse Development and Gaming Act ("Gaming Act") [4 Pa. C.S. §§ 1101 *et seq.*] governs the licensing and operation of casinos throughout the Commonwealth. The Pennsylvania Gaming Control Board ("Board") is composed of seven individuals, three of whom are appointed by the Governor and four of whom are appointed by designated members of the General Assembly holding positions of leadership. 4 Pa. C.S. § 1201(a)-(b). The Gaming Act provides the Board with "sole regulatory authority over every aspect of the authorization, operation and play of slot machines, table games and interactive

---

[1] Shortly before Sands filed its brief, Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino ("GGE"), filed an application for leave to intervene in this action. The Respondents answered GGE's application to intervene three days later. At the present time, the application is still pending. In any event, GGE has stated that it "is willing to accept the pleadings as they stand," and to adopt Sands' verified petition by reference, in the event that the application for leave to intervene is granted. Application for Leave to Intervene at 8, ¶ 19. Since any potential claims asserted by GGE will be identical to those brought by Sands, the arguments advanced by the Respondents in this brief will apply with equal force to any parallel claims brought by GGE if this Court grants GGE's application to intervene.

gaming devices and associated equipment." 4 Pa. C.S. § 1202(a)(1). The Pennsylvania Department of Revenue ("Department") is responsible for administering and collecting the taxes created by the Gaming Act. 4 Pa. C.S. § 1501.

Under the Gaming Act, there are "distinct classifications of slot machine licenses" that may be issued by the Board. 4 Pa. C.S. § 1301. A "Category 1 license" enables a person to "place and operate slot machines" at a facility licensed to "conduct thoroughbred or harness race meetings" on its premises. 4 Pa. C.S. § 1302(a). A person "seeking to locate a licensed facility in a city of the first class, a city of the second class or a revenue- or tourism-enhanced location" may apply for a "Category 2 license" without satisfying the race-related prerequisites for procuring a Category 1 license. 4 Pa. C.S. § 1304(a)(1). A "Category 3 license" may be awarded to the owner of a "well-established resort hotel[,]" or to the subsidiary of such an owner. 4 Pa. C.S. § 1305(a)(1). An existing Category 1 or Category 2 "slot machine licensee" may participate in an auction for a "Category 4 slot machine license," which would enable such a licensee to "install and make slot machines available for play at a Category 4 licensed facility." 4 Pa. C.S. §§ 1305.1(a)(1), (c), 1305.2(a)-(b). If Category 4 licenses remain available after the

"initial"[2] and "subsequent auctions" required by law, the Board may conduct "additional auctions" and permit Category 3 slot machine licensees to submit bids. 4 Pa. C.S. § 1305.2(a)-(b.1).

Each Category 1 and Category 2 licensee may operate up to 5,000 slot machines at its facility. 4 Pa. C.S. § 1210(a)(1), (b). A Category 3 licensee "holding a table game operation certificate" may operate up to 600 slot machines. 4 Pa. C.S. § 1305(c). Under certain circumstances, a Category 3 licensee can seek the Board's permission to operate an additional 250 slot machines at a facility that already has the maximum number of slot machines otherwise permitted by statute. 4 Pa. C.S. § 1305(c.1)(2). Although a Category 4 licensee may operate up to 750 slot machines, a Category 1 or Category 2 licensee who is also a Category 4 licensee may not exceed the statutory limit imposed on Category 1 and Category 2 facilities. 4 Pa. C.S. § 1305.1(d)(1)-(2). With the Board's approval, a Category 3 licensee who is also a Category 4 licensee may exceed the statutory limit otherwise applicable to Category 3 facilities by paying "a nonrefundable fee in the amount of $10,000.00" for each "additional slot machine" authorized by the Board. 4 Pa. C.S. § 1305.1(d)(3)(i)-(ii). Even if a Category 4 licensee stays within the statutory limit of 750 slot machines, it must nevertheless "pay a nonrefundable authorization

[2] The "initial auctions" must be conducted between January 15, 2018, and July 31, 2018. 4 Pa. C.S. § 1305.2(a)(1).

fee in the amount of $10,000.00" for each "authorized slot machine." 4 Pa. C.S. § 1305.1(d)(3)(iii).

The Gaming Act establishes a State Gaming Fund ("Gaming Fund"), a Pennsylvania Gaming Economic Development and Tourism Fund ("Tourism Fund"), and a Casino Marketing and Capital Development Account ("CMCD Account"). 4 Pa. C.S. §§ 1403(a), 1407.1(a). Every Category 1, Category 2 and Category 3 licensee is required to "pay a daily tax of 34% from its daily gross terminal revenue[3] from the slot machines in operation at its facility and a local share assessment" determined by the Department. 4 Pa. C.S. § 1403(b). Each Category 4 licensee must pay a similar "daily tax of 50% from [the] daily gross terminal revenue" collected by its slot machines, along with the prescribed local share assessment. 4 Pa. C.S. § 1403(b.1)(1). This slot machine tax revenue is placed in the Gaming Fund, appropriated to the Department, and distributed in a manner prescribed by statute. 4 Pa. C.S. § 1403(b)-(c).

---

[3] A licensee must calculate its "gross terminal revenue" by subtracting "[c]ash or cash equivalents paid out to players as a result of playing a slot machine," "[c]ash or cash equivalents paid to purchase annuities to fund prizes payable to players over a period of time as a result of playing a slot machine[,]" and "[a]ny personal property distributed to a player as a result of playing a slot machine" from the "cash or cash equivalent wagers received by a slot machine[,]" and then adding "cash received as entry fees for slot machine contests or slot machine tournaments." 4 Pa. C.S. § 1103.

In addition to the slot machine taxes paid into the Gaming Fund, each Category 1, Category 2 and Category 3 licensee must pay "a daily assessment of 5.5% of its gross terminal revenue" to the Tourism Fund and "a supplemental daily assessment of 0.5% of its gross terminal revenue" to the CMCD Account. 4 Pa. C.S. § 1407(c)-(c.1). The CMCD Account is also funded through annual transfers of $2,000,000 from the Gaming Fund.[4] 4 Pa. C.S. § 1408(c.1). The money deposited in the Tourism Fund is used to finance certain "capital projects" and to cover the "operational expenditures" associated with those projects. 4 Pa. C.S. § 1407(b). The money deposited in the CMCD Account is used to pay for mandatory distributions and discretionary grants awarded to Category 1, Category 2 and Category 3 licensees. 4 Pa. C.S. § 1407.1.

The Board is required to award grants to qualifying Category 1, Category 2 and Category 3 licensees from the funds contained in the CMCD Account. 4 Pa. C.S. § 1407.1(c). Every slot machine licensee that has been licensed for at least two years may apply to the Board for a grant. 4 Pa. C.S. § 1407.1(d). The applicable statutory provision provides that each grant awarded by the Board "shall be used by the [receiving] slot machine licensee for marketing or capital development." 4 Pa. C.S. § 1407.1(d). The term "capital development" is defined

[4] The annual $2,000,000 transfers of money from the Gaming Fund to the CMCD Account were scheduled to begin during the fiscal year starting on July 1, 2017. 4 Pa. C.S. § 1408(c.1).

broadly enough to include the "expansion or renovation of an existing licensed facility[,]" as well as the "constructi[on] or expan[sion of] amenities at a licensed facility." 4 Pa. C.S. § 1407.1(g).

Before awarding a "grant" from the CMCD Account, the Board must make certain "distributions" required by statute. 4 Pa. C.S. § 1407.1(e)(1). Under the mandated distribution formula, "[e]ach Category 1 or Category 2 slot machine licensee with gross terminal revenues of $150,000,000 or less for the previous fiscal year [receives] $4,000,000[,]" "[e]ach Category 1 or Category 2 slot machine licensee with gross terminal revenues of more than $150,000,000 but less than $200,000,000 for the previous fiscal year [receives] $2,500,000[,]" and "[e]ach Category 3 slot machine licensee with gross terminal revenue[s] of less than $50,000,000 for the previous fiscal year [receives] $500,000." 4 Pa. C.S. § 1407.1(e)(1)(i)-(iii). If the CMCD Account contains "insufficient money" to cover the distributions otherwise required by law, the ensuing distributions are to be "made in the proportion of" "the eligible licensees" under each distribution provision to "the total amount of money in the [CMCD] Account." 4 Pa. C.S. § 1407.1(e)(1)(iv)(A)-(B). After all required distributions are made, the Board must distribute any money remaining in the CMCD Account to the other Category 1, Category 2 and Category 3 grant applicants. 4 Pa. C.S. § 1407.1(e)(2). A slot machine licensee may not receive more than $4,000,000 from the CMCD Account

in a given year. 4 Pa. C.S. § 1407.1(e)(3)(i). Moreover, no funds from the CMCD Account may be distributed to a slot machine licensee during the two-year period immediately following the issuance of its license. 4 Pa. C.S. § 1407.1(e)(3)(ii).

The statutory provision creating the CMCD Account became effective on October 30, 2017. P.L. 419, No. 42, § 36. As of January 1, 2018, covered slot machine licensees are required to pay the "supplemental daily assessment" to the CMCD Account. 4 Pa. C.S. § 1407(c.1). The Board is required to "submit notice to the Legislative Reference Bureau for publication in the Pennsylvania Bulletin when the gross terminal revenue for each Category 1 and Category 2 slot machine licensee for the previous fiscal year exceeds $200,000,000 and the gross terminal revenue for each Category 3 slot machine licensee for the previous fiscal year exceeds $50,000,000." 4 Pa. C.S. § 1407(c.1)(1). The provisions requiring the payment of the supplemental daily assessment, establishing the CMCD Account and mandating the annual transfers of funds from the Gaming Fund to the CMCD Account are respectively codified at 4 Pa. C.S. §§ 1407(c.1), 1407.1 and 1408(c.1). Those three provisions all contain sunset provisions providing for their expiration "on the earlier of" the passage of ten years or the publication of the Board's notice in the Pennsylvania Bulletin. 4 Pa. C.S. §§ 1407(c.1)(2), 1407.1(f)(2), 1408(c.1)(2).

The Board is authorized to issue seven Category 1 licenses, five Category 2 licenses, two Category 3 licenses, and ten Category 4 licenses. 4 Pa. C.S. § 1307(a)-(b). At its discretion, the Board may "increase the total number of Category 2 licensed facilities" permitted under the Gaming Act "by an amount not to exceed the total number of Category 1 licenses not applied for within five years following the effective date" of the applicable statutory provisions. 4 Pa. C.S. § 1307(a). As of the date on which this action was commenced, the Board had issued six Category 1 licenses, five Category 2 licenses, and two Category 3 licenses.

Petitioner Sands Bethworks Gaming, LLC ("Sands"), operates Sands Casino Resort Bethlehem ("Sands Casino") under a Category 2 license. Verified Petition at 5-6, ¶ 8. During the 2016-2017 tax year, Sands Casino's gross terminal revenue was $304,160,284.80. *Ibid.* Sands avers that it "reasonably expects" Sands Casino's gross terminal revenue to "remain well above" the $200,000,000 threshold established by the Gaming Act's mandatory distribution formula. *Ibid.*

Objecting to the use of its tax money to fund the marking and capital development of its competitors, Sands seeks a declaration that §§ 1407(c.1), 1407.1 and 1408(c.1) are unconstitutional and the entry of an order enjoining the enforcement and implementation of those provisions. Sands maintains that the challenged provisions of the Gaming Act contravene the Uniformity and Special

Law Clauses of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. The respondents named in Sands' verified petition include the Board, the Department, and Secretary of Revenue C. Daniel Hassel. The Secretary has been named as a respondent only in his official capacity.

Statement of the Determination Under Review

Because this constitutional challenge falls within the Court's original jurisdiction, there is no underlying determination for the Court to review.

Statement of Place of Raising or Preservation of Issues

Since this case falls within the Court's original jurisdiction, there was no earlier proceeding in which the issues presently before the Court were raised or preserved.

SUMMARY OF THE ARGUMENT

This Court has exclusive jurisdiction to entertain this challenge to specific provisions of the Gaming Act, and to "render a declaratory judgment concerning the constitutionality of" those provisions. 4 Pa. C.S. § 1904. No provision of the Gaming Act gives this Court original jurisdiction to entertain a request for injunctive relief. For this reason, Sands' request for injunctive relief should be dismissed for lack of jurisdiction.

The provisions of the Gaming Act challenged by Sands do not contravene the Uniformity Clause, the Special Law Clause, or the Fourteenth Amendment. The Uniformity Clause governs only the manner in which taxes are "levied and collected" in this Commonwealth. PA. CONST., ART. VIII, § 1. It does not require the equal distribution of tax revenue that has already been collected. Since the Gaming Act's mandatory distribution scheme could potentially benefit any Category 1, Category 2 or Category 3 slot machine licensee operating in Pennsylvania, it does not violate the Special Law Clause. Furthermore, the United States Constitution does not prohibit a governmental entity from creating a graduated income tax that classifies taxpayers based on their respective levels of income.

In deciding whether the challenged statutory provisions violate the Uniformity Clause, the Special Law Clause or the Fourteenth Amendment, this

Court must remain cognizant of the General Assembly's broad authority and wide discretion in matters pertaining to taxation. The Court's inquiry is limited to determining whether there is any rational basis for the challenged statutory scheme. The distribution scheme challenged by Sands in this case satisfies all relevant constitutional requirements because it is rationally related to the General Assembly's objective of ensuring and preserving the economic vitality of all communities hosting gaming facilities, including those communities in which less profitable facilities are located.

ARGUMENT

Sands purports to bring both facial and as-applied challenges to the constitutionality of §§ 1407(c.1), 1407.1 and 1408(c.1). "[T]he distinction between facial and as-applied challenges" generally relates to "the breadth of the remedy employed by the Court" rather than to "what must be pleaded in a complaint." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 331 (2010). Since the Court's decision in this case will have "precedential value" in cases involving challenges to similar statutes, the distinction between the two types of challenges is inconsequential.[5] *Nextel Communications of the Mid-Atlantic, Inc.*

[5] Since Sands clearly mounts facial challenges to the constitutionality of the provisions establishing and controlling the Gaming Act's distribution scheme, this Court has no occasion to consider whether it would have original jurisdiction to entertain a more limited challenge to specific applications of those provisions. *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1273 (Pa. 2014) (questioning whether

v. Commonwealth of Pennsylvania, Dept. of Revenue, 171 A.3d 682, 701, n. 20 (Pa. 2017). Regardless of how its challenge is characterized, Sands cannot show that the relevant distribution formula "*clearly*, *palpably*, and *plainly* violates the Constitution" of either the United States of America or the Commonwealth of Pennsylvania. *Leonard v. Thornburgh*, 489 A.2d 1349, 1351-1352 (Pa. 1985) (emphasis in original; internal citations omitted).

A. THE RELIEF SOUGHT BY THE PETITIONER EXCEEDS THIS COURT'S ORIGINAL JURISDICTION

The applicable statutory provision gives this Court "exclusive jurisdiction to hear any challenge to or to render a *declaratory judgment* concerning the constitutionality" of the Gaming Act. 4 Pa. C.S. § 1904 (emphasis added). This Court is authorized "to find facts or to expedite a *final judgment* in connection with such a challenge or request for *declaratory relief*." *Ibid.* (emphasis added). In addition to the entry of a final judgment and a declaration that the challenged statutory provisions are unconstitutional, Sands seeks an order enjoining the enforcement of those provisions. Verified Petition at 28, ¶¶ 72-74. Under the present circumstances, however, the only relief that Sands can seek is the entry of a "declaratory judgment" finding the relevant provisions to be unconstitutional.

---

4 Pa. C.S. § 1904 provided this Court with original jurisdiction to consider "a constitutional challenge to a specific application of a provision of the Gaming Act").

Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth of Pennsylvania, 877 A.2d 383, 392-393 (Pa. 2005).

Although Sands challenges §§ 1407(c.1), 1407.1 and 1408(c.1) under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, it does not bring those federal constitutional challenges pursuant to 42 U.S.C. § 1983. Verified Petition at 5, ¶ 7, n. 1. Under federal law, § 1983 provides aggrieved individuals with a remedy to redress violations of federal rights created by the United States Constitution and distinct federal statutes. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 615-619 (1979). Federal constitutional claims are ordinarily cognizable only under § 1983. *Gagliardi v. Fisher*, 513 F.Supp.2d 457, 471 (W.D. Pa. 2007). In *Mount Airy #1, LLC v. Pennsylvania Dept. of Revenue*, 154 A.3d 268, 271, n. 1 (Pa. 2016), this Court held that it lacked original jurisdiction to entertain § 1983 claims purporting to challenge provisions of the Gaming Act.[6] Unlike a § 1983 plaintiff, who may bring a "suit in equity" or "other proper proceeding for redress" that could ultimately result in the issuance of an injunction, Sands is limited to the remedies available under Pennsylvania law. *Danforth v. Minnesota*, 552 U.S. 264, 288

[6] In this particular case, relief under § 1983 would potentially be barred by the United States Supreme Court's decision in *National Private Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 587-592 (1995), even if no jurisdictional defects were present. *Clifton v. Allegheny County*, 23 A.3d 607, 609 (Pa. Cmwlth. 2011).

(2008) (recognizing the authority of a State "to provide remedies for federal constitutional violations"). Since 4 Pa. C.S. § 1904 authorizes only "declaratory relief" in cases involving constitutional challenges to the Gaming Act, this Court lacks original jurisdiction to entertain Sands' request for an injunction. *Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Gaming Control Board*, 920 A.2d 561, 567 (Pa. 2007) (finding this Court's "original jurisdiction" to be limited by the "plain language" of § 1904).

Even if this Court did have jurisdiction to consider Sands' request for injunctive relief, any such relief could not include the entry of an order requiring the return of funds paid into the CMCD Account. Verified Petition at 19, ¶ D, 22, ¶ D, 24, ¶ D. The Commonwealth generally remains immune from suit in all situations in which its sovereign immunity has not been specifically waived by the General Assembly. 1 Pa. C.S. § 2310. As "Commonwealth parties" enjoying protection under Pennsylvania's Sovereign Immunity Act [42 Pa. C.S. §§ 8501 *et seq.*], the Respondents are immune from "equitable claims seeking affirmative action by way of injunctive relief." *Swift v. Dept. of Transportation*, 937 A.2d 1162, 1168 (Pa. Cmwlth. 2007). Injunctive relief against Commonwealth parties can include only the entry of an order *restraining* them from enforcing statutory provisions that are found to be unconstitutional. *Fawber v. Cohen*, 532 A.2d 429, 433-434 (Pa. 1987). The defense of sovereign immunity is not subject to waiver.

Tulewicz v. Southeastern Pennsylvania Transportation Authority, 606 A.2d 427, 429-430 (Pa. 1992). This Court's "equitable powers" cannot trump the Respondents' entitlement to sovereign immunity in this case. *Scientific Games International, Inc. v. Commonwealth of Pennsylvania, Dept. of Revenue*, 66 A.3d 740, 757-758 (Pa. 2013).

Relying on *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36-39, 51-52 (1990), Sands contends that the Due Process Clause of the Fourteenth Amendment requires that any tax money unlawfully collected be returned if this Court finds the relevant provisions of the Gaming Act to be unconstitutional. Petitioner's Brief at 44-45. The rule invoked by Sands applies only to "taxes collected in violation of *federal* law."[7] *Reich v. Collins*, 513 U.S. 106, 108 (1994) (emphasis added). It does not apply to taxes collected in violation of *state* law. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 100 (1993) (explaining that the "freedom state courts enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretations of

[7] Even in cases involving taxing schemes found to be in violation of the United States Constitution, the Commonwealth has considerable flexibility in determining the appropriate remedy. *Comptroller of the Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1806 (2015); *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427-428 (2010). The extent to which the Due Process Clause requires a refund depends on whether a particular State offers predeprivation hearings to taxpayers who allege that a specific taxing scheme is unconstitutional. *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442, 443-445 (1998) (*per curiam*); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 100-101 (1993).

federal law"); *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932) (permitting a State to "make a choice for itself between the principle of forward operation and that of relation backward"). This Court has previously recognized that retroactive relief in cases involving *federal* constitutional violations may sometimes be required by federal law. *Annenberg v. Commonwealth of Pennsylvania*, 757 A.2d 338, 351 (Pa. 2000). Taxes found to violate the Pennsylvania Constitution are governed by a different rule. *Mount Airy #1, LLC*, 154 A.3d at 280, n. 11. Nevertheless, the Respondents have already agreed to facilitate a refund to Sands in the event that the challenged statutory provisions are invalidated under either the United States Constitution or the Pennsylvania Constitution, thereby making it unnecessary for this Court to decide whether retroactive relief of that kind would otherwise be appropriate.

Under ordinary circumstances, "a decision of this Court invalidating a tax statute [under state law] takes effect as of the date of the decision and is not to be applied retroactively." *Oz Gas, Ltd. v. Warren Area School District*, 938 A.2d 274, 285 (Pa. 2007). That is because the retroactive application of such a decision normally "subjects the taxing entities to the potentially devastating repercussion of having to refund taxes paid, budgeted and spent by the entities for the benefit of all, including those who challenged the tax" in the first place. *Ibid.* In this particular case, however, the money deposited in the CMCD Account can only be

spent on the very distributions and grants that are challenged by Sands in this case. 4 Pa. C.S. § 1407.1(b). For this reason, the Respondents have agreed to "take all steps necessary to ensure" that Sands receives a "full refund" of the supplemental daily assessment that it pays into the CMCD Account in the event that §§ 1407(c.1), 1407.1 and 1408(c.1) are invalidated. The Respondents will honor the terms of their agreement and voluntarily attempt to secure a refund for Sands and all similarly situated slot machine licensees if this Court determines that the challenged provisions of the Gaming Act are unconstitutional.

B. THE GRANT DISTRIBUTION SCHEME DOES NOT VIOLATE THE UNIFORMITY CLAUSE

The Uniformity Clause of the Pennsylvania Constitution provides that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and [that such taxes] shall be levied and collected under general laws." PA. CONST., ART. VIII, § 1. This language has been construed to prohibit any classification "that is based solely on a difference in quantity of precisely the same kind of property" being taxed. *In re: Cope's Estate*, 43 A. 79, 81 (Pa. 1899). A tax imposed on income constitutes a "property tax" that is "subject to the constitutional requirement of uniformity." *Kelley v. Kalodner*, 181 A. 598, 601 (Pa. 1935). In Count I of the verified petition, Sands alleges that

§§ 1407(c.1), 1407.1 and 1408(c.1) collectively establish "an unconstitutional progressive tax." Verified Petition at 18, ¶ 44.

The Uniformity Clause has been construed to preclude the creation of an income tax that categorically exempts certain individuals from paying the tax because their incomes do not exceed a stated amount. *Saulsbury v. Bethlehem Steel Company*, 196 A.2d 664, 665-667 (Pa. 1964). In a similar vein, this Court has held that "the Uniformity Clause prohibits the General Assembly from imposing disparate tax rates upon income that exceeds a particular threshold." *Mount Airy #1, LLC*, 154 A.3d at 276. When these two principles are combined, they confirm that "a taxing statute which classifies similarly situated taxpayers solely on the basis of their income, and thereby places differing tax burdens on each class as a result, is forbidden." *Nextel Communications*, 171 A.3d at 700.

The supplemental daily assessment does not contravene any of these central jurisprudential tenets. *Every* Category 1, Category 2 and Category 3 licensee must "pay a supplemental daily assessment of 0.5% of its gross terminal revenue to the [CMCD] Account[,]" regardless of its level of income. 4 Pa. C.S. § 1407(c.1). No competitors of Sands are exempt from this requirement. The rate of taxation is *uniform*. Since § 1407(c.1) does not impose "different rates" of taxation "on varying amounts or quantities of the same tax base," it does not constitute "a

graduated income tax" that "lacks uniformity under our Constitution." *Turco Paint & Varnish Co. v. Kalodner*, 184 A. 37, 40 (Pa. 1936).

Sands' constitutional attack on the statutory scheme is not based on the manner in which gross terminal revenue is *taxed*. Instead, Sands' objection to the manner in which the three relevant provisions interact is centered on the *distribution* formula established by § 1407.1(e). Admittedly, the language of the Uniformity Clause is sufficiently "broad and comprehensive" to "include all kinds of taxes," including the taxes imposed on slot machine licensees under the Gaming Act. *Amidon v. Kane*, 279 A.2d 53, 58 (Pa. 1971). Nonetheless, that language cannot be reasonably construed to govern the numerous ways in which tax dollars are *distributed* among various grant applicants and recipients. *South Bend Public Transportation Corp. v. City of South Bend*, 428 N.E.2d 217, 223-224 (Ind. 1981).[8]

The constitutional provision invoked by Sands speaks only to the way in which "taxes" are "levied and collected" under Pennsylvania law. PA. CONST., ART. VIII, § 1. The Uniformity Clause merely "ensur[es] a rough equalization of tax burdens under a structure in which taxes are *imposed*, *adjusted*, and *collected* equitably." *Valley Forge Towers Apartments N, LP v. Upper Merion Area School*

[8] This Court has consistently recognized the importance of decisions interpreting the provisions of other state constitutions when presented with questions involving the interpretation of analogous provisions of the Pennsylvania Constitution. *Commonwealth v. Edmunds*, 586 A.2d 887, 895, 899-901 (Pa. 1991).

District, 163 A.3d 962, 979 (Pa. 2017) (emphasis added). It has no application whatsoever to post-collection distributions. *Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1374, 1386 (Colo. 1980); *State of Kansas ex rel. Schneider v. City of Topeka*, 605 P.2d 556, 562-563 (Kan. 1980). "Congress and state legislatures frequently use their taxing, spending and regulatory powers to redistribute wealth from one group in society to another." *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 732 (7th Cir. 2011). By its very nature, a "tax" is normally designed to "generate revenues" that can be used to offset costs having no specific relationship to the benefits conferred upon the taxpayer by the collecting governmental entity. *Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1399 (7th Cir. 1992). A decision holding that the Pennsylvania Constitution requires *distributions* of previously-collected tax revenue to be "uniform" among similarly situated grant applicants would inevitably call the constitutionality of numerous distribution schemes into doubt. *Gean v. Hattaway*, 330 F.3d 758, 771-772 (6th Cir. 2003) (explaining that a State necessarily "makes distinctions among its citizens based upon a sort of 'ability to pay'" when it manages "social welfare programs"). In light of the Uniformity Clause's plain text, which governs only the manner in which taxes are "levied and collected" throughout the Commonwealth, this Court should reject Sands' attempt to extend that provision's reach to the "distributions" at issue in this case. *Meierhenry v. City of Huron*, 354 N.W.2d 171,

177 (S.D. 1984) (finding state constitutional "requirements of equality and uniformity" to relate only to the "levy of taxes" and not to "the legislature's authority to allocate or distribute public funds"). There is simply "no factual predicate for a Uniformity Clause challenge." *Pennsylvania Medical Society v. Dept. of Public Welfare*, 39 A.3d 267, 286 (Pa. 2012).

In an attempt to deflect attention from the actual structure of the challenged statutory scheme, Sands repeatedly describes the distributions mandated by the Gaming Act as "tax credits." Petitioner's Brief at 23-34, 26. Unlike distributions of grant money, tax credits have been found to be subject to the requirements of the Uniformity Clause. *Fidelity Bank, N.A. v. Commonwealth of Pennsylvania*, 645 A.2d 452, 460-461 (Pa. Cmwlth. 1994). The distributions at issue in this case, however, bear no resemblance to tax credits. Under Pennsylvania law, the term "tax credit" is generally defined as "a direct reduction from the liability for tax[es] owed." *Berks County Tax Collection Committee v. Pennsylvania Dept. of Community & Economic Development*, 60 A.3d 589, 593 (Pa. Cmwlth. 2013); *Dunmire v. Applied Business Controls, Inc.*, 440 A.2d 638, 640 (Pa. Cmwlth. 1981). Because tax credits inevitably reduce tax liabilities, they directly relate to the "levying" and "collect[ion]" of taxes. PA. CONST., ART. VIII, § 1. In contrast, the distributions required by § 1407.1(e)(1) do not reduce the tax liabilities of slot machine licensees. Instead, they merely provide underperforming slot machine

licensees with additional money to fund their "marketing" and "capital development." 4 Pa. C.S. § 1407.1(d).

Even if the text of the Uniformity Clause could be stretched far enough to cover the distributions required under § 1407.1(e)(1), the classifications created by the General Assembly fall well within constitutional limits. Because the General Assembly has been afforded "wide discretion in matters of taxation," its legislative classifications will survive constitutional scrutiny "so long as there is some reasonable justification for treating the relevant group of taxpayers differently than others." *Hospital & Healthsystem Association of Pennsylvania v. Commonwealth of Pennsylvania, Dept. of Insurance*, 77 A.3d 587, 607 (Pa. 2013). In the present context, "a limited amount of variation" in the burdens imposed upon similarly situated taxpayers does not render a taxing scheme unconstitutional. *Clifton v. Allegheny County*, 969 A.2d 1197, 1210-1211 (Pa. 2009). A party challenging a tax statute on constitutional grounds bears the burden of demonstrating "not only that the enactment results in some form of classification," but also that it "is not rationally related to any legitimate state purpose." *Wilson Partners, L.P. v. Commonwealth of Pennsylvania, Board of Finance and Revenue*, 737 A.2d 1215, 1220 (Pa. 1999).

In many contexts, the constitutional validity of a statutory provision turns on whether that provision's objective is to accomplish a genuine "public purpose"

rather than a purely private purpose. *Tosto v. Pennsylvania Nursing Home Loan Agency*, 331 A.2d 198, 201 (Pa. 1975). Sands describes the CMCD Account as "a restricted fund that is used exclusively to redistribute tax proceeds to other casino licensees for their private use." Verified Petition at 4, ¶ 5. Discussing the "inherently unequal" distribution formula, Sands maintains that it is "not eligible" for grants from the CMCD Account. *Id.* at 10, ¶ 23.

This Court is not required to credit the "legal conclusions" contained in Sands' verified petition. *Front Street Development Associates, L.P. v. Conestoga Bank*, 161 A.3d 302, 307-308 (Pa. Super. 2017). A plain reading of the statutory language confirms that *all* Category 1, Category 2 and Category 3 slot machine licensees that have been licensed for at least two years are eligible to receive grants from the CMCD Account. 4 Pa. C.S. § 1407.1(d). Only the initial "distributions," which must precede the awarding of a "grant," are directly tied to an applicant's gross terminal revenue during the previous fiscal year. 4 Pa. C.S. § 1407.1(e)(1). After the mandated distributions have been completed, any "remaining money" in the CMCD Account must be "distributed to other slot machine licensees . . . that have applied for grants." 4 Pa. C.S. § 1407.1(e)(2). Since the CMCD Account is a segregated fund, "[a]ll money" deposited therein will ultimately "be distributed as grants in accordance with" the provisions of the Gaming Act. 4 Pa. C.S. § 1407.1(b). Once the required distributions have been made to qualifying slot

machine licensees, the remaining funds are to be awarded to other applicants pursuant to the "program guidelines" established by the Board. 4 Pa. C.S. § 1407.1(d). Like every other Category 1 or Category 2 slot machine licensee, Sands will be eligible to receive a mandatory distribution under § 1407.1(e)(1) if its gross terminal revenue falls below the $200,000,000 threshold. Even if that never happens, Sands can compete for any grants awarded under § 1407.1(e)(2).

Relying on information contained in its appendix, Sands points out that only four slot machine licensees would receive mandatory distributions if the gross terminal revenue figures for the 2016-2017 fiscal year were to be used, and that only $2,689,762 would be left in the CMCD Account to fund grants awarded to other applicants. Petitioner's Appendix, Exhibit 4, at 53a-54a. Sands baldly asserts that "[t]here is nothing remotely 'public' about enabling a few private entities to engage in 'marketing' or 'capital improvement'" through the use of funds provided by their competitors. Petitioner's Brief at 30. Ignoring the advantages that all slot machine licensees gain from the creation and maintenance of a vibrant casino industry throughout the Commonwealth, Sands contends that the measure of its "benefit" from the payment of its supplemental daily assessment is "zero." *Id.* at 32.

The "public purpose" of the distribution scheme established by §§ 1407(c.1), 1407.1 and 1408(c.1) becomes apparent when the overall objectives of the Gaming

Act are considered. The Gaming Act was specifically designed to "provide a significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives."[9] 4 Pa. C.S. § 1102(3). The grant distribution scheme furthers the Commonwealth's interest in generating revenue by providing limited financial assistance to Category 1, Category 2 and Category 3 licensees whose gross terminal revenue levels fall below the applicable thresholds, thereby ensuring that they can sustain their operations and continue to generate tax revenue. The General Assembly recognizes that the Gaming Act's "authorization of limited gaming" impacts the "Commonwealth as a whole," including the specific "geographic regions" in which "licensed facilities are located." 4 Pa. C.S. § 1102(3.1). The distribution scheme creates a safety net for all Category 1, Category 2 and Category 3 licensees, any one of which could experience revenue shortfalls during the course of a given fiscal year.

The General Assembly's decision to authorize "the installation and operation of slot machines" was significantly motivated by a desire to enhance "employment

---

[9] Because the General Assembly has "codified legislative findings" explaining its reasons for enacting the Gaming Act, this Court's analysis of the challenged statutory provisions must accord "due regard" to those findings. *Robinson Township v. Commonwealth of Pennsylvania, Public Utility Commission*, 147 A.3d 536, 572 (Pa. 2016), quoting *Harrisburg School District v. Zogby*, 828 A.2d 1079, 1087 (Pa. 2003).

in this Commonwealth." 4 Pa. C.S. § 1102(2). The Board's annual report confirms that, as of June 30, 2017, the twelve casinos operating in Pennsylvania employed 17,736 people. Petitioner's Appendix, Exhibit 1, at 24a. By giving struggling facilities the assurance that grant money will be forthcoming, the distribution scheme encourages such facilities to continue their operations and retain their employees. The statewide dispersal of grant money also broadens the Commonwealth's "tourism market" to all localities hosting casinos, "fosters technological advances" in areas in which gross terminal revenues are relatively low, and "encourages the development and delivery of innovative gaming products" in parts of the Commonwealth that lack the customer base necessary to facilitate such economic progress. 4 Pa. C.S. § 1102(6), (12.1). The promotion of "economic development" throughout the Commonwealth undoubtedly qualifies as a sufficiently "public" purpose to justify the enactment of the Gaming Act's grant distribution scheme. *Kelo v. City of New London*, 545 U.S. 469, 484-486 (2005) (recognizing that "economic development" qualified as a "public use" for purposes of the Takings Clause of the Fifth Amendment).

Given that the gross terminal revenue levels of the Commonwealth's Category 1, Category 2 and Category 3 facilities are likely to be different, the distributions required under § 1407.1(e)(1) will not be equally spread among grant applicants. Nevertheless, any disparities caused by the distribution formula will be

minimal. The "supplemental daily assessment" collected under § 1407(c.1) equals only 0.5% of a slot machine licensee's gross terminal revenue. 4 Pa. C.S. § 1407(c.1). If Sands' gross terminal revenue exceeds $200,000,000 in a particular fiscal year, it will not receive a mandatory distribution from the CMCD Account. 4 Pa. C.S. § 1407.1(e)(1)(i)-(ii). In any event, no competitor of Sands will ever receive more than $4,000,000 in grant money during the course of a single year. 4 Pa. C.S. § 1407.1(e)(3)(i). Even if no excess money is left in the CMCD Account after the mandatory distributions are made, the *maximum* amount of grant money that a Category 1 or Category 2 competitor of Sands could receive would constitute no more than two percent of Sands' gross terminal revenue. That percentage will decrease as Sands' gross terminal revenue increases, since the $4,000,000 cap remains in place regardless of how much gross terminal revenue an underperforming facility's competitors generate.

"No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 41 (1973). For this reason, the General Assembly is to be "afforded wide discretion in matters of taxation." *Bold Corp. v. County of Lancaster*, 801 A.2d 469, 474 (Pa. 2002). When one considers the fact that all Category 1, Category 2 and Category 3 facilities remain eligible for excess grant money and

enjoy the peace of mind that comes with operating over the safety net created by the mandatory distribution formula, it becomes clear that the statutory scheme challenged by Sands "does not impose substantially unequal tax burdens" on competing slot machine licensees. *Beattie v. Allegheny County*, 907 A.2d 519, 530 (Pa. 2006). Consequently, the applicable provisions of the Gaming Act satisfy the requirements of the Uniformity Clause. *Sablosky v. Messner*, 92 A.2d 411, 416 (Pa. 1952) (finding "absolute equality" to be "impracticable" and explaining that the Uniformity Clause required only "substantial uniformity of taxation"). Judgment should be entered against Sands, and in favor of the Respondents, with respect to Count I of the verified petition. 4 Pa. C.S. § 1904.

C. THE GRANT DISTRIBUTION SCHEME DOES NOT VIOLATE THE SPECIAL LAW CLAUSE

The Special Law Clause found in Article III, § 32, of the Pennsylvania Constitution declares that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law[.]" Distinct subsections of the Special Law Clause "specifically" prohibit the General Assembly from "pass[ing] any local or special law" that "refund[s] moneys legally paid into the treasury" or "[e]xempt[s] property from taxation[.]" PA. CONST., ART. III, § 32(5)-(6). Counts II and III of the verified petition are based on Sands' argument that the Gaming Act's grant distribution scheme violates the Special Law

Clause. Invoking that state constitutional provision, Sands avers that §§ 1407(c.1), 1407.1 and 1408(c.1) were unconstitutionally enacted to fund the "marketing and capital improvements" made by "a small number of private casinos[.]" Verified Petition at 23, ¶ 56.

The primary purpose of the Special Law Clause is to restrain the General Assembly "from granting special privileges or treatment to select industries, groups, or individuals which d[o] not serve to promote the general welfare of the public." *Robinson Township v. Commonwealth of Pennsylvania, Public Utility Commission*, 147 A.3d 536, 572 (Pa. 2016). The "constitutional principle" embodied within the Special Law Clause is that "like persons in like circumstances should be treated similarly by the sovereign." *Pennsylvania Turnpike Commission v. Commonwealth of Pennsylvania*, 899 A.2d 1085, 1094 (Pa. 2006). This Court has found that state constitutional provision to be "substantially coterminous" with the Equal Protection Clause of the Fourteenth Amendment. *William Penn School District v. Pennsylvania Dept. of Education*, 170 A.3d 414, 417, n. 3 (Pa. 2017). A court presented with a challenge brought under the Special Law Clause "may hypothesize regarding the reasons why the General Assembly created the [relevant] classifications." *Robinson Township v. Commonwealth of Pennsylvania*, 83 A.3d 901, 987 (Pa. 2013). In other words, a legislative classification will survive constitutional scrutiny if "there is any rational basis pursuant to which the

classification may have been made." *Harrison Development Corp. v. Commonwealth of Pennsylvania, Dept. of General Services*, 614 A.2d 1128, 1132 (Pa. 1992).

Applying the Special Law Clause, this Court has declared that "legislation creating a class of one member that is closed or substantially closed to future membership is *per se* unconstitutional." *West Mifflin Area School District*, 4 A.3d at 1048 (emphasis in original). The provisions of the Gaming Act challenged by Sands clearly do not run afoul of this fundamental rule. *Markovsky v. Crown Cork & Seal Co.*, 107 A.3d 749, 756-760 (Pa. Super. 2014). Under § 1407.1(d), *every* Category 1, Category 2 and Category 3 slot machine licensee that has been licensed for at least two years may submit an application for a grant from the CMCD Account. 4 Pa. C.S. § 1407.1(d). Furthermore, *every* Category 1 and Category 2 applicant with a gross terminal revenue of less than $200,000,000 during the previous fiscal year is entitled to a mandatory distribution. 4 Pa. C.S. § 1407.1(e)(1)(i)-(ii). Of course, Sands will attempt to keep its gross terminal revenue as high as possible, thereby making it less likely that such a distribution will be forthcoming. Nonetheless, "[a] class is not closed merely because possible class members may choose to avoid actions that subject them to the law" in question. *Corman v. National Collegiate Athletic Association*, 93 A.3d 1, 6 (Pa. Cmwlth. 2014). It is reasonable to assume that *all* Category 1, Category 2 and

Category 3 facilities will strive to exceed § 1407.1(e)(1)'s gross terminal revenue thresholds. Indeed, that is the very *purpose* of the CMCD Account. If that happens, §§ 1407(c.1), 1407.1 and 1408(c.1) will automatically expire. 4 Pa. C.S. §§ 1407(c.1)(2)(ii), 1407.1(f)(2)(ii), 1408(c.1)(2)(ii). The temporary nature of the CMCD Account illustrates that the challenged provisions are truly designed to get the gaming industry up and running rather than to benefit some facilities over others.

Sands' challenge under the Special Law Clause appears to rest primarily on this Court's decision in *Allegheny County v. Monzo*, 500 A.2d 1096 (Pa. 1985). Petitioner's Brief at 31-34. The tax invalidated in *Monzo*, however, was "a special tax imposed for the sole purpose of funding one convention center in Allegheny County." *Monzo*, 500 A.2d at 1102. A law that does not apply uniformly to all class members constitutes a "special law" prohibited by the Pennsylvania Constitution. *Heuchert v. State Harness Racing Commission*, 170 A.2d 332, 336 (Pa. 1961). The taxing statute at issue in *Monzo* constituted "special legislation" because its precise terms ensured that no county other than Allegheny County could rely on its authority to impose a similar tax. *Monzo*, 500 A.2d at 1105. The same cannot be said of the CMCD Account, which is used to finance the "marketing" and "capital development" of several different casinos throughout the Commonwealth. 4 Pa. C.S. § 1407.1(d)-(e).

The Gaming Act limits the number of slot machine licenses that can be issued by the Board. 4 Pa. C.S. § 1307. Separate provisions of the Gaming Act govern the locations at which licensed facilities can be erected. 4 Pa. C.S. §§ 1302(b), 1304(b)(1), 1305(b)(1.1). Those provisions prevent one facility from being placed too close to its competitors. *Ibid.* All Category 1, Category 2 and Category 3 facilities are potential recipients of grants awarded from the CMCD Account. 4 Pa. C.S. § 1407.1(d)-(e). The geographical restrictions placed on the locations of licensed facilities ensure that the benefits of grant money are spread throughout the Commonwealth. The statutory provision limiting a slot machine licensee to $4,000,000 in grant money during the course of a given year guarantees that money from the CMCD Account will never be concentrated in a single area. 4 Pa. C.S. § 1407.1(e)(3)(i).

The provisions of the Gaming Act describing the General Assembly's "[l]egislative intent" confirm that the entire statutory scheme was crafted to benefit "th[e] Commonwealth as a whole," including the numerous "geographic regions" in which "licensed facilities are located." 4 Pa. C.S. § 1102(3.1). In light of the great care to which the General Assembly went to ensure that the benefits of legalized gaming would be shared among the various communities throughout Pennsylvania, it is obvious that *Monzo* does not render §§ 1407(c.1), 1407.1 and 1408(c.1) "special legislation" for constitutional purposes. *Leventhal v. City of*

Philadelphia, 542 A.2d 1328, 1332-1335 (Pa. 1988). At a minimum, this objective provided the General Assembly with a "rational basis" for creating the CMCD Account and enacting the mandatory distribution formula. *Pennsylvania Liquor Control Board v. Spa Athletic Club*, 485 A.2d 732, 734-736 (Pa. 1984). Accordingly, judgment should be entered in favor of the Respondents, and against Sands, with respect to Counts II and III of the verified petition. 4 Pa. C.S. § 1904.

D. THE GRANT DISTRIBUTION SCHEME DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST., AMEND. XIV, § 1. Although the precise text of the Due Process Clause speaks only to the "process" through which a person is deprived of a liberty or property interest, the United States Supreme Court has construed that constitutional provision to include a "substantive component" that "forbids the government to infringe certain 'fundamental' rights *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) (emphasis in original). A state statute that does not implicate such a fundamental right need only "be

rationally related to legitimate government[al] interests" in order to withstand constitutional scrutiny.[10] *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

In Count IV of the verified petition, Sands avers that the challenged provisions of the Gaming Act violate the Due Process Clause. Verified Petition at 25-26, ¶¶ 60, 63-64. The Gaming Act's distribution formula clearly implicates no fundamental right of Sands. *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) (observing that a "tax classification" that did not "discriminate[] against out-of-state commerce or new residents" involved "neither a 'fundamental right' nor a 'suspect classification'"). Tax-related legislation need only be "rationally related to a legitimate legislative purpose" in order to satisfy the requirements of the Due Process Clause.[11] *United States v. Carlton*, 512 U.S. 26, 35 (1994) (applying the Due Process Clause of the Fifth Amendment). "The day is gone when th[e United States Supreme] Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and

---

[10] Even when fundamental rights are at stake, the government has considerable discretion to decide where public funds should be allocated. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-589 (1998).

[11] Because Sands challenges §§ 1407(c.1), 1407.1 and 1408(c.1) under the Due Process Clause of the Fourteenth Amendment rather than under a parallel provision of the Pennsylvania Constitution, the General Assembly's "legislative judgment" must be afforded "the degree of deference" articulated in the applicable decisions of the United States Supreme Court. *Shoul v. Commonwealth of Pennsylvania, Dept. of Transportation*, 173 A.3d 669, 677 (Pa. 2017) (discussing the differences between "the federal rational basis test" and the "more restrictive" test applied in cases involving challenges brought under the Pennsylvania Constitution).

industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955). "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

Sands' federal constitutional challenge to the Gaming Act's distribution scheme is premised on the incorrect idea that the Fourteenth Amendment prohibits the General Assembly from imposing "different tax burdens on casinos . . . based solely on their revenue levels." Verified Petition at 25, ¶ 62. Unlike the Uniformity Clause, however, the Due Process Clause does not preclude the creation of a progressive income tax. *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24-26 (1916) (rejecting a challenge to a federal taxing statute brought under the Due Process Clause of the Fifth Amendment). The provisions of the Internal Revenue Code creating progressive federal income taxes have been found to be constitutional. *Swallow v. United States*, 325 F.2d 97, 98 (10th Cir. 1963). Indeed, the United States Court of Appeals for the Eighth Circuit once found a constitutional challenge to the Internal Revenue Code's graduated income tax to be "so frivolous" that it was not worthy of extended discussion. *Ginter v. Southern*,

611 F.2d 1226, 1229, n. 2 (8th Cir. 1979). This line of reasoning applies with equal force to graduated state taxes challenged under the Fourteenth Amendment. *Bromley v. McCaughn*, 280 U.S. 124, 138-139 (1929). Statutory provisions creating progressive taxes on the income earned by individuals are not repugnant to the United States Constitution. *Tyee Realty Co. v. Anderson*, 240 U.S. 115, 117 (1916); *Fears v. United States*, 386 F.Supp. 1223, 1226 (N.D. Ga. 1975).

Since the Due Process Clause does not prohibit the General Assembly from directly imposing a progressive income tax on the gross terminal revenue earned by slot machine licensees operating throughout the Commonwealth, it follows *a fortiori* that the Gaming Act's grant distribution scheme does not violate the Fourteenth Amendment. "All money" in the CMCD Account must be "distributed as grants" awarded by the Board. 4 Pa. C.S. § 1407.1(b). Like every other Category 1, Category 2 and Category 3 slot machine licensee, Sands is eligible to apply and compete for those grants within the parameters set by statute. 4 Pa. C.S. § 1407.1(e). The Due Process Clause does not provide Sands with a constitutional right to receive the same amount of grant money that it pays into the CMCD Account. *Pennsylvania Federation of Dog Clubs v. Commonwealth of Pennsylvania*, 105 A.3d 51, 60-61 (Pa. Cmwlth. 2014).

The "rational basis" test supplies the proper "standard for determining whether legislation that does not proscribe fundamental liberties nonetheless

violates the Due Process Clause." *United States v. Comstock*, 560 U.S. 126, 151 (2010) (Kennedy, J., concurring in the judgment). As discussed earlier, the interlocking provisions of the Gaming Act are carefully calibrated to ensure that, to some extent, the economic benefits of legalized gaming are spread throughout the entire Commonwealth. 4 Pa. C.S. §§ 1302(b), 1304(b)(1), 1305(b)(1.1), 1407.1(d)-(e). The mandatory distribution formula established by § 1407.1(e)(1) bears a rational relationship to that objective. *Appeal of Tobrik*, 696 A.2d 1141, 1146 (Pa. 1997). Given that the Gaming Act's grant distribution formula is "rationally related" to the legitimate governmental interests underpinning the General Assembly's decision to license slot machine operators in the first place, it does not contravene the Due Process Clause. *Glucksberg*, 521 U.S. at 728-735. Sands' arguments to the contrary are wholly lacking in merit.

E. THE GRANT DISTRIBUTION SCHEME DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Equal Protection Clause provides that a State may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., AMEND. XIV, § 1. This constitutional provision "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Aside from "classifications affecting fundamental rights" and classifications based on race, national origin, sex and

illegitimacy, which trigger heightened levels of judicial scrutiny, "a statutory classification [need only] be rationally related to a legitimate governmental purpose" to satisfy the requirements of the Equal Protection Clause. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). In Count IV of the verified petition, Sands alleges that the Gaming Act's distribution formula violates the Equal Protection Clause because it "furthers no legitimate state interest." Verified Petition at 26, ¶ 63.

"In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably *conceivable* state of facts that *could* provide a rational basis for the classification." *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added). "When a legislative classification is attacked on the ground that it is not rationally related to a legitimate governmental interest, it makes no difference whether the reasons for the classification put forth by the government were actually relied upon by the relevant legislative body when the challenged classification was enacted." *McKivitz v. Township of Stowe*, 769 F.Supp.2d 803, 833, n. 20 (W.D. Pa. 2010). A State defending a statute under this standard of review "has no obligation to produce evidence to sustain the rationality of [the challenged] statutory classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993).

Unlike the specific language of the Uniformity Clause, which relates only to the "levying" and "collect[ion]" of taxes, the general language of the Equal Protection Clause reaches broadly enough to cover persons claiming an eligibility for grant money. PA. CONST., ART. VIII, § 1; U.S. CONST., AMEND. XIV, § 1; *Nyquist v. Mauclet*, 432 U.S. 1, 7-12 (1977). According to Sands, the distribution scheme created by the operation of §§ 1407(c.1), 1407.1 and 1408(c.1) violates the Equal Protection Clause because it disproportionately burdens "members of the same class based solely on revenue levels." Verified Petition at 26, ¶ 63. The Equal Protection Clause, however, does not mirror state constitutional provisions that require all property taxes to be uniform. *Nordlinger v. Hahn*, 505 U.S. 1, 15-16, n. 8 (1992). For over a century, it has been clear that "income taxes with progressive rates" are permitted under the United States Constitution. *Wheeler v. State of Vermont*, 249 A.2d 887, 890 (Vt. 1969). This Court's analysis of Sands' federal constitutional challenge to the applicable provisions of the Gaming Act must proceed with the understanding that the Equal Protection Clause *permits* a State to enact "a progressive income tax scheme" that requires a citizen "to contribute a higher percentage of [his or] her earnings" to the state treasury "as [his or] her income increases[.]" *Gean*, 330 F.3d at 771.

The Gaming Act uniformly taxes Category 1, Category 2 and Category 3 licensees at the rate of 0.5% of their daily gross terminal revenue. 4 Pa. C.S. §

1407(c.1). The structure of the distribution scheme ensures that no slot machine licensee receives a grossly disproportionate amount of grant money. 4 Pa. C.S. § 1407.1(e)(3)(i). There is no risk that the challenged statutory provisions will result in an "aberrational enforcement policy" like the one found to be unconstitutional in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 344, n. 4 (1989). Moreover, this case does not present a situation in which statutory classifications distinguish between taxpayers and grant applicants by reference to an arbitrary standard that fails to account for actual profits. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 557-566 (1935). The statutory definition of the term "gross terminal revenue" specifically accounts not only for money received by slot machine licensees, but also for money paid by those licensees to players of slot machines. 4 Pa. C.S. § 1103.

The constitutional validity of the Gaming Act's distribution scheme is confirmed by the decision of the United States Supreme Court in *Fitzgerald v. Racing Association of Iowa*, 539 U.S. 103 (2003). In *Fitzgerald*, the Supreme Court held that Iowa could constitutionally tax adjusted revenue from slot machines located near racetracks at a maximum rate of thirty-six percent while taxing revenue from slot machines located on excursion riverboats at a maximum rate of only twenty percent. *Fitzgerald*, 539 U.S. at 105, 110. Speaking through Justice Breyer, the Supreme Court explained that the Iowa Legislature may have

rationally concluded that the classification would "encourage the economic development of river communities" or "provid[e] incentives for riverboats to remain in the State[.]" *Id.* at 109. The statutory scheme was upheld because the factual circumstances of the case did not preclude "an inference that the reason for the different tax rates was to help the riverboat industry or the river communities." *Id.* at 110. The Supreme Court specifically rejected the idea that *Allegheny Pittsburgh Coal Co.* required a different result. *Id.* at 109-110. It is worth noting that the taxes imposed on revenue from both categories of slot machines were calculated at graduated rates. *Id.* at 105.

The financial disparity resulting from the operation of §§ 1407(c.1), 1407.1 and 1408(c.1) is not nearly as great as the disparity found to be constitutional in *Fitzgerald.* All Category 1, Category 2 and Category 3 slot machine licensees in Pennsylvania pay the same "supplemental daily assessment of 0.5% of [their] gross terminal revenue" to the CMCD Account. 4 Pa. C.S. § 1407(c.1). The annual transfers of money from the Gaming Fund to the CMCD Account mandated by § 1408(c.1) are funded by the uniform slot machine taxes paid by those same licensees. 4 Pa. C.S. § 1403(b). Every Category 1, Category 2 and Category 3 facility is eligible to apply for grants from the CMCD Account. 4 Pa. C.S. § 1407.1(d). The Gaming Act distinguishes between grant applicants only to the extent that it requires that distributions be made to the applicants whose gross

terminal revenues fall below the enumerated thresholds before grants are awarded to other applicants. 4 Pa. C.S. § 1407.1(e)(1)-(2). Because § 1407.1(e)(3)(i) precludes any one slot machine licensee from receiving more than $4,000,000 from the CMCD Account in a given year, the amount of extra money that a competitor of Sands could receive in grant money would never exceed two percent of Sands' gross terminal revenue even if Sands' gross terminal revenue for that year is exactly $200,000,000. If Sands' gross terminal revenue falls below that level, an award of grant money will be forthcoming. 4 Pa. C.S. § 1407.1(e)(1)(ii). The distribution scheme found in the Gaming Act is far more "equal" than the scheme upheld in *Fitzgerald*, which imposed drastically different rates of taxation on separate categories of slot machine operators and rendered the disadvantaged operators ineligible for the lower tax rate in all circumstances. *Fitzgerald*, 539 U.S. at 105.

Sands appears to base much of its argument under the Equal Protection Clause on *Thomas v. Kansas City Southern Railway Co.*, 261 U.S. 481, 484 (1923), in which the Supreme Court stated that "vague speculation" could not "justify a basis of taxation which necessarily produce[d] manifest inequality." Petitioner's Brief at 35-36. As one federal court has recognized, the continuing vitality of *Thomas* is subject to dispute. *North Carolina Electric Membership Corp. v. White*, 722 F.Supp. 1314, 1337 (D.S.C. 1989). In any event, the minimal

variation in "tax rates" identified by Sands cannot be fairly characterized as a "manifest inequality" of the kind condemned in *Thomas*. Petitioner's Brief at 11. Sands' arguments to the contrary are foreclosed by *Fitzgerald*. Since "[g]raduated income taxes" are common throughout the United States, it is not unusual for "[a] tax on casino revenue" to "fall on a limited portion of the population." *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 737 F.3d 228, 233 (2d Cir. 2013).

The Supreme Court has articulated a few bright-line rules concerning statutory classifications that are forbidden to the States in the area of taxation. As a general rule, a State has no "legitimate" interest in promoting only domestic businesses through the creation of taxing schemes that discriminate against nonresident competitors. *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 882 (1985). In a similar vein, a State cannot claim a "legitimate" interest in "favor[ing] established residents over new residents" in order to provide long-term residents with unique tax-related benefits. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 622-623 (1985). The provisions of the Gaming Act challenged by Sands, however, do not cross any of these constitutional lines. Instead, they merely allocate different amounts of grant money to resident businesses based on their respective levels of gross terminal revenue. 4 Pa. C.S. § 1407.1(e)(1). Since the applicable statutory provisions merely serve to spread the economic benefits of legalized gaming throughout the various parts of the Commonwealth hosting

Category 1, Category 2 and Category 3 casinos, they fall well within the General Assembly's broad discretion to create classifications and distinctions in tax-related statutes. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983); *Lebanon Valley Farmers Bank v. Commonwealth of Pennsylvania*, 83 A.2d 107, 113 (Pa. 2013).

The Gaming Act was specifically designed to create jobs, foster economic development, and enhance the tourism industry throughout the Commonwealth. 4 Pa. C.S. § 1102(2)-(2.1), (4)-(6). The grant distribution scheme established by §§ 1407(c.1), 1407.1 and 1408(c.1) promotes those objectives by ensuring that, to some extent, the economic benefits of legalized gaming are shared among the various communities that host Category 1, Category 2 and Category 3 casinos. For these reasons, the applicable provisions of the Gaming Act do not violate the Equal Protection Clause. *Fitzgerald*, 539 U.S. at 106-110. Judgment should be entered in favor of the Respondents, and against Sands, with respect to Count IV of the verified petition. 4 Pa. C.S. § 1904.

F. THE CHALLENGED STATUTORY PROVISIONS ARE CLEARLY SEVERABLE FROM THE REMAINING PROVISIONS OF THE GAMING ACT

The issue of severability arises only where a specific provision of a broader statutory scheme is found to be unconstitutional. *Nextel Communications*, 171 A.3d at 701. Because §§ 1407(c.1), 1407.1 and 1408(c.1) are valid under the

Uniformity Clause, the Special Law Clause and the Fourteenth Amendment, there is no need for this Court to determine whether those provisions are severable from the other provisions of the Gaming Act. In the event that the challenged provisions are invalidated, however, it is clear that the remaining provisions of the Gaming Act can remain in effect.

As a general rule, severability is favored under Pennsylvania law. 1 Pa. C.S. § 1925. With limitations not relevant to this case, the General Assembly has specifically declared the provisions of the Gaming Act to be "severable." 4 Pa. C.S. § 1902(a). When isolated provisions are found to be unconstitutional, this Court will decline to sever only if, "after the void provisions are excised, the remainder of the statute is incapable of execution in accordance with the General Assembly's intent." *Mount Airy #1, LLC*, 154 A.3d at 278.

The three statutory provisions challenged by Sands in this case contain sunset provisions mandating their collective expiration after the passage of ten years. 4 Pa. C.S. §§ 1407(c.1)(2)(i), 1407.1(f)(2)(i), 1408(c.1)(2)(i). If the gross terminal revenues of all Category 1, Category 2 and Category 3 licensees exceed the applicable statutory thresholds at an earlier date, the challenged provisions will become inoperative when the required notice of that fact is published in the Pennsylvania Bulletin. 4 Pa. C.S. §§ 1407(c.1)(1), (2)(ii), 1407.1(f)(1), (2)(ii), 1408(c.1)(1), (2)(ii). Under these circumstances, it is obvious that the other

provisions of the Gaming Act will someday remain in effect without §§ 1407(c.1), 1407.1 and 1408(c.1) regardless of how the Court decides this case. Consequently, the provisions presently at issue are "not integral to the workings of the comprehensive system" of legalized gaming created by the Gaming Act. *Stilp v. Commonwealth of Pennsylvania*, 905 A.2d 918, 973 (Pa. 2006). If the specific provisions challenged by Sands in this case are found to be unconstitutional, the permanent provisions of the Gaming Act should nevertheless remain operative.

CONCLUSION

WHEREFORE, it is respectfully requested that the Court deny the Petitioner's requests for declaratory and injunctive relief. It is further requested that the Court "expedite a final judgment" in favor of the Respondents, and against the Petitioner, with respect to all counts in the verified petition. 4 Pa. C.S. § 1904.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: /s/ Anthony Thomas Kovalchick

ANTHONY THOMAS KOVALCHICK
Deputy Attorney General

J. BART DELONE
Acting Chief Deputy Attorney General
Appellate Litigation Section

KAREN M. ROMANO
Deputy Attorney General

Office of Attorney General
Sixth Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219
Phone: (412) 565-2543
Fax: (412) 565-3019

Date: April 3, 2018

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 216 MM 2017

SANDS BETHWORKS GAMING, LLC,

Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF REVENUE; C. DANIEL HASSELL IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF REVENUE; and THE PENNSYLVANIA GAMING CONTROL BOARD,

Respondents.

CERTIFICATION

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Anthony Thomas Kovalchick
ANTHONY THOMAS KOVALCHICK
Deputy Attorney General
Attorney I.D. #89056

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 11,882 words within the meaning of Pennsylvania Rule of Appellate Procedure 2135. In making this certification, I have relied on the word count of the word processing system used to prepare the brief.

/s/ Anthony Thomas Kovalchick
ANTHONY THOMAS KOVALCHICK
Deputy Attorney General
Attorney I.D. #89056

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 216 MM 2017

SANDS BETHWORKS GAMING, LLC,

Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF REVENUE; C. DANIEL HASSELL IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF REVENUE; and THE PENNSYLVANIA GAMING CONTROL BOARD,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that, on April 3, 2018, I caused a true and correct copy of the foregoing Respondents' Brief in Opposition to the Verified Petition to be sent to the following:

VIA ELECTRONIC FILING

Timothy J. Lowry, Esquire
Adam A. DeSipio, Esquire
DLA PIPER LLP
1650 Market Street, Suite 4900
Philadelphia, PA 19103
Adam.desipio@dlapiper.com
desipio@aol.com

Ilana H. Eisenstein, Esquire
DLA PIPER LLP
1650 Market Street, Suite 2900

Philadelphia, PA 19103
Ilana.eisenstein@dlapiper.com

John J. Hamill, Esquire
DLA Piper LLP
444 West Lake Street, Suite 900
Chicago, IL 60606-0089
John.hamill@dlpiper.com

R. Douglas Sherman, Esquire
Chief Counsel
PA Gaming Control Board
303 Walnut Street
Commonwealth Tower, 5th Floor
Harrisburg, PA 17101-1803
rsherman@pa.gov

Karen M. Romano, Esquire
Deputy Attorney General
Office of Attorney General
Civil Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
kromano@attorneygeneral.gov

Mark Scott Stewart, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market St. 8th Floor
Harrisburg, PA 17101
mstewart@eckertseamans.com

/s/ Anthony Thomas Kovalchick
ANTHONY THOMAS KOVALCHICK
Deputy Attorney General
Attorney I.D. #89056