# S217896

No.
(Court of Appeal No. F065450, consolidated with F065451 and F065689
(Kern County Superior Court Nos. CV-276959 and CV-276961)

## IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



PEOPLE OF THE STATE OF CALIFORNIA
*Plaintiff/Respondent*

v.

KIRNPAL GREWAL, *et al.*,
*Defendant and Appellant*



2nd

## PETITION FOR REVIEW

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## STATE STATUTES

## ISSUES PRESENTED

1. Does Penal Code § 330b, which defines a "slot machine," require that the results generated by the machine be the product of random or chance operation, as held by the court of appeal in *Trinkle v. California State Lottery,* 105 Cal.App.4th 1401 (3d Dist. 2003) ("*Trinkle II*"), or was the court of appeal below correct in rejecting *Trinkle II's* holding and adopting its own materially different standard?

2. Was the court of appeal below correct in rejecting *Trinkle II's* conclusion that insertion of a physical object in order to trigger operation of the machine is a required element of Penal Code §330b?

3. Did the court of appeal below correctly conclude that *Trinkle II* was wrong in ruling that a "slot machine," as defined in any of California's slot machines statutes, must be a house banked game?

4. May a business, consistent with the state and federal constitutional guarantees of due process of law and the doctrine of stare decisis, be enjoined for allegedly violating a criminal statute where its operation is based on, and consistent with, a ten year old published court of appeal decision which authoritatively construed the statute?

## INTRODUCTION

This Petition raises an important issue regarding the appropriate construction of a criminal statute[1] which has been construed materially differently by two different courts of appeal in published decisions. Under the pre-existing (2003) decision, Petitioners' conduct would be entirely lawful; however under the opinion of the court of appeal below (which expressly rejects the earlier opinion in its entirety), Petitioners' conduct would be illegal and subject them and countless others to essentially limitless confiscatory fines, penalties and other various sanctions. This

[1] Albeit in a civil enforcement action under BPC § 17200, *et seq.*.

conflict, unless resolved by this Court, will now create chaos throughout the State regarding the status and scope of the law. (The court of appeal opinion herein is *People v. Grewal*, 224 Cal.App.4th 527 (5th Dt. 2014), hereafter referred to as "*Grewal*".)

Petitioners are subject to an enforcement proceeding under Business and Professions Code (BPC) § 17200 *et seq.* seeking interim and permanent injunctive relief and enormous potential monetary damages and penalties based upon the theory that the sweepstakes program they used to promote their computer/Internet rental businesses rendered each of their computers an illegal "slot machine" as defined in Penal Code § 330b(d).

Petitioners' computer-based sweepstakes program complied with the comprehensive and authoritative interpretation of that statute by the court of appeal in *Trinkle v. California State Lottery*, 105 Cal.App.4th 1401 (3rd Dist. 2003) ("*Trinkle II*") (without which interpretation the California State Lottery's Scratchers' Vending Machines – hereafter "SVMs" – would have been found to be illegal slot machines). *Trinkle II* articulated a three part test for a "slot machine":

> "[T]he elements of a slot machine are (1) the insertion of money or other object which causes the machine to operate, (2) the operation of the machine is unpredictable and governed by chance, and (3) by reason of the chance operation of the machine, the user may become entitled to receive a thing of value." 105 Cal.App.4th at 1410.

However, the court of appeal below expressly *rejected* every element of *Trinkle II's* above-quoted construction of the statute, drastically expanding its scope and thereby subjecting Petitioners to *enormous* potential liability.[2]

[2] At the same time, it necessarily compelled the conclusion that the State Lottery's SVMs are all illegal slot machines.

*Grewal* arose from preliminary injunctive rulings. On remand, Petitioners will imminently face an attempt to impose essentially unlimited potential civil penalties based on the ruling of the court of appeal, absent intervention by this Court.

*Grewal* raises four significant questions of law requiring resolution by this Court, three of which involve the correct definition of "slot machine," and a fourth involving whether, under the doctrine of strict construction of penal statutes, the state and/or federal constitutional due process guarantees, or stare decisis, business operators are entitled to the benefit of a pre-existing favorable interpretation of a state statute rendered by a court of appeal in a published opinion, under which their business would be unquestionably lawful.

Apart from eliminating the foregoing potential chaos and unfairness from all future applications of a significant state criminal statute, review is also necessary to prevent two potential *absurd* consequences flowing from the *Grewal* opinion.

First, by interpreting Penal Code 330b not to require the insertion of a physical object in order to activate the machine, and thereby expanding "slot machine" to include *any* device that delivers the result of a potential prize which is *unpredictable to the recipient*, *Grewal* criminalizes possession of all personal computers and cell phones used to ascertain or deliver results of numerous commercial sweepstakes and/or giveaway programs run by household name national and international companies.[3]

[3] PC § 330b(a) makes it a crime to "possess" a slot machine. PC § 330b(d) defines as a "slot machine" not only those devices which have actually been "adapted . . . for use" as a slot machine, but even those which "may readily be converted for use" as a slot machine. Technically, this makes possession of *any* computer or cell phone capable of connection to the Internet a crime, even if such devices have not actually been *used* to connect to an Internet sweepstakes program. However, Petitioners will

Any interpretation which would unwittingly criminalize a large portion of California residents surely constitutes the sort of absurd result which two of the three justices signing the *Grewal* opinion very recently concluded must compel a reevaluation of facial statutory language. *See People v. Spriggs*, 224 Cal.App.4th 150, 155 (5th Dist. 2014), stating:

> "*Absurd or unjust results will never be ascribed to the Legislature*, and a literal construction of a statute will not be followed if it is opposed to its legislative intent." (Emphasis added.)

*Accord: In re JB,* 178 Cal.App.4th 751, 756 (5th Dt. 2009).

Second, by expressly rejecting the holding in *Trinkle II*, *Grewal* creates great doubt as to the legality of the California State Lottery's ubiquitous SVMs.

*Trinkle II* rejected a claim that the California State Lottery's SVMs were illegal "slot machines," primarily by authoritatively interpreting Penal Code § 330b (and its companion, § 330.1) to require that a "slot machine" under either statute must, itself, generate the chance result by operating in a random manner. The court concluded that it is immaterial under those statutes that the result is merely unknown to the user. What controls is whether the result is determined by random or chance operation of the machine. 105 Cal.App.4th at 1410-1411. By expressly *rejecting* that interpretation of § 330b (*see* 224 Cal.App.4th at 541), *Grewal* unquestionably criminalizes SVMs and those who permit their operation, placement or maintenance on their premises. That would appear to be another absurd and unintended consequence of *Grewal's* interpretation.

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focus only on § 330b's application to any cell phones or personal computers *actually used* to participate in any Internet-based sweepstakes program.

Additionally, in arriving at its holding that SVMs are not "slot machines," *Trinkle II* held that "slot machines" are house banked games and, therefore, because SVMs are *not* house banked games, they cannot be "slot machines." 105 Cal.App.4th at 1412. *Grewal* expressly rejected that alternative holding of *Trinkle II.* 224 Cal.App.4th at 547. Consequently, if *Grewal* is allowed to become final, it will create the absurd and certainly unintended consequence of potentially rendering a major component of the California State Lottery system illegal.

## STATEMENT OF FACTS

Petitioners operated similar retail businesses in Bakersfield, California. They provided computers to the public for on-site rental, along with full Internet and email access. Their computers offered a wide variety of useful business and other software programs (word processing, spreadsheets, etc.), as well as video tutorials for their use.

Petitioners utilized the same sweepstakes program to promote their businesses. Customers acquired sweepstakes points with the purchase of computer time. Free sweepstakes entries were also available, and no purchase was necessary to participate in the sweepstakes. Sweepstakes results could be ascertained in three different ways: by: (i) asking an employee to reveal the result; (ii) pushing the "instant reveal" button at the user's rented computer station; or (iii) having the results revealed via a video *simulation* of a common game of chance.[4]

[4] They are "simulations" because, in a *real* game, the customer's interaction would affect the outcome. However, in these video *simulations* of games, nothing the customers did could change the predetermined outcome.

Regardless of which method was used, the identical result would be revealed. This was because the software, regardless of the method used to reveal the result, merely electronically displayed the next pre-determined result. The results were preloaded in an exact sequence by the software provider in advance of being installed in Petitioner's computers, and Petitioners had no ability to alter that sequence.

In short, there was no chance *operation* of Petitioners' computers; they generated no result – they merely revealed the next in line of the sequence of results which had been previously established when the software was installed. The only element of chance was from the perspective of the customer – not from the operation of the computer.

Because the computers involved no chance operation which determined the results, but merely involved revealing the next sequentially pre-loaded result, they functioned, from a legal perspective, exactly like the California State Lottery Scratchers Vending Machines (SVMs) which the court of appeal found *not* to be slot machines in *Trinkle v. California State Lottery,* 105 Cal.App.4th 1401 (3d Dist. 2003) ("*Trinkle II*"). Petitioners' computers, just like the SVMs in *Trinkle II,* simply delivered to a customer the next in line result (i.e., a virtual card in a preloaded stack of virtual cards). In both cases: (1) the user did not know the result before turning it over, and (2) the result is not the product of any chance or random operation of the machine.

Additionally, unlike the *Trinkle* SVMs (which were activated by inserting actual currency), no object of any type was ever *inserted* into Petitioners' computers in order to activate them. Instead, the user typed in a PIN code obtained when computer services were first purchased.

Lastly, as in any sweepstakes program, the total amount of prizes that would be paid out by Petitioners' business was fixed in advance. Petitioners were not pitted against their customers and had no interest in the outcome of any particular sweepstakes entry. Accordingly, Petitioners' sweepstakes programs did not operate as a *house banked* game (unlike a true "slot machine," which operates so that the owner and the user are at odds with each other and compete for the stake each time the handle is pulled).

Respondent filed separate actions against each Petitioner in Kern County Superior Court asserting that they were engaged in unlawful business practices in violation of Business and Professions Code § 17200 on the dual theories that they were operating "slot machines" in violation of three different slot machine statutes, Penal Code §§ 330a, 330b and 330.1, and a "lottery" in violation of Penal Code § 319.[5] The Complaint sought interim and permanent injunctive relief and virtually unlimited civil monetary penalties under BPC §§ 17200 *et seq.*

Although the trial court initially denied a requested Temporary Restraining Order against these two Petitioners (although *granting* a Restraining Order that same day against another defendant operating a different system), it ultimately preliminarily enjoined Petitioners' sweepstakes pending trial; this appeal followed. Trial was stayed pending the outcome of the appeal.

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[5] Petitioners provided uncontroverted evidence below that their businesses did not operate a lottery because they provided free game options. *See California Gasoline Retailers v Regal Petroleum*, 50 Cal.2d 844 (1958). The court of appeal did not address this issue, and it is not germane to the present Petition.

The court of appeal analyzed the complaint only under the definition of "slot machine" found in Penal Code § 330b on the theory that it was the most broadly worded of the three "slot machine" statutes. It affirmed the judgment below after rejecting *Trinkle II* on every single issue of law with respect to the definition of "slot machine" under PC § 330b. In pertinent part, it stated:

> "*Trinkle II* held that the chance element must be created by a randomizing process occurring at the moment the machine or device is being played. (*Trinkle II, supra,* at p. 1411, 129 Cal.Rptr.2d 904.) As will be explained below, *we think that holding was in error.* . . . [W]e adopt a different approach here than what was articulated in that case." 224 Cal.App.4th at 541 (emphasis added).

*Grewal* held that, rather than requiring proof of random operation of the machine itself (as was critical to the ruling in *Trinkle II*):

> "this element of the statute (commonly referred to as the chance element) can be satisfied [merely] by showing that a prize may be won by reason of an "outcome of operation unpredictable " to the *user*." *Id.* (Emphasis added.)

Next, although *Trinkle II* explained (albeit in dictum) that a required element of the statute is insertion of some type of physical "object,"[6] *Grewal* rejected that as well, concluding that typing in a PIN is sufficient to satisfy the insertion requirement. *Id.* at 542.

Finally, *Grewal* rejected *Trinkle II's* conclusion (*see* 105 Cal.App.4th at 1407 and 1412) that a "slot machine" must be a *house banked game*:

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[6] *See* 105 Cal.App.4th at 1410: "[T]he elements of a slot machine are (1) the insertion of money or other *object* which causes the machine to operate." (Emphasis added.)

> "Finally, defendants argue their integrated systems cannot be slot machines on the ground that they are not house-banked games in which the owner has an interest or stake in the outcome. (*See Trinkle II, supra,* 105 Cal.App.4th at p. 1412 [so indicating].) *We disagree* with the premise that only a house-banked game may constitute an unlawful slot machine or device." 224 Cal.App.4th at 547 (emphasis added).

In short, *Grewal* declared itself in conflict with every aspect of *Trinkle II* under which Petitioners' business operations were unquestionably lawful.

Petitioners filed a Petition for Rehearing (a copy of which is attached hereto) bringing to the court of appeal's attention, *inter alia,* the absurd consequence of its decision to the extent it would make criminals of all who possess cell phones and personal computers used to participate in widespread commercial sweepstakes and giveaway programs run by national and multi-national companies. The Petition for Rehearing was denied without opinion on March 26, 2014.

## REASONS FOR GRANTING REVIEW

### I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE *EXPRESSED* CONFLICT BETWEEN *GREWAL* AND *TRINKLE II* REGARDING THE DEFINITION OF "SLOT MACHINE" UNDER PENAL CODE § 330b.

As *Grewal* recognized, its interpretation of the meaning of Penal Code § 330b is *substantially* different from that of the Third District Court of Appeal in *Trinkle II. Grewal's* definition differs from *Trinkle II's* in at least *three* distinct respects: (1) the "chance operation" element of a slot machine may now be met solely on proof of an outcome unpredictable to the user, even if the result is not generated by any hazard or chance

operation of the machine; (2) a "slot machine" need not be activated by insertion of any type of physical object; and (3) "slot machines" are not limited to house banked games.

In contrast, under *Trinkle II,* all of the above are (and have long been) elements of a "slot machine" under § 330b. These conflicts must be resolved by this Court to avoid a material dichotomy between two diametrically opposite constructions of that statute throughout the state.

## II. THE COURT SHOULD GRANT REVIEW BECAUSE OF THE GREAT LIKELIHOOD OF LEGISLATIVELY UNINTENDED ABSURD CONSEQUENCES FLOWING FROM THE COURT OF APPEAL'S PUBLISHED OPINION

### A. By interpreting Penal Code § 330b as not requiring insertion of any tangible physical object to activate the machine, and including as a "slot machine" *any* device that delivers a potential prize which is unpredictable to the recipient, the court of appeal opinion criminalizes the general public's possession of all personal computers and cell phones used to ascertain results from a wide variety of generally-accepted commercial sweepstakes and/or giveaway programs.

Under *Grewal's* interpretation of Penal Code § 330b, the term "slot machine" no longer requires *either* that any tangible physical object be inserted into the device *or* that the device operate in a random or chance manner. If courts follow *Grewal,* it will now be sufficient to be a prohibited "slot machine" that a device used to ascertain unpredictable results merely be activated by inputting any type of user code. This interpretation, even if somewhat supported by the statutory facial language, leads to absurd results which surely could not have been intended by the Legislature. Specifically, use of sweepstakes programs by many nationally well-known companies, e.g., McDonald's, FedEx, Albertsons, Wal-Mart,

Coca-Cola, etc. has become commonplace, and many, if not all, of their programs now require use of a computer or mobile device with Internet access in order to fully participate in these promotions and learn whether one has won at least some aspect of the prize packages offered by these companies.[7] One going online to ascertain whether a prize has been won must typically input an identification or prize code received with the purchase of the company's product.

In short, each of these sweepstakes programs requires the inputting of some alpha-numeric code into a device in order to use that device to learn whether one has won a prize, a procedure which *Grewal* has now made criminal.

Because mere possession of a "slot machine" is a crime under PC § 330b(a), *Grewal,* if followed, makes criminals of innumerable Californians.[8] This surely is the type of legislatively unintended absurd

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[7] Some of these companies provide prizes both on site *and* online. *See, e.g.,* Monopoly Game at McDonalds *(http://www.playatmcd.com/Rules)* and Albertsons Monopoly Sweepstakes at (https://albertsons.playmonopoly.us/view/rules).

Others provide prizes *exclusively* via an online connection. *See, e.g.,* Coca Cola's "My Coke Rewards Loyalty Program" (http://www.mycokerewards.com/MCRRules.do), FedEx's "Ship on the Fly Sweepstakes" http://www.fedex.com/us/mobile/sweepstakes/58068_FedExShiptoFlySweepstakesRulesFINAL11.28.12).pdf) and Wal-Mart Sweepstakes (http://survey.walmart.com/Surveys/WM/StoreTrak/rules_date_en.htm?date=04/15/2014).

[8] This statute would *also* criminalize those businesses which operate (and those which promote or facilitate) such sweepstakes programs, to the extent the second (unnumbered) paragraph of § 330b makes it a crime "to make or to permit the making of an agreement with another person regarding any slot machine or device, by which the user of the slot machine or device, as a result of the element of hazard or chance or other unpredictable outcome, may become entitled to receive [any] . . . thing of value." All of these programs require the online user to click a box *agreeing* to the terms of use for the online site.

result which counsels against any such statutory construction, even if it may otherwise have support in the facial language of the statute. Again, *see Spriggs*, *supra,* 224 Cal.App.4th at 155, stating:

> "*Absurd or unjust results will never be ascribed to the Legislature*, and a literal construction of a statute will not be followed if it is opposed to its legislative intent." (Emphasis added.)

### B. By expressly rejecting the holding in *Trinkle II*, *Grewal* compels the conclusion that the California State Lottery's Scratchers vending machines are illegal slot machines.

But for the saving ruling in *Trinkle II*, the State Lottery's SVMs would be illegal *slot machines.* Although, as *Trinkle II* observed, the Legislature expressly authorized the state to run a lawful *lottery* (105 Cal.App.4th at 1406), it *never* authorized the state to operate or utilize *slot machines* in conducting that lottery. Moreover, the SVMs would not qualify under Penal Code § 330.5's "vending machine" slot machine exemption for two reasons: (1) § 330.5 exempts qualifying machines only from the slot machine provisions of § 330.1, *not* from those in § 330b, and (2) the vending machine exemption, as construed in *Trinkle v. Stroh*, 60 Cal.App.4th 771 (3d Dt. 1997) (*Trinkle I*), is unavailable to an SVM because the SVM user does not know in advance what the actual value will be of the purchased ticket. *See* 60 Cal.App.4th at 781-783. It might ultimately be worth nothing, or if a winner, it might be worth a great deal. Consequently, the dispositive "exact consideration" requirement of § 330.5 is not met. *Id.*

It has been well over a decade since *Trinkle II* was decided, and the Legislature has not acted to exempt SVMs from the slot machine statutes,

apparently relying instead on *Trinkle II's* construction of §§ 330b and 330.1 which made any such exemption unnecessary. Had the Legislature disagreed with *Trinkle II's* interpretation of either of those statutes, it has had more than 10 years to amend them and clarify their vast potential scope[9]. Its failure to do so suggests that *Trinkle II,* rather than *Grewal*, had the better sense of the Legislature's intent.

Incontestably, courts choosing to follow *Grewal* rather than *Trinkle II* must likewise find the SVMs to be illegal slot machines under PC § 330b, an absurd result clearly unintended by the Legislature. Even if *Grewal's* interpretation of § 330b more closely hews to the statute's literal language than does *Trinkle II's*, facial language should not be slavishly followed when it would lead either to absurd or legislatively unintended consequences. Respectfully, this Court must grant review to resolve whether the Legislature intended the far reaching impact which *Grewal's* construction of § 330b will have on the California State Lottery.

In sum, the absurd irrefutable impact of *Grewal* will be twofold: (1) it will criminalize innumerable average citizens who have used (or will use) their cell phones or computers to ascertain whether they have won a prize in commercial sweepstakes programs; and (2) it will require all courts who follow it to find SVMs to be illegal slot machines.[10]

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[9] I.e., it would have unambiguously given them the broad scope which *Grewal* now reads into 330b. *See n.* 11, *infra* as to how simply this change could have been effected. Simultaneously, they would have then expressly exempted SVMs from the statute.

[10] The mischief could go even further because § 330b(a) also makes criminals of those retail merchants who allow SVM machines on their premises. They would be subject to unfair competition lawsuits from their competitors.

## III. THE COURT SHOULD GRANT REVIEW TO RESOLVE WHETHER A PRE-EXISTING PUBLISHED DECISION OF A STATE COURT OF APPEAL INTERPRETING A CRIMINAL STATUTE IS A SUFFICIENTLY REASONABLE BASIS TO SUPPORT COMMERCIAL ACTIVITY CONSISTENT WITH THAT INTERPRETATION, UNDER THE DOCTRINES OF EITHER STARE DECISIS, THE RULE OF LENITY OR DUE PROCESS OF LAW.

*Lanzetta v. State of New Jersey*, 306 U.S. 451, 453 (1939), held that due process means, at a minimum, that "[n]o one may be required at peril of . . . property to speculate as to the meaning of penal statutes" and that "all are entitled to be informed as to what the State commands or forbids." As part of standard due diligence, any reasonable business person (directly or through counsel) would ascertain the laws governing a regulated business venture by reviewing not only the relevant statutes, but also any controlling judicial opinions authoritatively construing those statutes in order to learn what the State commands or forbids (or permits).

*Trinkle II* proclaimed the meaning of PC § 330b (and its companion 330.1) for nearly a decade before Petitioners opened their businesses. When Petitioners commenced operating, *Trinkle II* was the *only* California opinion which evaluated an alleged slot machine where there was no random action of the machine which generated the prize result. *Trinkle II's* decision that such random operation is a *required element* of a slot machine and that *more* is required than that the result be unpredictable to the user, is the only square California *holding* on the meaning of the "chance operation" element of § 330b. By analyzing and distinguishing all prior decisions involving the definition of "slot machines," *Trinkle II* clarified the scope of California's slot machine statutes and purported to render the authoritative interpretation of the "chance operation" element of a slot

machine.

Given that the Legislature acquiesced in *Trinkle II* (as evidenced by its failure both to eliminate the chance operation requirement[11] and provide an express exemption for SVMs), Petitioners were entitled to do business consistent with that seemingly controlling interpretation, at least until such time as the *Legislature*, and not a *judicial* ruling by *a court of no greater stature* called that interpretation into question. Stare decisis *alone* would seem to so require,[12] as would the state and federal guarantees of due

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[11] Had the Legislature disagreed with *Trinkle II's* interpretation of § 330b, the obvious remedy would have been to *eliminate* that statute's reference to any "element of hazard or chance" and "of operation," leaving it to read, instead: "by reason of any . . . outcome . . . unpredictable by him or her." Since chance or hazard operation will *always* be unpredictable to the user, *Grewal's* interpretation of the statute makes the words "element of hazard or chance" *entirely superfluous.*

This result is inconsistent with standard principles of statutory construction as noted in *Trinkle II* itself. Specifically, one of *Trinkle II's express reasons* for interpreting the chance operation element as it did, was its observation that any other reading of the statute would have rendered the words "of such operation" *entirely superfluous. See* 105 Cal.App.4th at 1410, stating "[i]n construing statutory language, the courts should give meaning to every word of a statute and avoid a construction making any word surplusage. (*Reno v. Baird,* 18 Cal.4th 640, 658 (1998).)" Likewise, any other reading of the statute would have rendered the words "element of hazard or chance" equally superfluous. Importantly, *Grewal* did not address *Trinkle II's* observation that the very type of construction rendered in *Grewal* would create superfluous statutory language. This suggests yet another reason for granting Review: resolution of the appropriate standards for statutory construction.

In *Arnett v. Dal Cielo,* 14 Cal.4th 4, 22 (1996), this Court considered a statutory construction issue *remarkably* similar to the present one; the statutory language at issue was a reference to "discovery or subpoena." (*Ibid.*) This Court held that an interpretation that "discovery" included "subpoena" should be avoided because that interpretation would render the word "subpoena" surplusage to the word "discovery."

[12] *See, e.g., Auto Equity Sales v. Superior Court*, 57 Cal.2d 450, 455 (1962), stating: "Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court."

process of law, which, at least since *Lanzetta*, require that citizens, including businessmen like Petitioners, be given notice of what the law commands or forbids.

Petitioners respectfully submit that this Court should grant review to resolve this extremely important question of law: May business owners rely with certainty on published court of appeal decisions purporting to render dispositive interpretations of the laws which establish whether a particular business practice is or will be lawful?[13]

## CONCLUSION

For all the reasons above, this Court is respectfully urged to grant review and thereby eliminate this irreconcilable conflict between two district courts of appeal in their interpretation of an important criminal statute and clarify whether, in today's complex regulatory environment,

[13] Petitioners note that if *Grewal* is allowed to stand, they will not only be forced to cease any further operation of their business model, but will also face claims for potentially *limitless and bankrupting* civil penalties under BPC § 17206. They will then invoke a different aspect of the rule of lenity, since they will then be subject to criminal punishment for conduct occurring prior to *Grewal,* which conduct they could not reasonably have believed to be criminal, given that it was lawful under *Trinkle II.* The issue of that aspect of the rule of lenity is not raised by this Petition as it would be premature to assert it at this time.

businesses may safely rely on critical definitive statutory interpretations in published authoritative opinions of courts of appeal.

Respectfully submitted,

Dated: April 16, 2014

John H. Weston
G. Randall Garrou
Jerome H. Mooney
**Weston, Garrou & Mooney**

by _____
John H. Weston
Attorneys for Petitioners

**CERTIFICATE OF WORD COUNT BY APPELLATE COUNSEL**

I am one of the attorneys who participated in preparation of this Petition for Review and hereby certify, per the requirements of CRC 8.504(d), that it consists of 4,658 words, exclusive of the cover, tables, signature blocks, proof of service and appendices.

G. Randall Garrou

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KIRNPAL GREWAL et al.,

Defendants and Appellants.

F065450/F065451/F065689

(Super. Ct. Nos. CV-276959, CV-276958, CV-276961)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Weston, Garrou & Mooney, John H. Weston, G. Randall Garrou and Jerome H. Mooney for Defendants and Appellants Kirnpal Grewal and Phillip Ernest Walker.

William H. Slocumb and Christopher T. Reid for Defendant and Appellant John C. Stidman.

Lisa S. Green, District Attorney, Gregory A. Pulskamp and John T. Mitchell, Deputy District Attorneys, for Plaintiff and Respondent.

Downey Brand, Stephen J. Meyer, Tory E. Griffin and Kelly L. Pope for Net Connection Hayward as Amici Curiae on behalf of Defendants and Appellants.

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In these three consolidated cases,[1] the People of the State of California by and through the Kern County District Attorney (the People) filed civil actions under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), seeking to enjoin several Internet café[2] businesses from continuing to engage in practices that allegedly violated the gambling prohibitions set forth at Penal Code sections 319 (unlawful lottery) and 330a, 330b and 330.1 (unlawful slot machines or devices).[3] When the People requested preliminary injunctions, the owners and operators of the Internet café businesses in question (i.e., Kirnpal Grewal, Phillip Ernest Walker & John C. Stidman; collectively defendants) opposed such relief on the ground that their businesses did not conduct lotteries but merely offered lawful sweepstakes that promoted the sale of their products. Additionally, while acknowledging that customers could reveal sweepstakes results by playing (on terminals provided on premises) a computer game program that simulated the

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1 Two additional related cases (i.e., *People v. Nasser*, case No. F066645 & *People v. Elmalih*, case No. F066646) will be addressed by us in a separate opinion. We note the only difference in those cases from what is considered here is that a telephone card (rather than Internet time) was the product purchased to gain sweepstakes points used on game programs at the businesses' computer terminals. With no material differences, the same rationale and disposition follows in those cases as is stated here.

2 Broadly speaking, the term "Internet café" depicts a café or similar establishment that sells computer use and/or Internet access on its premises. As commentators have pointed out, many such businesses now promote the sale of their products (e.g., computer time, Internet access or telephone cards) by offering a sweepstakes giveaway that allows customers to ascertain their winnings, if any, by playing specialized game programs on the businesses' own computer terminals. Typically, these programs simulate casino slot machines or other gambling games. (See e.g., Dunbar & Russell, *The History of Internet Cafes and the Current Approach to Their Regulation* (2012) 3 UNLV Gaming L.J. 243, 243-245; Silver, *The Curious Case of Convenience Casinos: How Internet Sweepstakes Cafes Survive in a Gray Area Between Unlawful Gambling and Legitimate Business Promotions* (2012) 29 J. Marshall J. Computer & Info. L. 593, 594-599.)

3 Unless otherwise indicated, all further statutory references are to the Penal Code.

look and feel of a slot machine or other game of chance, defendants maintained that the required statutory elements of an unlawful slot machine or gambling device were not present. The trial court disagreed with that assessment and granted the preliminary injunctions as requested by the People. Defendants have appealed from the orders granting such preliminary injunctions, raising the same arguments they made in the trial court.[4] Because we conclude the People will likely prevail on the claims that defendants violated prohibitions against slot machines or gambling devices under section 330b, we shall affirm the relief granted below.

## FACTS AND PROCEDURAL HISTORY

Since our opinion concerns three distinct Internet café businesses, we begin by summarizing the factual background of each of the underlying cases.[5]

Defendant Stidman's I Zone Internet Café

Defendant Stidman owns and operates a business known as the I Zone Internet Café (I Zone) in Bakersfield, California. I Zone sells Internet time to the public at a price of $20 per hour, which time may be used on a system of computer terminals located on the I Zone premises. In addition, I Zone sells copying services, packaging services and refreshments. To promote the sale of Internet time and other products, I Zone offers a sweepstakes to customers whenever they make a purchase. According to the sweepstakes rules, noncustomers may also enter the sweepstakes; that is, no purchase is necessary to

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4 After separate appeals were filed, we ordered the three cases consolidated. The consolidated cases herein are *People v. Grewal*, case No. F065450, *People v. Walker*, case No. F065451 and *People v. Stidman*, case No. F065689.

5 Although the facts and circumstances shown below were *as of* the time of the hearings below, for ease of expression we primarily use the present tense.

enter.[6] The sweepstakes is effectuated through a computer software system provided by a company known as Capital Bingo.

Under the sweepstakes as operated by the software system, a person who purchases Internet time or other products at I Zone receives sweepstakes points for each dollar spent. A customer is also given sweepstakes points for his first purchase of the day as well as for being a new customer. For example, a new customer who buys $20 of Internet time receives a total of 3,000 sweepstakes points, consisting of 2,000 sweepstakes points for the purchase of Internet time, 500 sweepstakes points for the first $20 of Internet time purchased for that day, and 500 sweepstakes points for being a new customer. Additional sweepstakes points may be received if the customer buys refreshments. A white plastic card with a magnetic strip is provided to the customer, which card is activated by an I Zone employee at the register. When the customer swipes the card at an open computer terminal, he is given the option of using the Internet function or playing sweepstakes computer games. If he chooses the latter, the time spent playing sweepstakes computer games does not reduce the amount of Internet time available.[7] Both options are touch-screen activated and do not require a keyboard or mouse.

In playing the sweepstakes computer games, I Zone customers use their sweepstakes points in selected increments (simulating bets) on games with names such as

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[6] To enter a sweepstakes without purchasing Internet time or other products, an individual may receive up to four free entries from the cashier each day upon request. Four additional entries are available by mailing a form with a self-addressed, stamped envelope.

[7] Detective Craig Checklenis of the Bakersfield Police Department initially reported that Internet time was reduced when he played the sweepstakes computer games. He later corrected himself, stating that "Internet time is not lost when playing the sweepstakes games."

"Buck Lucky," "Tropical Treasures" or "Baby Bucks." According to the I Zone sweepstakes rules, each increment level available for play "represents a separate sweepstakes."[8] As shown by photographic evidence, gambling-themed games resembling slot machines are prominently displayed on the I Zone terminals. According to the observations of Detective Checklenis, "[i]t appeared the subjects were playing casino style slot machine games on the computers.... The audible sounds were that of casino style slot machines." On a later inspection of I Zone, he surveyed the room and noted that no one was on the Internet, but rather "all the people using the computer terminals were playing the sweepstakes games."[9] Participants in the I Zone sweepstakes have a chance to win cash prizes in various amounts ranging from small sums to a top prize of $3,000.

In opposing the motion for preliminary injunction, Stidman presented evidence and argument regarding how the sweepstakes functioned. His position was essentially that the computer sweepstakes games played on the I Zone terminals were merely an entertaining way for customers to reveal a sweepstakes result. A customer could also reveal a sweepstakes result by other means, such as by using a special function on the computer terminal or by asking an I Zone employee at the register to print out a result on paper. As described in Stidman's opposition, "[e]ach time a customer reveals the results of a sweepstakes entry, [regardless of the means used], the next available sweepstakes entry in the 'stack' is revealed," in sequence, from a prearranged stack of entries. The

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8 Based on the description provided by Stidman of how the software system conducts the sweepstakes program, this statement indicates that each increment level available for play would access a distinct "batch of sweepstakes entries" stacked in a particular order or sequence.

9 Consistent with the detective's observation, Stidman's evidence revealed that at least some of the I Zone patrons had a considerable surplus balance of Internet time on their accounts.

"next available sweepstakes entry" contains a predetermined result that would be the same regardless of which method was used to reveal it. Thus, when the customer engages the sweepstakes computer games, the outcome is determined by the particular sweepstakes entry that is being revealed at that time, not by the workings of the game itself. That is, the game simply *reveals* the predetermined result of the next sequential sweepstakes entry.

Stidman provided a further operational description of how the software system used by I Zone conducted the sweepstakes. The descriptive information was primarily based on declarations from Stidman's expert, Nick Farley, and an attorney opinion letter provided to Stidman (purportedly from Capital Bingo's attorney) disclosing the Capital Bingo operational "model." Allegedly, there were three distinct servers, referred to as (1) the Management Terminal, (2) the Point of Sale Terminal, and (3) the Internet Terminal. As summarized in the trial court by Stidman's counsel: "It is at the Management Terminal where all sweepstakes entries are produced and arranged. Each batch of sweepstakes entries has a finite number of entries and a finite number of winners and losers. Once a batch of sweepstakes entries is produced at the Management Terminal, it is 'stacked' ... and then transferred to the Point of Sale Terminal in exactly the same order as when it left the Management Terminal. Each time a customer reveals the results of a sweepstakes entry, either at the Internet Terminal or at the Point of Sale, the next available sweepstakes entry in the 'stack' is revealed. In other words, the Internet Terminal simply acts as a reader and displays the results of the next sequential sweepstakes entry in the stack as it was originally arranged and transferred from the Management Terminal—it is never the object of play. In fact, exactly the same results [are displayed] for a specified sweepstakes entry whether the customer chooses to have the results displayed in paper format at the Point of Sale Terminal or in electronic format at an Internet Terminal." Additionally, Farley's declaration asserted that neither the Point of Sale Terminal nor the Internet Terminal had a random number generator and could not

be "the object of play," since those servers could not influence or alter the result of a particular sweepstakes entry, but merely displayed that result.

Defendant Walker's OZ Internet Café and Hub

Defendant Walker owns and operates a business called the OZ Internet Café and Hub (the OZ) in Bakersfield, California. Among other things, the OZ sells computer and Internet access (hereafter, Internet time) on computer terminals on its premises. The OZ promotes the sale of Internet time and other products with a sweepstakes giveaway that is implemented through a software system provided by a company known as Figure Eight Software. Participants in the sweepstakes have the chance to win cash prizes varying from small amounts to a top prize of $10,000 as set forth in the sweepstakes' odds tables.

Internet time may be purchased at the OZ for $10 per hour. When Internet time is purchased, a personal identification number (or PIN) is assigned to that customer by an employee of the OZ, who creates an account by which the customer may access the computers and Internet as well as play sweepstakes computer games. Customers are not charged for Internet time while they are playing the computer sweepstakes games. At the time of purchase, the customer receives 100 "sweepstakes points" for each dollar spent. As asserted by Walker, "[c]ustomers purchase product[s] consisting mostly of computer and Internet time at competitive prices and receive free sweepstake points in addition to the product purchased." Additionally, a customer may receive 100 free sweepstakes points every day that the customer comes into the OZ, and first-time customers receive 500 additional sweepstakes points. These sweepstakes points can be "used to draw the next available sequential entry from a sweepstake contest pool." This may be done and the result revealed in one of three ways: (i) asking an OZ employee to reveal a result, (ii) pushing an instant reveal button at the computer station, or (iii) playing computer sweepstakes games "that have appearances similar to common games of chance" at the computer terminals.

The sweepstakes rules provide that no purchase is necessary to enter the sweepstakes. According to Walker, noncustomers may obtain free sweepstakes entries by asking an employee at the OZ or by mailing in a request.

When Detective Checklenis investigated the OZ, he asked Walker if customers had to sign a form to access the computers. Walker responded in the affirmative and showed Checklenis a "Computer Time Purchase Agreement." On the form, each customer is required to acknowledge that he understands the following matters before using the OZ computers: (i) that he is purchasing computer time and (ii) that the sweepstakes computer games are "not gambling," but are a "promotional game" in which all winners are predetermined. On the form, the customer also affirms that he understands "[t]he games have no [e]ffect on the outcome of the prizes won," but are merely an "entertaining way to reveal [his] prizes and [he] could have them instantly revealed and would have the same result."

In opposing the motion for preliminary injunction, Walker's declaration explained what happens when a customer uses the sweepstakes computer game: "If a customer utilizes the pseudo-interactive entertaining reveal interface[,] the customer can encounter some games that have appearances similar to common games of chance." However, before any "spinning wheels or cards" appear on the screen, "the sweepstake entry has already been drawn sequentially from a pool of entries and is predetermined. There is no random component to the apparent action of the images in the interface even though it simulates interactivity. Instead, the images will display a result that matches the amount of any prize revealed in the entries. [Citation.] [¶] As told to the customers in the rules and in disclaimers, the pseudo interactive interface does not 'automatically' or 'randomly' utilize any play to obtain a result."

Walker's opposition also described in greater detail the operation of the software system utilized by the OZ to run the sweepstakes. Walker asserted by declaration that under that software system, the issue of whether a customer has won a cash prize is

determined at the point in time that his entry is drawn from a sweepstakes pool. Each such entry has a previously assigned cash prize of zero or greater. Entries are drawn sequentially from one of 32 sweepstakes pools created by the software company.[10] The entries in each pool are prearranged in a set order or sequence by the software company, and the OZ has no control over the order or sequence of the entries or the corresponding results. Access to a particular sweepstakes pool is determined by how many points the customer chooses to use (or bet) at any one time. Each pool has its own prizes and its own separate sequence of entry results. When a customer selects a sweepstakes pool, the software system assigns to him the next available entry result in that pool, in sequence. At that point, the result is established and cannot be affected by the computer game play, which merely reveals the established result. Additionally, Walker asserted that a specific sequential entry will yield the same result regardless of the method a customer used to draw and reveal it.

Defendant Grewal's A to Z Café

Defendant Grewal is the owner and operator of the A to Z Café in Bakersfield, California. Grewal's opening brief describes the sweepstakes conducted at his A to Z Café in identical terms to the sweepstakes operated by Walker. Our review of the evidentiary record confirms that the sweepstakes program used by the A to Z Café was in all material respects the same as the one described above regarding Walker's business, the OZ, and the parties likewise agree that the facts and circumstances of the two cases are in essence the same. Therefore, rather than engage in an unnecessary repetition of facts, we simply note that the material facts regarding the A to Z Café are the same as

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10 The printed sweepstakes rules also refer to such pools as "multiple finite deals of entries."

described above concerning the OZ. When we discuss Walker's system, the same is true of Grewal's.

Procedural Background

All three cases were commenced on June 21, 2012, by the Kern County District Attorney's Office on behalf of the People, filed as separate civil actions against Stidman, Walker and Grewal, respectively. Each complaint sought injunctive relief under Business and Professions Code section 17200 based on defendants' alleged violations of antigambling provisions of the Penal Code in the operation of their respective Internet café businesses.[11] The Penal Code provisions at issue under the pleadings were those relating to unlawful lotteries (§ 319) and unlawful slot machines or gambling devices (§§ 330a, 330b & 330.1). On July 23, 2012, hearings were held on the People's motions for preliminary injunctions by which the People sought to prohibit the sweepstakes operations until or unless otherwise ordered by the court after a trial on the merits. The trial court granted the requested relief as against each defendant. Formal written orders granting the preliminary injunctions were entered by the trial court on August 1, 2012, from which each defendant separately appealed. We ordered the three appeals consolidated.

## DISCUSSION

### I. The Issue in the Trial Court and Our Standard of Review

The decision to grant a preliminary injunction rests in the sound discretion of the trial court. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.) Ordinarily, "two interrelated factors" are evaluated by the trial court in deciding whether to exercise its discretion to issue a preliminary injunction: "The first is the likelihood that the plaintiff

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[11] Other relief, such as civil penalties, was also sought in each of the underlying complaints filed by the People.

will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*Id.* at pp. 69-70.)[12] An order granting or denying such interlocutory relief reflects the trial court's evaluation of the controversy on the record before it at the time of its ruling; thus, "it is not an adjudication of the ultimate merits of the dispute." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) In view of that latter principle, we base our opinion upon the state of the record that was before the trial court in granting interlocutory relief, and although on *those* initial facts we reach certain conclusions, we leave open the possibility—however remote it may be here—that a trial on the merits based on a more fully developed factual record may cast these matters in a different light.

We review an order granting a preliminary injunction under the abuse of discretion standard. (*People ex rel. Gallo v. Acuna, supra,* 14 Cal.4th at p. 1109.) If the evidence is in conflict, we interpret the facts in the light most favorable to the prevailing party. (*Cinquegrani v. Department of Motor Vehicles* (2008) 163 Cal.App.4th 741, 746.) To the extent that the grant of a preliminary injunction was based on statutory construction, we review the issue of statutory construction de novo. (*Ibid.*) The question of whether, under a given state of facts, a particular device is an unlawful slot machine is one of law. (*Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1405 (*Trinkle II*).) We review that question of law de novo.

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12 Where, as here, a governmental entity seeks specifically provided injunctive relief to prohibit an alleged violation of a statute, once that governmental entity makes a showing that it is likely to prevail at trial, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. (*IT Corp. v. County of Imperial, supra,* 35 Cal.3d. at pp. 71-72; see Bus. & Prof. Code, §§ 17203 [providing for injunctive relief against unlawful business practices], 17202 [includes specific or preventive relief to enforce penal law].)

In the instant appeal, defendants contend that the trial court erred or abused its discretion in issuing the preliminary injunctions because, allegedly, there was no likelihood that the People would be able to prevail on the merits. We proceed on this understanding of defendants' claims. (See *Tosi v. County of Fresno* (2008) 161 Cal.App.4th 799, 803-804.)

## II. Statutory Construction of Penal Code Sections

Because our review of the trial court's rulings requires that we interpret or apply certain Penal Code provisions on the record before us, we briefly set forth the relevant principles of statutory construction.

"'[T]he objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further.'" (*People v. Beaver* (2010) 186 Cal.App.4th 107, 117.) When the language is susceptible of more than one reasonable interpretation, however, we look to extrinsic aids, including the objects to be achieved, the evils to be remedied, the legislative history, public policy, and the statutory scheme of which the statute is a part. (*Ibid.*; accord, *People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.)

Under the rule of lenity, which defendants argue should be applied here, any doubts as to the meaning of a criminal statute are ordinarily resolved in a defendant's favor. (See, e.g., *People v. Overstreet* (1986) 42 Cal.3d 891, 896; *Walsh v. Dept. Alcoholic Bev. Control* (1963) 59 Cal.2d 757, 764-765).[13] However, that rule of statutory

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[13] The rule is sometimes also described as a principle of strict construction. (See, e.g., *People v. Overstreet, supra*, 42 Cal.3d at p. 896; *People v. Avery* (2002) 27 Cal.4th 49, 58.)

interpretation is only applied where the statute is reasonably susceptible of two constructions that are in relative equipoise—that is, resolution of the statute's ambiguity in a convincing manner is impracticable. (*People v. Lee* (2003) 31 Cal.4th 613, 627; *People v. Avery, supra*, 27 Cal.4th at p. 58; *People v. Jones* (1988) 46 Cal.3d 585, 599.) "Thus, although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*People v. Avery, supra*, at p. 58 [citing § 4].)[14] As recently stated by our Supreme Court, "'[t]he rule of lenity does not apply every time there are two or more reasonable interpretations of a penal statute. [Citation.] Rather, the rule applies "'only if the court can do no more than guess what the legislative body intended; there must be an *egregious* ambiguity and uncertainty to justify invoking the rule.'" [Citation.]' [Citation.]" (*People v. Nuckles* (2013) 56 Cal.4th 601, 611.)

No such ambiguity exists in this case, as will become apparent in the discussion that follows and, therefore, the rule of lenity does not apply.[15]

## III. An Unlawful Slot Machine or Device Was Shown by the Record

We begin with the issue of whether the devices in question (i.e., defendants' software systems operating the computer sweepstakes games on the networked terminals

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[14] Section 4 provides: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

[15] Even assuming a strict construction, however, that would not require the statutory wording to be strained or distorted to exclude conduct clearly intended to be within its scope, where the words are given their fair meaning in accord with the evident intent of the Legislature. (*Trinkle v. Stroh* (1997) 60 Cal.App.4th 771, 783 [so holding, construing provision relating to slot machines]; *People v. Shira* (1976) 62 Cal.App.3d 442, 460 [same, construing statute relating to lotteries]; cf. § 4 [penal provisions construed according to their fair import].)

provided to customers) were unlawful slot machines or gambling devices under the applicable penal statutes.

Sections 330a, 330b and 330.1 contain distinct but overlapping provisions that prohibit "slot machine[s] or device[s]" as defined in each section.[16] The definitional language in each section is similar, but not identical. (Cf. §§ 330a, subd. (a), 330b, subd. (d) & 330.1, subd. (f).)[17] Arguably the broadest of the three is section 330b, which defines a "'slot machine or device'" in the following terms: "[A] machine, apparatus, or device that is adapted ... for use in a way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money ... or thing of value ...." (§ 330b, subd. (d).)[18] The People center their discussion on section 330b; we will do the same.

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16 Section 330a was enacted in 1911, while sections 330b and 330.1 were both enacted in 1950. (Stats. 1911, ch. 483, § 1, p. 951 [re: § 330a]; Stats. 1950, 1st Ex. Sess., ch. 17, § 1, p. 452 [re: § 330b]; Stats. 1950, 1st Ex. Sess., ch. 18, § 1, p. 454 [re: § 330.1].)

17 Our courts have recognized the three provisions are "similar" in their terms (e.g., *Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 593), but also have differences (e.g., *People ex rel. Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal.App.4th 699, 703, fn. 6; but see *Trinkle II*, *supra*, 105 Cal.App.4th at pp. 1409-1410, fn. 7 [treating §§ 330b & 330.1 as identical]).

18 Section 330.1, subdivision (f), defines a "slot machine or device" in relevant part as "one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object the machine or device is caused to operate or may be operated or played, mechanically, electrically, automatically, or manually, and by reason of any element of hazard or chance, the user may receive or become entitled to receive anything of value ...."

Section 330a, subdivision (a), prohibits "any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other

California courts have found section 330b to prohibit a variety of devices where prizes may be won based on chance. In *People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th 699, a vending machine that dispensed telephone cards for $1 included a "sweepstakes" feature with audio-video displays resembling a slot machine. When customers purchased a phone card for $1, they were given a chance to win a cash prize of up to $100. A "preset computer program" determined the results of the sweepstakes; the user could not control or alter the results. (*Id.* at pp. 701-702.) The Court of Appeal held the vending machine was a prohibited slot machine under the plain language of section 330b, because "[b]y the insertion of money and purely by chance (without any skill whatsoever), the user may receive or become entitled to receive money." (*Id.* at p. 703.) Similarly, in *Trinkle v. Stroh*, *supra*, 60 Cal.App.4th 771, a jukebox that dispensed four songs for $1 was found to be a prohibited slot machine or device under section 330b because the operators also received a chance to win a cash jackpot. (*Id.* at pp. 776-780; see also *Score Family Fun Center, Inc. v. County of San Diego* (1990) 225 Cal.App.3d 1217, 1221-1223 [holding that an arcade video game that simulated card games violated § 330b because operators could, as a matter of chance, win free games or extended play].)

Based on these authorities, the People argue that an unlawful slot machine or device under section 330b was involved in each of defendants' businesses at issue in this consolidated appeal. According to the People, this conclusion follows from the facts that, under defendants' sweepstakes software systems as operated on their computer networks

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valuable thing is staked or hazarded, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner and by means whereof, or as a result of the operation of which any merchandise, money ... or any other thing of value, is won or lost, or taken from or obtained from the machine, when the result of action or operation of the machine, contrivance, appliance, or mechanical device is dependent upon hazard or chance ...."

and terminals, upon the payment of money (i.e., the purchase of Internet time), patrons can activate computer sweepstakes games on the terminals and, based on "chance" or "other outcome of operation unpredictable by" the patron, win cash prizes. We agree with that analysis. That is, on the question of whether it was appropriate for the trial court to grant the preliminary injunctions, we conclude that the record below was adequate to show the People would likely prevail on the merits under section 330b.

We explain our conclusion by examining each of the statutory elements of an unlawful "'slot machine or device'" under section 330b. Before we begin that task, a brief comment is needed concerning our approach. One Court of Appeal decision provided the following distillation of the three elements necessary to constitute a slot machine or device under section 330b: "(1) the insertion of money or other object which causes the machine to operate, (2) the operation of the machine is unpredictable and governed by chance, and (3) by reason of the chance operation of the machine, the user may become entitled to receive a thing of value." (*Trinkle II*, *supra*, 105 Cal.App.4th at p. 1410).) We take issue with this formulation because section 330b, subdivision (d), refers to *chance* "or" *unpredictable* outcome, while *Trinkle II* uses the conjunctive "and" in its articulation of the second element. As noted in *Score Family Fun Center v. County of San Diego*, *supra*, 225 Cal.App.3d, at page 1221, those terms are clearly in the disjunctive. As a result, this element of the statute (commonly referred to as the chance element) can be satisfied by showing that a prize may be won by reason of an "outcome of operation *unpredictable*" to the user (§ 330b, subd. (d), italics added; *Score Family Fun Center v. County of San Diego, supra*, at p. 1221). No further or additional proof relating to "chance" is needed.[19] Additionally, we disagree with *Trinkle II's* description

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[19] The disjunctive statutory wording does not mean that chance and unpredictability are entirely separable, but only that they may be distinguished in terms of what must be shown. Obviously, when the outcome of operation of a device is entirely unpredictable

of the manner in which the chance element must be realized in order to constitute a slot machine or device under section 330b. Specifically, *Trinkle II* held that the chance element must be created by a randomizing process occurring at the moment the machine or device is being played. (*Trinkle II*, *supra*, at p. 1411.) As will be explained below, we think that holding was in error. Since we disagree with *Trinkle II* on these significant matters relating to the statutory elements, we adopt a different approach here than what was articulated in that case.

In light of the foregoing, and in view of the complexities of the present case, we believe it is best to frame our discussion of the elements of section 330b in terms that are closely tethered to the language of the statute itself. We now turn to those statutory elements as revealed in the statutory language.

The first element specified in the statute is that "*as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operate or may be operated* ...." (§ 330b, subd. (d), italics added.) Defendants argue that this element is lacking because no coin or similar object was inserted into a slot by customers at the computer terminal to cause the sweepstakes computer games to operate. We reject that argument. Here, the insertion of a PIN or the swiping of a magnetic card at the computer terminal in order to activate or access the sweepstakes games and thereby use points received upon paying money at the register (ostensibly to purchase a product) plainly came within the broad scope of the statute. The statute

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to the user, it is *also* involving chance, since for purposes of our gambling laws "'[c]hance'" means that "winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill." (*Hotel Employees & Restaurant Employees Internat. Union v. Davis*, *supra*, 21 Cal.4th at p. 592.) Here, we believe the statute is simply making clear that it is *sufficient* to establish this element of an unlawful slot machine or device if a prize may be won by reason of an "outcome of operation unpredictable by [the user]." (§ 330b, subd. (d).)

expressly includes the catchall phrase "*by any other means*." (§ 330b, subd. (d), italics added.) Even though a coin, money or object (e.g., a token) was not inserted into a slot, the games were commenced *by other means* analogous thereto which effectively accomplished the same result and, therefore, this element is satisfied.

The second element of a "slot machine or device" articulated in section 330b is that "*by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any ... money ... or thing of value ....*" (§ 330b, subd. (d), italics added.)[20] This language describes the so-called "chance" element—that is, the requirement that any potential to win a prize must be based on hazard, chance or other outcome of operation unpredictable to the user of the machine or device.

Here, it is clear that defendants' customers may become entitled to win prizes under the software systems implementing defendants' computer sweepstakes games based on "hazard or chance or of other outcome of operation unpredictable" to the user. (§ 330b, subd. (d).) That is, we agree with the People that the chance element is satisfied. Under California gambling law, "'[c]hance'" means that "winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill." (*Hotel Employees & Restaurant Employees Internat. Union v. Davis*, *supra*, 21 Cal.4th at p. 592.) Since customers playing defendants' computer sweepstakes games can exert no influence over the outcome of their sweepstakes entries by means of skill, judgment or

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[20] Prior to 2004, this portion of the statute was worded as follows: "'by reason of any element of hazard or chance or of other outcome of *such* operation unpredictable by him ....'" (*Trinkle II*, *supra*, 105 Cal.App.4th at p. 1409, fn. 6, italics added.) In 2004, as a result of housekeeping legislation that made technical, nonsubstantive changes to numerous statutes, the word "such" appearing before the word "operation" was removed from section 330b. (Stats. 2003, ch. 264, § 1.)

how well they play the game, it follows that we are dealing with systems that are based on chance or luck. Moreover, by describing their promotional giveaways as *sweepstakes*, defendants have effectively admitted to the chance element because a "'[s]weepstakes'" is, by definition, "any procedure for the distribution of anything of value by lot or by chance that is not unlawful under other provisions of law...." (Bus. & Prof. Code, § 17539.5, subd. (a)(12).)[21] Our conclusion is further supported by the official rules of defendants' sweepstakes, which disclose odds or chances of winning and reiterate that the manner of playing the game does not alter the outcome of an entry.

(A) We Follow *People ex rel. Lockyer v. Pacific Gaming Technologies*

Moreover, even though all sweepstakes entries were previously arranged in batches (or pools) that had *predetermined* sequences, that fact does not change our opinion of this issue (i.e., the chance element) because the results would still be unpredictable and random from the perspective of the user. Section 330b, subdivision (d), refers to chance "*or* of other outcome of operation *unpredictable by him or her* ...." (Italics added.)[22] The situation here is clearly analogous to what was described in *People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th 699, where "[a] preset computer program determine[d] the results of the sweepstakes." (*Id.* at p. 702.) The machine or device in that case (a "VendaTel" that

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21 The difference between a lawful sweepstakes and an unlawful lottery has nothing to do with the chance element. Rather, the difference is that a sweepstakes does not require that consideration be paid to enter. (See § 319 [elements of lottery include consideration]; *California Gasoline Retailers v. Regal Petroleum Corp.* (1958) 50 Cal.2d 844, 861-862 [promotional sweepstakes was not an unlawful lottery since consideration element was absent where no purchase necessary to enter].)

22 In the words of an out-of-state case addressing this same issue, "'[w]hat the machine "knows" does not affect the player's gamble.'" (*Moore v. Miss. Gaming Com'n* (2011) 64 So.3d 537, 541.)

distributed a telephone card to each customer while entering them in a chance to win a prize) had a "'10 percent payout structure'" where it would "pay[] out $500 in prizes for every $5,000 paid into the machine" with "'predetermined winners' spread out over a period of time." (*Id.* at p. 702, fn. 4.) Under those facts, the Court of Appeal held that the users of the device became entitled to receive cash prizes "*purely by chance* (without any skill whatsoever)." (*Id.* at p. 703, italics added.)[23] The same is true here. Even if the sequence of entries has been electronically frontloaded into defendants' integrated system, patrons win cash prizes based upon "hazard or chance or of other outcome of operation unpredictable by [the patron]" in violation of section 330b, subdivision (d). Therefore, the chance element is satisfied.[24]

Finally, whether viewed as a third element or an aspect of the second, the statute requires that "*by reason of*" the chance element, a prize or thing of value may be won. (§ 330b, subd. (d), italics added.) Here, it is clear that defendants' customers may become entitled to receive a thing of value (i.e., cash prizes in varying amounts) by reason of the "chance" or "unpredictable" operation of defendants' software systems that run the computer sweepstakes games. (*Ibid.*)

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[23] As the Court of Appeal queried later in that same case, "if it isn't chance, what is it that determines whether the customer wins $100 for his $1?" (*People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th at p. 707.)

[24] If this were not the case, then even a casino-style slot machine would be legal as long as it was operated by a computer system that had previously arranged the sequence of entry results in a fixed order. Such a computer system might conceivably frontload hundreds of millions of discrete entry results into a predetermined sequence. A customer using that device would be surprised to learn that merely because there is a preset sequence, he is not playing a game of chance. Of course, in reality, that is exactly what he is doing. As aptly remarked in *People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th at page 701, "if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck." (Fn. omitted.)

(B) We Distinguish *Trinkle II*

In *Trinkle II*, the Court of Appeal reached the unsurprising conclusion that a vending machine that simply dispenses California State Lottery tickets in the sequential order that they were loaded into the machine is not an unlawful slot machine. However, certain statements made by the Court of Appeal in reaching that conclusion are specifically relied on by defendants herein. In explaining why the element of chance was not present, *Trinkle II* observed: "If a player purchases his ticket from a [Scratcher's vending machine, or SVM], the player obtains the ticket by inserting money into the machine and pushing a button, which releases the next ticket in sequence, according to the order in which it was printed and loaded into the SVM bin. Nothing about the machine or its operation by the customer alters the order in which the tickets were arranged at the time they were printed." (*Trinkle II*, *supra*, 105 Cal.App.4th at p. 1411.) The court further observed that "SVM's do not have computer programs that generate random numbers or symbols, nor do they have any capability of conducting a process of random selection or other kind of chance selection." (*Id.* at pp. 1411-1412.) Since the only element of chance was due to "the printing of the winning tickets and the placement of those tickets in a predetermined sequence" at the time the tickets were manufactured, the SVM itself had no role in outcomes because no further element of chance was involved in connection with the operation or play of the machine. (*Id.* at p. 1412.) In other words, *Trinkle II* explained that unless the element of chance is generated by the machines themselves at the time the customer plays or operates it (like the spinning wheels of the original mechanical slot machines or a computer program that shuffles the entries), it is only a vending machine.

Defendants insist that their sweepstakes systems are on par with the vending machine in *Trinkle II*, since customers playing defendants' computer sweepstakes games merely receive the next available entry result from a stack that is in a previously arranged, sequential order. We disagree.

For at least two reasons, we hold that *Trinkle II* does not salvage the devices at issue in the present appeal. First, we disagree that the chance element must *always* be generated by some randomizing action of the device itself when it is being played. Section 330b only requires that prizes may be won "by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her ...." (§ 330b, subd. (d).) Under this broad wording, if the entries are arranged in a particular order beforehand, rather than rearranged each time the game is played, it will still suffice. Either way, the next sequential entry/result that is dealt out by the software system will be, from the perspective of the player, by "chance or of other outcome of operation unpredictable by him or her ...."[25] (*Ibid.*)

Second, *Trinkle II* is distinguishable factually because, in the words of a recent federal district court decision, it involved a passive vending machine that "simply delivered a finished product—the lottery ticket." (*Lucky Bob's Internet Café, LLC v. California Dept. of Justice, et al.* (S.D.Cal. 2013) 2013 U.S. Dist. Lexis 62470, p. *8 (*Lucky Bob's*).) Here, in contrast, all the trappings and experiences involved in playing traditional slot machines are actualized in one form or another by defendants' sweepstakes software systems and networked computer terminals, since in each case points are received upon making a purchase, a game program is activated by the customer at a terminal, points are used or bet in selected increments, audio-visual scenes are played out on the screen to create the feel and anticipation of a slot machine or other gambling game, and prizes are won. For these reasons, the integrated systems in our case are in a different category than the vending machine in *Trinkle II*. The mere fact that winnings

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[25] To use an analogy, whether a deck of cards was shuffled the day before, or at the moment the player sits down at the table and places a bet, it is still a matter of chance whether the ace of spades is the next card dealt.

are based on a predetermined sequence of results programmed into the software system, rather than on a randomly spinning wheel (or the like), does not change the nature and character of devices herein, which as integrated systems function as slot machines.[26]

As should be apparent from the above analysis, we are treating each defendant's complex of networked terminals, software gaming programs and computer servers as a single, integrated system. Under section 330b, subdivision (d), an unlawful "'slot machine or device'" is not limited to an isolated or stand-alone piece of physical hardware, but broadly includes "a machine, *apparatus*, or device that is *adapted*" for use as a slot machine or device. (*Ibid.*, italics added.) As defined in dictionaries, the ordinary meaning for the term "apparatus" includes "a group or combination of instruments, machinery, tools, or materials having a particular function" (Random House Webster's College Dict. (1992) p. 66), as well as "[t]he totality of means by which a designated function is performed or a specific task executed" (Webster's II New College Dict. (2001) p. 54). Here, each defendant's system of gaming software, servers and computer terminals plainly operated together as a single apparatus. (§ 330b, subd. (d).) While it is true that the end terminals or computer monitors used by patrons—if considered in isolation—may not intrinsically or standing alone contain all the elements of a slot machine, in each case they are part of an integrated system or apparatus wherein

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[26] In *Lucky Bob's*, the district court correctly focused on all of the components of an integrated system functioning together in that case: "Plaintiff's operating system can be distinguished from the vending machine in *Trinkle* by the integrative nature of its components. Here, the sweepstakes winnings necessarily involved the 'value added' of each component of Plaintiff's integrative system—from the computers that read the magnetic strip card; the database server controlling the games; and the point of sale computer that allowed the employee to create the accounts, add internet time and sweepstakes entries and play out redeemed entries." (*Lucky Bob's*, *supra*, 2013 U.S. Dist. Lexis 62470 at pp. *8-9.)

the various parts or components work together so as to operate in a manner that *does* constitute an unlawful slot machine or device.

(C) Other Issues

We briefly address two remaining issues. Defendants suggest that the devices in question cannot qualify as slot machines or devices under section 330b due to a lack of an adequate showing of consideration. We find the argument unpersuasive. Unlike section 319 (regarding lotteries), section 330b does not directly specify that consideration is an element. Therefore, it would seem that as long as the express statutory elements of section 330b are satisfied, no separate showing of consideration is needed. In other words, to the extent that consideration is a factor under section 330b, it is simply subsumed by the existing statutory elements. Since those elements were shown here, nothing more was required. (*Trinkle v. Stroh*, *supra*, 60 Cal.App.4th at pp. 780-781.) Other cases have essentially followed this approach by concluding that even if consideration is necessary in slot machine cases, its existence will be found where a connection exists between purchasing a product from a vending machine or device and being given chances to win a prize. (*Id.* at pp. 781-782; *People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th at pp. 705-706.) "'Once the element[s] of chance [and prize]'" are added to a vending machine or device, it is reasonable to assume that "'people are no longer paying just for the product regardless of the value given that product by the vender.'" (*Trinkle v. Stroh*, *supra*, at p. 782; accord, *People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, at pp. 704-707.) That is the case here as well, since points are given to play the computer sweepstakes games on defendants' terminals based on dollars spent in purchasing products—that is, the elements of chance and prize are added to the purchase. Additionally, to the extent that defendants are raising the issue of consideration by analogy to the cases addressing lotteries (e.g., *California Gasoline Retailers v. Regal Petroleum Corp.*, *supra*, 50 Cal.2d at pp. 851-862 [consideration element of § 319 lacking where no purchase necessary to enter]), that

argument likewise fails because "lottery cases (which are governed by § 319) are not controlling on the issue of illegal slot machines," since they are separate things under the law. (*Trinkle v. Stroh*, *supra*, at p. 781.)[27]

Finally, defendants argue their integrated systems cannot be slot machines on the ground that they are not house-banked games in which the owner has an interest or stake in the outcome. (See *Trinkle II*, *supra*, 105 Cal.App.4th at p. 1412 [so indicating].) We disagree with the premise that only a house-banked game may constitute an unlawful slot machine or device. Section 330 forbids persons from playing or conducting any "banking ... game played with cards, dice, or any device." Sections 330a, 330b and 330.1 *separately* prohibit slot machines or devices as defined therein. No mention is made in the latter statutes of any requirement that the slot machine or device be a house-banked game. We are constrained to follow the explicit definition of an unlawful slot machine or device provided in the applicable statutory language, which is broad enough to include defendants' devices whether or not they are house-banked.[28] (See *Hotel Employees & Restaurant Employees Internat. Union v. Davis*, *supra*, 21 Cal.4th at pp. 593-594 [noting broad scope of slot machine statutes].)

We conclude on the record before us that the People are likely to prevail on the merits of its claims that the particular devices at issue were unlawful "slot machine[s] or device[s]" under section 330b. Accordingly, we affirm the trial court's orders granting preliminary injunctions. Because the foregoing analysis provides sufficient grounds to

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27 Additionally, we note that section 330b, subdivision (d), explicitly states that a device meeting the statutory criteria set forth therein constitutes an unlawful slot machine or device "irrespective" of whether a product is also sold by that same machine or device. (See also § 330.1, subd. (f) [same wording].)

28 To put it another way, we decline to insert a new element into section 330b (that the device be house-banked) that the Legislature did not put there.

affirm the trial court's orders, it is unnecessary to address the additional issue raised by the parties of whether or not the sweepstakes programs may also have constituted unlawful lotteries under section 319.

## DISPOSITION

The orders of the trial court are affirmed. Costs on appeal are awarded to the People.

Kane, J.

WE CONCUR:

Levy, Acting P.J.

Franson, J.

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**IN THE COURT OF APPEAL OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff/Respondent,<br>v.<br>KIRNPAL GREWAL,<br><br>Defendant/Appellant. | Case No.: F065450<br>Kern County Superior Court<br>Honorable William D. Palmer, Judge<br>(Superior Court No. CV-276959) |
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff/Respondent,<br>v.<br>PHILLIP WALKER,<br><br>Defendant/Appellant. | Case No.: F065451 (consolidated with F065450)<br>Kern County Superior Court<br>Honorable William D. Palmer, Judge<br>(Superior Court No. CV-276961) |

# PETITION FOR REHEARING (CRC 8.268)

Come now counsel for Appellants Grewal and Walker (collectively "Petitioners") and, pursuant to CRC 8.268, as well as CRC 8.500(c)(2), petition this Court for Rehearing

or Modification of its Opinion which issued in both above-referenced appeals on March 7, 2014.

**A. The factual issues.**

A request for a court of appeal to reconsider factual descriptions is a prerequisite, under CRC 8.500(c)(2), to asserting such facts in a Petition for Review. Consequently, Petitioners request that this Court modify its factual statement in the following five respects:

**1. Description of Proceedings Below.** Petitioners request that the Opinion note that the trial court initially denied the requested Temporary Restraining Order with respect to the stores owned by Grewal and Walker. *See* Clerk's Tr. in Grewal case at p.164 (entry of July 2, 2012); *see* Clerk's Tr. in Walker case at p. 169 (entry of July 2, 2012). This was also referenced at p. 4 of each of these Petitioners' Opening Briefs. These modifications are requested because they may be relevant to Petitioners' position regarding the rule of lenity issue in any Petition for Review they may file.

**2. Description of Evidence Concerning Nature of Petitioners' Businesses.** Petitioners request that the Opinion more fully and fairly describe the nature of their two businesses, based upon the uncontroverted facts in the record on appeal. The facts of record regarding Petitioners' two businesses are *very* different from those of the other three businesses which were simultaneously before this Court. While such differences may not matter under this Court's legal rationale for its decision, they may certainly matter on further review, and particularly if the Supreme Court addresses the pending allegations under Penal Code § 319 in any further review.

Specifically, the Opinion omits the extensive and uncontroverted descriptions of the services which customers purchased at both Petitioners' businesses as set forth in the Grewal clerk's transcript at p. 41, ¶4, and in the Walker clerk's transcript at p. 44, ¶ 4. The uncontroverted record shows that these Petitioners' customers purchases of computer time included a wide variety of useful software programs, including word processing,

spreadsheets, various types of calculators, business forms (including resume forms), as well as "how to" videos, math assistance programs, typing tutorials, and language translation software in addition to the entirety of the Internet. This is uncontradicted in the record, fairly describes their businesses, separates them from the other appellants, and may be relevant on further review.

**3. Description of Evidence on "No Purchase Necessary" Option.** The evidence of the free sweepstakes participation options at Petitioners' businesses may become significant should a Petition for Review be filed as the Supreme Court could, conceivably, choose to address the presently unaddressed "lottery" issues under Penal Code § 319. For that reason, Petitioners request that the Court modify its description of the no purchase necessary "mail in" participation option at these two Petitioners' businesses. The second sentence of the first paragraph on p. 8 of the Opinion states:

> "*According to Walker*, noncustomers may obtain free sweepstakes entries by asking an employee at the OZ or by mailing in a request." (Emphasis added.)

Petitioners request that the Court's Opinion reflect that the evidence of the free, "no purchase necessary," "mail-in" option was not limited to the testimony of Walker (and Grewal), but also included *uncontroverted physical exhibits* introduced by both sides, including: (1) the second unnumbered paragraph of the Computer Time Purchase Agreement which was attached not only to Petitioners' declarations (Grewal Tr. at p. 48; Walker Tr. at p. 51), and also to the declarations of Detective Checklenis (*see* Grewal Tr. at p. 25 and Walker Tr. at p. 27); and (2) paragraph 4 of the Sweepstakes Rules (*see* Grewal Tr. at p. 65 and Walker Tr. at p. 68)[1].

**4. Phrase "in each case . . . a game program is activated" at p. 22.** In the second sentence of the bottom paragraph on p. 22 of the Opinion, it states, in pertinent part:

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[1] The People also recently submitted a copy of these same sweepstakes rules as Exhibit A to "Respondent's Response to Appellant's' Motion For Leave to Correct Misstatement in Oral Argument Heard on February 13, 2014," filed in this Court on or about March 10, 2014, so there is clearly no dispute as to their authenticity.

> "Here, in contrast, all the trappings and experiences involved in playing traditional slot machines are actualized in one form or another by defendants' sweepstakes software systems . . ., since ***in each case*** . . . a game program is activated by the customer at a terminal, points are used or bet in selected increments [and] audio-visual scenes are played out on the screen to create the feel and anticipation of a slot machine or other gambling game." (Emphasis added.)

As this Court appears to have already acknowledged, sweepstakes participants (and certainly Petitioners') are not *required* to utilize the video game-simulation software to reveal their prizes. Consequently, it is not true that in *each* case such a mechanism is necessarily employed. The problem is that the Court likely intended the word "case" to refer to the fact that use of the video game simulation was an *option* at the businesses in each of the five cases before it, but, as written, it makes it sound as though the Court is saying that the only option ever employed for revealing sweepstakes results is the video game-simulation method, i.e., that it is employed by every customer every time that customer seeks to ascertain whether his sweepstakes points generate a prize.

Petitioners would suggest an alternative phrasing to prevent any misreading of this Court's intent, for example:

> "Here, in contrast, all the trappings and experiences involved in playing traditional slot machines are actualized in one form or another by defendants' sweepstakes software systems . . ., since *at each business,* . . . customers *may* opt to ascertain whether their sweepstakes points produced any prizes by activating a game program at a terminal, where points are used in selected increments [and] if the game program option is selected, audio-visual scenes play out on the screen to create the feel and anticipation of a slot machine or other gambling game. Other non-game procedures are also contemporaneously available to ascertain whether any prizes have been won."

**5. The word "bet" at p. 22.** In the above-discussed second sentence of the bottom paragraph on p. 22 of the Opinion, it also states, in pertinent part:

> "[I]n each case . . . a game program is activated by the customer at a terminal, points are used ***or bet*** in selected increments [and] audio-visual scenes are played out on the screen to create the feel and anticipation of a slot machine or other gambling game." (Emphasis added.)

While it is true that points are "used" in selected increments and that the *use* of such points can activate the video game simulations which reveal the results of a sweepstakes entry, under ***no*** circumstances are any points ever "bet" within any traditional definition of that term. In order to "bet," one must stake something of *value* which can be lost in order to have the opportunity to win something.[2] Sweepstakes points have absolutely no value (*see* Grewal Clerk's Transcript p. 42, ¶ 8). They cannot be utilized for any other purpose, traded or used by any other person.

Redeeming sweepstakes points to see whether any prizes have been won does not cost participants anything, and participants lose nothing if their redeemed point(s) fail(s) to award them a prize.

For each of these reasons, Petitioners request that the Court delete the words "or bet" from this sentence in its Opinion.

**B. The legal issue.**

**1. The Opinion now makes criminals of those who use cell phones and/or personal computers to ascertain the results of national sweepstakes contests.**

Under the Opinion's interpretation of the "or by any other means" language of § 330b,[3] it no longer has any physical insertion requirement. The Opinion states that it is

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[2] According to Oxford Dictionaries.com, the definition of "bet" is to "risk something, usually a sum of money, against someone else's on the basis of the outcome of a future event, such as the result of a race or game." Here, the participant never "risks" anything. Participants purchase computer time at arms length prices. They do not put anything at risk in order to reveal the results of sweepstakes entries. Consequently, they do not ever "bet." In the same way, persons who purchase hamburgers at McDonald's do not "bet" when they play a game to see if they have won any prize. They have not put anything at risk.

[3] Specifically, in pertinent part, Penal Code § 330b(d) states:

"[S]lot machine or device" means a machine . . . that . . . , as a result of the insertion of any piece of money or coin or other object, *or by any other means*, . . . is caused to operate . . . and by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any . . . thing of value, or additional chance or right to use the slot machine." (Emphasis added.)

sufficient to satisfy the "insertion" element if one merely inputs a registration or identification number. However, because the Opinion also states that chance operation of the relevant machine, i.e., the one utilized by the customer, is no longer a requirement and that § 330b is satisfied whenever a machine or device is used to reveal a result unpredictable to the user, the combination of these two constructions of the statute necessarily means that anyone using a cell phone or personal computer to learn the results of national sweepstakes contests such as those offered by CocaCola commits the crime of possessing a slot machine.[5]

Specifically, as construed by the Opinion, the only elements required to prove a slot machine are: (1) "a machine . . . that is caused to operate" "by any means" and (2) "by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any . . . thing of value (or additional chance or right to use the slot machine)." Thus, if a person who, after buying a Coke, took the sweepstakes number from the underside of its bottlecap and used his home computer, laptop, tablet or smart phone to ascertain whether the sweepstakes number was a winner (by typing the number into CocaCola's sweepstakes website), he would be illegally in possession of a slot machine.

As petitioners noted in their Reply Brief at p. 11, n. 10 and accompanying text, personal computers and cell phones are now the primary, if not the only, methods for the general public to participate in the sweepstakes offered by most national corporations, e.g., McDonald's, Coca-Cola, etc.[6] The way they operate is that someone purchases a product and receives a sweepstakes identification code of some type. Sweepstakes results are no longer ascertained at the moment of purchase. Instead, the customer utilizes his home

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[5] Penal Code § 330b prohibits possession of a slot machine but not use. Nonetheless, those using personal computers or smart phones to participate in international sweepstakes programs violate the statute under this Court's interpretation.

[6] *See, e.g.* Coca Cola's sweepstakes rules (http://www.mycokerewards.com/MCRRules.do) and McDonalds' (http://www.playatmcd.com/Rules). Several more such links are in the Reply Brief at 11, n. 10.

computer or personal laptop, tablet or smartphone to access the company's sweepstakes website via the Internet and inputs that code to learn if he has won a prize. Often times, the user will be directed to play a simple game of some sort (albeit with a predetermined outcome) in order to learn what his prize, if any, is. In such a scheme, one's personal computer or cell phone functions *exactly* like the computers at Petitioners' businesses. An identification code is input into the cell phone or personal computer which then links with the business' national website and then the customer uses his or her cell phone or personal computer to learn whether he or she has won a prize. If, under this Court's Opinion's constructions, there is no requirement of actual insertion of anything, and if there is no requirement that the device itself operate in a random or chance manner, then every cell phone and personal computer used for this purpose unquestionably meets the definition of "slot machine" as defined in this Court's Opinion, Since anyone possessing a slot machine is guilty of violating § 330b (*see* § 330b(a)), the Court's Opinion has instantly turned a sizable portion of the population into criminals.

Importantly, Petitioners' sweepstakes program works exactly like the sweepstakes programs of international companies like CocaCola and McDonald's and very differently from the awarding of prizes in the cases of *Trinkle v. Stroh*, 60 Cal.App.4th 771 (3d Dist. 1997), and *People ex rel Lockyer v. Pacific Gaming Technologies*, 82 Cal.App.4th 699 (2d Dist. 2000). Specifically, the machines involved in both *Trinkle* and *Stroh* simultaneously awarded a prize (or not) at the moment they delivered the purchased product. In sharp contrast, the sweepstakes programs of both Petitioners and these international companies involve a system where the product is purchased first and then, at one's leisure (which can even be several weeks later) they can use a computer to learn whether they have won any prize.

In short, there is no effective legal distinction between these international sweepstakes and Petitioners'; consequently, the Opinion will make criminals of a sizeable portion of the population.

However, a construction which instantly criminalizes commonplace conduct surely constitutes the sort of absurd result which this Court very recently concluded must compel a reevaluation of facial statutory language. *See People v. Spriggs*, 224 Cal.App.4th 150, ___, 168 Cal.Rptr.3d 347, 350 (5th Dist. 2014), stating:

> "Absurd or unjust results will never be ascribed to the Legislature, and a literal construction of a statute will not be followed if it is opposed to its legislative intent."

Petitioners respectfully submit such a reevaluation is needed here.

Dated: March 24, 2014

Respectfully,

WESTON, GARROU & MOONEY

By: _____
John H. Weston
Attorneys for Petitioners Grewal & Walker

## PROOF OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE

[Pursuant to C.C.P. Section 1013(a) and Rule 8.212(c)(2)]

I am a resident of and also employed in the County of Los Angeles, State of California. I am over the age of eighteen years and am not a party to the within entitled action. I work at the law firm of Weston, Garrou & Mooney located at 12121Wilshire Boulevard, Suite 525, Los Angeles, CA 90025.

I am readily familiar with this law firm's practice for the collecting and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, any correspondence delivered to our firm's mail room employee(s) is routinely stamped with postage and then deposited for mailing on the same day with the United States Postal Service.

### PETITION FOR REVIEW

☒ **SERVICE BY U.S. MAIL.** On the date shown below, I served the foregoing document on the interested parties in this action by delivering to our firm's mail room employee a true copy thereof in a sealed envelope for delivery by U.S. Mail, addressed as follows:

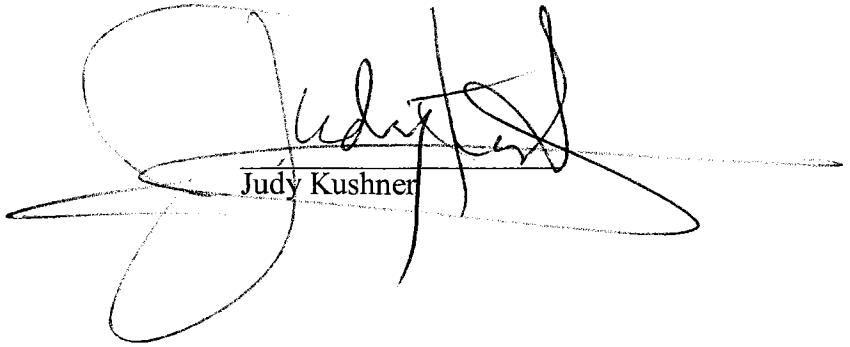
**See attached service list.**

☒ **ELECTRONIC FILING.** On the date shown below, in satisfaction of the requirements for service of Appellate Briefs in the State of California, a true copy of the foregoing document has been served on the Supreme Court of California via its California government website, in an area specifically designated for Electronic Service of Civil Appellate Briefs.

☒ **FILING PARTIALLY BY FEDERAL EXPRESS.** On the date shown below, in satisfaction of the requirements for service of Appellate Briefs in the State of California, an original of the foregoing document and eight copies have been sent to the Supreme Court of California for filing via Priority Federal Express.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: April 16, 2014



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