

No. 20-00450  
Polk County No. CVCV058556

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**IN THE  
SUPREME COURT OF IOWA**

\_\_\_\_\_  
**RED LINE VENDING, INC.,**  
Appellant,

v.

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS,**  
Appellees.

\_\_\_\_\_  
*ON APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR POLK COUNTY  
HONORABLE DAVID PORTER, DISTRICT COURT JUDGE*

\_\_\_\_\_  
**BRIEF FOR APPELLANT**

\_\_\_\_\_  
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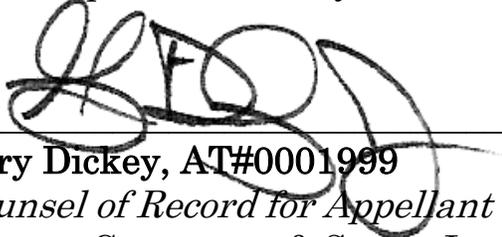
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## STATEMENT OF ISSUES

### I. WHETHER THE DEPARTMENT OF INSPECTIONS AND APPEALS CLEARLY ERRED IN INTEPRETING THE DEFINITION OF AN “AMUSEMENT CONCESSION” UNDER IOWA CODE SECTION 99B.1(1)

#### CASES:

*Bostic v. Clayton Cty.*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 1731 (2020)

*Banilla Games, Inc. v. Iowa Dept. of Inspections and Appeals*, 919 N.W.2d 6 (Iowa 2018)

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*Feld v. Borkowski*, 790 N.W.2d 72 (Iowa 2010)

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**II. WHETHER THE DEPARTMENT OF INSPECTIONS AND APPEALS' FACTUAL FINDINGS REGARDING WHETHER THE FOLLOW-ME FEATURE IS A GAME OF SKILL ARE SUPPORTED BY SUBSTANTIAL EVIDENCE**

**CASES:**

*Arndt v. City of Le Claire*, 728 N.W.2d 389 (Iowa 2007)

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**OTHER AUTHORITIES:**

Iowa Code § 17A.19

[https://en.wikipedia.org/wiki/Simon\\_\(game\)](https://en.wikipedia.org/wiki/Simon_(game))

(last accessed 08/10/20)

<https://www.walmart.com/ip/Simon-Game-by-Hasbro/53260489>

(last accessed 08/10/20)

## ROUTING STATEMENT

This appeal requires the Court to interpret the meaning of “amusement concession” as defined under Iowa Code section 99B.1(1). Because it is a substantial question of first impression that will affect all amusement concessions in this state, the Iowa Supreme Court should retain jurisdiction on direct review. Iowa R. App. P. 6.1101(2)(c).

## STATEMENT OF THE CASE

Red Line Vending, Inc. (“Red Line”) owns and operates various electronic gaming devices in Iowa. (App. at 84). In August 2018, Red Line filed applications for amusement concession licenses for three of its games: Lightning Skill, Gold Skill 1, and Hawkeye Skill. (App. at 6). On October 3, 2018, the Iowa Department of Inspections and Appeals (“Department”) denied the applications on the following basis:

This denial is based on the games not qualifying for this type of license because of the following: the games could clearly qualify as registered Amusement Devices, the amusement concession must be conducted in a fair and honest manner, the rules to play the games as presented to the Department are not sufficient, the games cannot be operated on a build-up or pyramid basis, and prizes cannot be displayed at the location of the games which are not able to be won.

(App. at 8). Red Line timely filed a notice of appeal, and an evidentiary hearing was held. (App. at 9, 73-198). Administrative Law Judge Lara Jontz subsequently issued a Proposed Decision affirming the Department’s denial. (App. at 25-32). Thereafter, the Department’s Director entered a Final Order adopting the Proposed Decision and concluding that the “licenses requested by

[Red Line] meet the requirements of a registered amusement device, not an amusement concession.” (App. at 33-34).

Red Line sought judicial review in the Iowa District Court for Polk County. (App. at 35-37).<sup>1</sup> District Court Judge David Porter entered a ruling affirming the agency’s final order. (App. at 58-70). Red Line appeals to this Court. (App. at 71).

### **STATEMENT OF THE FACTS**

The Iowa General Assembly has created a safe harbor from the general prohibition against gambling for two categories of amusement games. The first category is known as an “amusement device,” which is regulated under Iowa Code sections 99B.51 through 99B.60. An amusement device is an “electrical or mechanical” game that “awards a prize where the outcome is not primarily determined by skill or knowledge of the operator.” Iowa Code § 99B.53(1). Most amusement devices have the same look, feel, and function of traditional slot machines, except they dispense raffle tickets redeemable for merchandise only. *Id.* §

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<sup>1</sup> Red Line did not seek judicial review with respect to the license application for Hawkeye Skill.

99B.52(2), (3); (App. at 88-89). The other category is known as an “amusement concession,” which is defined as:

a game of skill or game of chance with an instant win possibility where, if the participant completes a task, the participant wins a prize. *Amusement concession* includes but is not limited to carnival-style games that are conducted by a person for profit. *Amusement concession* does not include casino-style games or amusement devices required to be registered pursuant to section 99B.53.

*Id.* § 99B.1(1). The difference between an amusement device and amusement concession is twofold:

- (1) An amusement concession requires the participant to complete a task, whereas the amusement device does not; and
- (2) An amusement concession may be either a game of chance or a game of skill, whereas an amusement device, by definition, is neither a game of skill or chance.

*Id.* § 99B.1(1)(2).

Red Line owns and operates various electronic gaming devices in Iowa, including both amusement devices and amusement concessions. (App. at 84). In August 2018, Red Line sought licensure for two amusement concessions: Lighting Skill and Gold Skill 1. (App. at 6). The functionality of the games,

which is essential to resolving this appeal, are described in detail below:

### Lightning Skill

Lightning Skill is a multi-phase arcade game consisting of a nudge-style puzzle and a follow-me contest. (App. at 95-118). The game begins when a player inserts money through a bill acceptor. (App. at 97). The game provides a preview feature, which allows a player to see the next starting screen by pressing an icon on the video screen prior to the initiation of a play. Once play is initiated, the player is presented with phase one, which is a three-by-three puzzle with electronic reels that spin when the player pushes the “Play” icon on the video screen:



(Ex. 13 Video Demonstration)(App. at 96). The player then determines, using his or her cognitive abilities, whether a potential winning combination of two or more icons is present.

(Ex. 13 Video Demonstration)(App. at 99-102). The player must choose one of the reels to “nudge” by moving up or down to complete the winning combination. (Ex. 13 Video

Demonstration)(App. at 99-102). A display box on the left side of the screen identifies the winning amount for each combination.

Not every play, however, presents a winning opportunity in phase one.<sup>2</sup> If the player attains a winning combination, phase one is complete, and the play ends. If the player does not attain a winning combination in phase one, he or she may choose to proceed to phase two at no additional cost. (Ex. 13 Video

Demonstration)(App. at 99-102). Thus, three ways exist for a player to proceed to phase two: (1) no winning opportunity is

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<sup>2</sup> The game randomly selects the first three-by-three starting screen from a predefined table. All subsequent starting screens follow in order from the table, without repetition, until the game reaches the last game outcome. When that occurs, the game randomly selects the starting screen from the table and continues sequentially thereafter, repeating in the same manner. (App. at 96-98).

presented; (2) the player does not correctly nudge the wheel to attain a winning combination; or (3) the player intentionally nudges the wheel to avoid a winning combination.

Phase two is a “Follow the Bananas” contest, consisting of a three-by-three display of banana icons, which light up in a sequential order:



To answer correctly, the player must touch the icons in the animated pattern within the allotted time. Round one begins with a single animation. Each time a round is correctly completed, an additional animation is added to the pattern. If a player touches the wrong banana or time expires, the game is over. There are twenty-five rounds altogether. After the first five rounds, there is an intermission period of approximately ten seconds. To complete

phase two to the end, it takes between fifteen to twenty minutes depending on the player's speed. If the player matches the entire pattern correctly, he or she wins \$1.04. (Ex. 13 Video Demonstration)(App. at 102-106).

Winning amounts for each play take the form of credits. A player may put his or her credits toward another game play or cash out at any time. The machines do not dispense money. Prizes are awarded in the form of a gift certificate that is redeemable for merchandise on the premises where the machine is located.

### **Gold Skill 1**

Gold Skill 1 is a multi-phase arcade game consisting of a nudge-style puzzle and a follow-me contest. (Ex. 13 Video Demonstration)(App. at 118-29). There are four different themes of the game, which operate the same except for the graphics:<sup>3</sup>

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<sup>3</sup> Luxurious Life, Pirate Bay, Precious Ingots, and Lucky Irish.



Each theme provides a preview feature, which allows a player to view the very next starting screen by pressing the “Preview” icon on the video screen prior to the initiation of a play. No payment is required to exercise the preview feature. The game begins when a player inserts money through a bill acceptor. Once a play is initiated, the player is presented phase one, which is a puzzle with multiple electronic reels that spin when the player pushes the spin icon:



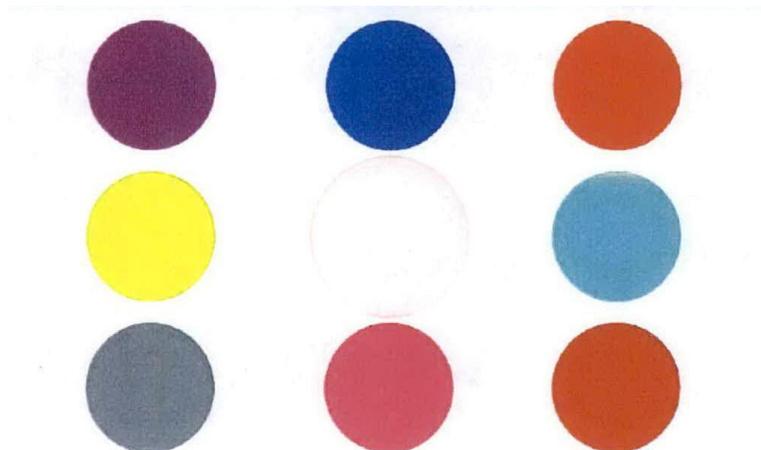
(Ex. 13 Video Demonstration)(App. at 118-29).



The player then determines, using his or her cognitive abilities, whether a potential winning combination is present. The player must nudge one of the reels to complete the winning combination. A display box on the left side of the screen identifies the winning amount for each combination. Not every play, however, presents a

winning opportunity in phase one.<sup>4</sup> If the player attains a winning combination, phase one is complete, and the play ends. If the player does not attain a winning combination in phase one, he or she may choose to proceed to phase two at no additional cost. (Ex. 13 Video Demonstration)(App. at 118-29). Thus, three ways exist for a player to proceed to phase two: (1) no winning opportunity is presented; (2) the player does not correctly nudge the wheel to attain a winning combination; or (3) the player intentionally nudges the wheel to avoid a winning combination.

Phase two is a “follow-me” contest, consisting of a three-by-three display of colored dots, which light up and make a sound in a sequential order:



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<sup>4</sup> The game randomly selects each starting screen.

To answer correctly, the player must touch the dots in the animated pattern within the allotted time. Round one begins with a single animation. Each time a round is correctly completed, an additional symbol is added to the pattern. If a player touches the wrong dot or the time expires, the game is over. There are twenty-five rounds altogether. After the first five rounds, there is an intermission period of approximately ten seconds. To complete phase two to the end, it takes between fifteen to twenty minutes depending on the player's speed. If the player matches the entire pattern correctly, he or she wins \$1.06. (Ex. 13 Video Demonstration)(App. at 118-29).

Winning amounts for each play take the form of credits. A player may put his or her credits toward another game play or cash out at any time. The machines do not dispense money. Prizes are awarded in the form of a gift certificate that is redeemable for merchandise on the premises where the machine is located. (Ex. 13 Video Demonstration)(App. at 118-29).

## ARGUMENT

### I. THE DEPARTMENT'S DENIAL OF RED LINE'S AMUSEMENT CONCESSION LICENSE APPLICATION IS BASED ON A CLEARLY ERRONEOUS INTERPRETATION OF IOWA CODE SECTION 99B.1(1)

#### Preservation of Error

Because Red Line exhausted all its administrative remedies and obtained judicial review of the Department's Final Order, error has been preserved. (App. at 6, 33-34, 58-70).

#### Scope and Standard of Review

The Department is responsible for the inspection and licensing of social and charitable gambling under chapter 99B. Iowa Code § 10A.104(10). The Department is also responsible for enforcement of chapter 99B. *Id.* § 10A.104(8). And, it is an “agency” as defined in the Iowa Administrative Procedure Act and is thus subject to judicial review under the IAPA. *See id.* § 17A.19(10). The legislature has not clearly vested the Department with interpretive authority over the statutes related to licensure of amusement concessions and amusement devices. *Banilla Games, Inc. v. Iowa Dept. of Inspections and Appeals*, 919 N.W.2d 6, 13-14 (Iowa 2018). Nor are the terms pertaining to their

regulation “specific to the expertise of the Department.” *Id.* at 13. Accordingly, the Department’s statutory interpretation is to be afforded no deference, and review is for correction of errors at law. *Id.* at 14. The legislature did, however, grant the Department with the authority to “administer inspection and licensing of social and charitable gambling pursuant to chapter 99B.” Iowa Code § 10A.104(10). Consequently, the Department’s application of law to the facts is reviewed to determine if it is “irrational, illogical, or wholly unjustifiable.” *Banilla Games, Inc.*, 919 N.W.2d at 18. Under either standard of review, Red Line Vending is entitled to relief if the Department’s action “is unreasonable, arbitrary, capricious, or an abuse of discretion.” *Id.* at 18-19.

### Analysis

This case turns upon the statutory interpretation of the amusement concession statutes found in Iowa Code sections 99B.1(1) and 99B.31. If Red Line’s games meet the definition of amusement concession under section 99B.1(1) and are operated within the limits set forth in section 99B.31, then the Department erred in denying the license applications. If they do not, then the

Department's decision should be upheld. Because Lightning Skill and Gold Skill 1 undeniably fall within the definition set forth in section 99B.1(1) and otherwise satisfy the requirements of section 99B.31, Red Line is entitled to an amusement concession license for each game.

**A. Applicable legal principles**

Any interpretive inquiry begins with the language of the statutes at issue. *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020).

Iowa Code section 99B.1(1) defines amusement concessions as follows:

a game of skill or game of chance with an instant win possibility where, if the participant completes a task, the participant wins a prize. *Amusement concession* includes but is not limited to carnival-style games that are conducted by a person for profit. *Amusement concession* does not include casino-style games or amusement devices required to be registered pursuant to section 99B.53.

Iowa Code § 99B.1(1). A person may conduct an amusement concession if all the following conditions are met:

*a.* The person conducting the amusement concession has submitted a license application and a fee of fifty dollars for each amusement concession, and has been issued a license for the amusement concession, and prominently displays the license at the

playing area of the amusement concession. A license is valid for a period of one year from the date of issue.

*b.* The rules of the amusement concession are prominently posted and visible from all playing positions.

*c.* The cost to play a single amusement concession does not exceed five dollars.

*d.* A prize is not displayed which cannot be won.

*e.* Cash prizes are not awarded.

*f.* The amusement concession is not operated on a build-up or pyramid basis.

*g.* A pet, as defined in section 717E.1, is not awarded.

*h.* The actual retail value of any prize does not exceed nine hundred fifty dollars. If a prize consists of more than one item, unit, or part, the aggregate retail value of all items, units, or parts shall not exceed nine hundred fifty dollars.

*i.* Merchandise prizes are not repurchased from the participants. However, a participant may have the option, at no additional cost to the participant, of trading multiple smaller prizes for a single larger prize.

*j.* Concealed numbers or conversion charts are not used to play the amusement concession.

*k.* The amusement concession is not designed or adapted with any control device to permit manipulation of the amusement concession by the

operator in order to prevent a player from winning or to predetermine who the winner will be.

*l.* The object of the amusement concession must be attainable and possible to perform under the rules stated from all playing positions.

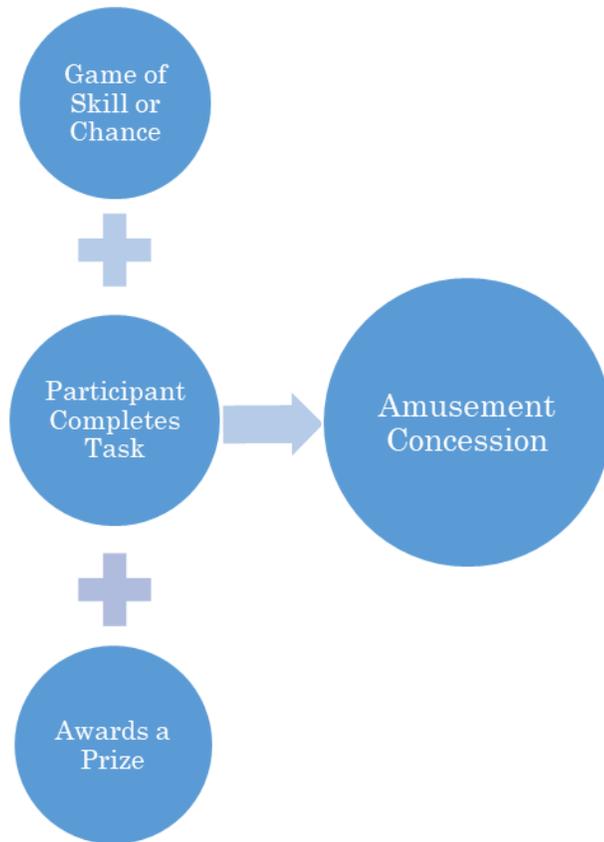
*m.* The amusement concession is conducted in a fair and honest manner.

*Id.* at § 99B.31. Section 99B.53 provides that the owner of an electrical or mechanical amusement device “that awards a prize where the outcome is not primarily determined by skill or knowledge of the operator” must register the device with the state.

Iowa Code § 99B.53(1).

**B. The plain language of Iowa Code section 99B.1(1) requires the conclusion that Lighting Skill and Gold Skill 1 are amusement concessions because they require the participant to complete a task in order to win a prize, which distinguishes them from amusement devices**

The plain language of Iowa Code section 99B.1(1) defines an amusement concession as any “game of skill or chance with an instant win possibility where, *if the participant completes a task*, the participant wins a prize”



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*Id.* § 99B.1(1) (emphasis added). As the statutory text and visual depictions make clear, the definition of an amusement concession has three signature features. First, an amusement concession may be a game of skill or chance. Second, the participant must complete a task to win. Third, awards take the form of a prize; not cash.

This is an exceedingly straightforward case. Lighting Skill and Gold Skill 1 are both games of skill or chance. In both games,

a player must complete a task to receive a prize.<sup>5</sup> And, both games award prizes in the form of merchandise; not cash. *The Department does not dispute any of these three factual propositions.* Under the clear text of the statutory definition and the undisputed functionality of the games, Red Line should have been awarded its licenses.

**C. The Department’s method of statutory interpretation was expressly rejected in *H & Z Vending v. Iowa Dept. of Inspections and Appeals***

The Department has never attempted to defend its interpretation of Iowa Code section 99B.1(1) with any traditional canons of construction that guide this Court. Instead, the

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<sup>5</sup> Lightning Skill and Gold Skill 1 are simply modern day, digital versions of conventional carnival games. In the “balloon-dart game,” for example, a participant must complete the task of throwing darts at a wall of balloons with a prize based upon the number of balloons popped. J. Royce Fichtner, *Carnival Games: Walking the Line Between Illegal Gambling and Amusement*, 60 Drake L. Rev. 41, 55 (2011). Similarly, in the “Ring a Bottle” game, the participant must complete a task by tossing a plastic ring at a table full of soft drink bottles and land one on the neck of a bottle to win a prize. *Id.* In the case of Red Line’s games, the participant must complete the task of solving a three-by-three puzzle in phase one by identifying the solution and nudging the reels to complete the winning combination. Likewise, in phase two, the participant must complete the follow-me task to win a prize.

Department has argued that Lighting Skill and Gold Skill 1 cannot be amusement concessions because they are either (1) amusement devices; or (2) slot machines. (App. at 14-19, 33-34). Thus, it claims that the games cannot be “x” because they are “y.” The Iowa Supreme Court expressly rejected this same logic in *H & Z Vending v. Iowa Dept. of Inspections and Appeals*, 511 N.W.2d 397 (Iowa 1994). The issue in *H & Z Vending*, was “whether a device that meets the requirements [as an amusement device] under section 99B.10 can nonetheless be an unlawful gambling device under section 725.9.” *Id.* at 398. The Court held that “devices that qualify [under section 99B.10] may be lawfully owned, possessed, and offered for use.” *Id.* In arriving at the decision, the Court explained that “the reason for enacting these statutes was to establish that certain devices that might otherwise be deemed to be gambling devices under section 725.9 would not be so classified if they satisfied the requirements of section 99B.10.” *Id.* This is true even though the games returned money to successful players and were designed to resemble slot machines in appearance. *Id.* In other words, a game is entitled to the

benefits of a legislatively-created safe harbor under Chapter 99B even if it would otherwise be a gambling device in the absence of the safe harbor.

What was true in *H & Z Vending* is also true here. Without the amusement concession safe harbor, Lighting Skill and Gold Skill 1 may very well be classified as slot machines or amusement devices. It follows *a fortiori* from *H & Z Vending*; however, that games “that might otherwise be deemed [slot machines or amusement devices] would not be so classified if they satisfied the requirements of sections [99B.1(1) and 99B.31].” *Id.* Because there is no meaningful dispute that Lighting Skill and Gold Skill 1 satisfy the three conditions of section 99B.1(1), *H & Z Vending* tells us they may be “lawfully owned, possessed, and offered for use” subject to limitations in section 99B.31. *Id.*

**D. The Department’s interpretation of Iowa Code section 99B.1(1) amounts to a bureaucratic veto**

At the heart of this case is a dispute between the Department and the Iowa General Assembly. The Department believes that games like Lighting Skill and Gold Skill 1 should be more heavily regulated than the amusement concession statutes

allow.<sup>6</sup> It views Red Line's as slot machines and does not like that they may "be placed anywhere and played by anyone of any age and award up to \$950 in prizes." (App. at 56). The Department's policy disagreement was on full display at the hearing before the district court:

I would just ask you that -- that under the petitioner's proffered interpretation here, this equivalent of a slot machine, something that I could play and get rewarded up to \$950 by pure chance of the spin of the reels, is not something that should be available at Chuck E. Cheese to anyone who wants to play, including any four-year-old with a dollar bill, so I would ask that the decision of the Department to deny these licenses as amusement concession be affirmed.

(01/31/20 Tr. of Judicial Review at 21-22).<sup>7</sup>

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<sup>6</sup> The Department has been fighting a losing battle in the regulation of amusement concessions. Prior to 2015, the definition of amusement concession meant "any place where a single game of skill or game of chance is conducted by a person for profit, and includes the area within which are confined the equipment, playing area and other personal property necessary for the conduct of the game." Iowa Code § 99B.1(1) (2013) (emphasis added). In 2015, the legislature removed the numerosity and proximity limitations on amusement concessions. 2015 Iowa Acts, ch. 99, § 1. This legislative history reflects the General Assembly's clear policy preference to expand the availability of amusement concessions in Iowa.

<sup>7</sup> If the Department's claim sounds familiar, it is because it advanced the same argument in *H & Z Vending*. In that case, the

As legitimate as these policy concerns may be (or may not be), they are not arguments the Department should be making to a court. “When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest.” *Bostic v. Clayton Cty.*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 1731, 1737 (2020). “Only the written word is the law, and all persons are entitled to its benefit.” *Id.* “The place to make new legislation, or address unwanted consequences of old legislation, lies in” in the Iowa General Assembly; not through a bureaucratic veto. *Id.* at \_\_\_, 140 S. Ct. at 1753. “When it comes to statutory interpretation, [the Court’s role] is limited to applying the law’s demands as faithfully as [it] can in the cases that come before [it].” *Id.*

**E. The District Court’s reliance on the Iowa Supreme Court’s decision in *Banilla Games, Inc.* is misplaced**

In the court below, the Department dangled the *Banilla Games, Inc.* decision to support its view that Lighting Skill and

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Department argued that games having “the physical appearance of a slot machine should be deemed to be prohibited irrespective of the” fact they also fell within the amusement device safe harbor. *H & Z Vending*, 511 N.W.2d at 398. The Iowa Supreme Court correctly rejected the Department’s atextual theory of statutory interpretation. *Id.* The same result is required in this case.

Gold Skill 1 must be registered as amusement devices. (App. at 50-51). The district court took the bait, explaining that “if completing a task is fatal to classifying a game as an amusement device, the *Banilla* Court would have said so.” (App. at 66). This attempt to shoehorn the Department’s interpretation of section 99B.1(1) within the *Banilla Games, Inc.* decision is misplaced on multiple levels.

In *Banilla Games, Inc.*, the vendor sought a declaratory order that its electronic touch screen machines did not have to be registered because they were games of skill. *Banilla Games, Inc.*, 919 N.W.2d at 9. The Iowa Supreme Court concluded that the nudge function did not result in the game being primarily determined by skill and therefore, it affirmed the Department’s declaratory order that the machines were subject to the registration requirements for amusement devices. *Id.* at 18. The parties framed the issue as whether the outcome of the games was predominated by chance or skill. *Id.* at 14-18. The question of whether the games fell within the amusement concession

definition was never presented. Indeed, the *Banilla Games, Inc.* opinion does not even mention Iowa Code section 99B.1(1).

Here, the question of whether Lightning Skill and Gold Skill 1 are predominated by chance or skill is of no consequence. An amusement concession may be either “*a game of skill or game of chance.*” Iowa Code § 99B.1(1)(emphasis added). For this reason, *Banilla Games, Inc.* offers no guidance to any issue before the Court in this appeal. The Department’s attempt to find a foothold in *Banilla Games, Inc.* is simply a smokescreen.

The problem with *Banilla Games, Inc.* does not end there. The Iowa Supreme Court has repeatedly emphasized that it will only decide an issue if it is presented and briefed on appeal. *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005)(explaining that issues not argued on appeal—even if preserved—are deemed waived). “Judges are not advocates who reach out to decide questions the parties themselves either deem unimportant or, for whatever reasons, fail to raise.” *Feld v. Borkowski*, 790 N.W.2d 72, 83 (Iowa 2010)(Appel., J. concurring in part and dissenting in part). The district court lost sight of this central tenet of appellate

review. It is impossible to read *Banilla Games, Inc.* as containing some background principle that nudge games are not amusement concessions *when the issue was never presented or argued by either party.*

## **II. THE DEPARTMENT’S FACTUAL FINDINGS REGARDING THE FOLLOW-ME FEATURE ARE WHOLLY UNSUPPORTED IN THE RECORD BY SUBSTANTIAL EVIDENCE**

### **Preservation of Error**

Red Line preserved error on this issue by raising it in its petition for judicial review. (App. at 35-37).

### **Scope and Standard of Review**

Red Line is entitled to relief if a determination of fact by the Department “is not supported by substantial evidence in the record before the court when that record is viewed as a whole.”

Iowa Code § 17A.19(10)(f); *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007).

### **Analysis**

Even if we follow the Department down the *Banilla Games, Inc.* rabbit hole, it still has no bearing because Lightning Skill and Gold Skill 1 both include a follow-me contest. As ALJ Jontz

acknowledged in her proposed decision, the “follow me” feature is a game of skill. (App. at 30-31).<sup>8</sup> It would necessarily follow under *Banilla Games, Inc.* that the games are not amusement devices. *Banilla Games, Inc.*, 919 N.W.2d at 12 (noting that an amusement device “awards a prize where the outcome is not primarily determined by skill or knowledge of the operator”).

Implicitly dissatisfied with this required result, ALJ Jontz simply cast aside the follow-me feature altogether as “a de minimis part of the game specifically added for the less restrictive Administrative (sic) Concession classification.” (App. at 31). She premised this conclusion on two findings: (1) the follow-me feature “can be disabled in the operator’s menu;” and (2) many players “likely will skip the round or fail to complete it. (App. at 31). *No evidence in the record*, let alone substantial evidence, supports either factual finding.

While theoretically the follow-me feature can be disabled, the Department did not deny Red Line’s application because the follow-me feature could be disabled. (App. at 8). And for good

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<sup>8</sup> In the Department’s Final Order, the Director adopted the factual findings of the ALJ Proposed Decision. (App. at 33-34).

reason—the evidentiary record establishes that Red Line’s application demonstrations included the follow-me feature. Similarly, the video demonstrations introduced at the evidentiary hearing also included the follow-me feature. (Ex. 13 Video Demonstration). The Department even conceded before that district court that it “does not dispute that Red Line intends to offer its two proposed games to the public with the follow me feature activated.” (App. at 12).

The record likewise is devoid of any evidence to support the ALJ’s finding that many players will skip the follow-me round or fail to complete it. (App. at 31). This finding appears to be anchored in the view that nobody would complete a twenty-minute task for a small return. Setting aside dearth of evidentiary support for this finding, it is illogical. The feature is virtually identical to the Simon electronic game that has been a pop culture icon since the 1970s and spawned several clones.<sup>9</sup> Indeed, Simon

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<sup>9</sup> [https://en.wikipedia.org/wiki/Simon\\_\(game\)](https://en.wikipedia.org/wiki/Simon_(game)) (last accessed 08/10/20)

is still available for sale and retails for \$17.19.<sup>10</sup> Accordingly, there is no factual basis to conclude that many people playing an *amusement* concession likely will skip the follow-me feature.

“Substantial evidence means the “quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.” Iowa Code § 17A.19(10)(f)(1); *see also Arndt*, 728 N.W.2d at 394. “[I]nferences, whether obvious or not, must amount to more than speculation and must be subject to reasonable deduction from the record.” *Butt v. Iowa Bd. of Med.*, 2015 Iowa App. LEXIS 992 at \*9 (Iowa Ct. App. Oct. 28, 2015). ALJ Jontz’s finding that the follow-me contests should be disregarded as a de minimis feature of the games cannot reasonably be deduced from the record.

## CONCLUSION

For these reasons, Red Line Vending, Inc. asks this Court to reverse the license denial for Lighting Skill and Gold Skill 1.

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<sup>10</sup> <https://www.walmart.com/ip/Simon-Game-by-Hasbro/53260489> (last accessed 08/10/20)

## REQUEST FOR ORAL ARGUMENT

Red Line Vending, Inc. requests to be heard in oral argument.

## COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was \$9.50, and that that amount has been paid in full by me.

## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and the type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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