

09-16092

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**VIDEO GAMING TECHNOLOGIES, INC., dba  
VGT, Inc., a Tennessee Corporation; et al.,**

Plaintiffs-Appellees,

v.

**BUREAU OF GAMBLING CONTROL, a law  
enforcement division of the California Department  
of Justice; et al.,**

Defendants-Appellants,

**CAPITAL BINGO, INC., a California  
corporation, et al.,**

Intervenors-Appellees.

On Appeal From the United States District Court  
for the Eastern District of California

No. 2:08-CV-01241-JAM-EFB  
John A. Mendez, Judge

**APPELLANTS' OPENING BRIEF**

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## STATEMENT OF RELATED CASES

### United States Court of Appeals for the Ninth Circuit

1. *Video Gaming Technologies, Inc., v. Bureau of Gambling Control*,  
USCA No. 09-16165; USDC Eastern District of California Co. Civ.  
S-08-01241.
2. *Video Gaming Technologies, Inc., v. Bureau of Gambling Control*,  
USCA No. 08-16736, USDC Eastern District of California Case #  
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## INTRODUCTION

This case is about the lawfulness of slot machine-style electronic gambling devices being used by the appellee charitable organizations to purportedly play bingo under the state’s charitable bingo statute. Based upon the Americans With Disabilities Act (ADA), Plaintiffs and Appellees<sup>1</sup>—gambling device manufacturers, charitable organizations and certain disabled individuals—are seeking to preliminarily and permanently enjoin the Appellants California Department of Justice Bureau of Gambling Control and the Chief of the Bureau in his official capacity (“Bureau”<sup>2</sup>) from enforcing the state’s charitable bingo statute and other state laws prohibiting certain types of gambling devices. The district court issued a preliminary

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<sup>1</sup> Due to the voluntary dismissals of Video Gaming Technologies, Inc., and Joan Sebastiani, the Appellees consist only of United Cerebral Palsy of Greater Sacramento (“UCP”); WIND Youth Services (“WIND”); Robert Foss; Capital Bingo, Inc.; Haggin Post No. 521, The American Legion, Department of California; Casa Robles School Ramsmen, Inc.; Mary Brown, and El Camino Athletic Boosters Club, LLC. Unless otherwise specified, all references to Appellees are to all of the appellees listed above. (Excerpts of Record “ER” Vol. 3, 366-67, 390-92, 409-10, Pltfs.’ Amd. Compls.; ER Vol. 3, 340-42, 349-51, Stips & Orders of Dismissal.)

<sup>2</sup> Unless otherwise specified, the Bureau and Appellant Mathew Campoy are jointly referred to herein as the Bureau. Mathew Campoy has since retired from the Bureau; however, the Plaintiffs have not substituted in the Bureau’s current chief for Mr. Campoy.

injunction to prohibit the Bureau from enforcing the state's charitable bingo law against the Appellees' electronic gambling devices, in effect invalidating the state's charitable bingo law.

This is an appeal from the issuance of a second preliminary injunction entered following this Court's remand of the case to the district court. In the first appeal,<sup>3</sup> this Court ordered the preliminary injunction vacated and reconsidered in light of changes in the law regarding the standard for issuance of a preliminary injunction and changes in state law clarifying the unlawfulness of the electronic gambling devices at issue. (ER Vol. 3, 331-33, Order [of Ninth Circuit Court of Appeals].) With regard to the above-referenced changes in state law, this Court stated that the California "Legislature enacted Senate Bill Number 1369, which unambiguously provides that the machines at issue in this case are illegal under state law." (*Id.*) Nonetheless, upon reconsideration, the district court issued a second preliminary injunction against enforcement by the Bureau and the Sacramento County Sheriff of the state's laws against the Appellees' electronic gambling devices. The substantive thrust of the district court's

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<sup>3</sup> All references to the "first preliminary injunction" and the "First Appeal" are, respectively, to the district court's preliminary injunction order entered on June 30, 2008, and to this Court's order of March 25, 2009, on the appeal from that preliminary injunction order.

ruling is that the state's charitable bingo law, to the extent that it prohibits the use of electronic gambling devices such, as those operated by plaintiffs, is not valid under the ADA. Because the district court erred in granting the second preliminary injunction, this appeal has been brought by the Bureau.

### **STATEMENT OF JURISDICTION**

The district court exercised jurisdiction over Appellees' claims for violations of the ADA under 28 U.S.C. § 1331. The district court issued and entered its order granting the preliminary injunction on May 7, 2009, and Appellants filed their notice of appeal from that order on May 26, 2009. (ER Vol. 1, 36-40, Ord. Granting Prelim. Inj.; ER Vol. 2, 49-50, Not. of App.) This Court has jurisdiction over this appeal from an order granting a preliminary injunction under 28 U.S.C. § 1292(a)(1). This appeal is timely under Federal Rules of Civil Procedure, Rule 4(a).

### **ISSUES PRESENTED ON APPEAL**

Did the district court abuse its discretion in granting the preliminary injunction?

- a. Is it probable that the Appellees will succeed on the merits of their claim that the Bureau's actions violated the ADA?
- b. Are Appellees likely to suffer irreparable harm in the absence of injunctive relief?

c. Does the balance of equities tip in favor of Appellees so as to support injunctive relief?

d. Is the issuance of a preliminary injunction in the public interest?

### **STATEMENT OF THE CASE**

On June 4, 2008, Video Gaming Technologies, Inc. (“VGT”), the manufacturer of gambling devices involved in this action, United Cerebral Palsy of Greater Sacramento, and WIND Youth Services, a tax exempt organization, and Robert Foss and Joan Sebastiani, persons with disabilities within the meaning of the ADA (hereafter collectively “VGT et al.”), filed a Complaint<sup>4</sup> for Declaratory and Injunctive Relief and Ex Parte Motion for Temporary Restraining Order against the Bureau, seeking to enjoin the Bureau from acting upon the Bureau’s prior notifications to bingo establishments to remove gambling devices including those manufactured by VGT, from their premises within thirty days. (ER Vol. 4, 619-36, Compl.) VGT et al.’s action contended that the anticipated enforcement action against their electronic gambling devices would violate the ADA, would be

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<sup>4</sup> As set forth herein, after the enactment of SB 1369, clarifying the illegality of the electronic gambling devices at issue in this case, [former Plaintiffs] VGT and Joan Sebastiani dismissed their actions with prejudice.

an unconstitutional deprivation of property rights under 42 U.S.C. § 1983, and would violate state laws pertaining to charitable bingo. (*Id.*) The district court granted a temporary restraining order and ordered the Bureau to show cause on June 25, 2008, why a preliminary injunction should not be issued. (ER Vol. 4, 591-96, Temp. Restr. Ord.)

On June 12, 2008, Appellees Capital Bingo (“Capital Bingo”), Inc., another electronic device manufacturer; Haggin Grant Post 521, the American Legion Department of California; Casa Robles High School Ramsmen, Inc.; and Mary Brown (collectively, “Capital Bingo, et al.”) moved to intervene in the suit, and sought a temporary restraining order, and joinder in the pending motion for the preliminary injunction based upon the same causes of action employed by VGT, et al., which motion to intervene was granted. (ER Vol. 4, 575-90, Compl. in Inter.; ER Vol. 4, 639-44, Civ. Dock.)

On June 25, 2008, the hearing on the preliminary injunction took place. Just prior to the hearing on the preliminary injunction, an inspection of ostensible samples of VGT’s and Capital Bingo’s electronic gambling devices was conducted by the district court judge at a local hotel. (ER Vol. 4, 477-531, Rep.’s Tr. Hrg. on Mot. for First Prelim. Inj. on 6/25/08.) After the inspection of the devices, the parties returned to the district court and

argued the matter. (ER Vol. 4, 461-76, Rep.'s Tr. Hrg. on Mot. for First Prelim Inj. on 6/25/08; ER Vol. 4, 644, Civ. Dock.) At the conclusion of the June 25, 2009, hearing, the district court stated that it would grant the preliminary injunction and would prepare a written order. (*Id.*) On June 30, 2008, the district court issued its Order Granting Preliminary Injunction. (ER Vol. 4, 538-47, Ord. Granting Prelim. Inj.) The district court's order stated in part as follows:

Plaintiffs and Intervenors have demonstrated that irreparable injury will result if Defendants [sic] actions are not enjoined and that the balance of hardships tips in their favor. Plaintiffs and Intervenors have also demonstrated that there remain serious questions about whether the [Bureau's] threatened seizure of their electronic bingo machines violates the ADA or their constitutional rights.

(ER, Vol. 4, 541, Ord. Granting Prelim. Inj.)

On July 29, 2008, the Bureau filed a Notice of Appeal from the district court's issuance of the Order Granting the Preliminary Injunction. (ER Vol. 4, 532-33, Not. of App.)

On July 28, 2008, the district court issued an order allowing Appellee El Camino Athletic Boosters Club, LLC ("El Camino"), another charitable organization, to intervene in the case under very similar claims to those being pursued in the complaints of VGT, et al. and Capital Bingo, et al. (ER

Vol. 4, 536-37, Ord. Re: El Camino; ER Vol. 3, 444-60.) The preliminary injunction in place from June 30, 2008, was amended to prevent the Bureau from taking enforcement action as to El Camino's electronic gambling devices. (ER Vol. 3, 440-43, Stip. Re: Amd. & Order.)

On September 30, 2008, California Governor Arnold Schwarzenegger signed California State Senate Bill Number 1369 ("SB 1369")<sup>5</sup> into law, which clarified that the electronic gambling devices, including devices distributed by VGT, et al., and operated by Capital Bingo, et al., and El Camino, were not a lawful form of charitable bingo. (ER Vol. 3, 422-39, Ex. A to Req. for Jud. Not.) As this Court stated in its order on the First Appeal, SB 1369 "unambiguously provides that that the machines at issue in this case are illegal." (ER Vol. 3, 331-33, Order [of the Ninth Circuit Court of Appeals].) See Cal. Pen. Code §§ 326.3(a)(8), 326.5(o) & (p). The only allowable electronic devices in the play of charitable bingo under SB 1369, are card-minding devices which by definition cannot:

Display or represent the game result through any means, including, but not limited to, video or mechanical reels or other slot machine or casino game themes, other than highlighting the winning numbers or symbols marked or

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<sup>5</sup> The state's charitable bingo statutes as amended by SB 1369 are found at California Penal Code sections 326.3, 326.4, and 326.5.

covered on the tangible bingo cards or giving an audio alert that the player's card has a prize-winning pattern.

Cal. Pen. Code § 326.5(p)(2)(C).

SB 1369 also provides regulatory authority in the California Gambling Control Commission to address the issue of lawful means by which bingo operators “may offer assistance to a player with disabilities in order to enable that player to participate in a bingo game. . . .” Cal. Pen. Code § 326.5(p)(6).

Between November 12 and November 20, 2008, the three Plaintiff groups—VGT, et al., Capital Bingo, et al., and El Camino—each filed an amended complaint that dropped their claims under state law and 42 U.S.C. § 1983, and asserted only a claim under the ADA against the Bureau. (ER. Vol. 3, 365-83, 388-407, 408-21, Amd. Compls.) These three amended complaints also named Sacramento County Sheriff John McGinness (“Sheriff”), in his official capacity, as a party defendant, and sought to enjoin him from taking any enforcement action against their electronic gambling devices under the ADA. (*Id.*)

On December 1, 2008, with the district court’s preliminary injunction in force pending appeal, the Bureau entered into a stipulation and order with the three Plaintiffs’ groups under which the Bureau agreed not to enforce the

provisions of SB 1369 until there a judicial resolution of the cases. (ER Vol. 3, 360-63, Stip. & Ord.) On December 3, 2008, the Sheriff entered into a similar stipulation and order agreeing not to enforce SB 1369 until there was a resolution of the case in the Court of Appeals. (ER Vol. 3, 352-55, Stip. & Ord.)

On December 18, 2008, VGT dismissed all of its claims with prejudice. (ER Vol. 3, 349-51, Stip. & Ord.)

On March 2, 2009, Joan Sebastiani, an individual Plaintiff in the case, dismissed her claims with prejudice.<sup>6</sup> (ER Vol. 3, 340-42, Stip. & Ord.)

On March 25, 2009, this Court issued an order on the First Appeal, vacating the preliminary injunction and remanding the matter to the district court for reconsideration. (ER Vol. 3, 331-33, Order [of Ninth Circuit Court of Appeals].) On March 25, 2009, counsel for Capital Bingo, et al. sent a letter to the Bureau's counsel taking the position that no enforcement action should be taken before the district court reconsidered the matter. (ER Vol. 3, 319A-19C, Ex. A to Goodman Decl.) On March 27, 2008, the Bureau

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<sup>6</sup> Shortly after this voluntary dismissal, substitutions of attorneys were filed so that counsel for Capital Bingo, et al. represented all of the remaining Plaintiffs in the suit with the exception of El Camino. (ER Vol. 3, 334-339, Substs. & Ords.)

sent responsive correspondence to the remaining Plaintiffs' counsel to the effect that his clients must remove the subject electronic gambling devices from the premises covered by the [vacated] preliminary injunction within 15 days<sup>7</sup>, and bring their bingo operations into compliance with state law. (ER Vol. 3, 319D-19F, Ex. B to Goodman Decl.) On or about March 31, 2009, the Sheriff sent a similar written notification to the remaining Plaintiffs. (ER Vol. 3, 319G-319H, Exh. C to Goodman Decl.)

On April 3, 2009, the remaining Plaintiffs from VGT, et al., and Capital Bingo, et al. moved ex parte for a temporary restraining order to prevent the Bureau and the Sheriff from taking enforcement action against their electronic gambling devices. (ER Vol. 3, 320-30, Ex Parte Mot. for TRO.) Without awaiting opposition, on April 6, 2009, the district court issued the temporary restraining order setting a hearing on an order to show cause regarding a preliminary injunction for April 14, 2009. (ER Vol. 3, 303-05, TRO.)

On April 6, 2009, El Camino joined in the then pending motion for a temporary restraining order and made its own motion for the same. (ER

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<sup>7</sup> This 15-day grace period was agreed to a part of the stipulation and order in re: the motion to amend the preliminary injunction. (ER Vol. 3, 360-63, Stip. & Ord.)

Vol. 3, 296-302, Joinder in Ex Parte Mot.) On April 7, 2009, the district court issued a corrected temporary restraining order to prevent the Bureau and the Sheriff from taking enforcement. (ER Vol. 3, 280-83, Corr. TRO.) The Bureau and the Sheriff filed oppositions to the order to show cause. (ER Vol. 2, 131-279, Bureau's & Sheriff's Opps. and Decls. in Supp. of Opps.)

The hearing on the order to show cause was held before the district court on April 14, 2009. (ER Vol. 1, 1-35, Rep.'s Tr. Hrg. on Mot. for Second Prelim Inj. on April 14, 2009; ER Vol. 4, 656, Civ. Dock.) At the conclusion of the hearing, the district court stated that it would grant the preliminary injunction, and directed counsel for Capital Bingo, et al., to prepare a written order. (*Id.*) On May 4, 2009, a proposed order was lodged with the district court by counsel for Capital Bingo, et al. (ER Vol. 2, 101-06, Prop. Ord.) The Bureau and the Sheriff submitted objections to the proposed order and proposed alternative orders for the district court's consideration on May 6, 2009. (ER Vol. 2, 62-67VV, 85-100, Objects. to Prop Ord. & Altern. Prop. Ords.) On May 7, 2009, the district court issued an order granting the preliminary injunction based almost entirely on Capital Bingo et al.'s proposed order. (ER Vol. 1, 36-40, Ord. Granting Second

Prelim. Inj.) On May 26, 2009, the Bureau filed an appeal from the order granting the preliminary injunction. (ER Vol. 2, 49-50.)

### **STATEMENT OF FACTS**

As a bureau within the California Department of Justice, the Bureau is responsible for the enforcement of California's laws regarding controlled gambling and also has authority to investigate suspected violations of the California Penal Code provisions prohibiting or limiting various forms of gambling, which includes the statute that addresses charitable bingo. (Cal. Bus. & Prof. Code §§ 19805(h), 19826(a), (b), (c), (d), (e); Cal. Penal Code §§ 319, 321, 326.5, 330a, 330b, 330.1, 335a; see also Cal. Govt. Code § 15002.5.) During 2003 and 2004, the Bureau began receiving numerous complaints and inquiries from the public and law enforcement concerning bingo establishments using devices or machines that appeared to be prohibited as a "slot machine or device" as that term is defined under California Penal Code §§ 330a, 330b and 330.1. (ER, Vol. 4, 604, Campoy Decl.) In response to this concern, agents of the Bureau investigated and determined that illegal gambling devices were to be found not only at bingo establishments, but also at the locations of a number of fraternal organizations. (ER, Vol. 4, 604, Campoy Decl.) Thereafter, complaints regarding the illegal gambling devices increased, and on June 6, 2004, the

Bureau issued a law enforcement advisory addressed to county sheriffs and municipal police departments outlining the illegality of the use of electronic gambling devices being operated as bingo devices. (ER, Vol. 4, 604, 610-12, Campoy Decl. Ex. 1.) Complaints about the unlawful gambling devices thereafter subsided. (*Id.*)

In 2006, complaints about the use of illegal gambling devices in bingo establishments again began to increase. (ER, Vol. 4, 604-05, Campoy Decl.) Bureau agents visited the locations about which complaints had been received and determined that bingo establishments were again operating illegal gambling devices. (*Id.*) The Bureau met with local law enforcement agencies regarding plans to address the problem. Most of those agencies indicated that they did not have the resources to address the issue and expressed their belief that the Bureau was best suited to handle the problem. (*Id.*)

In August of 2007, with the number of complaints of use of illegal gambling devices by charitable bingo establishments increasing, the Bureau issued another law enforcement advisory, this time not only to law enforcement, but also to approximately 200 bingo establishments statewide. (ER, Vol. 4, 604-05, Campoy Decl.) The 2007 law enforcement advisory reaffirmed that electronic “bingo” systems that substituted electronic

gambling devices for the play of bingo were illegal, but that use of electronic aids that merely notified bingo players that they were winners, used in conjunction with a traditional bingo card, was allowable. (ER Vol. 4, 613-14, Campoy Decl. Ex. 2.)

Although the initial response to the August 2007 advisory appeared to indicate industry compliance, after six or seven months complaints regarding the use of illegal gambling devices by bingo establishments again increased. (ER Vol. 4, 604-05, Campoy Decl.) A sampling of bingo establishments by Bureau agents confirmed the devices were once again proliferating. (*Id.*) It also came to the Bureau's attention that California cardroom operators, bars and other commercial establishments, believing that the Bureau would take no action against such gambling devices, were considering offering these devices for play by the public. (ER Vol. 4, 605, Campoy Decl.) Based on these facts, the Bureau decided to move forward with enforcement action against the use of the devices. (ER, Vol. 2, 605-06, Campoy Decl.)

Commencing on May 7, 2008, Bureau agents visited bingo establishments throughout the State to determine if there were illegal gambling devices on the premises. (ER Vol. 4, 606, Campoy Decl.) Based on these inspections, the Bureau issued written notifications to fifteen bingo establishments where illegal gambling devices were found. (ER, Vol. 4,

606, Campoy Decl.) The establishments were notified that they had thirty days to remove all such devices, or they would face enforcement action, including seizure of the devices. (ER Vol. 4, 606-07, Campoy Decl.) Prior to expiration of the thirty-day period, VGT, et al. filed suit. (ER Vol. 4, 619-36, VGT Compl.)

VGT, Capitol Bingo, and World Touch Gaming Inc.<sup>8</sup> (“World Touch Gaming”) are manufacturers of the electronic gambling devices that are operated in bingo establishments in the County of Sacramento, California that were the subject of the Bureau’s thirty-day notifications. (ER Vol. 3, 392-93, VGT Second Amd. Compl.; ER Vol. 3, 413-14, Capital Bingo First Amd. Compl.; ER Vol. 3, 369, El Camino First Amd. Compl.) While there are some differences in their operation, VGT’s, Capital Bingo’s and World Touch’s gambling devices look like slot machines and have graphic interfaces that display slot machine-type reels and other types of gambling that are illegal under California law, such as Keno. (ER Vol. 4, 477-531 Rep.’s Tr. Hrg. on Mot. for First Prelim Inj. on June 25, 2008, ER Vol. 3, 370-72, El Camino First Amd. Compl.) Unlike bingo, these electronic

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<sup>8</sup> World Touch Gaming, Inc. is not a party, but is the manufacturer of the electronic gambling devices used by El Camino. (ER Vol. 3, 368, El Camino First Amd. Compl.)

gambling devices operate and play like slot machines in that players place their bets by the insertion of purchased monetary credits, with each bet having a monetary equivalent, and bets of large amounts resulting in correspondingly higher monetary prize levels. (*Id.*) The betting on and play of these devices is also extremely rapid, unlike live call bingo. (ER Vol. 4, 571-72, Johnson Decl.)

The electronic gambling devices are available for play and played by the disabled and non-disabled alike, without reference to whether a patron is a qualified disabled individual. (ER Vol. 4, 568, Rep.'s Tr. Hrg. on Mot. for Temp. Rest. Ord. on June 5, 2008.)

There is no evidence to indicate that such electronic gambling devices are the only reasonable accommodation to play bingo.<sup>9</sup> Indeed the three amended complaints at issue claim that each of VGT's, Capital Bingo's, and World Touch Gaming's own separate form of electronic gambling devices constitutes the only reasonable accommodation in the play of bingo. (ER Vol. 3, 394, 399, VGT's Second Amd. Compl. ¶¶ 23, 24 & 47; ER Vol. 3, 409-10, 416, Capital Bingo's First Amd. Compl. ¶¶ 5 & 38; ER Vol. 3, 368,

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<sup>9</sup> These devices are specifically excluded from the definition of bingo and expressly prohibited as form of bingo under the state's charitable bingo law. Cal. Pen. Code § 326.5(o) & (p); see also Cal. Pen. Code § 326.3(a)(8).

377, El Camino's First Amd. Compl. ¶¶ 14 & 43.) As discussed below, the California Gambling Control Commission has issued regulations implementing the provisions for assistance to the disabled that do not include illegal electronic gambling devices. (Appellants' Req. for Jud. Not. Exh. A.) The County of Sacramento allows for assistance to the disabled by a live person. (ER Vol. 2, 232, Sac. County Code (SCC) § 4.26.168(V).)

An important change in circumstances since the first preliminary injunction was granted is that SB 1369 specifically provides:

The California Gambling Control Commission shall issue regulations to implement the requirements of this subdivision and may issue regulations regarding the means by which the operator of a bingo game, as required by applicable law, *may offer assistance to a player with disabilities in order to enable that player to participate in a bingo game*, provided that the means of providing that assistance shall not be through any electronic, electromechanical, or other device or equipment that accepts the insertion of any coin, currency, token, credit card, or other means of transmitting value, and does not constitute or is not a part of a system that constitutes a video lottery terminal, slot machine, or devices prohibited by Chapter 10 (commencing with Section 330 [of the California Penal Code]).

Cal. Penal Code § 326.5(p)(6) (emphasis added). At the hearing on the second preliminary injunction, the Bureau adduced uncontroverted evidence that the California Gambling Control Commission ("Commission") was

about to adopt such regulations concerning assistance to the disabled in the play of charitable bingo. (ER, Vol. 2, 168-70, Ciau Decl.) Prior to the Court's written order granting the second preliminary injunction, the Bureau gave specific notice to the district court that the Commission was scheduled on May 7, 2009, to consider for adoption the regulations providing for assistance to the disabled referenced above. (ER Vol. 2, 62-67H, Objects. to Prop. Ord. & Req. for Jud. Not.) The district court nonetheless issued its written order granting the second preliminary injunction on May 7, 2009. (ER, Vol. 1, 36-40, Ord. Granting Prelim. Inj.) The Commission did indeed adopt such regulations, which went into effect on May 18, 2009. (Appellants' Req. for Jud. Not., Ex. A.)

### **SUMMARY OF ARGUMENT**

In the First Appeal, this Court vacated the preliminary injunction and remanded the case for reconsideration in light of the enactment of SB 1369 and the intervening United States Supreme Court decision in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), setting forth a more stringent standard for preliminary injunctive relief than had been employed by the district court in relation to the First Preliminary Injunction.

Upon remand, the district court, ostensibly employing the *Winter* standard for the issuance of preliminary injunctive relief, ruled that the

Plaintiffs/Appellees were “likely to succeed on the merits of their allegation that enforcement of the provisions of SB 1369 would violate the Americans With Disabilities Act (“ADA”).” The district court’s ruling is not supported by the ADA as a matter of law. No state “service, program, or activity” is at issue in the Bureau’s enforcement of state statutes concerning charitable bingo, and the electronic gambling devices at issue are not reasonable accommodation required under the ADA.

As to the balancing of equities, in issuing the preliminary injunction the district court simply disregarded the state’s paramount interest in determining how charitable bingo is to be played in the State of California in favor of deliberate violations of the law by Appellees. The district court also improperly displaced the California State Legislature’s determination of the public interest in favor of its own perception of the public interest in allowing the use of electronic gambling devices in playing charitable bingo.

### **STANDARD OF REVIEW**

The district court’s grant of a preliminary injunction is reviewed under the abuse of discretion standard. *Brown v. California Dept. of Transportation*, 321 F. 3d 1217, 1221 (9th Cir. 2003). The district court’s conclusions of law are reviewed de novo. *Id.*

As noted by this Court in the First Appeal, the standard under which the district court determines whether a preliminary injunction should issue is set forth in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, as follows:

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

*Id.* at 374 (citations omitted).

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED IN DETERMINING THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS UNDER THE ADA**

The amended complaints in this case allege that enforcement of the state's charitable bingo statutes violates Title II of the ADA, by discrimination on the basis disability. The operative prohibition of Title II in title 42 U.S.C. § 12132, provides that “[no] qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the *benefits of the services, programs, or activities* of a public entity, or *be subjected to discrimination* by any such entity.”

(Emphasis added).

Appellees' primary argument throughout this matter is that their electronic gambling devices constitute the "only" reasonable accommodation for the play of charitable bingo, and that the Bureau's action in enforcing the prohibition of such devices under the state's charitable bingo and gambling laws constitutes unlawful disparate treatment under 42 U.S.C. § 12132. The seminal disparate treatment case under Title II of the ADA in this Circuit is *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996). In *Crowder*, the strict quarantine requirements for all animals entering Hawaii had a disparate impact on blind individuals relying upon guide dogs as aids. This Court stated that the quarantine "effectively precluded visually-impaired persons from using a variety of public services, such as public transportation, public parks, government buildings and facilities, and tourist attractions" and concluded that "the quarantine requirement is a policy, practice or procedure which discriminates against the visually-impaired individuals by denying them meaningful access to state services programs or activities by reason of their disability." *Crowder*, 81 F.3d at 1485. Appellees' electronic gambling devices have nothing to do with access to state "services, programs, or activities," and cannot reasonably be compared to guide dogs for the blind.

Additionally, *Crowder* does not dispense with the need for some operative relationship between the public entity and the disabled plaintiff claiming an injury at the entity's hands under 42 U.S.C. § 12132. In *Zimmerman v. Oregon Department of Justice*, 170 F.3d 1169, 1175-76 (9th Cir. 1999), this Court examined *Crowder* and reasoned that “the ‘action’ words in the statute [42 U.S.C. § 12132] assume a relationship between a public entity, on the one hand, and a member of the public, on the other. The former *provides* an output that the latter *participates in or receives*.” *Id.* (Emphasis in original.) There is no such provider-receiver relationship implicated in the Bureau's enforcement of California's gambling laws.

In an analogous context to this case involving a law enforcement action, an arrest was held not to be a service or benefit that could support an ADA claim. *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1159 (W.D. Wash. 1999). “As noted in *Rosen [v. Montgomery County Maryland]*, 121 F.3d [154] at 157 [(4th Cir. 1997)], casting the perpetration of a crime and any resulting arrest as a service or activity the benefit of which a disabled person has been denied strains the statutory language to, if not past, the breaking point.” *Id.*

As set forth above, SB 1369 does provide that the Commission “may issue regulations regarding the means by which the operator of a bingo

game, as required by applicable law, may offer assistance to a player with disabilities in order to enable that player to participate in a bingo game,” and the Commission has exercised this regulatory authority. Cal. Pen. Code § 326.5(p)(6). However, the mere provision of direction to bingo operators about lawful means to provide assistance to the disabled does not turn charitable bingo into a state service, program, or activity. Indeed, such regulatory direction is only necessary by virtue of Appellees’ efforts to compel the use of slot machine-style devices as a form of charitable bingo despite SB 1369 under the guise of a reasonable accommodation.

The district court and Appellees have relied heavily on *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004) to find an actionable claim under the ADA. (ER Vol 1, 38, Ord. Granting Second Prelim. Inj., ER Vol. 4, 544-45, Ord. Granting First Prelim. Inj.) Such reliance on *McGary* is misplaced. Unlike the “novel” theory allowed to go forward in the context of a motion to dismiss in *McGary*, this case does not involve direct enforcement of state regulations against disabled individuals. Rather, this case involves a facially neutral interpretation of the state’s gambling laws being applied not to the disabled, but to third parties, the charitable bingo operators. As such, this case is akin to *Safe Air for Everyone v. Idaho*, 469 F. Supp. 2d 884 (D. Id. 2006), in which facially neutral regulations

concerning agricultural burning as applied to third parties were alleged to have a disparate impact on disabled individuals. *Id.* at 879. Referring to the plaintiffs' ADA challenge to the regulations governing agricultural burning, the court stated:

Plaintiffs' [sic] here argue they have been denied access to the outdoors, public parks, streets, and the like as a result of the State's failure to accommodate their disabilities when implementing and administering the Smoke Management Program. Any failure by the State to accommodate or modify the Smoke Management Plan necessarily requires that the State first be required to provide such an accommodation or modification. The Plaintiffs maintain accommodation is required by the ADA and [Rehabilitation Act] because the State has chosen to regulate field burning; in other words, that because the State has undertaken the job of regulating field burning, the State is now under a duty to consider the needs of disabled individuals who will be impacted by the smoke and provide such accommodations as are necessary. This argument is an attempt to bypass the threshold questions of whether there is discrimination by the State and, second, whether the discrimination is based upon an individual's disability. Only after these determinations are made are the inquiries regarding accommodation and modification ripe. No such discrimination by the State has been alleged in this case.

*Id.* at 888.

In the present case, the Bureau has undertaken to neutrally regulate gambling to the benefit of all state citizens in accordance with state law.

Like the plaintiffs in *Safe Air for Everyone*, the Appellees and the district

court would bypass the threshold questions of whether there has been discrimination by the Bureau and whether such discrimination is based upon an individual's disability. These requirements for an action under the ADA are not met in this case and cannot be bypassed.

Citing *Alexander v. Choate*, 469 U.S. 287 (1985), the court in *Safe Air for Everyone* went on to state:

The Supreme Court has rejected the "notion that all disparate-impact showings constitute prima facie cases" of discrimination. What is required is that handicapped individuals be afforded meaningful access to the benefit offered by the state, which sometimes requires reasonable accommodations in order for the disabled to access the benefit. The Supreme Court made clear, however, that meaningful access does not require that the disabled receive a greater benefit but, instead, that the handicapped are provided equal access to the benefit offered by the state as provided to non-handicapped individuals. This standard is met here.

*Safe Air for Everyone v. Idaho*, 469 F. Supp. 2d at 889-90 (citations omitted). Charitable bingo is not a state service, program, or activity. Moreover, Appellees do not seek equal access to charitable bingo, but rather seek to gamble on various non-bingo games on illegal electronic gambling devices. Such a demand is outside the scope of the ADA.

**II. ASSUMING ARGUENDO THAT THE ACTIONS OF THE BUREAU IN THIS CASE ARE COGNIZABLE UNDER THE ADA, THERE IS NO LIKELIHOOD THAT APPELLEES CAN SUCCEED ON THE CLAIM THAT THEIR DEVICES ARE A REQUIRED REASONABLE ACCOMMODATION.**

Even assuming, arguendo, that there is a cognizable ADA claim in this case, under *Crowder v. Kitagawa*, 81 F.3d at 1485, “[t]he court’s obligation under the ADA and accompanying regulations is to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives.” SB 1369 states in pertinent part:

The California Gambling Control Commission shall issue regulations to implement the requirements of this subdivision and may issue *regulations regarding the means by which the operator of a bingo game, as required by applicable law, may offer assistance to a player with disabilities in order to enable that player to participate in a bingo game*, provided that the means of providing that assistance shall not be through any electronic, electromechanical, or other device or equipment that accepts the insertion of any coin, currency, token, credit card, or other means of transmitting value, and does not constitute or is not a part of a system that constitutes a video lottery terminal, slot machine, or devices prohibited by Chapter 10 (commencing with Section 330 [of the California Penal Code]).

Cal. Penal Code § 326.5(p)(6) (emphasis added).

At the district court hearing, the Bureau provided uncontroverted evidence that the Commission was developing emergency regulations to

address assistance to disabled persons in the play of charitable bingo within the lawful parameters of the charitable bingo statute. (ER Vol. 2, 168-70, Ciau Decl.) Indeed, the Commission adopted those regulations governing assistance to the disabled that are reasonable, adequate to the task, and now in effect. (Appellant's Req. for Jud. Not., Ex. A.)

Under *Crowder*, the state has set forth and implemented a reasonable regulatory mechanism for dealing with assistance to the disabled that is appropriate in light of the alternative proffered by Plaintiffs—the continued allowance of an illegal form of gambling for all bingo patrons. *See Assenberg v. Anacortes Housing Auth.*, 268 Fed. Appx. 643, 644; *Ross v. Raging Wire Telecomms.*, 42 Cal. 4th 920, 926-27 (Cal. 2008) (the court stating that laws prohibiting discrimination against the disabled do not require implementation of unlawful reasonable accommodations).

A state is not required to make any and all possible modifications under the ADA.

Title II does not require States to employ any and all means to make judicial services accessible or to compromise essential eligibility criteria for public programs. It requires only “reasonable modifications” that *would not fundamentally alter the nature* of the service provided.

*Tennessee v. Lane*, 541 U.S. 509, 511 (2004) (emphasis added); *see* 42 U.S.C. § 12182(b)(2)(A)(ii). SB 1369 dispels any vagueness as to what constitutes bingo by clarifying that the definition of bingo does not allow electronic gambling devices. Cal. Penal Code § 326.5(o), *see also* Cal. Pen. Code § 326.3(a)(8). Therefore, without any doubt, the use of electronic gambling devices as an accommodation to the disabled does fundamentally alter the nature of bingo as defined by statute. The ADA simply does not require the state to permit that. *Tennessee v. Lane*, 541 U.S. at 511; *Pruett v. Arizona*, 606 F.Supp.2d 1065, 1078-79 (D.Ariz., 2009) (proffered reasonable accommodation using a chimpanzee as a service animal that would fundamentally alter state statutes restricting wildlife possession was not required under the ADA).

Appellees' position is that their several vendors' (VGT, Inc., Capital Bingo, Inc., and World Touch Gaming, Inc.) variations of electronic gambling devices are the "only" reasonable accommodation in the play of charitable bingo. (ER Vol. 3, 394, 399, VGT's Second Amd. Compl. ¶¶ 23, 24 & 47; ER Vol. 3, 409-10, 416, Capital Bingo's First Amd. Compl. ¶¶ 5 & 38; ER Vol. 3, 368, 377, El Camino's First Amd. Compl. ¶¶ 14 & 43.) That each separate variation of electronic bingo is the *only* reasonable accommodation borders on a semantic, if not a legal, impossibility.

Moreover, at the demonstration of electronic gambling devices that preceded the first preliminary injunction hearing, it was asserted time and again by Plaintiffs in reference to the VGT's and Capital Bingo's devices that the gambling game graphics were wholly unnecessary to the devices' play of bingo, and were purely for "entertainment" value. (ER Vol. 4, 487-88, 496, 501, 505, 527, Rep.'s Tr. Hrg. on Mot. for First Prelim Inj. on June 25, 2008.) Counsel for Capital Bingo actually covered up the display of the gambling-type graphics during the demonstration to illustrate this point for the district court. (ER Vol. 2, 173-77, Excerpt from Rep.'s Tr. Hrg. on Mot. for First Prelim Inj. on June 25, 2008.) In that same vein, in its Second Amended Complaint, El Camino has pleaded:

On the above display screen [of the electronic gambling device] a digital bingo card appears, and on which randomly generated numbers appear. The screen below is merely *a video screen which displays a different electronic game for entertainment purposes only*, in regards to which there is no combination needed to win. It does not generate any actual cash winnings, and has absolutely no bearing on the outcome of the bingo games.

(ER Vol. 3, 371-72, El Camino's First Amd. Compl. ¶ 24 (emphasis added).)

By Appellees' own admission, the gambling games displayed on their devices are purely for "entertainment" purposes, and have nothing to do with effectuating the play of bingo or awarding of prizes. As such, the critical

display of gambling games is not at all necessary to the devices as “reasonable accommodation” in the play of bingo. A reasonable accommodation that is “not necessary to prevent discrimination on the basis of disability” is not required under the ADA. *Pruett v. Arizona*, 606 F. Supp. 2d at 1078.

Moreover, the several different electronic gambling devices of the various vendors—each of which is proffered by Plaintiffs as the *only* reasonable accommodation—must be provided not just to qualified disabled individuals, but to all patrons of the bingo establishment. This is well beyond “reasonable” in the context of what the ADA requires. *Pruett v. Arizona*, 606 F.Supp.2d 1065 at 1079.

The ADA requires only accommodations that are reasonable.

“[T]he accommodation required by the law is limited, not just expanded, by the word ‘reasonable.’ ” *McGary*, 386 F.3d at 1270. Where a law is intended to protect the community, an accommodation that threatens the health and safety of the community may be unreasonable. *Id.* Courts generally will not second-guess the public health and safety decisions of state legislatures acting within their traditional police powers, but the ADA and accompanying regulations require courts to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives. *Crowder*, 81 F.3d at 1485.

*Pruett v. Arizona*, 606 F. Supp. 2d at 1079. SB 1369 is an appropriate action by the state to address the assistance to disabled, while maintaining the state's long-standing interest in regulating gambling, even when done for charitable purposes. Cal. Const. art. IV, § 19; Cal. Bus. & Prof. Code §§ 19801, 19985-19987; Cal. Pen. Code §§ 319-329. and §§ 330-337z.

### **III. THE DISTRICT COURT ERRED IN DETERMINING THAT APPELLEES WOULD SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY INJUNCTIVE RELIEF**

Assuming, arguendo, that a cognizable claim under the ADA has been made to justify issuance of a preliminary injunction, no harm would accrue to Appellees in the implementation and enforcement of SB 1369. As discussed above, SB 1369 allows for the Commission to address the issue of assistance to disabled, and the Commission has done so. Similarly, the Sacramento County ordinance authorizing charitable bingo also addresses means of reasonable accommodation to the disabled. Provision for such reasonable accommodation is wholly in the hands of the Appellees, who have simply chosen instead to use electronic gambling devices for pecuniary reasons unrelated to the ADA. Indeed, Appellee United Cerebral Palsy put forth evidence referencing the revenues that it would lose if it did not continue to use electronic gambling devices as its basis for eschewing financial mitigation available under SB 1369. (ER Vol. 3, 311-14, Bergman

Decl.) Far from irreparable harm being caused by the Bureau's anticipated enforcement action, any resulting hardship to Appellees stems solely from the choice of Appellees' charities and gambling device manufacturers to offer only their illegal devices to assist the disabled. (*Id.*)

**IV. THE DISTRICT COURT ERRED IN DETERMINING THAT THE BALANCE OF EQUITIES TIPPED IN FAVOR OF APPELLEES.**

Appellees' charities' and device manufacturers' only genuine interest in offering electronic gambling devices as the "only" reasonable accommodation in playing charitable bingo is pecuniary. Their ADA claims are little more than a pretext for these transparent motivations and should be treated as such. It is almost inexplicable that the district court would find that deliberate violators of state criminal laws motivated by pecuniary interests are, in the balance, deserving of equitable relief.

**V. THE DISTRICT COURT ERRED IN DETERMINING THAT THE PUBLIC INTEREST WOULD BE SERVED BY THE ISSUANCE OF A PRELIMINARY INJUNCTION**

In SB 1369, the California State Legislature articulated the several public interests involved in charitable bingo as follows:

(a) The [California State ] Legislature finds and declares all of the following:

(1) Nonprofit organizations provide important and essential educational, philanthropic, and social services to the people of the State of California.

(2) One of the great strengths of California is a vibrant nonprofit sector.

(3) Nonprofit and philanthropic organizations touch the lives of every Californian through service and employment.

(4) Many of these services would not be available if nonprofit organizations did not provide them.

(5) There is a need to provide methods of fundraising to nonprofit organizations to enable them to provide these essential services.

(6) Historically, many nonprofit organizations have used charitable bingo as one of their key fundraising strategies to promote the mission of the charity.

(7) Legislation is needed to provide greater revenues for nonprofit organizations to enable them to fulfill their charitable purposes, and especially to meet their increasing social service obligations.

(8) Legislation is also needed to clarify that existing law requires that all charitable bingo must be played using a tangible card and that the only permissible electronic devices to be used by charitable bingo players are card-minding devices.

Cal. Pen. Code § 326.3(a)

At the hearing on the second preliminary injunction, the district court attacked the process of enacting SB 1369 in pertinent part, as follows:

Let me start with the machines, although I will indicate that the machines aren't really the issue anymore, as I indicated in my questions to Mr. Williams. It's really the law itself that's at issue in this

case now and whether that law complies with the requirements of the ADA.

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It's a strong argument, an argument that courts hear often, judges hear often, that judges should stay out of the business of legislation and should stay in the business of law.

The problem I'm having with the argument and with SB 1369 is I see no evidence supporting this argument in this specific piece of legislation. And as I said, I read it line by line, I looked at the history. I looked at 50 articles concerning how this got passed in trying to understand the law itself and whether, in fact, it is deserving of I think a presumption that laws—I think most judges believe that—that laws passed by state legislatures should have a presumption of validity.

And in this case, in my review, the presumption isn't warranted. And it's what Mr. Goodman alluded to. And that is this was a law which has been described, in even the kindest of terms, as a gut-and-amend bill that came in the final days of a legislative session that was the product of a compromise between Indian gaming tribes and large charities like the Catholic church. The church wanted the change because its games were losing customers to Indian casinos in recent years. And the tribes had long sought to end electronic bingo in Sacramento County. They argued that it encroached on their exclusive right to operate slot machines in California. "Indian gaming interests sent dozens of lobbyists to the Capitol on the bill." This is an article from The Sacramento Bee<sup>10</sup> dated October 2nd, 2008.

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<sup>10</sup> None of the news articles referred to by the district court were offered in evidence by any party.

There is an article also in The Sacramento Bee, and it's the September 3, 2008, edition, which is one of the best chronologies of legislation that I've seen, and, in particular, focuses obviously on SB 1369. Interestingly, back in April of 2008, there was legislation introduced by Senator Darrell Steinberg, SB 1626, that would have allowed bingo to be played on electronic replicas. But Steinberg dropped his bill before it received its first hearing. And then Senator Battin and Senator Cedillo took up the legislation. There is a quote from Senator Battin which would seem to undermine the argument that this bill is in the public interest, represents the interests of the people of the State of California. This is an article from the August 30th, 2008, edition of The San Diego Union-Tribune in which Senator Battin is quoted as follows. It says, "Senator Jim Battin, a Palm Desert Republican close to the tribes, bluntly said the measure was driven by a need to protect hundreds of millions of dollars the state receives from gaming tribes for the exclusive right to offer electronic gaming devices."

SB 1369 was written hastily, with little public comment, and with little public input. Again, done in the waning days of the legislative session. Senator Cedillo gutted a bill about school lunches and inserted the bingo measure into this piece of legislation.

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Obviously, the newspapers have pointed out that two primary moving forces between this legislation, and in particular the tribes, have contributed \$656,700 to 70 of the Legislature's 120 members, and that was only in the first six months of 2008. There was according to the history of this legislation, little, if no, opportunity for public comment.

There was a two-hour hearing. As county counsel Mr. Reed indicated, it was passed within 11 days. And

in an article in the Los Angeles Times, September 15, 2008, it's written that "It's more than a little troubling to see the haste with which lawmakers, who receive huge donations from tribes, rush to do their bidding. The state had been in the process of determining the legality of charity bingo machines, but Cedillo's bill would end that discussion. Californians should demand to see it reopened.

"At the time the gaming pacts were made, bingo machines weren't commonly available. Now that they are, it raises the question of whether any new technological advances in gambling that represent competition to Indian tribes will be banned. If so, the state first needs an open and public debate on the issue, not a quickly packaged and wrapped gift to Indian gaming.

"Through the state gambling pacts, Indian casinos pay \$100 million a year to the state. In addition, the tribes have donated hundreds of thousands of dollars to legislators this year alone."

And the article ends with the following: "California has just gotten a disturbing demonstration of the clout such sums can buy."

It concerns courts when legislation that criminalizes behavior is drafted in such a hastily fashion and is, in effect, benefitting not the public but two specific special interests. This is, in fact, a special interest piece of legislation. The evidence does not support the argument that this legislation is in the public interest.

(ER Vol. 1, 5-12 Rep.'s Tr. Hrg. Mot. for Second Prelim. Inj., April 14, 2009.) Notwithstanding this scathing attack,<sup>11</sup> it appears the district court actually agreed with all of the legislative findings of SB 1369, except for the one finding pertaining to use of electronic gambling devices in playing charitable bingo, for which the district court would substitute its view of the public interest for that of the California State Legislature.

The district court went on to state, as follows:

As the papers from the county counsel indicate, this is still a heavily regulated game even before SB 1369. And in the absence of 1369, it would continue to be heavily regulated. It's only being limited, at least from the evidence before the Court, because of special interests that were able to get this law passed.

And I thought it was somewhat ironic, I mean in considering these arguments last night, that when I got home, there sitting on the table was the official voter pamphlet<sup>12</sup> for the special election that's going to be held in May of this year. And I turned to Proposition 1C in which we're being asked to consider and, as I understand it, being supported and we're being urged to pass. It's a proposition which is designed to modernize the state lottery "to increase the percentage of lottery

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<sup>11</sup> The district court's derisive attitude toward the state's charitable bingo law pre-dates SB 1369 in that the district court apparently facetiously highlighted the letters BINGO in its first preliminary injunction order. (ER Vol. 4, 546, Ord. Granting First Prelim. Inj.)

<sup>12</sup> The voter pamphlet referred to by the district court was not offered in evidence by any party.

funds returned to players as prizes." It goes on to argue: With higher prize payouts, the state is hoping that the payouts "can attract more spending for lottery tickets and increase lottery profits." In other words, the state wants us to gamble more. And so here I have Mr. Williams saying we absolutely need to limit gambling. And I understand why he makes that argument, and he makes it well. But we have a state that is now encouraging us to pass a ballot initiative which will encourage more gambling, which will increase profits to the state, and we have a state budget which, in part, is now dependent on the gambling industry. We have legislation being passed which allows the Indian casinos to increase the number of slot machines, again increasing revenue to the state.

And I compare that to allowing someone who is disabled who simply wants to go down to a local bingo hall and play bingo on an electronic device. And there's a disconnect there for me. And it's among the many reasons I don't find the state's arguments about SB 1369 to be supported by any credible evidence. On the other hand, I do have evidence that these plaintiffs directly benefit from electronic devices.

(ER Vol. 1, 14-16, Rep.'s Tr. Hrg. Mot. for Second Prelim. Inj., April 14, 2009.)

It is of some note that the ballot proposition referenced by the district court did not pass. (Appellants' Req. for Jud. Not. Ex. B.) The people of California may not have thought the proposition was in the public interest, or perhaps they were simply swayed by high-priced political advertising campaigns. The result is nonetheless the statement of the public interest

under California's initiative process. Cal. Const. art. II, § 1. In the same vein, the California State Legislature articulates the public interest of the people of the State of California under its republican form of government. Cal. Const. art. IV, § 1; *see also* U.S. Const. art IV, § 4. It is beyond the pale for the district court to simply disregard the indisputably lawful actions of state government in articulating the public interest as embodied in SB 1369.

### CONCLUSION

Based on the foregoing, the district court abused its discretion in issuing the second preliminary injunction against Appellants Bureau of Gambling Control and Mathew Campoy. This Court should reverse the district court's ruling, and vacate and dissolve the preliminary injunction.

Dated: July 1, 2009

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SA2008304077

**CERTIFICATE OF COMPLIANCE  
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1  
FOR 09-16092**

1. This brief complies with the type-volume limitation of Fed. R. App.P. 32(A)(7)(B) because this brief contains 8,363 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect, version 8.0 in 14 point Times New Roman.

Dated: July 1, 2009

/s/ WILLIAM L. WILLIAMS, JR.  
William L. Williams, Jr.  
Deputy Attorney General

## **CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2009, I electronically filed the foregoing

### **APPELLANT'S OPENING BRIEF and REQUEST FOR JUDICIAL NOTICE**

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days to the following non-CM/ECF participants:

**HARLAN W. GOODSON  
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Dated: July 1, 2009

/s/ PAULA CORRAL

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