

UNITED STATES COURT OF APPEALS

MAR 25 2009

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

VIDEO GAMING TECHNOLOGIES,
INC., a Tennessee corporation UNITED
CEREBRAL PALSY OF GREATER
SACRAMENTO, a California non-profit
corporation; WIND YOUTH SERVICES,
a California non-profit corporation;
ROBERT FOSS; JOAN SEBASTIANI,

Plaintiffs - Appellees,

v.

BUREAU OF GAMBLING CONTROL, a
law enforcement division of the California
Department of Justice; MATHEW J.
CAMPOY, in his official capacity as the
Acting Chief of the Bureau of Gambling
Control,

Defendants - Appellants,

v.

HAGGIN GRANT POST NO. 521, THE
AMERICAN LEGION, DEPARTMENT
OF CALIFORNIA; CAPITAL BINGO,
INC.; CASA ROBLE HIGH SCHOOL
RAMSMEN, INC.; MARY BROWN; EL
CAMINO ATHLETIC BOOSTER CLUB,

Plaintiff-intervenors -
Appellees.

No. 08-16736

D.C. No. 2:08-cv-01241-JAM-
EFB

Eastern District of California,
Sacramento

ORDER

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted March 1, 2009
San Francisco, California

Before: WALLACE, THOMAS and BYBEE, Circuit Judges.

After the initial briefing in this case was completed, the California Legislature enacted Senate Bill 1369, which unambiguously provides that the machines at issue in this case are illegal under state law. In the aftermath of this bill's passage, all appellees have dropped their claims under 42 U.S.C. § 1983 and a number of the appellees have withdrawn as parties in this matter. We decline to resolve the legal issues presented by this case until the district court has an opportunity to reevaluate the plaintiffs' claim under the Americans with Disabilities Act. We therefore vacate the preliminary injunction and remand this matter to the district court for reconsideration in light of this substantial new development. On remand, the district should consider the effect, if any, of *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), which clarified the proper approach a district court should follow in evaluating claims of irreparable harm prior to granting a preliminary injunction. "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.” *Winter*, 129 S. Ct. at 374

All future appeals in this case shall be assigned to this panel. The parties shall bear their own costs on appeal.

VACATED AND REMANDED.

BYBEE, Circuit Judge, concurring in the judgment.

I concur in the court's order insofar as it vacates the preliminary injunction. I write separately to make clear that, in my view, the plaintiffs have not set forth a colorable ADA claim.

Title II of the ADA requires only "reasonable modifications that would not fundamentally alter the nature of the service provided." *Tennessee v. Lane*, 541 U.S. 509, 532 (2004) (internal quotation marks omitted); *see also* 28 C.F.R. § 35.130(b)(7). The machines at issue here permit the play of a complete "bingo" game in a matter of seconds and employ a betting scheme and physical structure materially indistinguishable from garden-variety slot machines (and quite unlike traditional bingo). They thus appear not to be a remotely reasonable accommodation for any inability on the part of the disabled to participate in live call bingo, as plainly required by § 326.5(o) of the California Penal Code. I would have denied the application for a preliminary injunction.