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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA
11
12

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

16 Plaintiffs,

17 v.

18 **BUREAU OF GAMBLING CONTROL, a
law enforcement division of the California
19 Department of Justice; MATHEW J.
CAMPOY, in his official capacity as the
20 Acting Chief of the Bureau of Gambling
Control; and JOHN MCGINNESS, in His
21 Official Capacity as the Sacramento County
Sheriff,**

22 Defendants.
23

24
25 **AND RELATED INTERVENORS.**
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27
28

2:08-CV-01241-JAM-EFB

**NOTICE OF LODGING OF APRIL 14,
2009 TRANSCRIPT OF COURT'S ORAL
RULING ON PRELIMINARY
INJUNCTION**

Date: April 14, 2009
Time: 1:30 p.m.
Courtroom: 6
Judge The Honorable John A. Mendez
Trial Date January 25, 2010

Action Filed: June 4, 2008

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Dated: May 6, 2009

Respectfully submitted,

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/s/ WILLIAM L. WILLIAMS, JR.

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Gambling Control and Mathew Campoy*

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOHN A. MENDEZ, JUDGE

VIDEO GAMING TECHNOLOGIES,
INC., dba VGT, 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, an
individual; JOAN
SEBASTIAN,

No. Civ. S-08-1241

Plaintiffs,

vs.

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.

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REPORTER'S TRANSCRIPT

COURT'S RULING RE PRELIMINARY INJUNCTION

TUESDAY, APRIL 14, 2009

Reported by: KELLY O'HALLORAN, CSR #6660

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1 SACRAMENTO, CALIFORNIA

2 TUESDAY, APRIL 14, 2009

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4 (Excerpt of proceedings.)

5 THE COURT: All right. The Court's prepared to rule
6 on the motion for a preliminary injunction, having considered
7 the arguments of counsel, both in writing and here today at
8 this hearing. The case is here back before this Court
9 because of the order issued by the Ninth Circuit Court of
10 Appeals Judges Wallace, Thomas, and Bybee. In that decision,
11 the court indicated that it was declining to resolve the
12 legal issues presented by this case until the district court
13 has an opportunity to reevaluate the plaintiffs' claim under
14 the Americans with Disabilities Act. The Ninth Circuit
15 vacated the preliminary injunction issued by this Court in
16 June of 2008 and remanded this matter back to this Court for
17 reconsideration in light of the substantial new development,
18 the new development being the California Legislature's
19 enactment of Senate Bill 1369 which unambiguously provides
20 that the machines at issue in this case are now illegal under
21 state law.

22 The Ninth Circuit went on to write that on remand, the
23 district court should consider the effect, if any, of Winter
24 vs. Natural Resources Defense Council, 129 S. Ct. 365, a 2008
25 U.S. Supreme Court case, which clarified the proper approach

1 a district court should follow in evaluating claims of
2 irreparable harm prior to granting a preliminary injunction.
3 And quoting from that case, "A plaintiff seeking a
4 preliminary injunction must establish that he is likely to
5 succeed on the merits, that he is likely to suffer
6 irreparable harm in the absence of preliminary relief, that
7 the balance of equities tips in his favor, and that an
8 injunction is in the public interest. And Judge Bybee wrote
9 separately in the memorandum order indicating that he not
10 only would have vacated the preliminary injunction, but that
11 he, in his view, believes that the plaintiffs have not set
12 forth a colorable ADA claim.

13 This Court appreciates the Ninth Circuit giving it an
14 opportunity for reconsideration in light of SB 1369. And
15 that was the basis obviously for the hearing today.

16 Let me first assure the Ninth Circuit Court of Appeals
17 that I have taken into consideration and will base the
18 Court's decision in part on the guidance provided by not only
19 prior cases dealing with preliminary injunctions but the
20 Winter case which gave this Court further guidance on how
21 this motion should be evaluated.

22 The Court actually has in the history of this case
23 previously asked the parties to brief the issue of the effect
24 of Senate Bill 1369 on this case. It did so back in October
25 once the law was signed by the governor. I received briefs

1 from the parties as to the effect of Senate Bill 1369 in the
2 context of a motion to dismiss filed by the defendants. But
3 because the case was on appeal, this Court was precluded from
4 rendering any decision.

5 Just so the record's clear, this isn't something new
6 or something not previously considered by the Court. It
7 actually was pretty well briefed back in October. And for
8 purposes of today's record, so all the parties recognize and
9 have asked me to do, I went back to those briefs as well. I
10 went back to some of the original declarations and papers
11 filed by both sides during the first stages of this case back
12 in June of 2008.

13 The case has evolved over the past ten months to the
14 point where it is, as the defendants have argued, almost a
15 pure, in fact, it is a pure ADA case at this point in light
16 of SB 1369. So the issues have been narrowed and more
17 focused, and this case remains primarily an ADA case, which
18 it always has been as my order in June indicated. Even
19 anticipating that perhaps the state might at some point
20 declare the machines at issue illegal that it would, at least
21 back in June, I thought still require a trial on this issue
22 of reasonable accommodations.

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

1 the law itself that's at issue in this case now and whether
2 that law complies with the requirements of the ADA. And I
3 asked Mr. Williams a lot of questions about the public harm,
4 the problem with these machines. From the plaintiffs' point
5 of view, these machines, at least in the evidence before the
6 Court, these machines allow them to play bingo in an
7 electronic form. The additional benefit of these machines,
8 which clearly isn't addressed in SB 1369 but was raised by
9 both Mr. Goodman and Mr. Peterson is, and it's not something
10 I think that anyone should take lightly, but the real benefit
11 of these types of accommodations is that they allow disabled
12 people to participate in an activity in a dignified manner.
13 And perhaps among the most important things to someone with a
14 disability is the fact that they lose their dignity because
15 of a disability that they didn't seek, they didn't ask for,
16 but they live with in an honorable manner day in and day out.
17 And in that sense, one of the major benefits which seems to
18 have been completely ignored by SB 1369 is this dignity
19 issue.

20 Now, the purpose when you look at the ADA, of this
21 legislation, there are a number of purposes. But in 42 USC
22 Section 12101, the congressional findings and purposes of
23 this act are set forth. And it's an acknowledgment that
24 individuals with disabilities are excluded, that they suffer
25 from discrimination, unfair and unnecessary discrimination,

1 and that the purpose of this act is, in part, to provide
2 clear and comprehensive national mandate for the elimination
3 of discrimination against individuals with disabilities, to
4 provide clear, strong, consistent, enforceable standards
5 addressing discrimination, to ensure that the federal
6 government plays a central role in enforcing the standards
7 established in the Americans with Disabilities Act on behalf
8 of individuals with disabilities. And although not
9 explicitly stated, to, in effect, restore and give them a
10 sense of dignity.

11 Section 12132 of this statute provides that no
12 qualified individual with a disability shall, by reason of
13 such disability, be excluded from participation in or denied
14 the benefits of the services, programs, or activities of a
15 public entity, or be subject to discrimination by any such
16 entity.

17 And in the defendants' memorandum and as argued by
18 Mr. Williams, the defendants argue that "In the balancing of
19 equities," which this Court has to do in a preliminary
20 injunction setting, "the plaintiffs would have this Court
21 give short shrift to the will of the people of the State of
22 California, as expressed through their democratically elected
23 representatives and governor in setting reasonable limits on
24 gambling in the state. In enacting SB 1369, the California
25 Legislature reflects the strong and long-held interest of the

1 people of the State of California in controlling and
2 restricting gambling in its many forms because of its
3 potential deleterious societal effects." And he cites to
4 Business and Professions Code Section 19801(a) and (d).
5 "Unregulated gambling enterprises are inimical to the public
6 health, safety, welfare, and good order. Plaintiffs now ask
7 this Court to usurp the role of state government in setting
8 public policy and allow for illegal gambling, largely because
9 it suits their pecuniary ends. The continued use of illegal
10 electronic gambling devices, as plaintiffs request, places
11 law-abiding charitable entities at a competitive disadvantage
12 to charities using electronic gambling devices for the
13 limited pool of charitable donations, especially when
14 electronic gambling devices are made available to all
15 patrons, regardless of disability. Indeed, the enjoyment
16 that disabled persons may get from playing electronic
17 gambling devices, as set forth in plaintiffs' supporting
18 declarations, cannot be divorced from the fact that they are
19 enjoying illegal slot-machine-like entertainment, and not
20 charitable bingo."

21 And then the last paragraph of the brief on page 9
22 reads, "Finally, notwithstanding the oftentimes frustrating
23 fallibility of our democratic system at the state level, it
24 is nonetheless the system that is guaranteed to the people of
25 the State of California under the federal and state

1 constitutions, and is deserving of credence in serving the
2 public interest. To place plaintiffs' parochial pecuniary
3 interests above that of the people of the state does not
4 serve the public interest."

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

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

18 And in this case, in my review, the presumption isn't
19 warranted. And it's what Mr. Goodman alluded to. And that
20 is this was a law which has been described, in even the
21 kindest of terms, as a gut-and-amend bill that came in the
22 final days of a legislative session that was the product of a
23 compromise between Indian gaming tribes and large charities
24 like the Catholic church. The church wanted the change
25 because its games were losing customers to Indian casinos in

1 recent years. And the tribes had long sought to end
2 electronic bingo in Sacramento County. They argued that it
3 encroached on their exclusive right to operate slot machines
4 in California. "Indian gaming interests sent dozens of
5 lobbyists to the Capitol on the bill." This is an article
6 from The Sacramento Bee dated October 2nd, 2008.

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

1 gaming devices."

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

7 And I don't disagree with Mr. Williams that people
8 often complain about the sausage-making factory. It's just
9 that this sausage is particularly offensive in the way it was
10 accomplished.

11 Obviously, the newspapers have pointed out that the
12 two primary moving forces between this legislation, and in
13 particular the tribes, have contributed \$656,700 to 70 of the
14 Legislature's 120 members, and that was only in the first six
15 months of 2008.

16 There was according to the history of this
17 legislation, little, if no, opportunity for public comment.
18 There was a two-hour hearing. As county counsel Mr. Reed
19 indicated, it was passed within 11 days. And in an article
20 in the Los Angeles Times, September 15, 2008, it's written
21 that "It's more than a little troubling to see the haste with
22 which lawmakers, who receive huge donations from tribes, rush
23 to do their bidding. The state had been in the process of
24 determining the legality of charity bingo machines, but
25 Cedillo's bill would end that discussion. Californians

1 should demand to see it reopened.

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

9 "Through the state gambling pacts, Indian casinos pay
10 \$100 million a year to the state. In addition, the tribes
11 have donated hundreds of thousands of dollars to legislators
12 this year alone."

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

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

22 And if you look at the legislation itself in detail,
23 it lacks the type of language that you find in the Americans
24 with Disabilities Act. It lacks a purpose statement. It
25 lacks any reason or rationale. And that, as Mr. Goodman

1 argued, is cause for concern.

2 And when that happens, then, as in this case,
3 plaintiffs turn to the courts, and they ask the courts to at
4 least allow them an opportunity for a fair hearing. And this
5 case is not so much about, as both defendants argue, the
6 charities, the manufacturers of the machines. It's now about
7 the plaintiffs, the people that, because of this law, can no
8 longer play bingo.

9 And again, I want to stress that I have taken to heart
10 and taken seriously the guidance that I received from the
11 Ninth Circuit judges. And I appreciate their willingness to
12 return this to the district court for further discussion and
13 to allow a more complete record upon which legally sound
14 decisions can be made.

15 And as I indicated in my questions to Mr. Williams,
16 what I see lacking at this point in the case on the
17 defendants' side is any evidence that the state has, in fact,
18 written a law that provides reasonable modifications. And
19 although the defendants clearly do not approve of and it's
20 clear from Judge Bybee's initial opinion that he disagrees
21 with the use of electronic devices to play bingo, there's no
22 other alternative that's been presented to this Court yet.
23 And in the absence of that and on this record based on
24 declarations from real people with disabilities who have been
25 affected and will be affected by the implementation of this

1 law and nothing on the other side other than a promise to
2 draft regulations, which still aren't here in any final form
3 whatsoever, on this record and applying the cases and the
4 guidance from the Supreme Court case mentioned in the Ninth
5 Circuit decision, Winter vs. NRDC, on this record at this
6 time, the plaintiffs are still likely to succeed on the
7 merits.

8 This is a different game, but that's not prohibited
9 under Title II of the ADA. That's not the issue. The issue
10 is: Is there some reasonable modification or accommodation
11 that allows these plaintiffs to continue to play bingo?
12 There's no reason why you can't continue to have electronic
13 bingo and card bingo. No one has suggested on the defense
14 side an overriding public interest as to why that should not
15 occur. SB 1369 certainly doesn't address that. There are
16 words in the legislation that promises that this issue will
17 be addressed, but words don't bring a law into compliance
18 with the ADA.

19 And it's interesting to note that they passed this law
20 in 11 days and was signed by the governor I think at the end
21 of September. And here we sit in April, and we still don't
22 have any final regulations even though, as Mr. Williams said,
23 they're trying to act on an emergency basis. It's not
24 surprising. It's not surprising.

25 And the argument that is made is that, although it's

1 not in SB 1369 itself, but that the law is, in part, designed
2 to limit gambling, restrict gambling, and the evils
3 associated with gambling.

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

10 And I thought it was somewhat ironic, I mean in
11 considering these arguments last night, that when I got home,
12 there sitting on the table was the official voter pamphlet
13 for the special election that's going to be held in May of
14 this year. And I turned to Proposition 1C in which we're
15 being asked to consider and, as I understand it, being
16 supported and we're being urged to pass. It's a proposition
17 which is designed to modernize the state lottery "to increase
18 the percentage of lottery funds returned to players as
19 prizes." It goes on to argue: With higher prize payouts,
20 the state is hoping that the payouts "can attract more
21 spending for lottery tickets and increase lottery profits."
22 In other words, the state wants us to gamble more. And so
23 here I have Mr. Williams saying we absolutely need to limit
24 gambling. And I understand why he makes that argument, and
25 he makes it well. But we have a state that is now

1 encouraging us to pass a ballot initiative which will
2 encourage more gambling, which will increase profits to the
3 state, and we have a state budget which, in part, is now
4 dependent on the gambling industry. We have legislation
5 being passed which allows the Indian casinos to increase the
6 number of slot machines, again increasing revenue to the
7 state.

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

16 As an aside, even though it is not directly relevant
17 to the legal issue in this case, in terms of the equities, I
18 can't ignore the fact that this money's going to charities
19 and the populations that they directly benefit. And if this
20 law remains on the books and is enforced, there is no dispute
21 that without electronic bingo that services to a population
22 of the disabled will be cut, if not eliminated. There's a
23 declaration from United Cerebral Palsy, which no one has
24 disputed, and states unequivocally that a number of services
25 will be cut, if not eliminated.

1 I asked a lot of questions about law enforcement's
2 view of the need for this law. And again, there's no
3 evidence, there still isn't even since June, that electronic
4 bingo presents any problems or, in effect, warrants inclusion
5 in the penal code. And, in fact, Ms. Walsh's declaration,
6 which I indicated was an excellent, very factual declaration,
7 indicated that there have been no problems. In light of
8 that, I don't believe there's any evidence to support an
9 argument, and I really didn't hear an argument, that law
10 enforcement perceives SB 1369 to be necessary. At least at
11 this time there's no evidence to support that.

12 As I indicated, I'm greatly concerned about a law that
13 is sponsored by two special interest groups which make
14 certain conduct criminal. And the lack of support for this
15 law from law enforcement I think is telling. There's nothing
16 in the law or the legislative history that suggests support
17 from sheriffs, police, district attorneys. And again, I find
18 little, if any, support in the record concerning any public
19 interests that the state argues is being protected or is
20 deserving of protection in this case.

21 And that's what, in part, distinguishes this case
22 before the Court from the Winter vs. NRDC case or the Pruett
23 vs. Arizona case which defendants have cited. In the Winter
24 case, you had a clearly national security interest, a
25 military interest, which the court found outweighed the

1 interest asserted by the plaintiffs, which was the protection
2 of marine mammals.

3 As an aside, I found it interesting that the Ninth
4 Circuit actually upheld the district court injunction in
5 Winter. The district court judge had issued an injunction
6 against the Navy. The Ninth Circuit actually upheld the
7 injunction, and the Supreme Court reversed the Ninth Circuit.
8 The Ninth Circuit thought that, at least under the facts and
9 circumstances of that case, the arguments by the plaintiff
10 and the threat to marine mammals warranted at least
11 injunctive relief. And certainly individuals with
12 disabilities deserve a similar protection.

13 Pruetts vs. Arizona is also distinguishable from this
14 case, again because in that case there was a clear, no
15 question, public health interest at stake. The case involved
16 an inherently dangerous animal. This is not an inherently
17 dangerous machine. And the court found that there were
18 several alternatives. Again, the plaintiff wanted a
19 chimpanzee, to be able to have a chimpanzee at her home, and
20 argued that she should be allowed to since it was an
21 accomodation under the ADA. But that court found that
22 several alternatives to having the chimpanzee in her home
23 were adequate.

24 That is the issue in this case, as I've indicated over
25 and over again. There are no other alternatives at this time

1 on this record. There is no evidence of that type of
2 reasonable accomodation in this case. So there is no, at
3 least this Court finds, no clear public interest which, based
4 on the record at this time, clearly outweighs the interest of
5 plaintiffs in not being denied access to playing bingo, the
6 plaintiffs' interest in being given a full and fair
7 opportunity to be heard, which they were not given by the
8 State Legislature, and the plaintiffs' interest in being able
9 to participate in a public event on equal terms with
10 nondisabled people.

11 The alleged public interest in the enforcement of
12 SB 1369 is, in large part, undermined by the manner and
13 methods employed in the passage of this legislation. The law
14 allows seizure first and accommodation second. And again, it
15 declares these machines to be illegal. You have to remove
16 them. We can take them out. And oh, by the way, we're going
17 to try to draft some regulations. We don't know what they
18 are yet. We still haven't got around to finalizing them.
19 We'll get there. A lot of promises that are still
20 unfulfilled. That seems backwards to this Court.

21 And if SB 1369 had truly taken into consideration the
22 mandates and requirements of the ADA, it should have provided
23 for reasonable accommodation first before seizure and
24 elimination of this game from the disabled individuals who
25 play this game. There are still no final regulations

1 concerning the use of portable card-minding devices or
2 regulations regarding the means by which the operation of a
3 bingo game, as required by applicable law, may offer
4 assistance to a player with disabilities.

5 Again, as the court pointed out, there is explicit
6 recognition in this legislation of the requirements of the
7 ADA, without actually mentioning it, but that language, as
8 required by applicable law, without question is referring to
9 the Americans with Disabilities Act. And it's an explicit
10 recognition that players with disabilities can't play regular
11 bingo without accommodation.

12 The defendants have presented no evidence that
13 portable card-minding devices, for example, or these other
14 yet-to-be-defined means designed to assist players with
15 disabilities, that these accommodations, first, actually
16 exist, can be implemented, or, which is the issue in this
17 case, will bring SB 1369 into compliance with the ADA. While
18 explicitly acknowledging the requirements of the ADA, the
19 words in this piece of legislation bring little comfort to
20 this Court, or more specifically to the plaintiffs. Actions
21 speak louder than words. Actions speak louder than good
22 intentions. And it's actions, not words, that are required
23 to bring SB 1369 into compliance with the ADA.

24 In fact, SB 1369 unfairly restricts disabled access by
25 requiring, without justification, that paper cards actually

1 be daubed by disabled players. And that's found in Penal
2 Code Section 326.5(o), as amended.

3 So the focus of this case now shifts from machines to
4 SB 1369. That's why the Ninth Circuit sent it back to this
5 Court and asked this Court to consider the effect or the
6 impact of 1369 on this case.

7 The issue is does this piece of special interest
8 legislation comply with the mandates of the ADA. And at this
9 point in this case, this Court finds that the plaintiffs'
10 evidence on this issue outweighs the defendants' lack of
11 evidence on this issue.

12 Precedent is clear that a state law may violate the
13 ADA if it fails to reasonably accommodate the disabled,
14 whether as interpreted and enforced or as written.

15 In the defendants' supplemental brief that was filed
16 back in October of 2008, the defendants wrote: "The Court's
17 obligation under the ADA and accompanying regulations is to
18 ensure that the decision reached by the state authority is
19 appropriate under the law and in light of proposed
20 alternatives."

21 That's exactly what I'm doing and have been asked to
22 do by the Ninth Circuit. And I don't find evidence to
23 support the state's position that the decision reached, as
24 reflected in SB 1369, is appropriate, or that there are any
25 proposed alternatives.

1 There is no evidentiary support for the argument that
2 the defendants raise that the alternatives for reasonable
3 accommodation set forth in 1369 are appropriate. They don't
4 exist.

5 On the other hand, I do have uncontroverted evidence
6 that electronic bingo devices are, at least at the present
7 time, a reasonable and workable accommodation. These
8 devices, without question, permit disabled individuals to
9 play bingo. A much faster, a more entertaining, and a more
10 efficient game of bingo, but it's bingo. And being
11 different, as a disabled person can tell you, is not a bad
12 thing. And, more importantly, it allows disabled individuals
13 to participate in a game of bingo alongside and against
14 nondisabled individuals.

15 McGary vs. City of Portland involved a law enforcement
16 action where no reasonable accommodation mechanism was in
17 place. In this case, the same thing exists, at least at this
18 time. There is no mechanism in place, only an unfulfilled
19 promise in a hastily drafted piece of legislation that has
20 not, at least as of today's date, been defined, and under the
21 second part, been proven to work.

22 Back in October of 2008 after the law was passed, as
23 indicated, the plaintiffs also filed a supplemental brief
24 discussing the impact of SB 1369 on this case. And in a
25 brief actually drafted by Video Gaming Technologies' attorney

1 at the time, and we all know Video Gaming Technologies is no
2 longer a party in this lawsuit, but at the time the following
3 arguments were raised which I think are equally applicable
4 today. And they argued as follows: "The ADA may be violated
5 by the explicit language of a state law, as opposed to
6 defendants' interpretation of a law. Indeed, most of the
7 authorities discussed by both parties in the briefing on this
8 case involved that very situation." And there are a number
9 of cases cited, including McGary, Bay Area Addiction Research
10 & Treatment vs. City of Antioch, Crowder vs. Kitagawa, T.E.P.
11 vs. Leavitt, S.D. Farm Bureau vs. Hazeltine. "These cases
12 collectively demonstrate that the 'services, programs or
13 activities of a public entity' subject to ADA Title II (see
14 42 USC Section 12132) include protection from the enforcement
15 of discriminatory laws, whether the discrimination is facial
16 or by disparate impact.

17 "This Court," referring to my preliminary injunction
18 order, "also explicitly recognized this point in granting the
19 preliminary injunction.

20 "BGC also argues that because its policy is facially
21 neutral, it has not discriminated against the disabled. The
22 Ninth Circuit has specifically rejected this reasoning,"
23 citing McGary. And quoting from McGary, "We have repeatedly
24 recognized that facially neutral policies may violate the ADA
25 when such policies unduly burden disabled persons, even when

1 such policies are consistently enforced."

2 And then quoting from the Court's preliminary
3 injunction order back in June, the plaintiffs write:
4 "Although the seizure of bingo machines may be evenly
5 enforced, it may still disproportionately affect the disabled
6 in violation of the ADA."

7 The plaintiffs go on, "In their supplemental brief,
8 defendants likely will reassert their circular argument that
9 the electronic bingo machines are now clearly illegal under
10 SB 1369 and therefore cannot be reasonable accommodations.
11 The circularity of this argument has not abated. By
12 challenging defendants' enforcement policy (now essentially
13 codified in SB 1369) under ADA Title II, plaintiffs are
14 attacking the legality of that policy under federal law. The
15 answer to plaintiffs' challenge cannot be that it fails
16 because the accommodations presented are illegal under the
17 very state law challenged. For instance, applying such logic
18 to the claims in Crowder vs. Kitagawa would have meant that
19 the plaintiffs' ADA challenge to avoid quarantine laws for
20 seeing-eye dogs failed because avoiding quarantines was
21 illegal under the very laws challenged. Such logic is
22 nonsensical whether the purported illegality arises from
23 defendants' interpretation of Section 326.5, or from the
24 actual language of SB 1369." And citing to 28 CFR
25 Section 35.130(b)(7), "A public entity shall make reasonable

1 modifications in policies, practices, or procedures when the
2 modifications are necessary to avoid discrimination on the
3 basis of disability, unless the public entity can demonstrate
4 that making the modifications would fundamentally alter the
5 nature of the service, program, or activity."

6 Plaintiffs conclude, "In short, SB 1369 merely
7 codifies defendants' discriminatory policies by prohibiting
8 electronic bingo machines and requiring paper bingo cards.
9 That fact alone does not change the ability of plaintiffs to
10 seek relief in a federal court under the protections of the
11 ADA. The passage of SB 1369 does nothing to diminish the
12 validity of plaintiffs' ADA claim, nor does it bolster
13 defendants' motion to dismiss those claims."

14 This case is now all about Terry Rosaril, Brian Bayer,
15 Mary Brown, Noreen Bartell, and the thousands, if not tens of
16 thousands, of other disabled individuals that want to do
17 something that they love, and that is play bingo, and do so
18 with dignity. And they deserve their day in court. They
19 deserve a chance to see, hear, and challenge defendants'
20 contentions that reasonable accommodations exist and to
21 testify, as they have in their affidavits and declarations,
22 that at this point this is the only way that they can
23 participate in these games.

24 The Court is required to determine, in particular with
25 respect to this motion, that until a trial takes place,

1 should an injunction be reinstated and should the status quo
2 in place prior to the passage of SB 1369 be maintained. In
3 applying the directives and guidance from all the preliminary
4 injunction cases, including Winter, in applying the elements
5 of are the plaintiffs likely to succeed on the merits, are
6 they likely to suffer irreparable harm, do the balance of
7 equities tip in their favor, and is the injunction in the
8 public interest, applying those tests to the facts of this
9 case as they are before the Court at this time, the Court
10 finds that the injunctive relief is warranted.

11 The plaintiffs are likely to succeed based in large
12 part on at the present time the declarations submitted by the
13 individual plaintiffs which clearly show that at this point
14 these machines are the only accommodation available. And
15 it's based also in part, as I've stated, on the lack of
16 evidence from the defendants and the failure to show that
17 there are any proposed reasonable accommodations that
18 actually do what these electronic devices do at the present
19 time, and that is allow disabled individuals to play bingo on
20 an equal footing with nondisabled individuals.

21 There are no final regulations yet. Right now, they
22 are simply promises, and the plaintiffs are entitled to a
23 trial. That is what this trial will be all about.

24 In terms of the irreparable harm that weighs heavily,
25 heavily on the side of the plaintiffs, and that has not

1 changed since the original injunction was issued, you are
2 taking away bingo from thousands of disabled individuals.
3 And there is a secondary impact. And that is the effect on
4 the charities that benefit from this bingo being played that
5 would be devastating.

6 In terms of the balance of equities, unlike Winter, as
7 I indicated, there's no national security interest involved
8 in this case, no military interest. Unlike Pruett, there is
9 no public health risk. There really is no public interest
10 that is supported by the evidence.

11 And the argument that there is a public interest and
12 this law is necessary to limit gambling is, as I've
13 indicated, belied by the fact or facts of how this
14 legislation was passed in light of the state's obvious
15 interest in encouraging gambling in other capacities. And
16 there's no, at least at this point, no negative impact from
17 an evidentiary point of view that's been shown by defendants.
18 There's only positive that comes out of playing electronic
19 bingo. Again, it brings disabled people into a bingo hall,
20 and it allows them to play. It gives them an opportunity to
21 participate in a state-sanctioned activity. And that in and
22 of itself far outweighs any alleged state interest. Bingo's
23 good. I think the state recognizes that. And they should
24 allow people to play bingo, and they should allow disabled
25 people to play bingo. There is little, if any, evidence of

1 harm. And there's certainly no evidence in the legislation
2 itself.

3 And then, finally, is the injunction in the public
4 interest. The public interest in providing opportunities and
5 assistance to the disabled community far outweighs any public
6 interest, that the Court has been unable to find, quite
7 frankly, in denying disabled individuals access to these
8 machines.

9 For all of those reasons, the Court grants plaintiffs'
10 motion for a preliminary injunction. Unless, Mr. Goodman,
11 you think the terms and conditions of the injunction need to
12 be modified from the previous injunction issued by the Court,
13 the Court would intend to reinstate its preliminary
14 injunction issued on June 30th, 2008.

15 MR. GOODMAN: I actually do think the form of the
16 injunction should track more the TRO order that the Court
17 signed for the reason I think it's clear that the Court wants
18 to permit those machines that are currently in use to
19 continue to be in use, yet the county kind of parsed the
20 injunction that was issued back in June because that seemed
21 to relate just to particular cease and desist orders, and the
22 county was taking the position that if a particular
23 manufacturer was not a party to that action, then maybe their
24 machines shouldn't be used, or if a particular charity wasn't
25 participating. So I think if it's a more blanket injunction,

1 it would avoid the harm to law enforcement that the county
2 cited in their briefs.

3 MR. REED: Actually, Judge, I had hoped to be heard on
4 that.

5 THE COURT: Well, here's what I'm going to do. I'm
6 going to ask, Mr. Goodman, then for you to draft a proposed
7 preliminary injunction order.

8 MR. GOODMAN: Will do.

9 THE COURT: Run it by both defendants. That way you
10 can get input from both defendants, particularly the county
11 counsel. If you need a further hearing on the terms of the
12 injunction, then I will allow further hearing, although I'm
13 confident that all sides can work out I think the language
14 based on the intent of the Court in its ruling.

15 I did want to add one final note, because there was
16 reference made over and over again to -- and obviously it was
17 cited by Judge Bybee in his separate opinion, and that's the
18 Tennessee vs. Lane case. In the language that is quoted,
19 it's just one little sentence in a larger paragraph. And I
20 want to make sure that the record's clear as to the case
21 involved, again, access to the courts, not electronic bingo
22 machines, but it does talk about accommodation. And the
23 entire paragraph reads that -- the official cite is 541 U.S.
24 509, and this is at page 531, 532. "Congress' chosen remedy
25 for the pattern of exclusion and discrimination described

1 above, Title II's requirement of program accessibility, is
2 congruent and proportional to its object of enforcing the
3 right of access to the courts. The unequal treatment of
4 disabled persons in the administration of judicial services
5 has a long history, and has persisted despite several
6 legislative efforts to remedy the problem of disability
7 discrimination. Faced with considerable evidence of the
8 shortcomings of previous legislative responses, Congress was
9 justified in concluding that this difficult and intractable
10 problem warranted added prophylactic measures in response.

11 "The remedy Congress chose is nevertheless a limited
12 one. Recognizing that failure to accommodate persons with
13 disabilities will often have the same practical effect as
14 outright exclusion, Congress required the states to take
15 reasonable measures to remove architectural and other
16 barriers to accessibility." And I want to read that sentence
17 again. "Recognizing that failure to accommodate persons with
18 disabilities will often have the same practical effect as
19 outright exclusion." Therein lies the problem with 1369,
20 because the practical effect of this law as it stands now is,
21 in fact, outright exclusion.

22 Now, the case goes on, and this is the part that, the
23 one sentence that's cited by defendants and referenced by
24 Judge Bybee. And it reads, "But Title II does not require
25 the states to employ any and all means to make judicial

1 services accessible to persons with disabilities, and it does
2 not require states to compromise their essential eligibility
3 criteria for public programs. It requires only reasonable
4 modifications that would not fundamentally alter the nature
5 of the service provided, and only when the individual seeking
6 modification is otherwise eligible for the service. As
7 Title II's implementing regulations make clear, the
8 reasonable accommodation requirement can be satisfied in a
9 number of ways."

10 That's what this case and the trial will be about.
11 And again, it won't be a lengthy trial, but at least a full
12 record will be developed as to whether, as Mr. Williams
13 argues on behalf of the defendants, whether this is the only
14 accommodation, or whether there are other reasonable
15 modifications that can be made to give access to disabled
16 individuals, access to bingo games.

17 And under no interpretation of my order am I requiring
18 the state to employ any and all means. I'm asking the state
19 to take a look at SB 1369, to take a look at these bingo
20 games, and to make sure that SB 1369 survives and, again,
21 withstands public scrutiny. Because as I indicated, it's a
22 sausage that just doesn't smell right right now, and that's
23 unfair to the plaintiffs and illegal in this Court's mind as
24 it stands right now.

25 All right. With that, that is the Court's order. We

1 have other business that we need to discuss. And,
2 Mr. Goodman, I'll look for that order in due time.

3 MR. GOODMAN: Your Honor, could I have the court
4 reporter transcribe the Court's rulings so that I can refer
5 to that in drafting the order?

6 THE COURT: I'm sure she'll be so happy to do that.
7 She'll get a transcript to you.

8 Mr. Williams, I assume you'd want a transcript as
9 well?

10 MR. WILLIAMS: Yes, please.

11 MR. GOODMAN: Thank you, your Honor.

12 THE COURT: There are motions that are set for I think
13 two weeks from now. What do you want to do with those,
14 because I know where this is headed. And if it goes back to
15 the Ninth, as I anticipate, then I'm going to be in a
16 position where I probably can't rule on the motions to
17 dismiss that are pending.

18 So do you want to continue those? Do you want me to
19 still decide those? And then the second issue is,
20 Mr. Goodman, when you will be leaving and what happens when
21 you leave?

22 MR. GOODMAN: Your Honor, right now I guess my
23 tentative date is probably not until June 8th. So I will be
24 handling the case through the remainder of my time. And I'm
25 getting Mr. McWhorter up to speed so he can step in with a

1 seamless transition, should that be the clients' wish.

2 THE COURT: Okay. And congratulations to you.

3 MR. GOODMAN: Thank you.

4 THE COURT: What do you want to do, both sides, in
5 terms of the motions to dismiss?

6 MR. WILLIAMS: I'd just like to have the opportunity
7 to discuss it with opposing counsel and see what our thoughts
8 are at this point.

9 THE COURT: That's fine. And then just let Mr. Vine
10 know. Okay?

11 MR. WILLIAMS: Okay.

12 THE COURT: Anything else we need to take up this
13 afternoon?

14 Oh, Mr. Stroud's in the audience. There is a separate
15 case in which Mr. Stroud, who now represents Video Gaming
16 Technologies, is involved. They were not and did not
17 participate in this particular argument.

18 Mr. Stroud, I'm going to leave it up to you to discuss
19 with counsel for the plaintiff in that case as to how you
20 wish to proceed, because technically your motion is still
21 pending. And just let Mr. Vine know whether you want a
22 hearing. If so, we'll set up a briefing schedule, or if you
23 and Ms. Candy can reach some type of agreement.

24 MR. STROUD: Yes, your Honor. It is set for May 6th.
25 And our brief is due tomorrow. But I will return to the

1 office right now and call my client and contact Ms. Candy as
2 well.

3 THE COURT: Okay.

4 MR. GOODMAN: One additional thing, your Honor. Since
5 our firm now represents both the initial plaintiffs and a
6 group of intervenors, and we have two complaints on file, I
7 think it might make a lot more sense if we filed one amended
8 and consolidated complaint. And I just wonder, so that
9 way --

10 THE COURT: Talk to Mr. Williams. And if you
11 stipulate to that, I'm sure I'll sign the stipulation.

12 MR. GOODMAN: Thank you.

13 THE COURT: Mr. Williams, anything further?

14 MR. WILLIAMS: No, your Honor.

15 THE COURT: Mr. Reed, anything further?

16 MR. REED: Judge, I understood your order earlier
17 regarding the handling of the final order. My concerns lay
18 there, and I will wait to see what counsel presents to you.

19 THE COURT: Okay. Mr. Peterson, anything further?

20 MR. PETERSON: No. Thank you, your Honor.

21 THE COURT: Thank you all very much.

22 (Proceedings concluded at 3:57 p.m.)
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I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s/ Kelly O'Halloran

KELLY O'HALLORAN, CSR #6660