**Nos. 1080826 & 1081015**

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# IN THE SUPREME COURT OF ALABAMA

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**SHERIFF TERRY SURLES, and**
**DISTRICT ATTORNEY RICHARD MINOR,**
**Appellants,**

**v.**

**CITY OF ASHVILLE; AMERICAN LEGION POST 170;**
**and SHOOTING STAR ENTERTAINMENT,**
**Appellees.**

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**STATE OF ALABAMA,**
**Appellant,**

**v.**

**CITY OF ASHVILLE, et al.,**
**Appellees**

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**On Appeal from the Circuit Court of**
**St. Clair County, Alabama**
**Case No. CV-08-382**

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## BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW, IN SUPPORT OF APPELLANTS

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**August 19, 2009**

## STATEMENT REGARDING ORAL ARGUMENT

*Amicus curiae* does not request oral argument in this case.

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## STATEMENT OF THE ISSUE

Whether the trial court erred in holding that the electronic "machine bingo" scheme approved by the City of Ashville is legal where the limited exception in Amendment 542 for the approval of bingo in St. Clair County does not permit electronic or media gaming, and where the St. Clair County bingo enabling act defines bingo as "that game commonly known as bingo" and refers to a "bingo card."

## SUMMARY OF THE ARGUMENT

Any case involving gambling issues in Alabama must be considered against the overarching law that forbids lotteries or "any scheme in the nature of a lottery." Art. IV, § 65, Ala. Const. 1901. Any constitutional exceptions, such as the St. Clair County bingo amendment found in Amendment 542 of the Alabama Constitution, must be narrowly construed against this broad anti-lottery ban to avoid subterfuge or evasion of the law.

Amendment 542 of the Alabama Constitution expressly permits charitable bingo in St. Clair County but does not mention machine or media "bingo." It is the only bingo amendment to specify the use of a "bingo card" and a specific fee per card. By contrast, two recent bingo amendments expressly permit machine or electronic bingo; but otherwise every single bingo amendment merely uses the word "bingo" and makes no mention of electronic or media machines. The language used in bingo amendments demonstrates that the people of Alabama are capable of plainly allowing for electronic or media bingo in those local amendments that state so; otherwise, it is not the

role of courts or city councils to expand the definition of bingo beyond its traditional legal definition.

Finally, this Court has refused to be fooled by gambling schemes of the past that attempted to whitewash their illegal operations with the rubric of legitimate gaming. Whether it was slot machines posing as "sweepstakes" in the recent *Barber v. Jefferson County Racing Association* case, 960 So. 2d 599 (Ala. 2006), or "instant bingo" lottery cards posing as "bingo" under a county bingo amendment nearly identical to St. Clair County's, *City of Piedmont v. Evans*, 642 So. 2d 435 (Ala. 1994), this Court has held the line against the persistent and imaginative attempts by gambling interests to do indirectly what cannot be done directly under Alabama law. The casino-like gambling approved by the City of Ashville in this case makes a mockery of the commonsense understanding of "bingo" and of Alabama's strong anti-lottery laws.

## ARGUMENT

### I. ANY CONSTITUTIONAL OR STATUTORY ALLOWANCES FOR GAMBLING IN ALABAMA MUST BE NARROWLY CONSTRUED AS EXCEPTIONS TO THE BROAD AND GENERAL BAN ON LOTTERIES AND "ANY SCHEME IN THE NATURE THEREOF" IN SECTION 65 OF THE ALABAMA CONSTITUTION.

In general, lotteries, gambling, and bingo[1] games are illegal in Alabama under Article IV, § 65 of the Alabama Constitution:

> "The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in *any scheme in the nature of a lottery* . . . ." (Emphasis added).

Alabama law takes seriously the broad proscription on "any scheme in the nature of a lottery" in section 65, as this Court has repeatedly affirmed. "The policy of the constitution and laws of Alabama prohibit the vicious system of lottery schemes and evil practice of gaming, in *all their protean shapes*." *Barber v. Jefferson County Racing Ass'n*, 960 So. 2d 599, 614 (Ala. 2006) (quotations and citations omitted). *See also Opinion of the Justices No. 373*, 795 So. 2d 630, 640 (Ala. 2001) (noting the

[1] This Court recognized that "bingo" is a lottery under Alabama law in *City of Piedmont v. Evans*, 642 So. 2d 435, 436 (Ala. 1994)

"Constitution explicitly condemns 'any scheme' containing elements that would make the scheme resemble a lottery").

This Court has repeatedly emphasized that the very purpose of the "broad declaration" in Section 65 of the Constitution "*was to put a ban on any effort at evasion or subterfuge*" of the lottery prohibition. *Opinion of the Justices No. 83*, 249 Ala. 516, 518, 31 So.2d 753, 755 (Ala. 1947) (emphasis added).

> "Whatever may be the view of the courts of other states on the subject of lotteries, [these] cases show that this court had adopted a *broad view of the meaning of the constitutional provision which does not admit of quibbling or narrow construction*."

*Id.* (emphasis added).

In light of both the Constitution's ban on "any scheme" like a lottery and this Court's broad construction of that ban, any *exceptions* to Section 65 are necessarily and correspondingly subject to a narrow interpretation. *See* 16 C.J.S. Constitutional Law § 56 (2009) ("[E]xceptions to general constitution provisions must be narrowly and strictly construed"); *United States v. Allen*, 163 U.S. 499, 504 (1896) (recognizing "general principle that exemptions must be strictly construed, and that doubt must resolve against the one asserting the exemption"). "No lottery" is

the general rule; bingo amendments are the narrow exceptions.

## II. AMENDMENT 542'S CHARITABLE BINGO EXCEPTION FOR ST. CLAIR COUNTY AUTHORIZES ONLY TRADITIONAL BINGO PLAYED ON "CARDS," NOT ELECTRONIC MACHINE GAMBLING.

The Alabama Constitution makes an exception to the general anti-lottery provision to allow in St. Clair County "[t]he operation of bingo games for prizes or money by certain nonprofit organizations for charitable, educational, or other lawful purposes." Amend. 542, Ala. Const. 1901 (ratified July 22, 1992). Although the word "bingo" is not defined in the amendment, Section 8 thereof requires that "[a] fee of $.10 (ten cents) shall be levied upon each bingo *card* sold" and said fee "shall be collected by the nonprofit organization who sold the bingo *card*." (Emphasis added.) Amendment 542 is unique in that it is the only bingo amendment in the Alabama Constitution that uses the phrase "bingo card" and specifies a fee therefor. Nothing in the amendment mentions "electronic," "machine," "media" bingo or the like.

Less than one year after ratification of the St. Clair County bingo amendment the Alabama legislature passed Local Act No. 93-687, which defined "bingo" in St. Clair County

as "*that game commonly known as bingo where numbers or symbols on a card* are matched with numbers or symbols selected at random." Ala. Act No. 93-687, Sec. 2(1) (emphasis added). Section 5(e) of the enabling act required "[a]ll fees collected . . . on bingo *cards*" to be remitted to the county tax collector or revenue commissioner. (Emphasis added.) Like the amendment before it, the local act makes no mention of electronic machines or "media."

The words "bingo" and "card" in Amendment 542 and the local act must be read *in pari materia*, of course. "A phrase that is used repeatedly in statutory provisions relating to the same object or subject matter shall be interpreted to have the same meaning throughout." *House v. Cullman County*, 593 So. 2d 69, 72 (Ala. 1992) (quotations omitted). "Moreover, 'where, in a constitution or statute, a word or phrase is repeated, and in one instance its meaning is definite and clear, and in the other it is susceptible of two meanings, *it will be presumed to have been employed in the former sense*.'" *Id.* (quoting *State ex rel. Meyer v. Greene*, 154 Ala. 249, 46 So. 268 (1908)). Here, in both the amendment and the subsequent statute, St.

Clair County bingo is given the traditional meaning of "that game commonly known as bingo" that contemplates an actual "bingo card" on paper that is subject to a unique fee per card.

By contrast, two relatively recent bingo amendments—— Amendments 732 (ratified 2002) and 743 (ratified 2004)——are the only amendments to expressly permit "bingo games, including *media* bingo" or bingo "on a card or *electronic marking machine*," respectively. (Emphasis added.) Every single one of the seventeen (17) other bingo amendments-- including Amendment 744, ratified the same day as 743-- merely uses the word "bingo" and makes no mention of electronic or media machines. *See* Amends. 386, 387, 413, 440, 506, 508, 542, 549, 550, 565, 569, 599, 600, 612, 674, 692, and 744, Ala. Const. of 1901. The words "including media bingo" and "or electronic marking machine" in Amendments 732 and 743 must be construed as substantive additions to mere "bingo," not needless or empty words. *See Ex parte The Children's Hospital of Alabama*, 721 So. 2d 184, 190 (Ala. 1998) (presuming "the Legislature could not have intended to include a meaningless phrase"). Thus, the *absence* of the same or similar words in the majority of the

other bingo amendments supports the notion that "bingo" meant traditional bingo on cards.

Moreover, the appearance of constitutional references to "media" and "electronic" machines are relatively recent as compared to the unadorned use of the word "bingo" in every bingo amendment from the first in 1980 until the 16th in 2000. Thus, Alabama's bingo amendments have only contemplated media or machine bingo in 2002 (Amend. 732) and in 2004 (Amend. 743). But even the most recent bingo amendment, number 744, ratified *after* amendments 732 and 743, was crafted like the "early" amendments to allow only traditional "bingo." When the people of Alabama want a county to have bingo played with electronic machines, and not just the traditional "game commonly known as bingo," they are demonstrably able to expressly allow it with the necessary constitutional language. As with Amendment 542 and most of the others, however, they have not done so.[2]

[2] This is not to imply, however, that bingo amendments permitting electronic or machine bingo *ipso facto* open the door to any gambling machines, devices, or schemes that may be contrive. As the appellants explain in their briefs, the game being played must still have all the elements of bingo, not merely a bingo label, to be a legal exception to the lottery prohibition of § 65.

Against this constitutional history, the City of Ashville Ordinance No. 2008-0011 unconstitutionally attempted to broaden the definition of bingo permitted in St. Clair County by authorizing bingo "(whether or not electronic computer [sic] or other technologic aids are used in connection therewith)." Yet even the specific provisions of the Ashville ordinance recognize and explain that there is a difference between traditional card bingo and electronic "bingo":

> "[Bingo] can be played with different kinds of equipment varying from one end of the spectrum, where traditional cards displaying the grids are used with tokens to cover the designated squares on the cards, to the technologically advanced end of the spectrum, where electronic devices perform the operations of the game using computers or micro-processors and interact with the human players by means of an electronic console."

Ordinance § (a)(vii). The ordinance's attempt to conflate traditional bingo with machine gambling as one game on two ends of a "spectrum" is unavailing. The constitutional and statutory provisions that allow a bingo exception in St. Clair County include--exclusively--the only end of the "spectrum" that is "commonly known as bingo," where "traditional cards" are used and fees applied to those

cards. Ashville's approval of any gambling outside traditional bingo is therefore unlawful.

## III. THE COMPUTERIZED GAMBLING OPERATION THAT THE CITY OF ASHVILLE HAS APPROVED EVIDENCES AN ILLEGAL LOTTERY SCHEME MASQUERADING AS "BINGO" IN AN ATTEMPT TO EVADE ALABAMA LAW.

This Court is aware of the schemes of gambling companies that regularly attempt to do "indirectly what is unlawful to be done directly." *Barber v. Jefferson County Racing Ass'n*, 960 So. 2d 599, 609 (Ala. 2006). Consistent with the broad construction required of § 65's sweeping ban on gambling, this Court has consistently ruled illegal those lottery devices or transactions merely posing as lawful activities such as "sweepstakes" or "bingo" games.

> "'[T]he courts have shown a general disposition to bring within the term 'lottery' every species of gaming, involving a disposition of prizes by lot or chance, and which comes within the mischief to be remedied regarding always the *substance and not the semblance of things*, so as to prevent evasions of the law . . . .'"

*Opinion of the Justices No. 277*, 397 So. 2d 546, 547 (Ala. 1981) (*quoting Yellow-Stone Kit v. State*, 88 Ala. 196, 200, 7 So. 338, 339 (1890) (emphasis added)). *See also Ex parte Ted's Game Enterprises*, 893 So. 2d 376 (Ala. 2004). As with other recent attempts to dress up illegal gambling, putting bingo "lipstick" on an illegal gambling "pig" will

not spare the pig. *See Billingsley v. State*, 96 Ala. 114, 11 So. 408 (1892) ("The law disregards such a mere sham or subterfuge, and looks to the result which was plainly intended and accomplished by the parties.")

In the case of *Barber v. Jefferson County Racing Association* this Court rejected the attempt by Innovative Sweepstakes Systems, Inc. and others to describe its sophisticated, computerized slot machines as a legal "sweepstakes" scheme. Innovative's innovative system required customers to purchase internet time on an encoded card that also gained the purchaser a certain number of predetermined sweepstakes entries. The customer then took the card with the entries to a terminal that "read" the entries on the card while simulating a slot machine. 960 So. 2d at 608. The trial court in *Barber* upheld Innovative's scheme by focusing too narrowly on the parts thereof and then declaring that Innovative was lawfully exploiting a legislative "loophole in the patchwork of Alabama's anti-gambling laws." *Id.* at 614. This Court was not fooled by the multi-stage scheme in *Barber*, however, and considered the computerized gaming network "collectively" rather than examining each part standing

alone: "Alabama's gambling law . . . is not so easily evaded." *Id.* The trial court's error in *Barber* was "in focusing on the function of the MegaSweeps readers in isolation." *Id.* at 617.

> "In the final analysis, Innovative created a system composed of what were formerly slot machines, which look like, sound like, and attract the same class of customers as conventional slot machines, and, when integrated with the [computer] servers, serve essentially the same function as did the slot machines."

*Id.* at 616. The Court held that Innovative's readers were slot machines prohibited under Alabama law. *Id.* at 617.

As in *Barber*, the trial court carved a loophole that did not exist by focusing too narrowly on the proposed machines as a mere "item used in the playing phases of lottery," *City of Ashville v. American Legion Post 170*, No. CV-2008-0382, Slip op. at 5 (Ala. St. Clair County Cir. Ct. March 30, 2008), instead of looking at the electronic gaming system collectively. The integrated, modern electronic "bingo" machine consoles proposed for St. Clair County are not distinguishable from the casino "bingo" game like the paper cards of traditional bingo are distinguishable from the other features of the game: other players' cards and daubers, and the announcer calling out

numbers the front of the room. It is thus more than a mere "item in the playing phase." The machines "are slot machines *as to those who pay to play them*." *Barber*, 960 So. 2d at 615.

The trial court also failed to distinguish between a "gambling device," on the one hand, and "lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes," on the other hand, in the definition provided in Ala. Code § 13A-12-20(5):

> "GAMBLING DEVICE. Any device, machine, paraphernalia or equipment that is normally used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. However, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices within this definition."

The statutory definition plainly incorporates gaming and "electronic bingo" consoles in that it specifies those things that are a "device," a "machine," or "equipment"; specifically excluded are "lottery *tickets*" and "policy *slips*"——playing items that are qualitatively different (and distinguishable) from gaming *machines*. In short, if it is a "machine" or "device" used for gambling, it is a gambling device; if it is a ticket or slip, it is not.

This attempt to introduce an electronic "bingo" scheme in St. Clair County is significantly more egregious than the illegal "instant bingo" lottery struck down by this Court in *City of Piedmont v. Evans*, 642 So. 2d 435 (Ala. 1994). In that case, the City of Piedmont passed a municipal ordinance to allow "instant bingo" games, ostensibly in accordance with Amendment 508 of the Alabama Constitution of 1901 which, like Amendment 542, allowed "bingo" to be operated legally in Calhoun County. But this Court noted that "[t]he only lottery legalized by the passage and ratification of Amendment No. 508 was and is the lottery of 'bingo,'" not "instant bingo." *Id.* at 436. The ordinance defined the latter as a covered "*ticket or card*" (emphasis added) concealing "numbers or symbols where one or more cards or tickets in each set has been designated in advance as a winner." *Id.* This Court held that Piedmont's "instant bingo" "does not constitute 'bingo'" under Amendment 508 but "is a separate and distinct type of lottery." *Id.*

When considered collectively and in the face of § 13A-12-20(5), the gaming machines at issue in St. Clair County will be "gambling devices" and, specifically, "slot

machines" defined and prohibited under § 13A-12-20(10) *et seq.* The trial court's creative loophole is unsupported by, and indeed contradicts, the very statute it misinterprets, and the court's zeal for constructing such a loophole runs counter to this court's admonishment to "regard[] always the *substance and not the semblance of things*, so as to prevent evasions of the [gambling] law . . . .'" *Opinion of the Justices No. 277*, 397 So. 2d at 547.

**CONCLUSION**

The trial court erred in ruling that Amendment 542 of the Alabama Constitution authorizes machine or electronic "bingo" in St. Clair County; that Ashville Ordinance No. 2008-0011 did not violate the anti-gambling laws; and that the approved machine or electronic "bingo" devices are not illegal slot machines. For these reasons, this Court should reverse the ruling of the trial court below.

Respectfully submitted this 19th day of August, 2009.

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**CERTIFICATE OF SERVICE**

I hereby certify that, pursuant to Rule 31(b), Ala. R. App. P., I have this date served a copy of the foregoing *Brief of* Amicus Curiae on the office of counsel for each party separately represented by placing a copy of same in the U.S. Mail, postage prepaid to the following on this 19th day of August, 2009:

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