

No. 1080168

IN THE SUPREME COURT OF ALABAMA

ETOWAH BAPTIST ASSOCIATION,

Appellant,

v.

SHERIFF TODD ENTREKIN, ETOWAH COUNTY, AL;
COOSA ENTERTAINMENT GROUP, LLC; CBS SUPPLY, LLC;
ETOWAH COUNTY COMMISSION,

Appellees.

On Appeal from the Circuit Court of
Etowah County, Alabama
Case No. CV-08-900349

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW
IN SUPPORT OF APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Amicus curiae does not request oral argument in this case.

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STATEMENT OF THE ISSUE

Whether "machine bingo" in Etowah County is illegal gambling under the Alabama Constitution and a companion enabling statute permitting traditional bingo on card or paper.

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 Etowah County bingo amendment found in Amendment 506 of the Alabama Constitution, must be narrowly construed against this broad anti-lottery ban to avoid subterfuge or evasion of the law.

The trial court erred by assuming that the lack of a definition of "bingo" in Amendment 506 required it to find that the amendment conflicted with the express definition of the term as a game played "on card or paper" found in the contemporaneous enabling statute passed by the Legislature within weeks of the amendment's language. Properly interpreted, the enabling statute's definition *explains* the definition of "bingo" in both the amendment and the statute—it does not bring them into conflict. Rather, it is Etowah County's attempt to shoehorn computerized "machine bingo" into the plain meaning of traditional bingo back in 1989 that raises a constitutional conflict in this case.

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 like the one in Etowah County, *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 complex, computerized, casino-like gambling approved by the Etowah County Commission in this case makes a mockery of the commonsense understanding of "bingo" and Alabama's 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.

Although the trial court narrowly considered this case to be merely whether a constitutional amendment and an enabling statute conflict, the legality of the bingo games at issue must be considered against the broader backdrop of Alabama law. In general, lotteries, gambling, and bingo¹ 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*

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)

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 "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 gambling 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. "No gambling" is the rule; a bingo amendment is the exception.

II. THE DEFINITION OF "BINGO" IN AMENDMENT 506'S BINGO EXCEPTION FOR ETOWAH COUNTY IS EXPLAINED, NOT CONTRADICTED, BY THE ENABLING LEGISLATION'S CONTEMPORANEOUS DEFINITION OF BINGO AS THE TRADITIONAL GAME PLAYED ON "CARD OR PAPER."

In this case, the Alabama Constitution makes an exception to the general anti-gambling provision to allow in Etowah County "[t]he operation of bingo games for prizes or money by certain nonprofit organizations for charitable or education purposes." Amend. 506, Ala. Const. 1901. Section 2 thereof provides that the legislature "shall have the right and power by general, special or local act to adopt laws supplemental to this amendment or in furtherance of the general purposes and objectives herein set forth."

Although the word "bingo" was not defined in the Amendment, shortly after Amendment 506 was proposed by Act 89-329 in 1989 (but before the people voted on it in August 1989), the legislature passed the enabling statute, Act 89-463, known as the Etowah County Bingo Act. 1989 Ala. Acts No. 89-463, 942. The enabling Bingo Act, and a later 1994 amendment to it (Act 94-135), defined "bingo" as "that game commonly known as bingo where numbers or symbols on a card or paper sheet are matched with numbers or symbols selected at random." *Id.* No other definition for "bingo" in Etowah

County has been provided by the Constitution of Alabama or the enabling legislative acts.

The trial court's paltry analysis below implies that the two legal provisions are in conflict, with the consequential result that Amendment 506, as a constitutional provision, prevails over the statute. The court below issued this conclusory ruling without the benefit of an explanation of the nature of the supposed legal conflict or how the court arrived at its decision. (C145-146). To find that the two laws conflict, however, the court had to make the assumption that the allowance for "bingo" in the Amendment was somehow broader than the definition of the same word supplied in the same year in the enabling statute. To sustain this logic the court would have also had to assume that the Legislature approved for the ballot an expansive and evolving constitutional definition of "bingo" that included all its future forms (electronic, video, machine, etc.) and in the same year passed the enabling act with the traditional definition of "that game commonly known as bingo" played "on a card or paper sheet." Such unstated assumptions run counter to the rules of interpretation and common sense.

The trial court, instead, should have presumed the constitutional validity of the statute and viewed Amendment 506 and the Bingo Act *in pari materia*. "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)).

The bingo amendment provides the general allowance for bingo while the enabling statute provides the specific definition of what is "commonly known as bingo." The same 1989 legislature that proposed the bingo amendment for ratification is the same legislature that proposed and passed the Bingo Act. Neither the court nor the Appellees offered any evidence that the Legislature contradicted itself in its own use of the word "bingo" from the one legislation to the other. The most reasonable explanation

is that "bingo" in these 1989 legislative acts contemplated only a game "on a card or paper sheet." The court's retroactive engrafting of modern "video bingo" machines into the traditional category of "bingo" allowed in Amendment 506 is a disingenuous attempt to manufacture a legal conflict and judicially amend a commonsense constitutional definition.

III. THE SOPHISTICATED AND COMPUTERIZED GAMBLING OPERATION THAT ETOWAH COUNTY DESCRIBES AS "MACHINE BINGO" 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 "indirectly what is unlawful to be done directly." *Barber*, 960 So. 2d at 609. Consistent with the broad construction required of Section 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).

Putting bingo "lipstick" on an illegal gambling "pig" will not spare the pig.

Approximately two years ago in *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. *Id.* at 608. Innovative constructed the system "'so that [the] required statutory element[s] of [a] "gambling device"—something staked "upon the outcome of a contest of chance or a future contingent event—would be missing.'" *Id.* at 614 (quoting Innovative's brief).

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. The trial court in *Barber* had 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." 960 So. 2d at 614. This Court disagreed, holding that "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 in this case fell into the trap of focusing on the fact that the computerized system of video machines to be used in Etowah County have

been given the name "bingo." Rather than simply rubberstamp this gaming scheme as "bingo," however, the trial court should have examined in greater detail, and as a whole, the machines and integrated computer systems to be assembled in Etowah County. As explained in the relevant resolution of the Etowah County Commission Resolution "Promulgating Rules and Regulations for the Operation of Charitable Machine Bingo" (July 7, 2008), Etowah County Machine Bingo rivals and may even exceed Innovative's system in sophistication, computerization, and casino-like presentation:

"Machine Bingo Games includes any machine, device or hardware that assists a player or the playing of Bingo Games, broadens the participation levels in a common game and includes all of the ancillary Bingo supplies. Examples of Machine Bingo Equipment and Supplies *include, but are not limited to,* dispensers, readers, electronic player stations, player terminals, central computer servers containing random number generators and other processing capabilities for remote player terminals, electronic consoles capable of providing game results in different display modes, telephones and telephone circuits, televisions, cables and other telecommunication circuits, and satellites and related transmitting and receiving equipment."

Resolution p. 5 (emphasis added). Expressly exempted from this definition is "[t]raditional bingo," defined as "utilizing paper cards." *Id.*

Machine bingo proposed in Etowah County is patently and categorically a different creature from traditional "paper card" bingo. Like in *Barber*, when the many and varied parts—dispensers, readers, stations, terminals, servers, consoles, telecommunications, etc.—considered as a whole system, "Machine Bingo" is only "bingo" in name only. Etowah County is "'trying to pull a tractor-trailer through a loophole.'" *Barber*, 960 So. 2d at 614. The substance of the gaming at issue is plainly illegal casino-type gambling, despite the *semblance* of the simple game of bingo in computerized form.

This sham-bingo scheme in Etowah County is significantly more egregious than the illegal "instant bingo" lottery struck down 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 506, 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” 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.*

In the same way, traditional bingo played with paper or cards is the only “bingo” allowed in Etowah County under Amendment 506 and specifically delineated in the Bingo Act. Defendants’ attempts to make “bingo” the shibboleth for their gambling “machines” is unavailing in light of the complex electronic casino that the county resolution contemplates. “The law disregards such a mere sham or subterfuge, and looks to the result which was plainly intended and accomplished by the parties.” *Billingsley v. State*, 96 Ala. 114, 11 So. 408 (1892).

CONCLUSION

The trial court erred in ruling that the Etowah County Bingo Act’s definition of bingo conflicted with Amendment 506 and that “machine bingo” was legal gambling under the Constitution of Alabama. For these reasons and those

raised by the Etowah Baptist Association, this Court should reverse the ruling of the trial court below.

Respectfully submitted this 22nd day of January, 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 above and foregoing *Brief of Amicus Curiae* on the office of counsel for each party separately represented by placing a copy of same in the United States Mail, postage prepaid and addressed to the following mail addresses on this 22nd day of January, 2009:

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