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STATE CONSTITUTIONAL LAW — GAMBLING LAW — ALABAMA  
SUPREME COURT APPROVES THE STATE’S PROSECUTION OF  
ELECTRONIC BINGO IN MACON COUNTY. — *State v. \$223,405.86*,  
Nos. 1141044 & 1150027, 2016 WL 1273039 (Ala. Mar. 31, 2016).

Although most people likely think of bingo as an innocuous game played in churches and nursing homes or perhaps as the name of a farmer’s dog,<sup>1</sup> disputes over the meaning of the word “bingo” have risen to the level of a constitutional crisis in Alabama. The Alabama Constitution broadly prohibits “lotteries,”<sup>2</sup> a term that includes bingo<sup>3</sup> as well as slot machines.<sup>4</sup> But seventeen constitutional amendments make exceptions to that prohibition to allow bingo in certain counties and localities.<sup>5</sup> The question of exactly what type of game those amendments allow has been at the center of a series of highly publicized political and legal disputes over the last decade known as the “bingo wars.”<sup>6</sup> Recently, in *State v. \$223,405.86*,<sup>7</sup> the Alabama Supreme Court held that the bingo amendment for Macon County does not allow slot-machine-like “electronic bingo”<sup>8</sup> and that the State’s attempts to eliminate electronic bingo in Macon County were not the result of unconstitutional selective prosecution.<sup>9</sup> In doing so, the court chastised local law enforcement officials who persist in refusing to

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<sup>1</sup> See *B-I-N-G-O*, SCOUTSONGS.COM, <http://www.scoutsongs.com/lyrics/bingo.html> [https://perma.cc/M4CS-E6PE].

<sup>2</sup> ALA. CONST. art. IV, § 65; see also *Op. of the Justices No. 373*, 795 So. 2d 630, 640 (Ala. 2001).

<sup>3</sup> See *Op. of the Justices No. 373*, 795 So. 2d at 640 (“The fact that it was necessary to amend the Constitution to except ‘bingo’ from § 65’s blanket prohibition on lotteries . . . demonstrates the broad construction that section has been given.”).

<sup>4</sup> *E.g.*, *Johnson v. State*, 34 So. 1018, 1019 (Ala. 1903); *Loiseau v. State*, 22 So. 138, 139 (Ala. 1897).

<sup>5</sup> See *State v. \$223,405.86*, Nos. 1141044 & 1150027, 2016 WL 1273039, at \*27–29 (Ala. Mar. 31, 2016) (providing a list of bingo amendments). The Alabama Constitution is subject to amendments that apply to only a single county (or even a single locality). Such amendments must be approved by a majority of voters in that county (a majority of voters in both the county and the locality is required for locality-specific amendments). They must also be approved by (1) a supermajority — without dissent — of each house of the state legislature and either a majority of the Local Constitutional Amendment Commission (LCAC) or a majority of voters in a statewide election; or, if any legislator dissents, (2) a supermajority of each house of the state legislature, and a majority of the LSAC and voters in a statewide election. ALA. CONST. amend. 425, *amended by id.* amend. 555.

<sup>6</sup> See generally Brandon A. Jackson, *Where Does the Authority Lie?: Constitutional Construction of Alabama’s Newest Bingo Amendments*, 5 UNLV GAMING L.J. 183, 184–92 (2014); J. Mark White et al., *Bingo in Alabama: More than Just a Game*, 41 CUMB. L. REV. 509, 509–20 (2011).

<sup>7</sup> 2016 WL 1273039.

<sup>8</sup> The court has described electronic bingo as a game played on “machines [that] operate almost exactly like slot machines,” *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 86 (Ala. 2009), in which players insert money and “press[] a button or pull[] a handle to find out” whether they won, *id.* at 87.

<sup>9</sup> *\$223,405.86*, 2016 WL 1273039, at \*9.

eliminate electronic bingo despite the court's consistent rulings on the issue.<sup>10</sup> But this reprimand appears to have had little effect, as the Macon County Sheriff subsequently facilitated the return of electronic bingo to the county.<sup>11</sup> This defiance represents a constitutional crisis and warrants impeachment under Alabama law. The State should pursue the impeachment of such sheriffs to end the bingo wars and preserve the rule of law.

Amendment No. 744 creates an exception to the Alabama Constitution's prohibition of "lotteries" to allow bingo in Macon County.<sup>12</sup> Its language is nearly identical to the other bingo amendments in the Alabama Constitution. The Alabama Supreme Court has repeatedly held that those amendments allow only "the game commonly or traditionally known as bingo,"<sup>13</sup> meaning electronic bingo is a form of illegal gambling.<sup>14</sup> Be that as it may, some sheriffs have refused to crack down on electronic bingo in their counties as a form of illegal gambling, forcing the State to lead the effort to eliminate electronic bingo in Alabama.

The Macon County Sheriff's Office has promulgated rules and regulations allowing electronic bingo in the county since the passage of Amendment No. 744.<sup>15</sup> Relying on those rules and regulations, KC Economic Development (KCED) installed electronic bingo machines to create a casino at Macon County Greyhound Park — a racetrack commonly known as VictoryLand.<sup>16</sup> The State raided VictoryLand and seized its electronic bingo machines as illegal gambling devices.<sup>17</sup> The State subsequently filed a forfeiture petition in the Cir-

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<sup>10</sup> *Id.* at \*23.

<sup>11</sup> Mike Cason, *VictoryLand Casino Reopens with Electronic Bingo Machines*, AL.COM (Sept. 13, 2016, 10:51 PM), [http://www.al.com/news/birmingham/index.ssf/2016/09/victoryland\\_casino\\_reopens\\_wit.html](http://www.al.com/news/birmingham/index.ssf/2016/09/victoryland_casino_reopens_wit.html) [<https://perma.cc/69NK-BNZ7>].

<sup>12</sup> ALA. CONST. amend. 744.

<sup>13</sup> *Cornerstone*, 42 So. 3d at 86. The court has defined "the game commonly or traditionally known as bingo" as "a group activity" in which players must diligently mark "[a]lphanumeric or similar designations [that] are randomly drawn and announced one by one" on "cards with spaces arranged in five columns and five rows, with an alphanumeric or similar designation assigned to each space," and players must both recognize and announce a winning pattern before any other player in order to win. *Id.*; *cf. Rules of Bingo*, BINGO RULES, <http://bingorules.org/bingo-rules.htm> [<https://perma.cc/5UNH-QS5Y>].

<sup>14</sup> *See, e.g., State v. Greenetrack, Inc.*, 154 So. 3d 940, 959–60 (Ala. 2014); *Ex parte State*, 121 So. 3d 337, 358 (Ala. 2013); *Cornerstone*, 42 So. 3d at 86–87; *see also* Brief of the State of Alabama at 30–32, \$223,405.86, 2016 WL 1273039 (Ala. Mar. 31, 2016) (Nos. 1141044 & 1150027); *see also id.* at app. (comparing Amendment No. 744 to other bingo amendments).

<sup>15</sup> *See* Brief of Appellee/Cross-Appellant, KC Economic Development, LLC at 22, \$223,405.86, 2016 WL 1273039 (Ala. Mar. 31, 2016) (Nos. 1141044 & 1150027).

<sup>16</sup> *See id.* at 22–23; *see also* *State v. 1615 Elec. Gambling Devices*, 46-CV-2013-90031, slip op. at 1 (Ala. Cir. Ct. June 25, 2015), *modified sub nom. State v. \$223,405.86 U.S. Currency*, No. 13-900031 (Ala. Cir. Ct. Oct. 2, 2015).

<sup>17</sup> \$223,405.86, 2016 WL 1273039, at \*1.

cuit Court of Macon County.<sup>18</sup> KCED intervened as the operator of VictoryLand.<sup>19</sup>

The trial court<sup>20</sup> denied the State's forfeiture petition. It began its discussion by laying out the definition of bingo adopted by the Alabama Supreme Court.<sup>21</sup> But rather than applying that definition to the machines seized from VictoryLand, the court discussed other facilities in Alabama that operated similar or identical machines without being shut down by the State.<sup>22</sup> In light of such nonenforcement, the court concluded, "[i]t is apparent at the present time that the State of Alabama is cherrypicking which facilities should remain open or closed."<sup>23</sup> The court held that this "cherrypicking" violated "the equal protection that is so fundamental to our system."<sup>24</sup> "[A]ll facilities operating the same type [of] bingo machines," the court continued, "should have the same forfeiture action applied against them each time there is a violation. This has not been done."<sup>25</sup> The court thus dismissed the State's forfeiture petition.<sup>26</sup>

In a subsequent order, the trial court denied the State's Motion to Alter or Amend Judgment and entered further findings of fact after considering the legislative and voter intent behind Amendment No. 744.<sup>27</sup> In particular, the court found that "the Macon County voter when voting on [Amendment No. 744] understood it to [allow] all forms of bingo," including electronic bingo.<sup>28</sup> The court further ruled that "[u]nless the State . . . initiate[d] legal action and/or forfeiture proceedings" against casinos that operated electronic bingo machines in other counties, the State would be required to return the machines it had seized from VictoryLand.<sup>29</sup>

The Alabama Supreme Court reversed both of the trial court's orders and entered judgment in favor of the State in a per curiam opinion.<sup>30</sup> The court began its analysis with a discussion of the trial

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<sup>18</sup> *Id.*

<sup>19</sup> Brief of the State of Alabama, *supra* note 14, at 2.

<sup>20</sup> The Alabama Supreme Court appointed Judge Shashy, a judge on a nearby judicial circuit, to hear the case. All of the judges on the Circuit Court of Macon County recused themselves after the Alabama Supreme Court disqualified the judge who previously presided over the case. \$223,405.86, 2016 WL 1273039, at \*1.

<sup>21</sup> 1615 *Elec. Gambling Devices*, slip op. at 1–2; *see also supra* note 13.

<sup>22</sup> *See 1615 Elec. Gambling Devices*, slip op. at 2–4.

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 6.

<sup>27</sup> State v. \$223,405.86 U.S. Currency, 46-CV-2013-9031, slip op. at 3 (Ala. Cir. Ct. Oct. 2, 2015).

<sup>28</sup> *Id.* at 2.

<sup>29</sup> *Id.* at 3.

<sup>30</sup> \$223,405.86, 2016 WL 1273039, at \*1. The opinion was joined by Justices Stuart, Bolin, Parker, Murdock, Wise, and Bryan.

court's equal protection ruling. As a factual matter, the court found that the numerous bingo cases it had previously decided as well as the broader enforcement actions discussed therein proved that the State's prosecution was far from selective and belied the trial court's cherrypicking finding.<sup>31</sup> Moreover, the trial court's equal protection ruling failed as a matter of law.<sup>32</sup> The trial court did not find — nor did KCED even argue — that the State's enforcement decisions were “based upon an unjustifiable standard such as race, religion, or other arbitrary classification”<sup>33</sup> or that they affected a fundamental right.<sup>34</sup> Consequently, any selective prosecution on the State's part fell well short of an equal protection violation and was thus a valid exercise of prosecutorial discretion.<sup>35</sup> The court also reprimanded the trial court for violating the separation of powers by “attempting to control the constitutional discretion of the executive branch” by “interrogat[ing] the State about its”<sup>36</sup> enforcement plans.<sup>37</sup>

Next, the court reviewed the trial court's findings regarding the legislative and voter intent behind Amendment No. 744. Evidence of the former, the court held, was inadmissible,<sup>38</sup> irrelevant,<sup>39</sup> and “meaningless.”<sup>40</sup> As to the latter, the court asserted that “apart from the intent to adopt the express language of an amendment, voter intent is an indiscernible commodity”<sup>41</sup> and echoed the concerns expressed by courts and commentators that evidence of both legislative and voter intent is too easily manipulated to be a reliable interpretive tool.<sup>42</sup> Moreover, the demands of the process for passing local amendments led Amendment No. 744's drafters to utilize the language of previous bingo amendments — which even KCED admitted did not allow electronic bingo — in order to make the proposed amendment “as uncontroversial as possible” and thus more likely to pass.<sup>43</sup> The court also suggested that the trial court's exclusion of testimony concerning what

<sup>31</sup> *Id.* at \*6.

<sup>32</sup> *Id.* at \*6–7.

<sup>33</sup> *Id.* at \*7 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

<sup>34</sup> *Id.* at \*6–7.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at \*8.

<sup>37</sup> *Id.* at \*7–8. The court found further support for its equal protection holding from two cases in which courts in other jurisdictions “addressed the issue of selective prosecution of operators of bingo facilities.” *Id.* at \*9 (citing *United States v. Cyprian*, 23 F.3d 1189 (7th Cir. 1994); *Fraternal Order of Eagles Sheridan Aerie No. 186, Inc. v. State*, 126 P.3d 847 (Wyo. 2006)).

<sup>38</sup> *Id.* at \*10–11 (citing *James v. Todd*, 103 So. 2d 19 (Ala. 1957)).

<sup>39</sup> *Id.* at \*11 (citing *Eagerton v. Terra Res., Inc.*, 426 So. 2d 807, 809 (Ala. 1982)).

<sup>40</sup> *Id.* (“[A] finding of legislative intent, even if permissible or possible, would be meaningless because no evidence was offered indicating that the voters who ratified Amendment No. 744 were aware of the legislators' intent.”).

<sup>41</sup> *Id.* at \*14.

<sup>42</sup> *Id.* at \*10–14.

<sup>43</sup> *Id.* at \*13.

voters were thinking contradicted the trial court's finding that voters intended Amendment No. 744 to allow electronic bingo.<sup>44</sup>

The court then found that Amendment No. 744 does not allow electronic bingo. The court summarized — in considerable detail — its previous rulings that electronic bingo does not constitute “bingo” as that word is used in Amendment No. 744 and the other bingo amendments.<sup>45</sup> That summary included a discussion of its earlier decision in the \$223,405.86 litigation in *Ex parte State*.<sup>46</sup> There, the court ordered the trial court to issue the warrant that started this case<sup>47</sup> and “left no doubt that the language of Amendment No. 744 authorizes only the game ‘traditionally known as bingo.’”<sup>48</sup> The court ended its discussion by describing its decision as “the latest, and hopefully the last, chapter” of the bingo wars.<sup>49</sup> The court expressed its frustration with the continuous attempts to defy its clear rulings on the definition of “bingo” as it is used in the Alabama Constitution, the considerable amount of public funds and judicial resources spent on the issue, and “the failure of some local law-enforcement officials in this State to enforce the anti-gambling laws of this State they are sworn to uphold.”<sup>50</sup> “All that is left,” the court concluded, “is for the law of this State to be enforced.”<sup>51</sup>

Chief Justice Moore filed a special concurrence to suggest that rather than entering judgment in favor of the State, the court should have remanded the case to the trial court.<sup>52</sup> He criticized the trial judge as well as the trial judges in two other cases for their “failure . . . to follow our precedent on the definition of bingo in local constitutional amendments.”<sup>53</sup> He thus observed that “it would . . . have been a salutary lesson for the trial judge on remand to apply our precedent to the case before him and to then render a judgment accordingly.”<sup>54</sup> Justice Shaw concurred in the result and wrote a separate opinion that echoed much of the per curiam opinion. He completely refused to en-

<sup>44</sup> *Id.* at \*13–14.

<sup>45</sup> *Id.* at \*15–23.

<sup>46</sup> 121 So. 3d 337 (Ala. 2013); see \$223,405.86, 2016 WL 1273039, at \*18.

<sup>47</sup> *Ex parte State*, 21 So. 3d at 340.

<sup>48</sup> \$223,405.86, 2016 WL 1273039, at \*18 (quoting *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 86 (Ala. 2009)).

<sup>49</sup> *Id.* at \*23.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at \*24–25 (Moore, C.J., concurring specially).

<sup>53</sup> *Id.* at \*24.

<sup>54</sup> *Id.* at \*25. It is highly ironic that Chief Justice Moore was the one to deliver such criticism, given his history of refusing to follow U.S. Supreme Court precedents. He was removed from office for one such refusal in 2003, and he was recently suspended for the rest of his term as Chief Justice for his refusal to follow *Obergefell v. Hodges*. Kent Faulk, *Alabama Supreme Court Justice Suspended for Rest of Term*, AL.COM (Oct. 1, 2016, 12:50 PM), [http://www.al.com/news/birmingham/index.ssf/2016/09/alabama\\_supreme\\_court\\_chief\\_ju.html](http://www.al.com/news/birmingham/index.ssf/2016/09/alabama_supreme_court_chief_ju.html) [https://perma.cc/Y22E-2YKR].

certain evidence of legislative or voter intent due to the clarity of Amendment No. 744's language.<sup>55</sup>

Odd as it may sound, bingo has been at the root of a constitutional crisis in Alabama. Casino operators like KCED have attempted to exploit the bingo amendments' narrow exception to the Alabama Constitution's broad ban of "lotteries"<sup>56</sup> to create massive casinos exclusively featuring electronic bingo machines.<sup>57</sup> At one point, the legality of electronic bingo was an open question.<sup>58</sup> But as the Alabama Supreme Court made clear in *\$223,405.86*, "[t]here is no longer any room for uncertainty, nor justification for continuing dispute," over the fact that the bingo amendments do not allow electronic bingo.<sup>59</sup> Indeed, "[a]ll that is left is for the law of this State to be enforced."<sup>60</sup> But that plainly hasn't happened at the local level because of "the failure of some local law-enforcement officials in this State to enforce the anti-gambling laws of this State they are sworn to uphold."<sup>61</sup> The State has tried to take over enforcement, but such efforts have led to the kind of unequal enforcement that troubled the trial court in *\$223,405.86* and strained the State's resources.<sup>62</sup> The Governor seems reluctant to spend more State resources to eliminate electronic bingo<sup>63</sup> and has instructed the Attorney General to pursue the impeachment of sheriffs who fail to prohibit electronic bingo.<sup>64</sup> Such nonenforcement likely constitutes grounds for impeachment under Alabama law. Pursuing impeachment for the continued defiance of the Alabama Constitution and the Alabama Supreme Court's rulings on the issue would help both to eliminate electronic bingo in Alabama and to preserve the rule of law.

<sup>55</sup> *\$223,405.86*, 2016 WL 1273039, at \*26–27 (Shaw, J., concurring in the result).

<sup>56</sup> *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 78 (Ala. 2009) ("[T]he bingo amendments are exceptions to the lottery prohibition, and the exception should be narrowly construed.")

<sup>57</sup> In *\$223,405.86*, for example, the State seized over one thousand electronic bingo machines from VictoryLand. 2016 WL 1273039, at \*1.

<sup>58</sup> The previous Governor and Attorney General took opposite positions on the issue, with the latter concluding that the bingo amendments allowed electronic bingo and refusing to prosecute it as illegal gambling. Jackson, *supra* note 6, at 188–89. That refusal is undoubtedly a major cause of local law enforcement's continued refusal to prosecute electronic bingo.

<sup>59</sup> *\$223,405.86*, 2016 WL 1273039, at \*23.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See Ala. Exec. Order No. 13 (Nov. 5, 2015), <http://governor.alabama.gov/newsroom/2015/11/executive-order-number-13-2> [<https://perma.cc/9YAD-2CX6>] (noting that the State "has expended immense resources" prosecuting electronic bingo).

<sup>63</sup> *Id.* In fact, the Governor issued an executive order that purported to strip the Attorney General of the authority to enforce the limits of the bingo amendments. *Id.* That order was abrogated by *\$223,405.86*. See *\$223,405.86*, 2016 WL 1273039, at \*23 n.19.

<sup>64</sup> Charles J. Dean, *Electronic Bingo: Gov. Bentley Tells AG Luther Strange that Troopers Will Not Play Leading Role in Enforcing Gambling Laws*, AL.COM (Jan. 16, 2015, 10:43 AM), [http://www.al.com/news/index.ssf/2015/01/electronic\\_bingo\\_gov\\_bentley\\_t.html](http://www.al.com/news/index.ssf/2015/01/electronic_bingo_gov_bentley_t.html) [<https://perma.cc/6FJ4-2GCA>].

The Alabama Attorney General and the Alabama Supreme Court recently demonstrated the process for impeaching a sheriff in *State ex rel. Strange v. Clark*.<sup>65</sup> The Attorney General can submit an information of impeachment and a prayer for ouster of a sheriff to the Alabama Supreme Court.<sup>66</sup> The resulting impeachment trial is effectively a criminal trial before the Alabama Supreme Court prosecuted by the Attorney General.<sup>67</sup> Under the Alabama Constitution, sheriffs may be impeached for (among other things) “willful neglect of duty,”<sup>68</sup> which the *Clark* court defined as the “intentional failure or omission of an officer to perform a plain and manifest duty which he is able to perform when he omits to do so.”<sup>69</sup> “[T]he failure of some local law-enforcement officials in this State to enforce the anti-gambling laws of this State they are sworn to uphold,” as the court put it in *\$223,405.86*,<sup>70</sup> would seem to fit that definition.

The case for the impeachment of the Macon County Sheriff in particular may be even stronger, both because of his support for the re-opening of VictoryLand and because his refusal to prohibit electronic bingo in Macon County directly violates the Alabama Constitution. Amendment No. 744 requires the Macon County Sheriff to “promulgate rules and regulations for the . . . operation of bingo games” and ensure compliance with those rules and regulations.<sup>71</sup> He thus violates these duties by either promulgating rules and regulations that allow electronic bingo in violation of Alabama law or refusing to ensure compliance with rules and regulations that properly prohibit electronic bingo. Either course of action constitutes an “intentional failure or omission . . . to perform a plain and manifest duty which he is able to

<sup>65</sup> No. 1151021, 2016 WL 4044903 (Ala. July 27, 2016).

<sup>66</sup> ALA. CODE §§ 36-11-4 to -5 (2013); see *Clark*, 2016 WL 4044903, at \*1.

<sup>67</sup> See *Clark*, 2016 WL 4044903, at \*1, \*3.

<sup>68</sup> ALA. CONST. art. VII, § 173; *id.* art. VII, § 174 (“[S]heriffs . . . may be removed from office for any of the causes specified in [Article VII, § 173] . . .”).

<sup>69</sup> *Clark*, 2016 WL 4044903, at \*3 (quoting *State ex rel. Brickell v. Martin*, 61 So. 491, 492 (Ala. 1913) (McClellan, J., concurring specially)).

<sup>70</sup> *\$223,405.86*, 2016 WL 1273039, at \*23; see also *id.* at \*23 n.18 (“[E]ven the trial court in this case candidly stated to the deputy attorney general prosecuting this case: ‘You know as well as I do [local law enforcement,] they’re not going to do it, so it comes to [your office].’” (second and third alterations in original)).

<sup>71</sup> ALA. CONST. amend. 744. Greene County’s bingo amendment includes the same language. *Id.* amend. 743. The other bingo amendments place the duty to promulgate and insure compliance with such rules and regulations on either the county commission, *e.g.*, *id.* amend. 692, or some other governing body, *e.g.*, *id.* amend. 674. One commentator has argued that because Amendments Nos. 743 and 744 place this duty on the sheriffs of Greene and Macon Counties, those sheriffs have “the quasi-legislative authority to define ‘bingo.’” Jackson, *supra* note 6, at 192. The Alabama Supreme Court implicitly rejected this argument in *\$223,405.86*. See *\$223,405.86*, 2016 WL 1273039, at \*14–23.

perform when he omits to do so.”<sup>72</sup> The latter violates the duty imposed by the respective bingo amendments; the former violates the duty to “support . . . the Constitution of the State of Alabama.”<sup>73</sup>

Admittedly, impeachment is a severe sanction given the strong democratic support for nonenforcement of bingo laws. Each bingo amendment applies to a specific county or locality, and the citizens of their respective counties and localities approved each of them. Each bingo amendment tasks a popularly elected governing body or official with promulgating and ensuring compliance with rules and regulations concerning the licensing and operation of bingo.<sup>74</sup> Focusing specifically on Macon County, the Alabama Supreme Court’s per curiam opinion in *\$223,405.86* conceded that “the relevant intent [in interpreting Amendment No. 744] would be that of the voters who ratified Amendment No. 744.”<sup>75</sup> Those same voters have the power to effectuate their intent by electing the sheriff who will oversee the operation of bingo in Macon County. If the citizens of Macon County thought their sheriff was improperly interpreting and enforcing (or failing to enforce) the limits of Amendment No. 744, they could vote that sheriff out of office.<sup>76</sup>

But local democratic support is insufficient to overrule Alabama’s highest legal authorities: the Alabama Constitution and the Alabama Supreme Court. Those two authorities have clearly established the illegality of electronic bingo, and the rule of law dictates obedience to those authorities on this issue. The considerable publicity the bingo wars have received<sup>77</sup> makes it doubtful that any sheriff harbors genuine uncertainty about the legality of electronic bingo. But sheriffs have a strong electoral incentive to turn a blind eye to the clear illegality of casinos like VictoryLand because of the potential economic boost casinos offer.<sup>78</sup> Indeed, the *\$223,405.86* court noted that electronic bingo was just the latest stratagem “conceived by those who would own or

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<sup>72</sup> *Clark*, 2016 WL 4044903, at \*3 (quoting *Martin*, 61 So. at 492 (McClellan, J., concurring specially)).

<sup>73</sup> ALA. CONST. art. XVI, § 279.

<sup>74</sup> See, e.g., *id.* amend. 744.

<sup>75</sup> *\$223,405.86*, 2016 WL 1273039, at \*14. The court in the same paragraph stated that “voter intent is an indiscernible commodity and certainly may not be employed to read something into an enactment that does not appear in the language of the enactment.” *Id.*

<sup>76</sup> In fact, Alabama law even allows citizens to bring an impeachment action themselves. ALA. CODE § 36-11-6 (2013) (“Any five resident taxpayers of the . . . county . . . for which the officer sought to be impeached was elected or appointed may institute proceedings of impeachment under sections 174 and 175 of article 7 of the constitution . . .”).

<sup>77</sup> See, e.g., Cason, *supra* note 11; Dean, *supra* note 64; see also Jackson, *supra* note 6; White et al., *supra* note 6.

<sup>78</sup> See, e.g., Jennifer Horton, *Victoryland’s Mid-September Reopening to Bring Hundreds of Jobs*, WSFA (Aug. 22, 2016, 6:43 PM), <http://www.wsfa.com/story/32816427/victorylands-mid-september-reopening-to-bring-hundreds-of-jobs> [<https://perma.cc/DA89-P4U7>].

operate casinos in Alabama”<sup>79</sup> to circumvent the Alabama Constitution’s prohibition of “the vicious system of lottery schemes and the evil practice of gaming.”<sup>80</sup> Perhaps Alabama will legalize gambling to make this a moot point.<sup>81</sup> The proper mechanism for legalization, however, is either legislation or constitutional amendment, not de facto legalization through nonenforcement by sheriffs. Such de facto legalization creates a constitutional crisis in that it shows that “important political actors” are “no longer willing to abide by existing constitutional arrangements.”<sup>82</sup> Sheriffs’ willingness to “systematically contradict constitutional proscriptions”<sup>83</sup> warrants the heavy sanction of impeachment to preserve the constitutional order.

Impeachment also allows the rest of the state to vindicate its right to protections provided by the Alabama Constitution. The constitution’s ban on lotteries “was intended to provide a broad proscription of the evils suffered by earlier generations who, after experiencing the effects firsthand, found lotteries to be ‘among the most dangerous and prolific sources of human misery.’”<sup>84</sup> The bingo amendments’ waiver of that ban thus impacts citizens throughout the state, and the Alabama Supreme Court has interpreted those waivers narrowly to prevent seemingly minor exceptions from eviscerating the broad ban.<sup>85</sup> But the ability of the state as a whole to ensure that the bingo amendments are properly applied and enforced on the local level is fairly limited. The governing bodies and officials tasked with overseeing the operation of bingo where it is allowed are not subject to election by the entire state, which creates a level of insulation from the opinion of the vast majority of voters whose approval (whether supplied directly or indirectly) was necessary to pass each bingo amendment. The drafters of the Alabama Constitution accounted for this situation by including the provisions allowing the Attorney General to prosecute the impeachment of sheriffs before the Alabama Supreme Court. To the extent that such an impeachment allows state-level gov-

<sup>79</sup> §223,405.86, 2016 WL 1273039, at \*15.

<sup>80</sup> *Id.* (quoting *Barber v. Jefferson Cty. Racing Ass’n*, 960 So. 2d 599, 614 (Ala. 2006)).

<sup>81</sup> Theoretically, the State could still pursue impeachment of some sheriffs even after the legalization of electronic bingo or casino gambling, as the impeachable “willful neglect of duty” has already taken place. Pursuing impeachment in that situation may not be worth the resources, effort, or political cost it would entail, but it would send a strong message about the importance of the rule of law in Alabama.

<sup>82</sup> Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2109 (2002).

<sup>83</sup> *Id.* at 2109–10.

<sup>84</sup> *Op. of the Justices No. 373*, 795 So. 2d 630, 643 (Ala. 2001) (quoting Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 12–13 (1992)).

<sup>85</sup> *See Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 78 (Ala. 2009).

ernment to override local democracy, that override was the purpose of those impeachment provisions.<sup>86</sup>

Pursuing the impeachment of sheriffs who fail to prohibit electronic bingo may also prove to be a more effective means for the State to eliminate electronic bingo in Alabama. Thus far, the State's efforts to directly enforce the limits of the bingo amendments have proven uneven — as the trial court's decision in *\$223,405.86* highlights — and costly.<sup>87</sup> Pursuing impeachment offers at least two pragmatic advantages over the direct-enforcement approach: First, the Governor would be able to replace impeached sheriffs with sheriffs who would enforce the limits of the bingo amendments at the local level.<sup>88</sup> Second, the first such impeachment may very well motivate other sheriffs to undertake their own enforcement efforts and consequently yield more even enforcement statewide.

Admittedly, the prospect of impeaching sheriffs for their failures to properly oversee the licensing and operation of bingo in their counties might sound excessive in normal circumstances. But the Attorney General has compared the situation to the corruption in Phenix City, Alabama, in the mid-twentieth century,<sup>89</sup> which culminated in the assassination of the Democratic nominee for Alabama Attorney General and the declaration of martial law in the city.<sup>90</sup> Moreover, the bingo wars represent a constitutional crisis. The Alabama Supreme Court has made the law inescapably clear: any sheriff's refusal to prohibit electronic bingo now represents a brazen refusal to obey the Alabama Constitution and the rulings of the state's highest court. Such a refusal is an affront to the constitutional order and the rule of law. The Alabama Supreme Court in *\$223,405.86* rightly condemned “the failure of some local law-enforcement officials in this State to enforce the anti-gambling laws of this State they are sworn to uphold.”<sup>91</sup> The court's language strongly indicates that sheriffs' persistent nonenforcement justifies impeachment under Alabama law. Pursuing the impeachment of sheriffs may be necessary to end the bingo wars and reaffirm that Alabama has “a government of laws and not of men.”<sup>92</sup>

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<sup>86</sup> See *Parker v. Amerson*, 519 So. 2d 442, 443–44 (Ala. 1987); see also *McMillian v. Monroe County*, 520 U.S. 781, 788–89 (1997).

<sup>87</sup> Ala. Exec. Order No. 13, *supra* note 62.

<sup>88</sup> ALA. CODE § 36-9-17 (2013).

<sup>89</sup> Luther Strange, Letter to the Editor, *Alabama AG Responds to Editorial*, COLUMBUS LEDGER-ENQUIRER (Sept. 28, 2016, 6:00 PM), <http://www.ledger-enquirer.com/opinion/letters-to-the-editor/article104748101.html> [<https://perma.cc/T3ZS-F78X>].

<sup>90</sup> Mark Gribben, *The Fall and Rise of Phenix City*, MALEFACTOR'S REG., <http://malefactorsregister.com/wp/the-fall-and-rise-of-phenix-city> [<https://perma.cc/CKT9-YCRD>].

<sup>91</sup> *\$223,405.86*, 2016 WL 1273039, at \*23.

<sup>92</sup> ALA. CONST. art. III, § 43; *accord* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).