Rel: September 30, 2022

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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2022

1200798

State of Alabama

v.

Epic Tech, LLC; K.C. Economic Development, LLC, d/b/a VictoryLand; and Sheriff Andre Brunson

Appeal from Macon Circuit Court (CV-17-900150)

1210064

State of Alabama

v.

White Hall Enrichment Advancement Team d/b/a Southern Star Entertainment; White Hall Town Council; and White Hall Entertainment

Appeal from Lowndes Circuit Court (CV-17-900069.80)

1210122

White Hall Entertainment and White Hall Town Council

v.

State of Alabama

Appeal from Lowndes Circuit Court (CV-17-900069.80)

SHAW, Justice.

In case nos. 1200798 and 1210064, the State of Alabama appeals from separate orders entered by the Macon Circuit Court and Lowndes Circuit Court, respectively, denying the State's requests for injunctive relief seeking to abate, as a public nuisance,[1] illegal gambling operations

[1]See generally §§ 6-5-120, 6-5-122, and 12-2-7, Ala. Code 1975.

in Macon County and Lowndes County. In case no. 1210122, defendants/counterclaim plaintiffs White Hall Entertainment and the White Hall Town Council (referred to collectively as "White Hall"), cross-appeal from the Lowndes Circuit Court's order dismissing their counterclaims against the State. This Court consolidated these appeals. In case no. 1200798, we reverse the order of the Macon Circuit Court denying, in effect, the State's request for preliminary injunctive relief and remand the matter for that court to enter, within 30 days, a preliminary injunction enjoining the defendants' gambling operations in Macon County; in case no. 1210064, we reverse the order of the Lowndes Circuit Court denying the State's request for permanent injunctive relief and remand the matter for that court to enter, within 30 days, a permanent injunction enjoining the defendants' gambling operations in Lowndes County; and in case no. 1210122, we affirm the Lowndes Circuit Court's order dismissing White Hall's counterclaims.

Facts and Procedural History

A full factual background of these matters is found in State v. Epic Tech, LLC, 323 So. 3d 572 (Ala. 2020) ("Epic Tech I"), and State v. Epic

Tech, LLC, 342 So. 3d 200 (Ala. 2021) ("Epic Tech II").[2] Essentially, in 2017, the State sued in the Macon Circuit Court, among others, Epic Tech, LLC ("Epic Tech"); K.C. Economic Development, LLC, d/b/a VictoryLand ("KCED"); and Sheriff Andre Brunson,[3] in his official capacity as sheriff of Macon County (referred to collectively as "the Macon County defendants"). At around that same time, the State sued, in the Lowndes Circuit Court, among others, White Hall Enrichment Advancement Team d/b/a Southern Star Entertainment ("Southern Star") and White Hall[4] (referred to collectively as "the Lowndes County

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[2]See also, generally, State v. Epic Tech Inc., [Ms. 1210012, May 20, 2022] ___ So. 3d ___ (Ala. 2022) (addressing similar operations in Greene County).

[3]To satisfy the State's aim of obtaining "an injunction against all those participating, profiting and promoting the illegal gambling enterprise," it also named as defendants in the Macon County action Aurify Gaming, a Georgia-based corporation; Winter Sky, LLC, the purported manufacturer of the electronic gaming machines at issue; and Promotions Holding Company, LLC, the sole member of Epic Tech, all of which the complaint included among the parties responsible for "operat[ing], administer[ing], licens[ing] and/or provid[ing] gambling devices for … VictoryLand…." As to Sheriff Brunson, the State alleged that he had both issued permits to illegal gambling facilities, from which he receives a monthly licensing fee, and that he had assisted and/or allowed illegal gambling facilities to operate in Macon County.

[4]In the Lowndes County action, the State also included as a named defendant the Town of White Hall because, the State alleged, it and the

defendants").[5] In each action, the State sought an order declaring the illegal gambling operations conducted by the defendants to be a public nuisance and related injunctive relief. See Epic Tech I, 323 So. 3d at 574. The State's complaint in each action was also accompanied by a motion seeking the entry of an order preliminarily enjoining the defendants from engaging in illegal gambling operations.[6] The State alleged, as support

White Hall Town Council "are the ones that have the sole right to license and issue licenses for operation of bingo, to pass ordinances or pass … regulations regarding the play of bingo in White Hall" and were "illegally and improperly doing so and providing assistance for the nuisance to occur." The State explained that Epic Tech, also referred to as Epic Tech Inc., was also named as a defendant "because [it is] the vendor[] or … the supplier[] … with regard to the machines being brought into our state and being operational in Lowndes County." However, as discussed below, Epic Tech was dismissed as a defendant in the Lowndes County action.

[5]The records before us establish that the State also commenced identical actions with regard to similar illegal gambling operations in Morgan, Houston, and Greene Counties.

[6]More particularly, the State sought to prohibit the defendants in each action from:

> "(a) offering 'electronic bingo' machines … at the[ir] facility in [each] County …;
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> "(b) receiving any monies in relation to the electronic machines at the[ir] facility in [each] County …;
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> "(c) transporting or providing any additional electronic machines to the[ir] facility in [each] County …; [and]

for its requests for the issuance of the preliminary injunctions, that it had a reasonable chance of success on the merits; that it would be irreparably harmed in the absence of injunctive relief; that it lacked an adequate legal remedy; and that the "balance of equities" favored the issuance of the injunctions. See Ormco Corp. v. Johns, 869 So. 2d 1109, 1113 (Ala. 2003) ("A plaintiff seeking a preliminary injunction has the burden of demonstrating '(1) that without the injunction the plaintiff would suffer immediate and irreparable injury; (2) that the plaintiff has no adequate remedy at law; (3) that the plaintiff has at least a reasonable chance of success on the ultimate merits of his case; and (4) that the hardship imposed on the defendant by the injunction would not unreasonably outweigh the benefit accruing to the plaintiff.'" (quoting Perley v. Tapscan, Inc., 646 So. 2d 585, 587 (Ala. 1994))). The State supported its motions with, among other evidentiary exhibits, video recordings of the gambling activities in each county and accompanying affidavit testimony attesting that special agents with the attorney general's office had,

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> "(d) receiving, utilizing and/or providing bingo licenses or permits under [the pertinent local constitutional amendment permitting bingo activities in the county] for the play of 'electronic bingo' in [each] County ...."

during surveillance of the subject facilities, observed nothing to suggest that the activities witnessed amounted to playing the legally permissible game of bingo. See generally Barber v. Cornerstone Cmty. Outreach, Inc., 42 So. 3d 65, 86 (Ala. 2009) ("Cornerstone") (outlining the six characteristics necessary for the legally permissible game commonly referred to as "bingo").

In 2019, the trial courts dismissed, on motions of the defendants and before hearings on the merits of the State's requests for preliminary-injunctive relief, each action in its entirety based on their conclusions that they lacked subject-matter jurisdiction over the State's claims. See Epic Tech I, 323 So. 3d at 606. In Epic Tech I, this Court reversed those dismissal orders and remanded the matters for further proceedings. See id. In doing so, the Court specifically noted the following regarding the State's claims in each case: "[I]t is clear that the State adequately alleged facts that would support a finding that the ... defendants' conduct caused harm to the public and that the State lacked another adequate remedy." Id. at 600.

Following remand, the filing of the defendants' answers, and several continuances, the trial court in each case conducted a hearing on the State's pending request for preliminary injunctive relief.

Macon County Proceedings

At a hearing conducted on June 22, 2021, the State, referencing this Court's 2016 decision in State v. $223,405.86, 203 So. 3d 816, 844 (Ala. 2016), argued that, despite this Court's "previous ruling,"[7] the Macon

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[7]The Court's "ruling" in that case, which arose from forfeiture proceedings initiated in Macon County, included the following:

> "Today's decision is the latest, and hopefully the last, chapter in the more than six years' worth of attempts to defy the Alabama Constitution's ban on 'lotteries.' It is the latest, and hopefully the last, chapter in the ongoing saga of attempts to defy the clear and repeated holdings of this Court beginning in 2009 that electronic machines like those at issue here are not the 'bingo' referenced in local bingo amendments. It is the latest, and hopefully the last, chapter in 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, thereby necessitating the exercise and performance by the attorney general of the authority and duty vested in him by law, as the chief law-enforcement officer of this State, to enforce the criminal laws of this State. And finally, it is the latest, and hopefully last, instance in which it is necessary to expend public funds to seek appellate review of the meaning of the simple term 'bingo,' which, as reviewed above, has been declared over and over and over again by this Court. There is no longer any room for uncertainty, nor justification for continuing dispute, as to the meaning of that term. And

County defendants had, subsequent to that ruling declaring the electronic gaming machines at issue in that case, which the defendants had characterized as "electronic bingo" machines, illegal, reopened the same facility ("the Macon County facility"), using machines that were substantially similar. It further explained that, based on failed attempts at obtaining the assistance of local law enforcement in shutting down the illegal gambling operations or the voluntary discontinuation of those operations, it had commenced the underlying action in an attempt to seek the court's help in abating the nuisance that, it alleged, the Macon County defendants' illegal gambling operations represent.

In support of its request for injunctive relief, the State submitted video recordings of the use of electronic gaming machines in the Macon County facility during visits in September 2016, July 2017, and December 2019, and accompanying testimony from two of the agents responsible for obtaining the video recordings, who explained the

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> certainly the need for any further expenditure of judicial resources, including the resources of this Court, to examine this issue is at an end. All that is left is for the law of this State to be enforced."

203 So. 3d at 844-45 (footnotes omitted).

recordings' contents in detail to the trial court. Specifically, the agents confirmed, as the State had originally alleged in its submissions in support of its request for injunctive relief, that, while wearing plain clothes and concealed recording devices, they had entered the Macon County facility and had viewed the available electronic gaming machines on multiple occasions.

As described by the agents, the Macon County facility contained, during the surveillance operations, several hundred machines that both "looked like a standard slot machine" and "played[] like[] a slot machine with a five by five grid and balls that dropped to simulate ... what would be a person calling a number." The agents estimated that the grid that recorded the numbers, i.e., the simulated "bingo" card, was approximately the size of a postage stamp while the spinning reels were the predominant display on the machines' screens. The agents further testified that they detected no correlation between the grid and the reels and that they were not required either to record numbers on the grid -- or on a corresponding physical bingo card -- or determine that the numbers on the grid matched those in the ball drop. Instead, they indicated that the machines could be played without the need for paying

attention to any of the activity occurring on the screen and estimated that a single game lasted approximately five seconds. The agents further denied that the machines required the use of any actual corresponding paper or printed bingo card, that any skill was required to win, or that the machines informed the player that he or she "was racing against anyone else to be the first to do anything." In sum, the agents opined that the electronic gaming machines were illegal "games of chance." The State's evidence further indicated that, despite urgings from the attorney general and the governor, local law enforcement had -- obviously, since the Macon County facility remained in operation -- taken no steps to shut down illegal gambling in Macon County. Thus, as discussed in more detail below, the State argued that its evidence established both that the electronic gaming machines in Macon County were illegal gambling devices in defiance of "the repeated holdings of the Supreme Court of Alabama," see, e.g., State v. $223,405.86, and "the need for an injunction."

In response to the State's evidentiary showing, the Macon County defendants did not dispute the nature of the electronic gaming machines in operation at the Macon County facility. Instead, they elicited, on cross-

examination, testimony from the agents acknowledging that the defendants operating the facility employed a security force responsible for limiting entry to persons aged 21 or older, that the electronic gaming machines bore appropriate "revenue stamps," that the agents were not frightened at any time during their visits to the facility, that they did not become addicted to gambling as a result of those visits, and that they were not coerced by the Macon County defendants into return visits. The Macon County defendants also presented testimony from numerous other witnesses, each of whom testified that charitable contributions and taxation revenue stemming from the proceeds of the Macon County operations were essential to providing services necessary for the health, safety, and welfare of Macon County residents.[8]

Relying on the foregoing, the Macon County defendants maintained that the State could not meet its burden of demonstrating that their operations caused irreparable harm. Thus, according to the Macon County defendants, the State failed to satisfy the requirements for the

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[8]In particular, the testimony established that the Macon County sheriff's office had historically received "a half a million dollars a year" from other Macon County defendants, who made total charitable contributions exceeding $1 million in 2017, 2018, 2019, and 2020.

issuance of an injunction or to demonstrate that the activities of the Macon County defendants constituted a nuisance as defined by Alabama law. The Macon County defendants further disputed that the State was entitled to essentially revoke the operating license for the Macon County facility because, they argued, it could not "obtain a greater penalty or forfeiture" than the maximum $6,000 fine that could be imposed had the State instead sought to prosecute the defendants for the misdemeanor crimes that, they maintain, apply to their activities if deemed illegal.

Upon the conclusion of the proceedings, the State filed a posthearing brief incorporating all the evidence and testimony presented at the injunction hearing. In its brief, it reiterated its claim that the Macon County defendants' "electronic bingo" operations were illegal and were prohibited by prior decisions of this Court; thus, according to the State, the requested injunction was necessary. The State further argued that it had established all the elements necessary for the issuance of injunctive relief, including irreparable injury to the "public welfare, morals, and safety of the State"; the lack of an adequate legal remedy because "criminal prosecution has failed" to eliminate the illegal gambling operations; and the State's likelihood of success on the merits

because, it argued, the balancing of the equities at issue weighed in favor of preserving the public safety and welfare. Finally, it maintained that the Macon County defendants' only evidence in opposition to its request for a preliminary injunction consisted of "naked emotional appeals" aimed at "highlighting possible detriments to the local community [and its] citizens … who receive a portion of the profits …."

The Macon County defendants, however, disputed that a preliminary injunction was necessary. For example, in posthearing filings, KCED contended that the requested preliminary injunction would not preserve the status quo, i.e., that "[t]he preliminary injunction sought by the State … [was] intended to alter the status quo by preventing [the Macon County] Defendants from conducting certain games … prior to the trial on the merits."[9] It further argued that there was nothing showing the requisite danger of irreparable harm in the

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[9]See Irwin v. Jefferson Cnty. Pers. Bd., 263 So. 3d 698, 702-03 (Ala. 2018) ("T]he purpose of temporary and preliminary injunctive relief is to maintain the status quo pending the resolution of the action on its merits."), and Spinks v. Automation Pers. Servs., Inc., 49 So. 3d 186, 189 (Ala. 2010) ("The status quo is the 'last uncontested status' of the parties preceding the commencement of the controversy.").

absence of an injunction and that, under Alabama law, an injunction should not issue to prevent the commission of criminal activity. More specifically, according to KCED, as to the irreparable-harm element, the State's evidence focused on the illegality of the Macon County defendants' activities without demonstrating an actual public injury -- or even injury to the State's investigating officers, who had participated in those activities as part of the State's undercover operation. Contrary to the State's claims, KCED instead asserted that, as allegedly demonstrated by the testimony of its witnesses at the injunction hearing, the activities of the Macon County defendants actually benefit the residents of Macon County.

Similarly, Epic Tech argued that any award of injunctive relief would be premature before the rendition of a verdict deeming the Macon County defendants' activities a nuisance and that the State's attempt at demonstrating injury resulting from those activities was insufficient when compared to the benefits to Macon County residents in the form of revenue and employment opportunities. Epic Tech further argued that the authority cited by the State in support of its request for injunctive

relief was distinguishable, and it disputed the likelihood of the State's success on the merits of its case.

Subsequently, the trial court entered an order titled: "Order Granting 'Status Quo' Relief to All Parties in the Absence of Evidence of Irreparable Harm or Injury." In that order, the trial court concluded that the State's evidence "was deficient in at least three of four of [the] elements" required for issuance of a preliminary injunction. In particular, citing testimony from defense witnesses "regarding the substantial economic benefits provided to the most impoverished citizens of Macon County," the trial court found that the Macon County defendants had "disproved any showing" by the State of the potential for immediate and irreparable injury in the absence of the requested injunction and, instead, concluded that issuing the requested injunction "would impose an unreasonable financial hardship for the citizens of Macon County." More particularly, it concluded that the State had failed to show that the absence of injunctive relief would subject "anyone" to immediate and irreparable harm. Thus, although requiring the immediate report of incidents involving minors or breaches of the peace at the Macon County facility, or of complaints by nonparties of

"endangerment to [their] public health, morals, safety, or welfare" as a result of the activities of the Macon County defendants, the trial court, in effect, denied the State's request for a preliminary injunction. In case no. 1200798, the State appeals that order.

Lowndes County Proceedings

Following our remand in Epic Tech I, but before a hearing on the State's pending request for injunctive relief in the Lowndes County Action, Epic Tech and the Lowndes County defendants, see note 4, supra, either separately answered the State's complaint or amended previous answers to assert counterclaims seeking, among other relief, a declaration of their legal rights and a judgment declaring that their activities were legal, as well as demanding a jury trial on those counterclaims. In particular, White Hall filed an "Amended Answer and Counterclaim" seeking to enjoin the State "from acting in bad faith, beyond [its] authority or under mistaken interpretation of the law and to enjoin [it] from enforcing an unconstitutional application of Alabama's public nuisance law," adopting a separate counterclaim asserted by Epic Tech, and further alleging both purported civil-rights violations and that the State had "tortiously interfered with the [defendants'] business

relationships" by bringing this action, thereby "causing potential irreparable harm and damages that could equal to [sic] millions of dollars." The trial court ultimately consolidated the State's request for a preliminary injunction with a full trial on the merits of the pending claims.

In its trial brief, Epic Tech argued that the State was "attempting ... to effect a complete forfeiture of the ... defendants' business enterprises, based on a contention that their bingo operations are 'illegal' under Alabama misdemeanor statutes" -- a characterization that Epic Tech disputed -- "without any convictions in criminal proceedings." Epic Tech further disputed that the State was able to establish the existence of a public nuisance under § 6-5-121, Ala. Code 1975. In support of that assertion, Epic Tech attached a copy of and quoted from the status-quo order entered in the parallel proceeding in Macon County, i.e., the order at issue in case no. 1200798, arguing that it established that the State's showing "'was devoid of any testimony as to harm from the operation of that facility'" and described the charitable benefits the Macon County defendants' activities had conferred on Macon County.

Before the start of trial on September 1, 2021, the trial court denied the State's pending motion seeking to dismiss Epic Tech's and the Lowndes County defendants' counterclaims. At the ensuing bench trial, the State first argued both that the Lowndes County defendants' operations are a nuisance to the extent that illegal gambling "damages all those that are in its sphere" and that the use and/or possession of illegal gambling devices constitutes a nuisance per se under prior rulings of this Court. Thereafter, it presented testimony aimed at establishing that the electronic gaming devices located at the facilities operated by some of the defendants ("the Lowndes County facilities") are illegal. See, e.g., Cornerstone, 42 So. 3d at 86.

In particular, the State presented evidence from an agent who participated in the investigation of the Lowndes County facilities. The agent testified that, as part of those investigations, between September 2016 and July 2021, agents visited those facilities on five separate occasions "to see if they were actually playing what is considered bingo in the state of Alabama."

Initially, during the agent's testimony, the State successfully admitted evidence of communications between the governor and the

attorney general and the district Attorney and the sheriff of Lowndes County, which occurred in September 2016, and in which the Lowndes County defendants' gambling operations were brought to the attention of the sheriff, accompanied by a "call" for the sheriff to "enforce the laws in this state and take any action necessary to bring about compliance." In reply, the sheriff noted the lack of any public complaint regarding the Lowndes County defendants' operations, his alleged inability -- due to a purported lack of both "manpower" and funding -- to undertake a related investigation, and a conflict of interest that "preclude[d] him from any further involvement with the investigation and/or prosecution of the alleged illegal bingo activity in Lowndes County." The agent's testimony confirmed that, despite the above-described exchange and the State's demands, he was unaware that any type of investigative activity regarding illegal gambling operations had occurred in Lowndes County or that the Lowndes County facilities had been shut down as a result.

The agent further indicated that during two of his four visits to the Lowndes County facilities in 2016 and 2017, agents had viewed the available electronic gaming machines, which he numbered at "several hundred" in each facility, and recorded activity using a "covert camera."

Recordings of the electronic gaming machines in operation in the Lowndes County facilities were admitted into evidence. Despite differing visual appearances, the agent's testimony indicated that all the available electronic gaming machines located at the Lowndes County facilities were "almost identical" and that, at the very least, "[t]hey all played the same." In particular, he noted that, on their initial visits to the facilities, each electronic gaming machine required the user to obtain in exchange for currency a pin number that could then be used to initiate play on the machine but that, during later visits, cash could be inserted directly into a machine to initiate play. Once play was initiated, the user could select from among five and six individual games available on the machine or play the single offered game, determine a bet amount, and "just mash the ['play'] button." The agent described what occurred next as follows: "The graphics would roll or the screen would roll like a traditional slot machine with the wheel spinning and, then, … it ma[d]e some noise, some flashing lights, and, then, it stopped and you either won or didn't win." He estimated that the entire process took only "[a] matter of seconds."

Although the agent testified that the screens of the electronic gaming machines also featured graphics including a "five by five

representation of what a … traditional bingo card looks like," he noted that the representative card was "[a] little bigger than a half dollar." The agent clarified, however, that the machines did not require the use of a paper or printed bingo card; that a bingo card was not provided to him at any time while at the Lowndes County facilities; that he did not hear anyone calling out either numbers or a successful "bingo" win; and that he was not required to record, recognize, compare, or match numbers that appeared on the machine's screen with a number or pattern that appeared on the depicted bingo grid in order to win. He further indicated that one could successfully play a machine "without paying attention to anything," including the numbers that appeared on the display screen or other players, and that skill was not required to win.

On cross-examination, counsel for the Lowndes County defendants attempted to demonstrate that the electronic gaming machines merely represented attempts "to adjust to the technological age to upgrade paper bingo as electronic bingo" and/or to accommodate the hearing impaired who, it was suggested, would be unable to hear numbers called aloud. They further attempted to undermine the agent's testimony by suggesting that he had neither actually played all the available electronic

gaming machines in each facility nor individually observed each one to confirm how each one operated; however, they were unable to get him to concede that a "win" occurred by obtaining a winning pattern on the depicted bingo grid. Instead, the agent consistently testified that any pattern established on the depicted bingo grid "has nothing to do with whether you won or not."

The Lowndes County defendants further emphasized the sheriff's communications with the governor and the attorney general, as discussed above, in which he denied having received any public complaints related to the Lowndes County defendants' operations, the fact that the State's agents never encountered any underage patrons at the Lowndes County facilities during their visits, and the facts that those agents never detected criminal activity or excessive noise outside the facilities or in the parking lots or any disorderly conduct or offensive odors once inside. In fact, the Lowndes County defendants noted, despite the lack of any arrests relating to the investigations, the only criminal activity the agent reported observing during the investigations was "illegal gambling." The agent further stated during cross-examination that, although he had both played the electronic gaming machines and observed them being

played, he had not become addicted to gambling and had not been forced to return to the facilities. He also stated that, while present at the facilities, he had not heard anyone complaining about the Lowndes County defendants' dishonesty or deceit and had observed other available activities.

Upon the conclusion of the State's case, Epic Tech filed a "Motion for Judgment in its Favor on ... Partial Findings." The trial court granted Epic Tech's motion on the basis that the only evidence the State had presented as to Epic Tech's connection to the case was that "there was an Epic Tech car in the parking lot." The Lowndes County defendants also moved for a judgment as a matter of law in their favor, arguing that the State had failed to demonstrate that their activities constituted either illegal gambling or a public nuisance, as confirmed by the sheriff's communications with the governor and the attorney general. At that time, the State also moved the trial court to dismiss the Lowndes' County defendants' counterclaims.

Thereafter, White Hall requested the opportunity to present rebuttal testimony aimed at demonstrating that, contrary to the State's contentions, the electronic gaming machines offered the traditionally

defined game of bingo. To that end, and to avoid the need for the proposed witness to potentially incriminate herself, the State stipulated, regarding the electronic gaming machines located at the Lowndes County facilities, "that on the screen that there are numbers that appear from a random number generator"; that those numbers appear "under a bingo description card on the screen"; that "when ... those randomly generated numbers appear, that card lights up if those numbers appear on the card and that ... if that card matches a pattern, ... that shows they won by showing a pattern on the card"; and "that those patterns can be accessible on the screen by touching a help button, or something like that, to see the different patterns that are possible in a game," i.e., "[a]cross, up and down, diagonal, or four corners."

The general response of the Lowndes County defendants to the State's claims, as detailed in subsequent briefing, was that, contrary to the State's allegations, their operations actually benefited all "persons within the sphere," i.e., that their operations do not constitute a nuisance per se, and that there had been no criminal charges in connection with those ongoing operations. Specifically, White Hall, in its filings below, disputed that the State had demonstrated that its activities were either

illegal or a nuisance[10]; that the State lacked another remedy; or that the Lowndes County defendants' activities harmed the public.

Thereafter, the trial court issued a final order in which it denied the State's request for permanent injunctive relief based on its conclusion that the State had failed to demonstrate that the Lowndes County defendants' activities constituted either a public nuisance or a nuisance per se. In reaching that conclusion, the trial court cited the lack of "evidence of any harm resulting from the [defendants'] activities" and/or the lack of "evidence that adequate legal remedies were not available to [the State]," as well as the legislature's omission of illegal gambling from the enumeration of "public nuisances menacing public health" found in § 22-10-1, Ala. Code 1975. In that same order, however, the trial court granted the State's request for reconsideration of its earlier decision denying the State's request to dismiss White Hall's counterclaims and

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[10] On the issue of legality, White Hall argued:

> "Contrary to the State's assertions, the Court does not have to decide whether or not Defendants' gaming activities are legal. That is not the ultimate issue. The issue is whether all electronic bingo gaming is a nuisance per se and therefore Defendants' activities constitute a nuisance per se."

granted the State's request for their dismissal. The State appeals (case no. 1210064) from the denial of its request for permanent injunctive relief; White Hall cross-appeals from the dismissal of its counterclaims (case no. 1210122).

Discussion

Case nos. 1200798 and 1210064

On appeal, the State contends that, in each case, it successfully demonstrated that the gambling operations of the Macon County defendants and the Lowndes County defendants were illegal, a public nuisance, and a nuisance per se; thus, the State maintains that, as a matter of law, it demonstrated all the elements necessary to obtain preliminary and permanent injunctive relief.

The Court's review of an order denying a preliminary injunction is well established:

> "'The decision to grant or to deny a preliminary injunction is within the trial court's sound discretion. In reviewing an order granting [or denying] a preliminary injunction, the Court determines whether the trial court exceeded that discretion.' SouthTrust Bank of Alabama, N.A. v. Webb-Stiles Co., 931 So. 2d 706, 709 (Ala. 2005). As to questions of fact, the ore tenus rule is applicable in preliminary-injunction proceedings. See Water Works & Sewer Bd. of Birmingham v. Inland Lake Invs., LLC, 31 So. 3d 686, 689-90 (Ala. 2009). As this Court recently noted in

Holiday Isle, LLC v. Adkins, 12 So. 3d 1173, 1176 (Ala. 2008), however,

> "'[t]o the extent that the trial court's issuance of a preliminary injunction is grounded only in questions of law based on undisputed facts, our longstanding rule that we review an injunction solely to determine whether the trial court exceeded its discretion should not apply. We find the rule applied by the United State Supreme Court in similar situations to be persuasive: "We review the District Court's legal rulings de novo and its ultimate decision to issue the preliminary injunction for abuse of discretion." Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428, 126 S.Ct. 1211, 163 L. Ed. 2d 1017 (2006)....'

"(Emphasis omitted.)

"The plaintiff bears the burden of producing evidence sufficient to support the issuance of a preliminary injunction. Ormco Corp. v. Johns, 869 So. 2d 1109, 1113 (Ala. 2003). The requirements for a preliminary injunction are well known:

> "'"Before entering a preliminary injunction, the trial court must be satisfied: (1) that without the injunction the plaintiff will suffer immediate and irreparable injury; (2) that the plaintiff has no adequate remedy at law; (3) that the plaintiff is likely to succeed on the merits of the case; and (4) that the hardship imposed upon the defendant by the injunction would not unreasonably outweigh the benefit to the plaintiff." '

"Blount Recycling, LLC v. City of Cullman, 884 So. 2d 850, 853 (Ala. 2003) (quoting Blaylock v. Cary, 709 So. 2d 1128, 1130 (Ala. 1997))."

Cornerstone, 42 So. 3d at 77-78.

The standard governing our review of the denial of permanent-injunctive relief differs slightly:

> "'"The applicable standard of review [of injunctive relief] depends on whether the trial court entered a preliminary injunction or a permanent injunction. A preliminary injunction is reviewed under an abuse-of-discretion standard, whereas a permanent injunction is reviewed de novo." TFT, Inc. v. Warning Sys., Inc., 751 So. 2d 1238, 1241-42 (Ala. 1999); see also Smith v. Madison County Comm'n, 658 So. 2d 422, 423 n. 1 (Ala. 1995).'
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> "Nevertheless, this Court has noted that a trial court's consideration of ore tenus testimony has a bearing upon the standard of review we apply to the entry of a permanent injunction. Here, the trial court considered ore tenus testimony. ...
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> "'The trial court entered a permanent injunction, and we review de novo the entry of a permanent injunction. TFT, Inc. v. Warning Sys., Inc., 751 So. 2d 1238, 1241 (Ala. 1999). However, the trial court also conducted a bench trial at which evidence was presented ore tenus.
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> "'"Where evidence is presented to the trial court ore tenus, a presumption of correctness exists as to the court's conclusions on issues of fact; its determination will not be disturbed unless it is clearly erroneous, without supporting evidence, manifestly

> unjust, or against the great weight of the evidence. However, when the trial court improperly applies the law to the facts, no presumption of correctness exists as to the court's judgment."
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> "'American Petroleum Equip. & Constr., Inc. v. Fancher, 708 So. 2d 129, 132 (Ala.1997) (citations omitted).'
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> "Collins v. Rodgers, 938 So. 2d 379, 384 (Ala. 2006)."

Classroomdirect.com, LLC v. Draphix, LLC, 992 So. 2d 692, 700-01 (Ala. 2008).

> "'"'To be entitled to a permanent injunction, a plaintiff must demonstrate success on the merits, a substantial threat of irreparable injury if the injunction is not granted, that the threatened injury to the plaintiff outweighs the harm the injunction may cause the defendant, and that granting the injunction will not disserve the public interest.'"
>
> "'[Grove Hill Homeowners' Ass'n v. Rice,] 43 So. 3d [609,] 613 [(Ala. Civ. App. 2010)] (quoting TFT, Inc. v. Warning Sys., Inc., 751 So. 2d 1238, 1242 (Ala. 1999), overruled on other grounds, Holiday Isle, LLC v. Adkins, 12 So. 3d 1173 (Ala. 2008)).'
>
> "Grove Hill Homeowners' Ass'n, Inc. v. Rice, 90 So. 3d 731, 734 (Ala. Civ. App. 2011)."

Epic Tech I, 323 So. 3d at 585.

The State first maintains that it is undisputed that, under Alabama law, gambling is illegal except as permitted in certain narrowly tailored constitutional amendments. See Ala. Const. of 1901 (Off. Recomp.), Art. IV, § 65. See also Cornerstone, supra, Barber v. Jefferson Cnty. Racing Ass'n, Inc., 960 So. 2d 599, 614 (Ala. 2006), and Opinion of the Justices No. 83, 249 Ala. 516, 31 So. 2d 753 (1947). Also according to the State, it successfully demonstrated that the electronic gaming machines offered in the Macon County facility and the Lowndes County facilities are illegal gambling devices -- not devices used to play the legally permissible game commonly referred to as "bingo" as defined by this Court in Cornerstone, supra. The State further argues that, under this Court's decision in Try-Me Bottling Co. v. State, 235 Ala. 207, 178 So. 231 (1938), the "ongoing criminal activity at the [defendants'] facilities in [each] County is a per se nuisance under Alabama law." We agree.

Electronic bingo is illegal in Alabama. See Cornerstone, 42 So. 3d at 86 (outlining the six characteristics necessary to "the game commonly or traditionally known as bingo" and concluding that the electronic gaming machines at issue in that case, which "operate[d] almost exactly like slot machines," did not comply); Riley v. Cornerstone Cmty.

Outreach, Inc., 57 So. 3d 704, 734 (Ala. 2010) (agreeing with the governor's position "that the term 'bingo' ... is a reference to the game traditionally known as bingo, i.e., a game that is not played by or within the electronic or computerized circuitry of a machine, but one that is played on physical cards (typically made of cardboard or paper) and that requires meaningful interaction between those who are playing and someone responsible for calling out the randomly drawn designations corresponding to designations on the players' cards"); Ex parte State, 121 So. 3d 337, 358 (Ala. 2013) (noting that the electronic gaming machines "depicted in the surveillance video and described in the affidavit ... do not reasonably resemble a game of 'bingo'" but are, instead, "slot machines or other gambling devices that are illegal under Alabama law"); State v. Greenetrack, Inc., 154 So. 3d 940, 960 & 962 (Ala. 2014) (noting that "the fact that an 'electronic marking machine' can be substituted for a paper card under the terms of [a local constitutional amendment] does not eliminate the requirement that, in all other respects, the game of bingo permitted by that amendment be the game traditionally known as 'bingo'" and finding, based on the evidence, that electronic gaming machines in use in Greene County were "'not the game of bingo and,

instead, [were] slot machines or other gambling devices that are illegal under Alabama law'" (quoting Ex parte State, 121 So. 3d at 358)); Houston Cnty. Econ. Dev. Auth. v. State, 168 So. 3d 4, 14 (Ala. 2014) ("HEDA") (holding that "[t]he game of bingo is in fact the game 'commonly or traditionally known as bingo,' i.e., one that does involve meaningful human interaction in a group setting, not one that is played within the circuitry of electronic machinery," and further finding that the electronic gaming machines at issue in that case did not involve the play of the traditional game of bingo); State v. $223,405.86, 203 So. 3d at 834 ("Section 65 of the Alabama Constitution of 1901 prohibits 'lotteries,' 'gift enterprises,' and 'any scheme in the nature of a lottery.' ... It is this so-called 'anti-lottery provision' that stands as the constitutional bar not just to what is known in contemporary parlance as a 'lottery,' but to slot machines and all other forms of gambling in Alabama."), State v. 825 Elec. Gambling Devices, 226 So. 3d 660, 668 & 671 (Ala. 2016) (reaffirming that, "[i]n Cornerstone, HEDA, and other similar cases over the past seven years, this Court has held that the unadorned term 'bingo' means simply 'the game commonly or traditionally known as bingo'" and holding both that that definition applies even in cases of a local

amendment "permit[ting] the use of an 'electronic marking machine' or an 'electronic card marking machine' in lieu of a paper card" and that the electronic gaming machines at issue did not satisfy those characteristics (quoting Cornerstone, 42 So. 3d at 86)). Cf. City of Piedmont v. Evans, 642 So. 2d 435, 437 (Ala. 1994) (affirming the trial court's conclusion that "'instant bingo' constitutes an illegal lottery"); Barrett v. State, 705 So. 2d 529, 532 (Ala. Crim. App. 1996) ("[L]otteries, other than the common game of bingo, are illegal in Calhoun county regardless of their perpetrator's thinly veiled attempts to disguise them."); Barber v. Jefferson Cnty. Racing Ass'n, 960 So. 2d at 610 & 614 (both providing "the statutory definition of a slot machine" as prohibited by § 13A-12-20(10), Ala. Code 1975, and explaining that "[i]t is '"the policy of the constitution and laws of Alabama [to prohibit] the vicious system of lottery schemes and the evil practice of gaming, in all their protean shapes"'" (quoting Opinion of the Justices No. 83, 249 Ala. at 517, 31 So. 2d at 754, quoting in turn Johnson v. State, 83 Ala. 65, 67, 3 So. 790, 791 (1887))); and Foster v. State, 705 So. 2d 534, 538 (Ala. Crim. App. 1997) (upholding the defendant's convictions for promoting gambling and possession of a gambling device on, among other grounds, the basis that

"'legal bingo was clearly defined'" and "'capable of a layperson's understanding as that game "commonly known as 'bingo'"'") (quoting Barrett, 705 So. 2d at 531)).

In Cornerstone, the Court defined "the game commonly or traditionally known as bingo," which is legally permitted by local constitutional amendments in Macon County and Lowndes County, as necessarily including the following characteristics:

> "1. Each player uses one or more cards with spaces arranged in five columns and five rows, with an alphanumeric or similar designation assigned to each space.
>
> "2. Alphanumeric or similar designations are randomly drawn and announced one by one.
>
> "3. In order to play, each player must pay attention to the values announced; if one of the values matches a value on one or more of the player's cards, the player must physically act by marking his or her card accordingly.
>
> "4. A player can fail to pay proper attention or to properly mark his or her card, and thereby miss an opportunity to be declared a winner.
>
> "5. A player must recognize that his or her card has a 'bingo,' i.e., a predetermined pattern of matching values, and in turn announce to the other players and the announcer that this is the case before any other player does so.
>
> "6. The game of bingo contemplates a group activity in which multiple players compete against each other to be the

> first to properly mark a card with the predetermined winning pattern and announce that fact."

42 So. 3d at 86. This definition applies to "bingo" in both Macon County and Lowndes County. See State v. $223,405.86, supra (Macon County), and Cornerstone, supra (Lowndes County). Thus, the electronic gaming machines in use in the Macon County facility and the Lowndes County facilities are illegal if they do not include all six of the foregoing characteristics identified in Cornerstone.

The State asserted in support of its requests for injunctive relief below that neither the activities of the Macon County defendants nor those of the Lowndes County defendants meet the definition of "bingo" in Cornerstone. Although it made the following argument in the Macon County proceedings, the State's logic is pertinent to both cases:

> "The only form of gambling made legal under Alabama's constitutional amendments is bingo in its traditional form: a game of personal, human ability between players who are playing simultaneously on cards, paying attention to each number as it is drawn, personally identifying matches on a card, and racing against each other to be the first to recognize and claim a winning pattern using their own cognitive abilities.
>
> "[The defendants], however, operate[] machines that accept cash or cash-value credits to play games controlled exclusively by chance in exchange for the hope of winning cash prizes within a few seconds. These machines have digital

> bingo grids instead of a physical bingo card, video representations of rapid-fire ball draws instead of live announcers calling drawn numbers one-at-a-time, automated displays of matching patterns instead of human recognition of matches and winning patterns, and an unskilled opportunity for customers to place a bet on a computerized game of pure chance instead of any competition of skill between human beings. In fact, every single element involved in the game commonly known as bingo is eliminated in the operation of these machines.
>
> "The machines are so automated that a player cannot, and is not required to, pay attention to and react to individual numbers drawn or personally decide which numbers on his video grid match drawn numbers or form winning patterns. Most of the machines do not even require a player to touch a machine more than one time. The [Macon County facility] offers the mindless, individual automated gambling of a slot machine -- the exact activity the laws as interpreted by the Alabama Supreme Court prevent -- not the competition of the game commonly known as bingo."

(Emphasis in original.)

In fact, in its brief in support of its request for injunctive relief in the Lowndes County action, the State made the following similar claim that, despite the clear illegality of their activities,

> "[t]he Defendants continue to administer, license, encourage, solicit, facilitate and/or promote gambling on electronic devices in [each] County in contradiction of the clear prohibitions under Alabama law. Attempts have been made by state officials to enforce the laws of this state and stop illegal gambling. The State's efforts have been to no avail and the defiance of state law continues.

"....

"This continued defiance of state law presents a textbook case for the issuance of injunctive relief for a public nuisance under ... § 6-5-121[, Ala. Code 1975]. The Defendants' violations harm not just the local community but also all citizens who desire to exercise their clear right to live in a place where there is clear enforcement of the laws. All individuals within the 'sphere of influence' are effected -- whether they want to admit it or not -- because the activity and possession of the devices is illegal; all who come into a facility, benefit from the facility, or run the facility are corrupted by the illegal activity. Those who offer the games are violating the law, those playing the games as patrons -- either ignorantly or in outright defiance of the law are violating the law, and those profiting from the leasing of machines are violating the law. None are immune to the application of the laws of the state.

"The Supreme Court has recognized the 'harm' of illegal gambling in its plethora of opinions upholding the prohibition of 'the vicious system of lottery schemes and the evil practice of gaming, in all their protean shapes, tending, as centuries of human experience now fully attest, to mendicancy and idleness on the one hand, and more profligacy and debauchery on the other.' [Epic Tech I, 323 So. 3d at 582] (quoting Johnson v. State, 3 So. 790,791 (1888) and citing previous opinions issued by Supreme Court) (emphasis added). In other words, the public policy of this State, as recorded in the Constitution, is that illegal gambling is harmful. As a result, the inquiry for this Court is not whether it agrees with that policy, or whether it personally views illegal gambling as harmful to the community. That determination has been made. Instead, the inquiry for this Court is whether Defendants are engaged in activities that, according to Alabama law, are harmful. The answer is yes. Under Alabama law, the continued operation of a criminal gambling enterprise impacts the 'public health, welfare and morals' of a

> community and thus harms the community. That is exactly why 'the State, under its police power, has the authority to abate nuisances offensive to the public health, welfare, and morals.' College Art Theatres, Inc. v . State ex rel. DeCarlo, 476 So. 2d 40, 44 (Ala. 1985)."

Although this Court did not reach the actual merits of the State's injunctive claims in Epic Tech I, in reversing the trial courts' dismissal orders in that case, we specifically noted that the State's allegations, if actually demonstrated, would "support a finding that the ... defendants' conduct caused harm to the public and that the State lacked another adequate remedy." 323 So. 3d at 600. As shown below, the State successfully met that burden.

The record in each case before us establishes that the State introduced evidence supporting the conclusion that it had a reasonable likelihood of success or should have prevailed on the merits of its claims that the electronic gaming machines in operation in the Macon County facility and the Lowndes County facilities do not constitute the legal game of bingo. The State's evidence, including testimony and recordings from agents demonstrating the play of those gaming machines, established that the machines are substantially similar to slot machines and do not offer the game traditionally know as bingo, based on the short

duration of play, the absence of numbered cards requiring player interaction, the automatic nature of the play and ultimate outcome, and the absence of an announcement of a winner upon the game's conclusion. Cf. Cornerstone, 42 So. 3d at 86-87. The defendants failed to counter this showing. Thus, the State's evidence established that the electronic gaming machines at issue were illegal; the State argues that the resulting harm to the public and the State by their continued existence is therefore presumed. See § 6-5-120, Ala. Code 1975 ("A 'nuisance' is anything that works hurt, inconvenience, or damage to another.").

In response to the State's arguments, as set out above, the Macon County defendants and the Lowndes County defendants argued that the State could not merely demonstrate that their activities in each county were illegal, but that the State also had to demonstrate that those activities constituted a nuisance under Alabama law. On appeal, in response to the State's claims, the defendants, each of which incorporates the arguments of the other, collectively argue that a grant of injunctive relief would actually alter rather than preserve the status quo; that the law generally disfavors mandatory injunctions; that the State "seeks to enjoin [the defendants'] conduct only because it [is] allegedly unlawful --

and not because the conduct is a true public nuisance"; that equity prohibits the injunction of criminal offenses; that purported "public policy shifts favor[] electronic gambling" in Alabama; and that the balance of the hardships weighs in their favor in the absence of any evidence "of tangible and measurable harm" caused by the defendants' activities.[11] In particular, the defendants, citing the purported "dearth of irreparable injury evidence" from the State, dispute that their activities constitute a public nuisance. However, as the Court observed in Try-Me Bottling, "'[t]he Legislature has in effect [declared them] so.'" 235 Ala. at 212, 178 So. at 235 (quoting with approval J.B. Mullen & Co. v. Mosley, 13 Idaho 457, 90 P. 986, 990 (1907)). The Court's holdings in that regard are clear:

> "'No state has more steadfastly emphasized its disapprobation of all these gambling devices of money-making by resort to schemes of chance than Alabama. For more than 40 years past -- we may say, from the organization of the state, with some few years of experimental leniency -- the voice of the legislature has been loud and earnest in its condemnation of these immoral practices, now deemed so enervating to the public morals.' [Quoting Johnson v. State, 83 Ala. 65, 67, 3 So. 790, 791 (1888).]

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[11]We do not address the defendants' "de facto forfeiture" claim because this is not a property-forfeiture case, and Timbs v. Indiana, 586 U.S. ___, 139 S. Ct. 682 (2019), an opinion the defendants rely upon, is clearly distinguishable.

> "True, the lawmaking body has not in so many words declared the use of such devices a nuisance, but it is our view that in substance and effect this has been done.
>
> "....
>
> "In Lee v. City of Birmingham, 223 Ala. 196, [197,] 135 So. 314, 315 [(1931)], speaking to a like question, this court observed that 'it is held by respectable authority that, if a gambling device is prohibited by statute, its operation may be considered a nuisance, and abated upon proper proceedings.'
>
> "And in Mullen & Co. v. [Mosley], 13 Idaho 457, 90 P. 986, 990, 12 L.R.A., N.S., 394, 121 Am. St. Rep. 277, 13 Ann. Cas. 450, (cited in the Lee Case, supra), the court said: 'It has been urged by counsel for appellants that, in order to authorize the destruction of these machines, it was necessary for the Legislature to declare them a nuisance. The Legislature has in effect done so. It has prohibited their use in any manner or form, and has also directed that, when any such instruments are found within this state, they shall be seized and destroyed. Making their use a crime and rendering them incapable of any legitimate use reduces them to the condition and state of a public nuisance which they clearly are. This amounts as effectually to declaring them a nuisance as if the word "nuisance" itself had been used in the Statute.'"

235 Ala. at 212, 178 So. at 234-35.[12] Accordingly, because "electronic bingo" machines are illegal under Alabama law, they -- and enterprises engaging in their use -- constitute a public nuisance per se.

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[12]Although the Court, in Try-Me Bottling, did reference in passing that "children often find [the bottle caps forming the basis of the subject defendant's 'lottery' enterprise] in trash piles," 235 Ala. at 211, 178 So. at 234, we see nothing in the language of that opinion either rendering

Further, we disagree that the potential existence of another remedy, namely criminal prosecution, prevents the issuance of injunctive relief in these cases:

> "It is scarcely necessary to observe that whether the maintenance of a public nuisance is or is not punishable in the law courts as a crime is an immaterial incident so far as the preventive jurisdiction of equity is concerned; for equity ignores its criminality, and visits upon the offender no punishment as for a crime."

State v. Ellis, 201 Ala. 295, 297, 78 So. 71, 73 (1918). See also Try-Me Bottling, 235 Ala. at 210, 178 So. at 233 ("[I]f the facts presented disclose

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that particular circumstance as determinative or limiting the ultimate holding permitting the abatement of that enterprise as a public nuisance only to cases including that circumstance. Further, as we explained in Epic Tech I, "even though [former] § 13-7-90[, Ala. Code 1975,] ha[s] been repealed, the principles set forth in Try-Me [Bottling are] still applicable." 323 So. 3d at 584. Similarly, although § 22-10-1, Ala. Code 1975, does include a list of things deemed to be public nuisances per se, nothing suggests that the included list is exhaustive or that it necessarily excludes illegal gambling operations. Specifically included among the enumerated public-health nuisances in that Code section is the activity of "conducting ... a business, trade, industry or occupation or the doing of a thing, not inherently insanitary or a menace to public health, in such a manner as to make it a menace, or likely to become a menace, to public health." § 22-10-1(7). Try-Me Bottling indicates that gambling enterprises are a menace to "'[t]he maintenance of the public health, morals, safety and welfare ....'" 235 Ala. at 211, 178 So. at 234 (quoting Stead v. Fortner, 255 Ill. 468, 478, 99 N.E. 680, 684 (1912)).

the need of equity intervention for the protection of rights cognizable by equity, then injunctive relief may be granted, though as an incident thereto the writ may also restrain the commission of a crime."). The State presented evidence establishing that no action had been taken in Macon and Lowndes Counties to enforce Alabama's ban on illegal gambling, despite our caselaw clearly identifying "electronic bingo" as illegal both generally and in these counties specifically. Thus, the State also successfully demonstrated its lack of success in applying that purported alternate remedy to shut down the defendants' illegal gambling operations, which constitute a public nuisance per se.

In addition, Alabama law suggests that criminal prosecution is not the State's sole legal remedy.

> "It is held by respectable authority that, if a gambling device is prohibited by statute, its operation may be considered a nuisance, and abated upon proper proceedings. 46 Corpus Juris, 707; Stanley-Thompson Liquor Co. v. People, 63 Colo. 456, 168 P. 750 [(1917)]; Mullen & Co. v. [Mosley], 13 Idaho 457, 90 P. 986, 12 L. R. A. (N. S.) 394, 121 Am. St. Rep. 277, 13 Ann. Cas. 450 [(1907)]; Lang v. Merwin, 99 Me. 486, 59 A. 1021, 105 Am. St. Rep. 293 [(1905)].
>
> "It is our opinion that the statutes and principles to which we have referred clearly intend to authorize a proceeding in equity to abate and condemn as contraband machines whose nature is such that they were intended to be and are used as gambling devices or gift enterprises."

Lee v. City of Birmingham, 223 Ala. 196, 197, 135 So. 314, 315 (1931).

In Try-Me Bottling, the Court later also observed:

> "The mere prosecution for a misdemeanor here involved will not give complete relief. The State is interested in the welfare of the people within her domain, and, of consequence, in the enforcement of the declared public policy against lotteries or gift schemes in the nature thereof. And, as said by the Illinois court, Stead v. Fortner, 255 Ill. 468, 99 N.E. 680 [(1912)], here approvingly quoted in State v. Ellis, [201 Ala. 295, 78 So. 71 (1918)]: 'As we have noted above, this court has never regarded a criminal prosecution, which can only dispose of an existing nuisance and cannot prevent a renewal of the nuisance, for which a new prosecution must be brought, as a complete and adequate remedy for a wrong inflicted upon the public. The public authorities have a right to institute the suit where the general public welfare demands it and damages to the public are not susceptible of computation. The maintenance of the public health, morals, safety, and welfare is on a plane above mere pecuniary damage, although not susceptible of measurement in money ....'"

235 Ala. at 212, 178 So. at 235 (emphasis added). As a final matter, in Epic Tech I, we specifically observed that "this Court's myriad decisions dealing with the legality of electronic bingo machines supports the State's assertion that it does not have any other adequate remedy to abate the public nuisances alleged here." 323 So. 3d at 588.

In sum, because the State established the existence of ongoing illegal gambling operations and a corresponding inability to compel the

defendants' compliance with the law in the absence of injunctive relief, we find that the State did, contrary to the arguments of the defendants in each case and the findings of the trial courts, demonstrate that it would be irreparably harmed in the absence of the relief requested in each case. The defendants have no right to engage in, and, thus, cannot be harmed by being enjoined from continuing in, an illegal enterprise. Cf. State v. $223,405.86, 203 So. 3d at 827 ("Gambling is not a fundamental right. 'There is no constitutional right to gamble.' " (quoting Lewis v. United States, 348 U.S. 419, 423 (1955))). The defendants fail to identify any legal principle suggesting that illegal activity cannot constitute a nuisance if a portion of the fruits of that illegal activity are charitably distributed. Additionally, although, as the defendants note, recent developments in Alabama law have made certain forms of gambling, in general, more permissible, those developments have not legalized electronic gaming machines like those at issue in these cases, nor has the legislature acted to alter the Court's conclusions in Try-Me Bottling, supra, that illegal gambling constitutes a public nuisance and in Cornerstone, supra, as to what constitutes legal "bingo" in Alabama.

Further, the Court remains unpersuaded that either forensic examination of the electronic gaming machines at issue or a more in-depth investigation of the defendants' operations was required to establish that they do not meet the elements of legally permissible bingo as established by the Court. See Cornerstone, 42 So. 3d at 86. See also Epic Tech I, 323 So. 3d at 593 ("'"[T]he game traditionally known as bingo" is a game that "is not played by or within the electronic or computerized circuitry of a machine, but one that is played on physical cards (typically made of cardboard or paper) and that requires meaningful interaction between those who are playing and someone responsible for calling out the randomly drawn designations corresponding to designations on the players' cards."'" (citations omitted)). Moreover, there is nothing to suggest that a forensic examination would, contrary to the State's evidence below, demonstrate that the electronic gaming machines at issue met the six-part test established in Cornerstone.

Based on the foregoing, we hold that, in each case, the State's evidence, as a matter of law, demonstrated the State's success on the merits, a substantial threat of irreparable injury to the public at large in

the absence of an injunction, that the threatened injury to the State outweighed any benefit in allowing criminal operations to continue, and that the requested injunctions were specifically aimed at serving the public interest. See Epic Tech I, 323 So. 3d at 585. Accordingly, contrary to the findings of the trial courts in each case below, the State successfully demonstrated that the operations of the Macon County defendants and the Lowndes County defendants are a public nuisance under Try-Me Bottling. Because the Macon Circuit Court exceeded its discretion in failing to grant, in full, the State's request for preliminary injunctive relief, and because the Lowndes Circuit Court exceeded its discretion in denying the State permanent injunctive relief, the orders of those courts are hereby reversed and the matters are remanded.

Case no. 1210122

In its cross-appeal, White Hall argues, in pertinent part:

> "Th[e] Lowndes County Circuit Judge dismissed [White Hall's] counterclaims in his final Order ... but did [not] provide an opinion or explanation for dismissal. The State never responded [to] White Hall['s] ... counterclaims. [White Hall] preserved all counterclaims for the record. [White Hall] subsequently appealed. These counterclaims have yet to be addressed by the State."

Despite arguing that the State should address its counterclaims on appeal, White Hall's one paragraph addressing this issue, as the State notes, entirely omits either argument or authority establishing that the trial court's dismissal of those counterclaims was erroneous. See Rule 28(a), Ala. R. App. P. Accordingly, White Hall has waived any arguments concerning the dismissal of its counterclaims, and we hereby affirm the Lowndes Circuit Court's order insofar as it relates to those claims. See, e.g., Tucker v. Cullman-Jefferson Counties Gas Dist., 864 So. 2d 317, 319 (Ala. 2003) (stating that issues not raised and argued in brief are waived), and City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998) ("When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research.").

Conclusion

Based on the foregoing, the Macon Circuit Court and the Lowndes Circuit Court erroneously denied or exceeded their discretion in denying the State's request in each case for injunctive relief prohibiting the Macon County defendants and Lowndes County defendants from continuing to

engage in the illegal gambling activities at issue. Accordingly, we reverse their orders and remand these cases for the Macon Circuit Court to enter an order, within thirty days of this Court's issuance of the certificate of judgment, preliminarily enjoining the Macon County defendants, and for the Lowndes Circuit Court to enter an order, within thirty days of this Court's issuance of the certificate of judgment, permanently enjoining the Lowndes County defendants, from offering "electronic bingo" machines at any facility in their respective county, from receiving any moneys in relation to "electronic bingo" machines in operation in their respective county, from transporting or providing any additional "electronic bingo" machines to any facility in their respective county, and from receiving, utilizing, or providing bingo licenses or permits to play "electronic bingo" in their respective county. Further proceedings in the Macon Circuit Court on the State's request for a permanent injunction shall be consistent with this opinion. Finally, because White Hall has waived all arguments at issue in its cross-appeal relating to the dismissal of its counterclaims, that portion of the Lowndes Circuit Court's order is hereby affirmed.

1200798 -- REVERSED AND REMANDED.

1210064 -- REVERSED AND REMANDED.

1210122 -- AFFIRMED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.