IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. JEREMY BAIRD, et al., Defendants-Appellees.	C.A. No. 94-10494 D.C. No. CRS 94-162-WBS (E.D. Calif., Sacramento) BRIEF FOR APPELLANT

Appeal from the United States District Court
for the Eastern District of California

BRIEF FOR APPELLANT

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JURISDICTION

The defendants were charged with violating 18 U.S.C. §§ 241, 245, 876, and 1512. E.R. 1. The district court therefore had jurisdiction under 18 U.S.C. § 3231. The district court entered an order dismissing counts one and two of the superseding indictment on August 31, 1994. E.R. 7. The government filed a timely notice of appeal from that order on September 30, 1994. E.R. 107. This Court therefore has jurisdiction under 18 U.S.C. § 3731.

ISSUE PRESENTED FOR REVIEW

Whether a convenience store offering electronic video games for use by members of the public is a "place of entertainment" and thus a "public accommodation."

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition of the Case in the District Court

This case arises out of a white supremacist gang's assault on two individuals, one black and one hispanic, at a 7-11 convenience store pursuant to a concerted effort to keep blacks out of a neighborhood which the gang considered its "turf." On August 25, 1994, a six-count superseding indictment was returned against defendants Jeremy R. Baird, Gary J. Flores, Jason R. Jordan, Aaron J. Phillips, and Timothy L. Reasons. E.R. 1. Count one charged a conspiracy to violate civil rights based on interference with the right to the full and equal enjoyment of the services of a place of accommodation and entertainment in violation of 18 U.S.C. § 241.[1] Count two charged interference with a federally protected right in violation of 18 U.S.C. § 245(b).[2]

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[1] Section 241 provides: "If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same [they shall be guilty of an offense against the United States]."

[2] Section 245(b)(2)(F) provides: "Whoever, whether or not acting under color of law, by force or threat of force, wilfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with --

> (2) any person because of his race, color, religion or national origin and because he is or has been --
>
> > (F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any . . . motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public. . . . [shall be guilty of an offense against the United States].

Counts three through six alleged witness intimidation, mailing threatening communications, and obstruction of justice against certain of these defendants. Only counts one and two (the "civil rights counts") are at issue in this appeal.

The defendants filed a motion to dismiss the civil rights counts on the ground that they failed to state a federal offense. C.R. 80. The defendants argued that the 7-11 store where the assault occurred was not a "public accommodation" within the meaning of Section 2000a of the Civil Rights Act of 1964 ("the Act"). E.R. 81. All parties agreed that the government must prove, as an element of the civil rights counts, that the 7-11 store was a "public accommodation" under the Act. E.R. 7. All parties also stipulated that the question whether the 7-11 store was a public accommodation could be decided by the district court on a pre-trial motion. E.R. 7-9. The parties submitted declarations in support of their respective positions on this issue, E.R. 77-106, and the district court found that the relevant facts were not in dispute. E.R. 10; Order at 4.

On August 31, 1994, the district court granted defendants' motion to dismiss and entered a written order dismissing the civil rights counts. E.R. 7. The court ruled that the 7-11 store where the alleged assault occurred was not a "public accommodation," an essential element of the civil rights counts. Id. The government dismissed without prejudice the remaining witness tampering and obstruction of justice charges against the defendants and pursued this appeal. C.R. 125-133.

B. Bail Status

Because all counts in the superseding indictment have been dismissed, the defendants are not in custody.

C. Statement of Facts

1. Background.

As alleged in the superseding indictment, this case involves a physical assault by members of a white supremacist gang, pursuant to a concerted effort to keep black individuals out of their neighborhood.[3]

The defendants are members of a white supremacist gang. The Summerhill Plaza shopping area and adjacent neighborhood in Citrus Heights, California, is part of its "turf." The gang's stated goal was "to get these niggers out of our territory."

On the evening of May 14, 1993, after defendants Baird and Phillips were ejected from a party due to their harassment of a black guest, defendant Baird and other gang members gathered at the 7-11 store in the Summerhill Plaza. Defendant Baird's van, which was parked in the store's lot, contained at least one black military helmet inscribed with "WHITE POWER," articles bearing racial slurs, a Nazi "SS" lightning bolts insignia, and specially

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[3] This section is based on the government's opposition to the defendants' motion to dismiss and summarizes the facts the government intends to prove at trial. C.R. 94. They are disputed by the defense, at least in part, which stipulated only to the facts contained in declarations that were filed in connection with the motion to dismiss. E.R. 10, 58.

constructed stocks and clubs (referred to as "nigger knockers" by the gang members).

Approximately one hour before the assault, several gang members who were around the van produced additional clubs -- including two pool cues "broken down" into four pool cue clubs -- when they observed several black males in the 7-11 convenience store parking lot. The gang members then directed racial slurs at these black individuals, including "nigger, go home," "go back to where you came from" and "stupid fuckin' cotton pickers."

One hour after the gang members gathered, the black victim parked and got out of his car in the store's parking area and walked toward the entrance. Several gang members left the van, closed in on the black victim, and began yelling racial slurs, such as "stupid nigger, get out of here." The black victim responded by gesturing upward with his hands as if asking "what's going on?" With sticks and clubs in their hands the gang members then surrounded the black victim. One of the assailants yelled "you fucking nigger, what are you doing around here?" and another gang member threatened "why don't you go back to where you came from?"

The Hispanic victim, who witnessed the incident from a nearby intersection, then drove into the store's parking lot to attempt to help the black victim. In doing so, he noticed two additional gang members emerging from defendant Baird's van. The additional gang members were charging the black victim with clubs in their hands. When the Hispanic victim left his truck, the gang members

began to surround him. The Hispanic victim was soon overcome by the assailants.

The gang members beat, kicked, and stomped the two victims' heads and bodies with their feet, fists, and clubs. Although the victims initially attempted to put up resistance to the beatings, both were quickly overcome and curled up in fetal positions in an attempt to protect themselves. The beatings continued while the victims lay curled on the ground.

As a result of the assault, the black victim was hospitalized with a fractured jaw, bruised ribs, and injuries to his back and liver. The Hispanic victim was beaten unconscious, and, as a result of the severity of the blows to his head, he has a blind spot in his left eye.

2. Undisputed Jurisdictional Facts

It is undisputed that, at the time of the assault, the 7-11 store was open to the public and contained two electronic video games which were operational and available for use by anyone. E.R. 77-78. Components of these video games were manufactured outside the state of California. Id.

3. The District Court's Opinion

The district court ruled that the convenience store was not a "place of entertainment," even though it offered electronic video games for use on its premises, because: its nature was not like other places of entertainment enumerated in the Act or found by cases to be covered by the Act; no Ninth Circuit case has held that the presence of entertainment devices makes an establishment

a place of entertainment; the "basic function" of the convenience store was to sell merchandise and services; and the corporate owner of the store declared that it did not intend for the store to become a place of entertainment. The court declined to follow a Fifth Circuit case, relied on by the government, which held that the presence of entertainment devices on premises open to the public transforms an otherwise non-covered establishment into a covered place of entertainment. E.R. 7.

SUMMARY OF ARGUMENT

The district court's ruling is inconsistent with the plain meaning of the Act, as determined by the Supreme Court, and with Congressional intent, which was that the Act should be broadly construed in order to attack discrimination in places of public congregation. Although there are no cases to the contrary, the district court declined to follow persuasive Fifth Circuit authority that an establishment not otherwise covered by the Act becomes a covered place of entertainment by offering entertainment devices for public use on its premises. Finally, the public policy objectives of notice to affected establishments and consistency of application by the courts is better served by the government's approach for determining a "place of entertainment."

ARGUMENT

A. Standard of Review

The issue presented by this appeal is the meaning of the term "place of entertainment" as used in the Civil Rights Act of 1964. The Court reviews a district court's interpretation of statutes de

novo. U.S. v. Bailey, ___ F.3d ___, C.A. No. 92-50721, Slip op. 12827, 12832 (9th Cir., October 20, 1994) (reversing district court's ruling that certain computer chips did not qualify as an "access device" under 18 U.S.C. §1029(a)).

B. The District Court's Ruling is Inconsistent with the Act's Plain Language.

The defendants were charged with violating 18 U.S.C. §§ 241 and 245(b) for conspiring to violate and actually violating the victims' right guaranteed by federal law to use a "public accommodation." E.R. 1. The definition of a "public accommodation" for purposes of 18 U.S.C. § 241 is contained in the Civil Rights Act of 1964, 42 U.S.C. § 2000a(b), which specifies several of the federal rights protected by Section 241. The definition of a public accommodation for purposes of 18 U.S.C. § 245(b) is contained in the statute itself. 18 U.S.C. § 245(b)(2)(F). The language in Section 245 is virtually identical to, and was thus intended to be coextensive with, that of the Civil Rights Act. Thus, consistent with the position of the parties at the district court level, E.R. 27-28, both civil rights counts in this case turn on the question whether the 7-11 convenience store is a "public accommodation" under 42 U.S.C. § 2000a.

Section 2000a(b) provides that each of the following "establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . . :"

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests . . . ;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U.S.C. § 2000a(b) (emphasis added).[4] The government contends that the 7-11 convenience store is a "place of entertainment" under Section 2000a(b)(3).[5]

In Daniel v. Paul, 395 U.S. 298 (1968), the Supreme Court adopted a broad interpretation of Title II in determining whether an establishment not expressly mentioned in Section 2000a(b)(3) of

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[4] The requirement that the operations of the establishment must "affect commerce" is not at issue on appeal. The defendants did not contest the store's affect on commerce. It is clear that the store's operations affected commerce, in part because it contained entertainment devices which were manufactured in another state. Daniel v. Paul, 395 U.S. 298, 308 (1968).

[5] Whether the convenience store is a "facility principally engaged in selling food for consumption on the premises" is not at issue on appeal. Although the government made this alternative argument to the district court, the government's contention on appeal is solely that the convenience store was a "place of entertainment."

the Act ("subsection (b)(3)") qualifies as a place of entertainment. There, the Court considered whether a recreational swimming and boating club was covered by the Act even though not expressly mentioned in the list of covered establishments. The club argued that it was not covered because, in light of the nature of the enumerated establishments, subsection (b)(3) should be construed to cover only establishments "where patrons are entertained as spectators or listeners rather than those where entertainment takes the form of direct participation in some sport or activity." Id. at 306. The Court rejected this restrictive interpretation, opting instead for a broad approach: "Under any accepted definition of 'entertainment,' the [club] would surely qualify as a 'place of entertainment.'" Id. at 306 (adopting Webster's definition of entertainment as "the act of diverting, amusing, or causing someone's time to pass agreeably: synonymous with amusement.") The Court further noted that nothing in the legislative history contravened this broad definition of a place of entertainment in light of the broad objectives of the Act. Id. at 306-08.

The first reported case after Daniel v. Paul to decide whether the presence of mechanical entertainment devices transformed an otherwise non-covered establishment into a covered establishment was United States v. Vizena, 342 F. Supp. 553 (W.D. La. 1972). There, the question was whether a neighborhood bar containing a jukebox and a pool table qualified as a place of entertainment under subsection (b)(3). A bar without

entertainment devices (a "bar per se") is not a covered place of entertainment under this statute. See, e.g., Cuevas v. Sdrales, 344 F.2d 1019, 1022 (10th Cir. 1965). Following the Supreme Court's broad interpretation, the court in Vizena indicated that to resolve the issue it "need look only to the activities of the patrons of the establishment and the facilities provided by the establishment to enable the patrons to engage in those activities." Id. at 554. The court concluded that because the establishment "provides a jukebox and pool table for the entertainment and amusement of its patrons," it becomes a "place of entertainment" within the meaning of the Act. Id. Thus, the presence of devices that provide "entertainment" transformed an otherwise non-covered establishment into a place of entertainment.

The Fifth Circuit also has held that the presence of mechanical devices that provide "entertainment" transforms an otherwise non-covered establishment into a "place of entertainment." In United States v. DeRosier, 473 F.2d 749 (5th Cir. 1973), the question was also whether a neighborhood bar which contained "mechanical amusement devices" (a jukebox, shuffleboard, and a pool table) is a "place of entertainment" under 42 U.S.C. § 2000a. Like the Supreme Court in Daniel v. Paul, the Fifth Circuit began its analysis with a "literal" application of the Act. Id. at 752. The court found that the presence of a jukebox, shuffleboard, and a pool table made the establishment a place of entertainment under the Act: "Certainly an establishment which

provides mechanical devices for the use and enjoyment of its patrons and customers is a 'place of entertainment.'" Id.

The court then addressed the defendants' argument in opposition to this application of the statute, which was that only establishments "which are devoted entirely or substantially to the entertainment of the public" qualify as places of entertainment. Id. The defendant thus argued in favor of a principal purpose, or at least substantial purpose, requirement. The DeRosier court rejected this argument, however, because the language of subsection (b)(3) does not require this limitation:

> The statute does not require that the entertainment be of a certain variety or that a certain quantum of the establishment's business be derived from the entertainment of its customers. On the contrary, the statute clearly specifies that ". . . any . . . place of entertainment" is a place of public accommodations within its meaning if that establishment's operations affect commerce.

Id. at 752 (emphasis in original). The court thus flatly rejected a "quantum" or "principal purpose" requirement.

Just as there was no serious question in Vizena and DeRosier that a jukebox and pool table provided "entertainment," there is no question in the present case that electronic video games provide entertainment by "diverting, amusing, or causing someone's time to pass agreeably." Indeed, video games have no purpose other than to entertain. As one court stated in a different context, "[i]n no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element." America's Best Family Showplace Corp. v.

The City of New York, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (video games treated as entertainment under a city's administrative code); see also Williams Electronics, Inc. v. Artic International, Inc., 685 F.2d 870, 872 (3d Cir. 1982) (video game treated as entertainment under copyright laws). In the present case, it is undisputed that, at the time of the alleged gang assault, the 7-11 store was open to the public and contained operational electronic video games which were available for use. E.R. 77-88.

The district court declined, however, to follow the Fifth Circuit cases despite the absence of any contrary authority. The court cited as one of its reasons for not following DeRosier that it "does not appear to have been followed outside of the Fifth Circuit." E.R. 17; Order at 11. In fact, all courts addressing the question have reached the same conclusion, including a different Fifth Circuit panel in United States v. Deyorio, 473 F.2d 1041 (5th Cir. 1973). Indeed, the government has been unable to identify a single case in any circuit, at any level, that has reached a contrary conclusion or even cited these cases with disapproval.

The district court also incorrectly asserted that "the present case is distinguishable from DeRosier." E.R. 17; Order at 11. The court reasoned that since a bar is already "a place where people are invited to congregate and mingle for social purposes," the addition of games simply enhances "the fundamental nature of the establishment as a place of entertainment." Id. This distinction completely ignores, however, the fact that bars

per se are not covered by the Act.[6] Congress's decision in 1964 to exclude bars from coverage was as calculated and clear a decision as the exclusion of retail establishments. If the presence of entertainment devices transforms an otherwise non-covered bar into a covered establishment, there is no rational basis for holding that the presence of functionally indistinguishable entertainment devices in a neighborhood convenience store do not have the same effect.

Although the government does not suggest that this Court is bound by Fifth Circuit cases, those cases are persuasive and should be followed. They are not distinguishable; they are consistent with the Supreme Court's definitional and liberal approach; and they are consistent with Congress's intent to attack discrimination in places of public congregation. Moreover, as this Court recently noted, the Court should "avoid creating intercircuit conflict when possible." Hale v. Arizona, 967 F.2d 1356, 1365 n.8 (9th Cir. 1992).

Rather than follow the Fifth Circuit cases, the district court in essence adopted a "basic function and purpose" test for determining whether an establishment is a place of entertainment. E.R. 17; Order at 11 (". . . the inclusion of two video games in a

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[6] Indeed, the case cited by the district court at the outset of its order to support its more restrictive approach, Cuevas v. Sdrales, 344 F.2d 1019 (10th Cir. 1965), is one of the leading cases for the proposition that bars are not covered by the Act. See also United States v. DeRosier, 473 F.2d at 753-54 & n.1A (citing cases and legislative history that "bars per se are not covered establishments.") Although bars per se are covered by 18 U.S.C. § 245, they have never been held to be covered by the Act.

retail convenience store does not change the basic function and purpose of that store. . . .") Neither the Supreme Court in Daniel nor any other court, however, has read a principal purpose requirement into subsection (b)(3). United States v. DeRosier, 473 F.2d 749, 752 (5th Cir. 1973) (noting that the entertainment need not be a "certain quantum of the establishment's business").

Moreover, a basic or principal function requirement would be irreconcilable with the language of the Act. Subsection (b)(2), regarding food establishments, contains an express principal function requirement: "Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises. . . ." In contrast, subsection (b)(3), pertaining to places of entertainment, contains no such limitation; it covers any place of entertainment. Given that Congress demonstrated its ability to include a principal function test in subsection (b)(2), there is absolutely no basis for reading such a requirement into the broad language of subsection (b)(3). See Leatherman v. Tarrant Co. Narcotics Intelligence and Coordination Unit, ___ U.S. ___, 113 S. Ct. 1160, 1663 (1993).

Finally, the district court erroneously cited as factual support for its conclusion a declaration by an officer of the corporate owner of 7-11 stores that these stores "are not intended to be places of exhibition or entertainment." E.R. 17a; Order at 12.) The most probative evidence, however, is the actual activity of the establishment and its patrons, not the post hoc statements

of subjective intent by the owner of the establishment. See Daniel v. Paul, 395 U.S. at 304-06; Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 350-51 (5th Cir. 1968) (en banc). Given the possibility that some establishments might want to avoid being subject to anti-discrimination laws, it would obviously be problematic to allow this issue to be decided even in part on the basis of such statements of subjective intent.

Because it is undisputed that the 7-11 store in this case was open to the public and contained electronic video games for use on its premises, it follows that the establishment provides "entertainment" and is thus a "place of entertainment" within the meaning of the Act. The district court's ruling to the contrary is inconsistent with the broad interpretation of the Act adopted by the Supreme Court and uncontradicted authority from the Fifth Circuit.

C. Congressional Intent Supports the Government's Broad Interpretation.

To the extent that it is relevant in light of the plain meaning of subsection (b)(3) which should be dispositive, the available evidence of Congressional intent is also supportive of the government's position. First, as the Supreme Court noted in Daniel v. Paul, the legislative history indicates that mechanical entertainment devices were considered by Congress to be "sources of entertainment" under the Act. Daniel v. Paul, 395 U.S. at 308. The Senate rejected an amendment which would have made most mechanical entertainment sources irrelevant to the jurisdictional analysis. Id. at 308 & n. 11 (citing 110 Cong. Rec. 13915-13921

(1964) (noting rejection of amendment that only sources of entertainment that have "not come to rest within a State" would be relevant)); United States v. DeRosier, 473 F.2d at 752 (noting that Congress "specifically considered such mechanical and stationary machines such as a jukebox, shuffleboard, and pool table, to be 'sources of entertainment' within the meaning of [the Act]).

As suggested by the Supreme Court's discussion, this legislative history indicates that Congress knew full well that certain establishments would be covered by the Act solely because of the presence of mechanical entertainment devices that were manufactured out of state and had "come to rest within a state." Indeed, in his dissenting opinion in Daniel, Justice Black noted that the majority opinion means just that. Id. at 314 ("The Court apparently refers to this jukebox on the premise that playing music and dancing makes an establishment the kind of place of 'entertainment' that is covered by section 201(b)(3) of the Act.") Knowing that the presence of these devices could subject certain establishments to coverage by the Act, Congress rejected the proposed amendment.

Second, the Supreme Court has reiterated that Congress intended that the Civil Rights Act of 1964 should be liberally construed and broadly read. Hamm v. The City of Rockhill, 379 U.S. 306 (1964); Klegg v. Cult Awareness Network, 18 F.3d 752, 755 (9th Cir. 1994). The district court failed to cite -- let alone follow -- this guiding principle of application. Indeed, the

court began its analysis by citing Cuevas v. Sdrales, 344 F.2d 1019 (10th Cir. 1965), for the restrictive proposition that the Act is "very explicit in limiting the types of establishments that may qualify as a place of public accommodation under the statute." E.R. 11; Order at 5. Cuevas was decided, however, four years before the Supreme Court made clear in Daniel v. Paul that the Act contains an illustrative rather than exhaustive list of covered establishments, and that the question whether an establishment not expressly mentioned in the Act is covered must be decided pursuant to a liberal and broad construction. Daniel v. Paul, 395 U.S. at 306-08.

Finally, although Congress made political compromises in defining the scope of the Act (such as by excluding retail stores and bars), Congress manifestly intended to cover establishments where people are most likely to congregate publicly since those are the places where the effects of discrimination are exacerbated. As the Supreme Court observed in Daniel, the overriding purpose of the Act was "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." Id. at 307-08 (quoting H.R. Rep. No. 914, 88th Cong., 1st Sess.). Consistent with this overriding purpose, Congress expressly included within the scope of the Act places such as restaurants, soda fountains, gas stations, and movie houses where, at least in the 1960's, public congregation seemed most likely and thus where the

potential for public "humiliation involved in discriminatory denials of access" would be particularly great.

In today's suburban America, neighborhood convenience stores containing entertainment devices have become teenage hangouts equivalent to the soda fountains and lunch counters that were popular places of congregation at the time the Act was passed. Miller v. Amusement Enterprises, Inc., 394 F.2d at 349 (court takes judicial notice of known facts in determining what is a place of public amusement). These stores have therefore become places of amusement and entertainment. Indeed, as the government contends in the present case, the convenience store at issue was used as a place of congregation or "hangout" by the white supremacist gang.

Thus, in addition to being consistent with the Supreme Court's statements regarding the proper construction of the Act, the conclusion that the 7-11 in this case is covered by the Act is consistent with Congressional intent.

D. Public Policy Supports the Government's Approach for Determining a "Place of Entertainment."

Having declined to follow the only relevant judicial authorities, the district court attempted to support its ruling with an assertion, presumably based on its view of public policy, that it would be "arbitrary" to hold that entertainment devices have the ability to transform an establishment into a covered place of entertainment. E.R. 17a; Order at 12. The court's expressed concern was that, under the government's view, a court

"would be compelled to find that the store was not covered under Title II before the machines were installed, became covered as a place of entertainment when the machines were installed in 1993, then became excluded from coverage again when the machines were removed in April 1994." Id.

As suggested by the absence of any authority for the proposition, it is not in the least bit arbitrary, let alone inconsistent with the intent the Act, to recognize that certain establishments will be covered at certain times and under certain circumstances but not others. For example, an empty warehouse may not be covered by the Act as a general matter, but if it is used for a boxing tournament, it would be a covered place of entertainment during the period of such usage (and the exclusion of blacks would be actionable). Similarly, a bare parcel of land is not generally covered, but if it is used for a period of time for a carnival, it would be a covered place of entertainment. In short, the fact that different facts yield different legal conclusions simply does not equate to arbitrariness. Indeed, the government's approach allows a property owner to choose whether to engage in conduct that will subject an establishment to the Act's coverage, which provides direct protection against arbitrariness.[7]

The relevant public policy question is thus whether the legal standard for determining a place of entertainment is clear enough

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[7] The 7-11 store in this case removed its video games shortly after the alleged assault in this case. E.R. 15, 17a; Order at 9, 12.

such that unpredictable and inconsistent litigation results are avoided. In addition to being consistent with existing judicial authority, the government's approach draws a "bright line" so that establishments are afforded reasonable notice as to when they are covered by the Act,[8] and courts are able to resolve these cases on a principled and consistent basis: If an establishment offers entertainment devices for use on its premises which are ostensibly open to the public, then the establishment is a place of entertainment and thus a public accommodation. In contrast, the district court's approach is so vague that it defies clear restatement in the form of a legal standard or jury instruction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the district court's dismissal of counts one and two of the superseding indictment should be reversed.

Dated: January 12, 1995

Respectfully submitted,

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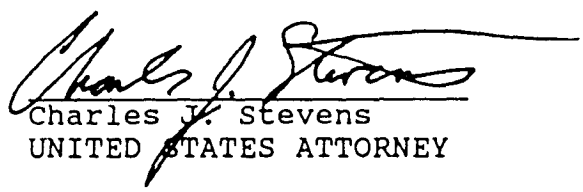
BY: 
Charles J. Stevens
UNITED STATES ATTORNEY

[8] Because the Act may give rise to civil actions against establishments, this notice may be significant. Notice of the Act, of course, is not required in criminal prosecutions under 18 U.S.C. §§ 241 and 245.

STATEMENT OF RELATED CASE

The United States is unaware of any related case.

CERTIFICATE OF SERVICE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. JEREMY BAIRD, et al., Defendant-Appellees.	C.A. No. 94-10494 D.C. No. CRS 94-162-WBS (E.D. Calif., Sacramento)

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

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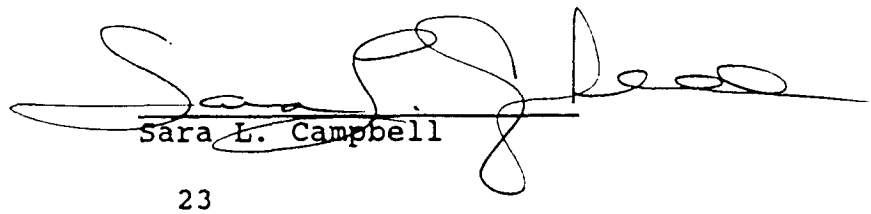

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