**COMMONWEALTH OF KENTUCKY**
**FRANKLIN CIRCUIT COURT**
**DIVISION II**

**CIVIL ACTION No. 10-CI-01154**

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**THE KENTUCKY HORSE RACING COMMISSION**
**THE KENTUCKY DEPARTMENT OF REVENUE;**
**APPALACHIAN RACING, LLC;**
**CHURCHILL DOWNS, INC.;**
**ELLIS PARK RACE COURSE, INC.;**
**KEENELAND ASSOCIATION, INC.;**
**KENTUCKY DOWNS, LLC;**
**LEXINGTON TROTS BREEDER ASSOCIATION, LLC;**
**PLAYERS BLUEGRASS DOWNS, INC.;**
**and**
**TURFWAY PARK, LLC** **JOINT PETITIONERS**

**v.**

**THE FAMILY FOUNDATION OF KENTUCKY, INC.**
**d/b/a THE FAMILY FOUNDATION** **RESPONDENT**

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## OPINION AND ORDER

This matter is before the Court upon a *Petition for Declaration of Rights* filed by Joint Petitioners the Kentucky Horse Racing Commission ("the Commission"); the Kentucky Department of Revenue ("the Department"); Appalachian Racing, LLC; Churchill Downs, Inc.; Ellis Park Race Course, Inc.; Keeneland Association, Inc.; Kentucky Downs, LLC; Lexington Trots Breeder Association, LLC; Players Bluegrass Downs, Inc.; and Turfway Park, LLC. The *Petition* is opposed on several grounds by Intervening Respondent The Family Foundation of Kentucky, Inc., d/b/a The Family Foundation ("the Family Foundation"). Upon review of the parties' briefs and papers, and after being sufficiently advised, this Court hereby **GRANTS** the *Petition*.

## STATEMENT OF FACTS

Petitioners in this case consist of two state agencies and a group of Kentucky racing associations ("the Associations"). The Kentucky Horse Racing Commission is a government agency, created pursuant to KRS Chapter 230, that is charged with regulating horse racing and pari-mutuel wagering on horse racing in the Commonwealth of Kentucky. The Department of Revenue is the regulatory agency charged with regulating the administration and enforcement of all tax laws in Kentucky, pursuant to KRS Chapter 131. The Associations are entities licensed by the Commission to conduct horse racing and pari-mutuel wagering in Kentucky. Intervening Respondent the Family Foundation is a corporation that opposes expanded gaming in Kentucky.

In response to a request from state Senator Damon Thayer, on January 5, 2010, the Attorney General of Kentucky issued an Opinion addressing the legality of wagering on historical horse races[1] under Kentucky law.[2] In the Opinion, the Kentucky Attorney General opined that there was no provision in KRS Chapter 230 that prohibited pari-mutuel wagering on historical horse races, but that such wagering was not authorized by the administrative regulations governing horse racing. *See* Ky. OAG 10-001 at 4. The Attorney General did not, however, offer an opinion as to whether pari-mutuel wagering

[1] Briefly, wagering on historical horse racing involves wagering on races that have previously been run. The patron is provided with limited past performance information, but any information that would allow a patron to identify the specific historical race is concealed.

[2] While the term "Instant Racing" was used in the AG Opinion, and has been used at times in this case, including by the Court, this *Opinion and Order* addresses the legality of pari-mutuel wagering on "historical horse races" as set forth in the Regulations promulgated by the Commission, and not on any particular game or scheme. Moreover, to the extent that the Court finds the Regulations themselves to be a permissible exercise of the Commission's regulatory authority, such a ruling does not address the legality of any *particular* game. Finally, we note that any historical horse race wager, like other exotic bets, must be reviewed and approved by the Commission, and must comply with the regulatory definition of "pari-mutuel," before an Association may offer it to the public. Amended 810 KAR 1:011, Section 3(7).

on historical horse racing violated the statutory prohibitions on gambling found in KRS Chapter 528. *Id.* at 1, n. 1.

Relying largely on the Attorney General's Opinion, on July 20, 2010, the Commission adopted Draft Regulations ("the Regulations") that purport to authorize pari-mutuel wagering on historical horse races on licensed premises in the Commonwealth. Simultaneously, the Department of Revenue amended its pari-mutuel tax collection form, Revenue Form 73A100, to specify that tracks offering pari-mutuel wagering on historical horse races were subject to the pari-mutuel excise tax found in KRS 138.510(1). On August 12, 2010, the Department filed an amendment to 103 KAR 3:050, which incorporated the amended form by reference. The Draft Regulations were filed with the Legislative Research Commission and are undergoing the review process in compliance with KRS Chapter 13A.

Petitioners brought this case pursuant to KRS 418.020, which allows, under certain circumstances, the submission of an agreed case.[3] In a September 1, 2010 *Order*, the Court allowed the Family Foundation to intervene in this case. Petitioners have presented three questions of law, which the Court will address in turn. We note, that the Family Foundation has consistently contested the Court's jurisdiction over this case. In the *Order* entered July 26, 2010, we determined that Petitioners presented a justiciable case or controversy that is presently ripe for decision. As such, the Court will not revisit that issue. Finally, recognizing that it is not the role of the Court to legislate from the bench, or to establish public policy, we will not offer an opinion on policy questions such

[3] KRS 418.020, found in Kentucky's Declaratory Judgment Act, KRS Chapter 418, provides that: "[p]arties to a question which might be the subject of a civil action may, without action, state the question and the facts upon which it depends, and present a submission thereof to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court shall, thereupon, hear and determine the case, and render judgment as if an action were pending."

as whether pari-mutuel wagering on historical horse races would or would not ultimately be beneficial to the horse industry and the Commonwealth. Rather, we will confine our inquiry to the legal questions presented by Petitioners, to determine whether the Regulations, as promulgated, comply with applicable statutes and case law.

## ANALYSIS

### I. The Regulations are a Valid and Lawful Exercise of the Commission's Statutory Authority to Regulate Pari-Mutuel Wagering on Horse Racing

Petitioners first request a declaration that the promulgated Regulations are a valid and lawful exercise of the Commission's statutory authority to regulate pari-mutuel wagering on horse racing under Chapter 230 of the Kentucky Revised Statutes. Specifically, the Commission asserts that its plenary authority to regulate pari-mutuel wagering on horse racing in the Commonwealth vests it with the authority to define pari-mutuel wagering on horse racing to include wagering on historical horse races as contemplated by the Regulations. In addressing the validity of a regulation with respect to its governing statute, the Court must determine whether the regulations are consistent with the policy set forth in the enabling legislation. This inquiry requires an examination of the enabling statutes that authorize pari-mutuel wagering and vest plenary authority in the Commission, as well as an examination of the scope of the Commission's power to regulate pari-mutuel wagering on horse racing. We will then scrutinize the proposed Regulations themselves.

The Enabling Statutes

The Commission's authority to regulate horse racing and pari-mutuel wagering on horse racing in the Commonwealth is derived from KRS Chapter 230, which sets forth its legislative purpose as follows:

> It is the policy of the Commonwealth of Kentucky, in furtherance of its responsibility to foster and to encourage legitimate occupations and industries in the Commonwealth and to promote and to conserve the public health, safety, and welfare, and it is hereby declared the intent of the Commonwealth to foster and to encourage the horse breeding industry within the Commonwealth and to encourage the improvement of the breeds of horses. Further, it is the policy and intent of the Commonwealth to foster and to encourage the business of legitimate horse racing with pari-mutuel wagering thereon in the Commonwealth on the highest possible plane. Further, it hereby is declared the policy and intent of the Commonwealth that all racing not licensed under this chapter is a public nuisance and may be enjoined as such. [...]

KRS 230.215(1) (emphasis added). With respect to the Commission, the statute states, in relevant part, that:

> It is hereby declared the purpose and intent of this chapter in the interest of the public health, safety, and welfare, to vest in the racing commission forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth so as to encourage the improvement of the breeds of horses in the Commonwealth, to regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth. [...]

KRS 230.215(2) (emphasis added). Based on the governing statutes, therefore, it is clear that the legislature intended to give the Commission plenary authority to regulate pari-mutuel wagering on horse racing in order to preserve the integrity of horse racing in the Commonwealth.

The Plenary Power of the Racing Commission

Not only does the enabling statute expressly vest in the Commission "plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth," KRS 230.215(2), but Kentucky's courts have also recognized that the scope of the Commission's authority is considerable, due to the significance of the horse industry in the Commonwealth and the state's substantial police power interest in preserving the integrity of horse racing.

In *State Racing Commission v. Latonia Agricultural Association*, 123 S.W. 681 (Ky. 1909), Kentucky's highest court examined the legislature's delegation to the Racing Commission of the power to regulate horse racing and upheld the Commission's prohibition of the practice of "bookmaking." The court opined that "[t]he intention of the Legislature in the enactment of the bill was in our opinion to foster a great industry in this state, one which has gained for the state much celebrity, and which has been a source of considerable profit to the breeders of thoroughbred horses." *Latonia*, 123 S.W at 683. In *Allen v. Kentucky Horse Racing Authority*, 136 S.W.3d 54 (Ky. App. 2004), the Court of Appeals of Kentucky noted that "[o]ne of the purposes of the horse racing statutes is to give the KHRA 'forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth [.]'" *Allen*, 136 S.W.3d at 57 (citing KRS 230.215(2)). Indeed, "[t]he Commission [is] vested with all powers necessary and proper to carry out fully and effectively those duties imposed upon it by the statutes." *Kentucky State Racing Commission v. Fuller*, 481

S.W.2d 298, 300 (Ky. 1972) (citing KRS 230.260). Judicial precedent in Kentucky clearly underscores the plenary power given to the Commission by the enabling legislation.

The Proposed Regulations

Pursuant to KRS 13A.140, administrative regulations are presumed to be valid, unless declared otherwise by a court. *Jewish Hospital, Inc. v. Baptist Health Care System, Inc.*, 902 S.W.2d 844, 848 (Ky. App. 1995). As noted by the Supreme Court of Kentucky,

> Administrative regulations of any kind which have been duly adopted and properly filed have the full effect of law. However, the authority of the agency is limited to a direct implementation of the functions assigned to the agency by the statute. Regulations are valid only as subordinate rules when found to be within the framework of the policy defined by the legislation. It is our responsibility to ascertain the intention of the legislature from the words used in enacting the statute rather than surmising what may have been intended but was not expressed.

*Flying J. Travel Plaza v. Transportation Cabinet, Department of* Highways, 928 S.W.2d 344, 347 (Ky. 1996) (citing *Kentucky Association of Chiropractors, Inc. v. Jefferson County Medical Society, et al.*, Ky., 549 S.W.2d 817 (1977)).

As the *Latonia* court noted, "a police regulation necessarily involves selection, involves the power to permit some and to refuse others, to suffer the act at one time and place, or under certain conditions, and to deny it under all others." *Latonia*, 123 S.W. at 685. Indeed, "[a] police regulation that is not a total prohibition necessarily implies a discretionary selection of the persons by whom, and the times and places when and where, and the conditions upon which, the thing to be regulated, may be done." *Id.* With respect to pari-mutuel wagering on horse racing, "[t]he Legislature has outlawed all racing, save such as is licensed by a board of officers, who shall in advance prescribe the general conditions upon which the license may be obtained." *Id.* at 686.

It is clear that "[t]he Commission is vested with broad powers to regulate thoroughbred racing and prescribe rules and regulations relative to racing." *Jacobs v. State Racing Commission*, 562 S.W.2d 641, 643 (Ky. App. 1978). However, regardless of the scope of the Commission's authority, its powers are nevertheless limited to those set forth in the enabling legislation. Pursuant to KRS Chapter 230, the Commission is authorized to regulate pari-mutuel wagering on horse racing; thus, to be within its statutory authority, any wagering scheme authorized by the Commission – including wagering on historical horse races as set forth in the Draft Regulations – still must involve pari-mutuel wagering on horse races.

Historical Horse Races

The Draft Regulations define an historical horse race as a "horse race that was previously run at a licensed pari-mutuel facility located in the United States and that concluded with official results." Amended 810 KAR 1:001, Section 1(32). If an historical horse race is not a legitimate horse race for the purposes of KRS Chapter 230, our inquiry ends here. Obviously, an historical horse race is not a live race, but Chapter 230 does not mandate that pari-mutuel racing may only be conducted on live races. We must "ascertain the intention of the legislature from the words used in enacting the statute rather than surmising what may have been intended but was not expressed." *Flying J Travel Plaza*, 928 S.W.2d at 347. In *Latonia*, Kentucky's highest court noted, with regard to horse racing, that "[r]aces are run mainly for amusement," and that "it is the exhibition of skill, speed, and intelligent courage that attracts the patrons of the race course." *Latonia*, 123 S.W. at 684. Moreover, "it is a well-known fact" that "[a]ttendant upon this sport there

has always been more or less of wagering upon the result of the races." *Id.* These elements are all present in an historical horse race, when the patron is not aware of the outcome of the race, as in the system set forth by the Commission in the proposed regulations. In relevant part:

> (c) Once a person deposits the wagered amount in the terminal offering wagering on an historical horse race, an historical horse race shall be chosen at random;
> (d) Prior to making his or her wager selections, the terminal shall not display any information that would allow the patron to identify the historical race on which he or she is wagering, including the location of the race, the date on which the race was run, the names of the horses in the race, or the names of the jockeys that rode the horses of the race;
> (e) The terminal shall make available true and accurate past performance information on the historical horse race to the patron prior to making his or her wager selections. The information shall be current as of the day the historical race was actually run. The information provided to the patron shall be displayed on the terminal in data or graphical form; and
> (f) After a patron finalizes his or her wager selections, the terminal shall display a video replay of the race, or a portion thereof, and the official results of the race. The identity of the race shall be revealed to the patron after the patron has placed his or her wager.

Amended 810 KAR 1:011, Section 3(7).

Viewing an "historical horse race" as a horse race is not as farcical a leap as the Family Foundation urges. Should an individual miss the opportunity to watch the running of the Kentucky Derby at Churchill Downs, and, instead, watches a tape of the Derby on the evening news, that individual is still watching the Kentucky Derby. He is still watching a horse race, without having traveled through time or interrupted the space-time continuum. Historical horse races are horse races; as long as the integrity of the system is preserved by the concealment of identifying information, and as long as the wagering upon the race is pari-mutuel in nature, the legislative purpose of KRS Chapter 230 is not frustrated.

Pari-Mutuel Wagering in Kentucky

"Pari-mutuel wagering" is not a term that is defined by the governing statutes.[4] "'A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Hall v. Hospitality Resources, Inc.* 276 S.W.3d 775, 784 (Ky. 2008) (quoting *United States v. Plavcak,* 411 F.3d 655, 660 (6th Cir. 2005) (*citing Perrin v. United States,* 444 U.S. 37, 42 (1979))). The federal Interstate Horse Racing Act, 15 U.S.C. §3001 *et seq.*, which regulates interstate commerce with respect to wagering on horse racing, defines "pari-mutuel" as "any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the participants are wagering with each other and not against the operator." 15 U.S.C. §3002(13). The Association of Racing Commissioners International, which promulgates model rules for racing commissions, defines "pari-mutuel wagering" as "a form of wagering on the outcome of an event in which all wagers are pooled and held by an [sic] pari-mutuel pool host for distribution of the total amount, less the deductions authorized by law, to holders of tickets on the winning contestants." ARCI Model Rules-004-007(M).

Federal law and industry usage are illustrative, but the history of pari-mutuel wagering in the Commonwealth is unique, in that it is intertwined with the significant

[4] In its brief, the Family Foundation argues that the definition of "mutuel" found in KRS 528.010(6) applies and, thus, pari-mutuel wagering must involve wagering on a *future* event, precluding pari-mutuel wagering on previously-run races. However, that statutory definition expressly applies only to a form of lottery or the "numbers game," and is therefore inapplicable here.

role the horse industry has played in this state. Thus, our inquiry necessarily must focus on pari-mutuel wagering as it has been interpreted in the Commonwealth.[5]

The Attorney General set forth a brief and useful history of pari-mutuel wagering in the January 5, 2010 AG Opinion:

> The pari-mutuel wagering system was first developed in France during the 1840s.[6] Loosely translated, pari-mutuel means "to wager between ourselves."[7] Under a pari-mutuel wagering system, "participants bet among themselves, and the winners divide the money wagered in proportion to their individual bets."[8] Pari-mutuel wagering was first introduced in Kentucky and eventually spread to other states.[9]
>
> Because "horseracing uses the pari-mutuel system in which bettors wager against one another instead of against the 'house'," it is unlike other forms of gambling.[10] Generally, "[o]f the total amount wagered on a particular race, approximately 80% is returned to winning bettor. The other 20%, called the "takeout," is shared between the state government, the racetrack and the horsemen who race at the track."[11]
>
> Under a pari-mutuel wagering system, participants are given "access to information about the race, including the odds of a horse winning."[12] The odds are posted prior to betting and provide a "forecast of how it is believed the betting will go in a particular race."[13] As bettors begin to place their wagers against each other, the odds begin to fluctuate.[14] These fluctuations "are displayed on the tote board, and convey information about how others are betting on the race and how those bets will affect payout on a winning ticket."[15] Bettors also have access to racing programs which "provide fans with extensive information

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[5] Or, as Kentucky's highest court has held, "whatever may be the rule in other jurisdictions, we are bound by our own decisions and history upon the subject." *Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987, 994 (Ky. 1931).
[6] *Let's Not "Spit the Bit" in the Defense of "The Law of the Horse:" The Historical and Legal Development of American Thoroughbred Racing*, 14 Marq. Sports L. Rev. 473, 496 (2004).
[7] *Id. citing* Fred S. Buck, *Horse Race Betting: A Comprehensive Account of Pari-Mutuel and Bookmaking Operations* 3 (1971).
[8] *Id.*
[9] *Id.*
[10] Hearing on Financial Aspects of Internet Gaming: Good Gamble or Bad Bet? Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs., 107th Cong. 192 (2001) (statement of Gregory C. Avioli, Deputy Comm'r and Chief Operating Officer, National Thoroughbred Racing Association).
[11] *Id.*
[12] *And They're Off: The Legality of Interstate Pari-Mutuel Wagering and Its Impact on the Thoroughbred Horse Industry*, 89 Ky. L.J. 711, 716 (2001).
[13] *Id.*
[14] *Id.*
[15] *Id.*

> about a given horse's past performance, any medication the horse will take before the race, the weight of the jockey, and the pedigree of the horse."[16]

Ky. OAG 10-001 at 2-3.

In *State Racing Commission v. Latonia Agricultural Association*, *supra*, the court distinguished between the prohibited form of betting by "bookmaking" and the permissible "Paris Mutual" system, in which bettors wagered against themselves. *Latonia*, 123 S.W at 687. In *Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987 (Ky. 1931), Kentucky's highest court further examined the history of pari-mutuel wagering in the Commonwealth, as interpreted by Kentucky's courts, and noted that:

> In French pool, the operator of the machine does not bet at all. He merely conducts a game, which is played by the use of a certain machine, the effect of which is that all who buy pools on a given race bet as among themselves; the wagers of all constituting a pool going to the winner or winners. The operator receives 5 per cent of the wages as his commission. But in selling ordinary pools on horse races the seller does not operate a 'machine or contrivance used in betting.' Neither does he bet on a horse race."

*Kentucky Jockey Club*, 38 S.W.2d at 991.

While the Family Foundation has urged the Court to adopt a five-part test to discern whether a wagering system is pari-mutuel or not, we find Kentucky decisional law, federal law, and industry usage to be more instructive. The Court finds that the essential element of a pari-mutuel wagering system is that the patron does not wager against the Association. Stated differently, the Association must not have a financial interest in the outcome of the bet, beyond the uniform deduction allowed by law. This comports with the legislative policy underlying the enabling statutes, which is to "maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth." KRS 230.215(2).

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[16] *Id.*

In the Draft Regulations, the Commission has prescribed the general conditions with respect to pari-mutuel wagering on historical horse racing as follows:

> "Pari-mutuel wagering," "mutual wagering" or ["]pari-mutuel system of wagering" each means a system or method of wagering approved by the commission in which patrons are wagering among themselves and not against the association and amounts wagered are placed in one or more designated wagering pools and the net pool is returned to the winning patrons."

Amended 810 KAR 1:001(49).

The Court finds that the Commission's interpretation of the term "pari-mutuel" is a permissible one, as it comports with Kentucky precedent, industry usage, and federal law.[17] Such a system avoids the perceived evil of wagering by "bookmaking" identified in *Latonia*, because the association does not wager against the patron. Rather, the patrons are wagering among themselves,[18] and the wagers are placed into pools.[19] To the extent

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[17] To the extent that the term "pari-mutuel," as used in KRS 230.215(1), could be considered ambiguous, under Public *Service Commission of Kentucky v. Commonwealth*, 320 S.W.3d 660, 668 (Ky. 2010), "[i]f a statute is ambiguous, the courts grant deference to any permissible construction of that statute by the administrative agency charged with implementing it." However, the Court does not believe that the term "pari-mutuel wagering," as used in KRS Chapter 230, is ambiguous.

[18] The Family Foundation has argued that wagering on historical horse racing, as set forth in the Regulations, does not involve patrons wagering against each other, because each patron would never bet against another patron in a particular horse race. However, the Court does not believe that the number of patrons wagering on a particular race – whether live or historical – is determinative. Indeed, it is possible, if improbable, that a single patron might be the sole bettor on a live horse race. The singular nature of the bet would not illegitimate it.

[19] The Family Foundation has made much of the nature of the pools in the system of wagering on historical horse racing as set forth in the Regulations. Specifically, it argues that "seed pools" are not true pari-mutuel pools. A seed pool is a separate pool funded through a deduction of a small portion of each patron's wager, which will replenish any depleted pool, so that successful bettors will receive the minimum payout. The Court finds the Petitioners' comparison of seed pools to "minus pools" in traditional horse racing wagering to be illustrative. A minus pool occurs when the wagers in a particular pool are not sufficient to cover payouts from that pool to all successful bettors. In that case, the track must make up the difference from its own funds. Indeed, to the extent that the legislative intent is to preserve the integrity of the wagering system, the seed pool concept, which involves no financial input from the association, is arguably more "pari-mutuel" than the minus pool system. Additionally, pari-mutuel wagering in Kentucky already employs a complex system of pooling bets pursuant to exotic wagers such as the "Pick 6," in which there can occur a "carry-over" of money wagered, if the pool is not completely paid out on a given day. As such, the money paid out from a particular pool does not necessarily come from patrons betting against each other on the same set of races. In sum, the structure of the pooling system is not the determinative factor of a pari-mutuel system.

that any approved system of wagering on historical horse races complies with this definition promulgated by the Commission, it is within its authority. The legislative mandate of integrity is preserved by the anonymity of the system; moreover, the system is pari-mutuel as required by KRS Chapter 230, because the patrons are not wagering against the Racing Association.

## II. The Licensed Operation of Pari-Mutuel Wagering on Historical Horse Races does not Contravene the Statutory Prohibitions on Gambling Found in KRS Chapter 528

Next, Petitioners seek a declaration that the licensed operation of pari-mutuel wagering on historical horse races, as authorized by the Regulations, does not contravene the statutory prohibitions on gambling contained in Chapter 528 of the Kentucky Revised Statutes, because it is an authorized form of pari-mutuel wagering exempted pursuant to KRS 436.480.

Under Chapter 528, illicit gambling devices are prohibited. The Family Foundation urges the Court to view the machines used in pari-mutuel wagering on historical horse racing as "slot machines," and thus as gambling devices prohibited by Chapter 528. However, pursuant to KRS 436.480, the prohibitions found in Chapter 528 "shall not apply to pari-mutuel wagering authorized under the provisions of KRS Chapter 230." Thus, the issue turns not on the appearance or construction of the machine, but on the nature of pari-mutuel wagering. The Court has found that pari-mutuel wagering on historical horse racing, as set forth in the Regulations, is pari-mutuel wagering authorized under the provisions of KRS Chapter 230. Therefore, pari-mutuel wagering on historical

horse racing does not contravene the statutory prohibitions on gambling found in Chapter 520.

**III. The Department's Determination that Revenue Generated by Pari-Mutuel Wagering on Historical Horse Races is Subject to the Pari-Mutuel Tax, as set forth in KRS 138.510, is a Valid and Lawful Exercise of its Statutory Authority**

Finally, Petitioners ask the Court for a declaration that the Department's determination that revenue generated by pari-mutuel wagering on historical horse races is subject to the pari-mutuel tax, as set forth in KRS 138.510, is a valid and lawful exercise of its statutory authority to interpret and enforce the tax laws of the Commonwealth. KRS 138.510 imposes a tax "on all tracks conducting pari-mutuel wagering on live racing under the jurisdiction of the [racing] commission." KRS 138.510(1). This tax is imposed on the "daily average live handle," which is:

> the total amount wagered at a track on live racing and does not include money wagered:
> (a) At a receiving track;
> (b) At a simulcast facility;
> (c) On telephone account wagering;
> (d) Through advance deposit account wagering; or
> (e) At a track participating as a receiving track or simulcast facility displaying simulcasts and conducting interstate wagering as permitted by KRS 230.3771and 230.3773[.]

KRS 138.511(3). The Department argues that the phrase "wagered at a track on live racing," as used in KRS 138.511(3) to define daily average live handle, must be given a broad interpretation to include all forms of pari-mutuel wagering at a track, unless expressly excepted from the definition by statute. The Court is not wholly convinced by this argument, as it assumes more than it proves. "Under basic principles of statutory

construction, we assume that the '[legislature] meant exactly what it said, and said exactly what it meant.'" *Alliance for Kentucky's Future, Inc. v. Environmental and Public Protection Cabinet*, 310 S.W.3d 681, 690 (Ky. App. 2008) (quoting *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky.2005) (internal citations omitted). "'Consequently, the intention of the administrative agency is found in the words used in the regulation and not from surmising an intention that is not expressed.'" *Id.* (quoting *Flying J Travel Plaza*, 928 S.W.2d at 347 (internal citations omitted)).

However, it is clear from the statutory provisions quoted above that the Legislature intended to tax *pari-mutuel wagering* on *live* racing. The Court agrees with the Department that, from the perspective of the patron betting on an historical horse race, an historical horse race is "live," in that the patron does not know the outcome of the race in advance. The patron is wagering on a contingent outcome. Moreover, statutes "must be read as a whole and in context with other parts of the law." *Hall*, 276 S.W.3d at 784. The Department of Revenue has acted reasonably, and within its discretion, in applying the pari-mutuel tax to pari-mutuel wagering on historical horse racing, which has been approved by the Commission in the Draft Regulations.

**WHEREFORE**, the Court **GRANTS** the Petition and declares as follows:

1) The Draft Regulations are a valid and lawful exercise of the Commission's statutory authority to regulate pari-mutuel wagering on horse racing.
2) The licensed operation of pari-mutuel wagering on historical horse races does not contravene statutory prohibitions on gambling found in KRS Chapter 528.

3) The Department's determination that revenue generated by pari-mutuel wagering on historical horse races is subject to the pari-mutuel tax, as set forth in KRS 138.510, is a valid and lawful exercise of its statutory authority.

This order is final and appealable and there is no just cause for delay.

**SO ORDERED**, this 29th day of December, 2010.

**THOMAS D. WINGATE**
**Judge, Franklin Circuit Court**

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this 29th day of December, 2010, to the following:

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