SUPREME COURT OF KENTUCKY
2018-SC-000630-TG

THE FAMILY TRUST FOUNDATION OF KENTUCKY, INC., D/B/A THE FAMILY FOUNDATION,

APPELLANT,

ON TRANSFER FROM
KENTUCKY COURT OF APPEALS
NO. 2018-CA-001689

ON APPEAL FROM
FRANKLIN CIRCUIT COURT
CASE NO. 10-CI-01154
HONORABLE THOMAS D. WINGATE

VS.

THE KENTUCKY HORSE RACING COMMISSION;
THE KENTUCKY DEPARTMENT OF REVENUE;
APPALACHIAN RACING, LLC;
CHURCHILL DOWNS INCORPORATED;
ELLIS PARK RACE COURSE, INC.;
KEENELAND ASSOCIATION, INC.;
KENTUCKY DOWNS, LLC;
LEXINGTON TROTS BREEDERS ASSOCIATION, LLC;
PLAYERS BLUEGRASS DOWNS, INC., AND
TURFWAY PARK, LLC,

APPELLEES.

BRIEF OF APPELLANT, THE FAMILY TRUST FOUNDATION OF KENTUCKY, INC., D/B/A THE FAMILY FOUNDATION

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[REQUIRED CERTIFICATES ARE ON BACK OF FRONT COVER]

CERTIFICATES REQUIRED BY CR 76.12(6), ANN (c)

I do hereby certify that copies of the foregoing were mailed by depositing same in the United States Mail, first class, postage prepaid, addressed to the following: Carmine G. Iaccarino, Esq., Office of Legal Services, Kentucky Public Protection Cabinet, 656 Chamberlin Avenue, Suite B, Frankfort, KY 40601, Carmine G. Iaccarino, Esq., Public Protection Cabinet, 500 Mero Street, 5th Floor, Frankfort, KY 40601, John Forgy, Esq., Kentucky Horse Racing Commission, 4063 Ironworks Parkway, Building B, Lexington, KY 40511, Richard W. Bertelson, III, Esq., Office of Legal Services for Revenue, P.O. Box 423, Frankfort, KY 40602-0423, Jay E. Ingle, Esq., William A. Hoskins, Esq., Christopher P. Hoskins, Esq., Jackson Kelly, PLLC, 175 East Main Street, Suite 500, Lexington, KY 40507, William M. Lear, Jr., Esq., Shannon Bishop Arvin, Esq., Stoll Keenon Ogden, PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507-1801, Samuel D. Hinkle, IV, Esq., Brad S. Keeton, Esq., Stoll Keenon Ogden, PLLC, 200 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202-2828, Sheryl G. Snyder, Esq., Jason Renzelmann, Esq., Frost Brown Todd, LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202, Hon. Thomas Wingate, Circuit Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601, Amy Feldman, Circuit Clerk, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601, Samuel P. Gaveris, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, on this the 6th day of September 2019.

The undersigned further certifies that the record on appeal was not checked out from the Franklin Circuit Clerk's Office.

Stanton L. Cave, Esq.
Counsel for Appellant, The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation

STATEMENT CONCERNING ORAL ARGUMENT

By Order of this Court, entered June 13, 2019, the Court instructed that the case "shall subsequently be set for oral argument." The appellant believes it will be helpful to the Court.

STATEMENT OF POINTS AND AUTHORITIES

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

I. INTRODUCTION

A. One Appellant. The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation (the "Foundation"), is the appellant in this appeal. The Foundation is a non-profit educational organization which advocates for Kentucky Families. The Foundation has a long history of opposing expanded gaming in Kentucky. The Foundation did not bring this action, but when the appellees failed to name any defendants/respondents at the time they filed the action, the Foundation sought and was granted permission to intervene as a party-respondent.

B. Ten Appellees. The appellees are the Kentucky Horse Racing Commission (the "Commission"), the Kentucky Department of Revenue and Kentucky's eight racetrack associations, Appalachian Racing, LLC, Churchill Downs Incorporated ("Churchill"), Ellis Park Race Course, Inc. ("Ellis Park"), Keeneland Association, Inc., Kentucky Downs, LLC ("Kentucky Downs"), Lexington Trots Breeders Associations, LLC, Players Bluegrass Downs, Inc., and Turfway Park, LLC (collectively, the "Appellees"). The eight racetrack associations may be referred to herein as the "Racetrack-Appellees".

C. Second Time Before The Court. This is the second time this case will be before this Honorable Court. This dispute is about the legality of "historical horse racing" -- a slot gaming system which the proponents claim is pari-mutuel wagering on horse racing. The Appellees represented that they brought this case to obtain determinations that the gaming was lawful *before* operating the gaming systems. Notwithstanding that, the gaming has been in operation eight of the nine years this case has been pending. The first

review by this Court resulted in an Opinion which, among other things, unanimously reversed the Franklin Circuit Court's declaration that the operation of historical horse racing was pari-mutuel wagering on horse racing due to the absence of an evidentiary record resulting from the trial court having barred all discovery. This Court's first opinion was styled, *Appalachian Racing, LLC, et al., v. The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation*, 423 S.W.3d 726 (Ky. 2014) (hereinafter "*App. Racing*, p. ___"). On October 24, 2018, the Franklin Circuit Court entered another equally erroneous Opinion and Order which disregarded the law of the case, redefined pari-mutuel wagering and declared a form of slot gaming to be pari-mutuel wagering. October 24, 2018 Opinion and Order, Franklin Circuit Court Record at Volume XXIV, pp. 3557-3558, (hereinafter "R. at V. __, p. __"). A copy is attached hereto as **Exhibit A** (the "2018 Opinion and Order"). The Foundation appealed and moved to transfer. By Order, entered June 13, 2019, this Court granted the motion to transfer from the Court of Appeals. There was no cross-appeal.

II. PROCEDURAL BACKGROUND

A. The "Agreed Case". In an attempted end-run around the General Assembly, on July 20, 2010, the Commission adopted new regulations purporting to authorize a new form of electronic slot gaming, known as historical horse racing (sometimes "HHR"). On the same day, the Appellees filed an "agreed case" under KRS 418.020, in the Franklin Circuit Court seeking declarations that:

> 1. The Commission's adoption of new regulations to license the operation of pari-mutuel wagering on historical horse racing was a valid and lawful exercise of the Commission's statutory authority under KRS Chapter 230;
>
> 2. The licensed operation of pari-mutuel wagering on historical horseraces pursuant to the new regulations did not violate the prohibitions of KRS Chapter

528 because the gaming system fit within the pari-mutuel wagering exemption of KRS 436.480.

App. Racing, p. 731, R. at V (Previously Certified Case History) 1, p. 5.[1] Referenced as Exhibit B and attached to the Joint Petition was an Opinion of the Kentucky Attorney General, OAG 10-001, January 5, 2010 ("Ky. OAG 10-001"). The Appellees alleged no facts upon which their second question depended as required by KRS 418.020 and named no respondents or defendants to their agreed case. According to the Appellees, if HHR gaming was pari-mutuel wagering on horse racing which was authorized by KRS Chapter 230, the wagering would be exempt by KRS 436.480 from the gambling prohibitions of KRS Chapter 528. To answer their first question, the Appellees had to secure a *facial* determination that the new regulations concerning HHR were within the statutory authority of the Commission in KRS Chapter 230. To answer their second question, the Appellees had to secure an *as applied* determination that the *actual* operation of HHR was within the scope of the new regulations and the statutory authority of the Commission. Notwithstanding the absence of an evidentiary record about how HHR actually worked, by Opinion and Order, entered December 29, 2010, the Franklin Circuit Court found that the new HHR regulations were valid *and* that the operation of HHR was pari-mutuel wagering on horse racing. Opinion and Order, entered December 29, 2010, R. at V. VI (Previously Certified Case History), pp. 793-810. A copy is attached hereto as **Exhibit B** (the "2010 Opinion and Order").

[1]The Appellees also sought a declaration that wagering on HHR was subject to the Department of Revenue's statutory authority to levy excise taxes under KRS 138.510. The Court answered that question in the negative. *App Racing*, p. 741.

B. The First Appeal. From the 2010 Opinion and Order, the Foundation appealed. This Court first denied the Appellees' motion to transfer. The Foundation then sought an injunction in the Kentucky Court of Appeals which was denied by Order, entered October 5, 2011. On June 15, 2012, by Opinion Vacating and Remanding, the Kentucky Court of Appeals reversed the Franklin Circuit Court's 2010 Opinion and Order and remanded for discovery. On January 11, 2013, this Court granted the Appellees' motion for discretionary review.

C. Discretionary Review. On February 20, 2014, this Court issued the *App. Racing* Opinion, a copy of which is attached hereto as **Exhibit C**. The *App. Racing* Opinion affirmed in part, reversed in part and remanded in part. If the proposed HHR is pari-mutuel wagering on horse racing as authorized by KRS Chapter 230, the provisions of KRS 436.480 exempt it from the gambling prohibitions in KRS Chapter 528. *App. Racing*, p. 741. While the Commission was directed by KRS 230.361(1) to "promulgate administrative regulations governing and regulating mutuel wagering on horseraces under what is known as the pari-mutuel system of wagering", KRS Chapter 230 did not define the meaning of "pari-mutuel system of wagering". This required the Court: (1) to ascertain the commonly understood meaning of pari-mutuel wagering on horse racing as used in KRS Chapter 230, (2) to determine if the Commission's newly adopted regulatory definition of "pari-mutuel wagering" was within the scope of that statutory authority in KRS Chapter 230, and (3) to determine if the actual operation of HHR gaming was within the scope of the statutory authority of the Commission and the new regulatory definition of pari-mutuel wagering.

1. *Facial* determinations. The Court could answer the first question about the *facial* validity of the regulatory definition of pari-mutuel wagering as matters of law. The Court emphasized that:

> [P]ursuant to KRS 230.215 and KRS 230.361(1), any wagering on horse racing in Kentucky must be based on a pari-mutuel system. In other words, the Commission has no authority to license an operation for wagering on horse racing that is not utilizing a form of pari-mutuel wagering.

App. Racing, p. 731. The *App. Racing* Court then ascertained the commonly understood meaning of pari-mutuel wagering as used in the statute from the "conception of the pari-mutuel wagering" described in the federal Interstate Horseracing Act, 15 U.S.C. § 3001, *et seq.* (the "Horseracing Act"), and in *Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987, 991 (Ky. 1931)(hereinafter "*Ky. Jockey Club*"). *App. Racing*, p. 737. The Horseracing Act described pari-mutuel wagering as:

> [A]ny 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). *Ky. Jockey Club* described "French pool" or "Paris mutual" as:

> 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 percent of the wagers as his commission. But in selling ordinary pools on horseraces the seller does not operate a 'machine or contrivance used in betting.' Neither does he bet on a horserace.

The *App. Racing* Court next had to determine if the Commission's regulatory definition of pari-mutuel wagering was within the statutory authority of the Commission in KRS Chapter 230, inclusive of the conception of pari-mutuel wagering in the Horseracing Act

and *Ky. Jockey Club*. The Commission's regulatory definition of "pari-mutuel wagering" in 810 KAR 1:001, Section 1(48), was as follows:[2]

> "Pari-mutuel wagering," "mutuel 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.

(hereinafter the "Regulatory Definition"). The Regulatory Definition's inclusion of the requirements that wagering be "wagering among themselves" with all wagers being "placed in wagering pools" contemplates the type of pari-mutuel wagering consistent with the Horseracing Act and *Ky. Jockey Club*, as well as that described in the Kentucky OAG 10-001 whereby players "participate directly in setting the odds for any given race". Kentucky OAG 10-001, p. 9. A copy of the Ky. OAG 10-001 is attached as **Exhibit D**. The Regulatory Definition was essentially a paraphrase of the conception of pari-mutuel wagering described in the Horseracing Act and *Ky. Jockey Club* which the *App. Racing* Court used to ascertain the statutory scope of the Commission's authority under KRS Chapter 230. Based on that, the Regulatory Definition of pari-mutuel wagering was *facially* valid as a matter of law. *App. Racing,* p. 737-38.

2. *As applied* determinations. The Court could not answer the third question concerning *application* of the statutory and regulatory definitions of pari-mutuel wagering to the *actual* operations of the HHR gaming "contemplated by [the Appellees]" without an evidentiary record. *App. Racing* 737. Questions about the "methodology of the

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[2]The definition of pari-mutuel wagering also appears in 811 KAR 1:005, Section 1(64) and 811 KAR 1:010, Section 1(58). Effective May 31, 2019, the Commission revised its regulations. The definition of "pari-mutuel wagering" now appears is other places, such as in 810 KAR 2:001, Section 1 (40), 810 KAR 3:001, Section 1(28), 810 KAR 4:001, Section 1(43), 810 KAR 5:001, Section 1(47), The definition is the same.

wagering", how "pay-outs at the specific terminals" were calculated and how the gaming worked had to be supported by an evidentiary record. *App. Racing*, pp. 737, 741-42. The *App. Racing* Court thus remanded for discovery and the development of evidence about the gaming contemplated by the Appellees:

> But as the Court of Appeals understood, whether the "operation" of historical horserace wagering in the form of the pay-outs at the specific terminals under review, pursuant to a license issued by the Commission actually "is" an authorized form of pari-mutuel wagering is a question of fact that cannot fairly be answered in the abstract. To answer the question posed by Appellants in a way that "eliminates or minimizes" the risk of prosecution, one must examine the methodology of wagering they would undertake to determine if it is actually pari-mutuel in form.
>
> We agree with the Court of Appeals that the Foundation, as an intervening Respondent in the trial court action, had the right to develop the evidence required to determine if the operation of historical horserace wagering as contemplated by Appellants conforms to the requirements of KRS Chapter 230 and KRS 436.480 for pari-mutuel wagering, so as to exempt such wagering from the prohibitions of KRS 528. We therefore affirm the Court of Appeals, insofar as it reversed this aspect of the trial court's judgment.

App. Racing, p. 742.

D. Four Historical Horse Racing Slot Gaming Systems. To date, the Commission has approved four variations of historical horse racing slot gaming systems. The first was the Instant Racing gaming system ("Instant Racing"). Instant Racing began operations in September 2011 in Kentucky and was in operation at Kentucky Downs, Ellis Park and at Lexington Trots Breeders Association, LLC, d/b/a The Red Mile. Even though the Appellees alleged that they were seeking a determination of legality *before* operating the gaming systems, the Appellees had been operating Instant Racing for over two years when this case was first before the Court in 2013. *App. Racing*, p. 741. On April 25, 2018, the Appellees filed a notice representing that as of April 12, 2018, Instant Racing was no longer in operation in Kentucky. R. V. XXIV, pp. 3488-3490. The second system is the

Exacta Gaming System, f/k/a the Encore Gaming System ("Exacta Gaming"), which is in operation at Ellis Park and Kentucky Downs. Exacta Gaming was approved by the Commission on March 23, 2015. 2018 Opinion and Order, Findings of Fact ¶ 17, p. 9, R. at V. XXIV, p. 3565. The third gaming system is the PariMAX Gaming System ("PariMAX") which was approved by the Commission in November 2016 and is in operation at the Red Mile. The fourth system is the Ainsworth Gaming System ("Ainsworth") which is in operation at Churchill's Derby City Gaming facility in Louisville, Kentucky.

E. Evidence Offered On Exacta Gaming Only. Despite four HHR systems being approved by the Commission from 2011 to the present, evidence was presented by the Appellees only on Exacta Gaming. To accomplish this, Kentucky Downs and Ellis Park moved for a trial on Exacta Gaming only. Kentucky Downs and Ellis Park Motion for Pre-Trial Conference on Exacta, June 26, 2017, R. at V. XXI, pp. 3035-3036. Even though Churchill was a party and had sought a declaration that the operation of HHR was lawful, Churchill declined to offer any evidence about the gaming systems it intended to operate. In fact, even though remaining a party, Churchill sought to be excused from presenting proof. The Foundation opposed the limitation to Exacta Gaming. Foundation Objection to Motion for Trial Date, July 22, 2017, R. at V. XXI, pp. 3043-3050. Such was contrary to the *App. Racing* Court's directions on remand: "[T]o determine if the operation of historical horserace wagering as contemplated by [the Appellees] conforms to the requirements of KRS Chapter 230 and KRS 436.480 . . . ." *App. Racing*, p. 742. Regardless, the Franklin Circuit Court again eliminated an evidentiary record and granted Churchill's request not to offer any evidence on the gaming it contemplated. Order, entered July 28, 2017, R. at V.

XXI, pp. 3056-3058; and Order, entered August 24, 2017, R. at V. XXI, pp. 3147-3149. No evidence was presented by any Appellee on PariMAX. Thus, based on the "iron rule, universally recognized" "however erroneous" law of the case doctrine, set forth in *Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747, 751 (Ky. App. 2007), when the 2018 Opinion and Order was made final and appealable with no just cause for delay, the Appellees had offered insufficient proof the Exacta Gaming was pari-mutuel and no proof that Instant Racing, PariMAX and Ainsworth were pari-mutuel wagering.[3]

III. EXACTA GAMING

On January 8, 2018, through January 11, 2018, a bench trial was conducted on whether Exacta Gaming was pari-mutuel wagering. The Franklin Circuit Court dispensed with opening statements and closing arguments at trial. To help this Court conceptualize the nature of the slot gaming before it, an excerpt of a video of Exacta Gaming in operation at Kentucky Downs which was introduced at trial is attached hereto as **Exhibit E.** The devices on which the gaming is played are virtually indistinguishable in appearance from slot machines. Video Exacta Gaming, Foundation Trial Exhibit D-16, R. at V. Exhibit Binder IV, p. (Attached manila envelope D-16). Even the trial court acknowledged that Exacta Gaming HHR presents as slot gaming. 2018 Opinion and Order, p. 7, R. at V. XXIV, p. 3563.

[3]The Franklin Circuit Court also *sua sponte* converted the Appellees' case from an agreed case under KRS 418.020, to a case for declaratory judgment under KRS 418.040. Perhaps this was done in recognition that an agreed case under KRS 418.020 may not immunize the Appellees from criminal liability. *App. Racing*, fn 7. The Franklin Circuit Court denied the Foundation's request for a jury trial. Order, entered, July 28, 2017, R. at V. XXI, p. 3056-3058.

Because numbers used in Exacta Gaming are allegedly derived from previously run horseraces, the gaming system is generically known as "historical horse racing". Operators use slot gaming game themes with names like "Triple Cherry Pop", "Aloha Tiki Bar", "In Ra We Trust", "Angels Gate", "Devil's Gate", etc. Commission's Supplemental Expert Disclosures, Gaming Laboratories International Expert/Forensic Report, prepared by Richard LaBrocca, dated March 2, 2016, pp. 36-41; R. at V. XVIII, p. 2647-2651; JP Trial Exhibit 11, Exhibit Binder I, a copy of which is attached as **Exhibit F** ("LaBrocca Report, p. ___").[4]

Money is inserted. A bet is placed. Spinning wheels, lights and sounds sensitize each player. Video Exacta Gaming, Foundation Trial Exhibit D-16, R. at V. Exhibit Binder IV, p. (attached manila folder D-16). After a discrete player places a discrete wager, "three races are chosen at random from a database of historical races." LaBrocca Report, p. 35, R. at V. XVIII, p. 2646: JP Trial Exhibit 11, Exhibit Binder I. Each discrete wager is placed in a carryover pool of losses (like lotteries and jackpots). Foundation Trial Exhibit D-4, Encore Gaming Race Database Overview, Parimutuel Pool Overview, May 15, 2014), R. at V. Exhibit Binder III, p. KHRC 009112-009117, ("Encore Overview p.__"). "All Encore Games utilize a single game outcome methodology. Historical horserace results and predictions regarding the finishing order made by the player are used as the determining factor in the outcome of a player's wager." LaBrocca Report, p. 34, R. at V. XVIII p. 2645, JP Exhibit 11, Exhibit Binder I. "After the order of finish is selected by the patron, three cartoon like replays of the finish of the races are displayed on the terminal. (Labrocca, Day 1, 10:50:21-10:50:36: 'What the player will see at that point is three

[4]"Race Tech" is also known as "Instant Racing" in the LaBrocca Report.

displays of the finishing of those three races, so you will be able to see horses cross the line in the order they cross the line with the proper sequencing of distance and finish order'; JP Exhibit 2, p. 6)". 2018 Opinion and Order, Findings of Fact, ¶ 66, p. 15, R. at V. XXIV, p. 3571. Discrete players wager on the discrete outcome represented by numbers generated from a data-library of three randomly selected previously run 10-horse horseraces. LaBrocca Report, p. 35, R. at V. XVIII p. 2646; JP Trial Exhibit 11, Exhibit Binder I. In Exacta Gaming this is referred to as the "triple race method". LaBrocca Report, p. 34, R. at V. XVIII p. 2645; JP Trial Exhibit 11, Exhibit Binder I.

Importantly, according to Appellees' witness, Robert F. "Skip" Lannert, no two players are ever wagering on the same uncertain event:

> Mr. Cave: Once the device randomly selects those previously three previously run races, is any other patron or wagerer wagering on that same group of 3 races?
>
> Mr. Lannert: Not that I'm aware.
>
> Mr. Cave: Do you know of any circumstance whereby two patrons would be wagering on that randomly selected three previously run races?
>
> Mr. Lannert: Theoretically, it's possible but I think it's . . . um . . . next to . . . next to impossible. In theory, it could happen – but it's very unlikely.

(VR No. 1: 01/11/18; 10:16:00-10:16:40). Appellees' witness, Richard LaBrocca, testified that *mutuel*, i.e., reciprocal, wagering does not exist because it is not required:

> Mr. Cave: So, is it your testimony that players can be placing wagers that have nothing to do with another player's prize or outcome of another player's prize and those players would be wagering among themselves simply because their wager goes into a pool with another player's losses?
>
> Mr. LaBrocca: That's correct. Nothing states - states - that it has to be - nothing defines 'amongst' in these rules and nothing states that one player can't influence another without reciprocal influence.
>
> Mr. Cave: What's the last thing you said? Without what kind of influence?

Mr. LaBrocca: Reciprocal.

Mr. Cave: OK. Let me hear that answer again, please.

Mr. LaBrocca: Nothing in these requirements states that one player -- nothing in these requirements states that one player has to make an impact on another without reciprocal - reciprocal influence from the player being affected by the first one.

Mr. Cave: So, is it - is it your testimony that to be in pari-mutuel wagering, there is no reciprocal influence required?

Mr. LaBrocca: No, I'm saying that there is no requirement for that. To be pari-mutuel wagering, there are other requirements, that is not the sole, sole item. So, what I'm saying is that there's nothing that states that "amongst" has to be influenced any player, all players, every player - it just simply says "among" the players.

Mr. Cave: Let me ask my question a little better. It is your testimony here today that patrons to be wagering among themselves, a reciprocal influence is not required.

Mr. LaBrocca: That's correct. Since we are so fond of hypotheticals, if we had your example for Monday, Tuesday, Wednesday and on Wednesday only one player placed a wager and only one player, for that entire day, was available to win the pool and won the pool, should that condition exist, we basically would be invalidating horse racing in its entirety for every exotic wager that has any type of carryover. If that does not hold true, many of our historic horse racing exotic wagers today would have the same type of problem we are talking about here, I believe, and if that's not the case, these, exotic wagers are tried and true and have been offered for decades.

(VR No. 1: 01/09/18; 11:01:23-11:04:50).

Dr. Robert Molzon was the Foundation's expert witness. Dr. Molzon was a professor of mathematics who taught courses at the University of Kentucky involving mathematical probabilities and statistics, including the use of pari-mutuel wagering as models for risk analysis and predicting outcomes. Dr. Molzon testified voluntarily as an independent expert witness. VR No. 1: 01/11/18; 1:22:00 - 1:33:06; Curriculum Vitae of Dr. Robert Molzon, R. at Exhibit Binder IV (Foundation Trial Exhibit D-17); Report of Dr. Robert Molzon, R. Exhibit Binder IV (Foundation Trial Exhibit D-18). Other than

reimbursement for his travel expenses, Dr. Molzon did not charge for his services. Dr. Molzon testified that the patrons in Exacta Gaming were not pari-mutuel wagering. Dr. Molzon provided insightful testimony with regard to the meaning of "pari-mutuel" and the requirement of reciprocity. To be pari-mutuel wagering, reciprocity among the players must exist:

> Mr. Cave: If you have a system that doesn't have reciprocity among the wagerers, can it be pari-mutuel?
>
> Dr. Molzon: Well, if you go back to the history, the entire history of pari-mutuel wagering, there's always, there is always this type of reciprocity. In fact, one of the things, I don't know if I mentioned this to you, so I lived in France, so I speak a little bit of French. Now, the word pari-mutuel actually comes from the French - I think there is a bit of confusion, confusion about the "P A R I" - some people thought it meant "Paris" - "Paris". "We're in Paris", pari-mutuel - because that is where it originally started but the "pari" actually means "bet" - "to bet" in French is "pari". So - so - and the "mutuel" is reciprocity. So, "mutuel" in French could be translated as reciprocal. So, the entire, the entire history of pari-mutuel wagering does involve this type of reciprocity.
>
> Mr. Cave: Yes. Beautiful. Thank you.
>
> Dr. Molzon: So, it could - just to elaborate a little bit on that, I mean, you could say that "mutuel" is the adjective describing the "pari", the bet - and it could mean a common bet so they are betting on a common occurrence or uncertainty.
>
> Mr. Cave: Would they be wagering amongst themselves?
>
> Dr. Molzon: That's exactly right.
>
> Mr. Cave: OK. So, they are wagering among themselves.
>
> Dr. Molzon: I mean that's - I mean those words - the wagering among themselves . . . those are common words that are used in probability courses, risk analysis courses, they are commonly used words, people commonly use - I wouldn't have to explain what they meant to my students except for the Chinese students who have very poor knowledge of English, and then I'd have to explain it to them. (VR No. 1: 01/11/18; 2:24:30-2:27:12).

Richard LaBrocca's testimony confirmed that reciprocity does not exist in Exacta Gaming. He testified that no current or future player has any effect on any previous player's

play. (VR No. 1: 01/09/18; 10:58:04–11:05:12). Mr. LaBrocca explained that he is unaware that mutual wagering (reciprocity) was ever required. It was not clear from the trial whether the Commission was relying on Mr. LaBrocca or if Mr. LaBrocca was relying on the Commission in trying to say that Exacta Gaming was pari-mutuel wagering. Mr. LaBrocca explained that if the Commission approves it, the wagering is pari-mutuel:

> Mr. LaBrocca: I do, but please understand that wagering is defined in each of those statements. The wagering that has been approved by the commission defines what the wager is… so, because the way this is constructed, the rules of the game, "the wager" is… the answers I'm giving have to relate to how Encore has set the 3 horserace method of wagering up, so, what I'm trying to explain is, these are pari-mutuel because the definition of wager is fluid to the types of wagers the Racing Commission can approve. You know, the "win" being the simplest example and all of the various flavors of exotic wagers that could potentially be, all fall under pari-mutuel wagering because Encore has gotten their wager approved. That is the context which I am viewing pari-mutuel wagering for the sake of this discussion.
>
> Mr. Cave: I'm sorry but I didn't understand a thing you said except you believe the Commission has the authority to approve any kind of wager it chooses.
>
> Mr. LaBrocca: I do not know exactly what the authority - how far the authority goes for the Commission – but the Commission has the authority to approve exotic wagers. I don't know where those boundaries are and, in this case, the Commission has approved the Encore/Exacta 3 race method and the math models of exotic wagers. Since pari-mutuel wagering is using the word wager, I'm assuming that when you're asking the questions about how wagers work or pari-mutuel wagering we're talking about what the Commission has approved. (VR No. 1: 01/08/18; 2:49:15-2:51:08).

Although Mr. LaBrocca declined to be specific at trial, the LaBrocca Report shows what he means by his legal opinion that the Commission can approve whatever it chooses. In Exacta Gaming, fixed, predetermined mathematical formulas are used in place of pari-mutuel payout odds[5] to determine the amount of prizes. LaBrocca Report, p. 35-36, R. at

[5]In pari-mutuel wagering, payout odds are set by the players themselves. Ky. OAG, p. 9. Attached hereto as **Exhibit D**. R. at V. I (Previously Certified Case History), p. 1-150 and

V. XVIII, p. 2646-2647, JP Trial Exhibit 11, Exhibit Binder I. Determination of each discrete prize, if any, to be paid from carried over losses, is a function of a string of binary numbers, converted to decimal, overlaid on a pay table, which determines the prize amount, if any, to be paid from a pool of carried over losses. The string of binary numbers is based on the number of correct guesses. The digit "1" represents a correct guess. The digit "0" represents an incorrect guess. The Exacta Gaming "triple race" methodology was described in the LaBrocca Report as follows:

> A 'pattern' is then generated based on the number and position of each correct and incorrect selection made by the [discrete] player. Patterns are based on each available selection in the 3-column, 10-row grid, where each column represents the race and each row represents the position of the horse, for example:

Position	Race 1	Race 2	Race 3
1st	1	0	0
2nd	0	0	1
3rd	1	1	0
4th	1	1	1
5th	0	0	0
6th	0	0	0
7th	0	1	0
8th	1	0	1
9th	0	0	0
10th	0	0	1

> A thirty digit binary number will represent each possible game outcome. With this thirty digit binary number, if the most significant bit (leftmost digit) is 1, the player correctly picked the first place finisher in the first race and if it is 0 they did not. The second to the leftmost digit represents the player's pick for the first place winner of the second race, the third to the leftmost digit represents the player's pick of the first place winner of the third race, and so on. This generates the following pattern based on the example above:
>
> 100 001 110 111 000 000 010 101 000 001

R. at V. II (Previously Certified Case History), pp. 151-192 (Referenced in the Joint Petition as Exhibit B, but labeled as Exhibit A thereto).

. . .

> This thirty digit number is then converted to decimal and is referred to as the Pattern ID. In the example given above, the binary number is converted to 568,067,393 in decimal. Ranges of Pattern IDs are assigned to prizes for each math model. For example, a Pattern ID of 0 to 300,000,000 may all be assigned to a prize value of zero for a particular game, if the decimal value generated by the thirty-digit binary pattern falls within this defined range, the player is awarded a prize of zero units. Each Math Definition File contains a range of all available prizes which the Pattern ID is validated against in order to determine the credit prize.

LaBrocca Report, pp. 35-36, R. at V. XVIII, pp. 2646-2647, JP Exhibit 11, Exhibit Binder I. None of the trial exhibits showed a winning prize if the first-place horse in the first race was not correctly selected. A player who correctly matches 28 out of the 30 positions would win no prize if the first-place horse in the first race was not correctly selected. By contrast a player who correctly matches 2 out of 30 positions would win a prize if the first-place horse in the first race was correctly selected. For example, the correct selection of the first-place finisher in the first race for a total of 16 correct selections results in a binary number of 110 100 110 101 001 111 000 101 100 011 which converts to a decimal number of 886,370,659[6] and a corresponding prize. The incorrect selection of the first-place finisher in the first race and a total of 16 correct selections results in a binary number of 010 100 110 101 001 111 000 101 100 111 which converts to a decimal number of 349,499,751[7] and no prize.

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[6] 2019: http://www.binaryhexconverter.com/binary-to-decimal-converter (last visited July 29, 2019.

[7] 2019: http://www.binaryhexconverter.com/binary-to-decimal-converter (last visited July 29, 2019.

Each Exacta Gaming math model has its own pay table which is created prior to the deployment of the game to the racetrack operators and in no way reflects player wagering opinions. Foundation Trial Exhibit D-13, pp. 12-13, R. at V. Exhibit Binder III. Each pay table identifies the takeout percentage, the total prize pool, the denomination, minimum pay, pool percentage and categories for prize determination. Foundation Trial Exhibits D-7, D-8, D-9, D-10, D-11, D-12, D-14, R. at V. Exhibit Binder III. A winning prize, if any, is that portion of the carried over pool associated with where the decimal number, derived from the binary number, resulting from the number of correct guesses, fits on a predetermined pay table. In other words, in Exacta Gaming, each discrete player is betting against the Exacta Gaming system hosted by the Racetrack-Appellees on a randomly selected discrete event instead of mutually against other players on the same uncertain events.

The pool of losses will grow as discrete wagers are lost. The pool will shrink as prizes are awarded. Encore Overview, pp. 1-5; Foundation Trial Exhibit D-4, R. at V. Exhibit Binder III. Prizes are fixed if the loss pool balance is less than the threshold amount (i.e., seed amount). Foundation Trial Exhibit D-13, p. 3, R. at V. Exhibit Binder III. If the amount of the pool balance (seed value) is below the threshold amount (the initial seed amount) and the decimal number matches a winning prize on the pay table, the player receives a fixed prize[8]. (VR No. 1: 01/10/18; 9:36:45-9:41:21). If the decimal number matches a winning prize on the pay table and the pool balance is above a threshold amount, the prize is fixed plus an unknown percentage. Mr. LaBrocca testified: "While there may

[8] Reliance on a seed pool deviates from the traditional pari-mutuel wagering system. (Ky. OAG 10-001, p. 9).

be guaranteed minimum prizes, it is not the same as having fixed odds, those odds will change over time." (VR. No. 1: 01/09/18; 3:56:46-3:56:52). As can be observed on any tote-board at any racetrack, pari-mutuel payout odds and prizes are variable until the wagering closes just before the horserace is run. This occurs because the mutual wagering on a horserace causes the pay-out odds and the prizes to vary. Mr. LaBrocca testified that in Exacta Gaming, by contrast, fixed prizes are used when the balance in the associated pool falls below a threshold level:

> Mr. Cave: And it's entirely possible that the resulting prize from that scenario will be fixed, right?
>
> Mr. LaBrocca: The prizes will be fixed in nature at any point where the balance in the pool is below the initial seed value, the initial seed value. (VR No. 1: 01/09/18; 3:54:50-3:55:06).[9]

As to the Regulatory Definition's requirement that the "net pool is returned to winning patrons", Mr. LaBrocca says that *"[O]ver time*, the net pool is returned to winning patrons." [Emphasis added]. LaBrocca Report, p. 34, R. at V. XVIII, p. 2645. This nonsensical fiction is at odds with the conception of pari-mutuel wagering. In other words, "over time" (in infinity) losses roll over and are replaced by future discrete lost wagers to fund future discrete prizes. To this end, the Appellees advance yet another nonsensical fiction whereby depositing a discrete wager into a pool of carryover losses from prior unrelated events transforms each discrete player into players who are wagering among each other on the outcome of the same uncertain events. The trial court referred to "pools"

[9]Paragraph ¶ 95 of the Findings of Fact provided that: "The approved version of the Exacta System does not use fixed or static prizes. (LaBrocca, Day 2 3:55:55-3:56:52)". That testimony does not appear in the record at the citation in the Findings of Fact. Indeed, that finding was contradicted by Mr. LaBrocca's testimony.

nineteen times in the 2018 Opinion and Order Findings of Fact but not to a "wagering pool" as required by the Regulatory Definition because there are no wagering pools in Exacta Gaming. For example, the trial court observed:

> [Richard] LaBrocca explained '[w]hen patrons are wagering among themselves into the same pool they are affecting the other wagers who come after them by either increasing the funding of the pool, as every wager is going to do, and at some cases when there is a win, decreasing the number . . . thereby affecting other future players.' (LaBrocca, Day 1, 3:04:08-3:04:33).

2018 Opinion and Order, ¶ 94, Findings of Fact, p. 18, R. at V. XVIII, p.2649. Dr. Molzon, the Foundation's expert witness, brought this to the trial court's attention, to no avail. (VR No. 1: 01/11/18; 4:35:10-4:39:05).

Finally, the 2018 Opinion and Order gives the erroneous impression that the use of "off odds" order of finish is the same as using pari-mutuel payout odds to determine the amount a player will win. 2018 Opinion and Order, Findings of Fact, ¶ 65, p. 14, R. at V. XXIV, p. 3570. Off odds order of finish are vastly different than variable payoff odds used in pari-mutuel wagering. "Off odds" are the final pari-mutuel payoff odds associated with each randomly selected previously run horserace at the time that particular race was run. Foundation Trial Exhibit D-4, p. 8-10, R. at V. Exhibit Binder III; Foundation Trial Exhibit D-13, p. 6, p. KHRC 008551, R. at V. Exhibit Binder III. "Off odds" occurred in the past. They are fixed. They are not established or varied by any player's wagering opinions. Off odds are used to expedite gameplay because they are used to cause the order of finish of each randomly selected race to be ranked automatically from most favored to least favored. Foundation Trial Exhibit D-4, pp. 8-10, R. at V. Exhibit Binder III; Foundation Trial Exhibit D-13 p.6, KHRC 008551, R. at V. Exhibit Binder III. Because off odds represent the most likely order of finish, Exacta Gaming assumes that the players will always accept

the off odds recommendation for the finish order. Foundation Trial Exhibit D-4, p. 12, R. at V. Exhibit Binder III. Off odds are not to be confused with payoff odds. Payoff odds are unnecessary in HHR, because the predetermined mathematical formula does it for them. Without question, from the Appellees' own evidence, Exacta Gaming does not satisfy the requirements of the Regulatory Definition or the statutory conception of pari-mutuel wagering.

By Order, entered January 26, 2018, the Franklin Circuit Court permitted the parties to file proposed findings of fact and conclusions of law and to file "a brief explaining the remand issue set forth in *Appalachian Racing, LLC, et al., v. The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation*, 423 S.W.3d 726 (Ky. 2014)". R. at V. XXIII, p. 3316-3319. The January 26, 2018 Order did not invite trial briefs on the evidence presented and/or the lack of evidence presented, but instead an explanation of the issue on remand. The Foundation tendered a post-trial brief on March 12, 2018, explaining that the issue on remand was compliance with KRS Chapter 230's conception of pari-mutuel wagering and application of the Regulatory Definition in conformity with KRS Chapter 230. R. at V. XXIII p. filed under seal, Included Separately. The trial court disregarded the instruction by this Court on remand, rewrote the definition of pari-mutuel wagering and found that Exacta Gaming met its rewritten definition.

On April 25, 2018, the Appellees filed notices that the Instant Racing slot gaming system was replaced by PariMAX. R. at V. XXIII, p. 3488-3490. The Foundation filed a reply-notice on April 26, 2018 attaching a verified amended complaint by *PARIMAX HOLDING, LLC, v. EXACTA SYSTEMS, LLC, F/K/A ENCORE GAMING, LLC*, Case No. 16CV259J, United States District Court for the District of Wyoming, in which PariMAX

alleges, among other things, in paragraph 1, p. 2 that "The Exacta System and Games have been marketed and sold by Exacta based on the false and misleading representations that: (1) the Exacta Games are strictly pari-mutuel; (2) the Exacta Games do not rely on any random elements to determine the outcome of wagers; and (3) that the Exacta Games are based on a model wager approved by the Association of Racing Commissions International ("ARCI") known as ARCI-04-105T – Pick (n) Position (x). In fact the Exacta System and Games are not strictly pari-mutuel, do rely on random elements, and do not follow the ARCI Pick (n) Position (x) model wager."

IV. ISSUES BEFORE THE COURT

1. Was it error for the trial court not to *apply* commonly understood meanings of words in the Regulatory Definition consistent with the conception of pari-mutuel wagering in KRS Chapter 230 to determine if Exacta Gaming is pari-mutuel wagering? This is a question of law.

2. Was it error to find that comingling of a discrete wager with prior losses was the same as pari-mutuel wagering and the same as placing all wagers in a wagering pool as required by the Regulatory Definition? This is a question of law.

3. Did the Franklin Circuit Court wrongfully defer to the Commission and/or the Commission's Consultant? This is a question of law.

4. Was it error to find the Appellees had carried their burden of proof to comply with the Regulatory Definition with respect to Exacta Gaming when the Franklin Circuit Court judicially changed the Regulatory Definition? This is a question of law.

5. Did the Appellees' fail to carry their burden of proof by not offering any evidence on Instant Racing, PariMAX and Ainsworth gaming systems in the face of this Court's direction that they do so? This is a question of law.

6. Was it error to approve of the Executive Branch invasion of the policy-making duties of the Legislative Branch? This is a question of law.

7. With unclean hands, are the Appellees entitled to equitable relief to allow the unlawful operations to continue? This is a question of law.

V. STANDARD OF REVIEW

The questions of law referred to above are to be reviewed *de novo*. Interpretation of statutes and regulations are matters of law which are reviewed *de novo*. *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998). It has long been the rule in Kentucky that questions of law are reviewed *de novo*. *Owen v. University of Kentucky*, 486 S.W.3d 266, 269 (Ky. 2016); *Schmidt v. Leppert*, 214 S.W.3d 309, 311 (Ky. 2007); *Faust v. Commonwealth*, 142 S.W.3d 89, 96 (Ky. 2004). "Interpretation of a statute is a matter of law." *Commonwealth v. Garnett*, 8 S.W.3d 573, 575 (Ky. App. 1999). "Regulations are valid only as subordinate rules when found to be within the framework of the policy defined by the legislation." *Flying J Travel Plaza v. Commonwealth of Kentucky, Transportation Cabinet*, 928 S.W.2d 344, 347 (Ky. 1996).

ARGUMENT

A. Summary Of Argument. To be lawful, HHR must be pari-mutuel wagering on horse racing. "Pari-mutuel wagering" is a simple concept whereby players bet with/among/against each other on the outcome of an uncertain event. 'Pari" is the French

word for betting on the outcome of an uncertain event. "Pari-" is modified by the French word "mutuel" which means reciprocal. So, "pari-mutuel wagering" is reciprocal wagering on the outcome of an uncertain event. In Kentucky, pari-mutuel wagering is associated with horseraces where multiple players bet with/among/against each other on the outcome of a common horserace, or a common group of horseraces. HHR slot gaming is starkly different. In HHR, a discrete player places a discrete wager on a randomly selected discrete event. No other discrete player is betting on the same discrete randomly selected event. Because of that, a discrete HHR bet is not placed in a "wagering pool" because there is no other bet on that discrete randomly selected event. Because of this, there are no pay-out odds determined by players betting among each other on the same event. Instead, HHR predetermined mathematical formulas to determine prize outcomes.

The *App. Racing* Court used a basketball analogy to determine that a video of a horserace was the same as a horserace. *App. Racing*, p. 737. Furthering that analogy demonstrates that HHR slot gaming is not pari-mutuel wagering. Consider a hypothetical office pool of "historical basketball". On September 15, 2019, one player would bet a dollar to win an office pool on a randomly selected NCAA Basketball Tournament such as the 1986 tournament won by the University of Louisville. On August 10, 2029, a different single player would bet a dollar to win an office pool on a different randomly selected NCAA Basketball Tournament such as the 1978 tournament won by the University of Kentucky. On July 5, 2039, another different single player would bet a dollar to win an office pool on another different randomly selected NCAA Basketball Tournament such as the 2015 tournament won by Duke. No person is betting with/among/against any other person at the same time or on the same randomly selected tournament. The bets in 2029

and 2039 have no effect on the outcome of the person's bet in 2019. The bet in 2039 has no effect on the outcome of the persons' bets in 2019 and 2029. While the player who wins or loses in 2019 may theoretically affect the amount of money lost which may be won two decades later, the reverse is not true for the bets in 2029 and 2039. A won or lost bet in 2029 or 2039 does not affect the amount of money the player in 2019 may win. Each of the bets is discrete and has no reciprocal effect on the other bets either as to amount or odds of winning. In other words, players are not reciprocally betting among each other. Without reciprocity, there is no "mutuel" (or "among themselves"). Without "mutuel" wagering, there is no pari-mutuel wagering. The Appellees and the Franklin Circuit Court created a fiction whereby the comingling of lost bets over an indefinite amount of time magically transforms players betting decades apart on different events into players who are betting among each other on the outcome of the same uncertain event. Under such flawed reasoning, everyone who takes a shower, regardless of when and where must be showering among each other as long as the shower water runs into the same sewer.

B. Material Facts About Exacta Gaming Are Undisputed. The evidence at trial confirmed material dispositive facts about Exacta Gaming. 1. No discrete player is wagering with, among or against any other player on the same event. 2. Prizes are determined by mathematical formulas, predetermined pay tables and not by payoff odds resulting from players wagering with, among or against any other player on the same event. 3. Prizes are not determined by players wagering among each other on the same event. 4. Each discrete wager is comingled with carried over losses instead of a wagering pool. 5. No reciprocity exists among discrete players. 6. Net pools are not paid out to players who

are wagering among themselves on the outcome of an uncertain event. 7. Off odds are not pari-mutuel payoff odds.

C. The Franklin Circuit Court Failed To *Apply* Words In Accordance With Their Commonly Understood Meanings.

As an exception to the general prohibition of gambling in KRS Chapter 528, the Regulatory Definition of pari-mutuel wagering in 810 KAR 1:001, Section 1(48), is precise:

> "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. [Emphasis added].

Because Exacta Gaming did not satisfy the Regulatory Definition, the Franklin Circuit Court changed the requirements to be pari-mutuel wagering, first finding that the gaming only had to satisfy four requirements to be met to be pari-mutuel. The trial court wrote:

> Kentucky's definition of pari-mutuel wagering can thus be broken down into four essential elements:
>
> (1) a system or method of wagering approved by the Commission;
>
> (2) in which patrons are wagering among themselves and not against the Association;
>
> (3) amounts wagered are placed in one or more designated wagering pools; and
>
> (4) the net pool is returned to the winning patrons.

2018 Opinion and Order, p. 6, R. at V. XXIV, p. 3562. In rewriting the requirements, the Franklin Circuit Court ignored one of the requirements and misapplied another. The

Regulatory Definition technically has five separate requirements. To be pari-mutuel wagering, the wagering must be:

(1) a system of wagering approved by the Commission;

(2) *(a) in which patrons are wagering among themselves and*

(b) not against the association;

(3) *amounts wagered are placed in one or more wagering pools*; and

(4) the *net pool is returned to the winning patrons*.

Even though expressed as a finding of fact in the 2018 Opinion and Order, instead of a matter of law, the Franklin Circuit Court found that "Pari-mutuel wagering does not require patrons to wager on the same horseraces, nor does it require reciprocity among patrons, or for a pool to remain open for a specified period of time. *See* 810 KAR 1:001, Section 1 (48)". 2018 Opinion and Order, Findings of Fact, ¶ 92, p. 18, R. at V. XXIV, p. 3574. Yet, under the plain meaning of the words of the Regulatory Definition, it is not enough to find that players are not wagering against the association (i.e., the racetrack) to satisfy the second requirement. Players must also be *wagering among themselves* on an uncertain event. Similarly, the trial court misapplied the requirement that all wagers had to be placed in "wagering pools". The Franklin Circuit Court found the third element was satisfied if each discrete wager was deposited into a nondescript "pool". 2018 Opinion and Order, Findings of Fact, ¶ 92, p. 18, R. at V. XXIV, p. 3574.The act of comingling a discrete wager with prior losses may be pooled betting but not all pooled betting is pari-mutuel wagering. *See e.g.*, Ky. OAG, 10-001 p. 8. Even a lottery uses pools but is not pari-mutuel wagering. *See e.g., Ky. Jockey Club,* 992. Based on the testimony at trial, the "pool" to which the trial court was referring was a loss pool, not a wagering pool. Axiomatic is that

the pool cannot be a wagering pool since no two players are wagering on the same event.[10] For example, describing pools used in Instant Racing, "each individual player places a bet on a different race with different horses with different outcomes from that of all other players placing bets at other Instant Racing machines. Thus, a person who successfully chooses a winning horse never shares a mutuel pool with other bettors simply because there is no one else betting on the same race." Ky. OAG, 10-001, p. 8. This is what occurs in Exacta Gaming.

In doing this, the Franklin Circuit Court disregarded the requirements in (2)(a) that the players be wagering among themselves on an uncertain event and that (3) wagers be placed in "wagering pools". The trial court deferred to the Appellees' witness, Richard LaBrocca, who testified that the Regulatory Definition has whatever meaning the Commission chooses to give it: "The wagering that has been approved by the Commission defines what the wager is -- these are pari-mutuel because the definition of wager is fluid to the types of wagers the Commission can approve." (VR No. 1: 01/08/18; 2:49:15-2:49:55). Although Mr. LaBrocca has a 2-year degree from the DeVry Institute and is not a lawyer, he provided legal opinions concerning the meaning of the Regulatory Definition. The trial court deferred to Mr. LaBrocca:

> Pari-mutuel wagering does not require patrons to wager on the same horseraces, nor does it require reciprocity among patrons, or for a pool to remain open for a specified period of time. *See* 810 KAR 1:001, Section 1(48).

2018 Opinion and Order, Findings of Fact, ¶ 92, p. 18, R. at V. XXIV, p. 3574. This new definition of pari-mutuel wagering was then found to be satisfied because:

[10] 2019 https://www.merriam-webster.com/dictionary/pool (last visited August 4, 2019).

> [Richard] LaBrocca explained '[w]hen patrons are wagering amongst themselves into the same pool they are affecting the other wagers who come after them by either increasing the funding of the pool, as every wager is going to do, and at some cases when there is a win, decreasing the number . . . thereby affecting other future players.' (LaBrocca, Day 1, 3:04:08-3:04:33).

2018 Opinion and Order, Findings of Fact, ¶ 92, p. 18, R. at V. XXIV, p. 3574. This was squarely contrary to the Ky. OAG, 10-001 which provided that "To the extent the success or failure of other bettors may influence the size of payouts of Instant Racing, it cannot occur in the same way in the context of traditional pari-mutuel betting." Ky. OAG, 10-001, p. 9. Nonetheless, based on the trial court's new redefinition of pari-mutuel wagering, the Appellees offered no proof that Exacta Gaming complied with the Regulatory Definition's requirements that players be wagering among themselves on an uncertain event or that amounts wagered be placed in one or more designated wagering pools and that such resulting net pools be paid out to winning patrons. Again, such an application of the Regulatory Definition is contrary to the meaning of the words used and the statutory conception of pari-mutuel wagering in KRS Chapter 230. The Franklin Circuit Court thus erroneously concluded as a matter of law that: "[T]he Exacta System was designed to align with the requirements of 810 KAR 1:001, Section 1(48)." 2018 Opinion and Order, Findings of Fact, ¶ 92, p. 20, R. at V. XXIV, p. 3576. Because Exacta Gaming did not meet the requirements to be pari-mutuel wagering, the Franklin Circuit Court changed the requirements and then adjudged the changed requirements met.

Each word in the Regulatory Definition has a commonly understood meaning. Citing to *Random House Webster's College Dictionary* 1946 (1st ed. 1995), the *App. Racing* Court defined "**wager**" as "something risked or staked on an uncertain event." *App.*

Racing, p. 740, fn 14.[11] The word "patron" is defined in 810 KAR 1:001, Section 1(50), as "an individual **present** at a track or a simulcast facility who observes or wagers on a live or historical horserace." [Emphasis added]. For avoidance of doubt, the "ordinary, contemporaneous and customary" meaning of the words in the Regulatory Definition, as set forth in the Merriam-Webster Online Dictionary ("Merriam-Webster"), are as follows:

"Wager" means:[12]

> 1a: something (such as a sum of money) risked on an ***uncertain event***: STAKE [Emphasis added – see definition below]
> 1b: something on which bets are laid : GAMBLE // do a stunt as a *wager*
> 2: *archaic* : an act of giving a pledge to take and abide by the result of some action

"Wagering" means:[13]

> *intransitive verb*
> : to make a bet
> *transitive verb*
> : to risk or venture on a final outcome *specifically* : to lay as a gamble : BET // *wager* $5 on a horse

"Wager" (noun) is the *main* entry in Merriam-Webster. "Wagering" is a *derivative* entry of "Wager". "Wagering" (a verb) is not redefined because its meaning is readily derivable

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[11]It is typical for the Court to consult recognized dictionaries to ascertain the ordinary meanings of words. The Court referred to *The New Oxford American Dictionary* (3rd ed. 2010) as a source to define the meaning of "controversy". *App. Racing*. p. 735, fn 8. The Court recently recognized the meanings of words from the Merriam-Webster Online Dictionary. *See Whitney Westerfield, et al., v. David M. Ward, et al.*, 2018-SC-000583-TG, p. 18 (June 13, 2019)(To be published).

[12] 2019 http://www.merriam-webster.com/dictionary/wager (last visited July 25, 2019).

[13]*Id.*

from the meaning of the root word "Wager".[14] Both "wager" and "wagering" connote the requirement that something is being risked on an "uncertain event". Thus, a requirement that patrons are wagering among themselves on an "uncertain event" is not adding words to the Regulatory Definition. It is an integral part of the meaning of the word "wagering". Indeed, the words "are wagering" makes the word "wagering" a "participle present progressive" which means that the words "are wagering" refer to a particular occasion or event.[15]

Because "uncertain event" appears in the Merriam-Webster definition of "wagering" the definitions of "uncertain" and "event" are as follows:

"Uncertain", which is used in the definition of "Wager", means: [16]

> 1a : not known beyond doubt : DUBIOUS // an *uncertain* claim
> b : not having certain knowledge : DOUBTFUL // remains *uncertain* about her plans
> c : not clearly identified or defined // a fire of *uncertain* origin
> 2 : not constant : VARIABLE, FITFUL // an *uncertain* breeze
> 3 : INDEFINITE, INDETERMINATE // the time of departure is *uncertain*
> 4 : not certain to occur : PROBLEMATICAL // his success was *uncertain*
> 5 : not reliable : UNTRUSTWORTHY // an *uncertain* ally

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[14] 2019 http://www.merriam-webster.com/help/explanatory-notes/dict-entries (last visited July 25, 2019).

[15] *A Comprehensive Grammar of the English Language*, by Randolph Quirk, Sidney Greenbaum, Geoffrey Leech, Jan Svartvik, § 4.25 pp. 197-98, Copyright, Longman Group Limited 1985.

[16] 2019 http://www.merriam-webster.com/dictionary/uncertain (last visited July 25, 2019).

"Event", which is used in the definition of "Wager", means: [17]

> 1a : something that happens : OCCURENCE
> b : a noteworthy happening
> c : a social occasion or activity
> d : an adverse or damaging medical occurrence // a heart attack or other cardiac *event*
> 2 : any of the contests in a program of sports
> 3a : a postulated outcome, condition, or eventuality // in the *event* that I am not here, call the house
> b : the final outcome or determination of a legal action
> c : *archaic* : OUTCOME
> 4 : the fundamental entity of observed physical reality represented by a point designated by three coordinates of place and one of time in the space-time continuum postulated by the theory of relativity
> 5 : a subset of the possible outcomes of an experiment **at all events** : in any case // **in any event** : in any case // **in the event** : *chiefly British* : as it turns out [Emphasis added].

Merriam-Webster defines the words "among themselves" and "pool" which appear in the Regulatory Definition as follows:

"Among" means: [18]

> 1 : in or through the midst of : surrounded by // hidden *among* the trees
> 2 : in company or association with // living *among* artists
> 3 : by or through the aggregate of // discontent *among* the poor
> 4 : in the number or class of // wittiest *among* poets // *among* other things she was president of her college class
> 5 : in shares to each of // divided *among* heirs
> 6a : **through the reciprocal acts of** // quarreling *among* themselves [Emphasis added].
> b: through the joint action of // made a fortune *among* themselves.

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[17] 2019 http://www.merriam-webster.com/dictionary/event (last visited July 25, 2019).

[18] 2019 https://www.merriam-webster.com/dictionary/among (last visited July 25, 2019).

"Themselves" means:[19]

> 1a : those identical ones that are they – compare THEY sense 1a – used reflexively, for emphasis, or in absolute constructions // nations that govern *themselves* // they *themselves* were present // *themselves* busy, they disliked idleness in others
> b : himself or herself : HIMSELF, HERSELF – used with an indefinite third person singular antecedent // nobody can call *themselves* oppressed – Leonard Wibberly
> 2 : their normal, healthy, or sane condition // were *themselves* again after a night's rest

"Pool" noun (2) means:[20]

> 1 a : an aggregate stake to which each player of a game has contributed
> b : all the money bet by a number of persons on a particular event
> . . .
> 3 : an aggregation of interests or property of different persons made to further a joint undertaking by subjecting them to the same control and a common liability.

"With the right *nouns* (names of persons, places, and things or ideas) and *verbs* (action or being words), you can construct a solid foundation in a sentence. The key for expressing your precise thoughts is to build on that foundation by adding descriptive words." *Grammar Essentials for Dummies*, by Geraldine Woods, Chapter 5, page 75, Copyright, Wiley Publishing, 2010. ("*Grammar Essentials for Dummies,* p.__"). "*Adverbs* – words that modify the meaning of a verb, an adjective, or another adverb – are also descriptive… Adverbs mostly describe verbs, giving more information about the action." *Grammar Essentials for Dummies*, p. 75. "Simply know that a prepositional phrase may do the same job as a single-word adjective or adverb." *Grammar Essentials for Dummies,* p. 145. In this case, "among themselves" is a prepositional phrase used as an adverb to

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[19] 2019 https://www.merriam-webster.com/dictionary/themselves (last visited July 25, 2019).

[20] 2019 https://www.merriam-webster.com/dictionary/pool (last visited August 4, 2019).

describe the type of "wagering". Applying the words "in which patrons are wagering among themselves" and "amounts wagered are placed in one or more wagering pools" their commonly understood meanings with their grammatical purposes results in a Regulatory Definition as follows:

> "**[P]atrons**" (a noun - individuals who are present at a track or simulcasting facility who observe or wager on a live or historical horserace) "**are wagering**" (a verb - to risk something of value on an 'uncertain' [not known, beyond doubt] 'event' [something that happens]) **"among"** (preposition describing the wagering - in or through the midst of, in the company or association with, through the reciprocal acts of) **"themselves"** (object of the preposition describing the wagering - those identical ones that are they) . . . "and amounts wagered are placed in one or more designated **'wagering'** (adjective describing the type of pools - to risk something of value on an 'uncertain' [not known, beyond doubt] 'event' [something that happens]) **'pools'**" (noun - an aggregate stake to which each player of a game has contributed; or all the money bet by a number of persons on a particular event).

Exacta Gaming does not satisfy these requirements for pari-mutuel wagering in the Regulatory Definition when the words are given their only "reasonable, rational, sensible, intelligent" interpretation and application consistent with their ordinary, contemporaneous and common meanings and their fundamental grammatical purposes.

D. A Fundamental Canon Of Construction Is That Words Must Be Given Their Ordinary Meanings And Words May Not Be Disregarded Or Added.

Noted above, the trial court held that "pari-mutuel wagering does not require patrons to wager on the same horserace, nor does it require reciprocity among patrons". This is contrary to the fundamental cannons of statutory and regulatory construction. "It is well settled that in the construction and interpretation of administrative regulations, the same rules apply that would be applicable to statutory construction and interpretation." *Revenue Cabinet v. Gaba*, 885 S.W.2d 706, 708 (Ky. App. 1994). "A fundamental cannon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Hall v. Hosp. Res. Inc.*, 276 S.W.3d 775, 784 (Ky. 2008) (quoting *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005)). "The courts should reject a construction that is 'unreasonable and absurd' in preference for one that is "'reasonable, rational, sensible, and intelligent'". *Commonwealth v. Kash*, 967 S.W.3d 37, 44 (Ky. App. 1997) (quoting *Johnson v. Frankfort C.R.R.*, 303 Ky. 256, 197 S.W.2d 432, 434 (1946)). This standard is nothing new nor unique to Kentucky. The United States Supreme Court embraced the standard: "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing, but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925). "[I]t is neither the duty nor the prerogative of the judiciary to breathe into the statute that which the Legislature has not put there." *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800, 802 (Ky. App. 1995). The Franklin Circuit Court did not apply the ordinary, contemporary and customary meaning of the words in the Regulatory Definition. It

breathed an illogical and unreasonable meaning into words and thus created an entirely new judicial definition completely outside the scope of the Commission's statutory authority.

E. The Franklin Circuit Court Failed To *Apply* The Regulatory Definition Within The Conception Of Pari-Mutuel Wagering In KRS Chapter 230.

The *App. Racing* Court emphasized that:

> These regulatory changes prescribe the rules by which the wagering on historical races shall be conducted, but the most critical element of the regulations is the requirement that all such wagering must be 'pari-mutuel'. That is so because, pursuant to KRS 230.215 and KRS 230.361(1), any wagering on horse racing in Kentucky must be based on a pari-mutuel system. In other words, the Commission has no authority to license an operation for wagering on horse racing that is not utilizing a form of pari-mutuel wagering.

App. Racing, p. 731. For the wagering to be lawful, it must be within the conception of pari-mutuel wagering contemplated by Chapter 230.215 and KRS 230.361(1). This is the law of the case. Again, "The Law of the case doctrine is an iron rule, universally recognized, that an opinion or decision of an appellate court in the same case is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been." *Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747, 751 (Ky. App. 2007). The Franklin Circuit Court's application further violates the canon that "A rule which is broader than the statute empowering the making of rules cannot be sustained." *Henry v. Parrish*, 211 S.W.2d 418, 422 (Ky. App. 1948). Mr. LaBrocca made clear that he nor the Commission had any intention of complying with the definition of pari-mutuel wagering much less the authorizing statute. Mr. LaBrocca testified that pari-mutuel wagering would have whatever meaning the Commission chooses to give it: "The wagering that has been approved by the Commission defines what the wager is -- these are

pari-mutuel because the definition of wager is fluid to the types of wagers the Commission can approve."(VR No. 1: 01/08/18; 2:49:15-2:49:55). As a matter of law, the Commission and the trial court were required to follow this Court's direction on remand. Neither did.

The Court should not fall prey to the disingenuous argument that HHR is permissible as some sort of exotic wagering, like the Daily Double, Pick-Three or the Pick-Six. The *App. Racing* Court did not remand for a determination of whether the gaming was exotic wagering. The law of this case is that this case was remanded for a determination of whether the gaming contemplated by the Appellees is pari-mutuel wagering. Even if it had, as the *App. Racing* Court intuitively and correctly understood, exotic wagering must first be pari-mutuel wagering to be within the statutory authority of the Commission. *See* 810 KAR 1:001, Section 1(24) and 810 KAR 1:120, Section 2(5)(b) and 810 KAR 1:120, Section 4(1)(b). When multiple players are wagering against everyone else playing the same exotic wager, the exotic wagering is pari-mutuel.

F. Comingling A Discrete Wager With Prior Losses On Unrelated Events Is Not Mutuel Wagering And Is Placing All Wagers In "Wagering Pools".

The Franklin Circuit Court interpreted and applied the words in the Regulatory Definition in a manner in which "*mutuel* wagering" is not required for wagering to be "pari-*mutuel* wagering". In so doing, the Franklin Circuit Court did not analyze the words *wagering, among, themselves or wagering pools.* Instead, the trial court deferred to Mr. LaBrocca and created a fiction whereby depositing a discrete wager into a nonspecific pool of carried over losses from prior discrete wagers, magically transforms discrete players who are wagering alone, years apart, on separate and discrete events, in a betting system which uses fixed mathematical formulas to determine prizes into players who "are

wagering among themselves" on the same event.[21] Dr. Molzon, Mr. LaBrocca and Mr. Lannert each made clear that Exacta Gaming players lack reciprocity. No two discrete players are ever wagering on the same discrete event. Mr. Lannert and Mr. LaBrocca made clear that no future player had any impact on any prior player's wager. Neither Mr. LaBrocca nor Mr. Lannert testified that any discrete wager was placed into a wagering pool.[22]

G. The Franklin Circuit Court Wrongfully Deferred To The Commission And Richard LaBrocca.

Neither the Commission nor Mr. LaBrocca is entitled to deference on the application of the requirements of pari-mutuel wagering for a number of reasons. First, this Court has already answered the question of what pari-mutuel wagering is by references to the Horseracing Act and *Ky. Jockey Club*. This is the law of the case leaving no room for deference. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747, 751 (Ky. App. 2007).

Second, by filing the "agreed case", the Appellees admitted that they did not know the answer to the questions they asked thus nullifying any claim of expertise. Beyond that, the Appellees hired an outside New Jersey gambling consultant with a two-year degree from the DeVry Institute to tell the Commission that slot gaming was pari-mutuel wagering

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[21]The 2018 Opinion and Order does not find that discrete wagers are deposited into "wagering pools".

[22]Neither Mr. LaBrocca nor Mr. Lannert testified that any discrete player participated in the setting of pay-out odds. Mr. LaBrocca confirmed that instead of payout odds, mathematical formulas were used to determine prizes. It was the trial court which confused off odds with payout odds.

on horse racing while being paid $860,849.67 by the vendors and certain of the Racetrack-Appellees. *Cf.* KRS 521.010, *et seq.*

Third, if inclined to afford the Commission agency deference, the deference standard changed since this Court last visited the issue in *Tibbs v. Bunnell* 448 S.W.3d 796 (Ky. 2014) (relying on *Auer v. Robins*, 519 U.S. 452 (1997)). In 2019 the United States Supreme Court took a bold step in limiting agency deference in recognition that public agencies were not objective interpreters of statutes and their regulations. *Kisor v. Wilkie*, 588 U. S. ___ (2019), a copy of the slip opinion is attached hereto as **Exhibit G**. The *Kisor* Court has "taken care... to reinforce the limits of *Auer* deference, and to emphasize the critical role courts retain in interpreting rules" because "of the far-reaching influence of agencies and the opportunities such power carries for abuse." *Kisor,* slip. op., p. 28). As the United States Supreme Court "cabined *Auer*'s scope in varied and critical ways," (*Id.*, at 18-19) this Court has often looked to the United States Supreme Court for guidance on agency deference. (*See Bullitt Fiscal Court v. Bullitt County*, 434 S.W.3d 29 (Ky. 2014)) ("We can gain further insight from our nation's highest court."). The nation's highest court recently made clear that proper *Auer* deference requires that (1) the regulation is "genuinely ambiguous"; (2) the agency's reading is "reasonable"; and (3) the "character and context of the agency interpretation entitles it to controlling weight." *Kisor*, pp. 13-18. Before finding a genuine ambiguity, this Court must first "carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.*, p. 14; *See also Metzinger v. Ky. Ret. Sys.*, 299 S.W.3d 541, 545 (Ky.2009) ("Yet, where the apparent statutory ambiguity can be resolved using traditional tools of statutory construction... an agency's interpretation is not entitled to *Chevron* deference."(internal

quotations omitted)). Applying well-established canons of statutory and regulatory construction in *App Racing* and those described herein, there is no ambiguity in the Regulatory Definition. Moreover, even if there was an ambiguity, an interpretation and application of the Regulatory Definition in a manner that disregards "mutuel" from the requirement of "pari-mutuel" is patently unreasonable as outside "the outer bounds of permissible interpretation" established by this Court in *App. Racing*. *Kisor*, p. 14. "Under *Auer*, as under *Chevron*, the agency's reading must fall within the bounds of reasonable interpretation. And let there be no mistake: That is a requirement an agency can fail." *Kisor*, p. 14.

Fourth, the "character and context of the agency interpretation" does not "entitle[] it to controlling weight." *Kisor*, p. 15 (citing *United States v. Mead Corp.*, 533 U.S. 218, 229-231, 236-237 (2001)). This Court already acknowledged the bias of the Commission when it found that the public agency had a "common interest" with the Racetrack-Appellees: "[A]ll of the [Appellees] shared a common interest in sustaining the ability to license, conduct and tax pari-mutuel wagering on historical horse racing." *App. Racing*, p. 733. So much so in this case that when this lawsuit was filed, the Appellees did not even bother to name a respondent or defendant. *App. Racing*, p. 731. Bearing emphasis is *Kisor's* concurring opinion's recognition that public agencies are often biased advocates rather than impartial interpreters of the law:

> [E]xecutive officials are not, nor are they supposed to be, "wholly impartial." They have their own interests, their own constituencies, and their own policy goals—and when interpreting a regulation, they may choose to "press the case for the side [they] represen[t]" instead of adopting the fairest and best reading. *Auer* thus means that, far from being "kept distinct," the powers of making, enforcing, and interpreting laws are united in the same hands—and in the process a cornerstone of the rule of law is compromised.... When we defer to an agency interpretation that differs from what we believe to be the best

> interpretation of the law, we compromise our judicial independence and deny the people who come before us the impartial judgment that the Constitution guarantees them. And we mislead those whom we serve by placing a judicial *imprimatur* on what is, in fact, no more than an exercise of raw political executive power.

Kisor, pp. 25-27 (Gorsuch, J. concurring, joined by Thomas, J., Alito, J., Kavanaugh, J.) Instead of being a regulatory agency, the Commission here is an advocate. Instead of seeking an objective consultant, the Commission relied on the gambling consultant paid for by interested vendors and the Racetrack-Appellees. *Kisor* recognized the practice for what it was and the role of the courts to keep it in check.

Further the Commission has "no special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase" the conception of pari-mutuel wagering in the federal Horseracing Act and *Ky. Jockey Club. See Kisor.*, p. 17 (n. 5). Such requires no "substantive expertise" by the Commission. Moreover, the filing of the agreed case confirms that the question "fall[s] more naturally into a judge's bailiwick." *Id.*, p. 17. Finally, the Commission's interpretation obviously fails to reflect "fair and considered judgment". *Id.*, p. 17-18 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988) and *Auer*, p. 462); It is merely a "convenient litigating position" and "*post hoc* rationalization advanced" to defend past agency action against attack". *Id.*

The trial court's misapplied deference violated another fundamental canon of construction that "Careful scrutiny is always given to an exception to a general statute, and especially is this true when there is an exception permitting the carrying on of an activity generally declared to be against public policy." *Hargett v. Kentucky State Fair Board*, 216 S.W.2d 912, 917 (Ky. 1949). In this case, KRS 436.480 creates an *exception* to the general

prohibition of gambling in Chapter 528 of the KRS. By finding the requirement that "patrons are wagering among themselves" is satisfied by a fiction where the operator deposits a discrete wager on a discrete event the trial court gave deference - not scrutiny - and by doing so created an exception broader than the prohibition.

H. The Appellees Did Not Carry Their Burden Of Proof.

The Appellees brought this case by the filing of a joint petition for declaratory relief under the "agreed case" statute, KRS 418.020. Under CR 43.01, the burden was on the Appellees to prove that all the gaming systems they contemplated were pari-mutuel wagering on horse racing. CR 43.01 provides that "(1) The party holding the affirmative of an issue must produce the evidence to prove it. (2) The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." CR 57 provides that "The procedure for obtaining a declaratory judgment pursuant to statute shall be in accordance with these rules . . ." Thus the Appellees were required to meet their burden of proof in an "agreed case", under KRS 418.020, and in an action for a declaratory judgment, under KRS 418.040.

Consistent with CR 43.01 and CR 57, the *App. Racing* Court remanded "to develop evidence required to determine if the operation of historical horserace wagering as contemplated by Appellants conforms to the requirements of KRS Chapter 230 and KRS 436.480 for pari-mutuel wagering ..." *App. Racing*, p. 742. That direction by this Court was the law of the case and was to be followed. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747, 751 (Ky. App. 2007). The Appellees failed to offer sufficient proof that Exacta Gaming was pari-mutuel wagering on horse racing under the Regulatory Definition and the statutory authority of the Commission in KRS Chapter 230.

Clearly, if four gaming systems were licensed by the Commission and operated by the Appellees, that would be the kind of "historical horse racing contemplated by the Appellants [now the Appellees]". Yet, the Appellees offered no evidence on any gaming system other than Exacta Gaming. As a result, the Appellees failed to carry their burden of proof that HHR was pari-mutuel wagering not only on Exacta Gaming but on Instant Racing, PariMAX and Ainsworth as well.

I. The Executive Branch Wrongfully Invaded The Policy-Making Duties Of The Legislative Branch.

"It is our responsibility to read the statutes of the General Assembly so as to save their constitutionality whenever such can be done consistent with reason and common sense." *Diemer v. Commonwealth, Transportation Cabinet*, 786 S.W.2d 861, 863 (Ky. 1990) (citing *Fann v. McGuffey*, 534 S.W.2d 770 (1975)). That did not happen here. "It is well settled law in the state of Kentucky that one branch of Kentucky's tripartite government may not encroach upon the inherent powers granted to it by any other branch." *Commonwealth of Kentucky, ex rel. Andy Beshear, Attorney General, v. Matthew G. Bevin, Governor, et al.*, Case No. 2017-SC-000647-TG, p. 13 (Ky, June 13, 2019). "The difference between the departments undoubtedly is that the legislat[ure] makes, the executive executes, and the judiciary construes, the law." *Commonwealth of Kentucky, ex rel. Andy Beshear, Attorney General, v. Matthew G. Bevin, Governor, et al.*, Case No. 2017-SC-000647-TG, p. 15 (Ky, June 13, 2019) (quoting *Slack v. Maysville & Lexington R.R.* 52 Ky. 1, 12 (Ky. 1852)). "An administrative agency may not by regulation 'amend, alter, enlarge, or limit the terms of legislative enactment.' [citations omitted]" *App. Racing*, p. 736. This was consistent with *Legislative Research Commission v. Brown*, 664 S.W.2d 907, 919-20 (Ky. 1984):

> There is no constitutional authority, however, whereby the governor can add, directly or indirectly, to the content of a statute by means of an administrative regulation and, a *fortiori,* no administrative regulation can be adopted unless it is necessary and is related to the content of the legislative act and to its effective administration.

Legislative Research Commission v. Brown, at 907, 919-20. Yet, that is exactly what has happened here by the Commission's application of the Regulatory Definition to HHR. Agency delegation has limits. *TECO Mechanical Contractor, Inc., v. Com.*, 366 S.W.3d 386 397 (Ky. 2012). "'The General Assembly may validly vest legislative . . . authority in [another branch] if the law delegating that authority provides 'safeguards, procedural and otherwise, which prevent an abuse of discretion by agency.'" *Id.* (quoting *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (citing *Butler v. United Cerebral Palsy of Northern Ky., Inc.*, 352 S.W.2d 203, 208 (Ky. 1961)). "The purpose of the nondelegation doctrine should no [ ] longer be either to prevent delegation or to require statutory standards; the purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power." *Miller v. Covington Development Authority*, 539 S.W.2d 1, 5, n. 9 (Ky. 1976) (quoting Davis, Administrative Law Text § 2.08 (3d ed. 1972)). To this end, the longstanding precedent is "that an administrative agency 'is limited to a direct implantation 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.'" *Flying J Travel Plaza v. Com., Transp. Cabinet, Dep't of Highways*, 928 S.W.2d 344, 347 (Ky. 1996). *App. Racing*, p. 736. In violation of these time-tested principles, the Franklin Circuit Court's application of the Regulatory Definition was at odds with the plain meaning and commonly understood words of the Regulatory Definition and KRS Chapter 230.

J. Appellees Are Not Entitled To Continue To Operate.

Once it is apparent that Exacta Gaming is not pari-mutuel wagering on horse racing, the next question is what to do about it. Appellees will claim it unfair to make them stop. They will seek an equitable remedy not sought by the Joint Petition. The Appellees sought a declaration that "The licensed operation of pari-mutuel wagering on historical horseraces pursuant to the new regulations did not violate the prohibitions of KRS Chapter 528 because the gaming system fit within the pari-mutuel wagering exemption of KRS 436.480" *before* they began operating. *App. Racing*, p. 731. When that declaration is answered in the negative, the Appellee must cease operations. Their claim for equitable relief must fail for a host of reasons. First, they did not request equitable relief in the Joint Petition. Second, the Appellees could not have reasonably relied to their detriment since they alleged that they were seeking an advance determination of legality *before* beginning to operate the gaming. Third, the issue on remand was not whether the Appellees were entitled to continue to operate or whether historical horse racing was exotic wagering. The issue on remand was whether historical horse racing was pari-mutuel wagering. If not pari-mutuel wagering, it does not matter whether the other wagering is called exotic or otherwise. The Commission's own regulation provides that: "The only wagering permitted on a live or historical horserace shall be under the pari-mutuel system of wagering. All systems of wagering other than pari-mutuel shall be prohibited. Any person participating or attempting to participate in prohibited wagering shall be ejected and excluded from association grounds." 810 KAR 1:011, Section 1(1).

Fourth, fundamental is that agencies are bound by their own regulations. *Shearer v. Dailey*, 226 S.W.2d 955, 957 (Ky. App. 1950). Equally fundamental is that equity

follows the law. Whenever the rights of parties are governed by laws, courts of equity will not follow equity. *Kaufman v. Kaufman's Adm'r*, 166 S.W.2d 860, 865 (Ky. App. 1942)("Remaining passive does not ordinarily deprive one of his legal rights . . .") This is especially true concerning a public agency. In this case, the Commission and its Racetrack-Appellees have not followed their own law. To them there is no remedy in equity.

Fifth, the Appellees do not have clean hands which is required before any equitable remedy may be allowed.

> It is he who 'comes' and he who 'seeks' affirmative relief who is denied it when he is himself guilty of inequitable or unconscionable conduct in relation to the transaction."

Barrowman Coal Corporation et al., v. Kentland Coal & Coke Co., et al., 196 S.W.2d 428, 432 (Ky. App. 1946). The Appellees' request for equity is not based on the new regulations, but on a longstanding practice of approving exotic wagering. The Appellees have been "guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses [them] all recognition and relief with reference to the subject-matter or transaction in question." *Id.* Confirming the Appellees' *violation of the fundamental conceptions of equity jurisprudence* are the following:

1. The Appellees failed to correct this Court's misapprehension about the nature of the gaming it was considering in 2013 in *App. Racing*:

> The bettor inserts money or its equivalent into the Instant Racing terminal and then chooses a horse identified by a number. The terminal then displays a video recording of the race for the bettor to watch, or, as the name "Instant Racing" implies, the bettor may forego the excitement of the actual race by opting to see immediately the results of the race and the outcome of his wager. *App. Racing*, p. 730.

The *App. Racing* Court went on: "We cannot say that, conceptually, watching a video-taped (or digitally-recorded) image of a horserace makes the event any less of a horserace

than watching a rerun of a basketball game makes it something other than a basketball game." *App. Racing*, p. 737. Of course, a bet on a video was never the case and the Appellees knew it. Associated with the "video-taped (or digitally recorded) image[s]" were slot gaming type random multipliers, random wild symbols and random bonus rounds to determine prizes. *App. Racing*, p. 730. This is described in the LaBrocca Report, pp. 7, 10, 11, 12, R. at V. XVIII, p. 2661, 2664, 2665, 2666, attached hereto as **Exhibit F.**

2. The Appellees concealed from the Court that in 2013, before this case was argued to this Court, a Commission member believed that the Instant Racing HHR was a sham. On April 9, 2013, Commission Chairman Robert Beck described the reliance on so-called "experts": "So I think we have to rely heavily upon the expert to tell us if these games – and somebody, you know." Commissioner Edward Bonnie observed: "We are paying our expert to tell us and he knows what we want him to say. And he has said it. And the opposition says he is dead wrong. And I just want us to be careful because we are the ones that are going to approve or not approve. And it makes me very nervous. This was stretching the interpretation of the statutes to start with. And this is further down that road moving away from historic races as far as I can see. There is not a reference to a historic race in Pigs in Mud and Bayou Bash. So I want to register my discomfort with expansion at this time. And, 2, whether or not it is consistent with statute. And I have not recently read our expert's view with respect to it. But I wanted to register it on the record." Exhibit F to Response to Omnibus Motions in *Limine* By Kentucky Downs and Ellis Park to Exclude Certain Evidence which may be Offered by the Family Foundation, *filed under seal*, October 17, 2017 Included Separately, pp. 96-106.

3. The Appellees facilitated improper payments in the amount of $860,849.67 from vendors and certain of the Racetrack-Appellees to Mr. LaBrocca's employer, Gaming Laboratories International, LLC, in connection with reports telling the Commission that historical horse racing slot gaming was pari-mutuel wagering. Foundation Trial Exhibit 15. R. at V. Exhibit Binder III and IV. *Cf.* KRS 521.010, *et seq.*

4. Non-lawyer, Richard LaBrocca, provided legal opinions that slot gaming satisfied the regulatory definition of "pari-mutuel wagering". JP Trial Exhibit 1, R. at V. Exhibit Binder I. (VR No. 1: 01/08/18; 2:49:15-2:51:08). *Cf.* KRS 524.130.

5. Failure to disclose that the 2010 Opinion and Order was drafted by a law clerk associated with the gambling association, the Kentucky Equine Education Project. The Family Foundation Response to KEEP Motion for Protective Order, Dated May 20, 2014 is attached as **Exhibit H**; R. V. IV, p. 486-525.

6. The Appellees' misrepresentations that they were seeking declarations *before* licensing and operating the gaming systems but beginning operations in 2011, two years before argument was first heard by this Court. *App. Racing*, p. 741.

7. The Appellees failure to set forth facts upon which their requests for declarations depended as required by the "agreed case" statute, KRS 418.020.

8. The Appellees opposition to all discovery before a question was asked until reversal by this Court in App. Racing. *App. Racing*, p. 732.

9. The Appellees filing four of ten affidavits with their "agreed case" swearing to events at the Commission which had not occurred when the affidavits were notarized. Petition for Declaration of Rights, Exhibit A, p. 8, 9, 10, 12; R. at V. I (Previously Certified Case History), pp. 1-150 and V. II, pp. 151-192.

10. Counsels' misrepresentations to the courts that random number generators were not used in Instant Racing up to September 2015. R. at V. XXIII, p. 1880 – 1882, R. at V. XXIII, p. 1883-1885.

11. Reliance on civil and criminal immunity under KRS 372.005 (Gambling Transactions) and KRS 501.070 (Liability-Ignorance or Mistake) rather than awaiting a final determination of the case the Appellees brought.

12. Opposing the Foundation's request for a demonstration of the Instant Racing and Exacta Gaming systems before the trial court Foundation Motion for a Demonstration, filed June 24, 2015, R. at V. XII, p. 1786-1795.

CONCLUSION

The unelected Commission has ushered in all the burdens of slot gaming for the near exclusive benefit of the Commission's constituent racetracks with virtually no benefit to the State and without a word of policy debate. Policy decisions of these magnitudes, with these implications, being determined by an unelected Commission without a vote of the people or the General Assembly violates the most fundamental principles of Kentucky's tripartite system of government. "Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does our Constitution ..." *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922). This appeal is *not* about church-sponsored casino nights or a bet on a football game. This case is about a massive gambling industry-driven expansion of slot gaming. The unchecked actions of the Commission which have occurred over the past eight years have real consequences to the State. The 2018 Opinion and Order pointed out on page 7 that: "The

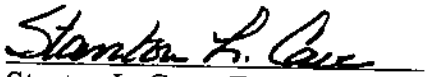
Commonwealth is being shortchanged on revenue as two (2) billion dollars in wagering has produced only eight (8) million dollars in state revenue." 2018 Opinion and Order, p. 7. R. at V. XXIV, p. 3563. By treating slot gaming as pari-mutuel wagering on horseraces, Kentuckians are cheated out of revenue. Under KRS 138.510, an excise tax is levied on all money wagered on historical horseraces at the rate of 1.5% of which the State General Fund receives about .5% after reductions of .75% for the Thoroughbred Development Fund for purses (KRS 138.510(1)(c)1.), 0.2% for the equine industry program trust for the University of Louisville (KRS 138.510(1)(c)4.), and 0.1% for the trust for the purchase of equipment for equine programs at the state universities (KRS 138.510(5)(a)).

If not reversed, this Court will have presided over the greatest expansion of gaming in the history of Kentucky without a vote of the people or the General Assembly. It will do so based on a trial court that (i) disregarded this Court's instructions on remand, (ii) disregarded every applicable rule of construction, (iii) disregarded the plain meaning of words and basics of grammar, and (iv) relied on legal opinions of a non-lawyer consultant to a public Commission, whose firm was paid $860,849.67 by interested vendors and certain of the Racetrack-Appellees. A more shameful development of public policy could not be imagined. The Appellees have had their run. It is now time for this Court to stop it.

Based on the foregoing, the testimony and exhibits at trial, the Foundation respectfully requests that the 2018 Opinion and Order of the Franklin Circuit Court be reversed, vacated and that judgment be entered in favor of the Foundation consistent with the foregoing, including a finding that Exacta Gaming, Instant Racing, PariMAX and Ainsworth are not pari-mutuel wagering on horse racing and that all operations be enjoined.

The Foundation expresses its appreciation to the Court for its consideration of the foregoing.

Respectfully submitted,



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APPENDIX

EXHIBIT A – 2018 Opinion and Order of the Franklin Circuit Court, entered October 24, 2018. R. at V. XXIV, pp. 3557-3578.

EXHIBIT B – 2010 Opinion and Order of the Franklin Circuit Court, entered December 29, 2010. R. at V. VI (Previously Certified Case History), pp. 793-810.

EXHIBIT C – *Appalachian Racing, LLC, et al., v. The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation*, 423 S.W.3d 726 (Ky. February 20, 2014). R. at V. XXIII, p. 3316-3319.

EXHIBIT D - Opinion of the Kentucky Attorney General, OAG 10-001. R. at V. I (Previously Certified Case History), p. 1-150 and R. at V. II (Previously Certified Case History), pp. 151-192 (Referenced in the Joint Petition as Exhibit B, but labeled as Exhibit A thereto).

EXHIBIT E – Video Excerpt of Operation of Exacta Gaming at Kentucky Downs, Franklin, Kentucky. R. at V. Exhibit Binder IV, p. (Attached manila envelope D-16).

EXHIBIT F –Gaming Laboratories International Expert/Forensic Report, prepared by Richard LaBrocca, dated March 2, 2016. R. at V. XVIII, p. 2647-2651; JP Trial Exhibit 11, Exhibit Binder I.

EXHIBIT G - *Kisor v. Wilkie*, 588 U.S. ___, ____ (2019).

EXHIBIT H - The Family Foundation Response to KEEP Motion for Protective Order, Dated May 20, 2014. R. at V. IV, p. 486-525.