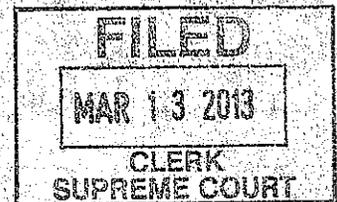


SUPREME COURT OF KENTUCKY
DOCKET NO. 2012-SC-000414



APPEAL FROM THE KENTUCKY
COURT OF APPEALS CASE NO. 2011-CA-000164

APPALACHIAN RACING, LLC, ET AL.

APPELLANTS

v.

THE FAMILY TRUST FOUNDATION
OF KENTUCKY, INC., ET AL.

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I. INTRODUCTION

The substantive issue raised in this case is the purely legal question of the facial validity of the Regulations authorizing Kentucky's existing Racing Associations to offer pari-mutuel wagering on historical horse races. The opinion of the Court of Appeals below was based on the erroneous procedural holding that an intervening party is entitled to conduct fact discovery before the Circuit Court may rule on a question of law presented by a petition under KRS 418.020.¹

II. STATEMENT CONCERNING ORAL ARGUMENT

The Appellant Racing Associations submit that oral argument will be useful to the Court in addressing the important legal questions raised in this appeal.

¹ The Court of Appeal's Opinion is attached hereto as Appx. A.

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IV. STATEMENT OF THE CASE

This matter involves the legality of regulations promulgated by the Commission to allow an additional form of pari-mutuel wagering on horse races in Kentucky². The Regulations were promulgated to enable the horse industry to prosper and to promote the industry on the highest plane. "It is impossible to overstate the importance of the horse industry to Kentucky's economy and image."³ As the Governor's Task Force on the Future of Horse Racing explained in its 2008 Report (the "Report"):

- Kentucky's horse industry has an annual economic impact of roughly \$4 billion.
- An estimated 80,000 to 100,000 Kentuckians owe their jobs to the horse industry.
- The horse industry is Kentucky's top agricultural cash crop.
- The Kentucky thoroughbred is the most sought after "brand" in the equine world.
- Kentucky breeders export horses worth in excess of \$127 million annually.⁴

² The subject regulations were adopted July 10, 2010, and included: 810 KAR 1:001 – Definitions, amendments; 810 KAR 1:011 – Pari-Mutuel Wagering, amendments; 810 KAR 1:120 – Exotic Wagering, new; 811 KAR 1:005 – Definitions, amendments; 811 KAR 1:125 – Pari-Mutuel Wagering, amendments; 811 KAR 2:250 – Exotic Wagering, new; 811 KAR 2:010 – Definitions, amendments; 811 KAR 2:060 – Pari-Mutuel Wagering, amendments; and 811 KAR 2:160 – Exotic Wagering, new (the "Regulations"). The amended regulations governing thoroughbred racing, as approved by the Commission, are attached hereto as Appx. C. The Commission adopted three sets of three regulations—one set for thoroughbreds, one set for standardbreds, and one set for quarterhorse, appaloosa and Arabian breeds. While each set contains certain unique provisions relative to that particular breed, each set contains identical salient provisions regarding pari-mutuel wagering on historical horse racing. For ease of reference, this brief references only the thoroughbred regulations.

³ Report of the Governor's Task Force on the Future of Horse Racing, December 2008, p. i. Available at http://ppc.ky.gov/Documents/Final_Governors_TaskForce_Report_on_Horse_Racing.pdf (last visited February 26, 2013).

⁴ *Id.*

Unfortunately, today “the horse racing industry in Kentucky faces unprecedented challenges.”⁵ Among the most significant of these challenges is the “significant and growing competition from other states” where revenue from legalized alternative gaming is being used to subsidize purses and breeding incentives.⁶ This situation is “posing a threat to Kentucky’s long-held position as the ‘The Horse Capital of the World:’”⁷

Alternative gaming revenue is fueling substantial increases in purse money and breed incentive programs in other states, escalating competition for horses among racing jurisdictions. At the same time, racetracks are putting pressure on trainers to remain at their home track, resulting in fewer horses shipping between jurisdictions. As a result, Kentucky is experiencing a decline in both the quality of its racing and the number of horses available to fill race fields. These declines could lead to fewer race days and the potential loss of a viable year-round racing circuit in Kentucky.⁸

The financial challenges facing the Kentucky horse racing industry motivated the five thoroughbred and three standardbred racetracks licensed in Kentucky (the “Racing Associations”), the Kentucky Horse Racing Commission (the “Commission”), and others to explore new sources of revenue to enhance Kentucky’s tracks’ competitiveness. Pari-mutuel wagering on historical horse races, which has been successfully implemented at Oaklawn Park in Arkansas since 2000, presented one such possible revenue source.

In January 2010, in response to a request from Senator Damon Thayer, Kentucky’s Attorney General addressed the legality of pari-mutuel wagering on historical races. The Attorney General concluded that “there is nothing in Kentucky’s Act that

⁵ *Id.*

⁶ *Id.* at ii.

⁷ *Id.*

⁸ *Id.* at 2.

clearly prohibits wagering under such conditions,” and “[t]o the extent Instant Racing is not permissible in Kentucky, it is because Instant Racing does not constitute pari-mutuel wagering under the current administrative regulations.”⁹

In response to the Attorney General’s opinion, the Commission developed and promulgated the Regulations at issue here to authorize and prescribe rules for pari-mutuel wagers on historical horse races.¹⁰ The Regulations describe certain elements that shall be incorporated in any approved historical race wagering, which include:

(a) A patron may only wager on an historical race on a terminal approved by the commission;

* * * *

(c) Once a person deposits the wagered amount in the terminal offering wagering on an historical horse race, an historical horse race shall be chosen at random;

(d) Prior to making his or her wager selections, the terminal shall not display any information that would allow the patron to identify the historical race on which he or she is wagering, including the location of the race, the date on which the race was run, the names of the horses in the race, or the names of the jockeys that rode the horses of the race;

(e) The terminal shall make available true and accurate past performance information on the historical horse race to the patron prior to making his or her wager selections. The information shall be current as of the day the historical race was actually run. The information provided to the patron shall be displayed on the terminal in data or graphical form; and

(f) After a patron finalizes his or her wager selections, the terminal shall display a video replay of the race, or a portion thereof, and the official results of the race. The

⁹ Ky. OAG 10-001. The Kentucky Attorney General’s opinion is attached hereto as Appx. B.

¹⁰ 810 KAR 1:001, § 1(32)

identity of the race shall be revealed to the patron after the patron has placed his or her wager.¹¹

If the patron has selected a winning outcome, he or she receives a payout from the corresponding pari-mutuel pool, which is comprised of wagers made by other patrons on historical horse races.¹²

The Regulations also expressly address the concern raised by the Attorney General by making clear that wagering on historical races would be pari-mutuel. The Regulations define pari-mutuel as follows:

(48) "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.¹³

The Regulations then plainly state each of the following:

The only wagering permitted on a live or historical horse race shall be under the pari-mutuel system of wagering."¹⁴

A wager on an historical horse race, less deductions permitted by KRS Chapter 230 or 810 KAR Chapter 1, shall be placed in pari-mutuel pools approved by the commission.¹⁵

¹¹ 810 KAR 1:011, § 3(7).

¹² *See id.*, § 4(1)-(2).

¹³ 810 KAR 1:001, § 1(48).

¹⁴ 810 KAR 1:011, § 1(1).

¹⁵ 810 KAR 1:011, § 4(1)(a).

A payout to a winning patron shall be paid from money wagered by patrons and shall not constitute a wager against the association.¹⁶

An association conducting wagering on an historical horse race shall not conduct wagering in such a manner that patrons are wagering against the association, or in such a manner that the amount retained by the association as a commission is dependent upon the outcome of any particular race or the success of any particular wager.¹⁷

An association shall only pay a winning wager on an historical horse race out of the applicable pari-mutuel pool and shall not pay a winning wager out of the association's funds.¹⁸

Wagering on an historical horse race is hereby authorized and may be conducted in accordance with KRS Chapter 230 and 810 KAR Chapter 1.¹⁹

Wagering conducted in conformity with KRS Chapter 230 and 810 KAR Chapter 1 is pari-mutuel.²⁰

The Regulations also require that any exotic wager on a historical horse race be approved by the Commission and that any such wagers only be placed on machines approved by the Commission.²¹

The Commission approved the new Regulations at its regular-session meeting on July 20, 2010. They became final and went into full force and effect on July 1, 2011.

¹⁶ 810 KAR 1:011, § 4(1)(b).

¹⁷ 810 KAR 1:011, § 4(1)(c).

¹⁸ 810 KAR 1:011, § 4(2).

¹⁹ 810 KAR 1:011, § 3(1).

²⁰ 810 KAR 1:011, § 1(2).

²¹ 810 KAR 1:011 § 3 (6), (7)(a); 810 KAR 1:120 § 2.

Following approval of the Regulations, Appellants filed this action pursuant to KRS 418.020 seeking declaratory judgment affirming the validity of the Regulations. Advance determination of that question was necessary to ensure that the commitment of the resources required to implement the Regulations would not be wasted, and that if the costly steps necessary for implementation were taken, the benefits to the industry and the Commonwealth would in fact be realized.

By its order of July 26, 2010,²² the Franklin Circuit Court found that the Petition presented a ripe and justiciable controversy and ordered briefing on the merits. Shortly thereafter, the Family Foundation (the "Foundation") moved to intervene as a party, which Appellants did not oppose. The Circuit Court granted the motion to intervene, but denied the Foundation's motion for broad fact discovery, finding that the sole questions presented by the Petition concerning the validity of the Regulations were "legal, not factual," and therefore the requested discovery was irrelevant.²³

After the issues were fully briefed, the Circuit Court heard oral argument on December 14, 2010, and thereafter issued an Opinion and Order granting Appellants' Petition. The Circuit Court emphasized that the question presented concerned only the Regulations themselves, not any particular game or wager:

While the term "Instant Racing" was used in the AG Opinion, and has been used at times in this case, including by the Court, this *Opinion and Order* addresses the legality of pari-mutuel wagering on "historical horse races" as set

²² Franklin Circuit Court "Order Scheduling Briefing" attached hereto as Appx. D, R. 193-97.

²³ Franklin Circuit Court, Sep. 23, 2010 Order at 2, attached hereto as Appx. E, R. 599-601.

forth in the Regulations promulgated by the Commission, and not on any particular game or scheme.²⁴

Because the question before the Circuit Court, and now before this Court, is limited to the validity of the Regulations, the Circuit Court focused its review on construction of the Commission's statutory authority and the Regulations themselves:

In addressing the validity of a regulation with respect to its governing statute, the Court must determine whether the regulations are consistent with the policy set forth in the enabling legislation. This inquiry requires an examination of the enabling statutes that authorize pari-mutuel wagering and vest plenary authority in the Commission, as well as an examination of the scope of the Commission's power to regulate pari-mutuel wagering on horse racing. We will then scrutinize the proposed Regulations themselves.²⁵

The Court concluded that the Regulations were within the scope of the Commission's statutory authority. The Foundation timely appealed.

On appeal, a majority of the Court of Appeals panel held that the Circuit Court should have allowed fact discovery before resolving the legal issue presented by the Appellants' Petition. Significantly, at the time of the Circuit Court's Order, no Association had sought approval to implement wagering under the Regulations and no particular wager or machine had been approved. While two Associations have subsequently sought and obtained Commission approval of specific wagers on historical horse races in separate, later proceedings, the Foundation did not intervene in those administrative proceedings, nor have the Commission's approval orders in those proceedings been appealed.

²⁴ Franklin Circuit Court, Dec. 29, 2010 Opinion and Order at 2, n.2, attached hereto as Appx. F.

²⁵ *Id.* at 4.

Accordingly, both as a matter of law based upon the submission before the Circuit Court under KRS 418.020 and as matter of factual necessity, the issue before the Circuit Court was *only* the facial validity of the Regulations as promulgated. Thus, as recognized by Judge Combs in her dissent, “the narrow legal issue” presented by this case is “did the Racing Commission act within the scope of its broad delegation of authority by the General Assembly pursuant to KRS 230.215(2)”²⁶ in promulgating the Regulations.

Ignoring both the scope of the legal question raised by the Appellants’ Petition, and the ordinary limitations upon the record reviewed in an appeal, the Foundation cited to and relied upon facts outside the record relating to the specific games and machines approved under the Regulations in its arguments before the Court of Appeals. For example, the Foundation’s Reply Brief even included photographs and a video of machines installed at Kentucky Downs months *after* the Judgment of the Franklin Circuit Court was entered.²⁷ By so doing, the Foundation tried to change the question in this case from whether the Regulations as adopted by the Commission are valid, to an entirely different question that was never before the Franklin Circuit Court of whether the Regulations *as applied* in the approval of specific games at Kentucky Downs are consistent with the statutes.

Without acknowledging the distinction between these two questions, the majority of the Court of Appeals appears to have accepted the Foundation’s reformulation of the case as an “as applied” challenge to the Regulations. This case has never been an “as applied” challenge to the Regulations. Nor could it be. At the time the case was filed, and

²⁶ Court of Appeals Opinion (Dissent) at 10, attached hereto as Appx. A.

²⁷ Court of Appeals Reply Brief of The Family Foundation of Kentucky, Inc., Exhibits R and S.

at the time the Circuit Court rendered its Opinion, no Association had sought approval for wagering on historical horse races. Thus, the Regulations had not yet been applied. The only question before the Circuit Court was whether the Regulations were valid on their face. For that reason, the Circuit Court exercised its discretion and denied the Foundation's motion for broad fact discovery.²⁸

In any event, the Court of Appeals' holding that discovery was necessary before the Circuit Court's resolution of a purely *legal* issue calls into question the long line of cases granting trial courts' broad discretion over discovery. It also casts a cloud of uncertainty over any efforts by the Associations to implement new wagers approved by the Commission under the Regulations, destroying the very certainty that was hoped to be attained by this proceeding. If this holding is affirmed, the effect would be to seriously impair implementation of the Commission's effort to provide urgently needed revenues to Kentucky's racing purses (and tax revenues) for the indefinite future—while the Foundation conducts a fishing expedition for facts that cannot conceivably be relevant to the purely legal question of whether the Regulations, on their face, are within the Commission's statutory authority, and while the parties await resolution of another protracted round of appeals from any ensuing Circuit Court ruling.

V. ARGUMENT

A. **The Court of Appeals' published opinion finding that denial of discovery before ruling on a purely legal question constitutes an abuse of discretion is unprecedented and erroneous.**

Unless reversed by this Court, the Court of Appeals' holding on discovery will

²⁸ Appx. E, Sep. 23, 2010 Order at 2 (finding that the sole questions presented by the Petition concerning the validity of the Regulations were "legal, not factual," and therefore that the requested discovery was irrelevant), R. 599-601.

establish a new legal precedent that could have far reaching implications for future cases involving the resolution of pure questions of law—especially in cases involving the facial validity of regulations or statutes.

1. **The Court of Appeals' Opinion erroneously deprives trial judges of their discretion to preclude discovery when unnecessary for the resolution of questions of law, and establishes a dangerous precedent for wide ranging factual discovery into the legislative and regulatory process.**

The Franklin Circuit Court was presented with a petition seeking a declaration of law as to whether the Regulations were a valid exercise of power granted to the Commission by statute. Accordingly, the Circuit Court properly denied the Foundation's motion for fact discovery, finding that the sole questions presented by the Petition concerning the validity of the Regulations were "legal, not factual."²⁹

The sole issue before the Court of Appeals was the legal question of whether the Regulations are a valid and lawful exercise of the Commission's and the Department's statutory authority. Nonetheless, the Foundation devoted much of its argument—both in its briefs and at oral argument—discussing the appearance or mechanics of specific games, but that was not the issue before the Circuit Court. Similarly, the Foundation made repeated references to materials outside of the record, which should have had no bearing on the question before the Court of Appeals.³⁰ As stated in the Regulations,

²⁹ Appx. E, Sep. 23, 2010 Order at 2. R. 599-601. *See also* Appx. F, Dec. 29, 2010, Opinion and Order at 4 ("[W]e will confine our inquiry to the legal questions presented by the Petitioners, to determine whether the Regulations, as promulgated, comply with applicable statutes and case law.").

³⁰ CR 76.12(4)(c)(vii); *Fortney v. Elliot's Adm'r.*, 273 S.W.2d 51, 52 (Ky. 1954) ("The case must be tried in this court [of appeals] on the record as it was presented to the trial court. ... [A]dditions cannot be made to the record of matters not considered by the trial court in rendering its judgment.").

specific games or wagers require review and approval of the Commission before they can be offered,³¹ and may be challenged in a proper proceeding seeking review of the Commission's decision. This appeal did not arise from such a proceeding.

Circuit Courts in Kentucky have long had broad discretion to supervise the conduct of the cases before them, including the scope and timing of discovery.³² A trial court's ruling on discovery matters is reviewed for an abuse of discretion.³³ "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."³⁴ Here, the Circuit Court did not abuse its discretion in either the process it undertook to decide whether discovery was warranted or in its conclusion that fact discovery would not have a bearing on the resolution of the legal question before it. The Circuit Court considered the Foundation's request for discovery at multiple stages and followed a deliberate course to determine whether discovery was necessary. When the issue first arose at the hearing on the Foundation's Motion to Intervene, the Circuit Court stated that it would defer its decision on whether to allow discovery until after the completion of briefing. After reading the briefs and considering the issue, the Circuit Court realized the questions before it were purely questions of law and ruled based on the plain language of the Regulations and KRS Chapter 230.³⁵ The Court of Appeals' published opinion holding otherwise would

³¹ 810 KAR 1:011 § 3(6); 810 KAR 1:120 § 2.

³² *Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky. App. 2001). *See also* CR 16.

³³ *Green v. Nevers*, 196 F.3d 627, 632 (6th Cir. 1999) ("Rulings concerning the scope of discovery are generally reviewed for abuse of discretion.").

³⁴ *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

establish a new precedent whereby any party may delay resolution of a legal question by merely asserting that discovery is needed.

Undersigned counsel has been unable to find any other Kentucky case where discovery has been required for the resolution of a facial challenge to a regulation or statute. Thus, the Opinion in this case presents a question of first impression for Kentucky courts and creates new law. However, the Court of Appeals resolved that question in a manner that is contrary to sound legal principles as evidenced by many analogous federal court cases holding that discovery is unwarranted in cases involving facial challenges to statutes.³⁶

For example, the D.C. Circuit recently held that discovery was not warranted where plaintiffs brought a facial challenge against the Voters' Rights Act (42 U.S.C.S. § 1973b).³⁷ The court noted that there were *no cases* that "stand for the proposition that extensive fact discovery is warranted to evaluate the facial constitutionality of congressional legislation."³⁸ Other courts have reached the same conclusion.³⁹

³⁵ Appx. F, Dec. 29, 2010, Opinion and Order at 2, n.2 ("this *Opinion and Order* addresses the legality of pari-mutuel wagering on "historical horse races" as set forth in the Regulations promulgated by the Commission, and not on any particular game or scheme"; Opinion and Order at 4 (noting that determination of whether regulations are consistent with enabling legislation requires examination of enabling legislation, followed by scrutiny of regulations themselves).

³⁶ *Revenue Cabinet, Com. v. Gaba*, 885 S.W.2d 706, 708 (Ky. App. 1994)("[I]n the construction and interpretation of administrative regulations, the same rules apply that would be applicable to statutory construction and interpretation.").

³⁷ *Shelby County v. Holder*, 270 F.R.D. 16, 2010 U.S. Dist. LEXIS 96970 (D.D.C. 2010).

³⁸ *Id.* at 20.

³⁹ See *General Electric Co. v. Johnson*, 362 F. Supp. 2d 327, 337 (D.D.C. 2005) ("[A] facial challenge to the text of a statute does not typically require discovery for resolution because the challenge focuses on the language of the statute itself."); *Daskalea v.*

2. The Court of Appeals erroneously ignored the express provisions of KRS 418.020.

Finally, while holding that this case was properly justiciable under KRS 418.020, the majority of the Court of Appeals panel in this case nonetheless ignored the provisions of that statute. The mechanics of proceedings under KRS 418.020—and particularly the role of discovery in such proceeding—is another question of first impression. It is, however, a question that is easily resolved by the express language of the statute itself.

Fact discovery is simply not part of the process envisioned for an agreed case under KRS 418.020. Rather than develop facts as in an ordinary civil action, the statute states that the parties are to “state the question *and the facts upon which it depends*” in their petition. Then, based upon the parties’ submission, the “court shall, thereupon, hear and determine the case, and render judgment [.]” Accordingly, adjudications under KRS 418.020 function much like determinations made upon an agreed stipulation of facts—the court is expressly asked to resolve the legal question based only upon the facts presented in the petition submitted by the parties filing the agreed case.⁴⁰

The purpose of this statute is to provide parties in appropriate circumstances with a simplified and direct process for obtaining a resolution of a purely legal question without all of the formalities of an ordinary civil action (such as even the necessity of an

Washington Humane Society, 577 F. Supp. 2d 82, 88 n.3 (D.D.C. 2008) (“Plaintiffs’ purported factual assertions are irrelevant to their Motion for Partial Summary Judgment because Plaintiffs only seek summary judgment on their facial challenge and, by definition, evaluating that claim only requires consideration of the text of the Act.”); *Cafe Erotica of Florida v. St. Johns County*, 360 F. 3d 1274, 1282 (11th Cir. 2004) (“When analyzing a facial challenge, we must analyze the statute as written.”).

⁴⁰ See *Lindsey v. Home Ins. Co.*, 244 Ky. 580, 581 (Ky. 1932) (“The stipulation of the facts obviated the necessity for further pleading, and entitled the parties to rely upon any right arising out of the facts stated.”).

adverse party).⁴¹ The Foundation's intervention did not change the nature of this proceeding under KRS 418.020 and the Foundation was not entitled to alter the question presented by the Appellants in their Petition.⁴²

Accordingly, the Court of Appeals Opinion directing that this case should be remanded to the Circuit Court for fact discovery is manifestly in error. Therefore, this Court should reverse the holding of the Court of Appeals and clarify that a trial court may validly exercise its discretion over discovery by resolving a facial challenge to the validity of administrative regulations, without permitting wide-ranging fact discovery concerning potential or hypothetical future applications of them. This Court should then proceed to address the merits of the underlying legal question presented by this case, which the Court of Appeals declined to address, without further delay. Because the issues before the Court are questions of law, the Court's review is and always will be *de novo*. Thus, there is no need for this Court to remand the case for any further consideration. Rather, it should decide the case on the merits and affirm the Franklin Circuit Court.

B. The Judgment of the Franklin Circuit Court holding that the "Regulations are a valid and lawful exercise of the Commission's statutory authority," should be affirmed.

1. The Regulations are a valid exercise of the Commission's "plenary" statutory authority to authorize pari-mutuel wagers on horse races.

The Franklin Circuit Court's Opinion and Order granted Appellants' request for a judgment declaring that the promulgated "Regulations are a valid and lawful exercise of

⁴¹ *McConnell v. Commonwealth*, 655 S.W.2d 43, 46 (Ky. App. 1983).

⁴² If the Foundation wanted to frame the question as a challenge to the approval of Instant Racing pursuant to the Regulations, it could have done so by filing its own separate proceeding. It cannot, however, alter the question presented in this case.

the Commission's statutory authority," based on its "examination of the enabling statutes that authorize pari-mutuel wagering" and "scrutin[y of] the proposed Regulations themselves."⁴³ The validity of administrative regulations is a matter of statutory interpretation concerning the scope of agency authority, which is a legal question this Court reviews *de novo*.⁴⁴

"Regulations are presumed to be valid," and will be upheld so long as they "fall within the framework of the policy defined by the legislation" authorizing their promulgation.⁴⁵ In determining whether a regulation is authorized by statute, the Court must "ascertain the intention of the legislature from the words used in enacting the statute rather than surmising what may have been intended but was not expressed."⁴⁶

The Regulations are consistent with both the letter and the spirit of KRS Chapter 230, and well within the scope of the Commission's express grant of "plenary power" to promulgate regulations prescribing valid forms of "pari-mutuel wagering" on horse races. The wagers contemplated by the Regulations operate according to pari-mutuel principles and expressly require wagers to be "placed in pari-mutuel pools"⁴⁷; they use the same totalizator technology as other pari-mutuel wagers; and a bettor's success is dependent on correctly predicting the outcomes of licensed horse races sanctioned by recognized racing

⁴³ Appx. F, Dec. 29, 2010, Opinion and Order at 16, 4.

⁴⁴ *Ky. PSC v. Conway*, 324 S.W.3d 373, 376 (Ky. 2010).

⁴⁵ *Ky. Airport Zoning Comm'n v. Ky. Power Co.*, 651 S.W.2d 121, 124 (Ky. App. 1983); *Flying J Travel Plaza v. Transp. Cabinet*, 928 S.W.2d 344, 347 (Ky. 1996).

⁴⁶ *Id.*

⁴⁷ 810 KAR 1:011, § 4(1)(a).

associations. The promulgation of the Regulations is a valid exercise of the Commission's power.

- a. **The Commission has “plenary” statutory authority to prescribe permissible forms of pari-mutuel wagering on horse races.**

KRS Chapter 230 expresses a broad legislative purpose “to encourage the horse breeding industry through the allowance of pari-mutuel wagering subject to regulation by the Kentucky Racing Commission.”⁴⁸ KRS 230.215(1) states that “it is the policy and intent of the Commonwealth to foster and to encourage the business of legitimate horse racing with pari-mutuel wagering thereon in the Commonwealth on the highest possible plane.”

KRS Chapter 230 grants the Commission broad authority to prescribe rules for permissible pari-mutuel wagering in order to effectuate this legislative purpose. Indeed, KRS 230.215(2) grants the Commission “**plenary power** to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth so as to encourage the improvement of the breeds of horses in the Commonwealth....”⁴⁹ “Plenary” power is that which is “[f]ull, complete, absolute, perfect, unqualified.”⁵⁰

Similarly, KRS 230.361 authorizes the Commission to “promulgate administrative regulations governing and regulating mutuel wagering on horse races

⁴⁸ *Ky. Off-Track Betting, Inc. v. McBurney*, 993 S.W.2d 946, 948 (Ky. 1999).

⁴⁹ KRS 230.215(2) (emphasis added).

⁵⁰ BLACK'S LAW DICTIONARY at 1154 (6th ed. 1990). *Accord Ky. PSC v. Conway*, 324 S.W.3d 373, 381-82 & nn. 22-23 (Ky. 2010) (PSC did not need specific authority for challenged rate mechanism in light of “plenary” ratemaking authority).

under what is known as the pari-mutuel system of wagering ... by a person licensed under this chapter to conduct a race meeting and only upon the licensed premises.”⁵¹

Kentucky courts have consistently recognized the unique breadth of this statutory authority. “The Kentucky State Racing Commission is more than an administrative agency having the quasi-judicial function of finding the facts and applying the law to the facts;” it is “vested with extensive authority over all persons on racing premises” and is “charged with the duty of protecting substantial public interest” in the racing industry.⁵² Thus, “[t]he Commission is vested with **broad powers** to regulate thoroughbred racing and to prescribe rules and regulations relative to racing.”⁵³

This authority has long been understood to include the discretion to prescribe rules for permissible wagering that advance “[t]he intention of the Legislature ... to foster a great industry in this state, one which has gained the state much celebrity,” while balancing the Legislature’s concern that reasonable limits be imposed on gambling.⁵⁴ In the case of *State Racing Commission v. Latonia Agricultural Association*, Kentucky’s highest court upheld a Commission rule prohibiting bookmaking and requiring use of “Paris Mutual” pools (a preference now codified in the statute).⁵⁵ The Court observed that

⁵¹ While the Foundation criticizes the Circuit Court for not specifically quoting KRS 230.361, the Circuit Court’s opinion plainly considered KRS Chapter 230 in its entirety, and determined that the wagers constituted legitimate wagers on horse races using “the pari-mutuel system,” as required by KRS 230.361.

⁵² *Ky. State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 301 (Ky. 1972).

⁵³ *Jacobs v. State Racing Comm’n*, 562 S.W.2d 641, 643 (Ky. App. 1977) (emphasis added).

⁵⁴ *State Racing Comm’n v. Latonia Agri. Ass’n*, 123 S.W.681, 682 (Ky. 1909).

⁵⁵ *Id.* at 682.

the Act expresses a broad legislative policy goal, and then “invests the racing commission with the power ... to ascertain and set forth the particular states of fact that will promote the breeding of thoroughbred horses, and the conducting of legitimate races, and to prohibit the evil of unlawful gambling on the race courses.”⁵⁶

b. The Regulations are a valid exercise of the Commission’s power.

KRS 230.361 authorizes the Commission to “promulgate administrative regulations governing and regulating mutuel wagering on horse races under what is known as the pari-mutuel system of wagering.” Thus, the primary questions answered by the Circuit Court were: (i) whether wagering on historical horse racing as authorized by the Regulations is required to be conducted by means of “what is known as the pari-mutuel system of wagering,” and (ii) whether it is “wagering on horse races.”⁵⁷ The answer to both questions is yes.

i. Historical racing pools are “pari-mutuel” wagers.

The crux of the Foundation’s challenge is its argument that wagers on historical horse races are not consistent with KRS Chapter 230 because those wagers are not pari-mutuel. A plain reading of the Regulations refutes any such argument, as the Regulations expressly provide that “the only wagering permitted on a live or historical horse race shall be under the pari-mutuel system of wagering.”⁵⁸ To that end, the rules prescribed in

⁵⁶ *Id.* at 686.

⁵⁷ Appx. F, Dec. 29, 2010, Opinion and Order at 8 (any wagering authorized by the Commission “must involve pari-mutuel wagering on horse races”) (emphasis in original).

⁵⁸ 810 KAR 1:011, § 1(1).

the Regulations require that approved historical race wagers are “pari-mutuel” within the meaning of KRS Chapter 230. That requirement alone renders the Regulations consistent with the enabling statutes and answers the question at hand without further review. While the Foundation may wish to challenge whether particular wagers approved pursuant to the Regulations meet the definition of pari-mutuel (which is not an issue in this appeal), the Foundation cannot challenge the fact that the Regulations on their face require wagering on historical races to be pari-mutuel.

A review of the remainder of the Regulations further confirms that wagering on historical races is consistent with pari-mutuel wagering. Although the phrases “pari-mutuel wagering” and “pari-mutuel system of wagering” are not defined in KRS Chapter 230, the meaning of those terms is well established. The term “pari-mutuel wagering” refers simply to a system of wagering in which patrons wager among themselves, rather than against the operator of the pool, by placing their wagers into one or more wagering pools that are distributed to winning patrons, minus authorized deductions or takeout.⁵⁹

As the Court explained in *Commonwealth v. Ky. Jockey Club*:

French pool or Paris Mutual is a machine or contrivance used in betting.... In French pool the operator of the machine does not bet at all. He merely conducts a game, which is played by the use of a certain machine, the effect of which is that all who buy pools on a given race bet as among themselves; the wagers of all constituting a pool going to the winner or winners. The operator receives 5 per cent of the wagers as his commission.⁶⁰

⁵⁹ *Commonwealth v. Ky. Jockey Club*, 38 S.W.2d 987, 991 (Ky. 1931).

⁶⁰ *Id.* at 991 (internal quotation marks and citations omitted).

The historical purpose for requiring wagering to be “pari-mutuel” was to preclude the practice of bookmaking, not to legislate detailed rules about wagering mechanics.⁶¹ The fact that patrons bet amongst themselves, and not against the operator of the pool, is what distinguishes pari-mutuel wagering from the practice of “bookmaking.”⁶²

This understanding of “pari-mutuel” is consistent with the definition codified in the Interstate Horse Racing Act (“IHA”), which provides:

“parimutuel” means any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which **the participants are wagering with each other and not against the operator.**⁶³

Similarly, the Association of Racing Commissioners International (ARCI),⁶⁴ defines “pari-mutuel wagering” as:

a form of wagering on the outcome of an event in which all wagers are pooled and held by an pari-mutuel pool host for distribution of the total amount, less the deductions

⁶¹ See *Latonia Agricultural Ass'n*, 123 S.W. 681; FRED S. BUCK, HORSE RACE BETTING: A COMPREHENSIVE ACCOUNT OF BOOKMAKING OPERATIONS 3-6 (1946). Excerpt attached as Exhibit C to R. 340-422, Racing Associations' Joint Brief in Support of Petition.

⁶² See generally *Swigart v. People*, 40 N.E. 432, 433 (Ill. 1895) (distinguishing pool selling from bookmaking in that “[i]n the first, the betting is with the bookmakers; in the second, the betting is among the purchasers of the pool, they paying a commission to the seller.”).

⁶³ 15 U.S.C. § 3002(13) (emphasis added).

⁶⁴ The Association of Racing Commissioners International (“ARCI”) is an industry standard-setting body originally founded in 1934 by the racing commissions of seven states, including Kentucky, which now includes in its membership racing commissions from 35 racing states, as well as the racing commissions of a number of foreign jurisdictions.

authorized by law, to holders of tickets on the winning contestants.⁶⁵

Similarly, in 2001 Congressional testimony, the Deputy Commissioner and Chief Operating Office of the National Thoroughbred Racing Association (“NTRA”) echoed this sentiment, stating that the “pari-mutuel system” is one “in which bettors wager against one another instead of against the ‘house.’”⁶⁶

Thus, the term “pari-mutuel wagering” simply refers to pooled betting on the outcome of horse races where participants bet against each other, not the operator. The term does not denote a specific set of practices or rules whereby pari-mutuel wagering may have historically been conducted.⁶⁷ The Massachusetts Supreme Judicial Court in *Donovan v. Eastern Racing Association* rejected a challenge to the legality of the “daily double” wager as outside the statutory authorization of “pari-mutuel wagering” on the grounds that “pari-mutuel wagering” had traditionally been limited to wagering on a single race. The court explained ““the pari-mutuel system is nothing more than a division of the pool among the successful contributors in proportion to the respective contributions, or wagers.””⁶⁸

⁶⁵ARCI Model Rules-001-010(52) and 004-007(M). Available at http://www.ua-rtip.org/sites/ua-rtip.org/files/Chapters1-4_2013.pdf (last visited February 26, 2013).

⁶⁶ Testimony of Gregory C. Avioli to the Oversight and Investigations Subcommittee, House Financial Services Committee, July 12, 2001, at p. (available at <http://www.financialservices.house.gov/media/pdf/071201ga.pdf>) (last visited February 26, 2013).

⁶⁷ See, e.g., *Donovan v. Eastern Racing Ass’n*, 86 N.E.2d 903, 906 (Mass. 1949).

⁶⁸ *Id.* (quoting *Wise v. Delaware Steeplechase & Race Ass’n*, 18 A.2d 419, 421 (Del. 1941) (holding that the phrase “pari-mutuel” did not imply or require use of traditional method for calculating of breakage)).

The wagers on historical horse races authorized by the Regulations utilize the “pari-mutuel system of wagering” within the established meaning of this term. Under the Regulations, patrons do not wager against the Racing Association who conducts the pools. Patrons’ wagers are placed in common wagering pools, and patrons who successfully pick the winning combination are paid out of the net pool, minus authorized deductions and takeout.⁶⁹

The Regulations expressly state that all wagers on historical races “shall be placed in pari-mutuel pools approved by the Commission,” and that any “payout to a winning patron shall be paid from money wagered by patrons and shall not constitute a wager against the association.”⁷⁰ The Regulations further specify that a wager on an historical horse race shall not be conducted in “such a manner that the amount retained by the association as a commission is dependent upon the outcome of any particular race or the success of any particular wager.”⁷¹ Moreover, wagering on historical horse races is required to be “conducted through the use of a totalizator or other similar mechanical equipment approved by the commission,” as contemplated by KRS 230.361.⁷²

This is pooled pari-mutuel wagering in the plain meaning of the term and consistent with the pari-mutuel system of wagering contemplated by KRS Chapter 230. Patrons wagering on historical horse races at a given time are competing against each other for a common pool, which is funded by their respective wagers. As they place

⁶⁹ See 810 KAR 1:011, §§2-4.

⁷⁰ 810 KAR 1:011, § 4(1)(a), (b).

⁷¹ 811 KAR 1:011, § 4(c).

⁷² 810 KAR 1:011, §2(1).

wagers on the historical races selected for them, their wagers are placed in one or more pari-mutuel pools. Once a player succeeds in a particular wager by selecting the correct winning outcome, he or she receives a payout from the corresponding pool. The patron is not wagering against the operator of the pool in any way. The odds are not “fixed,” as in a table game or slot machine. The ratio of the wager to the expected payout depends on the total amount wagered by other patrons, and the probability of a wager succeeding depends on which horses the patron selects, and how effectively he or she evaluates the available handicapping information.

Historical racing pools are recognized as a form of “pari-mutuel wagering” by the Association of Racing Commissioners International (“ARCI”), whose membership includes the racing commissions of 35 states, including Kentucky. ARCI includes several forms of historical racing pools in its Model Rules for Pari-Mutuel Wagering, alongside the model rules for other well-established exotic pari-mutuel wagers like the Pick Six and Daily Double.⁷³ The fact that the racing industry’s leading regulatory standards organization recognizes historical racing pools as “pari-mutuel wagers” confirms that such wagers are made “under what is known as the pari-mutuel system of wagering,” as contemplated by KRS 230.361.

The fact that patrons are not all wagering on the same historical horse race does not eliminate the pari-mutuel character of these wagers. Although wagering on different historical horse races, patrons’ wagers are still pooled together. Their wagers are placed into common pari-mutuel pools, and the successful bettor receives his or her payout from

⁷³ See ARCI Model Rules, ARCI-004-155(A) (rules governing “Instant Racing Pools”). Available at http://www.ua-rtip.org/sites/ua-rtip.org/files/Chapters1-4_2013.pdf (last visited February 26, 2013).

the pool.⁷⁴ Nothing in *Jockey Club*, or any accepted definition of “pari-mutuel” wagering, precludes pooling wagers from different races and allowing patrons to compete for the common pool.

To the contrary, many of the existing wagers that have long been offered at Kentucky tracks involve carryover pools, in which persons compete for a pool funded in substantial part by wagers placed on different races held on different days.⁷⁵ For example, in the Pick Six, one of the most popular wagers today, patrons attempt to pick the winners of all six races on a given day. A portion of the wagers is allocated to a carryover pool, which, if nobody picks all six races correctly, is available to be won the next day the wager is offered. Thus, a patron who wins the carryover pool receives a payout that includes wagers of patrons who bet on different races, on different days.⁷⁶ The “Super High 5” wager, where patrons attempt to pick the top five finishes in a given race, involves a similar carryover pool that carries over from race to race.⁷⁷ Moreover, as the Franklin Circuit Court observed, it is possible (although perhaps rare) that only one patron may place one of these wagers on particular race.⁷⁸ Even though only one person bets on that race, he is still competing for a pari-mutuel pool.⁷⁹

⁷⁴ See 810 KAR 1:011, § 4(1).

⁷⁵ R. 423-471, Affidavit of Marc Guilfoil (“Guilfoil Aff.”), Exhibit E to Brief of the Commission in Support of Petition for Declaration of Rights.

⁷⁶ *Id.* at ¶¶ 14, 22-26.

⁷⁷ *Id.* at ¶¶ 21-23.

⁷⁸ Appx. F, Dec. 29, 2010, Opinion and Order at 13, n.18.

⁷⁹ *Id.*

For over twenty years, the Commission has construed Chapter 230 to permit these types of carryover pools, which combine wagers placed on different races.⁸⁰ A longstanding agency interpretation, allowed to continue without legislative interruption, is entitled to deference.⁸¹

- ii. **The lawfulness of the patented game “Instant Racing,” or any other specific historical race wagering game (including those being offered at Kentucky Downs and Ellis Park⁸²), is not before this Court.**

The only issue addressed in the Franklin Circuit Court’s order is the validity of the Regulations themselves, and their authorization of the concept of pari-mutuel wagering on historical races according to the rules set forth therein. The Circuit Court’s order did not approve any specific game. Specific games require review and approval of the Commission before they can be offered,⁸³ and may be challenged in a proper proceeding seeking review of the Commission’s decision. This appeal does not arise from such a proceeding. The sole focus of this appeal is the validity of the Regulations, not the features of Instant Racing or any other particular game.

⁸⁰ R. 423-471, Affidavit of Marc Guilfoil (“Guilfoil Aff.”), Exhibit E to Brief of the Commission in Support of Petition for Declaration of Rights.¶ 14.

⁸¹ *Hagan v. Farris*, 807 S.W.2d 488, 491 (Ky. 1991).

⁸² In its briefs before the Court of Appeals, the Foundation submitted various materials relating to the games being offered at Kentucky Downs, which were not part of the record before the Franklin Circuit Court, and therefore are not part of the record to be considered on appeal. CR 76.12(4)(c)(vii). The Commission’s approval of those games was not before the Circuit Court, nor has the Foundation instituted an action in any court to challenge those approvals.

⁸³ 810 KAR 1:011, § 3(6); 810 KAR 1:120 § 2.

iii. The Regulations are within the Commission's power to prescribe rules for wagering on "horse races."

The Foundation's second challenge to the Regulations is that they are not consistent with KRS Chapter 230 because wagers on historical races are not wagers on live horse races. The word "live," however, appears nowhere in those provisions of KRS Chapter 230 that define the Commission's power to authorize "pari-mutuel wagering" and cannot be added by the courts.⁸⁴ As the Kentucky Attorney General recognized, "there is nothing in Kentucky's Act that clearly prohibits wagering" on completed historical horse races.⁸⁵ KRS 230.225 speaks to the Commission's authority to regulate "pari-mutuel wagering on horse racing." KRS 230.215(2) confers "plenary power" to prescribe the conditions for "all legitimate horse racing and wagering thereon." KRS 230.361 authorizes the Commission to regulate wagering "on horse races." Nothing precludes the Commission from authorizing pari-mutuel wagering on previously-run races. Nothing in Chapter 230 limits the Commission's authority to pari-mutuel wagering that is contemporaneous with the running of the race itself. It is not for the courts to impose a limitation that cannot be found in the plain language of the statute.⁸⁶

The Regulations on their face pertain to pari-mutuel wagers on "horse racing" within the meaning of KRS Chapter 230. The Regulations only permit wagers on "horse race[s] ... previously run at a licensed pari-mutuel facility located in the United States

⁸⁴ *Flying J Travel Plaza v. Transp. Cabinet*, 928 S.W.2d 344, 347 (Ky. 1996).

⁸⁵ Appx. B, Ky. OAG 10-001, p. 7 (emphasis added).

⁸⁶ *Flying J Travel Plaza*, 928 S.W.2d at 347 (courts look to "the words used in enacting the statute rather than surmising what may have been intended but was not expressed").

and that concluded with official results.”⁸⁷ Such wagering is only permitted on the licensed premises of Racing Associates licensed to conduct horse race meetings.⁸⁸ As with all pari-mutuel wagers authorized by the Commission, the patron’s success depends on accurately predicting the outcome in officially sanctioned horse races. Similarly, as with existing pari-mutuel wagering, the patron is provided with “true and accurate past performance information” concerning the horses running in the selected historical race to allow the patron to “handicap” the race.⁸⁹ After placing his or her wager, the patron may view all or a portion of the race itself and the official results.⁹⁰ That the wagers involve completed historical horse races does not take them outside the plain language of Chapter 230.

The Foundation’s argument that a video of a horse race is not a horse race confuses the medium with the message. The Regulations require that wagers be made on sanctioned horse races, actually run on a licensed track, and concluded with official results.⁹¹ That the races may be viewed on a video monitor does not change the fact that the wagers are determined by the outcome of horse races. A patron wagering on a simulcast horse race, or while watching a race in the enclosed portion of a track, is still wagering on a horse race, even though he or she is viewing it on a video monitor.

⁸⁷ 810 KAR 1:001, § 1(32).

⁸⁸ *Id.*, § 3(3).

⁸⁹ 810 KAR 1:011, § 3(7)(e).

⁹⁰ *Id.*, § 3(7)(f).

⁹¹ 810 KAR 1:001, § 1(32).

The Foundation's reliance on the use of the phrase "live racing" in the pari-mutuel taxation statute, KRS 138.510(1)(a), is misplaced. As the Franklin Circuit Court recognized, this is a reference to the phrase "daily average live handle," which is a defined term with a technical meaning for the Revenue Code.⁹² More fundamentally, this phrase only pertains to the scope of the excise tax under Chapter 138, not the Commission's authority under Chapter 230. The term "live racing" does not appear in KRS 230.215, 230.225, or 230.361. Even if the Foundation were correct that the use of "live" in KRS 138.510 was intended to limit the excise tax to "live" racing (treating other types of pari-mutuel wagering as ordinary corporate income), the omission of the term "live racing" from the operative provisions of KRS Chapter 230 would suggest there was no similar intent to impose such a limit on wagering permitted by the Commission under Chapter 230.

The Foundation's reliance on KRS 230.070 and .080's prohibition on entering horses in races under false names is also unavailing. These statutes apply only to parties who "**enter**" a horse for competition under an assumed or false name.⁹³ They do not address what information tracks must provide to patrons wagering on historical races **after** the horses were "entered" and the races concluded. These provisions prohibit persons who enter horses in a race from deceptively concealing information about the horse's eligibility or history. In historical racing, the legitimacy of the race and validity of

⁹² Appx. F, Dec. 29, 2010, Opinion and Order at 15.

⁹³ KRS 230.070 ("No person shall knowingly **enter or cause to be entered** for competition....any horse, under an assumed name, or out of its proper class....") (emphasis added); KRS 230.080 ("No person shall change the name of any horse **for the purpose of entry for competition** ... except as provided by the code or rules of the association....") (emphasis added).

information about the horses has already been determined—any race used for historical race wagering must have “concluded with official results,” and without any “scratches” or “disqualifications.”⁹⁴ Moreover, patrons must be given “true and accurate past performance information,” so there is no deception about the horse’s history.⁹⁵ Indeed, the horses’ identities are not concealed at all; they are simply withheld until after the patron makes a selection.

iv. Historical Racing terminals are not illegal “gambling devices.”

KRS 436.480 categorically states that the entirety of Chapter 528, which includes the prohibition on gambling devices, “**shall not apply to pari-mutuel wagering authorized under the provisions of KRS Chapter 230.**”⁹⁶ The Foundation’s argument that historical racing terminals cannot be authorized by Chapter 230 because they fall within the definition of “gambling devices” in KRS Chapter 528 is backwards. Under KRS 436.480, the Court must first determine the scope of the Commission’s authority under Chapter 230, and, if historical race wagering is permitted under that chapter, then all of Chapter 528—including its definition of “gambling machines”—is completely inapplicable.

Consistent with this view, KRS 528.080 only prohibits possession of gambling devices if done with a “belie[f] that it is to be used in the advancement of **unlawful** gambling activity.”⁹⁷ If historical wagering activity is permitted under KRS Chapter 230,

⁹⁴ 810 KAR 1:001, § 1(32).

⁹⁵ 810 KAR 1:011, § 3(7)(e).

⁹⁶ (emphasis added).

⁹⁷ (emphasis added).

use of terminals would not advance any “unlawful” gambling, whether or not the terminals fall within the definition of “gambling device” in KRS 528.010(4). Indeed, interpreting the definition of “gambling device” in KRS 528.010(4) as limiting the scope of lawful wagering under Chapter 230 would lead to absurd results, since the “catch-all” language in KRS 528.010(4)(b) including “[a]ny other machine ... for use in connection with gambling” arguably would apply to a variety of equipment used in lawful pari-mutuel wagering. Pursuant to KRS 436.480, Chapter 528 does not apply to wagering authorized in Chapter 230.

v. The Kentucky Penal Code’s definition of prohibited “mutuel” lottery games has no application to Chapter 230.

Similarly, contrary to the Foundation’s assertions below, the definition of prohibited “mutuel” lotteries contained in KRS 528.010(6) likewise does not have any bearing on the Commission’s authority to regulate pari-mutuel wagering under KRS Chapter 230. KRS 436.480 expressly states that “**KRS Chapter 528 shall not apply to pari-mutuel wagering authorized under the provisions of KRS Chapter 230.**” The definition of “mutuel” in KRS 528.010 is intended for use with the criminal prohibitions on mutuel games in KRS 528.020, .050, or .060, which necessarily **exclude** authorized pari-mutuel wagering. Indeed, the plain language of KRS 528.010 makes clear that its “definitions apply **in this chapter**”—*i.e.*, in Chapter 528—not throughout the entire Kentucky Revised Statutes.

Moreover, read in context, the term “mutuel” in KRS 528.010(6) plainly refers to a completely different form of wagering than is contemplated in Chapter 230. KRS 528.010(6) defines “mutuel” as a “form of lottery” that is synonymous with “the numbers

game.” The “numbers game” is a specific type of lottery game based on random number selection, which bears no resemblance to pari-mutuel wagering on the outcome of horse races.⁹⁸ Under Kentucky law, pari-mutuel wagering on horse racing is **not** a “lottery.”⁹⁹ If the General Assembly had understood KRS 528.010(6)’s definition of “mutuel” to apply to pari-mutuel wagering under KRS Chapter 230, it would have made no sense to define “mutuel” as a “form of lottery.”

vi. Resort to opinions and case law from other states is unnecessary and improper.

In its brief before the Court of Appeals, the Foundation relied extensively on the handful of judicial opinions and opinions of attorney generals from other states that have considered whether wagering on historical horse races is permitted under their respective state statutory and regulatory frameworks. In fact, those opinions have reached differing results.¹⁰⁰ More importantly, each of those decisions is based on those states’ distinct statutory and regulatory frameworks and has no bearing on whether **Kentucky** law allows such wagers.

⁹⁸ See BLACK’S LAW DICTIONARY 1069 (6th ed. 1990) (defining “the numbers game” as a game where “the player wagers or plays that on a certain day a certain series of digits will appear or ‘come out’ in a series such as the United States Treasury balance or pari-mutuel payoff totals of particular races at a certain racetrack for the day used as a reference.....”).

⁹⁹ See *Ky. Jockey Club*, 38 S.W.2d 987.

¹⁰⁰ Compare Ala. Op. Atty. Gen. No. 2009-20, 2008 WL 52640104 (Dec. 5, 2008) (historical racing pools are permissible forms of pari-mutuel wagering under Alabama constitution and statutes, as long as accurate handicapping information is provided allowing exercise of skill); Ala. Op. Atty. Gen. No. 2001 WL 489840 (Mar. 13, 2001) (same), with *MEC Oregon Racing, Inc. v. Oregon Racing Comm’n*, 225 P.3d 61 (Or. App. 2009); *Wyoming Downs Rodeo Events, LLC v. Wyoming*, 134 P.3d 1223 (Wyo. 2006).

For example, the *Wyoming Downs* court¹⁰¹ reached the conclusion that historical racing terminals were prohibited “gambling devices” without first considering whether wagering on historical racing was within the scope of permitted “pari-mutuel” wagering under the Wyoming racing statutes. The court acknowledged that it considered the definition of permissible “pari-mutuel” wagering only “[i]n passing.”¹⁰² While that may have been a permissible approach under Wyoming law, Kentucky law expressly requires the Court to determine whether pari-mutuel wagering on historical races is permitted under KRS Chapter 230 **before** it considers whether terminals used for such wagers are “gambling devices.” If historical race wagering is permitted under KRS Chapter 230, then the prohibitions on gambling devices in Chapter 528 simply do not apply.¹⁰³

The issue in *MEC Oregon*¹⁰⁴ was not whether the state racing commission had the authority to approve historical race wagers, but rather whether it was required to do so. The Oregon Racing Commission refused to authorize such wagers, and a racing association brought suit challenging the Commission’s decision.¹⁰⁵ Moreover, the court relied on a specific Oregon statute that expressly required all of the funds wagered on a particular race to be placed in the same single pool, which the court believed precluded

¹⁰¹ 134 P.3d 1223.

¹⁰² *Id.* at 1230.

¹⁰³ *See* KRS 436.480.

¹⁰⁴ 225 P.3d 61.

¹⁰⁵ *Id.* at 65-67.

pooling wagers on different races.¹⁰⁶ Kentucky's Chapter 230 has no equivalent statutory requirement.

Likewise, much of the legal basis for the Maryland Attorney General's opinion, including questions about the use of "seed pools," was based on the absence of "any reference to such a mechanism in the [Maryland] Commission's **regulations.**"¹⁰⁷ There is no such omission or ambiguity in the Commission's Regulations. Seed pools and all other necessary elements of historical racing pools are expressly authorized and required by the Regulations. The opinion also turned on questions of whether Maryland's statute allows "wagers on completely different races [to be] pooled together."¹⁰⁸ By contrast, Kentucky has long recognized the validity of wagers, like the Pick Six, that combine wagers placed on different races into a progressive pool.

Kentucky's highest court has emphasized that when it comes to the subject of pari-mutuel wagering, "whatever may be the rule in other jurisdictions, we are bound by our own decisions and history on the subject."¹⁰⁹ As such, the Court should review the Regulations for their consistency with KRS Chapter 230, and the decisions interpreting that statute, not on decisions from other states based on different regulatory and statutory schemes.

¹⁰⁶ *Id.* at 67 (quoting ORS 462.720(1)(b)).

¹⁰⁷ 94 Md. Op. Att'y Gen. 32, 2009 WL 998670, * 5 (emphasis added).

¹⁰⁸ *Id.* at 4.

¹⁰⁹ *Jockey Club*, 38 S.W.2d at 994.

c. The Commission's interpretation is entitled to deference.

The plain language of Chapter 230 permits the historical racing wagers contemplated by the Commission. However, even if there were some ambiguity whether “pari-mutuel wagering on horse races” included historical racing pools, the Commission’s interpretation of the Act would be entitled to deference. “If a statute is ambiguous, the courts grant deference to any permissible construction of that statute by the administrative agency charged with implementing it.”¹¹⁰

Thus, if KRS Chapter 230 is even “ambiguous, or at least silent upon the issue” of whether historical racing wagers are permitted, the Commission’s interpretation must be upheld as long as it is a “permissible” interpretation of the statute, whether or not it is the same interpretation the Court would reach *de novo*.¹¹¹ As set forth above, there is ample legal basis to justify the Commission’s interpretation. In addition, the only members of the judiciary to rule on the ultimate question of the Regulations’ validity, the Franklin Circuit Court and the Court of Appeals dissent, agreed with the Commission’s interpretation, as did the Attorney General when he concluded that “there is nothing in

¹¹⁰ *Ky. P.S.C. v. Commonwealth*, 320 S.W.3d 660, 668 (Ky. 2010) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984)). See also *Metzinger v. Ky. Ret. Sys.*, 299 S.W.3d 541, 545 (Ky. 2009) (emphasis added) (quotation omitted) (agency interpretation “in the form of an adopted regulation or formal adjudication” is entitled to *Chevron* deference).

¹¹¹ *Stumbo v. Ky. Pub. Serv. Comm’n*, 243 S.W.3d 374 (Ky. App. 2007).

Kentucky's Act that clearly prohibits wagering" on historical horse races.¹¹² Thus, the Commission's interpretation is, at the very least, a permissible one. It must be upheld.¹¹³

2. The petition presented a justiciable controversy under KRS 418.020.

The Franklin Circuit Court's Opinion does not constitute an impermissible "advisory opinion." Rather, the Court adjudicated the questions presented in the Petition according to the procedures expressly authorized by KRS 418.020.

The Foundation's argument to the contrary misunderstands KRS 418.020's "real controversy" requirement. This requirement is satisfied when "an advance determination would eliminate or minimize the risk of wrong action or mistakes by any of the parties," even if there is no party formally challenging a particular act.¹¹⁴ In the case of *McConnell v. Commonwealth*, the Kentucky Court of Appeals held that KRS 418.020 conferred jurisdiction to determine whether an infrared breath tester qualified as a

¹¹² Ky. OAG 10-001, p. 7 (emphasis added).

¹¹³ In its brief to the Court of Appeals, the Foundation incorrectly cited *United Sign, Ltd. v. Commonwealth*, 44 S.W.3d 794, 798 (Ky. App. 2000), and *Flying J Travel Plaza*, 928 S.W.2d at 347, for the proposition that "any doubt" about the Commission's authority must be resolved against it. These cases dealt with restrictions on First Amendment rights, which face a "strong presumption" of invalidity that does not apply here.

¹¹⁴ *McConnell v. Commonwealth*, 655 S.W.2d 43, 45 (Ky. App. 1983). See, e.g., *Appeal of Muhlenberg County Bd. of Educ.*, 714 S.W.2d 168, 169 (Ky. App. 1986) (holding that court has "authority to review the merits of this action because of the 'confusion detrimental to the school system [which] will undoubtedly result' if the situation complained of is not rectified"); *Combs v. Matthews*, 364 S.W.2d 647 (Ky. 1963) (holding court had jurisdiction to decide constitutionality of proposed legislative reapportionment in advance of extraordinary session of General Assembly); *Bd. of Educ. of Lexington v. Harville*, 416 S.W.2d 730 (Ky. 1967) (holding court had jurisdiction to decide question related to uniform tax rate throughout merged school district); *Commonwealth v. Carroll County Fiscal Court*, 633 S.W.2d 720, 721 (Ky. App. 1982) (holding that fiscal court would be left in "untenable position" without judicial direction on obligations for construction of jail).

“chemical test” under the relevant statute, although nobody opposed the test. A “real controversy” was present because the parties were “reluctant to make recommendations and/or financial commitment to the new equipment without a judicial answer to the narrow question.”¹¹⁵

Here, the Franklin Circuit Court properly found the Petition and supporting Affidavits showed advance determination was needed to “eliminate the risk that Kentucky’s racing associations make significant expenditures to install instant racing terminals that may be unlawful under Kentucky’s statutory provisions on gambling.”¹¹⁶ Moreover, the Foundation’s suggestion that there is no “real controversy” is refuted by the very fact that the Foundation is presently challenging the validity of the Regulations.

The Foundation’s argument below that KRS 418.020 does not allow construction of criminal statutes is also incorrect. KRS 418.020 merely requires that the question presented in petition “might be the subject of a civil action,” not that the only questions allowed are those that pertain to civil statutes. The validity or application of criminal statutes is commonly tested through *civil* Declaratory Judgment Actions.¹¹⁷ Moreover, the Petition was not limited to seeking interpretation of a criminal statute. The Petition’s primary request was for a declaration that the Regulations were within the Commission’s

¹¹⁵ *Id.*

¹¹⁶ Appx. D, Order entered July 26, 2010, at p. 3. R. 193-197.

¹¹⁷ *See, e.g., Chambers v. Stengel*, 37 S.W.3d 741, 742 (Ky. 2001) (constitutionality of statutes imposing criminal sanctions for attorney solicitations); *Bowling v. Kentucky Dept. of Corrections* 301 S.W.3d 478, 484 (Ky. 2009) (civil declaratory judgment action is “appropriate vehicle for determination of all issues regarding implementation of the death penalty which are not cognizable in a defendant’s criminal action”).

authority under KRS Chapter 230, a civil statute.¹¹⁸ The scope of KRS Chapter 230 automatically determines the applicability of the Penal Code, since KRS 436.480 – which is also not a criminal statute – categorically states that KRS Chapter 528 “shall not apply to pari-mutuel wagering authorized under the provisions of KRS Chapter 230.”

3. The Regulations are not “Special Legislation.”

A final argument against the Regulations offered by the Foundation below is that they somehow constitute unconstitutional “special legislation.” Initially, the Foundation offers no authority that sections 59 & 60 of the Kentucky Constitution, which address limitations on the General Assembly’s power to enact **statutes**, even apply to Executive Branch **regulations**.¹¹⁹ Regardless, the Regulations utilize neutral classifications that are not arbitrary or irrational. The Foundation has offered no reason to conclude otherwise.

The Regulations are by their terms generally applicable to all Racing Associations and therefore are not “special laws.” “A statute which relates to persons or things *as a class* is a general law, while a statute which relates to particular persons or things *of a class* is special.”¹²⁰ “[T]he only limitation upon the legislative power of classification is

¹¹⁸ Petition, ¶ 22 A (requesting a determination that “[t]he Regulations are a valid and lawful exercise of the Commission’s statutory authority to regulate pari-mutuel wagering of horse racing under Chapter 230 of the Kentucky Revised Statutes.”).

¹¹⁹ Both § 59 and § 60 are expressly addressed to the General Assembly, not the Executive Branch. *See* KY. CONST., § 59 (“The General Assembly shall not pass local or special acts....”); KY CONST., § 60 (“The General Assembly shall not indirectly enact any special or local act....”). It is therefore doubtful that the constitutional limitation on the General Assembly’s ability to enact “special laws” even applies to regulations promulgated by an administrative agency.

¹²⁰ *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820, 825 (Ky. 1942) (internal citations omitted) (emphasis in original).

that it shall be founded upon some reasonable and actual distinction, and not arbitrarily made.”¹²¹

As reflected in amended 810 KAR 1:001, the Regulations apply to the class of “Association[s],” which is defined by reference to KRS 230.210(1). “‘Association’ means any person licensed by the Kentucky Horse Racing Commission under KRS 230.300 and engaged in the conduct of a recognized horse race meeting.”¹²² Thus, the Regulations expressly apply to Racing Associations as a class. The classification of “Associations” is found throughout Chapter 230, and is plainly a “reasonable and natural distinction.”¹²³ Nor can any valid objection be raised to the fact that the Regulations restrict gaming to the existing facilities of a licensed Racing Association. “The requirement of being an existing facility is a quite natural and distinctive requirement.”¹²⁴ The Regulations are not Special Legislation.

VI. CONCLUSION

The Court of Appeals erred by declining to address the important legal questions regarding the validity of the Regulations at issue in this case; and in so doing, erroneously limited the discretion of trial courts to resolve questions of law without the delay of unnecessary discovery. This Court should correct that error. Furthermore, because the Regulations promulgated by the Commission constitute a lawful exercise of the

¹²¹ *Ky. Jockey Club*, 38 S.W.2d at 994. See also *St. Luke Hosp., Inc. v. Health Policy Bd.*, 913 S.W.2d 1, 3 (Ky. App. 1996).

¹²² KRS 230.210(1).

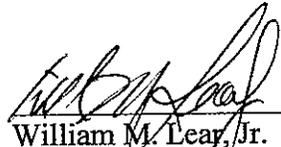
¹²³ See *Ky. Jockey Club*, 38 S.W.2d at 994.

¹²⁴ *St. Luke’s Hosp., Inc.*, 913 S.W.2d at 4.

Commission's plenary power consistent with KRS Chapter 230, the Opinion and Order of the Franklin Circuit Court should be affirmed.

Respectfully submitted,


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