IN THE SUPREME COURT OF FLORIDA

WINSHARE CLUB OF CANADA, a Canadian corporation, a/k/a 468560 ONTARIO LTD., d/b/a WINSHARE CLUB INTERNATIONAL; FAIRWAY CLUB INTERNATIONAL; and ORION INTERNATIONAL,

Petitioners,

vs.

STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS, ROBERT A. BUTTERWORTH, ATTORNEY GENERAL,

Respondent.
_____/

CASE NO. 72,924
Fifth DCA 87-1641

****

ON REVIEW OF DECISION OF

THE FIFTH DISTRICT COURT OF APPEALS

****

BRIEF OF AMICUS CURIAE
DEPARTMENT OF THE LOTTERY

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Congress has prohibited interstate commerce in lottery materials and Florida is powerless to enact legislation in contravention of federal law. Florida's criminal statute does not impede commerce into the state, but simply regulates under the state's police power conduct occurring wholly within its boundaries.

Even if the statute is analyzed under the traditional commerce clause test, it is constitutional as an evenhanded regulation which supports a legitimate public interest.

Florida's statute does not violate the First Amendment, which affords no protection if the advertisement is for unlawful activity. Petitioners' promotions concern activity which is unlawful in Florida and therefore are not entitled to First Amendment protection.

ARGUMENT I

SECTION 849.09(1), FLA. STAT., IS NOT AN UNCONSTITUTIONAL VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

In analyzing a Commerce Clause challenge to a state statute, the first step must always be to reflect upon the Commerce Clause itself. That clause, embodied in Article I, Section 8, Clause 3, grants to Congress the power "to regulate Commerce with foreign Nations, and among the several States."

The Commerce Clause, by reposing in Congress the regulation of Commerce between the states, was intended to forestall the "anarchy and commercial warfare between states" due to parochial legislation, which threatened "the peace and safety of the Union." Hood v. DuMond, 336 U.S. 525, 533, 93 L.Ed. 865, 871-72 (1949). The Clause is based upon the premise that every producer is entitled to free access to every market in the nation, and every consumer is entitled to free competition which prevents exploitation. Id. at 875.

Many potential areas of regulation are not addressed by Congress, however, and "in the absence of federal legislation, these subjects are open to control by the states so long as they act within the restraints imposed by the Commerce Clause itself." Philadelphia v. New Jersey, 437 U.S. 617, 623, 57 L.Ed.2d 475, 481, 98 S.Ct. 2531 (1978). Conversely, in those areas where Congress has chosen to legislate, the states are prohibited from enacting laws which contravene the federal

statutes. Chicago and Northwestern Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317, 67 L.Ed.2d 258, 265, 101 S.Ct. 1124 (1981). A state may not impede the free flow of commerce into its boundaries unless the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental. Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L.Ed.2d 174, 178; 90 S.Ct. 844 (1970).

Turning to the instant case, Petitioners contend that Section 849.09(1), Fla. Stat., which prohibits the advertising of any lottery scheme and the sale or offer for sale of any lottery ticket or share in a lottery ticket, is unconstitutional as violative of the Commerce Clause since Florida now conducts its own lottery as established in Chapter 24, Fla. Stat. Petitioners' argument cannot clear even the first hurdle in a Commerce Clause challenge to a state statute - whether the subject matter is one regulated by Congress. If Congress has regulated the subject area, Florida has no authority to legislate in a contradictory manner.

Interstate commerce in lottery materials has been prohibited by Congress since at least 1895. There are currently several statutes which prohibit the interstate transportation of lottery materials and paraphernalia. 18 U.S.C. s. 1301 provides that:

> Importing or transporting lottery tickets
>
> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company

> or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

18 U.S.C. s. 1302 provides, in pertinent part, that:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
>
> Any letter,package, postal card, or circular concerning any lottery...;
>
> Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in...a lottery;
>
> Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery...;
>
> Shall be fined not more than $1,000 or imprisoned not more than two years, or both.

In Champion v. Ames, 188 U.S. 321 (1902), the Supreme Court expounded at length on the predecessor to the current statutes, the Act of March 2, 1895, c. 191, 28 Stat. 963, entitled "An Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service, Subject to the Jurisdiction and Laws of the United States."

The court rejected a constitutional challenge to the act that the transportation of lottery tickets from one state to another by an express company did not constitute commerce within the meaning of the Commerce Clause. Particularly pertinent to the instant case is the following:

> ...As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the "widespread pestilence of lotteries" and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states - perhaps all of them - which for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischief of the lottery business, to be overthrown or disregarded by the agency of interstate commerce.

Id. at 327. (emphasis added).

A state's power to regulate gambling under its police powers has long been recognized. See Stone v. Mississippi, 101 U.S. 814 (1880). Under that power, a state may prohibit lotteries or other forms of gambling altogether, Champion v. Ames, supra, or it may authorize particular activities and prohibit others. Carroll v. State, 361 So.2d 144 (Fla. 1978). In enacting the federal lottery statutes, Congress not only recognized and validated the rights of states to legislate

concerning lotteries within their boundaries, it increased the ability of states to ensure compliance with those laws by providing additional criminal penalties for the introduction of lottery materials into commerce.

The purpose of the federal lottery statutes is still valid. In United States v. Stuebben, 799 F.2d 225 (5th Cir. 1986), the court responded to an argument that the changing opinions toward lotteries rendered illegitimate the purpose behind the federal prohibitory statutes. The court stated at 229:

> While state lotteries have achieved some public acceptance, this alone does not render the purpose of the statutes improper. Regulating or prohibiting forms of gambling is still a well-recognized governmental prerogative. A state legislature retains authority to exercise this prerogative by banning a lottery within its state borders, should it so wish, while Champion makes clear the power of Congress to prohibit any gambling-related activity that touches upon interstate commerce. Changing times do not empower federal courts to overturn such legislation - certainly, not absent signs of arbitrariness or discriminatory intent.

(emphasis added).

The fact that Florida has exercised its police power to allow the operation of a lottery run by the state rather than prohibiting lotteries altogether does not alter the above-cited principles. Arguments similar to those of Petitioners were raised in the case of Miller v. Radikopf, 228 N.W.2d 386 (Mich. 1975), in which the court held enforceable a contract to share the proceeds of an Irish Sweepstakes ticket. Justice Coleman,

in dissent, focused on the illegality of the underlying sale of Irish Sweepstakes tickets in Michigan, rather than the mere agreement to divide proceeds. He rejected out-of-hand the argument, identical to that raised by Petitioners, that the state statute establishing a state-run lottery evinced a public policy in favor of all lotteries, stating:

> The Legislature authorized only one type of lottery: a lottery run by the State of Michigan. All other lotteries remain illegal.
>
> The Court in Lieberthal v. Glen Falls Indemnity Co., 316 Mich. 37, 40, 24 N.W.2d 547, 548 (1946), unequivocally said:
>
> > "Public policy of a state is fixed by its Constitution, its statutory law, and the decisions of its courts; and when the Legislature enacts a law within the limits of the Constitution, the enactment insofar as it bears upon the matter of public policy is conclusive...."
>
> ...Michigan's public policy with respect to lotteries has been fixed by statute and that policy against lotteries other than those conducted by the state has been recently reaffirmed with the enactment of the Lottery Act of 1972.

Id. at 390.

Additionally, Justice Coleman, in response to the argument that the Irish Sweepstakes was historically acceptable and legitimately run, stated that the Legislature rather than the courts was the appropriate forum for redress.

Florida's public policy is, likewise, that only a lottery run by the State of Florida is acceptable. The Constitutional

Amendment which allowed the state to operate a lottery provides that "Lotteries may be operated by the state." Art. 10, Sec,. 15, Const. of the State of Florida. Florida has exercised its broad police powers in a manner which allows a limited exception to the general constitutional and statutory prohibitions against lotteries. The public policy of the state is thus established, and until such time as the voters in this state authorize lotteries other than a state run lottery, the state will punish activities such as those conducted by Petitioners and Congress will support its right to do so. In fact, 18 U.S.C. Sec. 1955, which prohibits illegal gambling businesses, including the operation of lotteries, makes violation of the law of the state of operation an element of the crime. "Congress can enact statutes which incorporate by reference the present and future laws of the state." United States v. Sacco, 491 F.2d 975, 1003 (9th Cir. 1974).

Because Congress has prohibited the interstate commerce of lottery materials, there is no "free flow of commerce" which could be impaired by Florida's statutes. Florida's statute simply regulates, under the state's clear police powers, transactions concerning lottery materials in the State of Florida.

Florida's criminal lottery laws would be enforceable even if Congress had not prohibited interstate commerce in lottery materials. In Washington v. Reader's Digest Association, 501 P.2d 290 (Wash.)(en banc), appeal dismissed 411 U.S. 945 (1972), the supreme court of Washington addressed an argument that state

laws prohibiting lotteries were unconstitutional as applied to users of the U. S. mail since Congress had preempted the field by enacting 18 U.S.C. sec. 1302. The court rejected the argument, holding that:

> ...While it is true the state is without power to regulate the mail, it is not powerless to prevent respondent from using unfair trade practices within its borders. Roth v. United States, 354 U.S. 476, 493-94, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The state cannot enjoin the mails, but it can enjoin respondent from conducting the Sweepstakes within its borders, subjecting respondent to the penalties of the Consumer Protection Act for refusal to comply.

Id. at 303.

See also Missouri v. Reader's Digest Association, 527 S.W.2d 355 (Mo. 1975).

In Cohens v. Virginia, 5 L.Ed. 257, 300 (1821), the Supreme Court addressed directly the sale of lottery tickets from a jurisdiction in which the lottery was legal in a state which prohibited such sales. That case was an appeal from a conviction of the Cohens under Virginia law for selling tickets to the National Lottery in violation of a Virginia law which prohibited the sale of tickets to any lottery except one authorized by the state. The issue addressed was whether Congress, legislating for the District of Columbia and authorizing the corporate body thereof to operate a lottery, intended to force the sale of its lottery tickets in states where such sales were prohibited by law.

The Court held that the power to operate a lottery

granted to the corporation was of a local nature, pointing out that if Congress had wanted to establish a national lottery, tickets to which would be salable in all states, it would have done so by legislation. The Court affirmed the conviction for selling unauthorized lottery tickets in the State of Virginia.

The power of the corporation to legislate for local concerns discussed in Cohens is akin to the power of a state to legislate within its boundaries. The rationale of the Court is therefore equally applicable to the issue presented in the instant case. The court stated:

> Does the corporate [states'] power to authorize the drawing of a lottery imply a power to authorize its being drawn without the jurisdiction of a corporation [state], in a place where it may be prohibited by law? This, we think, would scarcely be asserted. And what clear distinction can be taken between a power to draw a lottery in a place where it is prohibited by law and a power to establish an office for the sale of tickets in a place where it is prohibited by law?

Id. at 300.

If Congress' legislative power over the District of Columbia cannot be used to force states to permit the sale of extraterritorial lottery tickets, it can hardly be proposed that a state or foreign nation, which has no authority over other states, can force the sale of its lottery tickets in a state which prohibits such activity. A state or foreign nation can no more do that than it can force another state to allow it to conduct its lottery drawings there. Even Congress, which can pass legislation to preempt state law, cannot lightly

interfere with the penal laws of a state. Id.

Because Congress has prohibited interstate commerce in lottery materials, as Petitioners even admit in their brief, p. 8, and in their Appendix, p. 3-8, the principles set forth in the traditional Commerce Clause cases cited by Petitioners do not apply. Even so, analysis of Florida's statute under the test set forth in Pike v. Bruce Church, Inc., supra, results in the conclusion that if traditional commerce clause cases did apply, the statute would not be held constitutionally infirm. The Pike test is whether the statute regulates evenhandedly to effectuate a legitimate local interest with only incidental effect on interstate commerce.

Lotteries have throughout history been used as a means of revenue for a state. Greater Loretta Improvement Association v. State, 234 So.2d 665 (Fla. 1970). Increasing revenue to support improvements in public education, as Florida has done, Sec. 24.102(2), Fla. Stat., is clearly a legitimate local purpose. The only type of lottery which could further that purpose and provide additional revenue to the state is a lottery run by the state. Proceeds from the sale of tickets to other lotteries would go to those other lotteries and not into the state coffers. And proceeds from the sale of shares such as offered by Petitioners would go to private companies.

Florida's Legislature, acting reasonably in furtherance of a legitimate local interest, enacted a statute which authorized a state run lottery and specifically stated that "[t]his act shall not be construed to authorize any lottery

except the lottery operated by the department pursuant to this act." Chapter 24 is therefore a specifically authorized exception to the general prohibition against lotteries. Cf. Greater Loretta Improvement Association at 685. (Carlton J., dissenting). (Pari-mutuel wagering is a specifically authorized exception to the general prohibition on gambling.)

Section 849.09(1), Fla. Stat., applies evenhandedly to prohibit the sale of tickets to, and the promotion of, all lotteries other than that operated by the state. It does not, as alleged by Petitioners, prohibit only the promotion of and sale of tickets to other state and national lotteries. It also prohibits the promotion of and sale of tickets to illegal lotteries such as bolita conducted solely within the state of Florida, as well as illegal lotteries spanning state borders.

Petitioners present their arguments as if they were the agency operating the Canadian lottery. They are not. Petitioners are private companies. They have not alleged or argued that they are authorized or licensed by Canada to engage in the business of soliciting in foreign markets the purchase of Canadian lottery tickets or to actually sell Canadian lottery tickets outside that country. Purchasers of the shares in tickets offered for sale by these Petitioners have only the word of the companies and their own faith in the honesty and legitimacy of such companies to rely upon. It is doubtful that Canada, which presumably provides from its treasury payment for winning lottery tickets, would involve itself in a dispute between Petitioners and a purchaser should payment of a winning

share in a lottery ticket not be forthcoming.

The problems inherent in schemes such as those promoted by Petitioners provide an additional state interest justifying Florida's prohibition of the sale of tickets to a lottery other than its own highly regulated lottery. Florida cannot ensure the honesty and integrity of any lottery other than its own. The state has a clear and legitimate interest in protecting its citizens from unscrupulous persons and companies over which it has no control.

Florida's statute prohibits certain activity occurring wholly within the state of Florida. Even if lottery tickets were legitimate articles of interstate commerce, the fact that they are prohibited from being sold in the state does not render the statute an impermissible impediment to interstate commerce. As stated in South Carolina v. Appley, 35 S.E.2d 835, 837 (S.C. 1945):

> A subject of interstate commerce is not so hallowed as to be immune from a statute enacted by a state in the exercise of the police power whereby it is declared illegal.
>
> * * *
>
> ..."State prohibitory laws concerning gambling are generally held not to violate the commerce clause of the federal constitution or to conflict with federal legislation."

See also Ballock v. Maryland, 20 A. 184, 186 (Md. 1980), a criminal case involving the sale of Austrian bonds which were tantamount to lottery tickets. Addressing the constitutional arguments, the court stated:

> The case has been argued as if this defendant was charged to be and is an Austrian subject, and entitled by treaty stipulation to sell and dispose of his property. He is not so charged to be, and, if he was, he would have to be treated exactly as if he was a citizen of the United States, and the state of Maryland. The criminal laws operate alike and equally upon residents and non-residents. As an Austrian, he could not sell lottery tickets in Louisiana lottery, although he might own them, with any more immunity and right than one of our own citizens. Constitutional provisions and treaty stipulations never could have been intended to prevent a state from forbidding that which was deemed injurious to its people.

(emphasis added).

Florida's criminal statute is a valid exercise of its police power and furthers legitimate public interests. Any effect which it has on interstate commerce is permissible. Even if the statute is found to be subject to Commerce Clause limitations it can easily withstand the challenge.

ARGUMENT II

THE APPLICATION OF SECTION 849.09(1) IN THIS CASE IS NOT AN UNCONSTITUTIONAL ABRIDGEMENT OF THE FREEDOM OF SPEECH GUARANTEES OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The Department agrees with the arguments presented by Respondent in its brief. The Department would additionally like to call the Court's attention to the case of Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 106 S.Ct. 2968 (1986). In that case, the Court rejected a First Amendment challenge to a Puerto Rico statute which, as judicially restricted, prohibited the advertisement of casinos in Puerto Rico in local media addressed to inviting Puerto Rican residents to visit the casinos. The Court affirmed that commercial speech is protected only if it "concerns a lawful activity and is not misleading or fraudulent," Id. at 2976, and distinguished the cases of Carey v. Population Services Int'l, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (striking down a ban on the advertisement of contraceptives), and Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 222, 44 L.Ed.2d 600 (1975). (reversing a criminal conviction based on the advertisement of an abortion clinic). The Court stated:

> In Carey and Bigelow, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto

> Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling....
>
> ...It would...surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

Id. at 2979. (emphasis added).

Under the principles cited above, Florida could prohibit the advertisement of out of state lotteries even if their sale was legal, provided there were legitimate local interests advanced by the restrictions. Since their sale is not legal, it is without question that Florida can forbid their promotion. Because the underlying activity is unlawful, there is no First Amendment protection of the advertising.

Finally, it should be noted that the prohibition in 18 U.S.C. Sec. 1302 against the mailing of lottery advertisements has recently been upheld against a First Amendment challenge. Minnesota Newspaper Association v. Postmaster General, 677 F.Supp. 1400 (D.Minn. 1987), appeal filed, Case No. 87-1943, 57 USLW 3004 (May 27, 1988). The governmental interest furthered by statute is directly relevant to the issues in the instant case:

> Congress has an interest in exercising its postal power in a manner which allows individual states to make policy choices within the areas that have been reserved to the states. The regulation of lotteries traditionally has been left to the

> states...[N]onlottery states would have no effective means to implement their gaming policy without the prohibitions at issue here. Removing these prohibitions would also undermine the policies of those states which have chosen to allow only limited types of gaming.

Id. at 1404-05. (emphasis added).

Florida has chosen to allow limited forms of gaming, including a state-run lottery, and both Florida and Congress are interested in insuring its right to effectively implement that policy. Neither the federal nor the state statute regulating the advertising of lotteries unconstitutionally violates any First Amendment rights.

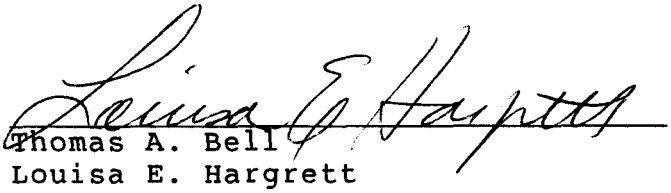
CONCLUSION

Section 849.09(1), Fla. Stat., violates neither the Commerce Clause nor the First Amendment to the United States Constitution. Congress has legislated on the matter of interstate commerce in and mailing of lottery materials and advertisements and both statutes have been upheld against constitutional challenges.

Florida's statutes are authorized under its police powers and encompass activites which take place solely within the state.

In answering the certified question, the Court should uphold the statute as constitutional and affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,



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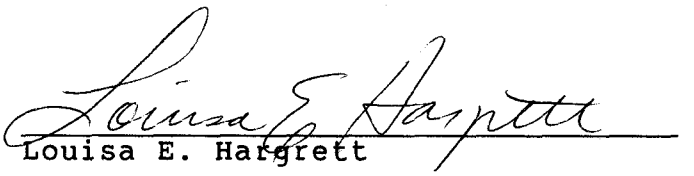
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to George E.

Adams, Esquire, Adams, Hill, Fulford & Morgan, 1417 East Concord Street, Suite 101, Orlando, Florida 32803; David L. Fleming, Esquire, 205 E. Intendencia Street, Pensacola, Florida 32501; Gene Coker, General Attorney, A.T.&T. Communications, Inc., 1200 Peachtree Street, N.E., Atlanta, Georgia 30357; Richard Robison, Esquire, Robison, Owen & Cook, P. A., 5250 South U. S. Highway 17-92, Casselberry, Florida 32707, and Nikki Ann Clark, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 2nd day of December, 1988.



Louisa E. Hargrett