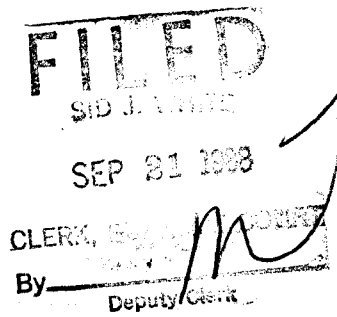
IN THE SUPREME COURT OF FLORIDA



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 CASE NO.: 87-1641)

On Review of Decision of

the Fifth District Court of Appeals

PETITIONERS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

DESIGNATION

In this Brief, the various parties will be referred to as follows:

1. Petitioners, 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, shall be referred to as the "Petitioners".

2. Respondent, THE STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS, ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, shall be referred to as the "State".

Citations to the Record on Appeal will be made by the letter "R" and the appropriate page number.

Citations to the Appendix will be made by the letter "A" and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

This case is before this Court on the certification of the Fifth District Court of Appeal of a question of great public importance, the constitutionality of §849.09(1) and §501.204(1), Fla. Stat. (1985).

Petitioners are foreign entities which offer to assist persons in purchasing entries in other state and national lotteries and assist in keeping track of and/or disbursing any winnings.

On April 6, 1987 the State filed its two count Complaint in the Circuit Court in and for Orange County, Florida, in Case No. 87-2394. It sought to enjoin Petitioners from engaging in the above described activities related to other state and national lotteries, which it alleged violated the Deceptive and Unfair Trade Practices Act, Chapter 501 Part II, Fla. Stat. (1985). The State did not allege that any of those lotteries were illegal where they occur. (R. 15-21).

The State alleged that the Petitioners' conduct violated §849.09(1) which makes it unlawful to aid or assist in setting up, promoting, or conducting any lottery or lottery drawing. (R. 15-21).

The State further alleged that the Petitioners' activity offends and was contrary to public policy as established by §849.09(1), and therefore committed unfair and deceptive acts or practices in trade or commerce in violation of §501.204(1) Fla. Stat. (R. 15-21).

On April 6, 1987 the State filed a separate but similar complaint in the same Circuit Court for injunctive relief against Canadian Express Club, also a foreign company, in Case No. 87-2395 (R. 22-28). Both cases were removed to the Federal Court (R. 36-37) but subsequently remanded back to the Circuit Court (R. 91-93, 132-134).

On June 22, 1987 the trial court entered an order based on a hearing held on June 12, 1987 which enjoined Canadian Express Club from engaging in the activity complained of. (R 127-129).

On July 20, 1987 the State's request for Temporary Injunctive Relief against these Petitioners was scheduled for hearing, but the court first entertained these Petitioners' Motion to Dismiss and granted the same by its Order of August 11, 1988. That Order dismissed the State's Complaint and held that since the State of Florida was now in the business of conducting its own lottery pursuant to Laws of Florida 87-65 (now known as the Florida Public Education Lottery Act), Chapter 24, Florida Statutes (1987)), the application of §849.09 Fla. Stat. (1985) as it pertains to the sale and possession of lottery tickets by other states and foreign governments in Florida was unconstitutional under the Interstate Commerce Clause of the United States Constitution. (R. 149).

Canadian Express Club filed an Amended Motion to Dismiss or in the alternative, Motion to Dissolve Temporary Injunction (R. 138-139). The court treated this as a Motion to Dismiss and granted the same, ruling the same as it did in these Petitioners'

case. (R. 149a).

The State filed a Motion to Consolidate and Reconsider (R. 141-144), and on September 4, 1987 the trial court ordered that the cases be consolidated but denied the State's Request for Reconsideration. (R. 150). The State then appealed to the Fifth District Court of Appeal which reversed the trial court's order and certified the issue of the constitutionality of the statutes and as one of great public importance. This appeal follows.

Canadian Express Club filed a Motion for Rehearing with the Fifth District Court of Appeal and that motion is still pending before that Court.

SUMMARY OF THE ARGUMENT

Because the State of Florida is now conducting its own lottery, the Interstate Commerce Clause of the Constitution of the United States prohibits it from discriminating against other state and national lotteries by not allowing their promotion in the State of Florida. The State's attempt to apply Florida Statute §849.09 and §501.204(1) to Petitioners violates the Interstate Commerce Clause because it amounts to pure economic protectionism, an attempt to keep Florida lottery bettors' money in this state. This violates the tests set forth in Brown-Forman Distillery v. N.Y. Liquor Authority, 106 S.Ct. 2080 (1986) and Philadelphia v. N.J., 437 U.S. 617 (1978).

Additionally, under Bigelow v. Virginia, 421 U.S 809 (1975), the Petitioners' promotion of other state and national lotteries which are legal where they occur is protected by the First Amendment. Under that case, a State cannot prohibit advertising an activity that is legal where it occurs in a state where the activity is prohibited.

Because the Interstate Commerce Clause and the First Amendment protects the activities sought to be enjoined by the State and the opinion of the Fifth District Court of Appeals should be reversed.

ARGUMENT

I. SECTIONS 849.09(1) AND 501.204(1), FLA. STAT. (1985) AS APPLIED IN THIS CASE ARE UNCONSTITUTIONAL VIOLATIONS OF THE INTERSTATE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

Because the State of Florida is now literally in the business of conducting its own government operated lottery, §849.09(1) and 501.204(1), Fla. Stat. (1985) are unconstitutional as applied in this case as interfering with interstate and foreign commerce.

The Interstate Commerce Clause of the United States Constitution, Article I, Section 8, grants Congress the power "to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." This grant of authority serves as a limitation on the State's powers to regulate interstate and foreign commerce. Cooley v. Board of Port Wardens, 12 HOW 299 (1851).

The United States Supreme Court has developed a two-tiered approach to determining if a state's statute violates the interstate commerce clause. First, if the state statute amounts to economic protectionism, it is usually struck. Brown-Forman Distillery v. N.Y. Liquor Authority, 106 S.Ct. 2080 (1986); Philadelphia v. N.J., 437 U.S. 617 (1978).

In Brown-Forman, the Supreme Court said at page 2084, "when a state statute regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interest over out-of-state interests, we generally have struck

down the statute without further inquiry." In the instant case, the effect of the application of the two statutes involved is to favor in-state economic interest over out-of-state economic interest. In its last paragraph of its Order reversing the Trial Court, the Fifth District Court of Appeal seems to have recognized that one of the State's purposes in seeking their injunctions was to keep the lottery-betters money in-state. (A. 1-2). Thus, the State is favoring in-state economic interest over out-of-state economic interest, and its actions fails the Brown-Forman test.

In Philadelphia, the Supreme Court stated at page 624, "thus where simple economic protectionism is effected by state legislation, a virtual per se rule of invalidity has been erected ... the clearest example of such legislation is the law that overtly blocks the flow of interstate commerce at a states borders." Under these two Supreme Court cases, the statutes in this case as applied are subject to the per se rule of invalidity and should be struck down without further inquiry.

In this case, the State of Florida is clearly favoring in-state economic interests over out-of-state economic interests. It has actually gone into business conducting and promoting its own lottery, while prohibiting the promotion of other state and national lotteries. The only difference is in which state or national government runs the lottery involved.

The State of Florida is clearly engaged in a business to make the most profits possible. The Florida Public Education

Lottery Act provides in pertinent part:

> **24.102 Purpose and Intent. -**
> (1) The purpose of this act is to implement s.15, Art. X of the State Constitution in a manner that enables the people of the state to benefit from significant additional monies for education and also enables the people of the state to play the best lottery games available.
> (2) The intent of the Legislature is ...
> (b) That the lottery games be operated by a department of state government that functions as much as possible in the manner of a entrepreneurial business enterprise. The Legislature recognizes that the operation of a lottery is a unique activity for state government and that structures and procedures appropriate to the performance of other governmental functions are not necessarily appropriate to the operation of a state lottery.
> (c) That the lottery games be operated by a self-supporting, revenue-producing department.
>
> **24.107 Advertising and Promotion of Lottery Games.**
> (1) The Legislature recognizes the need for extensive and effective advertising and promotion of lottery games. ... (emphasis added).

Thus, the State is attempting to protect its own economic interests to the exclusion of others at this state's borders. In Philadelphia, a New Jersey statute prohibited the dumping into that state of solid or liquid waste that originated outside of New Jersey. That State's Supreme Court upheld a challenge to the law accepting the State's purported legislative purpose of advancing vital health and environmental objectives with no economic discrimination against and with little burden upon interstate commerce. In reversing the New Jersey Supreme Court, the United States Supreme Court applied the per se standard in

holding that the statute was a parochial statute that was simply economic protectionism and thus violated the Interstate Commerce Clause. The Supreme Court held that regardless of what the stated legislative intent is, legislation can still violate the Interstate Commerce Clause when it stated,

> "... The evil of protectionism can reside in legislative means as well as legislative ends ... but whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce originating from outside the state unless there is some reason a part from their origin to treat them differently ..." 437 US at 627.

In this case, the evils of protectionism resides in the legislative means as well as the ends. The State of Florida is now in the business of operating, conducting and advertising its own lottery to make the most money possible as an entrepreneurial business but discriminating against other state and national government lotteries to keep lottery bettors' money in-state. In Philadelphia, the State of New Jersey contended that out-of-state waste was a threat to the environment, but the United States Supreme Court said that "there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter." 437 U.S. at 629.

Since the only difference between the Florida lottery and the other state and national lotteries involved are the origin of the lottery, the statutes in question as applied are violative of the Interstate Commerce Clause. If the State's purpose is to

protect its people from the "evils of lotteries", whatever they may be, and the out-of-state government lotteries are considered inherently harmful, then so is Florida's lottery. Certainly the State is not taking a position that Florida's lottery is harmful to its people. Therefore, for it to take the position that other state and government lotteries are harmful is illogical and does not follow. Thus, barring the promotion of other government lotteries can serve no legitimate public purpose.

This court has applied the Commerce Clause to strike down Florida legislation before which unconstitutionally discriminated against foreign commerce. In R.G. Industries, Inc. v. Askew, 276 So.2d 1 (Fla. 1973), Florida Statute §790.26, which forbid the assembly of guns within the state utilizing foreign parts was struck down. In effect, the statute forbade the importation of foreign gun parts and discriminated against the use of foreign gun parts within the state, a direct restraint on foreign commerce. The state in that case urged that the statute in question was a valid exercise of the police power and that its stated purpose was to protect the public safety by cutting off one source of cheap, dangerous, and easily concealed handguns known as "saturday night specials." The court stated that the banning of such guns would be a highly laudatory goal which would represent a legitimate public purpose if it could be shown that such weapon would become less available in Florida. However, that was not shown by the evidence in that case.

In the case at bar, the banning of the promotion of the

lotteries involved would arguably be a laudatory goal which would represent a legitimate public purpose if the state were not conducting its own lottery and taking money from its residents in return for lottery tickets. However, that is not the case.

II. THE APPLICATION OF FLORIDA STATUTES §849.09 & §501.204(1) IN THIS CASE IS AN UNCONSTITUTIONAL ABRIDGMENT OF THE FREEDOM OF SPEECH GUARANTEES OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There is also a significant First Amendment question involved in this case which is equally dispositive. This issue was argued in the briefs before the Fifth District Court of Appeal but not addressed in that Court's opinion. The injunction sought by the State against the advertising by the Petitioners constitutes an unconstitutional abridgment of the freedom of speech guarantees under the First Amendment to the Constitution of the United States. Advertising any activity that takes place and is legal elsewhere but illegal in the state where the advertisement takes place is protected by the first amendment. Bigelow v. Virginia, 421 U.S. 809 (1975).

In Bigelow, a newspaper editor who published an advertisement in the State of Virginia of an organization located in the State of New York which offered services relating to obtaining legal abortions in New York was convicted of violating a Virginia statute which made it a misdemeanor to encourage or prompt the procuring of an abortion by the sale or circulation of any publication. The Supreme Court of Virginia affirmed the

conviction holding that as to the publisher's First Amendment claim, the advertisement was a commercial activity which could be constitutionally prohibited by the state. The United States Supreme Court vacated the judgment of conviction holding that the First Amendment prohibits a state from regulating or prescribing the promotion of activities conducted in another state by an organization located there which provides services relating to obtaining legal abortions in that other state.

As in Bigelow, these Petitioners are advertising their services in the State of Florida relating to activities that are legal where the occur. Therefore, the State's application of §849.09, Fla. Stat., to the advertisements involved in this case is an unconstitutional abridgement of the First Amendment protections.

In fact, based upon the Bigelow case, the United States Congress is currently considering legislation that would change the federal laws concerning advertisements of state conducted lotteries because of the unenforceability of the prohibition of such advertising. (A. 3-8). The proposed change in the federal law would allow advertising or distribution of paraphernalia of any lotteries authorized and regulated by the state in which it is conducted in that state, or other states, regardless of whether the other states permit lotteries or other forms of gambling.

It has been documented that in 1985, 22 states and the District of Columbia had instituted government run lotteries. 13

Fla. Stat. L.Rev. 901 (1985). Without a doubt that number is greater today. Our citizens are exposed on a daily basis to other state's lotteries through promotions which include out-of-state television stations on cable television which televise other state lottery drawings and expose Florida residents to other state lottery television advertisements. They also include advertisements in the various print media circulated to and through the State of Florida such as out-of-state newspapers, airline magazines, and lottery and gaming publications.

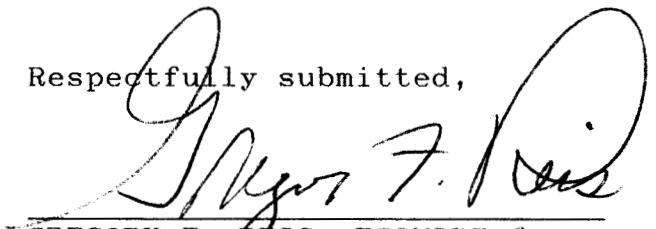
This case involves broad legal issues and policy questions which go beyond the facts of this case. Before the enactment of Florida's lottery act in 1987 known as the "Florida Public Education Lottery Act", Chapter 24, F.S. (1987), all lotteries were illegal in Florida. The State sought to enjoin Petitioners conduct as a deceptive or unfair trade practice and argued that since lotteries were a violation of §849.09 F.S. (1985), they were against the public policy as being offensive to the public morals and thus an unlawful accepted trade practice. By approval of Article X, Section 15 to the Constitution of the State of Florida by the voters on November 4, 1986, the citizens overwhelmingly approved of Florida's lottery and thus rejected the view that government operated lotteries were offensive to the public morals. Because Florida's governmental run lottery is now legal, the state cannot discriminate against other government run lotteries. But even if the Florida lottery were not in existence, the Bigelow decision would require the statutes to be

struck down as applied on First Amendment principles.

CONCLUSION

This Court should reverse the Order of the Fifth District Court of Appeal and reinstate the Trial Court's Order declaring the statutes involved to be an unconstitutional interference with interstate commerce, or in the alternative, as protected by the First Amendment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been duly furnished by U.S. Mail, this 19th day of September, 1988 to Nikki Ann Clark, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050; David L. Fleming, Esquire, LIBERIS, SAULS & FLEMING, 205 E. Intendencia Street, Pensacola, Florida 32501; Gene Coker, General Attorney, A.T.&T. COMMUNICATIONS, INC., 1200 Peachtree Street, N.E., Atlanta, Georgia 30357; and Richard Robison, Esquire, ROBISON, OWEN & COOK, P.A., 5250 South U.S. Highway 17-92, Casselberry, Florida 32707.

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