IN THE SUPREME COURT OF FLORIDA

CASE N0. 95,561

OCALA BREEDERS' SALES COMPANY, INC.,
Appellant,

v.

FLORIDA GAMING CENTERS, INC.
d/b/a/ OCALA JAI ALAI,
Appellee.

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT (DCA NO. 97-4783)

HOLLAND & KNIGHT LLP
Daniel S. Pearson
FBN 062079
William F. Hamilton
FBN 379875
Linda Collins Hertz
FBN 162608
701 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

CERTIFICATION AS TO TYPE STYLE

We hereby certify that this brief has been produced using proportionately spaced 14-point CG Times font.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES (continued)

CASES **Page**

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

TABLE OF AUTHORITIES (continued)

STATUTES **Page**

OTHER AUTHORITIES

TABLE OF AUTHORITIES (continued)

STATUTES **Page**

INTRODUCTION

Our client, Ocala Breeders' Sales Company, Inc. ("Breeders"), which operates a permanent thoroughbred horse sales facility in Marion County and holds a license issued by the State of Florida Department of Business and Professional Regulation, Division of Pari-Mutual Wagering ("the Division"), to conduct limited intertrack wagering there, appeals from a final decision by the First District Court of Appeal, declaring section 550.615(9) of the Florida Statutes (1997) unconstitutional both as a special law and as violative of equal protection. Joined by the State of Florida, we had appealed to the District Court from a final summary judgment entered by the Leon County Circuit Court on a declaratory judgment action brought by appellee Florida Gaming Centers, Inc., d/b/a/ Ocala Jai Alai ("Jai Alai"), against our client and the Division.

The District Court affirmed the trial court's finding that section 550.615(9) was unconstitutional, ordered the Division to cease issuing an intertrack wagering license to Breeders, and enjoined Breeders from conducting intertrack wagering at its Marion County facility. During the pendency of our appeal, we filed a suggestion of mootness based upon newly enacted section 550.6308 of the Florida Statutes (Supp. 1998) and the subsequent issuance to us of a license to conduct intertrack wagering pursuant to the new statute, but the District Court rejected our mootness argument and reached out to decide the constitutional issue. On this

appeal we again contend that the statute is constitutional and that the District Court's decision must be reversed on either the mootness issue or the constitutional issue, or both.

STATEMENT OF THE CASE AND FACTS

A.

Relevant Proceedings in the Circuit and District Courts

This case began with a complaint for declaratory judgment filed in July 1995 by Jai Alai against Breeders and the Division, challenging the constitutionality of section 550.615(9)[1] of the Florida Statutes, entitled "Intertrack wagering," as a special law or a denial of equal protection (1R 1-13).[2] On December 5, 1997, the trial court entered its order finding section 550.615(9) unconstitutional as challenged, ordered the Division to cease issuing an intertrack wagering license to Breeders and enjoined Breeders from conducting intertrack wagering at its Marion County thoroughbred horse sales facility.[3]

Breeders and the Division timely filed a joint appeal and the trial court, recognizing the continuing presumption of constitutionality of the legislative

---

[1] Although the complaint cited to former numbering of the statute, we use throughout a renumbered, but otherwise unaltered version as amended in 1996. The text of section 550.615(9), Florida Statutes (1997) is attached as Appendix A.

[2] We refer to the record of the trial court by volume and page numbers, as reflected in the record index, *e.g.*, "1R 1-13" refers to volume 1, pages 1-13.

[3] A copy of the Final Judgment is attached as Appendix B.

enactment while the matter was on appeal, approved and enforced a stay of its order pending the joint appeal.[4] By the end of April 1998, Breeders had filed its Initial Brief, the Division had adopted Breeders' brief, and Jai Alai had filed its Answer Brief.

On May 1, 1998, the Legislature approved a new provision of law, entitled "Limited intertrack wagering license," and it became a law on May 24, 1998. *See* Ch. 98-190, §§ 11 & 14, Laws of Fla.; Art. III, § 8(a), Fla. Const. The new law was designated section 550.6308 of the Florida Statutes (Supp. 1998).[5] On May 14, 1998, Breeders filed a suggestion of mootness, calling the District Court's attention to the fact that the new statute in effect superseded the statute at issue on the appeal (App. E-1).[6] The District Court promptly ordered Jai Alai to show cause "why the suggestion of mootness ... should not be granted" (App. E-2). Jai Alai responded that a license under the new statute could not be sought until January 1999 and that Breeders still was operating under a license issued pursuant the former statute (App. E-3). We filed a reply on mootness (App. E-4), and on June 2, 1998, a panel of the District Court deferred consideration of the mootness

---

[4] A copy of the stay order is attached as Appendix C.

[5] The text of new section 550.6308 is attached as Appendix D.

[6] We have filed Directions to the Clerk of the First District Court of Appeal to include in the record all pleadings regarding the mootness issue. A copy of our Directions is attached as Appendix E; we will refer to "App. E-#" to identify the documents by the corresponding numbering used in the directions.

issue to the merits panel (App. E-5). We filed our Reply Brief on June 18, 1998, and the District Court scheduled oral argument for January 27, 1999 (App. E-6).

On January 13, 1999, Breeders applied for an intertrack wagering license under new section 550.6308(1) for the remainder of the 1998-1999 fiscal year as well as for the 1999-2000 fiscal year (*see* App. E-7, attach). On January 21, 1999, we filed a supplement in the District Court, reiterating our mootness suggestion and attaching a copy of Breeders' new application (App. E-7). *Jai Alai agreed that our suggestion was well-taken*, responding on January 25, 1999 that:

> Appellee ... acknowledges that in light of the passage of time and the recent developments described in the ... January 21 Supplement and Update, for all practical purposes the ruling of the trial court will become moot by the time a decision is rendered. Accordingly, Ocala Jai Alai does not object to the relief requested in Appellant's Supplement and Update to Suggestion of Mootness. In light of these developments, oral argument on the merits of the appeal appears unnecessary.

(App. E-8, at 1). Despite Jai Alai's concession, the District Court required oral argument as scheduled. The argument focused on whether the appeal was moot in light of the developments. Jai Alai reversed its position again and argued *against* a finding of mootness.

On Friday, February 5, 1999, the Division issued Breeders an amended license to conduct intertrack wagering for the remainder of the 1998-1999 fiscal year, acting pursuant to the newly-enacted section 550.6308(1) (*see* App. E-9, attach). On Monday, February 8, 1999, we filed with the District Court a second

supplement to and renewal of suggestion of mootness) attaching a copy of the amended license (App. E-9)) because *Breeders was in fact then operating under the new statute*. Jai Alai responded on February 16, 1999 that it had *on that very same date* filed with the Division a petition for a formal administrative hearing to challenge the issuance of the amended license; it contended that its filing of the petition for an administrative hearing rendered the amended intertrack wagering license issued under the new statute merely "preliminary agency action" (App. E-10 & attach). On February 26, 1999, Breeders countered that Jai Alai was not an applicant for the license in question, had no standing to contest the issuance of the license to Breeders, and that, because the license application was complete on its face and Breeders met all the statutory requirements, the Division had been required to issue the license (App. E-11).

A scant five days after that, on March 3, 1999, the District Court issued its opinion finding section 550.615(9) unconstitutional as a special law and violative of the right to equal protection (App. F). The opinion did not address the mootness issue. Six days later, however, on March 9, 1999, the court issued a separate order denying the suggestion of mootness based upon its finding that the constitutional "issue is one of great public importance and, given the number of times the statute has been revised, it is an issue that is likely to recur":[7]

[7] A copy of the District Court's opinion is attached as Appendix F, and a copy of its order on mootness is attached as Appendix G.

> This case presents the reverse of the ordinary situation. Here the appellant has moved to dismiss its own appeal on the ground that it is moot and the appellee is the party objecting. The appellant has enjoyed the benefit of the statute (an automatic stay was entered because a state agency was aligned with the appellant as a party) throughout the entire course of the appellate proceeding even though the statute was declared unconstitutional in the trial court. *If the court were to grant the motion to dismiss, this entire process could repeat itself with respect to the latest version of the statute.*

(App. G, emphasis added). After the denial of our timely motion for rehearing and rehearing en banc, we timely appealed to this Court.

B.

Statement of Facts

Jai Alai operates a fronton in Marion County and holds a license authorizing the operation of pari-mutuel wagering pursuant to Chapter 550, Florida Statutes. It is licensed to conduct intertrack wagering on any class of pari-mutuel race or game operated by any class of permitholder licensed to conduct intertrack wagering. *See* § 550.615(2), Fla. Stat. (1997) (1R 2, 124; 3R 267). "`Intertrack wager[ing]' means a particular form of pari-mutuel wagering in which wagers are accepted at a permitted, in-state track, fronton, or pari-mutuel facility on a race or game transmitted from and performed live at, or simulcast signal rebroadcast from, another interstate pari-mutuel facility." § 550.002(17).

The Division is charged with the duty of administering and regulating the pari-mutuel industry under the provisions of Chapter 550 (1R 2, 10, 124); §§ 550.0251, 550.002(7), Fla. Stat. (1997).

Breeders is an agricultural marketing cooperative and operates a permanent thoroughbred horse racing and sales facility in Marion County, where it has conducted thoroughbred horse sales since 1975, under a license issued pursuant to section 535.01 (1R 1-2, 129; 3R 369, 393-403; 5R 697-702).[8] Its facility is located in Ocala, Florida approximately three miles west of Interstate 75 off State Road 40 (5R 698). It has stabling for 1200 horses and has conducted at its facility at least fifteen days of thoroughbred horse sales for at least three consecutive years (5R 699; 3R 396-403). During the four-year period from July 1, 1993 to June 30 1997, Breeders sold 12,263 horses, with total revenues of $187,422,400; during that same period of time it paid $4,736,205 in sales and other local and state taxes (5R 701-02).

In 1985, Breeders obtained a quarter horse racing permit,[9] and having erected the required permanent facility, still holds that permit (1R 4, 130). There

---

[8] We state the facts in the light most favorable to our client, Ocala Breeders' Sales, the party *against* whom summary judgment was entered (*see Moore v. Morris*, 475 So.2d 666, 668-69 (Fla. 1985)). We, of course, make every effort to state accurately the positions of all parties.

[9] *See Ocala Breeder Sales Company, Inc. v. Division of Pari-Mutuel Wagering*, 464 So.2d 1272 (Fla. 1st DCA 1985)(ordering permit to be issued).

is no restriction on the number of quarter horse permits that the Division may issue. *See* § 550.334(1).

Breeders does not conduct live pari-mutuel horse racing of any type (3R 328, 378; 5R 699), but does conduct at its sales facility one day of nonwagering thoroughbred horse racing each year, with purses totaling at least $250,000 (5R 699). *No other entity has requested to conduct such a nonwagering race event* (3R 304, 310), although there is no restriction in section 550.505(2) as to the number of nonwagering permits that the Division can issue.

Having met all of the criteria set out in section 550.615(9)(a), Breeders was licensed by the Division from 1990 through 1998 to conduct at its Marion County facility intertrack wagering on thoroughbred daytime horse races, generally only when Jai Alai was not conducting live performances. *See* 550.615(a)&(f). *No other horse sales entity has even requested a license to conduct intertrack wagering under this statute* (*see* 3R 378).

Fasig-Tipton Florida, Inc. is a wholly owned subsidiary of Fasig-Tipton Company, Inc., with headquarters in Lexington, Kentucky (3R 355-56). The parent is a major competitor and the second largest revenue producing entity in the thoroughbred horse sales industry in the United States (5R 700). Although it owns no sales facility in Florida, Fasig-Tipton has conducted at least one sale of thoroughbred horses each year since 1985, at the facilities owned by Calder Race

Track in Florida (3R 359, 375-77). It has never sought a license to conduct intertrack wagering in Florida (3R 360). According to its Chief Operating Officer, the company has no present plans of becoming involved in pari-mutuel wagering or intertrack wagering, or indeed in nonwagering thoroughbred racing, but he would not rule out that possibility (3R 360-61).

According to Thomas A. Chiota, President of Breeders, should Fasig-Tipton decide to do so, it could build its own Florida facility for horse sales, including a race-track to use for training sales, hold fifteen days of horse sales for three consecutive years, hold one day of nonwagering racing with a minimum of $250,000 in purses for two consecutive years, and thereby qualify to apply for an intertrack wagering permit under section 550.615(9)(a) (3R 383-84; 5R 700-01). "The requirements for thoroughbred auction companies in the State of Florida are general enough for Fasig-Tipton or any number of other competitors to meet the requirements and obtain an intertrack wagering license" (5R 701).

SUMMARY OF ARGUMENT

I. On February 5, 1999, Breeders was issued an amended license to conduct intertrack wagering and immediately began operating under that license issued pursuant section 550.6308(1), Florida Statutes (Supp. 1998). Although made aware of this fact, the District Court erroneously determined that it nevertheless had jurisdiction to decide, on an appeal from a declaratory judgment,

the constitutionality of section 550.615(9), even though Breeders was no longer operating pursuant to the license issued under that statute. The former statute had been, in effect, superseded during the pendency of the appeal, thus rendering any opinion on its constitutionality advisory, at best. The District Court's conclusion that the issue is one of public importance is belied by the narrowness of the issue itself. Its conclusion that the same procedure could "repeat itself with respect to the latest version of the statute" misapprehends and misapplies mootness concepts. The doctrine of "capable of repetition yet evading review" has no application here) there had been no prior litigation testing 550.615(9) and *there had been no litigation on the new statute*. Thus the issue had not been addressed previously and yet escaped review and the fact that the new statute *could be challenged in the future* does not confer on the District Court the power to reach constitutional questions not before it.

When an issue is moot it matters not that the appellant is the one seeking a declaration of mootness and the dismissal of its own appeal. Mootness is a question that goes to the jurisdiction of the court and any party can raise that issue at any time. The reason to set aside judgments that have become moot is to protect the parties from any *res judicata* effects of an opinion where meaningful review cannot be had. Thus it is not relevant that Breeders raised the mootness

issue. The question is whether the issue is moot. This one surely is and the District Court erroneously decided it was not.

II. In its opinion on the merits the District Court misperceived the facts and misapplied the law of this Court in ruling on the constitutional questions. In declaring section 550.615(9) unconstitutional, the court's decision that the statutory criteria for obtaining the single license in question "could only be applied, now or in the future, to Ocala Breeders" failed to analyze each discrete subsection of the section at issue. In finding the "statutory class of potential licensees ... effectively closed," the court commingled all of the subsections, and then concluded that the only way to obtain the license was to meet all of the criteria in the section. But that approach violates the intent of the legislature, evidenced by its division of section (9) into subsections, each serving different purposes and each to be analyzed separately.

II-A. Based upon its plain language, subsection (a) of section 550.615(9) is a valid general law. The criteria established by the legislature that an applicant must meet to qualify for a license to conduct intertrack wagering under section 550.615(9)(a) are generic, applicable in a uniform manner to all, and open to future applicants who hold a strong demonstrated interest in the horse sales industry. The fact that no other entity has qualified yet does not prove unconstitutionality.

Giving deference to the legislative enactment, this Court should determine that the criteria in (a) bear a reasonable and rational relationship to the purposes of the statute, *i.e.*, to help shore up a declining industry that has a strong presence in Florida, and to promote higher revenues for the state from taxes and income generated by the intertrack wagering and from the collateral benefits of greater employment potential for those interested in the horse sales field. The requirement for a quarter horse permit was to promote greater quarter horse interest and was simply a way of creating another category of applicants for the intertrack wagering license here at issue because so few such permits had been sought. A quarter horse permit is available to all who seek to qualify under section 550.334(1) and *the criteria for obtaining a quarter horse permit have not been challenged in this action*. There is *nothing* in the record to support a finding that no one else could qualify *in the future*. Beginning now, in three years, *any interested entity could qualify* for the license under the provisions of subsection (a).

The Court does not sit as a superlegislative body and should not substitute its judgment for that of the legislative branch in its role of designing criteria to promote legitimate goals of its laws, as long as those criteria are rationally related to the goals of the legislation. Not only did the District Court err in concluding that section 550.615(9)(a) is a special act, it also erred in determining that the criteria were so narrowly drawn as to apply only to Breeders, that the statute

described a closed classification and violated equal protection guarantees. In its ruling the District Court substituted its judgment for that of the legislature.

II-B. If, as we urge, subsection (a) is a valid general law, the Court need not address the merits of the challenge to subsections (b) and (e), also challenged by Jai Alai as violative of equal protection principles. Jai Alai has wholly failed to demonstrate that it has a constitutional interest in the provisions of 550.615(9)(b) and (e) and has no standing to challenge these portions of the statute, nor is there any record upon which such a judgment could be predicated.

Moreover, the District Court's decision that the criteria in subsection (b) violate the concepts set out by this Court in *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 245 So. 2d 625 (Fla. 1971), misapplies that decision and misunderstands the Court's ruling in that case.

II-C. Subsection (e) simply suspends the revocation of the quarter horse permit for the failure to hold quarter horse races as long as the permitholder holds the license authorized by subsection (a). Jai Alai is not a quarter horse permitholder and has no standing to invoke the equal protection rights of other quarter horse permitholders who are not parties to this action.

II-D. Of course, were the Court to reach either (b) or (e) and determine that either subsection violates equal protection principles, it also could determine that these subsections are severable, and, if invalid, could be invalidated without

violence to the remainder of the statute or the legislative intent. Such an analysis should await another day, however, when the Court would have the benefit of a claim by a real party in interest, based upon a ripe case or controversy.

TABLE OF AUTHORITIES (continued)

STATUTES **Page**

ARGUMENT

I.

THE DISTRICT COURT ERRED IN ISSUING AN ADVISORY OPINION AND REJECTING THE SUGGESTION OF MOOTNESS.

> An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. *Dehoff v. Imeson*, 153 Fla. 553, 15 So. 2d 258 (1943). A case is "moot" when it presents no actual controversy or when the issues have ceased to exist. Black's Law Dictionary 1008 (6th ed. 1990). A moot case generally will be dismissed.

Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992). We suggest this case is moot.

On May 1, 1998, the Legislature approved an act which in effect replaced section 550.615(9), Florida Statutes (1997) with section 550.6308, Florida Statutes (Supp. 1998), entitled "Limited intertrack wagering license," providing amended criteria for the issuance of a single intertrack wagering license (*see* App. D).[10]

---

[10] We use the terms "in effect" and "former," although 550.615(9) was not repealed, simply supplanted. The legislature passed a new statue *on the same subject matter*, yet failed to repeal the former. Both provisions appear in the 1998 Supplement to the Florida Statutes, but both cannot be effective at the same time. The latest statement of the intent of the legislature is the operative law. *See DeBolt v. Department of Health & Rehab. Servs.*, 427 So. 2d 221, 224 (Fla. 1st DCA 1983) ("Where ... two statutes are found to be in conflict, rules of statutory construction must be applied to reconcile, if possible, the conflict"). Analyzing the history of the act, the evil sought to be corrected, the purpose of the enactment, and the law then in existence bearing on the same subject, the court held *the latest legislative statement on the same subject controls*. *Id.* In this case, the history of 550.6308 reveals that it was implemented because of the trial court's ruling in this case. With reference to Senate Bill 440, The Senate Staff Analysis and Economic Impact Statement regarding the Fiscal Impact of the proposed changes to Senate Bill 440 (which became Ch. 98-190, Laws of Fla.) states that because the former statute was ruled unconstitutional, there was a projected loss of $400,000 in state revenues (*see* App. E-4, attach at 6). A routine legislative reviser's bill automatically will remove section 550.615(9) within two years. *See* § 11.242, Fla. Stat. (1997).

This legislative action substantially and materially altered the statutory wording that is the subject of this appeal and thus rendered moot the question of the constitutionality of the former statutory language.[11]

By early February 1999, Breeders began operating under a new license issued pursuant to section 550.6308(1). Thus the ruling of the trial court enjoining Breeders from operating under the old license issued pursuant to section 550.615(9)(a) no longer could be reviewed meaningfully and the injunctive order on appeal was moot. By deciding to maintain jurisdiction over the case the District Court in effect issued an advisory opinion as to how it *might rule* on the new statutory provisions)a question never litigated and not before the court)without examining the new statute or hearing argument about the relationship of the criteria to possible future challenges.

As a rule courts do not issue advisory opinions. When a case becomes moot while an appeal is pending, the normal practice is to return the parties to the status they enjoyed before the initiation of the lawsuit because the substance of the lower court judgment has become unreviewable. The Supreme Court of the United States has stated that its "established practice" in such cases, which "has become the standard disposition in federal civil cases," is "to reverse or vacate the judgment below and remand with directions to dismiss." *United States v.*

[11] Comparisons of the two statutes are attached as Appendix H.

Munsingwear, 340 U.S. 36, 39 & n.2 (1950) (*citing Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)); *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979) (following *Munsingwear*); *In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983) ("When a case becomes moot after the district court enters judgment but before the appellate court has issued a decision, the appellate court must dismiss the appeal, vacate the district court's judgment, and remand with instructions to dismiss the case as moot."). That procedure makes possible any future relitigation of the issues between the parties and "eliminates a judgment, review of which was prevented through happenstance. When [this] procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Ghandtchi*, *id.* (*quoting Munsingwear*, 340 U.S. at 40).

But it is also true that factual mootness does not destroy an appellant court's jurisdiction when questions are raised that are of great public importance or are likely to recur. *See Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984) (issue certified as question of great public importance affected a statutory discovery privilege regarding hospital committee proceedings that were widely applicable statewide); *DeHoff v. Imeson*, 153 Fla. 553, 15 So. 2d 258, 259 (Fla. 1943) (Florida courts will not decide issues "unless the questions presented are of general public interest and importance, or unless such judgment as this court might

enter would affect the rights of the parties as they stand *at the time the case is reviewed*" (emphasis added)). In its order denying our suggestion of mootness, the District Court cited two bases in support of its decision not to dismiss the action as moot: [1] that the issue is "one of great public importance and, [2] given the number of times the statute has been revised, it is an issue that is likely to recur." This holding misapplies the decisions of this Court.

In *Santa Rosa County v. Administration Comm'n*, 661 So. 2d 1190, 1193 (Fla. 1995), this Court reversed a finding by the District Court that an issue was of wide public interest, stating, "because there was no pending controversy, the Declaratory Judgment Act was no longer available." *Id.* at 1193. The Court stated further:

> Additionally, it is well settled that, "Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical `state of facts which have not arisen' and are only `contingent, uncertain, [and] rest in the future.'"

Id. at 1193.

In the present case the District Court's conclusion that this case is of great public interest is without support. There is no "great public importance" attached to the constitutionality of a law that has been superseded, especially where the proceeding was a declaratory judgment action. Here, the District Court gave no explanation as to why it found this issue to be of great public importance. Indeed,

for all the record discloses, no one (other than the parties and potential customers) has expressed the slightest interest in the constitutionality of section 550.615(9). The statute does not affect some large class of entities.

The District Court cited to this Court's decision in *Godwin v. State*, 593 So. 2d 211, in support of its ruling that the issue was not moot; that decision is inapposite. In *Godwin*, this Court held that the appeal from a civil commitment order under the Baker Act did not become moot solely because the person had been released, since the State had a right to assert a lien with respect to the cost it incurred in treating the person during the period of commitment. Id. at 212-14. The Court stated:

> Florida courts recognize at least three instances in which an otherwise moot case will not be dismissed. The first two were stated in *Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984), where we said: "[i]t is well settled that mootness does not destroy an appellate court's jurisdiction ... when the questions raised are of great public importance or are likely to recur." Third, an otherwise moot case will not be dismissed if collateral legal consequences that affect the rights of a party flow from the issue to be determined. *See Keezel v. State*, 358 So. 2d 247 (Fla. 4th DCA 1978).

Id. at 212. The Court concluded in *Godwin* that there was a collateral legal consequence. Here, however, the District Court referred to no collateral legal consequence)and we know of none)that would arise from the dismissal of this lawsuit challenging a law under which we are no longer operating, especially in a case arising from a declaratory judgment action involving no damages.

As to the District Court's observation that the issue was likely to recur "given the number of times the statute has been revised" (slip op. at 1), the number of times a *statute* has been revised hardly demonstrates that identical challenges to it are "capable of repetition." Indeed there is no history of prior litigation on the constitutionality of section 550.615(9). The District Court apparently concluded that *another issue*)the constitutionality of 550.6308)would "recur" and erroneously found that the issue of the constitutionality of 550.615(9) was "capable of repetition."[12]

The posture of this case appears to present the same kind of situation the District Court faced in *Allen v. Martinez*, 573 So. 2d 987, 989 (Fla. 1st DCA 1991) (court properly determined it did not have jurisdiction to review a portion of a decision that a commission had legal authority to rezone property if it had complied with the rulemaking provisions of applicable statute). There, appellant

---

[12] In the last paragraph of its order denying mootness, the District Court revealed that at least some of its rationale for finding a lack of mootness was based upon the fact that there had been a completely lawful stay during the pendency of our appeal, and that it was the appellant who had moved to dismiss its own appeal as moot (App. G). (Indeed, it is often the appellant who would be cognizant of and seek to have an appeal declared moot because it would want to prevent an opinion on a moot issue from having *res judicata* effect on its future rights. *See e.g., In re Ghandtchi*, supra). Although the District Court's opinion stated that the statute enjoyed a "strong presumption" of constitutionality while the case was on appeal because of the law's deference to the acts of a coordinate branch of government (slip op. at 5), it was nonetheless peevishly critical of Breeders for invoking the protection of the law. The District Court's assumption that "the entire process could repeat itself with respect to the latest version of the statute" (order on motion, at 1) does not describe a situation where the *same issue* will recur, but instead where *another issue* may be litigated. The finding of "likely to recur")in potential litigation of a new but different statutory amendment)is not consonant with traditional notions of due process.

suggested to the Court that the agency *subsequently* had adopted a new rule rezoning his property, *contending that the new rule made the issue not moot*. Particularly applicable here, the District Court found that the new rule should be challenged first in the appropriate proceedings and held that the issue regarding the *new rule* was not then before the Court, stating: "Effectively, the appellant is requesting us to render an advisory opinion concerning future actions by the state. We decline to do so." *Id.* at 989 & n.1. *See also Montgomery v. Department of HRS*, 468 So. 2d 1014 (Fla. 1st DCA 1985) (issue regarding proposed workfare rule could become ripe in the future should it be implemented in the county). And the District Court's reasoning in the present case regarding what represents a "recurrence" that "evades review" is faulty and is not consonant with the rationale expressed in its own opinion in *Martinez v. Singletary*, 691 So. 2d 537 (Fla. 1st DCA 1997), requiring that an issue be not only "capable of repetition" but also one that "evades review."

Inasmuch as Breeders is now operating under the limited intertrack wagering license issued under section 550.6308(1), the constitutionality *vel non* of section 550.615(9) is a moot question. The District Court should have dismissed the appeal and remanded with directions that the trial court vacate as moot the order under review and dismiss the declaratory judgment action as moot.

II.

TABLE OF AUTHORITIES (continued)

STATUTES **Page**

SECTION 550.615(9), FLORIDA STATUTES, IS CONSTITUTIONAL.

Overview

Every legislative enactment carries a presumption of validity, even on appeal from a decision by the District Court affirming a trial court's finding of unconstitutionality. *See Department of Legal Affairs v. Sanford-Orlando Kennel Club*, 434 So.2d 879, 881 (Fla. 1983). A statute will not be declared unconstitutional unless the challenger demonstrates beyond a reasonable doubt that it conflicts with some specified provision of the constitution, and bears the considerable burden to negate every conceivable basis for upholding the law, *see Gallagher v. Motor Ins. Corp.*, 605 So.2d 62, 68-69 (Fla. 1992), with all reasonable doubts as to the validity of this statute resolved in favor of its constitutionality. *Id.; see Biscayne Kennel Club, Inc. v. Florida State Racing Comm'n*, 165 So.2d 762, 763 (Fla. 1964). In its opinion, the District Court repeated the appropriate standard of review (slip op. at 5), but did not give it proper deference, and apparently felt Breeders had relied unfairly on the law (*see* App. G)..

Section 550.615(9) carries that same presumption of constitutionality on this appeal, yet the District Court struck the statute in its entirety finding it to be "a special law enacted in the guise of a general law" (slip op. at 5), and erroneously found that "[b]ecause the statutory class of potential licensees is effectively *closed to only one thoroughbred horse breeder*, the statute should have been enacted as a

special law" (*id.*, emphasis added). This finding is simply wrong since there is nothing in the statute that restricts it to one thoroughbred horse breeder.

Additionally, the District Court's analysis of whether there is any other applicant who could qualify "now or in the future" (slip op. at 5) misapprehends the statutory requirements and the facts shown in the record. There is nothing prohibiting other horse sales companies, horse breeders, or horse owners from forming an association and duplicating the work done by Breeders, if they are willing to make a commitment, contribute resources, and work to generate the same level of investment, energy, and interest to qualify for the license in question.

Nor does the statute violate equal protection concepts, as the District Court concluded (slip op. at 9). Here it found no rational relationship between the qualifications for obtaining a license and the public purpose for the legislation, *i.e.*, "benefitting thoroughbred horse breeding sales and related economic activities" (slip op. at 11). In reaching that conclusion it improperly shifted to Breeders the burden of demonstrating that the criteria chosen by the legislature had the required rational relationship to the statute's purpose, stating: "We have not been presented with any rational justification for this rather detailed requirement [of subsection (a)] and we cannot ascribe one to the statute on our own" (*see* slip op. at 12). Because the statute enjoys a presumption of constitutionality and the burden is on

the challenger to demonstrate otherwise, the District Court was wrong. Worse, in concluding that we had not made the requisite rational showing the District Court overlooked those portions of our briefs, in which we indeed suggested rational bases for the statutory requirements.

As we show below, section 550.615(9) is constitutional, subsection (a) is a not a special law, but a valid general law open to future applicants, with criteria that are rationally related to its purpose. Further Jai Alai does not have standing to object to the provisions of subsections (b) or (e) since it does not seek to qualify for the subsection (a) license and does not hold a quarter horse permit. On the merits we believe subsections (b) and (e) nevertheless have criteria rationally related to the purpose of the statute. Further, if either is determined to be invalid, it can be severed from the remainder of the section without doing violence to legislative intent.

A.

Subsection (a) is not a special law, but a valid general classification, open to future applicants.

1.

We begin with the wording of the statue in question and its history. Section 550.615, entitled "Intertrack wagering," provided in relevant part:

> (9)(a) Upon application to the division on or before January 31 of each year, *any quarter horse permitholder that has conducted at least 15 days of thoroughbred horse sales at a permanent sales facility for at*

> *least 3 consecutive years, and conducted at least one day of nonwagering thoroughbred racing, with a purse structure of at least $250,000 per year for 2 consecutive years prior to such application*, shall be issued a license to conduct intertrack wagering for thoroughbred racing for up to 21 days in connection with thoroughbred sales, to conduct intertrack wagering at such permanent sales facility between November 1 and May 8 of the following year, to conduct intertrack wagering at such permanent sales facility between May 9 and October 31 at such times and on such days as any jai alai permitholder in the same county is not conducting live performances, and to conduct intertrack wagering under the provisions of this subsection during the weekend of the Kentucky Derby, the Preakness, the Belmont, and the Breeders' Cup Meet that is conducted before November 1 and after May 8, subject to conditions set forth in this subsection, *provided that no more than one such license may be issued*. [Emphasis added to highlight provisions challenged].

The statute first was enacted in 1990 by the Florida Legislature as section 550.61; it provided for intertrack wagering for a variety of permitholders. Ch. 90-352, § 3, Laws of Fla., effective July 7, 1990 (§ 40). The statute was amended and rewritten in 1991 and provided expanded times when intertrack wagering at a permanent horse sales facility could be conducted. Ch. 91-197, §18, Laws of Fla., effective May 29, 1991 (§ 34). Subsection (a) contained the criteria being challenged by Jai Alai in this case. The 1991 amendment also added subsection (b), with criteria for the Division to use if more than one permitholder were to apply for the single license allowed by subsection (a), and added other subsections, most of which are not at issue here, except for the one which became

subsection (e), regarding suspension under other statutes of any revocation of the quarter horse permit. Ch. 91-197, §18, Laws of Fla.

The statute was again amended in 1992, changing the statutory numbering to section 550.615, and adding some additional details to the criteria in subsection (a). Ch. 92-348, §47, § 67, Laws of Fla., effective December 16, 1992 (§ 69). It was again amended in 1996 in a manner not at issue here, but the numbering of the applicable subsection was changed to (9), which numbering we use throughout. Ch. 96-364, §15, Laws of Fla.

2.

Article III, section 10 of the Florida Constitution prohibits the passage of a special law, unless there is a referendum.[13] Since the constitution does not define the distinctions between a prohibited special law and an appropriate general law, the duty of determining whether a particular provision is a special or a general law has devolved to the courts. This Court has determined that a general law operates universally throughout the state, operates uniformly upon subjects as they exist throughout the state, or applies uniformly within permissible classifications. *See Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So.2d 879,

[13] **10. Special laws.--**No special law shall be passed unless notice of intention to seek enactment thereof has been published in the manner provided by general law. Such notice shall not be necessary when the law, except the provision for referendum, is conditioned to become effective only upon approval by vote of the electors of the area affected.

881 (Fla. 1983) (*citing State ex rel. Landis v. Harris*, 120 Fla. 555, 163 So. 237, 240 (1934)).

A law is a general law when every person brought under it is affected by it in a uniform fashion. It is the uniformity of treatment within a class and not the number of persons within a class that makes the law a general law. "The controlling point is that even though [a] class did in fact apply to only one [entity], it is open and has the potential of applying to others [entities]... ." *Sanford-Orlando Kennel Club*, 434 So.2d at 882.

A special law, on the other hand, is one that relates to or is designed to operate upon a particular person or thing, or one that purports to operate upon a class of persons or things when classification is impermissible or the classification is illegal. *Department of Business Regulation v. Classic Mile, Inc.*, 541 So.2d 1155, 1157 (Fla. 1989) (*quoting State ex rel. Landis v. Harris*, 163 So. at 240). In *Classic Mile*, this Court held a statute unconstitutional because it authorized simulcasting horse races and pari-mutuel wagering based upon a legislative description which, *as all parties agreed, was a completely closed class*.[14]

[14] The statute in question in *Classic Mile* was one that could apply *only* to Marion County, because of the 1987 statute's requirement for the existence of two quarter horse racing permits that were unused prior to January 1, 1987, a date already passed at the time of enactment. That case illustrates the type of law)a special act)that is not permitted without the safeguard of a referendum as required for a special act.

The most important question to be answered in determining whether a legislative enactment is a general or a special law is whether the law may apply to others in the future. *See Classic Mile*, 541 So.2d at 1158; *Sanford-Orlando Kennel Club*, 434 So.2d at 882 (upholding statute that authorized conversion of harness racing permit to dog racing permit, if certain criteria were met, even though only one track met the specific criteria at time law was passed); *Biscayne Kennel Club, Inc. v. Florida State Racing Comm'n*, 165 So.2d 762, 764 (Fla. 1964) (upholding law permitting transfer of existing racing permit to another track when permitholder had financial difficulties).[15]

> "The validity of legislative classification is not dependent upon the probability of others entering or leaving a class. The criteria are: Is the class open to others who may enter it? and is there a rational distinction between those in the class and those outside it, when the purpose of the legislation and the subject of the regulation are considered?"

Biscayne Kennel Club, Inc., 165 So.2d at 764 (quoting the trial court).

3.

In the opening sentence and throughout its opinion, the District Court repeatedly and incorrectly characterized the applicant for the single intertrack wagering license at issue as "one thoroughbred horse breeder" (slip op. at 1).

---

[15] *See West Flagler Kennel Club, Inc. v. Florida State Racing Comm'n*, 153 So.2d 5, 8 (Fla. 1963), for an example of a statute, like that in *Classic Mile*, that described and distinguished permits on the basis of factors such as time of issuance and time of operations, a designation not susceptible of generic application, now or in the future.

Indeed, the repetition of this same mistake at least ten more times in the opinion (slip op. at 2, 4-5, 8-9, 13-14) gives rise to the assumption that the Court misapprehended the record facts concerning the issuance of the license in question. Notwithstanding the District Court's apparent view that the statute requires the Division to issue the license to "one thoroughbred horse breeder" (slip op. at 2), section 550.615(9)(a) requires only that the applicant be an entity that conducts sales of thoroughbred houses at a permanent facility in the state)not a breeder.

Indeed, Breeders is not simply a breeder, but an agricultural marketing cooperative that operates a permanent thoroughbred horse sales and racing facility to market horses (1R 2, 129; 3R 369, 347, 351-52)listing shareholders; 5R 697-99). Its facility has a one-mile track, an intertrack wagering facility that can accommodate up to 2800 people, and stable facilities sufficient for up to 1200 horses. From July 1, 1993 to June 30, 1997, it sold 12,163 horses, with total revenues of $187,422,400, and paid $4,736,205 in sales and other local and state taxes (5R 699-702). Through its cooperative activities, Breeders benefits a number of breeders and many other persons interested in the horse breeding and sales fields, and not just one breeder as the District Court's opinion mistakenly suggests throughout.

The record further discloses that at least four other entities have conducted licensed horse sales in Florida from 1985 to 1996: Fasig-Tipton of Florida; Thoroughbred Sales Company of Ocala, Inc.; Ashley Auction Associates; and Horsemen's Bloodstock Florida L.C. (3R 396-97, 402-03). The record does not support any finding that they, or any other similarly interested group, would not be able to incorporate and build a permanent facility for the sale of thoroughbred horses and obtain a non-wagering license and a quarter horse permit. There is no requirement that such an entity has to exist right now.[16] It is the *possibility* that such an entity could be formed in the future that makes the statute at issue a general law, a concept the District Court recognized but did not apply (slip op. at 7-8).

Nor does it matter that when the law was passed, Breeders was known to the legislators to be an entity that would benefit immediately from the law. *Sanford-Orlando Kennel*, 434 So. 2d at 882; *see also Rodriguez v. Jones*, 64 So.2d 278, 280 (Fla. 1953) (even though there was only one entity to benefit when the statute was passed, such fact did not state any special circumstance to relieve a subsequent applicant of law's import). Again, *the controlling issue is whether another entity could qualify in the future*: "The fact that matters is that the classification is

[16] As this Court stated in *Sanford-Orlando Kennel Club*: "The requirement of a *ten*-year history would not in and of itself preclude another track sometime in the future from converting. The fact that matters is that the classification is potentially open to other tracks." 434 So. 2d at 882-83 (emphasis added).

potentially open" to other thoroughbred horse sales entities. *Sanford-Orlando Kennel,* 434 So.2d at 882. Although no entity other than Breeders has *requested* a license under the statute and no entity other than Breeders has been identified as one that even *wants* to qualify for the immediate issuance of an intertrack license under the statute, the lack of a current applicant is not a basis for finding that no other entity would qualify in the future. *See Sanford-Orlando Kennel Club,* 434 So.2d at 882; *Biscayne Kennel Club,* 165 So.2d at 764.

4.

Plainly the statute at issue is a valid general law, based upon the clear and unambiguous language chosen by the legislature. Subsection (9)(a) sets out criteria which must be met by an applicant for the license to conduct intertrack wagering at a permanent horse sales facility. Those criteria include:

- *The applicant must be a quarter horse permitholder*. This requirement surely is rationally related to horse racing and sales and is a means of differentiating among various types of permitholders; such distinctions are used throughout the variety of statutes regarding pari-mutuel wagering. Section 550.334 sets out the requirements for obtaining a quarter horse permit, and contains no restriction on the number of such permits available.

- *The applicant must have conducted at least fifteen days of thoroughbred horse sales at a permanent sales facility for at least three consecutive years*. This

requirement is directly related to the statutory intent to promote horse racing and is designed to attract a proven solvent entity, one that will be around long enough to benefit the state and the related horse sales industry. An entity must have a license to conduct public sales of thoroughbred horses. §535.01, Fla. Stat. Again, there is no restriction on the number of licenses available.

- *The applicant must have conducted at least one day of nonwagering thoroughbred racing, with a purse structure of at least $250,000 per year for two consecutive years prior to the application*. Again, this requirement is directly related to the horse sales and racing industry. Nonwagering thoroughbred racing in connection with a sale brings in owners and potential purchasers. The issuance of nonwagering permits is controlled by section 550.505, but again the conditions in that provision are generic and are not restricted in number.

These criteria are all generic, all related to horse sales and to promotion of the entire industry, are not closed)there is no restriction with regard to time or location that cannot be met in the future)and are conditions which could be met by any entity with a demonstrated concentration in the field showing its seriousness about thoroughbred horse sales and willingness to establish itself at a permanent horse sales facility at which such thoroughbred racing and public showings for sales could take place. The District Court erred in interpreting the

plain language of subsection (a); it should have granted summary judgment for Breeders.

B.

Subsection (a) is rationally related to the purpose of the legislation and does not violate equal protection principles.

1.

The District Court also found that the statutory criteria violated principles of equal protection because the legislature employed qualifications that were not rationally related to the purpose of the legislation (slip op. at 9-14). Since the statute at issue does not involve any suspect classification and does not involve personal fundamental rights, there need exist only a rational basis for the legislative decision. *See Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).[17]

A general law that contains a specific classification scheme is a valid legislative decision if there is a reasonable relationship between the classification and the purpose of the legislation. *See Sanford-Orlando Kennel Club*, 434 So.2d

[17] The federal definition of the rational basis test is equally applicable to Florida's equal protection clause. *See Osterndorf v. Turner*, 426 So.2d 539, 543 (Fla. 1982). The equal protection clause of the Constitution of the United States is offended "`only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective,'" and the legislation will not be set aside "`if any state of facts reasonably may be conceived to justify it.'" *Florida League of Cities v. Department of Envtl. Reg.*, 603 So.2d 1363,1368 (Fla. 1st DCA 1992), (*citing and quoting McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)).

at 881. "When a classification is made by the legislature in the enactment of general laws, the presumption is in favor of the classification's reasonableness...." *Metropolitan Dade County v. The Golden Nugget Group*, 448 So.2d 515, 520 (Fla. 3d DCA 1984), *decision approved*, 464 So. 2d 535 (Fla. 1985). In the course of upholding the district court's decision, this Court quoted approvingly the district court's quote from *Lewis v. Mathis*, 345 So.2d 1066, 1068 (Fla. 1977), that any state of facts will sustain the classification, even if the facts did not exist at the time. 464 So.2d at 537.

Unquestionably, the test to be applied is extremely deferential to the legislative enactment. The statute should not be overturned unless the result is "so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). If the law has some relationship to the goal of some legitimate state interest or if there is any conceivably valid justification for the law, and a plausible link between the purpose of the law and the method selected to implement it, the courts will uphold it. *See Schwarz v. Kogan*, 132 F.3d 1387, 1391 (11th Cir. 1998). "[W]here there is a plausible reason for the legislative enactment, it is constitutionally irrelevant whether that reason *in fact* underlay the legislative decision." *Gallagher*, 605 So.2d at 69 (internal quotation marks deleted, emphasis added). The analysis includes a two-step inquiry: is the state's

interest legitimate and are the means chosen by the state rationally related to that interest. *See Ocala Kennel Club v. Rosenberg*, 725 F.Supp. 1205, 1208-09 (M.D. Fla. 1989). Subsection (a) easily satisfies both prongs of the inquiry.

2.

When the legislation at issue first was proposed in 1990, the summary submitted by the Committees on Rules and Calendar, Finance and Taxation, and Regulated Industries stated:

> Florida has the largest and most complex pari-mutuel industry in the nation. No other state has all of the pari-mutuel sports that are active in this state. Florida presently has eighteen greyhound permitholders, twelve jai-alai permitholders operating at 10 locations, five thoroughbred racing permits operating from four thoroughbred tracks, and one harness track. *From time to time Florida has also had quarter horse racing.* During the 1988-89 fiscal year, 7,160 live pari-mutuel performances were conducted in this state. No other state had even one third as many.
>
> The economic activity generated comes not merely from the races, but from numerous collateral enterprises, such as the breeding industries. However, most observers believe that pari-mutuel sports are in the midst of a long term decline in popularity.
>
> This trend appears to be national in scope and is a result of many social and economic factors playing on the entertainment dollar.
>
> Within the horseracing industry it is claimed that purses in Florida are no longer competitive with those offered in other major racing states and better racing exposure would benefit the level of purses, thereby improving income for all aspects of the horseracing industry.

(3R 413-14, emphasis added; *see* 3R 423). In addition, the long range consequences were projected: "The bill may prove to be beneficial to the goal in

the State Comprehensive Plan of maximizing job opportunities and increasing the per capita income of Florida residents" (3R 424).

When amendments to the law first were debated before the House Subcommittee on Pari-Mutuels in the Spring of 1991, Chris Meffert testified on behalf of Breeders in support of the proposed amendments (3R 436-48). Meffert explained that the bill limited the particular license to a "bona fide thoroughbred horse sales operation" (3R at 437), that Ocala, Florida was "one of the four major breeding and training centers in the world" (3R 437-38), and that Breeders is one entity really helping the thoroughbred industry (3R 438). Meffert further explained that while Breeders and Jai Alai were in the same county, *there was no direct competition for business* because Breeders was interested only in thoroughbred intertrack wagering; that Breeders is an agricultural cooperative owned by breeders and others whose primary business is the "promotion, marketing, and sales of thoroughbred horses for the benefit of the breeding industry" (3R 441); that Breeders is a daytime operation located in the center of horse farm country in Marion County, at a distance of 20-25 road miles from Jai Alai's fronton; and that the bill would generate more money for the state by helping an industry that was depressed (3R 442-43). Representative Albright further clarified that the people who would go to Jai Alai's fronton, located basically at a mid-point between Ocala and Gainesville, were not the same pool

of customers who would go to Breeders "out in the middle of horse country" (3R 440-41). While the amendment to the proposed bill passed at that time (3R 443), the bill failed by an evenly divided vote of the committee (3R 447) and was tabled (3R 448). Virtually the same bill passed two months later. Ch. 91-197, §§ 18, 34, Laws of Fla.

3.

Thus, the criteria approved by the bill, *i.e.*, fifteen days of thoroughbred horse sales at a permanent sales facility for three consecutive years, and one day of non-wagering thoroughbred racing with a $250,000 purse structure for two consecutive years prior to application, were designed to attract an entity that had a strong presence in the horse sales industry and by its past performance showed a potential to generate sufficiently large sales as to attract interested buyers and sellers at its horse sales facility. These criteria were designed not only to help shore up a declining industry that had a strong presence in Florida, but also to generate higher revenues for the state from the income generated by the intertrack wagering and taxes and from the collateral benefits of greater employment potential for those interested in the horse sales field. The fact that there had been less quarter horse activity in the state and that fewer such permits had been issued by the state than in the other categories of racing and gaming were rational bases

for the legislature to seek to encourage growth in the field by requiring the applicant to hold such a permit.

The District Court was particularly critical of the statutory requirement that the applicant hold a quarter horse permit (slip op. at 13), and derided the perfectly rational link to the field of horse racing in general and our argument that the legislature was trying to encourage growth and interest in a category that had been used very little. Since Florida unquestionably has a right to seek to bring in more revenue for the state and also has the right and duty to protect the viability of a declining industry that has a history of providing income and jobs in the state (*see Ocala Kennel Club, Inc. v. Rosenberg*, 725 F.Supp. at 1209), the only real question is whether the criteria selected have a rational relationship to that objective. In considering this question, the Court does not sit as a superlegislative body, and is not permitted to substitute its judgment for that of the legislative branch, "even if the enactment of the statute is considered improvident." *Ocala Kennel Club,* 725 F.Supp. at 1209 (upholding a 100-mile limitation of dog tracks as rationally related to promoting economic viability of existing pari-mutuel operations and protecting efficacy of Florida's tax structure).

The District Court did not hold Jai Alai to its burden to demonstrate that the criteria in section 550.615(9)(a) do not rest on any rational basis. Nonetheless, as the legislative history clearly demonstrates, they do.

C.

Jai Alai does not have standing to challenge subsections 550.615(9)(b) and (e) on equal protection grounds; these two subsections are nevertheless valid.

Because, as we have said, subsection (a) represents a valid exercise of legislative classification as a general law, the Court need not examine some of the remaining subsections for constitutional validity. But, since the District Court found some of those subsections unconstitutional as well, we will address those conclusions. We submit that Jai Alai has no standing to contest subsections (b) and (e), the only two remaining subsections challenged and ruled on below. Moreover, we submit that both are constitutional general laws and that the District Court erred in refusing to give any deference to the subsection divisions created by the legislature and by commingling all to reach its strained conclusion.

Since Jai Alai is not an applicant under subsection (a), we fully believe it has no standing to raise the constitutionality of subsection (b). We raised this argument in the trial court (*see* 1R 121-11), and in the District Court. The District Court wholly ignored our standing argument because it used the provisions of subsection (b) and (e) in conjunction with those of (a) to conclude that all of section (9) violated equal protection.

1.

Section 550.615(9)(b) provides:

> (b) If more than one permitholder applies, the division shall determine which permitholder shall be granted the license. In making its determination, the division shall consider the length of time the permitholder has been conducting thoroughbred horse sales in this state, the length of time the applicant has had a permanent location in this state, and the volume of sales of thoroughbred horses in this state, giving the greater weight to the applicant that meets these criteria.

It is axiomatic that the constitutionality of a statute may be challenged only by one whose rights are, or will be, adversely affected by the law in question. *See Acme Moving & Storage Co. of Jacksonville v. Mason*, 167 So. 2d 555, 557 (Fla. 1964). The rights of Jai Alai will not be affected by the method of choosing which entity among eligible applicants might be granted a license, and it has no enforceable right to obtain a declaration as to whether the qualifications listed in subsection (b) are constitutional.

Jai Alai is not, and will not be applying for a subsection (a) license, because it holds an intertrack license far broader than the license here at issue. *See* § 550.615(2). The constitutionality of the criteria for evaluating whether *another applicant* should be granted a license under subsection (b) is a question that should await another day when a competing applicant actually has a concrete interest in the outcome. Jai Alai does not have standing to contest this provision.

2.

Even if Jai Alai had standing to contest subsection (b), it would still lose on the merits under classic equal protection analysis. Absent suspect classes or

fundamental rights, a law does not violate equal protection if it is reasonable, *i.e.*, not irrational. Wide discretion is granted to the legislature in resorting to classification. *See Cesary v. Second Nat'l Bank of North Miami*, 369 So. 2d 917, 919 (Fla. 1979). The act at issue here surely is not irrational. The District Court erroneously adopted Jai Alai's rhetoric, even though Jai Alai never proved that Breeders had a "lock" on this limited intertrack wagering license, or that no one else might reasonably qualify in the future under subsection (b).

Although the District Court cited to this Court's decision in *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n, Inc.*, 245 So. 2d 625 (Fla. 1971) (*Hialeah v. Gulfstream II*) for a variety of purposes, the reasoning from that case can apply, if at all, only to the equal protection analysis of subsection (b) of section 550.615(9), which sets out guidelines for the Division to apply in determining which of *competing applicants* should be awarded the single license allowed by subsection (a).

We note at the outset that *Hialeah v. Gulfstream II* was decided on *due process* and *equal protection* grounds and *did not rely on special act analysis* for its conclusion that the statutory provision was unconstitutional and denied Gulfstream due process and equal protection. Further, that case was decided on a complete record following a full trial. The statute there in question divided the horse racing season into three periods and allocated the choice of racing dates to the track that

produced the largest amount of tax revenue during the preceding year. At trial Gulfstream showed that it *had tried for twenty years* but had been unable to produce the most tax revenue operating with the less advantageous dates. The statute's criteria for selecting among competing applicants was *proved* to perpetuate the advantage for the racetrack holding the most advantageous racing dates. Thus the advantage enjoyed by the track that produced the most revenue *as a result of already having the most advantageous racing dates* could not be overcome.

No such effect can be shown from the guidelines at issue here. Here, the criteria to be applied by the Division when called upon to select from among *competing applicants* does not depend upon the revenue produced by intertrack wagering, and thus does not depend upon revenue resulting from the license in question. Instead, the revenue to be measured in this statutory scheme is *not* revenue from the intertrack wagering, but from the volume of sales of thoroughbred horses, activity that Breeders undertakes)and that others can undertake)regardless of the intertrack wagering license. The additional criteria)concerning the length of time the permitholder has been conducting thoroughbred horse sales in the state and the length of time the permitholder has maintained a permanent facility in the state)are not criteria that give the holder of the subsection (a) license an advantage resulting from the license itself. Thus, the

rationale in *Hialeah v. Gulfstream II* is inapplicable here and the case does not support the conclusion the District Court reached.

The present case is more akin to *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 37 So.2d 692, 694 (Fla. 1948) (finding the statute not unconstitutional per se and that plaintiff's claim failed to present sufficient facts to show a violation of *its* constitutional rights), *appeal dismissed*, 336 U.S. 948 (1949), than it is to *Hialeah v. Gulfstream II*, 245 So.2d at 627-29, on which the District Court relied.

Further, the statutory criteria for choosing the recipient of the license are rationally related to the objectives of the statute based upon the same rationale we have set forth in our arguments in support of subsection (a), supra. These criteria)the length of time the permitholder has been conducting thoroughbred horse sales in the state, the length of time the applicant has had a permanent location in the state, and the volume of sales of thoroughbred horses in the state)all assure that the intertrack wagering license will be awarded to the entity that has demonstrated its ability to generate large horse sales, keep the horse breeding and sales industry strong, and provide maximum revenues for the state and the breeding industry. *See Sanford-Orlando Kennel Club*, 434 So.2d at 881. The criteria in subsection (b) rationally relate to the achievement of those state interests.

There has as yet been no showing by any *bone fide applicant* that the provisions of subsection (b) cannot be met. Because there has been no other applicant, there is no record to show how the Division would apply the criteria in subsection (b), and give "the greater weight to the applicant that meets these criteria." Therefore this Court should not address the issue, but instead should await a proper challenge by one who has a stake in the answer.

3.

Jai Alai also does not have standing to challenge whether or not the Division seeks to revoke the permits of quarter horse permitholders and does not have standing to challenge subsection (e), which provides:

> (e) For each year such quarter horse permitholder must obtain the license set forth in paragraph (a), any provisions relating to suspension or revocation of a quarter horse permit for failure to conduct live quarter horse racing do not apply.

Jai Alai does not hold a quarter horse permit and has not alleged that it ever will seek a quarter horse permit. The District Court did not address our argument that Jai Alai had no standing to challenge subsection (e). Whether or not the Division has revoked other quarter horse permits under the provisions of section 550.334(2) is irrelevant to the constitutionality of section 550.615(9)(e).

The conclusion that subsection (e) is unconstitutional was wrong and should be reversed. The legislature was certainly within its prerogative in suspending the

application of another of its statutes when the provisions of the instant statute were implemented properly. The quarter horse permit is simply a category of permits, open to all. The requirement that the applicant hold a quarter horse permit brings the applicant within the jurisdiction of the Division. For the purposes of the statute at issue, it is irrelevant whether the applicant actually holds quarter horse races, and thus the statute suspends the requirement to hold such races.

D.

Subsections (b) and (e) are severable from the remainder of section 550.615(9).

Should this Court reach the question of the constitutionality of either subsection (b) or (e) and find either to be invalid as violating Jai Alai's right to equal protection of the law, such a finding would not invalidate the entirety of section 550.615(9).

> The rule is well established that the unconstitutionality of a portion of a statute will not necessarily condemn the entire act. When a part of the statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Cramp v. Board of Pub. Instruction of Orange County, 137 So.2d 828, 830 (Fla. 1962); *see Small v. Sun Oil Co.*, 222 So.2d 196, 199 (Fla. 1969) (citing long line

of Florida cases dealing with severability). If the legislative purpose in passing valid portions of the statute can be accomplished independently from any portion held to be invalid, and if it cannot be found that the legislature would not have passed the valid portion without the invalid portion, "then it is the duty of the court to give effect to so much of the statute as is good." *Barndollar v. Sunset Realty Corp.*, 379 So.2d 1278, 1280 (Fla. 1980) (test is whether the court can determine that legislature would have enacted law without invalid portion); *see State v. Williams*, 343 So.2d 35, 38 (Fla. 1977) (court can sever unconstitutional provision and uphold remainder, if what is left is sensible and capable of being carried out).

Thus, even if the Court were to declare subsection (b) unconstitutional, it could sever that subsection in its entirety and still give effect to the intent of the legislature. In *Hialeah v. Gulfstream II*, 245 So.2d at 629, this Court struck the section of the act that provided standards for the State Racing Commission to apply in making its determination regarding the awarding of winter racing dates to three competing thoroughbred racetracks within a 100-mile radius of each other, but held that the Racing Commission would be left with discretionary power to determine how to award the most advantageous racing dates in an equitable fashion, "unaffected by voided Section 550.081... ." *Id.* at 629-30.

Similarly here, if this Court were to invalidate subsection (b), the Division would be left with the discretionary power to develop standards to be used if more than one entity were to apply for the single license allowed by subsection (a). Such a result would implement the intent of the legislature to promote the horse industry, and would do no violence to the remainder of section 550.615(9).[18]

If this Court were to invalidate subsection (e), such decision would have little, if any, effect on the remainder of section 550.615(9) and would not invalidate the legislative intent.

CONCLUSION

For all of the reasons we have given, and under the authorities cited, we ask this Court to reverse the decision of the First District Court of Appeal on the ground that it had no jurisdiction to determine the constitutionality of section 550.615(9) because the question is moot, to remand to that court with instructions that it declare this issue moot, dismiss the appeal, and remand to the trial court with instructions that the trial court vacate as moot its order entered December 5, 1997 and dismiss the declaratory judgment action filed July 7, 1995. Alternatively

---

[18] It is disturbing that the District Court used the subsequent legislative action that deleted subsection (e) as proof that this subsection had no rational basis to begin with (slip op. at 12, n.2). To permit the use of such reasoning sets bad precedent. Here the statute was held unconstitutional by the trial court. Then, during the pendency of the appeal, the legislature amended the statue *because of the trial court's decision*. Although refusing to recognize the new enactment for purposes of mootness, the District Court used the legislative action as proof of the lack of constitutionality. Such *post hoc* reasoning is unwarranted.

or additionally, we ask this Court to find section 550.615(9) constitutional, to reverse the order affirming the final judgment for Jai Alai and remand to the District Court for remand to the trial court with instructions to enter summary judgment for Breeders.

Respectfully submitted,

HOLLAND & KNIGHT LLP
Counsel for Appellants
701 Brickell Avenue
Miami, FL 33131
(305) 374-8500

By: _____

Daniel S. Pearson
FBN 062079
William F. Hamilton
FBN 379875
Linda Collins Hertz
FBN 162608

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June __, 1999, I delivered a true and correct copy of the foregoing Initial Brief of Appellant to FedEx for overnight delivery to: Stephanie A. Daniel, Esq. Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399; James S. Alves, Esq., Carolyn S. Raepple, Gary K. Hunter, Jr. and Gabriel E. Nieto, Hopping Green Sams & Smith, P.A. (counsel for Jai Alai), 123 South Calhoun Street (PO Box 6526), Tallahassee, FL 32314; and William P. Cagney, III, P.A. (counsel for Jai Alai), 501 East Atlantic Avenue, Delray, FL 33483.

TABLE OF AUTHORITIES (continued)

STATUTES **Page**

Linda Collins Hertz

INDEX TO APPENDICES

Tab