IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-2130

STATE OF FLORIDA, DEPARTMENT OF
BUSINESS AND PROFESSIONAL REGULATION,
DIVISION OF PARI-MUTUEL WAGERING,

Appellants,

v.

GULFSTREAM PARK RACING ASSOCIATION, INC.

Appellee.
_____/

AMENDED AMICUS BRIEF OF FLORIDA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC., IN SUPPORT OF GULFSTREAM PARK RACING ASSOCIATION, INC.

On Appeal from the District Court of Appeal, First District

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IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

Amicus Curiae is FLORIDA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC. ("FHBPA"), a Florida corporation, not-for-profit, which is an organization of individual thoroughbred race horse owners and trainers each of whom is licensed by Appellant, STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING, and each of whom engages in thoroughbred horse racing in the State of Florida at the thoroughbred horse racing track operated by Appellee, GULFSTREAM PARK RACING ASSOCIATION, INC., in addition to the thoroughbred horse racing meetings operated by CALDER RACE COURSE, INC. and TROPICAL PARK, INC.

FHBPA represents the interests of horse owners and trainers in Florida and enters into contracts with GULFSTREAM PARK RACING ASSOCIATION, INC., CALDER RACE COURSE, INC., and TROPICAL PARK, INC. regarding thoroughbred horse racing, purse money to be paid to winners of races (members of FHBPA) and the transmission of racing by cable, satellite or otherwise. Purse monies paid to the owners of winning horses are funded from, among other things, wagering on live thoroughbred horse racing at

those race tracks and income derived from the transmission of thoroughbred horse racing (via satellite, cable or otherwise) to persons who are not present for live racing but place wagers on the races at remote locations (commonly referred to as "Simulcasting"). Simulcasting significantly increases the amount of money handled by a pari-mutuel permit holder and therefore appreciably enhances the amount of purse money paid. GULFSTREAM PARK RACING ASSOCIATION, INC., CALDER RACE COURSE, INC., and TROPICAL PARK, INC. are three horserace permitholders who are all situated within the geographic area that is the subject of this appeal.

Any limitation, restraint or restriction on the ability of persons to wager money on thoroughbred horse racing negatively effects the interests of the FHBPA and its membership as purses are adversely affected. Consequently, FHBPA is materially interested in the subject matter of the within appeal.

STANDARD OF REVIEW

The District Court observed that the standard of review is *de novo*, and in so doing stated:

> As a general principle, a decision on the constitutionality of a statute is a question of law and is therefore reviewed *de novo*. See: *In re Estate of Caldwell*, 247 So. 2d 1 (Fla. 1971); *Ocala Breeders' Sales Co., Inc. v. Florida Gaming Ctrs., Inc.*, 731 So. 2d 21 (Fla. 1st DCA 1999), *aff'd*, 793 So. 2d 899 (Fla. 2001). In this case, however, the final judgment has both factual and legal components. Whether the statute could be applied to permit holders in other areas of the state is, at least in part, an issue of fact. We accept the trial court's findings of fact and apply the *de novo* standard of review only to the legal conclusion drawn from the facts.

This Court, like the District Court, should accept the trial court's factual findings and apply the *de novo* standard of review solely to the legal conclusions derived from those facts.

SUMMARY OF ARGUMENT

§550.615(6), Fla. Stats., is an unconstitutional special law. Although a general law may apply to a specific geographic location if it is reasonably related to the purpose of the statute, §550.615(6) is a special law in the guise of a general law. §550.615(6) seeks to regulate intertrack wagering amongst jai alai, greyhound and harness permitholders in Florida in one specific area "where there are three or more horse race permitholders within 25 miles of each other." The area referred to in §550.615(6) applies to one area of Florida only and, because of the restrictions imposed by §550.054(2), Fla. Stats., will never apply to any other area of Florida. There is no reasonable relationship between the purpose of §550.615(6) (intertrack wagering) and the area described. Consequently, §550.615(6), Fla. Stats. is an unconstitutional special law.

ARGUMENT

THE DISTRICT COURT CORRECTLY DETERMINED THAT §550.615(6), FLA. STATS. IS AN UNCONSTITUTIONAL SPECIAL LAW.

The term "special law" means a special or local law. Article X, Section 12(g), Fla. Const. §550.615(6), Fla. Stats. applies to one area of Florida only. Therefore, it is a special or local law and was improperly enacted as a general law contrary to Article III, Section 10 of the Florida Constitution, which provides:

> 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.

Essentially, §550.615(6), Fla. Stats. regulates intertrack wagering between jai alai, greyhound and harness permitholders, but not thoroughbred permitholders. Despite the fact that horserace permitholders (other than harness permitholders) are not restricted by §550.615(6), Fla. Stats., that section nevertheless utilizes horse race permitholders as the criterion for the area in which the provisions of §550.615(6), Fla. Stats. are to apply, to wit: an area of the state "where there are three or more horse race permitholders within 25 miles of each other." Thus, because this statute applies to a limited (and targeted) geographic

area which bears no relationship to the purpose of the statute (the regulation of intertrack wagers among greyhound, jai alai, and harness permitholders), it is an unconstitutionally enacted special law.

Special laws can operate in a limited geographic area within the state or they can regulate the conduct of a limited class of persons within the state. In this context they differ from general laws. Quite some time ago the Supreme Court explained the nature of special/local laws in *State ex rel. Landis v. Harris*, 120 Fla. 555, 562-63, 163 So. 237, 240 (1934), and stated:

> [A] special law is one relating to, or designed to operate upon, particular persons or things, ... or one that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal ...; a local law is one relating to, or designed to operate only in, a specifically indicated part of the State ..., or one that purports to operate within classified territory when classification is not permissible or the classification is illegal ... (citations omitted).
> See also: *Dept. of Bus. Reg. v. Classic Mile, Inc.*, 541 So.2d 1155 (Fla. 1989).

Special laws are subject to the procedural requirements found in Article III, Section 10 of the Florida Constitution which are inapplicable to general laws. Thus, a special law which affects a limited area (as in this case) can only be enacted if the legislature provides notice of its intention to enact the law, or if the proposed law has been approved by a vote of the electors in that county or district.

Conversely, a general law is one that "operates universally throughout the state, uniformly upon subjects as they may exist throughout the state, or uniformly within a permissible classification." *See*: *Classic Mile*, supra, at 1157; *State ex rel. Landis, supra*. The "[u]niformity of operation does not require that a law operate upon every person in the state, but that every person brought within the circumstances provided for is fairly and equally affected by the law," and that "[g]eneral laws may apply to specific areas if their classification is permissibly and reasonably related to the purpose of the statute." *See*: *State, Dept. of Natural Resources v. Leavins*, 599 So.2d 1326, 1336 (Fla. 1st DCA 1992); Art. III, §11(b), Fla. Const.

The legislature has broad discretion to establish statutory classification schemes in general laws. If a classification bears a reasonable relationship to the purpose of the statute and is "based upon proper distinctions and differences that inhere in or are peculiar or appropriate to a class," the statute is a valid general law. *See*: *Classic Mile* at 1157; see also *Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So.2d 879 (Fla.1983). However, a statute that employs an arbitrary classification scheme is not valid as a general law. *See*: *Classic Mile* at 1157 [statute which authorized simulcast horse racing and pari-mutuel wagering on that signal stricken because there was no reasonable

relationship between the statutory classification scheme and the subject of the statute; the classification was also based on time of issuance and usage of a permit; the purported classification scheme was merely descriptive of a particular county]. The legislature cannot enact a special law in the guise of a general law, because that would violate the procedural requirements of Article III, Section 10 of the Florida Constitution. Nor is a special law converted into a general law simply because the Legis lature treated it and passed it as a general law. *Classic Mile, Inc.*, *supra*; *Anderson v. Board of Public Instruction*, 136 So. 334 (Fla. 1931).

Whether a law is special or general depends in part on whether the class it creates is open. If it is possible in the future for others to meet the criteria set forth in the statute, then it is a general law and not a special law. *See*: *Biscayne Kennel Club, Inc. v. Fla. St. Racing Comm'n*, 165 So.2d 762 (Fla.1964); *Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., supra*; *Summersport Enterprises, Ltd. v. Pari-Mutuel Comm'n*, 493 So.2d 1085 (Fla. 1st DCA 1986); *Classic Mile, supra*. The District Court correctly concluded that the law imposes a "reasonable" standard on the courts determination of whether an area of the state can be replicated. *See: City of Coral Gables v. Crandon*, 25 So. 2d 1 (Fla. 1946). In this case, because of the limitations imposed by §550.054(2), Fla. Stats., as the District Court observed, it is not possible for the statutory classification to be

replicated in the future. *Dept. of Bus. and Prof. Reg., Div. of Pari-mutuel Wagering vs. Gulfstream Park Racing Assoc., Inc.*, 912 So.2d 616, 618, 621-622 (Fla. 1st DCA 2005).

It is undisputed that the only area of the State to which §550.615(6), Fla. Stats. applies is the area straddling Miami-Dade and Broward Counties where GULFSTREAM PARK RACING ASSOCIATION, INC., CALDER RACE COURSE, INC., and TROPICAL PARK, INC. are situated (that is the only area of Florida which contains three or more horse race permitholders within 25 miles of each other). Because Florida law imposes a mileage limitation for the issuance of a pari-mutuel permit, there can never be another area within Florida which replicates the area in Miami-Dade and Broward Counties to which subsection (6) applies. Specifically, §550.054, Fla. Stats., provides in part:

> In addition, an application may not be considered, nor may a permit be issued by the division or be voted upon in any county, to conduct horse races, harness horse races, or dog races at a location within 100 miles of an existing pari-mutuel facility, or for jai alai within 50 miles of an existing pari-mutuel facility; this distance shall be measured on a straight line from the nearest property line of one pari-mutuel facility to the nearest property line of the other facility.

Applying the plain meaning of §550.054(2), Fla. Stats., the District Court correctly concluded that the only location in Florida where a new pari-

mutuel facility could be located is Key West. But, when one facility of any kind is located in Key West, then no other facility could be located there.

Appellants reliance on *Sanford-Orlando Kennel Club*, *supra*, lends no velocity to their claims. Appellants incorrectly assert that the District Court strayed from prior special act cases. The Court in *Sanford-Orlando Kennel Club*, *supra*, focused on a statute that provided for the conversion of harness permits to dog racing permits and concluded that the class was open because other applicants could potentially meet the prescribed revenue levels. Thus, the statutory classification there was reasonably related to the purpose of the statute. In this case, however, as the District Court concluded, it is not reasonable to expect that the conditions in §550.615(6), Fla. Stats. will ever again exist in Florida.[1]

Here, however, there is no reasonable relationship between the subject matter of §550.615(6), Fla. Stats. (the regulation of intertrack wagering among greyhound, jai alai, and harness permitholders) and the description of the area of Florida in which this regulation is to apply (an area of the state "where there are three or more horse race permitholders within 25 miles of each other.").

[1] Appellants reliance on *Hialeah Racing Ass'n, Inc. v. Dept. Of Bus. & Prof. Reg., Div. Of Pari-mutuel Wagering*, 907 So.2d 1235 (Fla. 5th DCA 2005) is misplaced. That permit was revoked for failure of the licensee to conduct racing

§550.615(6), Fla. Stats. employs the descriptive geographic phrase "three or more horse race permitholders" as a ruse to describe the specific area in Miami-Dade and Broward counties to which the statutory regulatory scheme is to apply. That targeted geographic identification has no relationship, however, to the purpose of the statute which is the regulation of intertrack wagers by greyhound, jai alai, and harness permitholders. Indeed, the First District was "unable to uphold the statute as a general law of limited applicability because the classification it makes bears no reasonable relation to the subject regulated," citing *City of Miami v. McGrath*, 824 So. 2d 143 (Fla. 2002); *Dept. of Legal Affairs v. Sanford-Orlando Kennel Club*, *supra*; and *Carter v. Norman*, 38 So. 2d 30 (Fla. 1948).

As both the Lower Court and the First District concluded, §550.615(6), Fla. Stats. presently applies only to the limited geographical area in the vicinity of the border between Miami-Dade and Broward Counties.[2] Because the provisions of §550.615(6), Fla. Stats. cannot exist elsewhere or in the future,

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(the licensee claimed it was not economically feasible). That does not change the fact that no additional permit can be issued given the statutory mileage restrictions.

[2] There is no other harness track in Florida and, with the statutory mileage restrictions, there will never be another harness track. The record below clearly demonstrates that the description in § 550.615(6), Fla. Stats. intentionally and specifically targeted the area of Miami-Dade and Broward Counties for unique regulation of intertrack wagering which is not applicable in any other area of the

those factors make it a special law. Despite Appellant's optimistic claims,[3] the shortcoming of their argument lies in the fact that the targeted market area only exists because it developed before the enactment of laws which now prohibit its reoccurrence. Therefore such an area could never exist anywhere else in Florida.

Applying this analysis in a somewhat similar context the First District determined that another provision of §550.615, Fla. Stats. was unconstitutional (§550.615(9), Fla. Stats.) as a special law enacted under the guise of a general law in violation of Article III, Section 10 of the Florida Constitution. *Ocala Breeders Sales Company v. Florida Gaming Centers, Inc.*, 731 So.2d 31 (Fla. 1st DCA 1999). This Court affirmed that decision. *Ocala Breeders' Sales Company, Inc. v. Florida Gaming Centers, Inc.*, 793 So.2d 899 (2001). Similarly, in *West Flagler*

State. Moreover, the uncontroverted evidence demonstrates that it is not reasonable to assume that the area will be replicated anywhere else in Florida.

[3] Appellants suggest that the mere possibility that in the future someone might obtain a permit to conduct quarter horse racing within the proximity of a thoroughbred horse race track and at least one other horse racing permitholder could trigger the prohibition against intertrack wagering. This contention is without merit for several reasons. First, there is no audience for quarter horse racing which is why no quarterhorse racing has been conducted in Florida as the record below discloses. Quarterhorse racing is simply not economically viable. Second, the remote possibility that some set of facts might exist in the future cannot be accepted to sustain the constitutional viability of this otherwise unconstitutional law. A speculative contention can not be used to circumvent the constitutional requirements applicable to the enactment of special laws. Were it

Kennel Club, Inc. v. Florida State Racing Comm., 153 So. 2d 5 (Fla. 1963), the court held a statute invalid as an unconstitutionally enacted special law because the classification was based on the time of issuance and usage of a permit and the purpose of the statute was to provide for harness racing in Broward County.

§550.615(6), Fla. Stats. is an unconstitutional special act because the operative phrase is descriptive only and not reasonably related to the purpose of the statute (the regulation of intertrack wagering). Furthermore, the statute refers to only one area of the State and will never apply to any other geographic area.

CONCLUSION

For the foregoing reasons, the decision of the District Court of Appeal, First District, should be affirmed.

Respectfully submitted,

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otherwise Article III, Section 10 of the Florida Constitution would be emasculated, an untenable proposition.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by mail to **JOSEPH M. HELTON, JR., ESQ.**, Chief Attorney for Division of Pari-mutuel Wagering, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-2202; **CYNTHIA S, TUNNICLIFF, ESQ., MARC W. DUNBAR, ESQ., and WILLIAM H. HUGHES, III, ESQ.**, Counsel for Gulfstream Park Racing Association, Inc., c/o Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., 215 South Monroe Street, Second Floor, Post Office Box 10095, Tallahassee, Florida 32302-2095; and, **HAROLD F. X. PURNELL, ESQ.**, Rutledge, Ecenia, Purnell & Hoffman, P.A., Post Office Box 551, Tallahassee, Florida 32302-0551, and to and to **WILBUR BREWTON, ESQ**., (via e-mail), ROETZER & ANDRESS, LPA, 225 South Adams Street, Suite 250, Tallahassee, FL, 32301, this ____ day of February, 2006.

By: _____
Bruce David Green, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Appeal Brief has been prepared using 14 point proportionally spaced Times New Roman font.

By: _____
Bruce David Green, Esq.