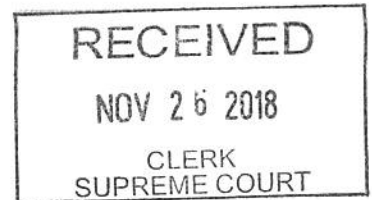


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. _____



KENTUCKY COURT OF APPEALS
CASE NO. 2018-CA-001689

ON APPEAL FROM THE FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 10-CI-1154

THE KENTUCKY HORSE RACING COMMISSION;
THE KENTUCKY DEPARTMENT OF REVENUE;
APPALACHIAN RACING, LLC;
CHURCHILL DOWNS INCORPORATED;
ELLIS PARK RACE COURSE, INC.;
KEENELAND ASSOCIATION, INC.;
KENTUCKY DOWNS, LLC;
LEXINGTON TROTS BREEDERS ASSOCIATION, LLC;
PLAYERS BLUEGRASS DOWNS, INC., and
TURFWAY PARK, LLC,

RESPONDENTS,

vs.

THE FAMILY TRUST FOUNDATION OF KENTUCKY,
INC., d/b/a THE FAMILY FOUNDATION,

MOVANT.

MOTION TO TRANSFER APPEAL TO THE
KENTUCKY SUPREME COURT
BY THE FAMILY TRUST FOUNDATION OF KENTUCKY,
INC., d/b/a THE FAMILY FOUNDATION

MAY IT PLEASE THIS HONORABLE COURT:

Pursuant to CR 74.02, the appellant in the Court of Appeals and the movant here, The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation ("The Family Foundation"), by counsel, does hereby respectfully move this Honorable Court to transfer this appeal from the Kentucky Court of Appeals to this Honorable Court for expedited consideration.

I. INTRODUCTION.

This appeal is about expanded gambling, the meaning of pari-mutuel wagering on horse racing and the civil/criminal immunity of the Respondents for licensing/operating illegal gambling games and devices. This will be the second time this case will be before this Honorable Court. It was first argued on August 21, 2013, followed by an Opinion, issued on February 20, 2014, in a case styled *Appalachian Racing, LLC, et al., v. The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation*, 423 S.W.3d 726 (Ky. 2014). This Court explained what pari-mutuel wagering on horse racing was and remanded the case for development of an evidentiary record concerning whether gambling on historical horse racing was actually pari-mutuel wagering on horse racing.

Although there are now four gaming systems, a bench trial was allowed only on the Exakta Gaming System. A bench trial was conducted on January 8 through January 11, 2018. After The Family Foundation requested a ruling, the Franklin Circuit Court finally entered an Opinion and Order on October 24, 2018, which, among other things, disregarded the conception of the fundamental requirement that pari-mutuel wagering be “mutuel”. The error of the trial court’s Opinion and Order is that a patron who bets alone on an event is wagering among/against other patrons under a fiction that when wagers are placed in a “pool” the patron is magically transformed to one who is wagering among/against other patrons who bet before and after. It is like saying the population of a city is showering together because the shower water winds up in the same sewer. By mischaracterizing the gaming system as pari-mutuel wagering, the trial court likewise found the Exakta Gaming System exempt by KRS 436.480 from the gambling prohibitions in Chapter 528 of the

Kentucky Revised Statutes. If allowed to stand, without a law change, a vote of the General Assembly or a Kentucky voter, the judiciary will have spoken into existence the legalization of casino gambling in Kentucky.

When first before this Court, historical horse racing was described as nothing more than betting on a video of an old horse race. The trial exhibits and the attached videos show that is untrue. A DVD containing videos of the Exakta Gaming System in operation at Kentucky Downs, LLC, is attached as **Exhibit A**. Few things speak more loudly about the real nature of the games than a display of the games/devices themselves. Before reading another word of this motion, this Honorable Court is respectfully requested to watch the videos on the attached DVD. The disparity between that represented to this Court in its 2013 discretionary review versus observations of the games themselves led one former Justice to declare that this Court had been misled.¹

Scott says he feels the court was “misled” about the way the games work. The racetracks and the state have said players bet on previously run horse races, but Scott said he saw little evidence of that, or that the wagering is pari-mutuel, in which players bet against each other rather than the house.

“If we had been standing at Kentucky Downs, that day, looking at those machines, and they’d told us that, we’d probably have thrown them out of court,” Scott said. He said he thought it would be something akin to off-track betting or simulcasting. “It has nothing to do with historical horse racing. I sat there in that case, thinking it was about historical horse racing. That’s BS,” Scott said. “That’s mathematics, that’s an algorithm.”

Lexington Herald Leader, Janet Patton, “Will T. Scott says Kentucky Supreme Court misled about wagering on historical racing”, May 14, 2015, a copy of which is attached as **Exhibit B**. From this misapprehension grew a multibillion-dollar illegal gambling

enterprise facilitated by an unelected and rogue Kentucky Horse Racing Commission.² When this Court realizes the betrayal of the trust it placed in the Racing Commission and the Respondents, it is certain to reverse the lower court yet again. After eight years of litigation, the case remains unresolved. The time has come for what respected horseman, lawyer and Racing Commission member generally characterized as a “charade” and a “sham” to end and to end soon.³ For these and the reasons stated herein, The Family Foundation humbly and respectfully requests transfer of this appeal to this Honorable Court.

II. COMPLIANCE WITH APPLICABLE CIVIL RULES

1. Pursuant to CR 74.02(1), a file-stamped copy of The Family Foundation’s notice of appeal is attached as **Exhibit C**.

2. Pursuant to CR 74.02(2), The Family Foundation states that this case concerns unauthorized expansion of gambling and is therefore of great and immediate public importance. The great and immediate public importance is discussed more fully herein above and herein below.

3. Pursuant to CR 76.20(4), a copy of the final order or judgment, findings of fact, conclusions of law and opinion of the trial court (the Franklin Circuit Court) is attached as **Exhibit D** (the “Franklin Circuit Court Opinion”). Additional opinions and order of the Franklin Circuit Court are attached to the notice of appeal and are incorporated

²The Kentucky Horse Racing Commission reports \$4,222,462,933 in historical horse racing handle since inception, with a mere \$21,307,999 for the State’s general fund over an approximate 7-year period. The Kentucky Horse Racing Commission is not even subject to the Executive Branch Ethics Code in KRS 11A.010 *et seq.*, but yet is being entrusted with oversight of expanded gambling. Axiomatic is the fact that an unelected casino operator/race track-controlled Kentucky Horse Racing Commission is the worst possible venue to address the legality of expanded gambling.

³The comments of Edward S. “Ned”) Bonnie are discussed more fully later in this motion.

herein by reference to the extent required. This Court previously remanded this case to the Franklin Circuit Court in an appeal styled, *Appalachian Racing, LLC, et al., v. The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation*, 423 S.W.3d 726 (Ky. 2014)(hereinafter “*App. Racing Opinion*, at p. ____”). A copy of the *App. Racing Opinion*, entered February 20, 2014, is attached as **Exhibit E**.

4. Pursuant to CR 76.42(2)(a)(iii), a filing fee in the amount of \$150.00 is tendered herewith to the Clerk of the Kentucky Supreme Court in the form of a good and negotiable check payable to the Kentucky State Treasurer.

5. Pursuant to CR 76.20(6) and CR 76.43(g), an original and nine copies of The Family Foundation’s motion to transfer are being filed/tendered herewith to the Clerk of the Kentucky Supreme Court.

6. Pursuant to CR 76.20(7), before filing, The Family Foundation’s motion to transfer was served to the other parties to this action and on the Clerk of the Franklin Circuit Court, the trial court whose decisions are sought to be reviewed, and such service is shown in the certificate of service below as provided by Rules 5.02 and 5.03.

7. Pursuant to CR 76.20(3)(a), the names of the movant and each respondent and the names and addresses of their counsel are set forth below:

A. The movant is The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation. Counsel for The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation, is Stanton L. Cave, Esq., Law Office of Stan Cave, P.O. Box 910457, Lexington, KY 40591-0457.

B. The Respondents are the Kentucky Horse Racing Commission (the “Racing Commission”), the Kentucky Department of Revenue, Kentucky Downs, LLC

(“Kentucky Downs”), Ellis Park Race Course, Inc., Appalachian Racing, LLC, Keeneland Association, Inc., Turfway Park, LLC, Players Bluegrass Downs, Inc., and Churchill Downs Incorporated (“Churchill Downs”)(collectively, the “Respondents”).

i. Counsel for the Kentucky Horse Racing Commission is: (i) Carmine G. Iaccarino, Esq., Deputy Executive Director Office of Legal Services, Kentucky Public Protection Cabinet, 656 Chamberlin Avenue, Suite B, Frankfort, KY 40601, and Carmine G. Iaccarino, Esq., Public Protection Cabinet, 500 Mero Street, 5th Floor, Frankfort, KY 40601;⁴ and (ii) John Forgy, Esq., George Seay, Esq., Kentucky Horse Racing Commission, 4063 Ironworks Parkway, Building B, Lexington, KY 40511;

ii. Counsel for the Kentucky Department of Revenue is: (i) Richard W. Bertelson, III, Esq., Office of Legal Services for Revenue, P.O. Box 423, Frankfort, KY 40602-0423, and (ii) Gwen R. Pinson, Esq., General Counsel, Finance and Administration Cabinet, Annex Rm 392, 702 Capitol Avenue, Frankfort, KY 40601;

iii. Counsel for Kentucky Downs, LLC, Ellis Park Race Course, Inc.⁵, Lexington Trots Breeders Association, LLC, and Appalachian Racing, LLC,⁶ is: Jay E. Ingle, Esq., William A. Hoskins, Esq., Christopher F. Hoskins, Esq., Jackson Kelly, PLLC, 175 East Main Street, Suite 500, Lexington, KY 40507;

⁴This is the address listed on the Certificate of Service of the Opinion and Order, entered October 24, 2018. Upon belief, the address has changed.

⁵Ellis Park Race Course, Inc., has been represented by different counsel at different states in the case. At one time, Ellis Park Race Course, Inc., was represented by Frost Brown Todd LLC. During the trial it appeared that Ellis Park Race Course, Inc., was represented by Jackson Kelly, PLLC. Upon belief Ellis Park Race Course, Inc., is represented by Jackson Kelly, PLLC.

⁶Appalachian Racing, LLC, has been represented by different counsel at different stages in the case. At one time, Appalachian Racing, LLC, was represented by Jackson Kelly, PLLC. Upon belief, Appalachian Racing, LLC, is represented by Stoll Keenon Ogden, PLLC.

iv. Counsel for Keeneland Association, Inc., Turfway Park, LLC, Players Bluegrass Downs, Inc., and Appalachian Racing, LLC is: (i) William M. Lear, Jr., Esq., Shannon Bishop Arvin, Esq., Stoll Keenon Ogden, PLLC. 300 West Vine Street, Suite 2100, Lexington, KY 40507-1801; and (ii) Samuel D. Hinkle, IV, Esq., Brad S. Keeton, Esq., Stoll Keenon Ogden, PLLC, 200 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202-2828; and

v. Counsel for Churchill Downs Incorporated and Ellis Park Race Course, Inc., is: Sheryl G. Snyder, Esq., Jason Renzelmann, Esq., Frost Brown Todd, LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202.

8. Pursuant to CR 76.20(3)(b), the date of entry of the judgment sought to be reviewed is October 24, 2018. This was the final and appealable Opinion and Order of the Franklin Circuit Court. Additional interlocutory Opinions and Orders are designated in and attached to the file-stamped notice of appeal, a copy of which is attached hereto as Exhibit C.

9. Pursuant to CR 76.20(3)(c), no supersedeas bond, or bail on appeal, has been executed.

10. Pursuant to CR 76.20(3)(e), the movant, The Family Foundation, does not have a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

11. Pursuant to CR 76.20(3)(f), no other party to the proceeding has a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

III. STATEMENT OF MATERIAL FACTS, QUESTION OF LAW, AND SPECIFIC REASONS WHY THE JUDGMENT/APPEAL SHOULD BE TRANSFERRED/REVIEWED

Pursuant to CR 76.20(3)(d), The Family Foundation provides its clear and concise statement of (i) the material facts, (ii) the questions of law involved, and (iii) the specific reason or reasons why the appeal should be transferred/reviewed.

A. Statement of Material Facts.

From the Respondents' representations, the Court described historical horse racing: "The bettor inserts money or its equivalent in to the Instant Racing terminal and then chooses a horse identified by a number. The terminal then displays a video recording of the race for the bettor to watch, or, as the name "Instant Racing" implies, the bettor may forego the excitement of the actual race by opting to see immediately the results of the race and the outcome of his wager." *App. Racing Opinion*, at p. 730. Under this misapprehension, this Court held, in the abstract, that the subject regulations were facially within the statutory authority of the Kentucky Horse Racing Commission. Because pari-mutuel wagering was not defined in Chapter 230 of the KRS which is the source of the Racing Commission's statutory authority, the Court looked to the "conception" of pari-mutuel wagering. The Court then determined that the regulatory definition of pari-mutuel wagering in 810 KAR 1:001(48) was facially within the "conception" of pari-mutuel wagering in the federal Interstate Horse Racing Act, 15 U.S.C. § 3001, *et seq.* and the seminal case of *Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987, 991 (Ky. 1931). *App. Racing Opinion*, at p. 737. Specifically, the Court found that the subject regulations described "a system or method of wagering approved by the commission *in which patrons are wagering among themselves* and not against the association *and* amounts wagered are

placed in one or more designated wagering pools and the net pool is returned to the winning patrons.” [Emphasis added]. *App. Racing Opinion*, at p. 737. Based on this, this Court “concluded that the regulations adopted by the Commission to license the operation of pari-mutuel wagering on historical horse racing was a valid and lawful exercise of the Commission’s statutory authority under KRS Chapter 230.” *App. Racing Opinion*, at p. 738.

Because the Franklin Circuit Court had barred all discovery, however, there was no evidence as to whether historical horse racing was in fact within that conception of pari-mutuel wagering and moreover whether the new regulations *as applied* by the Racing Commission were within the Racing Commission’s statutory authority. Based on that this Court remanded for the development of an evidentiary record to determine if historical horse racing was in fact pari-mutuel wagering on horse racing. Acting on the finding that the regulations were valid, however, the Racing Commission and Respondents continued their expansion of the licensing and operation of gambling facilities. Currently, the Respondents have licensed/operated five operating gambling facilities (with another planned opening in 2019), operating some 2,700+ gambling devices, four gambling systems⁷ and billions in wagering handle with little for the State’s general fund.⁸

⁷Instant Racing – discontinued after discovery of elements of chance resulting from the use of random number generators; Exacta Gaming System f/k/a Encore at Kentucky Downs, LLC, and Ellis Park Race Course, Inc., -- subject of a trial in the Franklin Circuit Court January 8, 2018 – January 11, 2018; PariMAX Gaming System at The Red Mile/Lexington Trots Breeders Association, LLC, and Turfway Park, LLC – not tried; and Ainsworth Gaming System at Churchill Downs Incorporated/Derby City Gaming – no discovery.

⁸For example, according to Kentucky Horse Racing Commission Reports, for Fiscal Year to Date as October 2018, of \$340,148,982 wagered only \$1,145,595 went to the State’s general fund. Since inception, of \$4,222,462,933 wagered, only \$21,307,999 went to the State’s general fund. A copy of the coverage page of the Kentucky Horse Racing Commission’s October 2018 Kentucky Historical Horse Racing Report is attached as Exhibit F.

Because they had immunity, first from the December 29, 2010, Opinion of the trial court and then from the Racing Commission's licensure it mattered not that the Respondents said one thing in this Court and another in other courts. Courier-Journal reporter and racing enthusiast Greg Hall wrote on October 14, 2013:

In a high-profile case before the Kentucky Supreme Court, Kentucky Downs – the state's first track to offer the Instant Racing game that looks like a slot machine – has argued that it is the same as a bet on a live horse race, and just as legal.

But a month later, Kentucky Downs argued in a different case in Simpson Circuit Court that Instant Racing is alterative gambling – a phrase used to describe slots and other casino games that are currently illegal in Kentucky.

For Kentucky Downs' minority partners – Churchill Downs and Turfway Park – the distinction is critical to efforts to unload their minority ownership of the track for more than \$4 million.

Churchill General counsel Alan Tse said in an interview that he doesn't see how the two positions by Kentucky Downs can be viewed as anything other than contradictory.

“We're surprised that Kentucky Downs is arguing that Instant Racing is alternative gaming in our case while simultaneously arguing the opposite in the Instant Racing case pending before the Supreme Court,” Tse said. **“From the legal perspective, it's pretty shocking.”** [Emphasis added].

A copy of the Courier-Journal Story, entitled “Instant Racing view assailed Foes: Track arguing both sides of issue, dated October 14, 2013, is attached as **Exhibit G**. Another example of the lack of concern about how the gaming actually worked appears in an email from Racing Commission, Executive Director, Lisa Underwood, dated July 1, 2011. This followed arguments in December 2010 by the Respondents to the Franklin Circuit Court that the historical horse racing was pari-mutuel wagering on horse racing. Commission Underwood wrote:

We need someone to walk us through how the games are played and why they are pari-mutuel and secure. It would help if they had a power point or could bring in a machine or something to show us how the games are played. May be a combination of people. When do you suggest. Lisa

A copy of the email, dated July 1, 2011, from Executive Director of the Kentucky Horse Racing Commission, Lisa Underwood, to Louis A. Cella, *et al.*, is attached as **Exhibit H**. Even though statutorily charged with regulating pari-mutuel wagering on horse racing, but unable to recognize pari-mutuel wagering on horse racing, the Kentucky Horse Racing Commission hired a New Jersey gambling consultant, Gaming Laboratories International, LLC ("GLI"), in the person of Richard LaBrocca, to give opinions that games with names like "Cherry Pop", "Very Cherry", Devil's Gate", "Pigs In The Mud", etc., were pari-mutuel wagering on horse races. While somewhat experienced in the subject matter of gambling, Mr. LaBrocca had a two-year degree from DeVry Institute.

Not everyone was convinced, however. Nearly five months before this case was argued in August 2013, at a Racing Commission meeting on April 9, 2013, respected horseman, lawyer and Racing Commission member, Edward S. "Ned" Bonnie, observed:

MR. BONNIE:

But these additional, at least there was a - - well, **I call it a charade** - - when I asked, they were based on historic races. And I said, well, that - - I understand that. I said, and how do they judge and bet on the races one horse versus another? And I said, have they got a form sheet to look at these historic races? And the answer was yes. [Emphasis added].

I said, how long do they get to look at the form sheet before they bet? There was a pause. And they said **5 to - - 3 to 5 seconds**. And I said, I am not the fastest reader around, **but I don't know anybody that can read that that is a legitimate past performance**. And people are even looking at it. I am not a fast reader. **But I don't know anybody that is going to decide that that is a bet that is - - it may be close to legal. It may be arguably legal. But this is not - - this is not necessarily appropriate**. [Emphasis added].

Then we get these 5 new games. And it seems to me we are moving further away from betting as we know it traditionally.

And I just want - - I just want my views on the record saying that we are not out of this Jackpot yet. **And I think this additional, these betting systems, is moving us further away and will provide - - provide fuel for the arguments that this is a sham.** [Emphasis added].

So - -

And I know the numbers. The numbers are really good. We need the money. The horsemen, everybody else in business needs the money. But I question whether or not this is a - - this is a - - the expansion of these bets is appropriate.

CHAIRMAN BECK: Ned, it seems to me that you have addressed 2 separate things.

The first is whether or not this was good timing to ask for additional games while a lawsuit is still pending. And, you know, that's - I think that's in the purview of Kentucky Downs that they need to ask.

The second, which **I think is really a legal issue**, is whether or not these particular games comply with the statute. And also while it is not directly in question, there is a set of model rules that RCI has promulgated. **So that we have the same expert we have had on all the other games. An expert comes in and looks at the games, looks at all the information, and gives us an opinion about whether the games are within the statutory language and within the purview of RCI.** [Emphasis added].

And I think, you know, I can't tell the difference between one or another. So I think we have to rely heavily upon the expert to tell us if these games - and somebody, you know. I mean we have sat through sessions before trying to follow all of the logistics of this kind of thing.

You know, Susan has dealt with the expert.

The expert has given us an opinion in this case. And I think that's what we have to rely on the same as we have the other things when they have reviewed them.

MR. BONNIE: I agree that you have expressed the issues.

My question is as with medical issues, do we need another opinion? **We are paying our expert to tell us and he knows what we want him to say. And he has said it.** And the opposition says he is dead wrong. And I just want us to be careful because we are the ones that are going to approve or not approve. **And it makes me very nervous.** [Emphasis added].

This was stretching the interpretation of the statute to start with. And this is further down that road moving away from historic races as far as I can see. There is not a reference to a historic race in Pigs in Mud and Bayou Bash. [Emphasis added].

So I want to register my discomfort with expansion at this time. That's question number one.

A copy of relevant pages of the transcript from the April 9, 2013, meeting of the Racing Commission and a copy of Mr. Bonnie's curriculum vitae are attached as **Exhibit I.**⁹ The passage of time have confirmed that Mr. Bonnie's concerns were well founded.

Another example that this case is less about whether the games are pari-mutuel wagering on horse racing and more about civil/criminal immunity arises from a September 23, 2015, Opinion of the Wyoming Attorney General in which the Attorney General found that prize outcomes in Instant Racing were random and concluded that "Although all game themes are lawful to an extent, the ultimate outcome is determined, in part, by events that are non-pari-mutuel in nature and based upon total chance. Just as giving someone a scratch-off ticket with each 'live' horse race wager does not make scratch-off tickets legal in Wyoming, combining one historic pari-mutuel event with a series of non-pari-mutuel

⁹Due to the cost of copying and duplicating, only select pages of the transcript are attached. The undersigned will gladly make the entire transcript available if this Honorable Court desires. Mr. Bonnie was in the same law firm as counsel for appellee at the time and now, Churchill Downs Incorporated. Yet this was still not disclosed to the Court.

‘bonus round’ events does not make the game themes lawful.” A copy of the September 23, 2015, Wyoming Attorney General Opinion is attached as **Exhibit J**. The Wyoming Attorney General and the GLI’s Report describe gaming systems vastly different represented to be the case to this Court.¹⁰ A copy of the GLI Report, dated June 9, 2015, for the Wyoming Attorney General is attached as **Exhibit K**. Important here is that the Racing Commission’s very own consultant, Richard LaBrocca, was also the gambling consultant for the Wyoming Attorney General. What the Wyoming Attorney General paid GLI is unknown; however, through May of 2017, GLI appears to have been paid invoices totaling **\$886,913.41** by the race track-Respondents or their associated entities, who were seeking to operate the games at the Kentucky tracks.¹¹ A disk containing invoices and check payments is attached as **Exhibit L**.

Bearing emphasis is that for months the Respondents had denied that random number generators were used to determine prize outcomes. Yet, within days of the Wyoming Attorney General Opinion, on September 17, 2015, and again on September 24,

¹⁰When prize outcomes are determined by random number generators, i.e., chance, those games are not pari-mutuel wagering on horse racing under any definition. Randomly determined wild symbols, multipliers, bonus rounds, and random number generators are nowhere to be found in the conception of pari-mutuel wagering on horse racing. Upon information and belief, these are the same wagering systems being considered by the Racing Commission at its April 9, 2013, meeting about which Mr. Bonnie expressed concerns.

¹¹There is a separate 2014 contract between the Racing Commission and GLI for expert witness services. This is in Exhibit L. Failing the laugh test, the Respondents will say that GLI was paid nearly a million dollars to integrity test the devices. Bearing emphasis is the fact that Chapter 521 prohibits paying an “any person participating as advisor, consultant or otherwise ion performing a governmental function”. KRS 521.010 provides that: “The Following definitions apply in this chapter, unless the context otherwise requires: (1) ‘Public servant’ means: . . . (c) Any person participating as advisor, consultant or otherwise in performing a governmental function, but not including witnesses; or” And, KRS 521.020 provides that: “(1) A person is guilty of bribery of a public servant when: (a) He offers, confers, or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant’s vote, opinion, judgment, exercise of discretion, or other action in his official capacity as a public servant; or (b) While a public servant, he solicits, accepts, or agrees to accept any pecuniary benefit upon an agreement or understand that his vote, opinion, judgment, exercise of discretion, or other action as a public servant will thereby be influenced.”

2015, counsel for the Racing Commission and for Keeneland Association, Inc., filed disclosures in the Franklin Circuit Court purporting to correct their misrepresentations about the use of random number generators.¹² Copies of the disclosures are attached as **Exhibit M-1 and M-2**.

Beginning in mid-2011 until sometime in 2015, Kentucky Downs, LLC, operated the Instant Racing gambling system. In the spring of 2015, Kentucky Downs, LLC, decided to stop operating the Instant Racing gaming systems and convert to the Encore RBG (Race Based Gaming) gaming system. By letter, dated March 2, 2015, from former Racing Commission Executive Director, Lisa Underwood, who later acted as counsel for Kentucky Downs, LLC, applied to the Racing Commission on behalf of Kentucky Downs, LLC, for approval to operate the Encore RBG gaming system. The March 2, 2015, letter application from Ms. Underwood is attached as **Exhibit N**. Again, being paid by the race-tracks/proprietors, Mr. LaBrocca again opined that the Exacta gaming system was pari-mutuel wagering on horse races. Another example that the Respondents did not care about legality of the gaming systems is when the Respondents declined to demonstrate the Instant Racing and Exacta Gaming Systems for the Franklin Circuit Court.

The Family Foundation asked the Respondents to demonstrate the Instant Racing and the Exacta Gaming System devices in the trial court. This was, of course, consistent with the affirmative obligations of the Respondents to set forth the facts upon which their question about the legality of the gaming systems depended under the “agreed case” statute. KRS 418.020. The Respondents refused arguing “[T]he demonstration is a farce,” because

¹²The disclosure by the Racing Commission’s lawyer was made prior to her leaving the Racing Commission to become the lawyer for the Exacta Gaming Systems company.

the games are computerized and designed to look like slot machines. ‘Mr. Cave thinks these machines are slot machines because they look like slot machines,’ Hoskins told Wingate. ‘That’s not the question. It’s whether they are pari-mutuel.’” Lexington Herald Leader, July 1, 2015, Janet Patton, “Family Foundation seeks in-court demonstration of instant racing”, a copy of which is attached as **Exhibit O**. By Order, entered July 13, 2014, the Franklin Circuit Court refused to have either of the gaming systems demonstrated. Given that patrons are not betting with, among or against one another and thus are not “mutuel”, it would appear that the devices and gaming systems are what they appear to be . . . “slot machines”.

Three lawsuits among the tracks/proprietors of the gaming systems confirm the same pattern. The first case is *Parimax Holdings, LLC, v. Exacta Systems, LLC, f/k/a Encore Gaming, LLC*, Case No. 16CV2591 (the “*Exacta* Wyoming Action”). The second case is *Amtote International, Inc. v. Kentucky Downs, LLC*, Civil No. 1:15-CV-0047-GNS, and *Exacta Systems, LLC, and Parimax Holdings, Inc., v. Kentucky Downs, LLC, and Exacta Systems, LLC*, Civil No. 1:15-CV-00082-GNS (the “*Kentucky Downs/Exacta* Case”). The third case is *Kentucky Downs Management, Inc., v. Churchill Downs Incorporated*, Case No. 12-CI-00300, Simpson Circuit Court (the “*Kentucky Downs* Simpson Circuit Action”).

In the *Exacta* Wyoming Action, Parimax Holdings, LLC (“PariMAX”), the holder of the PariMAX gaming technology which was approved by the Racing Commission at a special meeting during the Thanksgiving Week in 2016, sued Exacta Systems, LLC.¹³ While allegations of a plaintiff, the allegations in the *Exacta* Wyoming Action, if true,

¹³The PariMAX gaming system is in operation at the Red Mile, which is owned by Respondent, Lexington Trots Breeders Association, LLC.

corroborate that the Respondents had misled this Court about how the gaming systems were going to work.¹⁴ A copy of the amended complaint is attached as **Exhibit P**. While the *Exacta* Wyoming Action concerns alleged violations of the Lanham Act, § 43(a), 15 U.S.C. 1125(a), the description by PariMAX, a fellow proprietor with gaming operations at The Red Mile, is revealing. In paragraph 3, on page 2, of the amended complaint, PariMAX alleges that:

Contrary to Exacta's misrepresentations, the Exacta System and Games are not strictly pari-mutuel because the payouts associated with successful wagers are fixed prior to wagers being placed, according to a fixed-odds payable, and these payouts are not distributed according to pari-mutuel principles.

In paragraph 4, on page 3, of the amended complaint, PariMAX alleges that:

Exacta has made the false and misleading representation that its System and Games are 'just like' live horse racing wagers. By contrast, Exacta's wagers and payouts are fundamentally unlike pari-mutuel wagers in live horse racing and would not be recognized or understood as such by anyone knowledgeable about the live horse racing business. Unlike live horse racing wagers, which each have separate pools of money associated with each wager, Exacta uses a single pool and the Exacta System and Games do not distribute all the losing money in this pool to bettors who made winning wagers.

In paragraph 5 on page 3 of the amended complaint, PariMAX alleges:

Contrary to Exacta's misrepresentations that its Games do not rely on random elements, the payouts of the Exacta Games do rely on a random number generator. The Exacta System and Games use a "Triple Race Method" in which each wager involves predicting the finishing order in each of three historical races, and a random number generator is used to randomly and arbitrarily designate each of these races as Race 1, 2, or 3. The payouts in the Exacta Games are heavily dependent on which of the three races the bettor's correct predictions are associated with.

¹⁴Working in "common interest" with one another should mean that an admission of one is imputed to the others. This can be discussed more in the briefs.

In paragraph 7 on page 3-4 of the amended complaint, PariMAX alleges:

Contrary to Exacta's misrepresentations, the Exacta Games also do not follow the ARCI Pic (n) Position (x) model wager because the net prize pool is not distributed even if all positions in all races are selected correctly. For example, the Pick (n) Position(x) rule mandates that all correct position selection same weighted equally (e.g. correctly picking the runner who comes in 1st place is rewarded the same as correctly picking the runner who comes in 10th place). Contrary to this mandate, the Exacta Games assign different weight to each position selection (e.g. correctly picking 1st place is not rewarded the same as correctly picking 10th place.)

In the *Kentucky Downs/Exacta Case*, AmTote International, Inc. ("AmTote") and RaceTech, LLC ("RaceTech"), the proprietors of the Instant Racing gaming system, claimed that Kentucky Downs, LLC, and Exacta had converted its gaming technology and created the Exacta Gaming System.¹⁵ Mr. Vern Mir, a Developer 4 and 45-year employee of AmTote, was deposed in that case on July 12, 2018. Mr. Mir disclosed that totalization with the Instant Racing gaming system was different than the "conception" of totalization of pari-mutuel wagering in 1933 (two years after *Commonwealth v. Kentucky Jockey Club* was decided). *See, App. Racing Opinion*, p 737. Again, Kentucky Downs, LLC, was operating the Instant Racing gambling system when this case was before this Court and said nothing about a so-called "totalizator" system being vastly different than that used in the conception of pari-mutuel wagering. Mr. Mir's testified:

Q. What is a totalizator?

A. The basic term totalizator means a machine that collects the wagers and collates them into pools needed to calculate the payoffs and odds. That's how it was defined in 1933.

...

¹⁵AmTote was affiliated with RaceTech in the development of the Instant Racing gambling. RaceTech was the proprietor of the Instant Racing gambling system.

Q. What I'm trying to figure out and learn is what does the Spectrum software do for live and simulcast racing that is not necessary for Instant Racing?

A. The traditional live racing involves placing a bet, recording the bet, and then later, and sometimes much later, getting an inquiry about what that bet paid.

And that is fundamentally different from the Instant Racing where you place the bet and immediately get an answer about what it pays.

...

Q. Does Instant Racing – do the Instant Racing displays of payouts use the same part of the Spectrum software that runs a tote board for live racing?

A. Not specifically.

Q. Does Instant Racing use the inter-tote system protocol?

A. No, it doesn't.

...

Q. Did the Instant Racing System use a random number generator in any way?

A. It did.

Q. How did it use a random number generator?

A. In the original game, it used it in two steps. One was part of the game and the other was part of the display. The game portion was which of the possible winning combinations would be used to present to the customer.

For instance, we used ten-runner races with a trifecta-style outcome. So it would be ten times nine time eight possible combinations. It would pick one of them, not reveal it to the customer. And they would try to, using the past performance charts presented, predict which one of those it was.

Q. How else was the random number generator used in the Instant Racing System?

A. The second step, once a winning combination was selected and kept secret, would be to select one of the races that -- whose outcome was that -- had that outcome, and pick the past performance charts for that race to display.

Q. Did the random number generator in Instant Racing have any effect on the amount of money a player earned for making a successfully -- a successful pick?

A. Note in that form.

Q. You said initially, that's how the Instant Racing System Worked. Was there some point in time where the use of the random number generator was changed in the Instant Racing System?

A. The Thoroughbred Mania game was exactly that. As additional games were put on line, there were some where there were the appearance of spinning reels, and the player's pick would be put on one reel and random horse numbers would be put on the other reels, approximately speaking. So that there was randomness added to the outcome in addition to the player's skill moderating the outcome.

Deposition Transcript, Vern Mir, July 12, 2018, pp. 12, 14-15, 44-45, *Kentucky Downs/Exacta Case*.

With the election of a new Governor at the end of 2015, the administration changed, as did the composition of the Racing Commission and its lawyers. With that came even more aggressive expansion of gambling. For example, during Thanksgiving Week of 2016, following a November 21, 2016, 24-hour special meeting notice, on November 22, 2016, the Commission approved the new PariMAX Gaming System. Then, in 2018 the Racing Commission approved a new Ainsworth Gaming System. It was announced that Ainsworth had a new "slot machine" deal with Churchill Downs. "Construction of Derby City Gaming began in December of last year. It is a \$60-million gambling (<http://calvinavere.com/business>) facility that will feature the 600 Ainsworth-developed

slot machines, a simulcast betting area, two full-service restaurants and a 50-seat bar.” A copy of the Ainsworth announcement, dated July 5, 2018, “Ainsworth raises profit expectations after Churchill Downs deal (<https://calvinayre.com/2018/07/05/b-raises-profit-expectations-after-churchill-downs-deal/>) is attached as **Exhibit Q**. When the Racing Commission responded to an open records request about how the Ainsworth gaming system worked, a pari-mutuel gaming system was not described. Instead, pages were redacted as supposedly containing proprietary information. A copy of a portion of the Racing Commission’s response to The Family Foundation’s open records request about how the Ainsworth gaming system worked is attached as **Exhibit R**. Irony is the fact that if the Ainsworth gaming was pari-mutuel, it would not be proprietary since pari-mutuel wagering is in the public domain being described in dozens of books and web sites.

For the first four years of this case, the Respondents concealed how the gaming systems worked. Then when the case was remanded for discovery, the Respondents, took a different approach. They then sought to *overwhelm* The Family Foundation by what can charitably be called egregious discovery tactics. With introduction of the new Exakta Gaming System in 2015, new discovery had to be conducted from the start. With limited discovery, motion practice ensued for most of 2016. On July 28, 2017, the trial court entered a Scheduling Order. The Racing Commission produced an estimated 100,000 pages of documents, with an estimated 75,000 pages of those documents, produced in the month of August 2017, particularly in the last two weeks immediately prior to the August 31, 2017, discovery deadline. Many of the documents long predated the August 31, 2017, discovery cutoff and could have been produced much earlier in the ordinary course. Racing Commission produced material documentation *after* The Family Foundation deposed

Richard LaBrocca, who conveniently had little memory of the Exacta game rules or game specifications but which he had previously opined to the Racing Commission were pari-mutuel wagering on horse racing.¹⁶

B. Questions of Law.

This Court remanded this case “to engage in discovery to develop the evidence required to determine if the operation of historical horse race wagering as contemplated by Appellants conforms to the requirements of KRS Chapter 230 and KRS 436.480 for pari-mutuel wagering, so as to exempt such wagering from the prohibitions of KRS 528.” *App. Racing Opinion*, at p. 742. Proof was developed from the Respondents’ own documents and largely by testimony from Mr. LaBrocca at trial. The question before this Court on those facts is a question of law. The primary questions are: Is *mutuel* wagering required for wagering to be pari-mutuel wagering on horse racing? If so, can operators transform a single patron’s wager into a *mutuel* by placing a single wager in a pool with those on other randomly generated race outcomes?

“Mutuel” wagering on horse races is required. KRS 230.361(1) limits the Racing Commission’s regulatory authority to “mutuel wagering on horse races under what is known as the pari-mutuel system of wagering.” If the wagering is not “mutuel [with/among/against each other] wagering on horse races under what is known as the pari-mutuel system of wagering”, the gambling is outside the scope of the Racing Commission’s

¹⁶The Family Foundation pieced together hundreds of pages of documents and spreadsheets and through the year-end holidays, and finally discovered how the Exacta Gaming System worked in time for the trial the following January 8, 2018. As a result, The Family Foundation proved through the Racing Commission’s own documents that the Exacta gaming system was not pari-mutuel wagering on horse races under the conception of pari-mutuel wagering recognized by this Court and the subject regulations as applied by the Racing Commission.

statutory authority and, moreover, not exempt by KRS 436.480 from the gambling prohibitions in Chapter 528 of the KRS. Mutual wagering on horse races is required by 810 KAR 1:001(48) which defines “‘pari-mutuel wagering,’ ‘mutuel wagering,’ or ‘pari-mutuel system of wagering’ as a system or method of wagering approved by the commission in *which patrons are wagering among themselves* and not against the association and amounts wagered are placed in one or more designated wagering pools and the net pool is returned to the winning patrons.” [Emphasis added]. *Mutuel* wagering on “the outcome of a horserace” is required by the federal Interstate Horse Racing Act, 15 U.S.C. § 3001, *et seq.* The Interstate Horse Racing Act “defines pari-mutuel wagering as ‘any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and *in which the participants are wagering with each other* and not against the operator.’” [Emphasis added]. *App. Racing Opinion*, at p. 737. *Mutuel* wagering is required by the seminal case of *Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987, 991 (Ky. 1931). The *Kentucky Jockey Club* court held: “In French pool the operator of the machine does not bet at all. He merely conducts a game, which is played by the use of a certain machine, the effect of which is that *all who buy pools on a given race bet as among themselves*; the wagers of all constituting a pool going to the winner or winners. The operator receives 5 per cent of the wages as his commission.”

Because the evidence showed that the Exacta gaming system lacked mutuality and thus was not pari-mutuel under the conception of pari-mutuel wagering described by this Court, the Franklin Circuit Court ignored the plain meaning of *mutuel* expressed twice in Chapter 230 of the Kentucky Revised Statutes and embraced by this Court in the *Kentucky*

Jockey Club case, the plain language of the federal Interstate Horse Racing Act, at 15 U.S.C. § 3001, *et seq.*, and the obvious appearance of the word “mutuel” in words “pari-mutuel wagering”, “mutuel wagering” and “pari-mutuel system of wagering” and as described in the regulations at 810 KAR 1:001(48) which define pari-mutuel wagering.

The Franklin Circuit Court ignored the requirement that *mutuel* buying and selling pools on a given race is required, stating that “Pari-mutuel wagering does not require patrons to wager on the same horse races, nor does it require reciprocity among patrons, or for a pool to remain open for a specified period of time. *See* 810 KAR 1:001, Section 1(48).” Franklin Circuit Court Opinion, ¶ 92, p. 18. The Franklin Circuit Court then adjudged that the mutuality requirement in the regulatory definition of pari-mutuel wagering in 810 KAR 1:001(48), was satisfied merely by the wagers going into the same pool notwithstanding that patrons are not betting on the same horserace or group of horse races, to wit: “[w]hen patrons are wagering amongst themselves into the same pool they are affecting other wagers who come after them by either increasing the fund of the pool, as every wager is going to do, and at some case when there is a win, decreasing the number . . . thereby affecting other future players.” Franklin Circuit Court Opinion, ¶ 94, p. 18.

In stark contrast to pari-mutuel wagering, evidence from the trial will also show that patrons in the Exacta Gaming System are not wagering among themselves on a given race(s). The numbers from the race outcomes and the associated payout odds (known as off odds order of finish¹⁷) are both randomly selected by random number generators making the games pure games of chance. Patrons are not betting on the same race or group

¹⁷ Off odds order of finish are the final payout odds at the time the race was actually run. While “off odds order of finish” reflect the betting opinions of patrons when the race was actually run, “off odds order of finish” are the most likely order of finish and impose pre-determined random elements of chance to prize outcomes.

of races meaning that they are not mutually betting. Reciprocity, i.e., mutuality, among patrons does not exist. A patron who bets today has no effect on player who play before him. If anything, the betting is “serial” instead of mutuel. The betting pool is not paid out to winners. Instead, remaining balances are carried forward. By contrast to the conception of pari-mutuel wagering in the federal statutes and in the *Kentucky Jockey Club* case, there was a settlement, i.e., pay out, of the wagering pool. No so with the Exacta system. Payout odds do not vary or change based on wagers. Instead, payouts are determined by fixed mathematical formulas and algorithms related to keeping a pool balance positive. Each selected number/matched with the “off odds order of finish” which are randomly selected results in a number which is compared to a fixed payable from which prizes are determined. The payable is determined by math models producing a fixed payout structure. The historical horse racing gaming systems do not use a totalization system consistent with the conception of pari-mutuel wagering. There is no need to. The math models take the place of such a totalization system.¹⁸ A standalone totalizator which calculates payout odds based on mutuel wagers on a race or group of races was not approved by the Racing Commission. Instead, the so-called totalizator component of the Exacta wagering system is contained within the Exacta source code and XML/math definition files. In other words because patrons are not wagering among one another, what Exacta calls a “totalizator component” is an algorithm in which patrons are not *mutually*

¹⁸ KRS 230.361(1) expressly requires that “The pari-mutuel system of wagering shall be operated only by a totalizator or other mechanical equipment approved by the racing commission.”.

wagering. See email, dated July 5, 2018, from counsel for Exacta in the *Kentucky Downs/Exacta Case*, a copy of which is attached as **Exhibit S**.¹⁹

C. Reasons the Judgment Should be Transferred/Reviewed.

The question of expanded gambling is emotional and extremely important to a large number of Kentuckians on all sides of the issue. For those who profit from it, it is called support for the horse industry. For budget writers, it is about revenue. For others, like The Family Foundation, who is seeking no monetary recovery, it is about a family's breadwinner losing the week's grocery money or the month's rent, a gambling addiction, the corruptive influences on government and the pain and the loss of victims falling prey to the irrational greed of the gambling industry. For the Courts, this case should be about reaching the correct outcome and an unassailable integrity of the process. The foregoing surely demonstrates the lengths to which the gambling industry will go to manipulate and corrupt government. One can only imagine what it will do to the poor and defenseless.

Regardless of motivation, agreement should exist that expanded gambling is a policy question that should not be decided under a cloud of secrecy by an unelected Kentucky Horse Racing Commission. Working in "common interest", with those it is supposed to be regulating, to expand gambling, the Kentucky Horse Racing Commission has evolved from a once respected regulatory agency into a little more than a tool to circumvent the policy making process. Without question, the process by which this expansion of casino gambling has occurred since 2011 should offend supporters and

¹⁹Then there is the use of a cartoon display of the horse race, which can be addressed later. Suffice it to say here, that a *cartoon* of a delayed telecast of a basketball game may lack the excitement and similarity of a video replay. So not only is the Exacta gaming system not pari-mutuel wagering, it is not even pari-mutuel wagering on a horse race or pari-mutuel wagering on a video replay of a horse race.

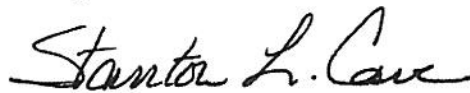
opponents alike. From the beginning, this Court was misled about the real intentions of the Respondents in what Mr. Bonnie generally characterized as a “charade” and a “sham”.

The continuing institutional, societal, moral and cultural damage caused by an unelected Kentucky Horse Racing Commission working in *common interest* with the other Respondents must be stopped now.

After having once accepted discretionary review and now with the benefit of a record, a decision not to transfer this case will have the effect of rewarding the Respondents for one of the darkest periods in Kentucky jurisprudence. If ever a case satisfies the criteria for immediate transfer to this Honorable Court, this case does.²⁰

WHEREFORE, for the reasons stated above, The Family Foundation humbly and respectfully requests this Honorable Court to transfer this case from the Kentucky Court of Appeals to this Court for expeditious review.

Respectfully submitted,



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²⁰The health of counsel for The Family Foundation is another reason for this appeal to be transferred. Suffice it to say that, while things hopefully will work out, with eight years invested in this case it would be a grave injustice to The Family Foundation for this case not to be resolved due to the absence or inability of counsel to continue.

CERTIFICATE OF SERVICE

Pursuant to CR 76.20(7), CR 5.02 and CR 5.03, I do hereby certify that copies of the foregoing motion mailed, by depositing same in the United States Mail, first class, postage prepaid, addressed to the following on this the 26th day of November 2018:

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A handwritten signature in cursive script that reads "Stanton L. Cave". The signature is written in dark ink and is positioned above a horizontal line.

Stanton L. Cave, Esq.