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NO.
STATE OF NEBRASKA
OFFICIAL
MAR 23 1994
DEPT. OF JUSTICE

DATE: March 17, 1994

SUBJECT: Constitutionality of Requirement that Organization Representing Majority of Horse Owners and Trainers at Racetracks Consent to Simulcasting Agreements Under Neb. Rev. Stat. §§ 2-1227 and 2-1229 (Supp. 1993).

REQUESTED BY: Dennis Oelschlager, Executive Secretary
Nebraska State Racing Commission

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion as to the constitutionality of the requirement that the organization representing a majority of the owners and trainers at racetracks must consent to agreements for parimutuel wagering on intrastate and interstate simulcasts of horse races under Neb. Rev. Stat. §§ 2-1227 and 2-1229 (Supp. 1993). Your request is prompted by a Kentucky federal district court decision declaring unconstitutional the Interstate Horseracing Act, 15 U.S.C. §§ 3001 to 3007 (1993) ["IHA"]. ***Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing***, 832 F. Supp. 1097 (E.D. Ky. 1993), ***appeal docketed***, No. 93-6425 (6th Cir. Nov. 2, 1993) ["***Turfway***"].[1] Noting that the IHA "contains language similar to the language used in" §§

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[1] An appeal of the district court's decision is pending before the United States Court of Appeals for the Sixth Circuit. While the appeal has been briefed and argued, a decision has not been rendered as of the time of the issuance of this opinion.

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2-1227 and 2-1229, you ask whether the "provisions of Nebraska statutes which require the consent of the organization representing owners and trainers [are] constitutionally defective based on the issues raised in the Kentucky case?" If these provisions are found to be unconstitutional, you also ask us to consider whether amendments to the statutes proposed by LB 1355 would cure any constitutional defects. After discussing the basis for the Kentucky court's decision, we will address the constitutional questions raised in the context of the consent requirements imposed under Nebraska's simulcasting statutes.

I. The Kentucky Decision.

Turfway arose as a result of a dispute between the Kentucky Division, Horsemen's Benevolent & Protective Association, Inc. [the "KHPBA"] and Turfway Park Racing Association ["Turfway"]. Turfway and the KHPBA were involved in a dispute concerning the negotiation of a contract for the terms and conditions of racing at Turfway. The KHBPA notified Turfway that, unless agreement on a new contract was reached, it would not consent to interstate simulcasting of races at Turfway, as required by the IHA.[2] Turfway nevertheless commenced interstate simulcasting in December, 1992, and the KHBPA brought suit against Turfway and out-of-state off-track betting facilities for violating the IHA by failing to obtain the KHBPA's consent. Turfway defended by asserting that the IHA was unconstitutional. 832 F. Supp. at 1098-1100.

The district court found the IHA unconstitutional on three grounds. First, the court held the statute placed "an invalid

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[2] The IHA prohibits interstate off-track wagering on horse races unless consents are obtained from specified groups. First, the "host racing association", which essentially means the host racetrack authorized to conduct the horse race subject to the interstate wager, must give its approval. 15 U.S.C. §§ 3002(9) and 3004(a)(1). In order to give its consent to interstate off-track wagering, the host racetrack "must have a written agreement with the horsemen's group" under which the racetrack may give such consent. 15 U.S.C. § 3004(a)(1)(A). The "horsemen's group" is defined as "the group which represents the majority of owners and trainers racing [at the host racetrack], for the races subject to the interstate off-track wager on any racing day." 15 U.S.C. § 3002(12). In addition, the entity accepting the off-track wager must have the permission of the racing commission of the state in which the race is being held, and the racing commission in the state where the wager is being accepted. 15 U.S.C. § 3004(a)(2) and (3). Finally, the approval of racetracks located near the off-track wagering site must be obtained in certain circumstances. 15 U.S.C. § 3004(b).

restriction on commercial speech in violation of the First Amendment. . .", because it allowed simulcasting of races at Turfway to be prohibited if either the state racing associations or horsemen's organizations at the tracks withheld consent. 832 F. Supp. at 1098, 1101. The court concluded that the simulcasting of horse races constituted "commercial speech", and that the IHA offended the First Amendment rights of Turfway because it did not "constitute a `narrowly tailored' regulation of expression. . .", but, rather, gave "unfettered discretion to veto Turfway's simulcasts not only to public officials--the Kentucky racing commission, and the state racing commissions of the receiving states--but, worse, the Horsemen's organizations which are the enemies of Turfway." *Id.* at 1102.

Second, the district court concluded that the language of the IHA was "fatally vague" and therefore violated substantive due process principles. 832 F. Supp. at 1098. The court found that several provisions in the statute were not adequately defined and were ambiguous, making specific reference to terms used in the definition of "horsemen's group", including "owner", "any racing day", and "represent". *Id.* at 1103-04; 15 U.S.C. § 3002(12). The court found that, because of these ambiguities, the statute did not adequately inform parties how to conform their conduct in the horse racing industry, and that "it [was] impossible to apply [the statute] with certainty on a day-to-day basis in the context of the ongoing dispute." 832 F. Supp. at 1104.

Finally, the district court determined that the IHA was an "irrational" means to carry out Congress' objectives to protect and preserve horseracing, and, therefore, violated substantive due process. The court stated the goal of the statute was "the promotion of horseracing, especially the preservation of small tracks, while protecting the interests of the horsemen and the public." *Id.* at 1105. The court found that the statute, by "[p]roviding an absolute veto over the simulcasting without any standards to guide it, virtually assure[d] that the statute will be applied, not to achieve Congress' goal, but for selfish motives." *Id.* The court concluded that "[t]he statutes are not only not rationally related to, but totally counterproductive in, achieving the legislative goal. . . ." *Id.* [3]

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[3] Turfway also argued that the IHA was an unconstitutional delegation of Congress' power to private parties, and that the statute lacked adequate standards for the exercise of such power. The district court, however, did not address this issue. 832 F. Supp. at 1100n.5.

II. First Amendment.

The court in ***Turfway*** found that the IHA imposed an impermissible restraint on Turfway's commercial speech rights because it allowed government officials or private parties to prohibit simulcasting of Turfway's races by withholding their consent. In reaching this conclusion, the court relied on United States Supreme Court cases governing the regulation of commercial speech, including ***United States v. Edge Broadcasting Co.,*** ___ U.S. ___, 113 S. Ct. 2696 (1993) and ***Board of Trustees of State Univ. of N.Y. v. Fox,*** 492 U.S. 469 (1989), and found that the simulcasts constituted commercial speech protected by the First Amendment. 832 F. Supp. at 1100-1101.

In our opinion, the court in ***Turfway*** erroneously applied a First Amendment analysis to the IHA. The district court failed to consider that the focus of the IHA is the regulation of interstate off-track **wagering** on horse races. 15 U.S.C. § 3003. The court determined that the "simulcasts" of races by Turfway constituted protected commercial speech. 832 F. Supp. at 1100. The IHA, however, is not directed at the simulcasting or mere transmission of a horse race; rather, it is legislation directed at the regulation of gambling activity consisting of interstate off-track **wagering** on horse racing.

"[T]here is no constitutional right to gamble." ***Lewis v. United States,*** 348 U.S. 419, 425 (1955). The Supreme Court has recognized that gambling activities can be controlled and forbidden by Congress. ***See California v. Cabazon Band of Mission Indians,*** 480 U.S. 202, 221 (1987) ("surely the Federal Government has the authority to forbid. . .gambling enterprises."); ***see also Champion v. Ames,*** 188 U.S. 321 (1903) (upholding federal prohibition on interstate transportation of lottery tickets). The Court has also recognized that gambling is an activity which states may prohibit, and which, if permitted, is subject to state regulation and restrictions. ***Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,*** 478 U.S. 328 (1986) (upholding against First Amendment challenge Puerto Rico's prohibition on casino advertising within its borders). Indeed, the Supreme Court recently upheld against a First Amendment attack a federal statute prohibiting some forms of broadcast advertising pertaining to lotteries. ***United States v. Edge Broadcasting Co.,*** 113 S. Ct. 2696. The Court explained that "the activity underlying the relevant advertising--gambling--implicates no constitutionally protected right; rather it falls into a category of `vice' activity that could be, and frequently has been, banned altogether." 113 S. Ct. at 2703.

Based on the foregoing, we believe the court in ***Turfway*** erred in failing to recognize that the IHA regulates gambling activity, i.e., interstate off-track wagering on horse racing. As gambling

activity is not a form of "expression" subject to protection under the First Amendment, the court improperly applied a First Amendment analysis in finding the IHA unconstitutional. The Nebraska simulcasting statutes govern the conduct of simulcasting "for the purpose of parimutuel wagering;. . . ." Neb. Rev. Stat. § 2-1225(7) (1991). Thus, like the IHA, the focus of the Nebraska statues is regulation of the terms and conditions under which parimutuel wagering on simulcast race events may be conducted. The Legislature's regulation of gambling activity in this manner does not, in our view, implicate restraint of a form of protected speech or expression under the First Amendment. We reject the First Amendment analysis employed by the district court in ***Turfway*** to strike down the IHA, and conclude that the similar consent provisions in §§ 2-1227 and 2-1229 are not invalid on this basis.

III. Vagueness.

The court in ***Turfway*** also held the IHA unconstitutional because certain terms in the statute were found to be impermissibly vague, and, therefore, violative of substantive due process requirements. 832 F. Supp. at 1103-04. Specifically, the court identified several terms in the act's definition of "horsemen's group" which it determined were vague. "[H]orsemen's group" is defined as "the group which represents the majority of owners and trainers racing [at the host racing track], for the races subject to the interstate off-track wager on any racing day." 15 U.S.C. § 3003(12). The court singled out as vague the terms "owner", "any racing day", and "represents" as used in the IHA. 832 F. Supp. at 1103.

We do not believe that the IHA is "void for vagueness" based on the reasons articulated by the court in ***Turfway***. The "void for vagueness" doctrine is generally applied to criminal statutes to determine whether reasonable persons can understand what conduct is prohibited by a statute in order to conform their conduct to its requirements. To the extent the doctrine has been applied to civil statutes, a statute will not be deemed impermissibly vague unless it is so "vague and indefinite as to really be no rule or standard at all." ***Boutilier v. Immigration Service,*** 387 U.S. 118, 123 (1967). The Court has recognized that economic or business regulation "is subject to a less strict vagueness test. . . ." ***Village of Hoffman Est. v. Flipside, Hoffman Estates,*** 455 U.S. 489, 498-99 (1982).

Moreover, the Court has upheld statutes against vagueness challenges where the statutes "employed words or phrases having a technical or other special meaning, well enough known to enable those within [the statute's] reach to correctly apply [them]. . . ." ***Connally v. General Const. Co.,*** 269 U.S. 385, 391 (1926); ***see also United States v. Petrillo,*** 332 U.S. 1 (1947) (upholding

constitutionality of the Communications Act of 1934 against vagueness attack). The terms found impermissibly vague by the court in *Turfway*, including "owner", "any racing day", and "represents", may not, in actuality, be so vague as to render the IHA unconstitutional. The IHA is industry-specific legislation which has existed for over fifteen years. The terms which the district court found impermissibly vague may, in light of industry custom and practice, be found to be sufficiently definite to provide adequate notice of the statute's operation and effect so not as to offend substantive due process.

In any event, the terminology in the IHA found unconstitutionally vague in *Turfway* differs somewhat from the language employed in §§ 2-1227 and 2-1229. For example, the district court found the IHA's requirement that consent be obtained by the group representing the majority of owners and trainers "on any racing day" rendered the statute vague. Section 2-1227(1) requires that agreements for intrastate simulcasting "have the consent of the organization representing a majority of the licensed owners and trainers at both the sending and the receiving track." Section 2-1229 provides, in part, that interstate simulcasting agreements "have the consent of the group representing the majority of horsepersons racing at the sending track and of the organization which represented a majority of the licensed owners and trainers at the receiving track's immediately preceding live thoroughbred race meeting." § 2-1229(1)(c). Thus, Nebraska does not include the "any racing day" language employed in the IHA.

As to the references in the Nebraska statutes to the "organization" representing (or which represented) the "majority of the licensed owners and trainers", this language has not, to our knowledge, resulted in the inability to identify such a group or organization for purposes of implementing the simulcasting legislation. Simulcasting agreements have been approved and wagering on simulcast race events under such agreements has taken place in Nebraska for several years. Apparently industry custom and practice has operated to "fill in" any purported gaps as to the proper definition of these terms as applied in Nebraska. Accordingly, we do not believe that the *Turfway* decision compels us to conclude that the Nebraska simulcasting statutes are unconstitutionally vague.

IV. Irrationality.

The court in *Turfway* also found the IHA was an "irrational" means to carry out Congress' objectives to protect and preserve horseracing, and, therefore, violated substantive due process principles. 832 F. Supp. at 1104-05. Again, we are not in accord with this view.

Initially, it is unclear whether substantive due process analysis is applicable to the provisions of the IHA. "Substantive due process" is essentially "the doctrine that governmental deprivations of life, liberty, or property are subject to limitations." ***Pearson v. City of Grand Blanc,*** 961 F.2d 1211, 1216 (6th Cir. 1992). As noted previously, the IHA is directed to the regulation of interstate off-track wagering on horse races. Because there is no right to engage in gambling, it could be argued that there is no constitutionally protected property interest in gambling activity, and, therefore, that the IHA does not affect any constitutionally recognized property right subject to due process considerations.

Assuming that the IHA implicates a constitutionally protected right amenable to analysis under the due process clause, judicial inquiry into the validity of a statute regulating business or economic activity is limited to determining if "the regulation has no rational relation to the objective" of the act. ***Williamson v. Lee Optical Co.,*** 348 U.S. 483, 491 (1955); ***see also Nebraska Messenger Services Ass'n v. Thone,*** 611 F.2d 250 (8th Cir. 1979) (upholding statute prohibiting any person from placing monies of another into parimutuel wagering pool for a fee against due process challenge, applying "rational relationship" standard). We are not convinced that the district court in ***Turfway*** properly considered Congress' purposes in enacting the IHA. Congress sought to protect the racing industry from the threat of unregulated off-track wagering, and, at the same time, allow such activity. Congress also sought to preserve the rights of states to govern gambling activity of this nature within their borders. ***See*** 15 U.S.C. § 3001. We are not prepared to say that the statutory scheme to regulate interstate off-track wagering on horse races adopted by Congress bears "no rational relation" to the purposes sought to be served by the statute.

Similarly, we do not believe that the means chosen by the Legislature to regulate simulcasting under §§ 2-1227 and 2-1229 bear no reasonable relationship to the purposes underlying the statute. We note that the Legislature's findings in § 2-1224 includes the following: "No simulcast or interstate simulcast shall be authorized which would jeopardize present live racing, horse breeding, or employment opportunities or which would infringe on current operations or markets of the racetracks which generate significant revenue for local governments in the state." § 1224(d). Clearly, the Legislature, in adopting legislation authorizing parimutuel wagering on simulcast horse races, sought to promote the economic benefits of allowing such wagering, but, at the same time, recognized a need to balance this goal against the potentially harmful impact such wagering could have on live racing, horse breeding, and employment opportunities associated with the horse racing industry. We cannot say that the balance struck,

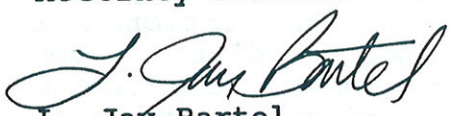
requiring that the State Racing Commission, the racetracks, and horse owners and trainers all be involved in the process resulting in establishing the terms and conditions under which such wagering is conducted, is without a rational basis.

V. Conclusion.

Acts of the Legislature are presumed to be constitutional, and all reasonable doubts will be resolved in favor of constitutionality. ***Jaksha v. State,*** 241 Neb. 106, 486 N.W.2d 858 (1992). Based on the reasons set forth above, it is our opinion that the requirement that the organization representing a majority of the owners and trainers at racetracks must consent to agreements to allow parimutuel wagering on intrastate and interstate simulcast horse races under §§ 2-1227 and 2-1229 are not clearly unconstitutional based on the federal district court decision in ***Turfway***.

Very truly yours,

DON STENBERG
Attorney General



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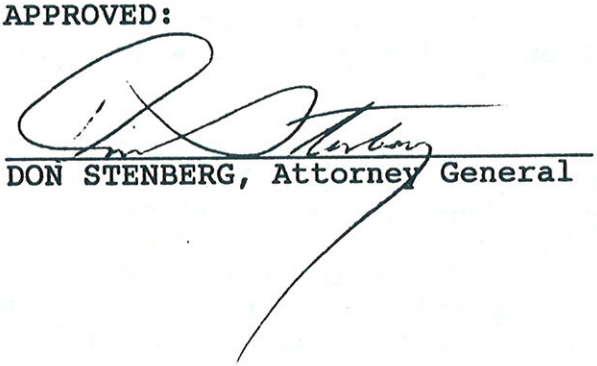

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