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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF FORD,

Appellant,

-against-

No. 225

NEW YORK STATE RACING AND WAGERING BOARD,

Respondent.

20 Eagle Street
Albany, New York 12207
November 19, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 225, Matter of Ford. Counselor, would
3 you like any rebuttal time, counselor?

4 MR. TURRO: Yes, I would, Your Honor. I'd
5 like to reserve four minutes for rebuttal time.

6 CHIEF JUDGE LIPPMAN: Four minutes for
7 rebuttal time. You have it. Go ahead. Start.

8 MR. TURRO: Thank you very much.

9 CHIEF JUDGE LIPPMAN: Thank you.

10 MR. TURRO: Good afternoon, Your Honors.
11 My name is Andrew Turro of Meyer, Suozzi, English &
12 Klein, and I represent the petitioners-appellants, in
13 this action.

14 Your Honors - - - Honors, this case
15 involves, as you know, the out-of-competition testing
16 rules that were promulgated by the Racing Board. And
17 these rules and these out-of-competition rules are an
18 ill-conceived, Constitutionally offensive - - -

19 JUDGE PIGOTT: Can we sort them out between
20 the ones that you sued on and the ones that exist
21 now?

22 MR. TURRO: Sure.

23 THE COURT: Okay.

24 MR. TURRO: I would say that they both are.
25 And if you want to talk about both of them - - -

1 JUDGE READ: Well, but the ones that - - -
2 the ones that are current, that were promulgated - -
3 -

4 MR. TURRO: Yes.

5 JUDGE READ: - - - at the end of the summer
6 - - -

7 MR. TURRO: August the 6th, they became - -
8 -

9 JUDGE READ: - - - yeah.

10 MR. TURRO: - - - effective.

11 JUDGE READ: They haven't been adjudicated
12 by any of the lower courts, right?

13 MR. TURRO: They have not. We're in the
14 process, Your Honor, of preparing an Article 78 to
15 preserve our rights on that. We're doing that
16 because if you read the notice of adoption of August
17 the 6th, they basically cite the Third Department
18 decision for the basis of their - - - of their power
19 to promulgate the out-of-competition testing - - -

20 CHIEF JUDGE LIPPMAN: Counsel, what rules
21 do you - - - do you most object to? Let's take the
22 ill-considered first.

23 MR. TURRO: Okay.

24 JUDGE LIPPMAN: What - - - what's ill-
25 considered and what is it that you're basically

1 objecting to?

2 MR. TURRO: I'm objecting to the Board
3 abrogating to itself the authority - - -

4 JUDGE LIPPMAN: Why do you say abrogating
5 to themselves? Why isn't it - - - they claim that
6 this is very much within their purview - - - their
7 statutory purview. Why isn't it?

8 MR. TURRO: Okay. It's not in their
9 statutory purview because the very statute that they
10 cite for the regulatory authority, and those are - -
11 - include 301(2)(a). And that's - - - that's
12 probably the most critical. But it's 101, 902(1),
13 and 301(2)(a). And you find that in their regulatory
14 impact statement at - - - on the record at 233. At
15 the very outset, they cited that as their authority,
16 their statutory authority to promulgate these rules.
17 And - - -

18 JUDGE READ: So you're saying they - - -
19 they don't have the authority to promulgate any out-
20 of-competition - - -

21 MR. TURRO: No, that's not what I'm saying,
22 Your Honor.

23 JUDGE READ: You're not saying that?

24 MR. TURRO: I'm not saying that. I think
25 that the - - - any out-of-comp - - - and let me

1 address that, because I think that's an important - -
2 - it's a fine point.

3 What the Board is relegated to, is they are
4 relegated to the - - - under 301(2)(a), or (a)(2) - -
5 - it's basically they are allowed to test or
6 promulgate regulations for the purpose of
7 ascertaining whether or not horses who are about to
8 participate - - - their speed is a - - - is - - - can
9 be affected. Horses who are about - - -

10 JUDGE SMITH: So you - - - you - - -

11 MR. TURRO: - - - to participate.

12 JUDGE SMITH: - - - you say "about to
13 participate" has to mean less than 180 days?

14 MR. TURRO: Sure. I do.

15 JUDGE SMITH: How much - - - well, what - -
16 - what time period would be acceptable?

17 MR. TURRO: I would say, under the current
18 regulations, without any further legislative action,
19 I would say, when - - - when the horses are in what
20 they call in the box, which would be the entry date.

21 JUDGE PIGOTT: Well, does that cause - - -

22 MR. TURRO: Which would be several days.

23 JUDGE PIGOTT: - - - a problem with their
24 argument about some of the - - - some of these drugs
25 are - - - are not detectible? In other words, let's

1 assume they agreed with you and thought this was the
2 great rule, is it - - - is the drug problem solved?

3 MR. TURRO: Well, I think - - - I think
4 that - - - let me say this. I don't think it's going
5 to be all solved, because I think there's a challenge
6 here. And certainly, you know, no one can ignore the
7 challenge. And - - - and quite frankly, Your Honor,
8 the petitioners, like everyone else, wants out-of-com
9 - - - we we're not against out-of-competition
10 testing. We're not against a - - - having - - - we
11 all want a fair, level playing field. Owners and
12 trainers don't want other owners and trainers to have
13 an in - - - an unfair advantage.

14 What we object to is the manner in which
15 the Board has - - - and I say it again - - - has
16 vested itself with powers that are beyond their
17 legislative - - -

18 CHIEF JUDGE LIPPMAN: Why - - - why isn't
19 it well within - - -

20 MR. TURRO: - - - domain.

21 CHIEF JUDGE LIPPMAN: - - - their ambit - -
22 - if you look at the spirit of what this is about,
23 why isn't it well within their ambit to ensure that
24 there isn't unfair competition? Why - - - why isn't
25 that such - - - so basic and so fundamental to what

1 they're trying to do to prevent people from having
2 unfair advantage for - - - prevent them from
3 circumventing the rules about these kind of illegal
4 drugs? Why - - - why isn't this square center in the
5 middle of - - - of what they're supposed to be doing?

6 MR. TURRO: Okay, let me - - - okay, and I
7 will begin again - - -

8 CHIEF JUDGE LIPPMAN: The spirit of it.
9 But - - -

10 MR. TURRO: I understand.

11 CHIEF JUDGE LIPPMAN: - - - don't - - -
12 don't cite the particular statute.

13 MR. TURRO: Okay.

14 CHIEF JUDGE LIPPMAN: Tell me why this is
15 not consistent with what they're supposed to be
16 doing?

17 MR. TURRO: Because what they have been
18 given - - - what - - - the power they've been given,
19 an executive agency has only the power that the
20 legislature gives to them. The legislature, in this
21 - - - in this instance, has not given them free rein
22 to test any horse anywhere, whenever they want,
23 without notice and without, in effect, a - - -

24 CHIEF JUDGE LIPPMAN: What are they trying
25 to achieve - - -

1 MR. TURRO: - - - benefit - - -

2 CHIEF JUDGE LIPPMAN: - - - by the testing?

3 MR. TURRO: Well, I - - - I think if you
4 look - - -

5 CHIEF JUDGE LIPPMAN: In general, what is
6 the purpose of testing?

7 MR. TURRO: The purpose of testing, the pu
8 - - - it should be to ascertain whether these
9 animals, whether these horses, when they participate
10 in a race, are going to be unduly influenced by a - -
11 - a substance. Now, many of these substances - - -

12 JUDGE SMITH: But can't that - - -

13 MR. TURRO: - - - have therapeutic
14 purposes.

15 JUDGE SMITH: - - - can't that evil be
16 created, as their expert says, by a - - - by a drug
17 given weeks or even months before the race?

18 MR. TURRO: Well, let's address that. Dr.
19 Maylin - - - and Dr. Maylin is a - - - is a highly
20 credentialed expert, and I have - - - you know, I'm
21 not going to take him on. I know Dr. Maylin and I've
22 dealt with him. But what - - - what his - - - I'm
23 sorry - - - what is affidavit boils down to is number
24 one, he does, he testifies that - - - he gives sworn
25 testimony that these substances can last weeks or can

1 be in the system, can be administered weeks or
2 longer.

3 JUDGE SMITH: And you don't dispute that?

4 MR. TURRO: I don't dispute that. But it's
5 certainly not 180 days.

6 JUDGE READ: But I thought a hundred - - -

7 MR. TURRO: But - - - but we did dispute
8 and we do dispute - - - and in fact, the courts
9 throughout this have affirmed, that many of these
10 substances he identified - - - that were identified
11 and said - - - which he said did not have therapeutic
12 uses, in fact, did have therapeutic uses.

13 JUDGE SMITH: Okay, but what does that have
14 to do with the - - - the basic - - - you say that the
15 legislature gave them no authority to test a horse
16 until the horse is in the box?

17 MR. TURRO: Well, I - - - I said that they
18 are - - - they are - - - until - - - they can test
19 horses for the purpose of ascertaining whether or not
20 the substances being administered are going to - - -
21 in the words of the statute - - - affect the speed of
22 the horse in a race it's about to participate in.

23 JUDGE SMITH: Okay. Suppose - - - suppose
24 I can give my horse a drug today that's going to - -
25 - that's going to help him a month from now. You - -

1 - you don't deny that that's a possibility?

2 MR. TURRO: To help him in what way,
3 therapeutically?

4 JUDGE SMITH: Win a race.

5 MR. TURRO: Or speed? You know - - - you
6 know, Your Honor, I - - -

7 JUDGE SMITH: Do - - - do you - - -

8 MR. TURRO: - - - that's a - - - take your
9 hypothetical - - -

10 JUDGE SMITH: - - - do you - - - wait a
11 minute. Wait a minute. Do you or don't dispute that
12 that can be done, that I can give a horse a drug
13 today that would give him an unfair advantage in a
14 race next month?

15 MR. TURRO: Well, that - - - that's what
16 Dr. Maylin said.

17 JUDGE SMITH: Do you want to answer yes or
18 no to that question?

19 MR. TURRO: Well, my - - - my - - - our
20 expert disputed that point, that - - - that it had an
21 efficacious period - - - that long a period of time.

22 JUDGE SMITH: Well, could - - -

23 JUDGE PIGOTT: So you're answer's no?

24 JUDGE SMITH: - - - isn't - - -

25 MR. TURRO: So my answer would be no, but -

1 - - but I'm open - - -

2 CHIEF JUDGE LIPPMAN: You would - - - you
3 would admit the possibility - - -

4 MR. TURRO: Yes.

5 CHIEF JUDGE LIPPMAN: - - - that that can
6 happen. And if that can - - - assume for the sake of
7 argument, that you can give the horse a drug and that
8 thirty days later, still in the system and allows
9 that horse to go faster. Why can't they test for
10 that when you have the option, if you want to, to say
11 if they want to test the horse, you could say, look,
12 that horse will not race competitively?

13 MR. TURRO: Well - - -

14 CHIEF JUDGE LIPPMAN: You could say that
15 and you can opt out of this testing, can't you?

16 MR. TURRO: Well, you can opt out under the
17 new rules of the testing. And - - -

18 CHIEF JUDGE LIPPMAN: Yeah, but if you - -
19 -

20 MR. TURRO: - - - you know, I can say I'm
21 not bringing my horse back from Canada. I'm not - -
22 -

23 CHIEF JUDGE LIPPMAN: - - - but - - - if
24 you're not - - - if you can opt out, and if you
25 accept the hypothetical, which we're asking you to

1 do, that you could, well in advance, give the horse a
2 drug that helps them thirty or sixty or whatever it
3 is days later, what - - - what is the harm to you or
4 the prejudice to you, if he's not racing - - - he or
5 she - - - the horse is not racing then say they're
6 not racing. And if they're racing, why doesn't
7 effect - - - what that affect exactly what the
8 mandate is here, to ensure that those races are fair
9 and on the up-and-up?

10 MR. TURRO: Well, because - - - because
11 their powers go well beyond that. And first of all -
12 - -

13 CHIEF JUDGE LIPPMAN: Their powers go - - -
14 no, that's no your argument - - -

15 MR. TURRO: - - - there - - - first of all
16 these - - -

17 CHIEF JUDGE LIPPMAN: - - - that the powers
18 go well beyond it.

19 MR. TURRO: I'm not - - - I'm saying - - -

20 CHIEF JUDGE LIPPMAN: It's your argument
21 their powers don't - - -

22 MR. TURRO: - - - they're exercise - - -
23 they're exercising their - - - they're exercising - -
24 - their conduct goes well beyond their powers.

25 JUDGE SMITH: You're saying 180 is too

1 long?

2 MR. TURRO: Absolutely. Espec - - - and
3 Dr. Maylin's affidavit itself - - -

4 JUDGE SMITH: But it sounds to me like
5 you're concert - - - conceding that maybe thirty
6 would not be too long?

7 MR. TURRO: I'm - - - I'm not the scientist
8 here. But if there were proof - - - and - - - and
9 there's been no - - - Dr. Maylin has no - - -

10 JUDGE RIVERA: But why isn't it within the
11 agency's discretion to decide that it wants to go
12 beyond the thirty?

13 MR. TURRO: Well, the agency doesn't - - -
14 right now, the agency can only test horses for the
15 purpose of having a - - - a - - - of ascertaining
16 whether or that substance is going to affect them.
17 Okay? And - - - and, you know - - - in terms of when
18 they're about to race - - - in a race they're about
19 to participate in. 180 days is - - - you don't even
20 know when a race - - - that's well beyond that. And
21 the other thing, the whole - - -

22 JUDGE RIVERA: You're saying because you -
23 - - are you saying because the owner or the trainer
24 won't know if they're going to run the horse 180 days
25 - - -

1 MR. TURRO: 180 days - - -

2 JUDGE RIVERA: - - - from there?

3 MR. TURRO: - - - the owner and trainer
4 won't even know. That's right.

5 JUDGE READ: But I thought the 180 days was
6 eliminated when they - - - when they revised the
7 rules?

8 MR. TURRO: Well, now they - - - under the
9 new rules they can - -they can - - - they can test
10 them at any time they want to. They've now
11 eliminated what was an - - -

12 JUDGE ABDUS-SALAAM: Counsel - - -

13 MR. TURRO: - - - illusory standard before.
14 They can test them anywhere, any time. And the other
15 thing is, any place.

16 JUDGE ABDUS-SALAAM: Counsel, you mentioned
17 a new rule several times now. So I'm wondering, why
18 are we even hearing these arguments about these
19 rules, the ones that are before us now? Isn't this
20 all moot, or most of it?

21 MR. TURRO: Well, I would not - - - I don't
22 think it would be moot, only because, Your Honor,
23 they have cited as their authority for the new rules,
24 the Third Department's decision. If that Third
25 Department decision is upheld on its merits, then we

1 have - - - then we have that precedent from this
2 court that's then going to - - - you may say it's
3 moot here, but you know, the new rules have not been
4 - - - right now, we've got an Article 78. I can't
5 bring it - - - you know - - -

6 JUDGE SMITH: Before you run out of time -
7 - -

8 MR. TURRO: - - - bring a brief to this
9 court.

10 JUDGE SMITH: - - - should - - - why don't
11 you say a few words about the Fourth Amendment?

12 MR. TURRO: All right. All right. The
13 Fourth Amendment - - - a couple things. First of
14 all, this allows searches and seizure anywhere. It
15 allows - - - you know, it has a compulsory process
16 from Canada. The - - - and under the new rules, they
17 can go anywhere. They can go to any racing
18 jurisdiction. They can go to Dubai, they can go to
19 another state, to - - - to test other horses.

20 JUDGE SMITH: You - - - you say that's just
21 too much discretion in the Board of where and how to
22 test?

23 MR. TURRO: Well, there's absolutely no - -
24 - there's no control. They basically can - - -
25 basically have a - - - there's no control, there's no

1 limits.

2 CHIEF JUDGE LIPPMAN: But - - -

3 MR. TURRO: They can go in and out of the
4 state. No notice.

5 CHIEF JUDGE LIPPMAN: - - - but don't you -
6 - - by becoming licensees, don't you kind of
7 recognize that - - - that you may be subject to - - -
8 to testing under this authority?

9 MR. TURRO: Well, you - - - this also
10 affects nonlicensees, too, Your Honor. The - - -

11 CHIEF JUDGE LIPPMAN: Who? Who?

12 MR. TURRO: - - - the private farm owners,
13 who in other jurisdictions are licensed, such as in
14 New Jersey. And here, we have chosen - - -

15 CHIEF JUDGE LIPPMAN: They're not in this
16 lawsuit, though, are they?

17 MR. TURRO: Yes, they are.

18 CHIEF JUDGE LIPPMAN: The private farm
19 owners?

20 MR. TURRO: Yes, we have private farm owner
21 representatives, Your Honor.

22 JUDGE RIVERA: So, I'm sorry, how are they
23 affected?

24 MR. TURRO: Well - - -

25 JUDGE RIVERA: Can't they deny access to

1 their property?

2 MR. TURRO: - - - they're - - - they're
3 affected two ways.

4 JUDGE RIVERA: Okay.

5 MR. TURRO: They're affected on - - - one
6 way, they're affected because the - - - the
7 regulations provide that they can sanction a person -
8 - - a person for not cooperating with the
9 regulations. That person - - - so if a - - - so if a
10 nonlicensed farm owners says no, you can't come on
11 the property, that person is subject to sanctions.

12 Secondly, and almost more importantly, what
13 happens is, it allows licensees to be punished for
14 the - - - for the acts of the nonlicensees. For
15 instance, if I've got a licensee owner in Queens on
16 Queens Boulevard who owns some horses, and the - - -
17 the - - - and we've got a horse that's - - - that's
18 up in Saratoga, and the - - - on a private farm, and
19 the Board wants to - - - wants to search that - - -
20 that, and the - - - he can't get on the property
21 because the nonlicensed farm owner doesn't let him on
22 the property - - -

23 JUDGE RIVERA: But why can't you negotiate
24 that out when you - - - the stable or whatever it's
25 called. You - - - have your horse on that property.

1 Why - - - why aren't they able to enter an agreement
2 with them that would allow the private owner to
3 permit the testing?

4 MR. TURRO: Well, most of these, basically
5 are - - - most of the horses - - - as a practical
6 matter, held - - - are basically not there as
7 tenants, they're there as licensees. There's no
8 paper. And I think it's - - - could it be done,
9 theoretically? I guess it could be. But as a
10 practice matter, in practicum, what happens in
11 horseracing, it's just not done.

12 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
13 - - -

14 MR. TURRO: Yes.

15 CHIEF JUDGE LIPPMAN: - - - could talk more
16 about this in rebuttal.

17 MR. TURRO: Thank you very much.

18 CHIEF JUDGE LIPPMAN: Let's hear from - - -
19 hear from your adversary.

20 Thank you, counselor.

21 MS. ARNOLD: Good afternoon, may it please
22 the court. I'm Kathleen Arnold on behalf of the
23 respondent in this matter.

24 CHIEF JUDGE LIPPMAN: Counsel, where's your
25 authority come to issue these regulations,

1 particularly the testing well in advance of the race?

2 MS. ARNOLD: Do you - - - under the amended
3 statute or the statute under which they were
4 initially promulgated?

5 CHIEF JUDGE LIPPMAN: Tell us where your
6 authority comes from under either or both?

7 MS. ARNOLD: Well, it comes from - - - in
8 the new statute - - -

9 CHIEF JUDGE LIPPMAN: Yes.

10 MS. ARNOLD: - - - sections - - - the
11 general broad authority comes from Sections 100, 103,
12 and 104. And the specific authority comes from
13 Section 301. The new - - -

14 CHIEF JUDGE LIPPMAN: So - - - yeah?

15 MS. ARNOLD: - - - new 103, 104 give the
16 Gaming Commission broad general authority over gaming
17 activities in the state and creates a division of
18 horseracing and parimutuel race - - - parimutuel
19 wagering over which - - - which has responsibility
20 over those activities in the state. And the new
21 Section 100 sets forth specifically the legislative
22 intent - - -

23 CHIEF JUDGE LIPPMAN: Is it in light of the
24 new section that you believe that all of this is
25 moot, what we're talking about today?

1 MS. ARNOLD: It's - - - no - - - what's
2 moot is the regulations. The statute - - - the
3 overarching issue whether the agency has the
4 authority to adopt out-of-competition regulation is
5 the same, because the statute is substantively the
6 same now as it was - - -

7 JUDGE READ: So that's not moot, whether or
8 not you can issue regulations that deal with this
9 subject?

10 MS. ARNOLD: Correct.

11 JUDGE READ: The particular regulations
12 that were amended - - -

13 MS. ARNOLD: Right.

14 JUDGE READ: - - - in last August, what - -
15 - what about them?

16 MS. ARNOLD: So - - -

17 JUDGE READ: The original set, the ones
18 were - - - before they were amended.

19 MS. ARNOLD: Right.

20 JUDGE READ: Is that - - - is that moot?
21 Is that before us?

22 MS. ARNOLD: Yes. It's - - - it is - - -
23 it's moot. Those - - - those - - - the provisions
24 that petitioners challenge now are different from the
25 ones that the Third Department ruled on.

1 JUDGE SMITH: I mean, suppose the Third
2 Department was wrong. Basically you're - - - you are
3 saying - - - if the Third Department was wrong, and
4 we agree with you, that the case is now moot, he's
5 left with an erroneous decision which is - - - a
6 fortiori validates the new rules. What's he supposed
7 to do?

8 MS. ARNOLD: The option would be, if this
9 court were to uphold the part of the Third
10 Department's decision finding that the agency had the
11 authority to adopt the regulation, and that the
12 regulations themselves were moot - - - had been
13 mooted out, then it would be up to the petitioners to
14 decide how to proceed. They could go back to the
15 Supreme - - -

16 JUDGE SMITH: Well, I - - - but I'm - - -
17 but my question is, doesn't that put him in a - - -
18 in an unfair position? He's got an Appellate
19 Division decision that upheld a certain set of
20 regulations. You're changed them, I guess, to make
21 them a little more favorable to him, to improve them
22 a little from the - - -

23 MS. ARNOLD: And to conform them to
24 Thoroughbred. So there's two reasons to amend them.

25 JUDGE SMITH: Okay, but - - - okay. But

1 I'm not talking about your purpose so much as if he
2 can't complaint to the old ones, he certainly can't
3 complain about the new ones. So what's he supposed -
4 - - he's got to bring a new lawsuit. He's doomed to
5 lose until - - - until he gets through the Appellate
6 Division. Then he comes back to us? Does that make
7 sense?

8 MS. ARNOLD: Yes.

9 JUDGE SMITH: Why shouldn't - - - I mean,
10 why can't - - - you know, why shouldn't we say look,
11 to the extent that you've removed - - - that the new
12 regulations remove problems in the old one, yeah,
13 sure, they're moot. But problems that are not
14 removed should not be moot, should they?

15 MS. ARNOLD: Well, you could do that. You
16 - - - you could do it. You might want to require
17 that the parties submit additional briefing on the
18 new regulations or you could just compare them
19 yourselves.

20 CHIEF JUDGE LIPPMAN: But why isn't that
21 totally logical?

22 MS. ARNOLD: Pardon me?

23 CHIEF JUDGE LIPPMAN: The ones that are
24 still at issue, that they're still complaining about.

25 MS. ARNOLD: Whether you - - - the court

1 can just compare - - -

2 CHIEF JUDGE LIPPMAN: Yeah.

3 MS. ARNOLD: - - - the new and the old?

4 CHIEF JUDGE LIPPMAN: Yeah.

5 MS. ARNOLD: Yes, I - - - the court can do
6 what it wants.

7 CHIEF JUDGE LIPPMAN: So the bottom line is
8 there's enough here for us to decide?

9 MS. ARNOLD: I think that there is. You
10 can compare them side-by-side, particularly because
11 the new regulations accommodate a lot of the
12 complaints that petitioners had to begin with.

13 JUDGE READ: But we would be doing that ab
14 initio, right? We wouldn't have the benefit of the
15 lower - - -

16 MS. ARNOLD: You would.

17 JUDGE READ: - - - courts assessing - - -

18 MS. ARNOLD: You would.

19 JUDGE READ: - - - the legitimacy of the
20 new regulations against the statute.

21 MS. ARNOLD: Exactly. No court has ruled
22 on the new regulations.

23 JUDGE SMITH: Well, to the extent - - - to
24 the extent that some of his argue - - - he has some
25 arguments, I would suppose, that apply equally to old

1 and - - - I mean, his argument that - - - if he's
2 making it; I'm not sure if he is - - - his argument
3 that you can't test until the - - - until the horses
4 are actually there, if he's right about that, the new
5 regulations are just as bad as the old.

6 MS. ARNOLD: That's correct.

7 CHIEF JUDGE LIPPMAN: So what is your
8 answer to the heart of that argument that basically
9 you can't test in advance of the race or certainly as
10 far in ad - - - far in advance as you want to? What
11 is your answer? What gives you, again, the authority
12 to test when the race is not at hand? What - - -
13 what's your basic - - -

14 MS. ARNOLD: Well, the new Section 100 of
15 the statute - - -

16 CHIEF JUDGE LIPPMAN: Yes.

17 MS. ARNOLD: - - - titled "Legislative
18 Intent", could not make it more clear that the
19 legislature's goal in amending that statute is that
20 all gaming activity in the state, including harness
21 horseracing, be of the highest integrity and
22 credibility. This type of testing ensures that that
23 happens. And - - -

24 JUDGE SMITH: And so what - - -

25 CHIEF JUDGE LIPPMAN: So you have unlimited

1 power to do that? I mean, it doesn't matter. Could
2 you do it - - -

3 MS. ARNOLD: The power - - -

4 CHIEF JUDGE LIPPMAN: - - - six months
5 before, just say, you know what, we're going to have
6 some races coming up in the state in the next period
7 of time. We know that drugs are more powerful than
8 they used to be. We're going to test every horse
9 that might conceivably run in a race in the next six
10 months. We're going to test them. Do you have the
11 authority to do that?

12 MS. ARNOLD: Yes. Because the legislature
13 gave to the Board that broad general authority to
14 ensure that racing is fair.

15 JUDGE PIGOTT: Why - - - you know, one of
16 the things that strikes me is that a lot of the
17 arguments made by the petitioner here, are - - - are
18 based on practicality. He talks about the fact that
19 you don't know you're going to be in a race
20 necessarily, that far in advance. You don't - - -
21 did the Board - - - I realize you have very strong
22 legislative authority to do what you want. In fact,
23 that's what the Appellate Division said. But was
24 there any consideration given to some of that? I - -
25 - I looked at - - - for example, the Appellate

1 Division said, "The Supreme Court erred by declaring
2 arbitrary the regulation requirement that a licensed
3 owner or trainer, upon the Board's request, bring to
4 New York - - - to a New York track, any racehorse
5 that is stabled out-of-state, within 100 miles of the
6 track."

7 MS. ARNOLD: Right.

8 JUDGE PIGOTT: How do those rules - - - how
9 do you - - - why 100? Why not 150? And why should
10 we, as a court even be talking about that? I - - -
11 it seemed - - - a lot of this, it seemed to me, a
12 conversation would take care of, rather than having,
13 you know, seven judges say this is arbitrary or it's
14 not.

15 MS. ARNOLD: Well, certainly the new
16 regulations make that true. And the hundred-mile
17 rule was decided because when - - - what actually
18 happens is, horses are - - - enter a race about four
19 days before the race actually occurs. And they're
20 stabled - - - New York doesn't require that horses be
21 stabled on the track. They can stable them and train
22 them wherever they want.

23 And the truth is that trainers and owners
24 bring their horses in the day of the race or the day
25 before the race. So they are out-of-state or out of

1 the - - - off-track premises immediately prior to the
2 race.

3 The hundred-mile rule came about because
4 that was - - - the Board determined that that is
5 about the distance that generally people bring their
6 horses in. And the way the new rule reads now is,
7 it's much less onerous, and it has a three-part
8 requirement.

9 First, the agency has to have some probable
10 cause - - -

11 JUDGE PIGOTT: This is the new rule, you're
12 talking about.

13 MS. ARNOLD: Yes.

14 JUDGE PIGOTT: Why wasn't the new rule the
15 rule in the first place, I think is my question?
16 Because it seems like you're conceding that these
17 weren't very thought out, I guess.

18 MS. ARNOLD: Well, actually - - -

19 JUDGE PIGOTT: Because all of a sudden,
20 they're - - - they've been changed substantially. I
21 think, you know, to the benefit of the breeders and -
22 - -

23 MS. ARNOLD: You know, they - - - the
24 purpose was to try to make - - - make some - - - make
25 them more amenable to petitioners. And I would like

1 to point out that other racing jurisdictions - - -
2 and there are about ten in the country - - - that had
3 - - - have out-of-competition testing, don't have
4 this kind of a - - - don't have a 100-mile rule.
5 They can test any horse, anywhere: Dubai, wherever,
6 because the authority rests in the power of the
7 agency to regulate racing that's conducted on New
8 York racetracks.

9 JUDGE SMITH: And so you're not - - -
10 you're not literally saying you have the right to go
11 to Massachusetts and test a horse. You just have the
12 rights to keep - - - right to keep that horse out if
13 they haven't let you test it?

14 MS. ARNOLD: We - - -

15 JUDGE SMITH: You - - - you don't have the
16 right to test the horse, but he doesn't have the
17 right to race it if you don't test it?

18 MS. ARNOLD: Right. And what we would do,
19 and what's contemplated in the regulation, is to have
20 the Massachusetts racing jurisdiction - - - authority
21 - - - do the testing and to share the results.

22 JUDGE PIGOTT: Does it say that in the - -
23 - in the reg, though?

24 MS. ARNOLD: Pardon me?

25 JUDGE READ: That's in the new rules.

1 MS. ARNOLD: It's in the new reg.

2 JUDGE PIGOTT: In the new reg.

3 MS. ARNOLD: Yeah.

4 JUDGE PIGOTT: That's what I - - - that's
5 what I'm missing. I - - -

6 MS. ARNOLD: Well, that's what makes it so
7 hard to - - -

8 JUDGE PIGOTT: But you passed a rule and -
9 - - and I would think someone up, you know, in
10 Buffalo where I'm from, is thinking a hundred miles
11 is Pennsylvania, it's Ohio - - -

12 MS. ARNOLD: Right.

13 JUDGE PIGOTT: - - - it's Michigan, it's
14 Canada. And you're saying that anybody in any of
15 those jurisdictions has to bring their horse to a New
16 York racetrack to get tested. And they're probably
17 saying they don't want to do that.

18 So now - - - and it makes sense for you to
19 say if you want to bring it with a certification from
20 your - - - from the Ohio racing association, we'll
21 buy that. But that wasn't in your reg in the
22 beginning. And that makes me wonder how - - - how
23 solid were those regs when you first promulgated
24 them.

25 MS. ARNOLD: The Board had the authority to

1 do that at - - - at the time. And this is - - -

2 JUDGE PIGOTT: They do. And then - - -
3 that's the arbitrary and capriciousness, right? And
4 that's what - - - you know, that's what the Supreme
5 Court got into, and the Appellate Division. And
6 you're asking us to do the same, or petitioner is.

7 MS. ARNOLD: Yeah, I'm asking you to say
8 that those ones are moot and that you can't rule on
9 them, because they're all different now.

10 CHIEF JUDGE LIPPMAN: But he - - - but the
11 judge is asking you, did you believe that the
12 original set couldn't survive - - -

13 MS. ARNOLD: Absolutely - - -

14 CHIEF JUDGE LIPPMAN: - - - an arbitrary
15 and capricious test?

16 MS. ARNOLD: Yes.

17 CHIEF JUDGE LIPPMAN: And that's why you
18 modified them?

19 MS. ARNOLD: No, we thought that they did
20 survive for all of the reasons that the Third
21 Department said. They - - -

22 CHIEF JUDGE LIPPMAN: But you modified them
23 because?

24 MS. ARNOLD: To conform them to the Harness
25 - - - sorry, the Thoroughbred rules and to address

1 some of the issues that petitioners had. And to be
2 accommodating.

3 JUDGE SMITH: You - - - you - - -

4 MS. ARNOLD: Because - - -

5 JUDGE SMITH: - - - you thought they were -
6 - - you thought they were okay as they were, but you
7 wanted to err on the side of caution a little bit?

8 MS. ARNOLD: Yes. And I would say
9 especially with the hundred - - - sorry - - - yeah,
10 the hundred-mile rule, you know, there's some
11 question about whether that was a seizure, you know,
12 is it a seizure to take a horse - - -

13 JUDGE SMITH: What is - - - what is the
14 rule today under the new rules? If I - - - if I'm
15 stabling my horse across the border in Massachusetts,
16 what do you do?

17 MS. ARNOLD: If we - - - if there's
18 reasonable cause to believe that the horse has been
19 administered performance-enhancing drugs, and there's
20 no other practical way for the agency to obtain a
21 sample, say, from the local jurisdiction, and it's
22 within a hundred miles. So those three - - -

23 JUDGE SMITH: Then, in that case, you can
24 make him bring in the horse?

25 MS. ARNOLD: Right.

1 JUDGE SMITH: And otherwise, what about - -
2 - well, what if you just want to make sure by random
3 testing that that horse is clean? You rely on the
4 Massachusetts authorities?

5 MS. ARNOLD: Yes.

6 JUDGE SMITH: So they have to bring a
7 Massachusetts certificate?

8 MS. ARNOLD: No, we give - - - our agency
9 calls Massachusetts and says - - -

10 JUDGE SMITH: Yeah.

11 MS. ARNOLD: - - - can you please test
12 horse XY and send the results to us.

13 JUDGE SMITH: Okay, so the - - - so to the
14 extent that he's claiming that you have no authority
15 to do testing or that your authority is too broad and
16 unconfined, you haven't cured that problem just by
17 having the Massachusetts authorities do it at your
18 request?

19 MS. ARNOLD: Yes. We have cured it. I'm
20 not sure if I understand your question.

21 JUDGE SMITH: Well, assume - - - I mean,
22 it's - - - I understand, you say you've got a perfect
23 right to test - - - to test a horse, even one you
24 have no particular suspicion of, to do essentially
25 random drug testing of horses within - - - within 180

1 days of the race?

2 MS. ARNOLD: Yes.

3 JUDGE SMITH: Suppose you're wrong.

4 Suppose he's right that you don't have any authority
5 - - - take the extreme case - - - that you don't have
6 any authority to test anything before the race, you
7 would agree with me that you don't cure that problem
8 by saying, oh, no problem; I'll call up Massachusetts
9 and ask Massachusetts to test it?

10 MS. ARNOLD: Right.

11 JUDGE SMITH: Okay. Could I do one - - -
12 let me ask you about the Fourth Amendment issue.
13 Isn't - - - isn't the discretion that the Board or
14 the commission has here broader than anything the
15 Supreme Court has upheld in these administrative
16 search case? Can't you - - - aren't you basically
17 claiming the right to pick a horse at random and test
18 it?

19 MS. ARNOLD: Yes. Just the same way that
20 in other warrantless administrative searches, for
21 example, gun shops can be randomly inspected or
22 pawnshops can be randomly inspected. There's - - -
23 there's no going outside of the limitations of Burger
24 or Scott or Quackenbush. There's - - -

25 JUDGE SMITH: Well, I'm - - - Quackenbush I

1 remember. Quackenbush we - - - we made a point of
2 the fact that we don't - - - we don't - - - aren't
3 testing the cars at random; we're only testing them
4 when they've been involved in a - - - in a
5 significant event.

6 MS. ARNOLD: Right. But there's no
7 uncovering of criminal activity here. I mean, that
8 was - - - that was a purpose in Quackenbush.

9 JUDGE SMITH: So what's - - - what's the
10 best case you've got on essentially random testing,
11 where there's not - - - where there's not a - - - not
12 a health or safety - - - not a danger to human - - -
13 human life or something like that?

14 MS. ARNOLD: Well, because there - - -
15 because New York doesn't require that they be - - -
16 the animals be stabled on the tracks, owners and
17 trainers who are in the business of - - -

18 JUDGE SMITH: No, my question is what's the
19 best case you've got?

20 MS. ARNOLD: For?

21 JUDGE SMITH: For the - - - that you're
22 allowed - - - that you have not exceeded the limits
23 of the Fourth Amendment with - - - with these
24 regulations. That you do not - - - have not given
25 yourself too much discretion in doing random testing?

1 MS. ARNOLD: Oh, because the discretion is
2 very - - -

3 JUDGE SMITH: What's the best case you've
4 got.

5 MS. ARNOLD: Oh, Burger.

6 JUDGE SMITH: Burger?

7 MS. ARNOLD: Is that what you mean? The -
8 - - the U.S. Supreme Court case.

9 JUDGE SMITH: Okay. I don't - - - all
10 right.

11 MS. ARNOLD: I see that my - - -

12 CHIEF JUDGE LIPPMAN: Counselor, what - - -
13 what's the - - - what's wrong with the present
14 testing or the testing you used to do at the track?
15 And this new testing, how do we know that that's
16 effective when you're making people go through hoops
17 to do that kind of testing? Is it scientifically
18 proven that you can detect this kind of drugs,
19 enhancing drugs, for a long period - - - that were
20 given long periods of time before?

21 MS. ARNOLD: Yes, that's in Dr. Maylin's
22 affidavit.

23 CHIEF JUDGE LIPPMAN: I know it's in his
24 affidavit. But do you believe that that's - - - the
25 science is that we know that's what percent

1 effective? A hundred percent effective? Fifty
2 percent of the time you can find these old drugs?

3 MS. ARNOLD: I don't know how - - - how
4 effective that is, because I think you can rely on
5 equine practitioners for the premise that if the
6 Board's expert says that this is the situation based
7 on his or her expertise, then that's enough. And the
8 fact that petitioners' experts may have a different
9 opinion doesn't matter.

10 CHIEF JUDGE LIPPMAN: So you're saying
11 whether you're - - -

12 MS. ARNOLD: Because - - -

13 CHIEF JUDGE LIPPMAN: - - - whether you're
14 right or wrong, you have something to back up your
15 view, and that - - -

16 MS. ARNOLD: There's a rational basis - - -

17 CHIEF JUDGE LIPPMAN: - - - that's enough?

18 MS. ARNOLD: That's exactly right. There's
19 a rational basis for the rule.

20 JUDGE SMITH: What about - - - what about
21 the 180 days. Isn't that basically picked out of the
22 air? I mean - - -

23 MS. ARNOLD: No.

24 JUDGE SMITH: Where - - - what - - - where
25 in the record does it say 180 days makes more sense

1 than 150 or 210?

2 MS. ARNOLD: It - - - there is no place in
3 the record that says that. That's a - - - that's a
4 number that Dr. Maylin, in his expertise, arrived at
5 because - - -

6 CHIEF JUDGE LIPPMAN: Did he - - - he
7 picked the 180?

8 MS. ARNOLD: He - - - somebody did it in
9 consultation with him, based on - - -

10 JUDGE SMITH: But is it - - - but it is - -
11 - would it be fair to say - - - let me try to put it
12 in - - - it would be fair to say that nobody really
13 knows the right number of days, and you figured 180
14 gave you a reasonable cushion?

15 MS. ARNOLD: That's right. Because these
16 drugs remain in the system, and the - - - the effects
17 of them - - -

18 JUDGE SMITH: Is that - - - is that good
19 enough - - -

20 MS. ARNOLD: Yes.

21 JUDGE SMITH: - - - to - - - yeah, you
22 don't - - - you don't have any scientific studies
23 showing that 160 or even 120 wouldn't work, but you
24 thought - - - you made a commonsense judgment on the
25 limited scientific knowledge. Are you allowed to do

1 that?

2 MS. ARNOLD: Yes. Yes. In its discretion,
3 the agency can do that. It has a rational basis for
4 doing that and it's based on Dr. Maylin's tests. And
5 it's also based on the - - - on the general knowledge
6 within the equine pharmacology - - -

7 CHIEF JUDGE LIPPMAN: Okay, counselor.

8 MS. ARNOLD: - - - can I just - - -

9 CHIEF JUDGE LIPPMAN: Thank you.

10 MS. ARNOLD: - - - one thing.

11 CHIEF JUDGE LIPPMAN: No, counsel - - -

12 MS. ARNOLD: One thing?

13 CHIEF JUDGE LIPPMAN: - - - your time is
14 up. Thank you

15 MS. ARNOLD: Okay.

16 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

17 MR. TURRO: Thank you, Your Honor. I just
18 want to start, if I can, just try to take my time and
19 not go over. But number one is that the - - - there
20 is no - - - the new regulations don't have probable
21 cause. They have reasonable belief that something
22 might have been administered. It's a - - -

23 JUDGE PIGOTT: What about the point that -

24 - -

25 MR. TURRO: - - - standard.

1 JUDGE PIGOTT: - - - Ms. Arnold makes in
2 her brief, though, that this is the only sport in the
3 State of New York where you bet - - - where - - -
4 where people wager on - - - on these animals. And
5 therefore they're given this power, because bad
6 things happen when people are betting on sporting
7 events.

8 MR. TURRO: Again, I don't dispute the
9 protecting the integrity. What I do think and what I
10 think that that court - - - it's important for the
11 court to have in the forefront of their minds, is
12 that everyone on - - - on both sides, the owners and
13 trainers, also need a fair playing field.

14 What we have here - - - I mean, we - - -
15 we've talked about and - - -

16 JUDGE SMITH: Well, but the fact is,
17 there's some people who don't want a fair playing
18 field. They want an unfair playing field - - -

19 MR. TURRO: Well, sure.

20 JUDGE SMITH: - - - tilted toward them.
21 And even - - - that's what these regulations are
22 supposed to deal with.

23 MR. TURRO: And when - - - say - - - when
24 you asked, for instance, like you did before, well,
25 we can test anyone, the real danger here is also they

1 can test anyone they want to for any reason.

2 CHIEF JUDGE LIPPMAN: Counsel - - -

3 MR. TURRO: They can single people out - -

4 -

5 JUDGE SMITH: Isn't that - - - isn't that
6 essential? Isn't random - - - isn't random testing
7 really the only way to protect the integrity of the
8 sport?

9 MR. TURRO: Well - - - well, first of all,
10 you could have random testing for horses who are
11 about to participate. But - - -

12 JUDGE SMITH: And your - - - your
13 definition of about to, is within the next five
14 minutes?

15 MR. TURRO: It's certainly not within the
16 next 180 days. And it's certainly not under the - -
17 -

18 CHIEF JUDGE LIPPMAN: Counsel, why - - -

19 MR. TURRO: - - - new regulations.

20 CHIEF JUDGE LIPPMAN: - - - isn't it - - -
21 why isn't it a good policy for the State of New York
22 to be able to test these horses - - - putting aside -
23 - - let's put aside for a second the Constitutional
24 arguments you're making - - - why isn't this just
25 good public policy? Why would we want the horses to

1 get hurt? The people driving them to get hurt? The
2 integrity of the sport question? Why - - - why isn't
3 this exactly what the state should be doing?

4 MR. TURRO: It may be. But that should
5 come from the legislature, Your Honor, not the
6 executive.

7 JUDGE SMITH: Let me - - - let me - - -

8 MR. TURRO: And I have no problem with what
9 you're saying.

10 JUDGE SMITH: - - - if I can just - - - I'm
11 just rephrasing the chief judge's question a
12 different way. If you're right and these regulations
13 aren't allowed, there's a very serious flaw in the
14 statutes that ought to be corrected quickly, correct?

15 MR. TURRO: And it's been five years, Your
16 Honor. And I don't disagree. And I think what has -
17 - - has to happen, it's got to come from the
18 legislature. We're not against it.

19 JUDGE ABDUS-SALAAM: Well, counsel - - -

20 MR. TURRO: But it's got to come from the
21 right place.

22 JUDGE ABDUS-SALAAM: - - - did - - -
23 counsel - - -

24 MR. TURRO: Yes.

25 JUDGE ABDUS-SALAAM: - - - was there a

1 comment period where - - - was the public allowed to
2 comment on these regulations - - - these proposed
3 regulations? Did you do that?

4 MR. TURRO: Yes, we did. And it's in the
5 record, Your Honor. We wrote letters to them. And
6 in fact, in the - - - in the last round of
7 regulations, after Ms. Arnold submitted to the court
8 the proposed regulations, I submitted our comment
9 letter - - - the comment letter of - - -

10 JUDGE ABDUS-SALAAM: Right.

11 MR. TURRO: - - - of Standardbred Owners as
12 well as other entities.

13 JUDGE PIGOTT: Well, speaking of - - -

14 MR. TURRO: Certainly there was comment.

15 JUDGE PIGOTT: Speaking - - - I'm sorry,
16 Judge.

17 JUDGE ABDUS-SALAAM: I just - - - and so
18 when they proposed the 180 days, you obviously had a
19 counterproposal, yes?

20 MR. TURRO: Yes. We - - - we object to it.
21 And in fact, there were actually active negotiations.
22 We - - - we didn't - - - we were trying to resolve
23 this, Your Honor.

24 JUDGE RIVERA: So doesn't that - - -
25 doesn't that really, then - - -

1 MR. TURRO: We were trying to work it out,
2 like you said.

3 JUDGE RIVERA: - - - I understand. But
4 doesn't this boil down to their expert says we got to
5 go to at least 180, you don't agree. Don't they have
6 the expertise and can't - - - aren't we supposed to
7 defer to that choice?

8 MR. TURRO: You're skipping a - - - you are
9 skipping - - -

10 JUDGE RIVERA: Oh.

11 MR. TURRO: - - - something.

12 JUDGE RIVERA: Go ahead.

13 MR. TURRO: Because I think you're skipping
14 301(2)(a). 301(2)(a) is the enabling statute. And
15 the enabling - - - what we're doing is we're ignoring
16 what "about to participate" means.

17 JUDGE SMITH: Well - - -

18 MR. TURRO: To allow - - -

19 JUDGE SMITH: - - - actually, if you look
20 at the context of "about to participate" - - -

21 MR. TURRO: Sure.

22 JUDGE SMITH: - - - I had it a minute ago,
23 it seems to say that it's to prevent people from
24 administering drugs to horses in - - - for races in
25 which - - - to enhance their success in races in

1 which they're about to participate. In that context,
2 shouldn't "about to participate" be read as identical
3 with the - - - with the time in advance when you can
4 influence a horse's action in the race? Isn't that
5 common sense?

6 MR. TURRO: Well, I have - - - as I read
7 this, Your Honor, and it says "the administration of
8 drugs or stimulants or other proper - - - improper
9 acts for the purpose of affecting the speed of
10 harness racehorses, in which they are about to
11 participate." That, to me - - -

12 JUDGE SMITH: So you're saying - - - are
13 you really saying - - - did the legislature really
14 mean to say that it's perfectly okay to administer a
15 drug to a horse to influence his outcome in a race as
16 long as he's not about to participate, he's only
17 going to participate week after next?

18 MR. TURRO: No. It has to be that they're
19 going to - - - about to participate - - - this is an
20 issue - - -

21 CHIEF JUDGE LIPPMAN: But - - - and if
22 you're not going to participate, you could just say
23 so.

24 MR. TURRO: And then you can't race for six
25 months.

1 CHIEF JUDGE LIPPMAN: So:

2 MR. TURRO: And many of these - - - many of
3 these - - -

4 CHIEF JUDGE LIPPMAN: But you're arguing
5 that they have to do it right on - - - on top of the
6 race. The - - - if you intend to race, if you can't
7 say this horse is not going to race, then why
8 shouldn't they be able to test?

9 MR. TURRO: Because many of these
10 medications also have recognized therapeutic value.
11 And in fact, that was something that, at the end of
12 the day, when Dr. Maylin - - - and they're being
13 challenged again, and they're going to be challenged
14 again this time. The way the - - - the way the
15 current regulations are, they only use - - - they
16 only use - - -

17 CHIEF JUDGE LIPPMAN: But they also have
18 damaging effects, right?

19 MR. TURRO: Some do, some don't. And your
20 - - - can't we say that about any - - -

21 JUDGE SMITH: But isn't that - - - isn't
22 that what we have commission for, to sort that out?

23 MR. TURRO: I'm sorry?

24 JUDGE SMITH: Isn't that what the
25 commission's job is to sort that out and figure these

1 are the good drugs, these are the bad drugs. And
2 they're going to make some mistakes; but somebody's
3 got to make that call.

4 MR. TURRO: But they've got to first have
5 the authority, Your Honor. They have to first be
6 given the authority.

7 JUDGE SMITH: Okay, but let me just be
8 clear. If I have a drug that I know, if I give it to
9 the horse today, one, it's going to help him in a
10 race ninety days from today; and two, it's going to
11 be undetectable - - - and Dr. Maylin says there are
12 such drugs - - - you're saying that there's - - -
13 that if I want to give that drug to my horse, there's
14 nothing that the commission can do about it?

15 MR. TURRO: Well, Dr. Maylin says that.
16 And the only one he refers to is EPO. And in the
17 Laterza case, it was effective.

18 JUDGE SMITH: Okay, but just take it - - -
19 take it as - - - whether Dr. - - -

20 MR. TURRO: You need some kind of - - -

21 JUDGE SMITH: - - - Maylin's - - - shh.
22 Whether Dr. Maylin said it or no - - -

23 MR. TURRO: Okay.

24 JUDGE SMITH: - - - take it as a
25 hypothetical, I've got - - - I've got a pill that I

1 can give my horse today that's going to make him a
2 very fast horse in three months, and it's going to
3 give him an unfair advantage over all the other
4 horses, and at that point, it's going to be
5 undetectable.

6 As the law exists today, there's nothing
7 whatever the commission can do to prevent that?

8 MR. TURRO: The - - - you would need an
9 emergency rule. You'd need - - - you'd need
10 legislative action. And you've had four years for
11 legislative action.

12 JUDGE SMITH: Okay.

13 CHIEF JUDGE LIPPMAN: Okay, thanks counsel.
14 Appreciate it.

15 MR. TURRO: Thank you, Your Honor.

16 CHIEF JUDGE LIPPMAN: Thank you both.

17 MR. TURRO: Thank you.

18 (Court is adjourned)
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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Ford v. New York state Racing and Wagering Board, No. 225 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

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Date: November 27, 2014