No. _____

In the Supreme Court of the United States

JERRY JAMGOTCHIAN,
Petitioner,

v.

KENTUCKY HORSE RACING COMMISSION; JOHN T. WARD, JR., in his official capacity as Executive Director, Kentucky Horse Racing Commission; ROBERT M. BECK, JR., in his official capacity as Chairman, Kentucky Horse Racing Commission; and TRACY FARMER, in his official capacity as Vice-Chair, Kentucky Horse Racing Commission

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Commerce Clause of the United States Constitution is worded as a grant of authority to Congress to regulate commerce among the several states; however, the Clause has long been understood to embody a negative restriction on permissible state regulation. *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). This restriction, otherwise referred to as the dormant Commerce Clause, has been interpreted by the Court to invalidate local laws that impose commercial barriers or ". . . discriminate against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 390 (1994).

The Kentucky Horse Racing Commission (the "KHRC" or "Commission") prohibits purchasers of Thoroughbred race horses at claiming races[1] in Kentucky from racing or transferring their horses out of state for a prescribed time period. *See* 810 KAR 1:015, Section 1 at Article 6(a)-(b) ("Article 6" or the "Regulation"). This restriction on racing at out-of-state facilities is known colloquially in the Thoroughbred racing industry as "claiming jail" or "jail time."[2]

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[1] In a claiming race, any of the entered horses may be purchased out of the race by properly licensed buyers.

[2] As discussed further *infra*, similar jail time laws have been enacted in twenty-seven of the thirty-eight states that permit wagering on horse races, thus making the constitutionality of Article 6 a matter of nationwide import. A compilation of these jail time laws is submitted as Appendix D. (App. D at 83a).

The question presented is whether the jail time restriction contained in Article 6 violates the Commerce Clause of the United States Constitution by impermissibly discriminating against interstate commerce.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was the Plaintiff-Appellant below, is Jerry Jamgotchian.

Respondents, who were the Defendants-Appellees below, are the Kentucky Horse Racing Commission; John T. Ward, Jr., in his official capacity as Executive Director, Kentucky Horse Racing Commission; Robert M. Beck, Jr., in his official capacity as Chairman, Kentucky Horse Racing Commission; and Tracy Farmer, in his official capacity as Vice-Chair, Kentucky Horse Racing Commission.

There are no non-governmental corporations involved in the case, therefore a Rule 29.6 disclosure is not required.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerry Jamgotchian respectfully submits this Petition for a Writ of Certiorari.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky is reported at 488 S.W.3d 594 (Ky. 2016), and reprinted at App. A. The opinion of the Court of Appeals is unpublished, available at 2014 Ky. App. Unpub. LEXIS 851 (Ky. Ct. App., Feb. 7, 2014), and reprinted at App. B.

JURISDICTION

The Supreme Court of Kentucky entered Judgment upholding the Regulation on May 5, 2016. The time for filing a petition for rehearing expired 20 days later on May 26, 2016. *See* Ky. R. Civ. P. 76.32(2). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Article I, § 8, cl. 3:

> The Congress shall have the power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

810 KAR 1:015, Section 1 at Article 6:

> (a) A horse claimed in a claiming race shall not be sold or transferred, wholly or in part, within thirty (30) days after the day it was claimed, except in another claiming race.

> (b) Unless the stewards grant permission for a claimed horse to enter and start at an overlapping or conflicting meeting in Kentucky, a horse shall not race elsewhere until the close of entries of the meeting at which it was claimed.

STATEMENT OF THE CASE

The Kentucky General Assembly created the KHRC as ". . . an independent agency of state government to regulate the conduct of horse racing and pari-mutuel wagering on horse racing and related activities within the Commonwealth of Kentucky." Ky. Rev. Stat. Ann. 230.225(1). The KHRC has the authority to enact administrative regulations that prescribe the terms under which horse racing shall be conducted in the Commonwealth. *See* Ky. Rev. Stat. Ann. 230.260(8) (the KHRC ". . . shall have full authority to prescribe necessary and reasonable administrative regulations and conditions under which horse racing at a horse race meeting shall be conducted in this state [.]").

Pursuant to this authority, the KHRC enacted Article 6 (otherwise referred to herein as the "Regulation"), which provides as follows:

> A horse claimed in a claiming race shall not be transferred, wholly or in part, within thirty (30) days after the day it was claimed, except in another claiming race. Unless the stewards grant permission for a claimed horse to enter and start at an overlapping or conflicting meeting in Kentucky, a horse *shall not race*

> *elsewhere* until the close of entries of the meeting at which it was claimed.

810 KAR 1:015, Section 1 at Article 6(a)-(b) (emphasis added).

In addition to the prohibition of sale and transfer contained in subsection (a) of the Regulation, the practical effect of subsection (b) is that Thoroughbred horses claimed in a Kentucky claiming race are prohibited from racing outside of Kentucky until the meet has closed, while nevertheless being permitted to race immediately within the Commonwealth of Kentucky. *Id*. The period of extraterritorial ineligibility contained in the Regulation is known in the horse racing industry as "jail time" or "claiming jail," because the owner of a newly claimed horse is prohibited from participating in races at other meets in the United States until the period of ineligibility described in Article 6 has expired.[3] According to KHRC regulatory policy, persons who violate Article 6 are subject to fines, license suspension, and other sanctions. *See generally* 810 KAR 1:028. This is exactly what happened in the case of the Petitioner, Jerry Jamgotchian.

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[3] For example, if a Thoroughbred is claimed at Churchill Downs in Kentucky, an owner can immediately race that horse at Churchill Downs, but is prohibited by Article 6 from racing the horse at any other track outside of Kentucky until the meet has closed. In Kentucky, this jail time period can extend upwards of three months. (App. A at 46, n. 15).

A. Factual Background.

On May 21, 2011, Jamgotchian claimed the horse ROCHITTA for $42,400.00 in a claiming race at Churchill Downs ("Churchill"), a private racetrack in Louisville, Kentucky. The corresponding Churchill meet began on April 30, 2011 and ended on July 4, 2011. Because of the requirements of Article 6, Jamgotchian was restricted from racing ROCHITTA at any racetrack outside Kentucky until after the Churchill meet ended on July 4, 2011 – more than a month after Jamgotchian claimed his horse.

Despite the jail time imposed by the Regulation, Jamgotchian entered ROCHITTA at several races scheduled for June of 2011 in Pennsylvania. On May 31, 2011, Penn National Race Course Racing Secretary David F. Bailey ("Penn National" and "Bailey," respectively) discovered that Jamgotchian had tried to enter ROCHITTA in a June 4, 2011 race at that facility. This discovery prompted Bailey to contact Ben Huffman ("Huffman"), Racing Secretary at Churchill, to obtain more details concerning Kentucky's jail time requirements. In response to this inquiry, Huffman informed Bailey that Article 6 prohibited ROCHITTA's entry, because the horse could not race anywhere else, other than in Kentucky, until all entries were taken for the last day of the Churchill meet the following month.

Based on the information Bailey obtained from Huffman, and upon learning that the meet where Jamgotchian claimed ROCHITTA did not end until July 4, 2011, Bailey refused the entry of ROCHITTA to race at Penn National, and Jamgotchian forfeited his entry fee. Soon afterward, Bailey told Jamgotchian

that ROCHITTA was denied entry because of the restrictions imposed by Article 6.

B. Proceedings Below.

1. The Trial Court Upholds The Regulation On Cross-Motions For Summary Judgment And The Court of Appeals Affirms.

On July 13, 2011, Jamgotchian filed suit in the Franklin Circuit Court against the Respondents seeking a declaration that Article 6 violates the dormant Commerce Clause. Jamgotchian also sought an injunction to prevent the KHRC and its agents from taking further action to implement or enforce Article 6 against him and others. Because the constitutionality of Article 6 is a matter of law, the Parties submitted the case for decision on Cross-Motions for Summary Judgment and supporting Memoranda.[4]

In its Opinion and Order finding that the Regulation does not violate the dormant Commerce Clause, the Franklin Circuit Court held that while

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[4] Pursuant to Supreme Court Rule 14-1(g)(i), Jamgotchian states that the federal question raised by this Petition was initially presented and considered through the parties' Cross-Motions for Summary Judgment before the Franklin Circuit Court. The Franklin Circuit Court's Opinion and Order, which granted Summary Judgment for the Respondents and found Article 6 to be constitutional, was timely appealed to the Kentucky Court of Appeals, whose ruling was later affirmed by the Supreme Court of Kentucky on discretionary review. Given the length of the discussion by the lower courts of the federal question presented by this Petition, the opinions of all three lower courts are including in the Appendix at App. A-C.

Article 6 may have some impact on interstate commerce, it is not discriminatory on its face and is therefore not subject to the virtual *per se* rule of invalidity applied by the United States Supreme Court to facially discriminatory regulations. (App. C at 78-79). Further, citing *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) and *Dept. of Revenue v. Davis*, 553 U.S. 328 (2008), the Franklin Circuit Court found that the Regulation met the criteria for a "traditional government function" exception purportedly created by those cases:[5]

> While the state is not a market participant [in horse racing] as that term has been used in cases under the Commerce Clause, there can be little doubt that the pervasive role of the state in regulating the horse racing industry meets the broad criteria for traditional government function contemplated by the [United States] Supreme Court. (App. C at 74).

Accordingly, the Trial Court entered Summary Judgment in favor of Respondents, ultimately

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[5] While the United States Supreme Court has clearly rejected the notion that differentiation between "traditional" and "non-traditional" government functions can be a dispositive rule of adjudication, certain cases such as *United Haulers, supra*,550 U.S. 330 (2007) and *Davis*, *supra*, 553 U.S. 328 (2008) have allowed discriminatory regulations to survive where laws pertaining to government functions (e.g., waste management, *see United Haulers*) or governmental market participation (e.g., issuance of bonds, *see Davis*) favor the government's provision of public services rather than local private interests. *See Davis*, *supra*, 553 U.S. at 343.

concluding that Jamgotchian ". . . should not be allowed to obtain the benefits of the claiming races without accepting the relatively slight burden of restrictions on racing the claimed horse at other tracks until the end of the meet." (App. C at 81).

Like the Trial Court, the Court of Appeals, in a unanimous opinion, found that because the Regulation involves a traditional government function – that is, that the KHRC's *regulation* of horse racing in and of itself is a traditional government function – the Regulation is not subject to the rigorous scrutiny generally applied by this Court to laws which benefit in-state interests and burden out-of-state interests. (App. B at 63-64). Specifically, the Court of Appeals stated that ". . . the first step in determining the constitutionality of the Regulation is deciding whether it involves a traditional government function[,]" and it then used this metric as a bright-line rule for exempting the Regulation from the rigorous scrutiny normally applied by this Court to regulations that discriminate against interstate commerce and are therefore invalid under the dormant Commerce Clause. (App. B at 59-60). The Court of Appeals further justified its affirmance on the basis that the Regulation represents a legitimate exercise of Kentucky's police power, and that "[o]ut of the thirty-eight states that permit wagering on horse racing, twenty-seven states have a claiming law similar to Kentucky's regulation." (App. B. at 63).

2. The Supreme Court Of Kentucky Upholds The Regulation, But On Entirely Different Grounds.

In response to the ruling of the Court of Appeals, Jamgotchian filed a Motion for Discretionary Review with the Supreme Court of Kentucky, which the court granted on October 15, 2014. While the Supreme Court of Kentucky found, like the Court of Appeals before it, that the Regulation passed constitutional muster, it rejected the analysis of the Court of Appeals and reached its conclusion on entirely different grounds.

Agreeing with the Petitioner, the Supreme Court of Kentucky found that *United Haulers* and *Davis* were not controlling because " . . . unlike the municipal waste processing at issue in *United Haulers* and the municipal bonds at the heart of *Davis*, thoroughbred horse racing is not, in Kentucky at any rate, a government function." (App. A at 26). Instead, the court found that

> . . . regulations such as the Article 6 restrictions at issue, regulations which favor, or at least appear to favor, Kentucky's race tracks by imposing some limits on a claiming owner's ability to race a claimer at out-of-state tracks do not get a Commerce Clause pass under *United Haulers* and *Davis*. They must rather, as Jamgotchian insists, undergo the more standard sort of Commerce Clause analysis. *Id.*

Despite finding that the Regulation is properly subject to strict scrutiny because of a "modicum of discrimination" in the Regulation, the Supreme Court of Kentucky nevertheless upheld the Regulation based

on "its *minimal effect*[6] on the realm of commerce in which it operates, namely thoroughbred horses[,]" and because its restrictions did not have a "comprehensive and pervasive" effect on commerce. (App. A at 21) (emphasis added).

The Supreme Court of Kentucky's judgment is final because the Petitioner did not seek rehearing. Accordingly, the Petitioner now seeks review of the Supreme Court of Kentucky's holding that Article 6 does not violate the Commerce Clause of the United States Constitution.

REASONS FOR GRANTING THE PETITION

The Court should grant the Petition because the Supreme Court of Kentucky resolved an important federal issue in a way that conflicts with the relevant decisions of this Court. Indeed, this matter presents a significant constitutional question concerning the permissible scope of state regulatory power within the context of an industry that is not only important to the Commonwealth of Kentucky, but also to the thirty-seven other states which permit wagering on race horses, as well as the many thousands of private individuals who participate in this national industry.

As described *supra*, twenty-seven of the thirty-eight states with legalized gambling on horse races have enacted a jail time rule similar to Article 6 which temporarily prohibits the export of horses to other states for purposes of sale and racing. (App. D at 83-97). Accordingly, this Court's review will not only

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[6] The KHRC did not submit any evidence of record concerning the actual effects of the Regulation on interstate commerce.

address the constitutionality of Article 6; but, to the extent Petitioner is correct that the jail time restriction in Article 6 is unconstitutional, will prevent the continued enactment and/or enforcement of a specific category of regulation that already exists in the majority of states in the country. *See generally* App. D.

I. The Court Should Grant The Petition Because The Supreme Court Of Kentucky Analyzed And Applied The Dormant Commerce Clause In A Way That Conflicts With The Relevant Decisions Of This Court.

The dormant Commerce Clause has been interpreted to invalidate local laws that impose economic or commercial barriers or ". . . discriminate against an article of commerce by reasons of its origin or destination out of State." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). In considering whether a law violates the dormant Commerce Clause, the precedent of this Court holds that the first step is questioning whether the law discriminates against interstate commerce. *See United Haulers, supra* 550 U.S. at 338. In this context, "'discrimination' simply means differential treatment of in-state and out-of state economic interests that benefits the former and burdens the latter." *Id.* Such discriminatory laws are virtually *per se* invalid, except in narrow instances where the defendant can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. *See C & A Carbone, supra*, 511 U.S. at 392 (1994).

Despite concluding that Article 6 imposed a "modicum of discrimination," the Supreme Court of Kentucky shifted away from the virtual *per se* rule of

invalidity described by this Court, instead resorting to an improvised quantitative analysis of the extent to which Article 6 discriminates against interstate commerce:

> Here, Jamgotchian simply had to wait thirty days to transfer his Kentucky-claimed horse, and, only had to wait forty-two days (May 11 to July 1) to race her in another state . . . [i]n sum, however complex and confusing dormant Commerce Clause jurisprudence may be, we are confident that it is not aimed at and does not prohibit a temporary restriction encountered as part of a voluntarily-agreed-to sales transaction, a transaction with inherent commercial advantages to the purchaser not available if that purchaser proceeds in other available ways, *i.e.*, a private sale or public auction. (App. A at 46, 48).

In reaching the above decision, the court did not address the fact that the Respondents had not produced any evidence of record that nondiscriminatory means were unavailable for advancing the stated purpose of the Regulation. In *Granholm v. Heald*, 544 U.S. 460 (2005), this Court held that the unavailability of nondiscriminatory means for advancing the State's interest must be justified through "concrete record evidence," not mere speculation that the discrimination is justified. *Id.* at 492-93.

The Supreme Court of Kentucky readily acknowledged that the Article 6 restrictions are triggered by the acquisition of property in Kentucky, and that the Regulation temporarily limits the export of that property and encourages its use in Kentucky.

(App. A. at 45). The holding of the United States Supreme Court concerning this type of regulatory action is clear: "[s]tate and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *C & A Carbone*, *supra*, 511 U.S. at 394. Jamgotchian therefore respectfully requests that his Petition be granted to remedy the Supreme Court of Kentucky's misapplication of federal law concerning the Commerce Clause.

II. The Court Should Grant The Petition Because Laws Similar To Article 6 Are Enacted In The Majority Of States.

In addition to challenging Article 6, Jamgotchian previously filed a similar legal action against the California Horse Racing Board (the "CHRB") to address California's jail time regulation. In that instance, after a determination by the California Attorney General in an informal opinion (the "California Opinion") that proposed changes to California's jail time restrictions violated the Commerce Clause, the CHRB voluntarily ceased enforcement of its jail time rule. *See generally* App. E.

Despite California's decision to stop enforcing its jail time regulation, other states have not followed suit. Petitioner has included in the Appendix, in pertinent part, the jail time regulations from the twenty-seven other states with regulations similar to Article 6. *See* App. D. For example, in Colorado, "[a] claimed horse shall not race elsewhere for a period of thirty (30) days or until after the close of the meet, whichever comes first . . .[;]" and in Massachusetts, "[a] claimed horse shall not race elsewhere until after the close of the

meeting at which it was claimed or until 60 calendar days the day after the claim, whichever comes first." *See* 1 CCR 208-1 Ch. 8:118; 205 CMR 4.06(5) (App. D at 85, 89). As acknowledged by the Respondents below, the purpose of such regulations is to maintain the health of local industry by ensuring adequate fields of horses on which patrons can wager.

Given that regulations similar to Article 6 are widespread and implicate a multi billion-dollar industry in the United States, the question presented in this case is of sufficient import to warrant the attention of this Court. If the Kentucky Supreme Court is in error and its holding is not reviewed and reversed, the ruling will entrench the analogous unconstitutional regulations that exist in at least twenty-seven other states and will provide authority for new regulations which discriminate against interstate commerce. On the other hand, to the extent this Court is inclined to rule that Article 6 impermissibly discriminates against interstate commerce, this case presents an opportunity for the Court to effect a sweeping overhaul of a highly regulated and commercially influential industry, and will prevent further propagation of similar unconstitutional regulations in the future.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 2, 2016

APPENDIX

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APPENDIX A

TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

2014-SC-000108-DG

[Filed May 5, 2016]

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KENTUCKY HORSE RACING COMMISSION; JOHN T. WARD, JR., IN HIS OFFICIAL CAPACITY, AS EXECUTIVE DIRECTOR, KENTUCKY HORSE RACING COMMISSION; ROBERT M. BECK, JR., IN HIS OFFICIAL CAPACITY AS CHAIRMAN, KENTUCKY HORSE RACING COMMISSION; AND TRACY FARMER, IN HIS OFFICIAL CAPACITY AS VICE-CHAIR, KENTUCKY HORSE RACING COMMISSION APPELLEES	))))))))

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2012-CA-002154-MR
FRANKLIN CIRCUIT COURT NO. 11-CI-01047

RENDERED: MAY 5, 2016

OPINION OF THE COURT BY JUSTICE HUGHES

AFFIRMING

On May 21, 2011, Appellant Jerry Jamgotchian claimed Rochitta, a bay filly, for $42,400 in a claiming race at Churchill Downs in Louisville, Kentucky. Foaled February 26, 2008 in Pennsylvania, Rochitta was first purchased at the 2009 Keeneland Yearling Sales in Lexington, Kentucky for $160,000 by Rabbah Bloodstock. Prior to her debut at Churchill Downs, Rochitta had run previously at Saratoga Race Course and Belmont Park in New York as well as Keeneland Racecourse and Turfway Park in Kentucky. She had never finished better than third place (in two races at Turfway) prior to the maiden claiming race at Churchill Downs where she finished second. After being claimed by Jamgotchian on May 21, 2011, Rochitta's next race was on July 8, 2011 at Presque Isle Downs in Erie, Pennsylvania where she again had a second place finish. She raced three more times that summer at Presque Isle before heading to the Mountaineer Racetrack in Chester, West Virginia where she claimed her first victory on October 14, 2011. Her next and final races were at Tampa Bay Downs in Florida in December 2011 and January 2012. Having concluded her multi-state racing career, Rochitta was shipped to the Tattersalls December 2012 Mares Sale in Newmarket, England by her new owner where she sold for $480,330. At sale, Rochitta was in foal, having

been covered by Hat Trick, a Japanese-bred sire. She was purchased by Mattock Equine of Kildare, Ireland.[1]

Rochitta's life and times are of interest to this Court because she is the basis for Jerry Jamgotchian's claim that certain Kentucky thoroughbred racing regulations violate the Commerce Clause of the United States Constitution. The regulations challenged provide in pertinent part:

> (1) In claiming races a horse shall be subject to claim for its entered price by a licensed owner in good standing, or by the holder of a certificate of eligibility to claim. . . .
>
> * * * * * *
>
> (6)(a) A horse claimed in a claiming race shall not be sold or transferred, wholly or in part, within thirty (30) days after the day it was claimed, except in another claiming race.
>
> (b) Unless the stewards grant permission for a claimed horse to enter and start at an overlapping or conflicting meeting in Kentucky,

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[1] Rochitta's history is derived from http://www.equibase.com (last visited 4/1/2016). Equibase Company is a partnership between subsidiaries of the Jockey Club and the Thoroughbred Racing Associations of North America and its website serves as the thoroughbred industry's official database. Information regarding the Tattersalls December 2012 Mares Sale is derived from http://www.tattersalls.com/archived-catalogues.ph. It appears that Jamgotchian sold Rochitta in early 2012, shortly after her last career start at Tampa Bay Downs, to Baroda & Colbinstown Studs of Ireland. Ray Paulick, *"Who says you can't make money in horse racing?"* Paulick Report (Dec. 7, 2012), http://www.paulickreport.com.

> a horse shall not race elsewhere until the close of entries of the meeting at which it was claimed.

810 Kentucky Administrative Regulations (KAR) 1:015, §1 (1), (6). Violations of these provisions can, among other things, result in the purchaser of the horse being fined or having his or her Kentucky owner's license suspended. 810 KAR 1:028.

The question this case poses is whether these restrictions on the transfer and racing of claimed thoroughbreds, restrictions often referred to in the industry as the "claiming jail" (and referred to herein as the "Article 6 restrictions" or simply as "Article 6"), run afoul of the so-called "negative" or "dormant" Commerce Clause. Dormant Commerce Clause jurisprudence derives from the limitation on state regulatory authority that the United States Supreme Court has found implicit in the federal Constitution's Commerce Clause (U.S. Const., Art. I, § 8, cl. 3), which grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." We are convinced that the challenged Kentucky regulations—regulations similar (often identical) to regulations in effect in the large majority of states that allow wagering on thoroughbred horse races—do not conflict with the federal Constitution's insistence on an interstate commerce unburdened by state-erected barriers against that commerce.

The challenged regulations are merely evolved, updated versions of regulations that have applied to "selling" or "claiming" - type horse races for hundreds of years, but, more importantly, they are by no means

pervasive and unavoidable governmental restrictions because any thoroughbred horse (including Rochitta as her history illustrates) can be bought and sold (assuming a willing buyer and willing seller) in Kentucky without regard to these regulations through either a private sale transaction or at auction. In essence, the buyer who claims a horse at a licensed Kentucky race track has voluntarily chosen a form of purchase that is closely regulated (indeed, the sale is enforced) by the state racing authority and, in doing so, has contracted for the horse at a guaranteed pre-race price binding on the horse's owner and the buyer, both of whom receive advantages in the carefully structured claiming process but also agree to certain limited restrictions. And in fact, the Article 6 restrictions which claiming owners such as Jamgotchian agree to by presenting a binding pre-race claim are fleeting; the claiming jail has quickly vanishing bars, as illustrated by Rochitta's run at Presque Isle in Pennsylvania a few weeks after her Churchill Downs debut.

Turning to the constitutional issues, we agree with the lower courts that the Commonwealth is not actually a market participant as that concept is currently understood in dormant Commerce Clause jurisprudence, but we cannot agree with their conclusions that regulating thoroughbred racing is itself a governmental function that results in all racing regulations getting the usual "government" pass under the Commerce Clause. We do recognize, however, as did the lower courts, that thoroughbred racing only exists because the Commonwealth allows it to exist with extensive regulation of racetracks and the requisite pari-mutuel betting (legalized gambling) necessary to racing's survival. The uniqueness of this

industry, an industry that depends on the blessing of the state for its very existence, but more importantly the limited scope and terms of the voluntarily-encountered Article 6 regulation demand the nuanced approach to dormant Commerce Clause analysis which has characterized several United States Supreme Court opinions. So, while Jamgotchian, as a claiming owner, has a sufficient "case or controversy" to sustain this action, he does not have a winning claim. When Article 6 is placed in its proper context it is essentially a contract term that has evolved, not for economic protectionism, but to advance the underlying purpose of a claiming race, the classification of thoroughbreds for racing purposes. Jamgotchian knowingly and voluntarily agreed to this limited restriction when he sought the benefits of claiming Rochitta in a regulated claiming race rather than buying her in a private sale transaction or at auction. In the final analysis, Article 6 survives the strict scrutiny applicable to laws that appear facially discriminatory, and, accordingly, we affirm the lower courts.

RELEVANT FACTS

Jamgotchian is, or at least was in 2011 when this case arose, a California resident and a leading owner of thoroughbred race horses. According to Jamgotchian's complaint, he owned at that time in excess of eighty thoroughbred horses, and in the first half of 2011 his horses were so successful at winning purses that he ranked as one of the United States' seventy winningest thoroughbred owners. Among the tracks where Jamgotchian was licensed and where his horses raced was Churchill Downs, a race track licensed by the Commonwealth of Kentucky.

In this country presently, thoroughbred horse racing is conducted for the most part by licensed racing associations[2] at "tracks" during periods referred to as "meets" or "meetings" assigned to the association by the state agency responsible for racing regulation. 810 KAR 1:001 (40) (defining "meeting" as "the entire period of consecutive days, exclusive of dark days, granted by the commission [Horse Racing Commission] to a licensed association for the conduct of live horse racing.") In Kentucky, the agency that regulates racing is the Kentucky Horse Racing Commission (HRC or the Commission),[3] the appellee in this case and the agency that promulgated the Article 6 restrictions at issue. In 2011, HRC assigned to Churchill Downs the period from April 30 through July 4 for its Spring meeting. During that meet, on May 21, 2011, Jamgotchian, pursuant to Kentucky's claiming regulations, claimed

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[2] The organization of racing associations—whether public or private, and if private whether for-profit or not-for-profit—varies among the thirty-eight or so states where horse racing is allowed, but in Kentucky private, for-profit corporations own and operate the state's licensed thoroughbred tracks. Kentucky Revised Statutes (KRS) 230.210; KRS 230.300. As for thoroughbred racing regulation in the United States generally see Alexander M. Waldrop, Karl M. Norbert, John W. Polonis, *Horse Racing Regulatory Reform Through Constructive Engagement by Industry Stakeholders with State Regulators*, 4 Ky. J. Equine, Agric. & Nat. Resources L. 389 (2012) (Waldrop).

[3] See KRS 12.020 (making the Horse Racing Commission a part of the Public Protection Cabinet) and KRS 230.225 (creating the Kentucky Horse Racing Commission "as an independent agency of state government to regulate the conduct of horse racing and pari-mutuel wagering on horse racing, and related activities within the Commonwealth of Kentucky").

Rochitta prior to her start in a $40,000 claiming race. A "claiming race" is "any race in which every horse running in the race may be transferred in conformity with 810 KAR Chapter 1," the thoroughbred racing chapter of Kentucky's administrative regulations. 810 KAR 1:001 (12). As noted above, under Chapter 1 (810 KAR 1:015 Section 1 (1)), "[i]n claiming races a horse shall be subject to claim for its entered price by a licensed owner in good standing." Jamgotchian claimed Rochitta for the $40,000 claiming price and also paid taxes of $2,400, for a total of $42,400.

As a claimer, Rochitta was subject to the "Article 6" restrictions, and thus was not to be sold or transferred for thirty days, except via "another claiming race," and, absent steward permission for an in-state exception, she was not to race "elsewhere," *i.e.,* anyplace other than Churchill Downs, until the close of entries for Churchill's spring meet (July 1, 2011, according to the Commission). Notwithstanding Article 6, in May and June, 2011, prior to the end of Churchill's meeting, Jamgotchian sought to enter Rochitta in several races in Pennsylvania, including the Lyphard Stakes run in mid-June at the Penn National Race Course in Grantville, Pennsylvania, and a race (apparently a claiming race) on June 28, 2011 at Presque Isle Downs in Erie, Pennsylvania. As it happened, Rochitta did not run in any of those races,[4] and the Commission never

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[4] The parties dispute why exactly Rochitta did not run in any of the Pennsylvania races. Jamgotchian claims that with respect to at least some of the races the Article 6 restrictions interfered; the Commission maintains that in several instances, at least, the race was simply cancelled when it failed to attract a sufficient number of entrants, so that Article 6 had nothing to do with Rochitta's not

issued sanctions against Jamgotchian. Nevertheless, in July 2011, Jamgotchian filed a Complaint in the Franklin Circuit Court against HRC and certain of its officers seeking, among other things, a declaration that by precluding him (via the threatened sanctions) from racing his Kentucky-claimed horse "elsewhere,"—including anywhere outside Kentucky—for the duration of the pertinent meet the Article 6 restrictions violate the Commerce Clause either because they discriminate against interstate commerce or because they burden that commerce unreasonably.

After some initial skirmishing over Jamgotchian's standing, the ripeness of his claim, and his claim's vulnerability to the Commission's sovereign immunity —all questions answered in Jamgotchian's favor—the parties submitted the Commerce Clause question on competing motions for summary judgment. The trial court resolved that question in favor of the Commission.

The trial court explained its conclusion by invoking two lines of analysis. Under the first, a line one might refer to as standard dormant Commerce Clause analysis, the court began by asking whether the challenged regulations discriminate against interstate commerce. It determined that they do not, since they apply in the same way to all owners claiming horses, without distinction between Kentucky residents and non-residents such as Jamgotchian. In light of that determination, the trial court then asked whether the

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racing. The trial court detected a measure of truth in both accounts, but held that Article 6 was sufficiently implicated to permit the case to go forward.

regulations imposed any incidental burdens on interstate commerce that outweighed their benefits, whether interstate or intrastate. In the court's view, the Article 6 restrictions, because of their limited duration—about three months maximum—have a minimal effect, if any, on interstate commerce, whereas their benefit to Kentucky's thoroughbred racing industry, an industry, of course, in which Kentucky takes a keen interest, both economically and culturally, is substantial. As the trial court saw it, the Article 6 restrictions, by tending to counteract one of the drains on the supply of horses competing at a given meet, encourage larger race fields at that meet, which in turn increases the interest in and the amount of money wagered on the meet's races, a benefit resulting in larger purses, payoffs, handle,[5] and tax receipts to all the interests involved. Under standard Commerce Clause analysis, the trial court concluded, the Article 6 restrictions pass constitutional muster.

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[5] The regulations define "handle" as "the aggregate of all pari-mutuel pools, excluding refundable wagers." 810 KAR 1:001 (29). In the pari-mutuel system of wagering, at least as practiced in Kentucky, the associations do not participate in the wagering, but are paid commissions based on the handle. KRS 230.3615. The pari-mutuel or French pool form of betting now used nationwide was first introduced in Kentucky. Joan S. Howland, *Let's Not "Spit the Bit" in Defense of the Law of the Horse: The Historical and Legal Development of American Thoroughbred Racing,"* 14 Marq. Sports L. Rev. 473, 496-97 (2004) (Howland). See also *Grinstead v. Kirby*, 110 S.W. 247, 33 Ky. L. Rep. 287 (1908) (concluding that because licensed Kentucky race tracks were expressly authorized by statute to sell "combination or French pools" those participating by betting could not be prosecuted).

That conclusion was bolstered, in the trial court's view, by a second line of dormant Commerce-Clause analysis, a line the United States Supreme Court introduced relatively recently in the cases *United Haulers Ass'n. Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S 330 (2007) and *Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008). As the trial court characterized them, those cases stand for the proposition that "government action[s] in discharging traditional government functions are outside the scope of the restrictions of the Commerce Clause." *Jamgotchian v. Ky. Horse Racing Comm'n*, 11-CI-01047, p. 4 (Nov. 29, 2012). Rather than the standard dormant Commerce-Clause analysis, under these cases, according to the trial court, even a discriminatory state regulation does not violate the dormant Commerce Clause provided the discrimination favors the state itself in its pursuit of one of its "traditional government functions," as opposed to the more typical protectionism set up in favor of local private interests.

The trial court acknowledged that horse racing in Kentucky is conducted by private, for-profit corporations. In its view, the alternative analysis of *United Haulers* and *Davis* still applied, however, because, notwithstanding that private interest, the horse racing industry is, and for more than a century bas been, so heavily regulated and so infused with a public interest as to "meet[] the broad criteria for traditional government function contemplated by the Supreme Court." *Jamgotchian* at p. 5. In other words, even if there were some doubt about the validity of the Article 6 restrictions under standard dormant Commerce Clause analysis, that doubt would vanish in light of the Supreme Court's deference in *United*

Haulers and *Davis* to the states' "traditional government functions," of which, in Kentucky at least, regulated thoroughbred horse racing is one.

Jamgotchian appealed from that decision and the Court of Appeals affirmed. If anything, that Court embraced even more enthusiastically than had the trial court the traditional-government-function line of analysis. It agreed with the trial court that "the regulation of horse racing is, and always has been, a traditional government function, at least since 1894 in Kentucky." *Jamgotchian v. Kentucky Horse Racing Comm'n*, No. 2012-CA-002154-MR, p. 7 (Feb. 7, 2014). And having made the "involvement" of a traditional government function the first question to address in determining the Commerce-Clause validity of a challenged regulation, the Court of Appeals panel relegated the standard Commerce Clause concerns of discrimination against and undue burden upon interstate commerce to roles as minor factors of no real concern when states are engaged in their "traditional functions."

We granted Jamgotchian's motion for discretionary review to address his dormant Commerce Clause assertions but are compelled first to address the Commission's assertion that given the relevant facts surrounding Rochitta's attempts to race in Pennsylvania in the summer of 2011, there is no case or controversy for this Court to consider.

ANALYSIS

As noted above, the constitutional question at the heart of this case was presented to the trial court by way of the parties' competing motions for summary

judgment. Summary judgment is appropriate if, but only if, construed favorably to the non-movant, the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. Under our rule, summary judgment should not be granted if it appears that the non-movant has any realistic chance of producing evidence that would warrant a favorable judgment. *Labor Ready, Inc. v. Johnston*, 289 S.W.3d 200, 203 (Ky. 2009) (citing *Steelvest, Inc. v. Scansteel Service Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991)). We review the trial court's "no issue of material fact" determination without deference under that "any realistic chance" standard. *Stilger v. Flint*, 391 S.W.3d 751, 753 (Ky. 2013) (citing *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010)). The trial court's "matter of law" conclusions, of course, including its construction of statutory and constitutional provisions, we review de novo. *Nash v. Campbell Cty. Fiscal Court*, 345 S.W.3d 811, 816 (Ky. 2011) ("[O]n appeal of a summary judgment, . . . [i]ssues of law are reviewed de novo."); *Bd. of Educ. v. Hurley*, 396 S.W.3d 879, 885 (Ky. 2013) (noting that statutory construction is a matter of law); *Greene v. Commonwealth*, 349 S.W.3d 892, 898 (Ky. 2011) (constitutional construction is a matter of law). Here, once past the "case or controversy" question noted above, the only material question is the purely legal one concerning the constitutionality of Article 6.

I. Sufficient Controversy Exists to Address the Constitutional Issue.

The Commission contends that Kentucky courts (this Court as well as the lower courts) do "not have

jurisdiction over Jamgotchian's declaratory judgment claim because there is no case or controversy." The Commission argues, essentially, that while the Rochitta incident may have caused some sparks it did not result in flames: notwithstanding Jamgotchian's threats and attempts to race Rochitta in Pennsylvania, she did not race "elsewhere" during her Churchill "jail" period, and consequently the Commission never sanctioned Jamgotchian. Without some such concrete injury or consequence to complain about, the Commission insists, Jamgotchian's assertions that he *might* have been sanctioned in conjunction with Rochitta or that he *might* face sanctions in the future in conjunction with some future Kentucky-claimed horse are simply too speculative to satisfy the requirement that courts address only "actual" controversies, not speculative or academic ones. We agree with the courts below, however, that Jamgotchian's eligibility as a licensed owner in good standing to claim horses at Churchill Downs renders his interest in the constitutionality of Kentucky's claiming regulations sufficiently concrete to satisfy Kentucky Revised Statute (KRS) 418.040, our declaratory judgment statute. That statute allows a plaintiff to ask for, and a court to make, a declaration of rights provided that the court otherwise has jurisdiction and "it is made to appear that an actual controversy exists."

As we explained in *Jarvis v. National City*, 410 S.W.3d 148, 153 (Ky. 2013), a declaratory judgment action allows persons within, or arguably within, the scope of a statute "to have their rights and obligations [under the statute] declared without being forced to act improperly and initiate litigation after an injury has

occurred." In that case, the corporate trustees of testamentary trusts sought a declaratory judgment regarding their right to charge reasonable fees for their services rather than being constrained by a rigid fee structure imposed by a since-repealed statute in effect when the trusts were created. The trustees and the beneficiaries of the trusts were of differing views regarding allowable trustee compensation so the risk of "wrong action" was real and the controversy was "actual," not merely theoretical or hypothetical. By contrast, in *Foley v. Commonwealth*, 306 S.W.3d 28 (Ky. 2010), this Court upheld the denial of a motion for a declaration that Kentucky's self-defense statutes were unconstitutional, finding no justiciable case or controversy. The denial was proper in *Foley* because the challenged self-defense statutes had no foreseeable application to the movant himself.

This case is far more like *Jarvis* than like *Foley*. Jamgotchian was, and apparently remains, an eligible claimant under Kentucky's thoroughbred claiming rules with a demonstrated interest in exercising that eligibility and exercising it in a way the Commission is apt to deem "wrongful." Eliminating or minimizing such a genuine risk of "wrong" action by any of the parties "is the very purpose of declaratory judgment actions." *Jarvis*, 410 S.W.3d at 153. Thus, as the Court of Appeals correctly determined, the trial court did not exceed its jurisdiction under KRS 418.040 by entertaining Jamgotchian's complaint.[6]

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[6] As for HRC's initial challenge to Jamgotchian's standing, we note particularly *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), in which the Court discusses the interests required to establish standing to bring a Commerce Clause challenge against an

II. The Dormant Commerce Clause Doctrine Generally.

In *Department of Revenue of Kentucky v. Davis*, Justice Souter summarized the Supreme Court's modern dormant Commerce Clause doctrine and its standard test for Commerce Clause compliance as follows:

> The Commerce Clause empowers Congress "[t]o regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, and although its terms do not expressly restrain "the several States" in any way, we have sensed a negative implication in the provision since the early days[.] . . . The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism[,] that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. . . . The point is to effectuate the Framers' purpose to prevent a State from retreating into [the] economic isolation . . . that had plagued relations among the Colonies and later among the States under the Articles of Confederation[.] . . . The law has had to respect

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allegedly discriminatory state law. It notes that "cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates" but may extend to those, such as customers of discriminated against companies, who indirectly bear the burdens of that discrimination. Jamgotchian's standing is appropriately established along these lines, since arguably he bears a cognizable burden stemming from Kentucky's alleged discrimination, via Article 6, against non-Kentucky race tracks.

> a cross-purpose as well, for the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy. . . . Under the resulting protocol for dormant Commerce Clause analysis, we ask whether a challenged law discriminates against interstate commerce. . . . A discriminatory law is virtually *per se* invalid, . . . and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives[.] . . . Absent discrimination for the forbidden purpose, however, the law will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.

553 U.S. at 337-39 (citations and internal quotation marks omitted). Thus summarized, Commerce Clause analysis seems straight forward enough. First, is the challenged provision discriminatory, *i.e.,* does it intend or bring about "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter'"? *United Haulers*, 550 U.S. at 338 (quoting *Oregon Waste Sys., Inc. v. Dep't of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994)). If so, the provision is considered *per se* invalid unless the state overcomes that presumption by demonstrating a legitimate (*i.e.*, nonprotectionist) purpose for the discrimination and by showing that the purpose cannot be adequately served in a different, non-discriminatory way. If not discriminatory on its face, the challenged provision is valid, unless the challenger can show that, although seemingly non-discriminatory, the provision nevertheless burdens

interstate commerce in a way or to a degree that is clearly out of proportion to the provision's valid local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Invoking this formula, Jamgotchian maintains that the Article 6 restrictions are discriminatory on their face, since they expressly prohibit the owners of thoroughbreds newly claimed in Kentucky from racing those horses at out-of-state tracks, tracks that compete with the Kentucky tracks where the newly claimed horses are allowed to race. Article 6 is thus presumptively invalid, according to Jamgotchian, and it must be struck down unless the Commission can show that it serves a legitimate, non-protectionist purpose for which there exist no alternative, non-discriminatory means. Since the Commission does not argue that Article 6 would survive that sort of strict scrutiny,[7] Jamgotchian concludes that the courts below

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[7] The Commission and both lower courts purport to avoid Jamgotchian's argument by noting that Article 6 does not distinguish between Kentucky owners and out-of-state owners but applies the same temporary transfer ban and racing restrictions to both groups. The Commission and the lower courts all concluded that, at least with respect to Jamgotchian's complaint, its equal treatment of all owners makes Article 6 non-discriminatory and thus subject not to the sort of strict Commerce Clause scrutiny Jamgotchian wants, the sort applied, for example, in *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994), but rather to the less exacting *Pike* test. As noted above, however, we agree with Jamgotchian that Article 6 *appears* at least to discriminate against out-of-state race tracks in favor of Kentucky's tracks and that Jamgotchian has standing to challenge that alleged discrimination if he is made to bear the burden of it, albeit indirectly. The fact that Article 6 does not discriminate directly against out-of-state owners, therefore, does not, by itself, defeat Jamgotchian's claim

erred by not declaring Article 6 *per se* unconstitutional.

As the Supreme Court has itself acknowledged, however, Commerce Clause analysis is a more nuanced undertaking than the simple summary of it might suggest. *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 n. 12 (1997) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986), for the observation that "no clear line" separates the "discriminatory" from the "non-discriminatory" strands of dormant Commerce Clause analysis). For instance, the Supreme Court has fashioned a number of exceptions to the standard analysis, such as, for example, *United Haulers*, 550 U.S. at 330 (upholding discriminatory regulation in favor of "traditional public function" as opposed to discrimination in favor of private enterprise); *Davis,* 553 U.S. at 328 (applying that same exception to a discriminatory tax); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (upholding discriminatory regulation that favored, as opposed to private enterprise, the government's own "participation in the market."); *Henneford v. Silas Mason, Co.*, 300 U.S. 577 (1937) (upholding discriminatory interstate use tax that merely "compensated" for intrastate sales tax). The Court has also rejected a knee-jerk approach to both the initial determination of whether a challenged

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for strict scrutiny. As explained below, however, Article 6's "discrimination" against out-of-state racetracks is more apparent than real, and so, even if the lower courts ought not to have stopped with Article 6's direct effect upon owners, their conclusion that Article 6 is not subject to the *per* se invalidation was ultimately correct.

law discriminates, *General Motors Corp. v. Tracy*, 519 U.S. at 278 (upholding an apparently discriminatory tax exemption for local natural gas utilities when, upon closer consideration, it appeared that the utilities did not compete—at least in the most important market—with the allegedly discriminated against out-of-state natural gas sellers), as well as the subsequent determination of whether a discriminatory law is invalidly protectionist or serves a sufficiently compelling, non-protectionist local purpose. *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding discriminatory ban against importation of out-of-state baitfish as only feasible means of protecting native species). In *Pike v. Bruce Church*, moreover, the Court made clear that the "lesser" scrutiny applicable to non-discriminatory state laws does not equate to "no" scrutiny or to merely cursory application of presumptions. 397 U.S. 137 (1970) (holding unconstitutional a facially neutral cantaloupe shipping regulation). What these cases illustrate, among other things, are the wide variety of circumstances in which Commerce-Clause issues can arise and the difficulty of articulating rules that survive translation from one set of circumstances to the next. They also illustrate the Supreme Court's grappling with that difficulty by, on the one hand, adhering, at least initially, to the basic steps of its standard analysis, but doing so, on the other hand, with sensitivity to the salient realities of the particular form of commerce involved. See, *e.g., Davis*, 553 U.S. at 334-35 (discussing history of municipal bonds and their tax treatment); *Tracy*, 519 U.S. at 282-85 (discussing development and deregulation of natural gas industry); *Taylor*, 477 U.S. at 140-42 (discussing the feasibility of inspecting imports of live baitfish). In a very real sense, for both strands of dormant Commerce Clause analysis

"the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers Corp.*, 476 U.S. at 579.

To say that the challenged claiming jail regulation is *per se* invalid is to ignore the overarching principles of dormant Commerce Clause jurisprudence in favor of a narrow-lens view. That narrow view ignores the challenged regulation's origin and purpose; its minimal effect on the realm of commerce in which it operates, namely thoroughbred horses; and the knowing and voluntary choice on the part of claiming owners such as Jamgotchian necessary to even bring the regulation into play. As discussed more fully *infra*, the challenged regulation appears to be somewhat unique in the reported cases because not only is it not comprehensive and pervasive in its effect on commerce (applying only to claimed thoroughbreds, as opposed to all Kentucky-purchased thoroughbreds, and then only for a matter of weeks at most), it is essentially a contract term that is knowingly and voluntarily agreed to by any prospective owner who opts to purchase via a claiming race at a Kentucky track as opposed to through a private sale transaction or at auction. Before turning to the thoroughbred industry generally and the history and specifics of claiming races and their regulation, we first address the lower courts' conclusions regarding the applicability of the governmental function exception to dormant Commerce Clause analysis.

III. The Lower Courts' Misapplication of *United Haulers* and *Davis*.

In granting summary judgment to the Commission and in affirming that Judgment, the trial court and the Court of Appeals both relied in significant part on

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt Auth., decided in 2007, and *Dep't of Revenue of Kentucky v. Davis*, decided in 2008. In *United Haulers* the Supreme Court upheld against a Commerce-Clause challenge an ordinance requiring trash haulers to bring locally collected waste to a particular waste processing facility. The Court had previously struck down an almost identical "flow control" ordinance on the ground that it discriminated against interstate commerce in waste processing. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994). The difference between the two cases, the *United Haulers* Court explained, was that, whereas in *C & A Carbone* the challenged ordinance "forced haulers to deliver waste to a particular *private* processing facility," the laws at issue in the later case "require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation." 550 U.S. at 334.

The Court found the private entity/public corporation distinction constitutionally significant. For, while the Court's Commerce Clause cases had long employed a presumption that state laws discriminating against interstate commerce in favor of local *private* enterprise were motivated by the sort of "simple economic protectionism" the Commerce Clause is meant to prevent, and hence "are subject to a 'virtually *per se* rule of invalidity,'" 550 U.S. at 338 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)), that presumption is not appropriate with respect to laws favoring the government itself. As the *United Haulers* Court explained,

> States and municipalities are not private businesses—far from it. Unlike private

> enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens. . . . Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.

550 U.S. at 342-43 (citations omitted). Accordingly, laws favoring government can be deemed non-discriminatory for Commerce Clause purposes (provided all private companies—in-state and out-of-state—are treated the same), and can be upheld without the rigorous scrutiny typically applied to laws favoring in-state businesses vis-à-vis out-of-state competition, since "[l]aws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism." 550 U.S. at 343.

The contrary approach, the Court worried, *i.e,* treating public and private entities the same under the dormant Commerce Clause, "would lead to unprecedented and unbounded interference by the courts with state and local government." *Id.* The impropriety of such judicial interference was underscored in *United Haulers*, the Court noted, by the fact that "[w]aste disposal is both typically and traditionally a local government function." 550 U.S. at 344 (citation and internal quotation marks omitted). In line with that tradition, the New York counties before the Court had opted not to rely on competition among private firms to address their increasingly pressing and complex solid waste management problems, but instead had displaced that competition with regulation and monopoly public control. "We may or may not agree with that approach," the Court summed up, "but

nothing in the Commerce Clause vests the responsibility for that policy judgment with the Federal Judiciary." 550 U.S. at 344-45.

The Court reiterated its *United Haulers* holding in *Dep't of Revenue of Kentucky v. Davis*, a case that concerned a taxpayer's challenge to Kentucky laws allowing an income-tax exemption on the interest earned on bonds issued by Kentucky or its subdivisions, but not exempting interest income on state or municipal bonds issued elsewhere. The case was decided by a five-member majority, and it generated seven opinions, reflecting a degree of disarray in dormant Commerce Clause jurisprudence,[8] or at least a degree of complexity sufficient to make judges reluctant to venture sorting it all out. Upholding the Kentucky income-tax exemption for interest on Kentucky-issued bonds, the *Davis* majority explained that the rationale of *United Haulers*, *i.e.*, the constitutionally significant distinction between traditional government functions, such as municipal solid waste management, and private enterprises, such as the private waste-processing facility at issue in *C & A Carbone*, "applies with even greater force to laws favoring a State's municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially public function, with [a] venerable [at least 300 year] history." 553 U.S. at 341-42. The tax exemption at issue, moreover, was itself a long-standing and widespread means of supporting the

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[8] The United States Court of Appeals for the Fifth Circuit recently referred to the Supreme Court's dormant Commerce Clause jurisprudence as "quite simply, a mess." *Churchill Downs Inc. v. Trout*, 589 Fed. Appx. 233, 235 (5th Cir. 2014).

government's bonds: "It should go without saying that the apprehension in *United Haulers* about 'unprecedented . . . interference' with a traditional government function is just as warranted here, where the Davises would have us invalidate a century-old taxing practice . . . presently employed by 41 States, . . . and affirmatively supported by all of them." 553 U.S. at 342 (citations omitted).

Indeed, concerns about undue interference with so basic a government function as bond issuance led the Court to go further and to explain that Kentucky's laws could be upheld under *United Haulers* even without the lesser sort of scrutiny (so called *Pike* balancing after the rule in *Pike v. Bruce Church*, 397 U.S. at 137) often applied to non-discriminatory state laws to insure that they do not burden interstate commerce unreasonably. Such rational-basis type scrutiny was not appropriate in this case, the Court insisted, because the questions involved exceeded the Court's capacity to provide answers.

> It would miss the mark to think that the Kentucky courts, and ultimately this Court, are being invited merely to tinker with details of a tax scheme; we are being asked to apply a federal rule to throw out the system of financing municipal improvements throughout most of the United States, and the rule in *Pike* was never intended to authorize a court to expose the States to the uncertainties of the economic experimentation the Davises request.

553 U.S. at 356.

United Haulers and *Davis*, therefore, stand for the proposition that regulations and tax provisions favoring the government's own functions, at least functions the government has traditionally performed, are not subject to the same skepticism and the same scrutiny under the Commerce Clause as that applied to regulations and tax provisions favoring local private enterprises at the expense of interstate commerce. We agree with Jamgotchian that *United Haulers* and *Davis* do not control here, because, unlike the municipal waste processing at issue in *United Haulers* and the municipal bonds at the heart of *Davis*, thoroughbred horse racing is not, in Kentucky at any rate, a government function.

Churchill Downs, where Jamgotchian claimed Rochitta, may well be subject to strict licensing requirements and a host of other regulations, and it may stage Kentucky's most beloved event (and the world's most prestigious horse race), the Kentucky Derby, but the fact remains that Churchill Downs and the other licensed racing associations in the state are private enterprises. Their main concern is their shareholders, not the health, safety, and welfare of Kentuckians generally. That being so, regulations such as the Article 6 restrictions at issue, regulations which favor, or at least which appear to favor, Kentucky's race tracks by imposing some limits on a claiming owner's ability to race a claimer at out-of-state tracks do not get a Commerce Clause pass under *United Haulers* and *Davis.* They must rather, as Jamgotchian insists, undergo the more standard sort of Commerce Clause analysis.

Against this conclusion, the Commission argues (and the courts below agreed) that while horse racing itself may not be a traditional government function for the purposes of *United Haulers* and *Davis*, in Kentucky the *regulation* of horseracing certainly is. According to the Commission, thoroughbred racing is vital not only to Kentucky's economy—a healthy racing industry being crucial to the health of Kentucky's substantial thoroughbred breeding industry—but to its very identity as "the Bluegrass State." Given how thoroughly regulated that industry has been for more than a century now[9], the Commission maintains that the entire industry should be deemed a public function, with the tracks not so much independent, private enterprises as agents of that public purpose.

This argument has some definite appeal, and it might give us pause, had the Supreme Court not already rejected its equivalent. Justice Souter's dissent in *C & A Carbone*, after all, made a very similar argument to the effect that the waste processing

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[9] HRC notes that their regulations "govern every aspect of horse racing, from establishing the latest minute in a day that a race can begin to requiring that a jockey's buttons be fastened. 810 KAR 1:016, §1; 810 KAR 1:009, §14(1). HRC has thirty-six separate regulations–with hundreds of sections and thousands of subsections–that pertain solely to thoroughbred racing, including laws that regulate owners, trainers, jockeys, apprentices, pari-mutuel wagering, medications, testing procedures, and the running of the race." A perusal of thoroughbred racing regulations reveals that every single person who participates in any manner in racing at a Kentucky track must have a state license, everyone from the owners, trainers and jockeys through and including the custodial staff, vendor employees and parking attendants. 810 KAR 1:025.

facility deemed in that case to have been given a monopoly over local waste processing in derogation of the Commerce Clause was in actuality a municipal facility notwithstanding the fact that technically it was private. Only two other members of the Court, then-Chief Justice Rehnquist and Justice Blackman, joined that dissent, and Justice Souter himself later noted in *Davis* that the *C & A Carbone* majority had not been overruled. 553 U.S. at 347. In *United Haulers*, moreover, the Court clarified that what the *C & A Carbone* majority had rejected in the dissent was not its public/private distinction but rather its willingness to treat a legally private enterprise as a quasi-public one. 550 U.S. at 340. The Commission's suggestion that we analyze thoroughbred racing in Kentucky as a quasi-public function notwithstanding the actual legal status of its participants is thus a position that we believe the Supreme Court has foreclosed.

The Commission's suggestion is also untenable in more general terms. The Commission insists that Kentucky's *regulation* of horse racing is itself a traditional government function calling into play the more deferential review applied in *United Haulers* and *Davis,* regardless of whether horseracing is a government function. To be sure, regulation, along with taxation, is perhaps *the* quintessential traditional government function. But regulation (or taxation) by itself cannot be what the Supreme Court meant in *United Haulers* by the phrase "traditional government function," because if it were then *United Haulers* would obliterate, not establish, a Commerce-Clause distinction between private enterprise and government function—the government "regulates" in both instances—and would call into question every case in

which a regulation has been invalidated under the sort of strict scrutiny frequently applied to regulations that discriminate against interstate commerce.

So simply regulating or even extensively regulating a private function does not render it a "government function" as the *United Haulers* Court made clear. That Court noted that the New York voters who had opted for the government to provide waste management services could just as well have left the matter to private enterprise, but if they had, "any regulation [the State] undertook could not discriminate against interstate commerce." 550 U.S. at 344. Kentucky's regulation of thoroughbred horse racing, as extensive and as longstanding as that regulation may be, is not by itself sufficient to bring this case within the "traditional government function" rule of *United Haulers* and *Davis*.

IV. Article 6 Does Not Violate the Commerce Clause.

A. Article 6 is Not *Per Se* Invalid.

As noted above, the trial court invoked *United Haulers* and *Davis* in an attempt to bolster its conclusion that the Article 6 restrictions do not violate the Commerce Clause. It reached that conclusion initially by applying the Supreme Court's standard Commerce-Clause analysis and determining that Article 6 does not discriminate against interstate commerce (resident and non-resident claiming owners being treated the same) and that it passes the *Pike* balancing test for reasonableness. Jamgotchian contends that the trial court's analysis went astray by failing to recognize that Article 6 does discriminate on

its face against interstate commerce via the temporary ban on a claimed horse racing out-of-state and, consequently, the regulation's validity hinges on a much more exacting test than the one announced in *Pike*. Under this less forgiving, "strict scrutiny" approach, Jamgotchian insists Article 6 violates the federal Constitution *per se*.

Although we agree with Jamgotchian that in certain respects the trial court's analysis did not go far enough, we are convinced that his own analysis stops short. Heeding, or at least attempting to heed, the Supreme Court's example of resolving Commerce Clause challenges on the basis of commerce realities as much as on "rules" purportedly abstracted from the cases, we conclude that the trial court basically got it right: Notwithstanding a modicum of discrimination, Article 6 is part of a larger, non-discriminatory racing regulation, not a trade regulation, and its protectionist effect is negligible compared with its important racing benefits. More importantly, this regulation is knowingly and voluntarily agreed to by an owner seeking the advantages of a claiming race purchase; it is the legal consequence of a particular type of business transaction, not an unavoidable governmental regulation affecting all commerce in thoroughbred horses in the Commonwealth.

The mechanical, narrow-lens approach to the Commerce Clause urged by Jamgotchian is accurate enough as far as it goes, but it pays scant heed to the particulars of the thoroughbred horse racing industry, and in doing so, not only leaves out what the Supreme Court has indicated is an important part of the analysis, but also grossly overstates the protectionist

intent and effect of the Article 6 restrictions. Supplying even a little context makes clear that Article 6 does not discriminate against interstate commerce to any significant extent and that its purpose is not to insulate Kentucky's race tracks from out-of-state competition but rather to preserve a system in which thoroughbred horse racing remains viable and socially acceptable. We turn, then, to a brief consideration of the all-important context for the challenged regulation.

1. Thoroughbred horses and racing.

It is no surprise that the General Assembly placed the Horse Racing Commission within the Public Protection Cabinet. Horse racing as we know it "exists only because it is financed by the receipts from controlled legalized gambling which must be kept as far above suspicion as possible." *Jacobson v. Maryland Racing Comm'n*, 274 A.2d 102 (Md. 1971). Indeed, in its unusually expansive statement of legislative purpose for KRS Chapter 230, the chapter devoted to Horse Racing and Showing, the Kentucky General Assembly acknowledges as much and more.

> It is hereby declared the purpose and intent of this chapter in the interest of the public health, safety, and welfare, to vest in the racing commission forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth so as to encourage the improvement of the breeds of horses in the Commonwealth, to regulate and maintain horse racing at horse race meetings in

> the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth. In addition to the general powers and duties vested in the racing commission by this chapter, it is the intent hereby to vest in the racing commission the power to eject or exclude from association grounds or any part thereof any person, licensed or unlicensed, whose conduct or reputation is such that his presence on association grounds may, in the opinion of the racing commission, reflect on the honesty and integrity of horse racing or interfere with the orderly conduct of horse racing.

KRS 230.215(2).

This has been the Commission's charge since it was first established in 1906. *State Racing Comm'n v. Latonia Agric. Ass'n*, 136 Ky. 173, 123 S.W. 681 (1909) (upholding the Commission's enabling legislation and noting that the General Assembly had tasked and empowered the Commission to "promote the breeding of thoroughbred horses, and the conducting of legitimate races, and to prohibit the evil of unlawful gambling on the race courses"); *Grainger v. Douglas Park Jockey Club*, 148 F. 513, 540-41 (6th Cir. 1906) (upholding the Commission's authority to regulate horse racing in Kentucky and noting that "an

invariable accompaniment of the operation of such race tracks [thoroughbred race tracks] is betting on the races there run. . . . Certainly legislation whose effect is not to abolish the operation of such race tracks, but to minimize this evil and other evils arising therefrom, has a real and substantial relation to the public welfare and is valid.") In the early twentieth century, public opposition to gambling, an aspect of the then-burgeoning temperance movement, had led to the abandonment of horse racing in many states and to the closure of most of the country's race tracks,[10] unwelcome developments in a state where "'[t]he raising of horses for the track had long been a favored industry . . . and much capital was invested in it.'" *Commonwealth v. Kentucky Jockey Club*, 238 Ky. 739, 38 S.W.2d 987, 991 (1931) (quoting *Grinstead v. Kirby*, 110 S.W. 247, 33 Ky. L. Rep. 287 (1908)). The General Assembly's joining with a handful of other state legislatures (in particular New York's) in regulating rather than banning thoroughbred racing, together with the dramatic success of pari-mutuel wagering at the Kentucky Derby in May 1908, in the face of a threat by local officials to strictly enforce laws newly enacted against bookmaking, were important events in the eventual national restoration of thoroughbred racing as a widely accepted form of public entertainment. Biracree & Insinger at 143-44.

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[10] Tom Biracree & Wendy Insinger, The Complete Book of Thoroughbred Horse Racing 143 (1982). Our references to the history of thoroughbred racing and its regulation are informed by Biracree and Insinger's still pertinent accounts by Robert L. Heleringer, Equine Regulatory Law (2012), and by Howland, *supra*.

As the General Assembly's statement of purpose for KRS Chapter 230 indicates, the public acceptance of thoroughbred racing continues to be a legislative concern and continues to require the oversight of the gambling that makes racing an industry rather than a hobby. Among the host of conditions necessary to public confidence in the industry is assurance that the races are fair and genuinely competitive. In trying to provide that assurance, the industry has developed an elaborate system for grading the racing ability of thoroughbred horses, often referred to as the horse's class, and has evolved a parallel system of graded races—from the richest stakes races for thoroughbreds of the highest class to the most obscure maiden claiming races for horses at the opposite end of the class spectrum. In simple terms, the grading systems are meant to make racing more transparent, by announcing the caliber of the horses involved in a particular race, and to insure that races pit only horses of roughly equal ability against each other. In the higher class races, entry conditions and handicapping by a track official ensure competitiveness. A track's handicapping resources are limited, however, so in the majority of races, competitiveness requires some other means. Biracree & Insinger at 217. Enter the claiming race.

As noted above, in its capacity as Kentucky's regulator of thoroughbred horse racing, the Commission has defined a "claiming race" as "any race in which every horse running in the race may be transferred in conformity with 810 KAR Chapter 1 [the thoroughbred racing chapter]." 810 KAR 1:001(12). Subchapter 15 of that chapter, the subchapter devoted to claiming races, provides in its first section what we

might refer to as the basic claiming rule: "In claiming races a horse shall be subject to claim for its entered price by a licensed owner in good standing." As courts and commentators have observed, "[t]he purpose of the claiming race is to keep owners from entering superior horses in mediocre fields," and in that way "to foster competitive races." *The United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781, 784 (7th Cir. 1981); *Gill v. Delaware Park, LLC*, 294 F. Supp.2d 638, 641 (D. Del. 2003) ("The purpose of claiming races is to insure that horse races are competitive, and that horses of similar ability compete against each other.")[11]

The claiming race works that feat by means of the claiming rule, under which a price is established beforehand, with the understanding that any horse entered in the race is, during a brief period just prior to the start of the race, being offered for sale at that price. An owner tempted to take advantage of the field by entering a superior horse will thus be deterred by the chance, the likelihood even, of losing a good horse, and of having to sell it for less than it is worth. Owners will be deterred from entering inferior horses simply by the fact that such horses have little chance of finishing in the money. The hope, reasonably borne out by centuries of experience, is that, generally at least, the claiming rule will result in transparent, competitive races. It has been so for a long time, as long as there has been

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[11] "The easiest way for a racing secretary to produce competitive contests between such animals [the vast majority of thoroughbreds the racing ability of which is no better than mediocre] is to pass the responsibility for appraising a horse's class to the owner and trainer. The way this is accomplished is the claiming race." Biracree & Insinger at 217.

thoroughbred racing. According to thoroughbred racing historians, a version of the claiming rule was in effect in England at least as early as 1689. Biracree & Insinger at 217.

By the mid-1800s, a more popular version of the rule had evolved. Under that version, the pre-race understanding was that after the race the winning horse would be auctioned off, with the owner given the claiming price, and any amount bid in excess of that price given to someone else, the someone else varying from place to place and time to time. Sometimes the excess went to the runner-up, sometimes to the track and sometimes it was divided among the track and the other entrants. Biracree & Insinger at 217-18. Eventually, however, that version of the rule, too, lost favor. Its wide application had resulted in a tremendous turnover of horses, and it was felt that rather than punishing the occasional owner who inappropriately dropped a horse in class to snatch a purse, it punished just as severely those owners and trainers who simply were good at preparing their appropriately classed horses for a race. *Id.*

The rule served its basic purpose too well to be abandoned, however, so eventually it evolved again, coming into its modem form, under which buyers must commit themselves to the claim/purchase *before* the race is run and who then own the horse regardless of how it fares in the race. In its modern guise, however, the claiming rule suffers from what those who study rules sometimes refer to as overbreadth. In seeking to deter a narrow form of conduct—the abuse of racing's class-system by an owner entering a superior horse in what is billed as and what is meant to be a lesser field

—the rule applies not just to abusive owners but to "class-abiding" owners as well, subjecting everybody in the race to the risk of losing a good or a favored horse. The claiming rule's overbreadth also means that the claiming rule is itself subject to "abuse" by claimants who take advantage of it to claim not just patently and inappropriately undervalued horses, but other horses as well.

In *Jacobson v. Maryland*, for example, a Maryland racing steward testified that under the modern form of the claiming rule, "[a] claiming race is not intended to be a sales ring in which a clever horseman or dealer can pick up a bargain and sell it at will." 274 A.2d at 104. The rule, however, according to the steward, had exposed owners participating in earlier Maryland winter meetings to claims by out-of-state horsemen who came to the meets with the purpose of claiming large numbers of horses in order to "take them to other racing States and sell them." *Id.* Accordingly, certain restrictions were adopted, including a claiming jail restriction. "These and others [restrictions] are designed . . . to preserve the intent of the claiming rule, to classify horses in what appears to be the most accurate and satisfactory manner." *Id.*

Similarly, in *Gill v. Delaware Park, LLC*, 294 F. Supp. at 638, local horsemen and track officials had taken sufficient umbrage at what they regarded as Michael Gill's abusive claiming practices (Gill being, at the time, this country's largest-volume thoroughbred owner, with some 270 horses) to seek to ban him from the track. In describing that umbrage, the court notes that under Delaware's basic claiming rule (which is like ours), a tradition had grown up among many owners

and trainers of not using the rule, except, presumably, for its narrow class-enforcing purpose. Gill, however, eschewed that tradition and used the claiming rule aggressively in what was, essentially, an attempt to "corner" the meet's purses.[12]

Abuses, or perceived abuses, such as these gave rise to rules like the Article 6 restrictions at issue here, *Jacobson*, 274 A.2d at 104 (quoting the steward's testimony to the effect that to keep the claiming rule from turning claiming races into a "sales ring," restrictions had come to be imposed, such as "a horse cannot change ownership except by claim for sixty days, a horse cannot run at another track until the meeting in which he is claimed is terminated"). Such rules are meant to mitigate the claiming rule's overbreadth by attaching to claims costs that will tend to deter frivolous claims and by deterring aggressive claiming practices that undercut the claiming rule's primary, competition-furthering purpose. Like the claiming rule that they modify and support, short-lived restrictions on post-race conduct such as those in Article 6 have been adopted in a large majority of the jurisdictions that permit wagering on thoroughbred racing.[13]

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[12] According to the court, Gill largely succeeded, winning purse money during the pertinent meet of nearly $2.7 million, while the next most successful owner came in at something under $0.5 million.

[13] Citing pertinent statutes, the Commission contends that twenty-seven of the thirty-eight wager-allowing states have such restrictions, including Delaware, Illinois, Maryland, New York, and Pennsylvania. Jamgotchian does not contest the Commission's contention. He also concedes that California has likewise adopted

Jamgotchian does not suggest that the claiming rule is itself discriminatory or otherwise violative of the Commerce Clause, and we have belabored the long history and central importance of that rule in an attempt to explain why, in our view, the Article 6 restrictions that refine it are not truly discriminatory either, notwithstanding the aspect of them (the ban on

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such restrictions, but he contends that that state's Racing Board has ceased to enforce them in light of an informal opinion by the California Attorney General deeming them invalid under the Commerce Clause. His brief refers us to pp 89-93 of the trial court record, where we find, as an attachment to Jamgotchian's motion for summary judgment, what appears to be a letter dated September 2003 from Derry L. Knight, a California Deputy Attorney General, to Roy C. Wood, Jr., the Executive Director of the California Horse Racing Board. Knight is responding, according to the letter, "to a question posed at the July California Horse Racing Board ("CHRB") meeting concerning the board's authority to prohibit a horse claimed in a California claiming race from racing out-of-state for a period of time *beyond that specified in the current board rule*." (emphasis supplied). The then current California rule, apparently, like the rule in Kentucky, forbade racing a claimed horse "in any State other than California until the close of the meeting where it was claimed." The Deputy Attorney General expressly disavowed any intention to address the legality of the current rule, but he opined that a proposed amendment to that rule, an amendment to the effect that "a horse claimed out of a claiming race is ineligible to race in any other state *until 60 days after* the close of the meeting at which it was claimed," (emphasis supplied) would violate the Commerce Clause. According to Jamgotchian, that letter prompted California's Racing Board not merely to refrain from amending the then current rule, but to cease enforcing it altogether. Be that as it may, we think his characterization of the informal opinion letter as a determination by the California Attorney General "that the California 'jail time' restrictions violated the Commerce Clause" misstates that letter's import.

"elsewhere" racing for the duration of the pertinent meet) that could, at first glance, seem to be so. First, once due consideration is given to the key role the claiming rule plays in assuring that races at Kentucky's tracks are not only competitive and interesting, but also above-board and fair, one is better able to understand that, any appearances to the contrary notwithstanding, the *purpose* of the Article 6 restrictions is not protectionist discrimination, but rather refinement of the claiming rule and prevention of its abuse.

The *effect* of the Article 6 restrictions is not protectionist, either, as becomes apparent in light of the broad acceptance of the claiming rule as a vital tool of what amounts to a sort of owner self-regulation. As the Commission very candidly acknowledges, Kentucky's meet-duration ban on a local claimer's being raced "elsewhere" has some tendency to prevent disruption of the given meet through the loss of claimed horses. However, claiming "jail" does not give Kentucky's tracks any sort of meaningful leg up in their competition with out-of-state tracks since, even while Kentucky keeps access to the horses "jailed" here, it loses access to the horses "jailed" elsewhere, a situation the vast majority of tracks here and elsewhere understand, expect, and accept. Indeed, the mutuality of such restrictions is undoubtedly the explanation for the claims before us being advanced by a claiming owner instead of one of the "elsewhere" tracks at which a claimed horse cannot race for a few days or weeks. And lest this situation be mistaken for the very sort of protectionist tit-for-tat the Commerce Clause is meant to obviate, it should be reemphasized that the claiming rule is not protectionist in intent. As

discussed above, the Commission has compelling reasons—racing integrity reasons, if you will—that have nothing to do with Kentucky tracks' competition with out-of state businesses for adopting some form of claiming rule that balances the risks/rewards to owners and potential purchasers, and thus has independent reason for as efficient a rule as experience with it can devise.

2. Thoroughbred Racing as Competitive Sport.

As we carefully examine the context of the Article 6 restriction, one other notable reality bears mention. Thoroughbred horse racing is, of course, a major sport, and as economists and courts have long noted, professional and collegiate sports operate under an unusual economic model. Specifically, the competitors—be they the teams of the National Football League, the member schools of the National Collegiate Athletic Association, or even individual golfers or tennis players—produce a product —competitive sporting events—"that inherently and uniquely cannot be produced by a single [competitor] acting alone." Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 Wash. & Lee L. Rev. 573, 586 (2015) (footnote omitted). *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 102 (1984); *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010); *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55 (2nd Cir. 1988). To produce the product, therefore, whether a single game or an entire season of games culminating in playoffs and championships, the competitors not only must compete on the field or course or track, but must also

agree to a host of rules and regulations that define the game, make clear who is eligible to compete, and otherwise establish the conditions under which the competition is to be carried out. Frequently—as in the major professional league sports, professional tennis, and professional golf—private, centralized associations of competitors and other interested parties are formed to draft and to administer the rules. Such private agreements among competitors raise antitrust concerns and, accordingly, professional sports have given rise to a large body of antitrust litigation.[14] In *Am. Needle*, the Supreme Court rejected a claim by the NFL that its teams should be treated for antitrust purposes as a single entity incapable of conspiring or agreeing with itself. Instead, the Court reiterated, on the one hand, that, in some businesses, "restraints on competition are essential if the product is to be available at all" and that "the interest in maintaining a competitive balance" among competitors can be "legitimate and important," 560 U.S. at 203-04 (citations and internal quotation marks omitted). On the other hand, however, "competitors cannot simply get around antitrust liability by acting through a third-party intermediary or joint venture." 560 U.S. at 202 (citation and internal quotation marks omitted). The upshot is that at least in the antitrust context the pro-and anti-competitive

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[14] See generally Grow, *Regulating Professional Sports Leagues*, *supra*; Cyntrice Thomas, Thomas A. Baker III, and Kevin Byon, *The Treatment of Non-Team Sports Under Section One of the Sherman Act*, 12 Va. Sports & Ent. L.J. 296 (2013); James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 Marq. Sports L. Rev. 517 (2011); Thomas A. Piraino, *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. Rev. 889 (1999).

effects of trade agreements among sports competitors must generally be assessed on a case-by-case basis.

Unlike football, golf, or car racing, horse racing is also a form of legalized gambling, an activity traditionally subject to public, not private, regulation. Waldrop, *supra,* at 400 (noting the potential commercial advantages of private, cooperative arrangements such as those employed by the major sports leagues, but discussing obstacles to such cooperative arrangements in horse racing, including the fact that "[h]istorically, the public has always been distrustful of privately regulated gambling operations"). The extensive state regulation of horse racing and the legalized gambling accompanying and supporting it means that, uniquely among the country's major sports, horse racing operates for the most part under a decentralized model, with each of the thirty-eight racing jurisdictions responsible for its own racing regulations. Even when separate jurisdictions recognize the desirability of a uniform approach to some aspect of the industry (such as the recognition by at least twenty-seven of the thirty-eight racing states that the claiming rule is appropriately coupled with a brief "jail" period) giving expression to that uniformity is cumbersome at best. *Id.* at 396 (noting that while the Association of Racing Commissioners International, (of which the racing commissioners of all the racing states are members) has as one of its principal purposes the development and publishing of model rules, "there is no mechanism by which to enact and enforce these model rules in individual jurisdictions"). In thoroughbred racing,

> [t]he lack of uniformity combined with the difficulties associated with developing and implementing a cooperative approach have contributed to a regulatory environment that favors the status quo. Since the states regulate the sport within their own respective borders, a semi-competitive environment exists whereby states compete for racing business from owners and trainers because they are capable of searching for the most favorable and least burdensome racing venues. This system has created a forum shopping practice of sorts intended to entice racing business, and has created little or no incentive for the states to dramatically change their rules.

Id. at 397.

All of this is meant to underscore the peculiar form of commerce at issue in this case and the need for Commerce Clause analysis sensitive to that peculiarity. We are not dealing with a product or service such as baitfish, *Taylor*, cantaloupe, *Pike*, natural gas, *Tracy*, or waste processing, *United Haulers*, which is needed by the populace and will be bought and sold irrespective of state regulations. Rather, our focus is on thoroughbreds which derive their commercial value solely from the fact that they can be bought and sold to race in state-regulated competitions and perhaps subsequently held for breeding purposes to produce new stock for future racing and the continuation of the sport. Whether their role in this unique competitive sport that depends on legalized gambling regulated by the various states would alone dictate different considerations for dormant Commerce Clause purposes,

we need not decide because in addition to the uniqueness of the realm of thoroughbred commerce generally, the particular regulation at issue does not fit the comprehensive, unavoidable commercial "barrier" model that characterizes dormant Commerce Clause cases.

Superficially, at least, the most analogous type of dormant Commerce Clause case to the facts presented here are those where the Supreme Court has routinely struck down export embargoes, *e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (invalidating state's attempt to disallow export of electricity generated within the state), and local processing laws, *e.g., Pike v. Bruce Church, Inc.*, 397 U.S. at 145 (invalidating requirement that state-grown cantaloupes be packed within the state and noting that "the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere."); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (plurality opinion deeming invalid Alaska's requirement that timber taken from state land be processed in Alaska before export). As in those cases, the Article 6 restrictions before this Court are triggered by the acquisition of property in this state, and the challenged restrictions limit (*albeit* very temporarily) the export of that property and encourage its use in Kentucky. These very general similarities do not, however, support the same result reached in the seemingly similar embargo and local processing cases because there are very significant differences in the regulations in those cases and Article 6.

The differences are those between permanent and temporary, between total and partial, between serious and slight and between inescapable and voluntary. The laws challenged in the Supreme Court cases just referenced forbade export of the article of commerce entirely or forbade it for as long as the would-be exporter failed to do something, such as employ a local processor. Here, Jamgotchian simply had to wait thirty days to transfer his Kentucky-claimed horse, and, only had to wait forty-two days (May 11 to July 1) to race her in another state.[15] A more analogous regulation is the ten-day hold period on the resale of scrap metal at issue in *Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442 (6th Cir. 2009). As the Sixth Circuit stated in that case, "scrap metal recycling is big business in Tennessee," resulting in billions of dollars of revenue, with 95% of the metal being eventually sold out of state. *Id.* at 446. In the wake of a historic metal theft crime wave, the challenged Memphis ordinance required scrap dealers to "tag and hold" scrap metal for a period of ten days so that victims of metal theft and law enforcement officials could inspect it. The Sixth Circuit acknowledged that the ordinance was apt to increase storage costs on the dealers and the delay could result in a competitive disadvantage in a volatile metal market, but it nonetheless held the temporary restriction did not unduly burden interstate commerce or outweigh the city's interest in combating metal theft.

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[15] According to the Commission, the longest Kentucky meet lasts approximately three months. Thus, even if someone claimed a horse early in that meet, the ban on racing elsewhere would extend for no more than about ninety days. In the eight months following Jamgotchian's claiming of Rochitta, she raced in Pennsylvania, West Virginia and Florida.

Article 6, similarly limited in temporal scope and designed to advance a legitimate, non-protectionist local interest (balancing of the class-enforcing measure with restrictions that deter aggressive claiming practices), is even less objectionable.

Additionally, the Commerce Clause litigants in the Supreme Court cases we have reviewed (embargo cases, processing cases or otherwise) were strictly confined to the regulated form of commerce: if they wanted to deal in baitfish, cantaloupe, electricity or whatever article of commerce might be at issue, they had to do so in conformity with the challenged regulation – the alleged barrier to interstate commerce was unavoidable. That is simply not the case before us. As we have belabored, not only does Article 6 stem from legitimate racing (more specifically *claim* racing) concerns, it is a purely voluntarily-encountered regulation. It has no application to private sales or public auctions of thoroughbreds in Kentucky but applies only in the narrow circumstance where a buyer elects to take advantage of the unique purchasing opportunity available in a claiming race. If Jamgotchian wished to avoid the Article 6 restrictions he was free to purchase Rochitta (or another equally desirable thoroughbred) directly from her owner, with whatever attendant terms and costs that approach would entail.[16] As the trial court here noted, "[t]he plaintiffs should not be allowed to obtain the benefits

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[16] *Cf Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 516 (4th Cir. 2002) (noting, in the antitrust context, that "a market innovation 'does not restrain trade if an alternative opportunity . . . is realistically available.'") (quoting *Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917, 925 (2nd Cir. 1984)).

of the claiming races without accepting the relatively slight burden of restrictions on racing the claimed horse at other tracks until the end of the meet." *Jamgotchian v. Kentucky Racing Comm'n*, No. 11-CI-01047, at 11 (Nov. 29, 2012).

In sum, however complex and confusing dormant Commerce Clause jurisprudence may be, we are confident that it is not aimed at and does not prohibit a temporary restriction encountered as part of a voluntarily-agreed-to sales transaction, a transaction with inherent commercial advantages to the purchaser not available if that purchaser proceeds in other available ways, *i.e.,* a private sale or public auction. Article 6 serves a legitimate local purpose (as a component part of claiming race rules necessary to classification of thoroughbreds for competitive racing) in the first instance, and regardless of whether the claiming race rule could be structured differently and still achieve that purpose, the myriad opportunities to purchase thoroughbreds generally (including Rochitta herself) in Kentucky through means wholly untouched by this very temporally limited regulation dictate our conclusion that it survives strict scrutiny.

B. Article 6 is Not Impermissibly Extraterritorial.

Finally, in a last gasp attempt to avoid the trial court's summary judgment, Jamgotchian invokes *Healy v. The Beer Inst., Inc.*, 491 U.S. 324 (1989) for the proposition that the Commerce Clause invalidates not only discriminatory state laws, but also such laws "that ha[ve] the 'practical effect' of regulating commerce occurring wholly outside the State's borders." *Id.* at 332. Jamgotchian did not present this

"extraterritoriality" argument to the trial court or the Court of Appeals, and he presents it to us as a sort of afterthought with little discussion, but his contention seems to be that because the owner of a newly Kentucky-claimed thoroughbred is prohibited from racing the horse outside Kentucky for a prescribed time period, the regulation imposing that prohibition has "obvious and direct extraterritorial effect on the owner of that horse" and so runs afoul of *Healy*. Jamgotchian has not preserved this argument and we could deny consideration of it but, for completeness, choose to address it. Simply put, Jamgotchian reads *Healy* too broadly.

Healy addressed a Connecticut statute that required brewers and importers of beer to "affirm" monthly that their beer prices for in-state wholesalers were (and would remain) no higher than the lowest prices they would charge for those products in the states bordering Connecticut. The Supreme Court concluded the price-affirmation statute interacted with beer-pricing statutes in those bordering states in a manner which foreclosed the brewers/importers from altering their prices after the "moment of affirmation," *id.* at 338, resulting in, for example, the Connecticut law controlling the price of beer in Massachusetts. Not surprisingly, the statute did not survive Commerce Clause analysis. However, *Healy* did *not* invalidate every state law with some effect on commercial transactions in another state. In *United Haulers*, for example, the challenged regulation mandated that local solid waste be processed at the local, county-run facility and thus in effect forbade solid waste haulers from disposing of their waste at out-of-state processing sites, an even stronger (because permanent) form of the

"extraterritorial effect" Jamgotchian objects to here. Nevertheless, the regulation was upheld. In *Pharmaceutical Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003), moreover, the Supreme Court gave short shrift to the broad reading of *Healy* Jamgotchian urges. In *Walsh*, the Supreme Court rejected a *Healy*-based challenge to a Maine prescription drug rebate program, notwithstanding the fact that the program affected transactions between drug manufacturers and distributors that took place outside of Maine. Unlike the Massachusetts price affirmation statute at issue in *Healy*, the Court explained, the Maine program did not, by its terms or by its effects, "regulate the price of any out-of-state transaction." 538 U.S. at 669.

As *Walsh* indicates, *Healy* was not addressed to "extraterritorial effects" as such, but rather to attempts by one state "actually . . . to regulate activities in other states." *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 665 (7th Cir. 2010). In *Midwest Title*, for instance, the Court of Appeals for the Seventh Circuit invalidated under the Commerce Clause and *Healy* a "territorial application" provision of Indiana's consumer protection laws, whereby Indiana sought to apply those laws to Illinois automobile title-loan companies. The fact that the companies advertised in Indiana, the Court explained, did not justify the extraterritorial projection of Indiana's public policy onto the Illinois companies.

Unlike the price affirmation law at issue in *Healy* and the consumer protection laws at issue in *Midwest Title*, Article 6 is not an attempt by Kentucky, directly or indirectly, to regulate horse racing (or any other) activities in other states, and moreover the regulation

does not have that unintended effect. Article 6 regulates, rather, claiming races at Kentucky's thoroughbred race tracks and it applies to persons, such as Jamgotchian, who participate in racing at those tracks in a manner that brings them within Kentucky's power to license and to regulate. The mere fact that Article 6 may have incidental effects outside Kentucky does not mean it is at odds with the Commerce Clause.

Jamgotchian also notes that the *Healy* Court voiced concern about competing state regulations that could subject those engaging in interstate commerce to conflicting obligations. 491 U.S. at 336-37 ("Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."). *See Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633 (9th Cir. 1993) (invalidating Nevada statute that imposed procedural rules on NCAA enforcement proceedings in part because the rules imposed by Nevada were inconsistent with rules imposed by other states). He asserts that Article 6 potentially exposes him to that sort of dilemma and so should be deemed invalid. Jamgotchian has not alleged any sort of actual conflict, however, and at first blush it is hard to imagine how another state is apt to create one. There seems little chance, after all, of another state's *requiring* him to race his newly Kentucky-claimed horse at one of its tracks, or *forbidding* him to race it in Kentucky. In short, Jamgotchian's belated extraterritoriality claim provides no basis for relief from Article 6.

CONCLUSION

In sum, while the lower courts' reliance on the "traditional government function" rationale of *United Haulers* and *Davis* was misplaced, their conclusion that Article 6 does not contravene the dormant Commerce Clause is correct. The trial court correctly determined that the temporary restrictions the Commission imposes through Article 6 on a thoroughbred owner's ability to race a horse that he or she claimed at a Kentucky track are not protectionist in any meaningful way. The fleeting restrictions serve a sufficiently important state interest—helping to ensure the integrity and viability of thoroughbred racing, one of this state's most important industries—and, more importantly, are applicable only when purchasers voluntarily avail themselves of the privilege and advantages of buying a thoroughbred for a set price in a claiming race as opposed to through a private sale or public auction. Dormant Commerce Clause jurisprudence does not require invalidation of this unique type of regulation. The trial court having correctly granted the Commission's motion for summary judgment, we hereby affirm the February 2014 decision by the Court of Appeals allowing that Judgment to stand.

All sitting. All concur.

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APPENDIX B

TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2012-CA-002154-MR

[Filed February 7, 2014]

JERRY JAMGOTCHIAN
APPELLANT

v.

KENTUCKY HORSE RACING COMMISSION; JOHN T. WARD, JR., IN HIS OFFICIAL CAPACITY, AS EXECUTIVE DIRECTOR, KENTUCKY HORSE RACING COMMISSION; ROBERT M. BECK, JR., IN HIS OFFICIAL CAPACITY AS CHAIRMAN, KENTUCKY HORSE RACING COMMISSION; AND TRACY FARMER, IN HIS OFFICIAL CAPACITY AS VICE-CHAIR, KENTUCKY HORSE RACING COMMISSION
APPELLEES

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-01047

RENDERED: FEBRUARY 7, 2014; 10:00 A.M.

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Jerry Jamgotchian appeals from an order of the Franklin Circuit Court and challenges the constitutionality of 810 Kentucky Administrative Regulations (KAR) 1:015, Section One at Article 6(a)-(b), an administrative regulation enacted by the Kentucky Horse Racing Commission. After careful review, we affirm the circuit court's holding that the regulation is constitutional under the Commerce Clause of the United States Constitution.

The Kentucky General Assembly created the Kentucky Horse Racing Commission (KHRC) as an "independent agency of state government to regulate the conduct of horse racing and pari-mutuel wagering on horse racing and related activities within the Commonwealth of Kentucky." *See* Kentucky Revised Statutes (KRS) 230.260(8). The KHRC has the authority to enact administrative regulations that prescribe the terms under which horse racing shall be conducted in the Commonwealth. Pursuant to this authority, the KHRC enacted Article 6, which provides that "[a] horse claimed in a claiming race shall not be transferred, wholly or in part, within thirty (30) days after the day it was claimed, except in another claiming race. Unless the stewards grant permission for a claimed [Thoroughbred] horse to enter and start at an overlapping or conflicting meeting in Kentucky, a horse **shall not race elsewhere until the close of entries**

of the meeting at which it was claimed." (Hereinafter referred to as "the Regulation"). The practical effect of the Regulation is that no privately owned Thoroughbred racehorse claimed in a Kentucky claiming race is eligible to race anywhere except in the Commonwealth of Kentucky until the meet has closed. According to the KHRC regulatory policy, persons who violate Article 6 are subject to fines, license suspension, and other sanctions.

On May 21, 2011, the Appellant, Jamgotchian, purchased the horse Rochitta for $42,400.00 in a claiming race at Churchill Downs, a privately owned racetrack in Louisville, Kentucky. The Churchill meet began on April 30, 2011, and ended on July 4, 2011. Accordingly, based on the requirements of the above Regulation, Jamgotchian was restricted from racing Rochitta at any racetrack outside Kentucky until after this meet concluded on July 4, 2011.

Despite the restricted time imposed by the Regulation, Jamgotchian chose to submit Rochitta for entry at several racetracks in Pennsylvania during the month of June 2011. On May 31, 2011, Penn National Race Course Racing Secretary David F. Bailey (hereinafter "Mr. Bailey") noticed that Jamgotchian tried to enter Rochitta in a June 4, 2011, race at that facility. This prompted Mr. Bailey to contact Ben Huffman, Racing Secretary at Churchill, to obtain more details concerning Kentucky's "jail time" requirements. Mr. Huffman informed Mr. Bailey that pursuant to the Kentucky Regulation, a Thoroughbred claimed in Kentucky is not permitted to race anywhere outside of Kentucky until entries are taken for the last day of the meet where the horse was claimed.

Based upon this information and upon learning that the meet where Jamgotchian claimed Rochitta did not end until July 4, 2011, Mr. Bailey refused the entry of Rochitta to race at Penn National, and Jamgotchian forfeited his entry fee. Soon afterwards, Mr. Bailey told Jamgotchian that Rochitta was denied entry at the Pennsylvania race because of Kentucky's restrictions imposed by the Regulation.

Jamgotchian filed suit against the KHRC and its chief agents in Franklin Circuit Court, seeking a declaration that the Regulation violates the "negative" aspect of the Commerce Clause that denies the States the power to unjustly discriminate against or burden the interstate flow of articles of commerce, or the dormant Commerce Clause. Jamgotchian also sought an injunction to prevent the KHRC and its agents from taking further action to implement or enforce the Regulation against him and other owners who want to race their claimed horses in other racing jurisdictions. Because the constitutionality of the Regulation is a matter of law, the parties submitted the case on cross-motions for summary judgment.

The circuit court first considered whether Jamgotchian had standing to seek declaratory and injunctive relief. In its November 29, 2012, order the circuit court resolved the standing issue in the affirmative, agreeing that Jamgotchian had alleged a sufficient deprivation of his liberty of action and financial interests to allow him to challenge the Regulation. Citing *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), the court held that "an adequate case or controversy [exists] to ensure that the parties are adversarial and

have a concrete stake in the outcome . . . .” The circuit court held that Jamgotchian failed to show that the Regulation imposes a burden on interstate commerce that amounted to a violation of the Commerce Clause. This appeal now follows.

On appeal, Jamgotchian argues that the circuit court committed reversible error when it found that the Regulation does not create the type of discrimination against or burden on interstate commerce that is prohibited by the Commerce Clause of the United States Constitution.

The KHRC counters that Jamgotchian is not entitled to a declaration of rights because his claims are not justiciable and argues that this Court lacks jurisdiction over Jamgotchian’s declaratory judgment because no case or controversy exists and therefore he has no standing. We agree with the trial court that Jamgotchian has standing to challenge the Regulation. He has alleged a sufficient deprivation of his liberty of action and financial interests to allow him to challenge the Regulation. *See Board of Regents*, 408 U.S. at 570-71 (1972). We also agree with the trial court that the case was ripe for review and that there was an adequate case or controversy to ensure that the parties are adversarial and have a concrete stake in the outcome. *Revis v. Daugherty*, 287 S.W. 28, 29 (Ky. 1926).

Turning to the merits of Jamgotchian’s arguments on appeal, we review the Franklin Circuit Court’s order granting summary judgment to determine whether the court correctly found “that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.” *Pearson ex*

rel. Trent v. Nat'l Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002). We review questions of law *de novo. Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

The Commerce Clause of the United States Constitution provides that Congress has the power to "regulate Commerce with foreign Nations, and among the several States[.]" U.S. Const. Art. I, §8 cl. 3. From this grant of authority, the United States Supreme Court judicially developed the "dormant" Commerce Clause, which imposes certain implicit limitations on the ability of states to burden the flow of interstate commerce. *McBurney v. Young*, 133 S.Ct. 1709, 1719, 185 L.Ed.2d 758 (2013).

The crux of the inquiry when a law, such as the Regulation at issue in the instant case, is alleged to have violated the dormant Commerce Clause is whether the challenged law is protectionist in measure, or "whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). Starting from this basic premise, the United States Supreme Court imposes different standards for evaluating whether a law is protectionist in nature, and whether it pertains to a legitimate local concern, depending upon whether the challenged law pertains to a traditional government function. *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 341, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008).

Thus, the first step in determining the constitutionality of the Regulation is deciding whether it involves a traditional government function. *United*

Haulers Ass'n, Inc. v. Oneida Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007). Jamgotchian argues that at no point in the history of the United States of America has horse racing—unlike trash collection and state taxation—been considered to be a traditional government function. We agree with the KHRC that this argument mischaracterizes the role of the state in the regulation of horse racing. While horse racing itself is not a traditional governmental function, there can be no question that the regulation of horse racing is, and always has been, a traditional governmental function, at least since 1894 in Kentucky. *See* KRS Ch. 36 §§ 1326-1330 (1894). For more than 100 years, both statutory and case law have established that the state has a unique and far-reaching role in the regulation of this sphere of economic activity.

We agree with Jamgotchian that horse racing is conducted by private owners at privately-owned tracks, but every aspect of the operation of those tracks is closely supervised and regulated by the state. While the state is not a market participant as that term has been used in cases under the Commerce Clause, there can be little doubt that the pervasive role of the state in regulating the horse racing industry meets the broad criteria for traditional governmental function contemplated by the Supreme Court. *United Haulers Ass'n*, 550 U.S. at 338; *Davis*, *supra*, 533 U.S. at 342. The purpose and effect of the regulation in question is not to give preference to any individual in-state private party, but to nurture and promote the market for race horses, and to ensure that the public as a whole will benefit from the stronger fields and more competitive races that will result. In *Davis*, the Supreme Court

held that the inquiry is "to find out whether the preference was for the benefit of a government fulfilling governmental obligations, or the benefit of private interests because they were local." *Id.* at 342, n.9.

The KHRC also points out that the Regulation at issue is an exercise of the state's police power regarding the public health, safety, and welfare of the Commonwealth and its citizens. The Kentucky legislature has created a comprehensive regulatory scheme for horse racing, acting principally through the KHRC, which was created as part of the Public Protection Cabinet. *See* KRS 230.260. The regulation of horse racing is a valid exercise of the state's police power, as acknowledged in KRS 230.215:

> (1) It is the policy of the Commonwealth of Kentucky, in furtherance of its responsibility to foster and to encourage legitimate occupations and industries in the Commonwealth and **to promote and to conserve the public health, safety, and welfare,** and it is hereby declared the intent of the Commonwealth to foster and to encourage the horse breeding industry within the Commonwealth and to encourage the improvement of the breeds of horses. Further, it is the policy and intent of the Commonwealth to foster and to encourage the business of legitimate horse racing with pari-mutuel wagering thereon in the Commonwealth on the highest possible plane. Further, it hereby is declared the policy and intent of the Commonwealth that all racing not licensed under this chapter is a public nuisance and may be enjoined as such. Further, it is hereby

> declared the policy and intent of the Commonwealth that the conduct of horse racing, or the participation in any way in horse racing, or the entrance to or presence where horse racing is conducted, is a privilege and not a personal right; and that this privilege may be granted or denied by the racing commission or its duly approved representatives acting in its behalf.
>
> (2) It is hereby declared the purpose and intent of this chapter **in the interest of the public health, safety, and welfare,** to vest in the racing commission forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth so as to encourage the improvement of the breeds of horses in the Commonwealth, to regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth.
> . . .

(Emphasis added). Our highest state court has recognized that the KHRC was "properly invested by

the legislature with authority under the police powers of the state to make and enforce rules for the conduct of horse racing in Kentucky, including claiming races." *Bobinchuck v. Levitch*, 380 S.W.2d 233, 236 (Ky. 1964). Just as the *Davis* Court recognized that Kentucky's tax structure "enable[d] Kentucky to promote its police power by protecting the health, safety, and welfare of its citizens," the Regulation, as part of the regulatory scheme created by the legislature and carried out by the KHRC, is expressly an exercise of the state's police power with respect to the public health, safety, and welfare of its citizenry. *Davis*, 553 U.S. at 341-42. This is established by the express language of the governing statutes and recognized by the Kentucky Supreme Court.

In addition, the KHRC notes that the regulation of horse racing—including the regulation of claiming races—is pervasive across the United States. Out of the thirty-eight states that permit wagering on horse racing, twenty-seven states have a claiming law similar to Kentucky's regulation. In *Davis*, the United States Supreme Court placed importance on the numerous other states having a tax law similar to Kentucky's in determining that Kentucky's law served a traditional public function. *Davis*, 553 U.S. at 335, 350. With respect to the Regulation, the significant majority of states that permit horse racing have enacted a claiming law similar to Kentucky's that serves their respective public interests.

We agree with the KHRC that the Regulation, which is part of a larger comprehensive regulatory scheme, constitutes a traditional governmental function because it directly satisfies every factor the

United States Supreme Court articulated in *Davis*. Thus, the trial court properly rejected Jamgotchian's arguments to the contrary.

Because the Regulation involves a traditional governmental function, the second step in the Court's analysis is whether the Regulation is discriminatory. In making this determination, the Regulation is not subject to the more rigorous scrutiny generally applied to laws favoring in-state private entities over out-of-state private entities. *See Davis*, 533 U.S. at 342-43. Instead, the Court compares "substantially similar entities" subject to the Regulation, which in the instant case are Kentucky resident licensees who claim Thoroughbred horses in Kentucky races and out-of-state licensees, such as Jamgotchian, who claim Thoroughbred horses in Kentucky races. A review of this inquiry indicates that the Franklin Circuit Court correctly held that the Regulation is not discriminatory on its face because it applies equally to Kentucky owners and out-of-state owners who have bought a horse at a claiming race in Kentucky. The Regulation treats all private actors—both Kentucky resident licensees and out-of-state licensees—exactly the same. All owners purchasing horses in claiming races on the day Jamgotchian did, regardless of whether they were a Kentucky resident or not, were treated the same under the Regulation. We agree that the Regulation is not discriminatory.

The third and final consideration in assessing whether the Regulation violates the Commerce Clause is whether the Regulation's burden on interstate commerce is clearly excessive in relation to its putative local benefits. *Davis*, 553 U.S. at 339; *United Haulers*,

550 U.S. at 338-39. This analysis was first set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), and the Court in *Davis* observed that "[s]tate laws frequently survive this *Pike* scrutiny." *Davis*, 553 U.S. at 338-39.

Jamgotchian has not established that the Regulation's impact on interstate commerce is anything more than incidental, especially with respect to his circumstances. The circuit court determined that other than Jamgotchian's claimed loss, "the burden on interstate commerce is unclear from the record in this case" and is thus "rather minor and somewhat speculative," while noting that Jamgotchian did not suggest even one potential alternative to the Regulation.

Nonetheless, even if Jamgotchian could demonstrate the Regulation had an impact on interstate commerce, the impact is certainly not more than incidental, for several reasons. First, the Regulation does not totally prohibit the transfer or sale of Thoroughbred horses outside of Kentucky because it only applies to a narrow set of circumstances. In order for the Regulation to apply, a licensee must elect to purchase a Thoroughbred horse at a claiming race in Kentucky. An individual, including a licensee, is free to purchase a Thoroughbred horse privately, outside of a claiming race, and is consequently not subject to the Regulation. A licensed individual such as Jamgotchian, who chooses to purchase a Thoroughbred racing horse in Kentucky, however, agrees to be bound by the Regulation for the privilege of participating in horse racing in this state. *See* KRS 230.290(2). Jamgotchian unilaterally chose to purchase a horse in a claiming

race rather than purchase the horse privately; his elective action does not constitute an excessive burden on interstate commerce. The circuit court stated, and we agree, that Jamgotchian "seeks to obtain the benefits of the claiming race regulation" and that because he is a buyer he must "abide by the reasonable restrictions that are designed to promote the health of the horse racing industry as a whole," which necessarily includes the Regulation.

Second, the vast majority of states that permit wagering on horse racing—27 out of 38 states—have enacted laws similar to the Regulation. If nearly every other horse racing jurisdiction has a similar rule, the alleged impact on interstate commerce is likely inconsequential. Third, the Regulation's impact on interstate commerce, if any, is of limited duration and scope. With respect to Rochitta, Jamgotchian purchased the horse on May 21, 2011, and the Regulation prevented him from racing the horse outside of Kentucky until July 4, 2011—meaning he was impacted for approximately forty days. Even if an individual claimed a horse on the first day of the longest meet in Kentucky, under the Regulation, the individual would be impacted for approximately three months. We agree with the circuit court that the relatively short duration of this restriction militates strongly in favor of upholding the Regulation as a reasonable exercise of the state's police power.

Our review also indicates that the benefits of the Regulation outweigh the trivial burden the Regulation may place on interstate commerce. The Regulation benefits the Commonwealth by preventing the uncontrolled transfer of Thoroughbred horses out of

Kentucky in order to ensure larger fields of horses. Jamgotchian discounts this important benefit by asking the Court to take judicial notice of the fact that Churchill Downs was able to fill the field for the 2013 Kentucky Derby. More relevant evidence than the ability of Churchill Downs to fill its field for the most famous horse race in the world is that several of the races in which Jamgotchian sought to enter Rochitta were cancelled because they did not fill. The circuit court's order aptly noted that the Regulation permits the KHRC to accomplish "its core governmental function of ensuring that horse racing maintains competitive fields that are necessary for a healthy racing industry."

Another benefit of the Regulation is that the purchases of horses in claiming races generate revenue through sales taxes on the claimed horses. Jamgotchian, for example, paid $2,400.00 in sales tax to the Commonwealth for the purchase of Rochitta. It is undisputed that the generation of tax revenues benefits the Commonwealth. By ensuring there are a sufficient number of horses to fill races, the Regulation consequently promotes economic development in Kentucky, as did the tax law at issue in *Davis*, *supra*.

Our review indicates, as the trial court properly found, that the Regulation at issue in this case does not violate the dormant Commerce Clause of the United States Constitution. Therefore, we affirm the Franklin Circuit Court's November 29, 2012, opinion and order granting summary judgment in favor of the Kentucky Horse Racing Commission.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard A. Getty
Kristopher D. Collman
Lexington, Kentucky

BRIEF FOR APPELLEES
KENTUCKY HORSE RACING
COMMISSION, JOHN T. WARD,
JR., ROBERT M. BECK, JR., AND
TRACY FARMER:

Robert M. Watt, III
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APPENDIX C

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I

CIVIL ACTION NO 11-CI-01047

[Filed November 29, 2012]

JERRY JAMGOTCHIAN	)
PETITIONER	)
	)
v.	)
	)
KY. HORSE RACING COMMISSION	)
RESPONDENT	)
	)

OPINION AND ORDER

INTRODUCTION

This action is before the Court on cross-motions for summary judgment. The plaintiff, Jerry Jamgotchian, is a licensed owner of thoroughbred horses, who is subject to regulation by the respondent, the Kentucky Horse Racing Commission, the administrative agency of state government that has plenary regulatory authority over horse racing in Kentucky. Mr. Jamgotchian seeks declaratory and injunctive relief striking down the administrative regulation of the Commission that prohibits an owner from transferring a horse purchased at a claiming race to another track until after the end of the track meet. *See* 810 KAR

1:015 § 1(6)(b). The plaintiff argues that this administrative regulation is a violation of the Commerce Clause, Article I, § 8 of the U.S. Constitution. For reasons more fully stated below, the Court finds that the administrative regulation is a proper exercise of the Commission's regulatory authority that does not on its face discriminate against interstate commerce, that any incidental burden on interstate commerce as a result of this regulation is slight, and that the local benefits of the regulation outweigh any burden on interstate commerce. Accordingly, the plaintiffs Commerce Clause challenge must be rejected, and the validity of the regulation must be sustained.

FACTUAL BACKGROUND

Plaintiff is a horse owner who bought a horse at Churchill Downs through a claiming race. Subsequent to this purchase, plaintiff sought to race the horse in races outside of Kentucky before the end of Churchill Downs' meet. The Kentucky Horse Racing Commission (KHRC) promulgated a rule that requires all horses bought in Kentucky at a claiming race to race only at the track at which they were purchased until the end of the meet at which the horse was purchased. Plaintiffs entry of a horse claimed at Churchill Downs in Kentucky into an out of state horse race prompted the out of state track to contact the KHRC and inquire about the claiming race restriction. A KHRC agent informed the track representative that entry into the out of state race was prohibited. Plaintiff was then informed by the out of state track representative that such racing before the end of a track meet violated 810 KAR 1:015, § 1(6)(b). Plaintiff fearing fines and the loss

of his Kentucky racing license, declined to participate in the race, forfeiting his entry fee. Plaintiff entered the horse into three subsequent races, knowing of the restriction. Subsequent races were not held because they did not have the minimum entries required to run. Plaintiff brings this Declaration of Rights action to challenge the constitutionality of KHRC's regulation as a burden on interstate commerce in violation of Article I, § 8, Cl. 3 of the U.S. Constitution. Plaintiff seeks to have the rule declared invalid and requests a permanent injunction against KHRC from enforcing the rule.

DISCUSSION

As a preliminary matter, the Court finds that the plaintiff has standing to challenge the regulation. He has alleged a sufficient deprivation of his liberty of action and financial interests to allow him to challenge the regulation. *See* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). Likewise, the Court rejects the Commission's argument that the case is not ripe for review. There is an adequate case or controversy to ensure that the parties are adversarial and have a concrete stake in the outcome, therefore a justiciable controversy exists on the record presented here. Revis v. Daugherty, 287 S.W.28, 29 (Ky. 1926). KRS 418.040. Nor is there any basis for a claim of sovereign immunity, when all the plaintiff seeks here is declaratory and injunctive relief. Ex parte Young, 209 U.S. 123 (1908).

The plaintiff's primary argument is that 810 KAR 1:015, § 1(6)(b) violates the negative implications of Article 1' s Commerce Clause (The Dormant Commerce Clause). "It is well settled that actions are within the

domain of the Commerce Clause if they burden interstate commerce or impede its free flow." C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 389 (1994) (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937)). The Supreme Court has long interpreted the Commerce Clause as an implicit restraint on state authority, even without any conflicting federal statute. *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007). "To determine whether a law violates this so-called "dormant" aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce." American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 359 (1992). For this analysis, discrimination means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 99 (1994); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988). Discriminatory laws motivated by economic protectionism, those laws that "would excite those jealousies and retaliatory measures the Constitution was designed to prevent," are *per se* invalid. C & A Carbone, 511 U.S., at 390 (1994); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

On the other hand, an evenhanded approach satisfies this prong. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed

on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970) The Plaintiff bears the initial burden of showing *prima facie* discrimination, and once shown can only be overcome by showing that the state has no other means of advancing a legitimate local purpose. Maine v. Taylor, 477 U.S. 131, 138 (1986); Cherry Hill Vineyard LLC v. Baldacci, 505 F.3d 28, 33 (1st Cir. 2007); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). Plaintiff here fails to show *prima facie* interstate commerce discrimination.

The Supreme Court has further held that government action in discharging traditional government functions are outside the scope of the restrictions of the Commerce Clause. United Haulers, 550 U.S. 330; Dept. of Revenue of Ky. v. Davis, 553 U.S. 328 (2008). As the U.S. Supreme Court has explained, "a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives as distinct from the simple economic protectionism that the Clause abhors." Davis, 553 U.S., at 341. For these activities, governments may enact regulations that ensure proper operation of necessary governmental services, even if those regulations have an incidental burden interstate commerce. Id.

Plaintiff argues "at no point in the history of the United States of America has horse racing – unlike trash collection and state taxation – been considered to be a traditional government function." (Memorandum of Plaintiff in Opposition to Defendant's Cross-motion for Summary Judgment, p. 12.) This argument

mischaracterizes the role of the state in the regulation of horse racing. While horse racing itself is not a traditional government function, there can be no question that the *regulation* of horse racing is, and always has been, a traditional government function, at least since 1894 in Kentucky. *See* Kentucky Statutes, Barbour & Carroll, Ch. 36, §§ 1326-1330 (1894). For over a hundred years, both statute and case law have established that the state has a unique and far reaching role in the regulation of this sphere of economic activity. Long before the New Deal court, and while the Supreme Court continued to strike down state legislation regulating private contracts in other economic spheres, Kentucky's highest court sustained a far reaching regulatory scheme that governed virtually all aspects of the thoroughbred horse racing industry. State Racing Commission v. Latonia Agricultural Association, 131 S.W. 681 (Ky. 1909); *see also* Helringer, Equine Regulatory Law, pp. 76-88 (2012).

Horse racing is conducted by private owners at privately-owned tracks, but every aspect of the operation of those tracks is closely supervised and regulated by the state. While the state is not a market participant as that term as been used in cases under the Commerce Clause, there can be little doubt that the pervasive role of the state in regulating the horse racing industry meets the broad criteria for traditional government function contemplated by the Supreme Court. United Haulers, 550 U.S. 330; Davis, 553 U.S., at 342. The purpose and effect of the regulation in question is not to give preference to any individual in-state private party, but to nurture and promote the market for race horses, and to ensure that the public as

a whole will benefit from the stronger fields and more competitive races that will result. As the Supreme Court explained in Dept. of Rev. v. Davis, the inquiry is "to find out whether the preference was for the benefit of a government fulfilling governmental obligations, or the benefit of private interests because they were local." Id., 553 U.S. 342, n. 9.

Here, the claiming race regulation is for the benefit of the public interest, in that the Commission in fulfilling its core governmental function of ensuring that horse racing maintains competitive fields that are necessary for a healthy racing industry. There is no particular economic benefit to any local private interest that overshadows the regulation's public purpose. In fact, the tracks at which the horses were claimed are instrumental in creating and increasing the value of the claimed horses, so it is only fair that those tracks receive some benefit from hosting the claiming races. So long as the regulation is part of a comprehensive regulatory program that is designed to promote the public purpose of fostering a racing industry that is a vital part of the economy of the state, this Court will not strike down a valid exercise of the police power as a violation of the dormant Commerce Clause absent a strong showing of detrimental impact on interstate commerce. No such showing has been made here.

Since the regulation does not conflict with any assertion of Federal power, and the state has sufficient interest in the horse industry as a vital source of economic activity in the state, this Court finds KHRC has validly exercised its police power to reasonably regulate that industry. It is plainly within the authority of the Commission to enact such a regulation

designed to improve the quality of racing and the pool of horses that compete in the tracks that are subject to regulation. KRS § 230.215. However, it does not follow from the existence of this power to regulate that a state may exercise it beyond the confines of Constitutional limitations. Toomer v. Witsell, 334 U.S. 385, 393-94 (1948). If the restriction of the regulation prohibited entry of claimed horses at other tracks for a lifetime, or even a year, the plaintiff would have a better argument that the restriction unduly impedes interstate commerce. But the relatively short duration of this restriction militates strongly in favor of upholding it as a reasonable exercise of the state's police power in the filed of horse racing regulation.

Claiming races do not reflect the unfettered operation of the free market. Youst v. Longo, 729 P.2d 728 (Cal. 1987) ("Thoroughbred horse racing is one of the most highly regulated sports in the United States"). The very basis of the economic vitality of the industry is rooted in gambling, an activity that is otherwise illegal, and which therefore justifies (perhaps requires) the full exercise of the police power of the state. *See* Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987 (Ky. 1931). A claiming race allows the sale of a horse at a race, at a stipulated price. This method of purchase was designed by the regulatory authorities in order to add liquidity to racehorse investing and to ensure competitive races. Neibergs and Vinzant, Estimates of Racehorse Earnings and Profitability, 17 Journal of Agribusiness 1, 37-48 at 38 (Spring 1999).

The regulation applies to a significant percentage of all horse races run at Kentucky tracks.[1]

The legislature vested the Commission with plenary authority over horse racing to ensure the both the economic health and the integrity of the industry. KRS § 230.215. As the former Court of Appeals has held, "[t]he Kentucky State Racing Commission is more than an administrative agency having the quasi-judicial function of finding the facts and applying the law to the facts. The Commission was created for the purpose of maintaining integrity and honesty in racing .... and the promotion of interest in the breeding of and improvement of the breed of thoroughbred horses." Fuller v. State Racing Commission, 481 S.W.2d 298, 301 (Ky. 1972). Here, the regulation governing claiming races is reasonably designed to meet these legislatively and judicially approved goals.

The KHRC contends this regulation only incidentally burdens interstate commerce and is therefore constitutional and a valid exercise of the state's police power to regulate the health, safety, and welfare of the people in accordance with United Haulers and Davis. Plaintiff contends that on its face this regulation burdens out-of-state business to benefit in-state business.

Although 810 KAR 1:015, § 1(6)(b) may have some impact on interstate commerce, it is not discriminatory on its face. The KHRC's regulation applies equally to Kentucky owners and owners from out-of-state, to

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[1] Estimated in one analysis to be 54% of all horse races in the state of Kentucky. Neibergs and Vinzant, Id. at 39.

other tracks in Kentucky as well as out of state tracks. "The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values." Maine v. Taylor, 477 U.S., at 151. Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), elaborates that the Commerce Clause does not protect "the particular structure or methods of operation" of a market. Id. at 127. The KHRC here has enacted a regulation that does not discriminate in on its face against out-of-state horse owners, but rather even-handedly applies to all horse owners who have bought a horse at a claiming race in Kentucky. The Commerce Clause cannot *prima facie* prohibit a particular method of operation for these claiming races, it may only ensure that the methods treat all participants equally, and the burdens on interstate commerce do not outweigh the local benefits.

Because this regulation does not discriminate on its face, the real issue at hand is whether the regulation prohibiting the free transfer of horses claimed at a claiming race is valid despite any effect on interstate commerce. The regulation is properly analyzed under the test in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), which applies to laws directed towards "legitimate local concerns, with effects upon interstate commerce that are only incidental." Philadelphia v. New Jersey, 437 U.S., at 624. Using the Pike test, the Court must determine whether the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." Pike, 397 U.S., at 142. The balancing test will measure the extent of the burden compared to the importance of the local interest

involved, and whether there is a less restrictive alternative. Id.

Beyond plaintiff's loss, the burden on interstate commerce is unclear from the record in this case. It should be noted that the regulation has absolutely no application to private sales. Any licensed owner has the unfettered right to purchase any horse at a private sale, and to avoid any restriction of this regulation on entry of the horse at any track, in state or out. But owners who purchase a horse at a publicly regulated claiming race are subject to reasonable restrictions on racing the horse in other venues until the completion of the meet at which the horse is purchased. The duration and scope of the restriction appears to impose relatively minimal burdens on interstate commerce, as the restriction only applies for the duration of the meet in which the horse was purchased (in Mr. Jamgotchian's case, 42 days). (Defendant's Memorandum of Law in Support of its Cross-Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment, p. 23).

As for the benefits, the Commission identifies three areas in which the regulation promotes a legitimate public interest. First, the regulation helps to "ensure larger fields of horses," improving the welfare of Kentuckians involved in the horse and tourism industries. Second, the regulation "helps classify horses in a proper manner and promotes horse racing by keeping better bred horses in Kentucky," promoting the safety of jockeys, trainers and track staff through healthier horses. *See* Jacobson v. Maryland Racing Comm'n, 274 A.2d 102 (Md. Ct. App. 1971) (upholding the enforcement of Maryland's claiming regulation).

The regulation makes it easier for KHRC to enforce its other regulations that ensure horse racing remains a competitive and safe sport. Third, the regulation helps to generate more revenue at racetracks through entry fees, wagers and retail sales. (Defendant's Memorandum of Law in Support of Its Cross-Motion For Summary Judgment And Response In Opposition To Plaintiff's Motion For Summary Judgment, p. 23-24). All of these benefits are economically related, and while "'revenue generation is not a local interest that can justify *discrimination* against interstate commerce,' *Carbone*, 511 U.S., at 393, 114 S.Ct. 1677 (emphasis added), it is a cognizable benefit for purposes of the *Pike* test." United Haulers, 550 U.S., at 346. Further, neither party has suggested that there are more reasonable alternatives. This Court refuses to speculate on any potential alternatives, and so finds the Pike test prong requiring no reasonable alternative satisfied. (Plaintiff's Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment, p. 18).

On balance, the record here demonstrates a rather minor and somewhat speculative negative impact on interstate commerce, balanced against an unquantified but legitimate public interest in promoting the health of the racing industry. The racing industry in Kentucky employs thousands of people. The regulation serves a legitimate public purpose in stabilizing the market for the sale of horses and promoting competitive races. Here, the plaintiff seeks to obtain the benefits of the claiming race regulation (the ability to purchase a high quality race horse for a set price that may be below the true market value if the horse performs well in the race), but to avoid the minimal burden of keeping the

horse at the track at which it was claimed for the remainder of that meet. By claiming the benefits of the purchase, the buyer must also abide by the reasonable restrictions that are designed to promote the health of the horse racing industry as a whole.

If the plaintiff had purchased the horse in question in the open market, there would be no restriction on his ability to enter the horse in any race, in state or out of state. But the plaintiff did not purchase this horse in the open market, in a simple transaction between buyer and seller. He purchased the horse at a highly regulated racetrack, during a claiming race, which requires that the horse "shall not race elsewhere until the close of entries at the meeting at which it was claimed." 810 KAR 1:015(1)(6)(b). The plaintiff should not be allowed to obtain the benefits of the claiming races without accepting the relatively slight burden of restrictions on racing the claimed horse at other tracks until the end of the meet.

The plaintiff has failed to carry his burden to demonstrate that the challenged regulation imposes a burden on interstate commerce that is a violation of the Commerce Clause. The Court finds that the regulation is a reasonable exercise of the Commission's police power to regulate horse racing in the public interest. The plaintiff, having benefited from the regulation's provisions allowing purchase of quality race horses at a fixed price, cannot complain that he is restricted in his right to race the claimed horse at other tracks until the end of the meet at which the horse is purchased.

CONCLUSION

For the reasons stated above, the Commission's motion for summary judgment is **GRANTED,** and the Plaintiff's motion for summary judgment is **DENIED.** This is a final and appealable judgment and there is no just cause for delay.

So ordered this 29th day of November, 2012.

/s/ Phillip Shepherd
PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

APPENDIX D

Compilation of Regulations

Arizona

A.A.C. R19-2-115 G(1)(c)

G. Ownership restrictions.

1. If a horse is claimed, the claimant:

   a. Shall not sell or transfer the horse to anyone, wholly or in part, except in another claiming race, for 30 days from the day of claim; and

   b. Shall not return the horse to the same stable or under control or management of the horse's former owner or trainer for 30 days from the day of claim unless the horse is reclaimed in another claiming race.

   c. Shall ensure that the claimed horse does not race outside of Arizona until the race meet at which the horse was claimed is closed or for 60 days from the day of claim, whichever is less, except:

      i. To fulfill a stakes engagement that transferred automatically to the claimant, or

      ii. If the horse was claimed for a price that causes the horse to be ineligible to be reentered at the track where claimed.

Arkansas

Arkansas Racing Commission Rule 2458

2458.

(a) Except as otherwise provided in this Rule 2458, no horse claimed during an Oaklawn race meet shall be eligible to race at another track for a period of thirty (30) days following the end of the Oaklawn racing season unless the claimed horse has subsequently run back in another race at Oaklawn following the claim.

(b) Horses claimed during the final fifteen (15) scheduled race days of an Oaklawn race meet are excepted from the requirements of Rule 2458(a).

(c) Horses entered in good faith in a subsequent race at Oaklawn with appropriate conditions that are unable to run back before of failure of the subsequent race at Oaklawn to fill or failure to draw in from the also eligible list may be excepted from the requirements of Rule 2458(a), if approved by the Racing Secretary and Stewards.

(d) Horses also may be excused from the requirements of Rule 2458(a) with approval by the Racing Secretary and Stewards in other appropriate circumstances where the horse was unable for good cause to run back in a subsequent race at Oaklawn.

Colorado

1 CCR 208-1-8:118

A claimed horse shall not race elsewhere for a period of thirty (30) days or until after the close of the meet, whichever comes first, except by special permission of the stewards at the meet where the horse was claimed.

Delaware

Del. Code Ann. tit. 3 § 13.6

Thirty Day Prohibition – Sale of Claimed Horse: No horse claimed in a claiming race shall be sold or transferred, wholly or in part, to anyone within thirty (30) days after the day it was claimed, except in another claiming race. A horse claimed by an Owner that has started a horse at the current meet and by a Trainer that is currently stabled on the grounds of the Association, shall not be permitted to run in another racing jurisdiction for the period of sixty (60) days, beginning the day after the claim was made, or until the end of the current meet, whichever comes first. A horse that is claimed by an Owner that has started a horse at the current meet by a Trainer that is not currently stabled on the grounds of the Association shall not be permitted to race elsewhere until the close of the meeting which it was claimed. The Stewards shall have the authority to waive this rule upon application, so as to allow a claimed horse to race in a stakes race. The Stewards may also permit a horse claimed in a steeplechase or hurdle race to race elsewhere in a steeplechase or hurdle race after the close of the steeplechase program, if such a program ends before the close of the meeting at which it is claimed.

Idaho

I.D.A.P.A. 11.04.09.035

No horse which has been claimed out of a claiming race in which said horse was declared the official winner, is eligible to start in any other claiming race for a period of thirty (30) days, exclusive of the day it was claimed, for less than twenty-five percent (25%) more than the amount for which it was claimed. A horse which has been claimed out of a claiming race in which said horse was not declared the official winner may be eligible to start for any price desired by the claimant. No horse which has been claimed out of a claiming race is eligible to race at any other race meeting in this state or elsewhere until the close of the meeting where it was claimed, unless its removal from the grounds of such meeting is approved by the Stewards for good cause or is required by the Racing Association where it was claimed.

Illinois

11 Ill. Adm.Code § 510.200(a)-(c)

a) A standardbred horse claimed out of a claiming race is not eligible to race in any state other than Illinois for a period of 60 days from the date of the claim, or until a date following which there is no standardbred race meet scheduled in Illinois for 30 days.

b) A thoroughbred horse claimed out of a claiming race is not eligible to race in any state other than Illinois for a period of 45 days from the date of the claim, or until a date following which the racing season has concluded.

c) This Section shall not apply when claimed horses are fulfilling a stakes engagement or have the express written consent, of the race track where they were claimed, to race at another location.

Indiana

71 IAC 6.5-1-4(i)

No horse claimed out of a claiming race shall race outside of the state of Indiana for a period of sixty (60) days without the permission of the stewards and racing secretary, or until the conclusion of the race meet.

Iowa

491 IAC 10.6(18)(f)(3)

Racing elsewhere. A horse that was claimed under these rules may not participate at a race meeting other than that at which it was claimed until the end of the meeting, except with written permission of the stewards. This limitation shall not apply to stakes races.

Louisiana

LAC 35-9909

If a horse is claimed it shall not be sold or transferred to anyone wholly or in part, except in a selling or claiming race, for a period of 30 days from date of claim, nor shall it, unless reclaimed, remain in the same stable or under the control of management of its former owner or trainer for a like period, nor shall it race in any other state until after the close of the meeting at which it was claimed, unless special permission is obtained from the commission. However,

a horse claimed at a track in Louisiana must remain at the track where it was claimed for a period of 60 calendar days or until the current meeting at which it was claimed is terminated. Where a race meeting is authorized and conducted as a split-meeting, a horse claimed in such a race meeting must remain at the track where it was claimed for a period of 60 calendar days or until that segment of the split meeting at which it was claimed is terminated. The following calendar day shall be the first day and the horse shall be entitled to enter at another track in the state whenever necessary so the horse may start on the sixty-first day following the claim.

Maryland

COMAR 09.10.01.07M(4)

M. If a horse is claimed:

(1) For a period of 30 days from the day of the claim, the horse may start in a claiming race only for a claiming price at least 25 percent more than the claiming price for which it was claimed;

(2) The horse may not be sold or transferred to anyone, wholly or in part, for a period of 30 days from the day of the claim, except:

(a) In a claiming race, or

(b) When the horse is entered and starts for a claiming price which would cause the horse to become ineligible to be entered at Laurel or Pimlico;

(3) Unless reclaimed, the horse may not remain in the same stable or under the control or

management of its former owner or trainer for a period of 30 days from the day of the claim;

(4) It may not race outside of Maryland for a period of 60 days from the day of the claim except:

(a) To participate in a stakes race;

(b) To participate in a claiming race for a price which would cause the horse to become ineligible to be entered at Laurel or Pimlico; or

(c) During the scheduled absence of a live thoroughbred race meet in Maryland for at least 15 days.

Massachusetts

205 CMR 4.06(5)

If a horse is claimed, it shall not start in a claiming race for a period of 30 days from the date of claim for less than the amount for which it was claimed. A claimed horse shall not race elsewhere until after the close of the meeting at which it was claimed or until 60 calendar days the day after the claim, whichever comes first.

Michigan

MCL 431.3205(3)

A claimed horse is not eligible to race in any state other than Michigan for a period of 60 days from the date of claim or until after the close of the meeting at which it was claimed.

Minnesota

Minn. R. 7883.0140, subp. 22

CLAIMED HORSE SHALL RACE AT TRACK CLAIMED. No claimed horse shall race at any other racetrack until after the close of the race meeting at which it was claimed, or for 60 days, whichever is shorter, except to fulfill one or more stakes engagements.

Montana

Rule 32.28.804(6)

A claimed horse shall not race elsewhere until after the close of the meeting at which it was claimed except by permission of the stewards at the meeting where the horse was claimed.

Nebraska

294 Neb. Admin. Code, ch. 15 § 007.05

Any horse so claimed shall not be sold or transferred wholly or in part to anyone for thirty (30) days thereafter, except in another claiming race, nor shall it remain under the control or management of its former owner or trainer for a like period, unless reclaimed. A horse claimed at a Nebraska track shall not be permitted to race at a track outside of Nebraska until after the close of the meeting at which it was claimed, nor shall it race at another Nebraska track, except in stake or handicap races, except by special permission of the stewards at the meeting at which it was claimed. A horse claimed at a Nebraska track shall not be prevented from entering or running in a stake or handicap race at another Nebraska track. Provided,

however, that in the period of thirty (30) days after the date of claiming, upon petition of the owner of record or said owner's authorized agent, the Commission may permit or ratify the sale or transfer, in whole or in part of a horse claimed at a Nebraska meeting. This action of the Commission shall be for reasons and under conditions and terms which shall appear sufficient to the Commission. Provided, further, that when a horse is claimed at a recognized meeting under rules which are at variance with this rule, title to such horse shall be recognized in Nebraska to follow the rule of the meeting under which it was claimed. See Statute 2-1220.)

Nevada

NAC 30.335(7)

No horse which has been claimed out of a claiming race in which said horse was declared the official winner shall be eligible to start in any other claiming race for a period of 30 days, exclusive of the day it was claimed, for less than 25% more than the amount of which it was claimed. A horse which has been claimed out of a claiming race in which said horse was not declared the official winner may be eligible to start for any price desired by the claimant. No horse which has been claimed out of a claiming race shall be eligible to race at any other race meeting in this state or elsewhere until the close of the meeting where it was claimed unless its removal from the grounds of such meeting is approved by the board of stewards for good cause or is required by the association where it was claimed.

New Jersey

N.J.A.C. 13:70-12.5

A claimed horse shall not race elsewhere until after the close of the meeting at which it was claimed. Nothing in this rule shall preclude any claimed horse from entering any stake race.

New Mexico

15 NMAC 2.4.8 G(6)

A claimed horse shall not race elsewhere, except within state, or out of state stake races for a period of 30 days or the end of the meet, whichever occurs first.

New York

9 NYCRR 4038.4

If a horse is claimed it shall not be sold or transferred to anyone wholly or in part, except in a claiming race, for a period of 30 days from the date of the claim. A claimed horse shall not, unless reclaimed, remain in the same stable or under the control or management of its former owner or trainer for a like period. A claimed horse shall not race outside New York State for a period of 30 days from the date of the claim or the end of the meeting at which it was claimed, whichever period of time is longer, except that a horse may run in a sweepstakes elsewhere for which the horse was nominated by its former owner or trainer, or if permission is granted by the stewards.

North Dakota

NDAC 69.5-01-07-17 (5)(b)

Eligibility price. A claimed horse may not start in a race in which the claiming price is less than the price in which it was claimed for a period of thirty days. If a horse is claimed, no right, title, or interest therein may be sold or transferred except in a claiming race for a period of thirty days following the date of claiming. The day claimed does not count but the following calendar day must be the first day. The horse is entitled to enter whenever necessary so the horse may start on the thirty-first calendar day following the claim for any claiming price. The horse is required to continue to race at the track where claimed for a period of thirty days or the balance of the current race meeting whichever comes first.

Ohio

Ohio Adm.Code 3769-6-15

No thoroughbred horse claimed in Ohio may be raced in another state, except in a stake race, for a period of sixty days.

Oklahoma

OHRC Rule 325:30-1-17

(a) A horse claimed out of a claiming race shall be eligible to race at any racing organization within the State of Oklahoma immediately or in any other state after the end of the race meeting where the claim occurred. A claimed horse shall not be eligible to start in any other claiming race for a period of thirty (30) days exclusive of the day such horse was claimed for

less than the price for which the horse was claimed. A claimed horse, with permission of the Stewards at that race meeting, may be allowed to participate in stakes or nomination races in other jurisdictions.

(b) Any horse claimed in another racing jurisdiction is subject to the eligibility requirements for the claimed horse in effect at the time of the claim in the jurisdiction in which the horse was claimed.

Pennsylvania

58 Pa. Code § 163.255

If a horse is claimed, it may not be sold or transferred to anyone wholly or in part, except in a claiming race, for a period of 30 days from date of claim, nor may it, unless reclaimed, remain in the same stable or under the control or management of its former owner or trainer for a like period, nor may it race elsewhere until after the close of the meeting at which it was claimed. The Commission has the authority to waive this section upon application and demonstration that the waiver is in the best interest of horse racing in this Commonwealth.

Texas

16 Tex. Admin. Code § 313.308

(a) A horse claimed in a claiming race in Texas:

(1) may not be sold or transferred, in whole or part, by any method other than a claiming race during the 30-day period after the initial claim; and

(2) is ineligible to start in a race at a race meeting other than the one at which it was claimed until the end of the race meeting at which the horse was claimed, except in a stakes race after verification by the stewards.

(b) A horse claimed in another state is subject to the eligibility requirements for claimed horses in effect at the time of the claim in the jurisdiction in which the horse was claimed.

Virginia

11 VAC § 10-120-80(4)

When a horse is claimed out of a claiming race other than steeplechase races, the following restrictions shall apply to the horse for 30 calendar days after the day that the horse was claimed:

1. The horse may only start in claiming races for a designated price of 25 more than the amount for which the horse was claimed, except in harness racing a horse may start in claiming races for any price;

2. The horse may not be sold or transferred wholly or in part to another person, except in another claiming race;

3. The horse may not remain in the same stable or under the control or supervision of its former owner or trainer, unless reclaimed;

4. Notwithstanding the 30-day restriction above, the horse may not race elsewhere until after the close of the meeting at which it was claimed, except with the permission of the stewards; and

5. All horses claimed in other jurisdictions and racing in Virginia shall be subject to the conditions of the claiming regulation in the jurisdiction where the claim was made.

West Virginia

W. Va. CSR 178-1-38.5

Any horse claimed shall not be sold or transferred, wholly or in part thereof, to anyone for thirty (30) days except in another claiming race. The horse shall not remain in the same barn or under the control or management of its former owner or trainer for thirty (30) days, unless reclaimed, nor shall it race outside of the state of West Virginia for a period of sixty (60) days, except for stakes races and special events, or unless special permission is granted by the stewards.

Wyoming

Wyoming Conduct of Racing Rules, Chapter 8, Section 22(d)

(d) Any horse claimed shall not be sold or transferred wholly or in part to anyone for thirty (30) days except in another claiming race. The horse shall not remain in the same barn or under the control or management of its former owner or trainer for a like period unless reclaimed. It shall not race elsewhere until after the close of the meeting at which it was claimed, except by permission of the Stewards at the meeting at which it was claimed.

(i) The Commission may permit or ratify the sale or transfer of a horse claimed at a Wyoming meeting

in the period of thirty (30) days after the date of claiming upon petition of the owner.

(ii) When a horse is claimed at a recognized meeting under rules which are at variance with this rule, title to the horse shall be recognized in Wyoming to follow the rule of the meeting under which it was claimed.

APPENDIX E

HORSE RACING BOARD

State of California
DEPARTMENT OF JUSTICE

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September 8, 2003

[redacted]

Roy C. Wood, Jr., Executive Director
California Horse Racing Board
1010 Hurley Way, Suite 300
Sacramento, CA 95825

RE: Claimed Horses – Prohibiting Out-Of-State Racing

Dear Mr. Wood:

This is to provide advice responsive to a question at the July California Horse Racing Board ("CHRB")

meeting concerning the board's authority to prohibit a horse claimed in a California claiming race from racing out-of-state for a period of time beyond that specified in current board rule.

It is our informal advice that a CHRB rule prohibiting a horse claimed in a California race from participating in any out-of-state race for an extended period of time would be unconstitutional, as a violation of the Commerce Clause of the United States Constitution.

Background

Board rule 1663 has long placed limitations on the entry of claimed horses, providing, as pertinent here, "nor is it [a claimed horse] eligible to race in any State other than California until the close of the meeting where it was claimed, except in a stakes race." (Cal. Code Regs., tit. 4, § 1663.) The rule also provides that a horse claimed out of a claiming race is eligible to race at any racing association in California immediately after being claimed, but is not eligible to start in another claiming race in the state for twenty five days for less than 25% more than the amount for which it was claimed. (*Id.*)

The CHRB staff analysis for item 11 of the CHRB's July 24, 2003 meeting noted that the Security and Licensing Committee heard a proposal to amend Rule 1663 to provide that a horse claimed out of a claiming race is ineligible to race in any other state until 60 days after the close of the meeting at which it was claimed. The object of the proposed amendment was to keep claimed horses in California. Proponents of the amendment maintained that horses claimed in

California are being shipped to other jurisdictions, which results in fewer horses and short fields in California. At that time, some individuals were opposed to the amendment on the ground that it would restrict owners' ability to use their property to their best advantage. They also expressed the view that the so-called 60-day "jail time" could be a violation of the Commerce Clause of the Constitution.

With this background, and some further discussion at the July 24, 2003 CHRB meeting, we were requested to review the issue, and provide the board with an informal letter of advice on possible legal limitations on California imposing a 60-day post claiming-meeting prohibition for a claimed horse to race in any other state.

ANALYSIS

Board Rule 1663 addresses race entry of a claimed horse, as follows:

> (a) A horse claimed out of a claiming race is eligible to race at any racing association in California immediately after being claimed. The horse is not eligible to start in a claiming race for 25 days after the date of the claim for less than 25% more than the amount for which it was claimed; nor is it eligible to race in any State other than California until the close of the meeting where it was claimed except in a stakes race.
>
> (b) A claimed horse may be removed from the grounds of the association where it was claimed for nonracing purposes.

> (c) This rule does not apply to standardbred horses.

(Cal. Code Regs. tit. 4 § 1663.[1])

The proposal to make horses claimed in a California race ineligible to race out-of-state for 60-days after the close of the meeting at which claimed would, we suggest, violate the Commerce Clause, United States Constitution article 1, section 8, clause 3. The Supreme Court's statement of the law set forth in *Healy v. Beer Institute* (1989) 491 U.S. 324 is dispositive:

> The principles guiding this assessment . . . reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce [fn. omitted] and with the autonomy of the individual States within their respective spheres. [Fn. omitted.] Take together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following proposition: *First, the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside the State's borders, whether or not*

---

[1] There are no statutes in the Horse Racing Law specifically addressing the start of claimed horses, but Business and Professions Code section 19420 is shown as a reference for adoption of Rule 1663. Section 19420 provides as follows:

> Jurisdiction and supervision over meetings in this State where horse races with wagering on their results are held or conducted, and over all persons or things having to do with the operation of such meetings, is vested in the California Horse Racing Board.

> *the commerce has effects within the State. . . .*" [Citations.] . . . *Second, a statute that directly controls the commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature.* The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. . . . Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what affect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. [Citation.] And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.

(*Healy v. Beer Institute*, *supra*, 491 U.S. at pp. 335-337, italics added.) The Court in *Healy* found a Connecticut statute requiring out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers are no higher than the prices at which those products are sold in specified bordering states. The statute was found to have the impermissible practical effect of controlling commercial activity

wholly outside Connecticut. By virtue of the Connecticut statute's interaction with the regulatory schemes of the border-states, the statute required out-of-state shippers to take account of their Connecticut prices in setting their border-state prices and restricted their ability to offer promotional and volume discounts in the border States, thereby depriving them of whatever competitive advantages they may possess based on the local market conditions in those States. (*Healy*, *supra*, 491 U.S. at pp. 336-340.)

A California restriction on the out-of-state racing of a California-claimed horse would, as noted by the opponents of the suggested CHRB rule 1663 amendments, have a very direct extraterritorial effect on the owner of the animal. The owner of the horse would be prohibited from racing the animal out-of-state (but not within the state) during the 60-day post-meeting period. Other states imposing similar, or perhaps conflicting, restrictions on the out-of-state regulatory regime into the jurisdiction of another state that *Healy* counsels the Commerce Clause is intended to prevent.

These constraints on the extraterritorial reach of state regulation were similarly treated by the Supreme Court in *Edgar v. Mite Corporation* (1982) 457 U.S. 624:

> "[A] state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." [Citations.] The Commerce Clause also precludes the application of a state statute to commerce that takes place

> wholly outside of the State's borders, whether or not the commerce has the effects within the State. In *Southern Pacific Co. v. Arizona*, 325 U.S. 7611, 775 . . . (1945), the Court struck down on Commerce Clause grounds a state law where the "practical effect of such regulation is to control [conduct] beyond the boundaries of the state. . . ." The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."

(*Edgar v. Mite Corporation*, *supra*, 457 U.S. pp. 642-643.)

It would seem undeniable that the proposed 60-day post-race meeting prohibition of out-of-state racing of a California claimed horse would have the effect of controlling commercial activity occurring wholly outside the boundary of the state. The owner of the claimed horse would be prohibited by the California regulation from racing the horse in any other state for an extended period of time after the close of the meeting at which it was claimed. And the restriction is plainly proposed only for economic reasons, as an effort to keep more horses from leaving the state. California plainly cannot assert extraterritorial jurisdiction such as here being considered.

It is therefore our informal advice that, if challenged, the proposed 60-day out-of-state racing prohibition would, based on authorities such as *Edgar*

and *Healy*, be found invalid as a violation of the Commerce Clause.[2]

If further assistance is needed on this subject, please do not hesitate to be in touch with this office.

Sincerely,

/s/ Derry Knight
DERRY L. KNIGHT
Deputy Attorney General

For BILL LOCKYER
Attorney General

DLK
Enclosure

[2] We have not been asked to review whether the restriction on out-of-state racing of claimed horses found in current CHRB Rule 1663 is subject to legal challenge, and this advice letter should not be construed as in any way addressing that issue.