No. 16-171

In the Supreme Court of the United States

JERRY JAMGOTCHIAN,
Petitioner,
v.

KENTUCKY HORSE RACING COMMISSION; MARC A. GUILFOIL, in his official capacity as Executive Director, Kentucky Horse Racing Commission; FRANKLIN S. KLING, JR., in his official capacity as Chairman, Kentucky Horse Racing Commission; and JOHN C. ROACH, in his official capacity as Vice-Chairman, Kentucky Horse Racing Commission,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Racehorses are acquired by one of four methods: private sale, auction, birth rights, or a claiming race. Racehorse owners voluntarily choose their preferred method of acquisition, and States have no say in the owners' decisions.

Kentucky does not regulate the acquisition of horses by private sale, auction, or through birth rights. It does, however, regulate the acquisition of horses through claiming races. Kentucky's claiming rule restricts claimed horses from racing elsewhere until the end of that track's meet. The rule applies regardless of whether the owner or trainer is a Kentucky citizen and regardless of whether the horse has any Kentucky connection. Kentucky's claiming rule does not, however, place any temporal restriction on the physical transfer of a horse—with its attendant commercial activity—to another location, whether in-state or out-of-state.

The question presented is whether Kentucky's claiming rule violates the dormant Commerce Clause by preventing a claimed horse from racing elsewhere for a limited period of time following the horse being claimed.

PARTIES TO THE PROCEEDING

Respondents, who were the Defendants-Appellees below, are the Kentucky Horse Racing Commission, Marc A. Guilfoil, in his official capacity as Executive Director of the Commission, Franklin S. Kling, Jr., in his official capacity as Chairman of the Commission, and John C. Roach, in his official capacity as Vice-Chairman of the Commission.[1]

[1] Pursuant to Rule 35.3, the parties provided notice to the Court in an August 30, 2016 letter that Mr. Guilfoil has succeeded John T. Ward, Jr., that Mr. Kling has succeeded Robert M. Beck, Jr., and that Mr. Roach has succeeded Tracy Farmer.

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The Kentucky Supreme Court's opinion is reported at 488 S.W.3d 594 (Ky. 2016), and is reproduced in Petitioner's Appendix A (Pet. App. 1–53). The Kentucky Court of Appeals' opinion is not reported but is available at 2014 WL 495576 (Ky. Ct. App. Feb. 7, 2014), and is reproduced in Petitioner's Appendix B (Pet. App. 54–68). The Franklin Circuit Court's decision is not reported, but is reproduced in Petitioner's Appendix C (Pet. App. 69–82).

STATEMENT

1. Horse racing is a closely regulated industry in the thirty-eight States that allow it. Pet. App. 31, 43; *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2028 (2014). States that permit horse racing have established administrative bodies vested with "forceful control" of horse racing, including the "plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted." *See, e.g.*, KY. REV. STAT. ANN. § 230.215(2). In Kentucky, this body is the Kentucky Horse Racing Commission ("Commission"). The Commission's 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.'" Pet. App. 27, n.9.

Horse racing is conducted through associations that operate at tracks nationwide, such as Churchill Downs in Louisville, Kentucky. Pet. App. 7. While associations have developed a grading system for racehorses, the resources available to judge a horse's perceived ability are limited. Pet. App. 34. Therefore,

the Commission and other States' governing bodies established the "claiming race." Pet. App. 34–35.

A "claiming race" is a race in which every horse is subject to claim by another licensed person. Pet. App. 8. The price for each horse is identical, and the price is established and published before the race. Pet. App. 35. The claiming system deters an owner of a good horse from running the horse in a lesser field for fear that the horse will be claimed. Pet. App. 35. Conversely, the claiming system deters the owner of a lesser horse from running the horse in a better field because the owner must pay an entry fee for a horse that has little chance to finish in the money. Pet. App. 35. This juxtaposition means that claiming rules foster competitive races. Pet. App. 35 (internal citations omitted). Competitive races increase public confidence in the horse-racing industry, Pet. App. 34, which matters due to the *sine qua non* of horse racing: legalized gambling. Pet. App. 31. Congress has determined that whether to permit legalized gambling on horse racing is a matter that should be left to the States, but that States that permit gambling on horse racing must allow gambling in accordance with federal law. *See* 15 U.S.C. § 3001. Otherwise, federal law is silent with respect to horse racing.

2. Claiming races are one of three methods to purchase a racehorse, the other two being at auction or by private sale. Pet. App. 48. A racehorse may also be acquired at birth if the owner holds the horse's birth rights. Kentucky law regulates the purchase of a racehorse in a claiming race, but it does not regulate the purchase of a racehorse at auction or by private

sale, nor does it regulate the acquisition of a horse at birth. Pet. App. 47.

An owner voluntarily chooses the method by which he or she acquires a horse. Therefore, a "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." Pet. App. 5. Moreover, the owner "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." Pet. App. 5. This makes the provisions of the claiming rule "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." Pet. App. 21.

Twenty-seven of the thirty-eight States that permit horse racing have established a claiming rule that restricts—for a brief period of time following a horse's claim—the horse's ability to race elsewhere. Pet. 9. The Commission's claiming-race regulation provides:

> (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.[2]

810 KY. ADMIN. REGS. 1:015, Section 1(6)(a)–(b) (the "Regulation"). Distilled to its essence, the Regulation provides that a claimed horse (1) may change ownership within thirty days of it being claimed only through another claiming race,[3] and (2) may not race at another track until the close of entries of the meeting at which it was claimed.[4] Petitioner Jerry Jamgotchian ("Jamgotchian"), a licensed thoroughbred owner in Kentucky, refers to this latter restriction as "claiming jail." Pet. i. As the Kentucky Supreme Court noted, if the regulation can be described as creating a "claiming jail," that jail "has quickly vanishing bars." Pet. App. 5.

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[2] Kentucky's claiming rule theoretically allows a claimed horse to race at another Kentucky track during the prohibited period upon approval by the stewards. This exception is virtually never applied, nor can it be, because Kentucky's tracks have only a handful of overlapping race days in a given year. For example, in 2011, thoroughbred horse racing was conducted at multiple Kentucky tracks on only four days. *See* Kentucky Horse Racing Commission, 2011 Racing Dates, available at: http://khrc.ky.gov/Documents/racedates2011.pdf (last accessed Oct. 11, 2016).

[3] Kentucky's claiming rule allows a claimed horse to run within thirty days only if the race's determining eligibility price is at least twenty-five percent more than the price for which the horse was claimed. *See* 810 KY. ADMIN. REG. 1:015, Section 1(5)(a). This threshold requirement protects the horse's welfare.

[4] Entries typically close a few days prior to the end of a meet. In Kentucky, a meet ranges in length from about three weeks to three months.

3. The Regulation is not omnipresent; it does not apply to all racehorse sales in Kentucky. Rather, it applies only to a subset of racehorse sales—those in a claiming race. Pet. App. 47. Likewise, the Regulation's effect on commerce is limited, not pervasive. Contrary to the wording of Jamgotchian's Question Presented, a racehorse claimed in Kentucky may be transported immediately to any location in the world. And, a racehorse never stops generating commerce. The horse will always need a trainer, a groom, an exercise rider, and a veterinarian, not to mention drivers and pilots who transport the horse, farmers who cut the hay to feed the horse, and the bloodstock agent who breeds the horse.

The Regulation also applies evenly to all racehorses acquired via a claiming race and to all owners who acquire a racehorse via a claiming race. No distinction is made based upon whether the horse's owner is a Kentucky citizen or not, whether the horse was born in Kentucky or not, or whether the horse will remain in Kentucky or not.

In any event, the Regulation exists for "racing integrity reasons," Pet. App. 41, such as "to deter frivolous claims and to deter[] aggressive practices that undercut the claiming rule's primary, competition-furthering purpose." Pet. App. 38.

4. Jamgotchian brought a declaratory judgment action in a Kentucky trial court to challenge the Regulation's Constitutional footing. Pet. App. 9. Jamgotchian alleged that the Regulation violates this Court's dormant Commerce Clause jurisprudence because the Regulation restricts an owner's ability to race a horse for a short time after the horse is claimed.

Pet. App. 9. The Commission disputed Jamgotchian's standing to bring the case. Pet. App. 13–15.

The Kentucky trial court decided the case upon the submission of briefs and affidavits and without discovery. Pet. App. 9. The trial court held that Jamgotchian had standing to challenge the Regulation and that a justiciable controversy existed, but ruled against Jamgotchian on the Commerce Clause challenge. Pet. App. 9–12. After losing his appeal to the Kentucky Court of Appeals, Pet. App. 12, Jamgotchian sought and received discretionary review from the Kentucky Supreme Court. Pet. App. 12. There, the court engaged in a lengthy Commerce Clause analysis before unanimously concluding that the Regulation withstood scrutiny:

> When [the Regulation] 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.

Pet. App. 6. Jamgotchian then sought this Court's review.

REASONS FOR DENYING THE PETITION

Jamgotchian fails to identify any compelling reason for this Court to review the Kentucky Supreme Court's decision against him and in favor of the Regulation. *See* Sup. Ct. R. 10. Unable to identify a State or Circuit split, Jamgotchian asserts that this Court should correct the Kentucky Supreme Court's perceived legal error. Pet. at 10–12. But the Kentucky Supreme Court recited and applied this Court's Commerce Clause decisions faithfully. Further review is not warranted.

I. Jamgotchian fails to identify any compelling reason for this Court to grant his Petition for Writ of Certiorari.

A. There is no split of authority.

This Court typically grants certiorari only in cases that involve important public matters or where there is a split of authority. *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."). The parties agree that there is no State or Circuit split on the issue presented. In fact, there is a resounding judicial silence on the particular question presented despite the apparently wide acceptance of similar regulations. *See* Pet. App. D (aggregating state claiming rules).

Because a split of authority is lacking, Jamgotchian attempts to manufacture a conflict through reliance on an informal opinion written by a California deputy attorney general. Pet. 12–13. Jamgotchian fails to note that the informal California opinion disclaims its effect on California's then-existing claiming rules, stating that "this advice letter should not be construed" to address existing rules. Pet. App. 105, n.2; Pet. App. 39, n.2. But even if an informal agency opinion were sufficient to create a split of authority, Jamgotchian's reliance is unjustified and unsupported because the informal California opinion does not create a genuine conflict with the Kentucky Supreme Court's decision. The informal opinion addresses a *proposed* California rule that was structured differently than Kentucky's actual rule. California's proposed rule would have created a racing restriction longer than almost anything possible under Kentucky law. Moreover, the proposed rule would not have treated post-claim, in-state and out-of-state racing on equal footing. These distinctions matter.

Without any conflict, this Court should allow the question presented to percolate in the lower courts rather than wade into an issue decided by only one State court of last resort (and no Federal Courts of Appeal). Doing so would allow this Court to benefit from further refinement of the issues and arguments. And, recent filings by Jamgotchian present at least two near-term opportunities for future review. On August 31, 2016, Jamgotchian filed a substantively identical action in the United States District Court for the Southern District of Indiana. *See Jamgotchian v. Ind. Horse Racing Comm'n*, No. 1:16–cv–2344 (S.D. Ind.). In addition, on October 7, 2016, Jamgotchian filed a

substantively identical action in the United States District Court for the Middle District of Pennsylvania. *See Jamgotchian v. State Horse Racing Comm'n*, No. 1:2016–cv–02035 (M.D. Penn.). This Court should await the outcome of Jamgotchian's two new cases, which will advance through separate Circuits, before it determines whether the issue warrants review.[5]

Further caselaw development is justified because Jamgotchian's Petition does not raise the same type of nationally important issue that this Court normally addresses through its far-reaching Commerce Clause holdings. For example, this Court's Commerce Clause cases have addressed laws regulating the movement of waste across State borders, *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth'y,* 550 U.S. 330 (2007); *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994), the flow of alcohol across State lines, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), disparate state-taxation schemes, *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008), and perhaps most frequently, attempts to protect local dairy farmers, *see, e.g.*, *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Dean Milk Co. v. Madison*, 340

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[5] In addition to Jamgotchian's current cases against three State commissions, twenty-four other States have similar claiming rules. Pet. 9. If interested parties doubt the Constitutional validity of these rules (which, despite their lengthy existence, have never been challenged by anyone other than Jamgotchian), there is no reason to believe that future cases will not arise to address the alleged Constitutional infirmity. If the claiming rule has national significance, patience is justified so that this Court may benefit from the legal analysis and factual records of future cases.

U.S. 349 (1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

Jamgotchian, by contrast, presents a question that relates to what the Kentucky Supreme Court called a "peculiar form of commerce." Pet. App. 44. Unlike the cases cited above, this case addresses a narrow regulation applicable only in limited circumstances to a particularized subset of thoroughbred sales within an industry of varying significance in only some States. Stated differently, a racehorse is not a good that "is needed by the populace and will be bought and sold irrespective of state regulations." Pet. App. 44. This basic fact counsels against granting certiorari now as opposed to after Jamgotchian's similar challenges are decided.

B. Jamgotchian's petition merely asks this Court to correct alleged error.

Unable to demonstrate a Circuit split or other compelling reason for this Court to grant certiorari, Jamgotchian alleges legal error in an attempt to thwart the well-reasoned opinion of the Kentucky Supreme Court. Notably, the three courts to review this matter have upheld the challenged Regulation unanimously. *See generally* Pet. App. A, B, and C.

Rule 10 explicitly cautions that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Despite the rule's language, Jamgotchian urges this Court to grant certiorari "to remedy the Supreme Court of Kentucky's misapplication of federal law concerning the Commerce Clause." Pet. at 12.

Nowhere does Jamgotchian contend—nor can he—that the Kentucky Supreme Court failed to state or apply this Court's precedents. The Kentucky Supreme Court properly stated this Court's dormant Commerce Clause jurisprudence, engaged in an extended discussion of this Court's precedents, and upheld the Regulation, stating that the Commerce Clause "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." Pet. App. 48. Jamgotchian simply disagrees with the result.

Perceived error correction is neither this Court's purpose nor a compelling reason to grant Jamgotchian's Petition for a Writ of Certiorari. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) (citing S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.")). The Petition should be denied.

II. This case is a poor vehicle to decide the question presented.

Jamgotchian's questionable standing to bring this case, his potential waiver of arguments, and the procedural history of this matter make it a poor vehicle for review.

First, this case presents fundamental standing questions that may prevent the Court from ever reaching the merits. The Commission has challenged Jamgotchian's standing to bring the underlying declaratory judgment action at every stage. Pet. App. 13–15. Jamgotchian's attempted entry of Rochitta at Penn National, a *private* race track in Pennsylvania, was not rebuffed by the Commission or its racing officials. Pet. 4–5; Pet. App. 57. Rather, Penn National denied Rochitta's entry after speaking with the racing secretary of a *private* race track in Kentucky. Pet. 4. The Commission was not involved, and neither was any other state actor. Moreover, the Commission never issued or attempted to issue a sanction against Jamgotchian. Pet. App. 9. Because of this, Jamgotchian fails to meet the "irreducible constitutional minimum of standing" due to his inability to demonstrate "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

Second, Jamgotchian declares that the Kentucky Supreme Court's decision is wrong because the Commission did not produce "evidence of record that nondiscriminatory means were unavailable for advancing the stated purpose of the regulation." Pet. 11 (citing *Granholm v. Heald*, 544 U.S. 460 (2005) ("[T]his 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.").) Assuming the validity of Jamgotchian's argument, his point leads to a fundamental reason to deny review: the trial court decided the matter on the

briefs and affidavits alone and without a developed factual record. This Court's Commerce Clause opinions often turn on the balancing of detailed facts. Here, those facts have not been developed fully, and factual disagreements abound. Pet. App. 8, n.4.

Finally, Jamgotchian's complaint is not that the Regulation treats Kentucky citizens or horses differently than those from out of state, because it does not, but that the Regulation is "impermissibly extraterritorial." Pet. App. 48. Although the Kentucky Supreme Court addressed this argument for "completeness," it did so only after noting that the argument was not preserved or argued below. Pet. App. 48–49. This Court should avoid granting certiorari to decide an argument that was raised only at the last moment. *See Auer v. Robbins*, 519 U.S. 452, 464 (1997) (holding Court will not review inadequately preserved argument).

Combined, these reasons make this case an inappropriate vehicle for review.

III. The Kentucky Supreme Court's Opinion is correct.

To date, three courts have unanimously concluded that the Commission's Regulation does not violate the dormant Commerce Clause. As explained below, all three courts are correct.

A. The Commission's Regulation is a lawful exercise of a State's regulatory authority.

The first question in most dormant Commerce Clause challenges is whether the "challenged law

discriminates against interstate commerce." *Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 338 (2008). If so, the law will "survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93, 101 (1994)). If the law does not discriminate against interstate commerce, it "'will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The Kentucky Supreme Court correctly recognized this test, Pet. App. 17–18, and applied it throughout its opinion, Pet. App. 29–52.

The Kentucky Supreme Court initially observed that the Regulation "*appears* at least to discriminate against out-of-state tracks in favor of Kentucky tracks."[6] Pet. App. 18, n.7 (emphasis in original). But, the court held, the Regulation must be viewed in context rather than through the "mechanical, narrow-lens" proposed by Jamgotchian. Pet. App. 30; *see also* Pet. App. 19–20 (noting that this Court has "rejected a knee-jerk approach to both the initial determination of whether a challenged law discriminates . . . as well as the subsequent determination of whether a discriminatory law is invalidly protectionist or serves a sufficiently compelling, non-protectionist local purpose").

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[6] The Commission does not concede that the Regulation is discriminatory. The Regulation applies evenhandedly to all owners, trainers, and horses that participate in a claiming race, regardless of citizenship or other factors.

The Kentucky Supreme Court went to great lengths to discuss and analyze the "particulars of the thoroughbred horse racing industry," Pet. App. 30, including the origins of claiming races and rules, their refinement over time, and their modern-day necessity, Pet. App. 31–38. After conducting its contextual review, rather than the "mechanical, narrow-lens" review proposed by Jamgotchian, the Kentucky Supreme Court held that the Regulation is "not truly discriminatory" despite the potential appearance of discrimination. Pet. App. 39–40.

> [O]nce 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 [Regulation's] restrictions is not protectionist discrimination, but rather refinement of the claiming rule and prevention of its abuse.
>
> . . .
>
> [T]he Commission has compelling reasons—racing integrity reasons, if you will—that have nothing to do with Kentucky tracks' competition with out-of-state business for adopting some form of claiming rule that balances the risks/rewards to owners and potential purchasers, and thus has independent reasons for as efficient a rule as experience with it can devise.

Pet. App. 40–41. This conclusion finds historical precedent, *see Crutcher v. Commonwealth*, 141 U.S. 47, 61 (1891) (holding that a State's police power extends "to the prohibition of lotteries, gambling, horse-racing, or any thing else that the legislature may deem opposed to the public welfare"), and does not warrant further review.

After holding that the Regulation passed the first-prong of Commerce Clause analysis, the Kentucky Supreme Court next considered whether the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. The court held that the Regulation passed this hurdle too after aptly recognizing a critical reality: the difference in some of this Court's dormant Commerce Clause precedents and this case is the difference "between permanent and temporary, between total and partial, between serious and slight and between inescapable and voluntary." Pet. App. 46. The Commission's Regulation is temporary in that it does not forever (or even for a lengthy period) prohibit a horse from racing elsewhere; partial in that the regulation applies only to claimed horses, not all horses; slight because the horse may be transferred to any location (in or out of state) for training, medical care, rest, or any other reason chosen by the owner; and voluntary in that an owner may freely choose not to participate in a claiming race and instead acquire a stable of racehorses through private sale, auction, or breeding rights without any regulatory hurdle. In an analogous situation, the Sixth Circuit held that a temporary restriction on the sale of scrap metal in Tennessee—a multi-billion dollar business—did not unduly burden interstate commerce. *See Tenn. Scrap*

Recyclers Ass'n v. Bredesen, 556 F.3d 442, 452 (6th Cir. 2009).

In sum, Jamgotchian acquired Rochitta "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." Pet. App. 48. The Commission, through the adoption and approval of claiming rules, created the market through which horses are claimed. It is "somewhat self-serving" for Jamgotchian to complain that a regulatory scheme that has allowed him to acquire numerous horses over the years, a scheme that he has used to gain benefits in the racing industry, and a scheme that allows an owner to turn a $42,400 investment in a claiming race into a $480,330 sale one year later, Pet. App. 2, now imposes too much of a burden on his operations. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980) (rejecting Commerce Clause challenge of out-of-state cement distributor after a state-owned plant stopped doing business with it). The Kentucky Supreme Court correctly upheld the Regulation.

B. The Regulation also passes muster because the Commission established claiming races, provides staff to administer the claiming process, and expends funds for the improvement of horse racing, thereby making it a market participant.

In Kentucky, claiming races exist only because the Commission has created them. *See* 801 KY. ADMIN. REG. 1:015; Pet. App. 34–35. The Commission has established the procedure by which a claim is made,

which includes submission of the claim on a Commission form, *id.*, Section 1(7), and Commission employees review all claims prior to a race to determine the claim's validity. *Id*., Section 1(14). After learning the identity of the claimant, a Commission employee must confirm that the claimant has sufficient credit to pay for the claim. *Id*., Section 1(9). Without the Commission, the market for claiming horses would not exist and owners such as Jamgotchian would have one less option to acquire a racehorse. *Cf. McBurney v. Young*, 133 S. Ct. 1709, 1720 (2013) (holding that a state does not violate the Commerce Clause if it creates the relevant market and favors its own citizens).

The Commission also administers several programs that pour state money into the horse industry, including money that increases horse racing purses. *See, e.g.*, KY. REV. STAT. ANN. § 230.800, 810 KY. ADMIN. REG. 1:070 (Kentucky Thoroughbred Breeders' Incentive Fund); KY. REV. STAT. ANN. § 230.400, 810 KY. ADMIN. REG. 1:090 (Kentucky Thoroughbred Development Fund); KY. REV. STAT. ANN. § 230.218, 810 KY. ADMIN. REG. 1:021 (Backside Improvement Fund). These state expenditures support holding that the Commission is a market participant and exempt from the otherwise applicable Commerce Clause analysis. *Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 339. The Regulation passes Constitutional muster, and the Court should deny review.

CONCLUSION

Jamgotchian fails to present a compelling reason for this Court to grant his Petition for Writ of Certiorari. Instead, Jamgotchian blatantly requests that this Court grant certiorari on a question of limited application and importance to correct an alleged legal error. This Court should deny Jamgotchian's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX 1

810 KAR 1:015. Claiming races.

RELATES TO: KRS 230.215(2), 230.225(1), 230.260(3)

STATUTORY AUTHORITY: KRS 230.215(2), 230.225(1), 230.260(3), (6)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 230.215(2), 230.225(1), 230.260(3) requires that the authority promulgate administrative regulations prescribing conditions governing horse racing. This administrative regulation prescribes conditions for claiming races.

Section 1. (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. The procedure for obtaining a certificate of eligibility to claim shall be as follows:

(a) An applicant shall, fifteen (15) days prior to entering a claim, submit:

1. An application for owners' original license;

2. A financial statement;

3. A finger print card;

4. The name of a licensed trainer, or person eligible to be licensed as a trainer, who will assume care and responsibility for the horse claimed; and

5. The requisite fee for owners license.

(b) The certificate of eligibility shall be valid for the remainder of the calendar year.

(2)(a) A claim may be made by an authorized agent.

(b) An agent may claim only for the account of those for whom he is licensed as agent.

(c) The name of the authorized agent; and the name of the owner for whom the claim is being made shall appear on the claim slip.

(3) A person shall not claim his own horse or cause his own horse to be claimed, directly or indirectly, for his own account.

(b) A claimed horse shall not remain in the same stable or under the care or management of the owner or trainer from whom it is claimed.

(4)(a) A person shall not claim more than three (3) horses from a race.

(b) Multiple claims submitted by the same authorized agent and/or trainer for a single horse shall not be permitted and shall be void.

(5)(a) A claimed horse shall not run for thirty (30) days after being claimed in a race in which the determining eligibility price is less than twenty-five (25) percent more than the price for which the horse was claimed.

(b) The day following the day the horse is claimed shall be the first day;

(c) The claimed horse shall be entitled to enter whenever necessary to permit it to start on the 31st calendar day following the claim.

(d) This subsection shall not apply to starter handicaps in which the weight to be carried is assigned by the handicapper, and starter allowance races.

(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.

(7)(a) A claim shall be:

1. Made on authority "Claim Blank";

2. Sealed in an envelope supplied by the Authority; and

3. Deposited in the association's claim box.

(b) The "Claim Blank" form and envelope shall be filled out completely and accurately.

(8)(a) Claims shall be deposited in the claim box at least fifteen (15) minutes before post time of the race from which the claim is being made.

(b) Money or its equivalent shall not be put in the claim box.

(c) A claim shall be valid if the claimant at the time of filing the claim has a credit balance in his account with the horseman's bookkeeper of not less

than the amount of the claim, plus the Kentucky sales tax.

(9) The stewards, or their designated representative, shall:

(a) Open the claim envelopes for each race as soon as the horses leave the paddock en route to the post; and

(b) Check with the horseman's bookkeeper to ascertain whether the proper credit balance has been established with the association.

(10) If more than one (1) valid claim is filed for the same horse, title to the horse shall be determined by lot under the supervision of the stewards or their designated representative.

(11)(a) After the race has been run a horse that has been claimed shall be delivered to the claimant.

(b) The claimant shall present written authorization for the claim from the racing secretary.

(c) After written authorization has been presented, horses that are sent to the detention area for post race testing shall be delivered.

(d) Other horses shall be delivered in the paddock.

(e) A person shall not refuse to deliver a horse claimed out of a claiming race to the person legally entitled to the horse.

(f) If the owner of a horse that has been claimed refuses to deliver the horse to the claimant, the horse shall be disqualified from further racing until delivery is made.

(12)(a) A claim shall be irrevocable.

(b) Title to a claimed horse shall be vested in the successful claimant from the time the horse is a starter; and the funds transferred to the account of the previous owner, with said funds immediately available for future claiming transactions.

(c) The successful claimant shall become the owner of the horse whether it is:

1. Alive or dead;

2. Sound or unsound; or

3. Injured during the race, or after it.

(d) A claimed horse shall run in the interest of and for the account of the owner from whom it is claimed.

(13)(a) A person shall not offer to:

1. Enter, or enter into an agreement to claim, or not to claim; or

2. Attempt, or attempt to prevent another person from claiming any horse in a claiming race.

(b) A person shall not attempt by intimidation to prevent anyone from running a horse in a claiming race.

(c) An owner or trainer shall not make an agreement with another owner or trainer for the protection of each other's horse in a claiming race.

(14)(a) A claim that does not comply with the provisions of this administrative regulation shall be void.

(b) The stewards shall be the judges of the validity of a claim.

(15) A person holding a lien of any kind against a horse entered in a claiming race shall record the lien with the racing secretary or horseman's bookkeeper at least thirty (30) minutes before post time for that race. If none is so recorded, it shall be presumed that none exists.

(16) The engagements of a claimed horse pass automatically with the horse to the claimant.

(17) Notwithstanding any designation of sex or age appearing on the racing program or in any racing publication, the claimant of a horse shall be solely responsible for determining the age or sex of the horse claimed.

Section 2. Incorporation by Reference. (1) The following material is incorporated by reference:

(a) "Claim Blank (Rev 96)"; and

(b) Claim Blank envelope.

(2) This material may be inspected at Kentucky Racing Authority, 4063 Iron Works Pike, Building B, Lexington Kentucky 40511, Monday through Friday, 8 a.m. to 4:30 p.m. (KSRC Ch. 15, 15.01 to.16; 1 Ky.R. 909; eff. 5-4-75; Am. 5 Ky.R. 159; eff. 10-4-78; 629; eff. 3-7-79; 6 Ky.R. 292; eff. 1-2-80; 18 Ky.R. 2012; eff. 2-19-92; 22 Ky.R. 1496; 1865; eff.

4-5-96; 24 Ky.R. 2450; 25 Ky.R. 854; eff. 10-12-98; TAm eff. 8-9-2007.)