No. 16-171

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

REPLY BRIEF FOR PETITIONER

RICHARD A. GETTY
Counsel of Record
KRISTOPHER D. COLLMAN
THE GETTY LAW GROUP, PLLC
1900 Lexington Financial Center
250 West Main Street
Lexington, Kentucky 40507
(859) 259-1900
rgetty@gettylawgroup.com

PAUL E. SALAMANCA
279 Cassidy Avenue
Lexington, Kentucky 40502
(859) 338-7287
psalaman@uky.edu

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REGULATION

RULES

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerry Jamgotchian respectfully submits this Reply in support of his Petition for a Writ of Certiorari.

A. Kentucky's Rule Obviously Discriminates Against Interstate Commerce and the Supreme Court of Kentucky Obviously Applied the Wrong Test.

This is not one of those thorny cases where the discriminatory nature of a regulation can be known only by its "practical effect." *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Simply by reading the rule, this Court can see what Kentucky is doing:

> 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 Kentucky Administrative Regulations 1:015, §1 (6)(b) (emphasis added). As Justice Brennan noted in *Hughes*, "[s]uch facial discrimination by itself may be a fatal defect, regardless of the State's purpose, because 'the evil of protectionism can reside in legislative means as well as legislative ends.'" *Id. at* 322 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978)). "At a minimum," he went on to say, "such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Id.*

The Supreme Court of Kentucky undertook no such analysis. Although it did identify an abstract goal of protecting the integrity of claiming races, it never asked whether the state had a non-discriminatory option, and Respondents all but concede that they did not suggest one.[1] In effect, the Supreme Court of Kentucky gave the rule a pass because of its friendly relatives. "Notwithstanding a modicum of discrimination," it wrote, "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." Pet. App. 30. "More importantly," it added,

> this regulation is knowingly and voluntarily agreed to by an owner seeking the advantages of 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.

Id.

To the extent this analysis is not factually wrong, it is beside the point. The rule does not come from the track, which is in the private sector, but from the state,

---

[1] In their response to the Petition, Respondents assume *arguendo* that they "did not produce 'evidence of record that nondiscriminatory means were unavailable for advancing the stated purpose of the regulation.'" Brief in Opposition at 12 (quoting Petition at 11). This comes as something of a surprise, given that Respondents bore the burden of proffering this evidence. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977).

through the Horse Racing Commission. This alone renders it other than "knowingly and voluntarily agreed to." To be sure, Jamgotchian could buy a horse outside a claiming race, but if he chose to buy a horse *in* a claiming race, he would be subject to the rule.

The facts of almost any other case decided by this Court under the Dormant Commerce Clause are the same. If Hughes had bought commercially raised minnows — as opposed to minnows obtained from the waters of Oklahoma — he could have sold them outside the state. *See Hughes*, 441 U.S. at 325. If South-Central had chosen not to buy wood directly from Alaska, it would not have been obliged to have it semi-processed in the state. *See South-Central Timber Development Co., Inc. v. Wunnicke*, 467 U.S. 82, 84 (1984). The fact that both Hughes and South-Central had alternatives is irrelevant because this Court's proper focus is on where the state *does discriminate*, not where it does not.[2]

The purpose of close judicial scrutiny, as this Court has observed in a variety of contexts, is to put the government to the test. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). If a state wants to discriminate against interstate commerce, let it explain why it has no alternative, and let the courts evaluate that explanation. The virtue of

---

[2] It is also entirely beside the point that Kentucky does not discriminate on the basis of state of citizenship. *See* Brief in Opposition at i, 5. This was Justice Rehnquist's argument *in dissent* in *Hughes v. Oklahoma*. *See* 441 U.S. 322, 344 (1979) (Rehnquist, J., dissenting). The Supreme Court of Kentucky itself rejects this argument. *See* Pet. App. 18 n.7.

this process is that it identifies instances where "the evil of protectionism . . . reside[s] in legislative means [instead of] legislative ends.'" *Hughes*, 441 U.S. at 322 (quoting *Philadelphia v. New Jersey*, 437 U.S. at 626). That did not happen here, although Respondents had every opportunity to make their case and explain their non-discriminatory options, if any.

The Supreme Court of Kentucky appears to conclude that the cost of claiming a horse must be raised "to deter frivolous claims" and "aggressive claiming practices" that arise from the claiming rule's "overbreadth." Pet. App. 38. But anyone who has ever taken Economics 101 might ask, "if the price is set too low to deter frivolous claims, why not raise it?" To be sure, forbidding a horse to race in another state is a way to "raise the price," but it is a way of doing so that overtly discriminates against interstate commerce and appears to protect local interests. If a horse runs in a $40,000 claiming race, as did Rochitta, and someone has no desire to run her in another state, $40,000 is the real price. If, by contrast, a horse runs in that race and someone — such as Petitioner — has a desire to run her in another state, the real price is more than $40,000, because of the *opportunity cost* of claiming jail.

Respondents had every opportunity to answer this question. They had every opportunity to explain why they have no option but to enhance the price of claiming races in a way that patently and precisely discriminates against interstate commerce. They had every opportunity to explain why, like the State of Oklahoma in *Hughes*, they chose the one way to serve their putative local purpose that *does* discriminate against interstate commerce. *See Hughes*, 441 U.S. at

337-38 ("Far from choosing the least discriminatory alternative, Oklahoma has chosen to 'conserve' its minnows in the way that most overtly discriminates against interstate commerce."). Had *proper* application of this Court's precedents taken place, Respondents might have answered these questions. But instead they assume *arguendo* that no such arguments were made. Brief in Opposition at 12. Moreover, it is virtually impossible to see how this could be done, given the obviously protectionist nature of the rule. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359 (1992) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988)) (observing that "[a] state statute that clearly discriminates against interstate commerce is . . . unconstitutional 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.'"). Indeed, the Supreme Court of Kentucky itself appears to concede the rule's protectionist purpose and effect:

> 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, and tax receipts to all the interests involved*.

Pet. App. 10 (footnote omitted) (emphasis added). As this Court has noted, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. at 624. Because the Supreme Court of Kentucky "has decided an important federal question in a way that conflicts with relevant decisions of this Court," we urge a grant of this Petition. S. Ct. R. 10(c). Indeed, this case is a good candidate for summary reversal. *See* S. Ct. R. 16(1).

B. A Destabilizing Split of Authority Exists Between the Decision Below and the Position Taken by Responsible Public Bodies in California.

Although Respondents assert a "resounding judicial silence" on the question presented, Brief in Opposition at 7, they do not deny — nor can they deny — the direct conflict between California and Kentucky's answers to the issues Petitioner raises. Try as they might to minimize or distinguish the advice given by the Attorney General of California, his words represent a "resounding" rejection of the decision below:

> *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.*

Letter from Bill Lockyear, Attorney General of California, to Roy C. Wood, Jr., Executive Director of the California Horse Racing Board ("CHRB"), Sept. 8, 2003, Pet. App. at 104 (emphasis added). To be sure, the CHRB had only contemplated an extension of its claiming jail, but the logic of this letter undermined the entire concept, as Attorney General Lockyear's words amply demonstrate. That is, if it would be "undeniable" that a "60-day post-race . . . 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," it would similarly be "undeniable" that a comparable ban until the end of the meet "would have the effect of controlling commercial activity occurring wholly outside the boundary of the state." It is no surprise, therefore, that the CHRB did away with its claiming jail rules after receiving this letter. After all, with this letter in the public record, how long could its rule have survived? And under what circumstances would the issue ever have reached the courts, given the CHRB's decision and the strength of Attorney General Lockyear's analysis? As he observed, "the restriction is plainly proposed only for economic reasons, as an effort to keep more horses from leaving the state." Exactly.

Respondents also underestimate the significance of the split between California and Kentucky. Kentucky holds itself out as the *ne plus ultra* of horse racing, and California is our most populous state. Their contrary positions thus create precisely the kind of conflict that this Court has historically sought to resolve — divergent constructions of the federal Constitution in different jurisdictions. As long as the CHRB adheres to Attorney General Lockyear's persuasive analysis, this Court has enough conflict to grant this Petition. Nor does the pendency of similar actions in Indiana and Pennsylvania counsel against a grant. *See* Brief in Opposition at 8-9 (citing *Jamgotchian v. Ind. Horse Racing Comm'n*, No. 1:16-cv-2344 (S.D. Ind.), and *Jamgotchian v. State Horse Racing Comm'n*, No. 1:2016-cv-02035 (M.D. Penn.)). If these cases are "substantively identical" to this case, as Respondents contend, *see* Brief in Opposition at 8, 9, then this Court's decision on petition reduces to an analysis of which case would provide the best vehicle for addressing the issue. The instant case has been fully briefed and argued, and it has been "resolved," albeit on the basis of the wrong test, by the highest Court of a state that takes horse racing very seriously. Petitioner respectfully submits that the instant case provides the best vehicle for resolving the issues presented. In addition, a decision from this Court recognizing that claiming jail rules discriminate against interstate commerce on their face — which they obviously do — and requiring Respondents to justify such a rule according to the correct test — which the Court below emphatically did not apply — would resolve an area of substantial uncertainty in a

major industry with operations in a vast majority of the states.[3]

[3] Respondents' claim that Petitioner lacked standing to bring this action is a red herring. *See* Brief in Opposition at 12. The Supreme Court of Kentucky itself recognized Petitioner's standing. *See* Pet. App. at 6. Petitioner routinely claims horses at claiming races in Kentucky, and this Court has held that an interested party need not violate a law to establish standing to attack it. *See Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

Respondents also assert an insufficiently developed factual record, assuming *arguendo* in the process that they failed to explain why they lacked a non-discriminatory alternative to the rule at issue in this case. *See* Brief in Opposition at 12-13. But surely this Court should not penalize Petitioner for Respondents' failure to discharge their own duties. *See Hunt*, 432 U.S. at 353.

CONCLUSION

For the reasons stated above as well as those previously stated in the Petition, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

RICHARD A. GETTY
Counsel of Record
KRISTOPHER D. COLLMAN
THE GETTY LAW GROUP, PLLC
1900 Lexington Financial Center
250 West Main Street
Lexington, Kentucky 40507
(859) 259-1900
rgetty@gettylawgroup.com

PAUL E. SALAMANCA
279 Cassidy Avenue
Lexington, Kentucky 40502
(859) 338-7287
psalaman@uky.edu

Counsel for Petitioner