**COMMONWEALTH OF KENTCKY**
**SUPREME COURT**

**Case No. 2014-SC-000108-D**
**(2012-CA-002154)**

**Appeal from Franklin Circuit Court**
**Civil Action No. 11-CI-1047**

**JERRY JAMGOTCHIAN** **APPELLANT**

**v.** **REPLY BRIEF OF APPELLANT JERRY JAMGOTCHIAN**

**KENTUCKY HORSE RACING COMMISSION et al.** **APPELLEES**

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Reply Brief Of Appellant Jerry Jamgotchian was mailed, postage prepaid, to: Susan B. Speckert, Esq., 4063 Ironworks Pike, Building B, Lexington, Kentucky 40511; and Robert M. Watt Esq., Anthony Phelps, Esq., and Monica H. Braun, Esq., 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507; Hon. Phillip Shepherd, Judge, Franklin Circuit Court, Judicial Bldg. 669 Chamberlin Ave., Frankfort, Kentucky 40601; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 on this the 30th day of March, 2015.

COUNSEL FOR APPELLANT

## STATEMENT OF POINTS AND AUTHORITIES

The Appellant, Jerry Jamgotchian ("Jamgotchian"), by counsel, respectfully submits this Reply to address points raised by the Kentucky Horse Racing Commission ("KHRC") and its agents Marc Guilfoil ("Guilfoil"), Tracey Farmer ("Farmer"), and Robert M. Beck, Jr. ("Beck") (collectively, "Appellees") in their Response Brief on Discretionary Review. For his Reply,[1] Jamgotchian respectfully states as follows:

## ARGUMENT

The Appellees' argument in favor of the constitutionality of Article 6 can be summarized as follows: If a state chooses to regulate private activity and does so for a long time, such regulations involve a "traditional government function" and are exempt from the strict scrutiny normally applied to discriminatory laws under the dormant Commerce Clause. See Appellees' Response Brief at p. 11. As described below, this proposition is not supported by the decisions of the United States Supreme Court – including Department of Revenue of Kentucky v. Davis, 553 U.S. 328 (2008) and United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) – and is unavailing to support the constitutionality of Article 6. Furthermore, the Sixth Circuit's decision in Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423 (6th Cir. Ky. 2008) – which was handed down after United Haulers and Davis – further reinforces the Supreme Court's mandate that discriminatory laws in the context of private markets are virtually per se invalid, and that Appellees' have misstated the holdings of United Haulers and Davis.

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1 The focus of this Reply is the Appellees' continued misapplication and misrepresentation of the framework used by the United States Supreme Court in deciding cases implicating the dormant Commerce Clause. Furthermore, Jamgotchian will briefly address the Appellees' renewed assertion that this matter is not justiciable because there is no case or controversy. See Appellees' Response Brief at pp. 25-26.

## I. THE KHRC CONTINUES TO MISINTERPRET UNITED HAULERS AND DAVIS.

The Appellees entirely rely on United Haulers and Davis to support the notion that "traditional government functions" are exempt from the strict scrutiny normally applied to regulations which discriminate against interstate commerce. However, neither of these cases supports the constitutionality of Article 6, because neither case involves the regulation of private enterprise or private trade in the national marketplace. Rather, United Haulers and Davis both address laws that were designed to favor traditional governmental activities: in United Haulers, the activity was waste disposal in the context of a government-owned waste disposal facility; in Davis, the governmental activity was the issuance of municipal bonds. As this Court is well aware, Kentucky itself does not participate in horse racing, and horse racing is not a governmental activity or government function. Therefore, the analyses applied in United Haulers and Davis bear no conceivable connection to the restraint on private interstate trade imposed by Article 6.

The focus of the Dormant Commerce Clause is to invalidate state regulations that interfere with private trade. See Reeves v. Strake, 447 U.S. 429,436-37 (1980) (". . . the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace.") (emphasis added). Furthermore, as made explicit in United Haulers and described infra, the Dormant Commerce Clause prevents a state from enacting regulations that burden private parties, like Jamgotchian, who cannot avail themselves of the political process in the state enacting the regulation in question.

United Haulers is unequivocal in its distinction between laws which favor local private business and laws which favor state and governmental activities (which are sometimes referred to as "governmental functions"). In particular, Justice Roberts,

writing for the Court, made it clear that laws which benefit a government operated facility are not comparable to laws which favor private businesses over their competitors, as states and municipalities are not private businesses, and are likewise vested with the obligation of protecting the health and welfare of citizens in ways that private entities are not. See United Haulers, supra, 550 U.S. at 342-43. More specifically, Justice Roberts noted that

> [t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition. In this case, the citizens of Oneida and Herkimer Counties have chosen the government to provide waste management services, with a limited role for the private sector in arranging for transport of waste from the curb to the public facilities. The citizens could have left the entire matter to the private sector, in which case any regulation they undertook could not discriminate against interstate commerce. But it was also open to them to vest responsibility for the matter with their government, and to adopt flow control ordinances to support the government effort.
> . . .
> Finally, it bears mentioning that the most palpable harm imposed by the [flow control] ordinances – more expensive trash removal – is likely to fall on the very people who voted for the laws. Our dormant Commerce Clause cases often find discrimination when a state shifts the costs of regulation to other States, because when "the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."
>
> See United Haulers, supra, at 343-45 (emphasis added).

Unlike the citizens of Oneida and Herkimer Counties – who elected to have their government provide waste disposal services – the citizens of Kentucky have not chosen their government to create a publicly owned and operated Thoroughbred racing industry. Instead, Kentucky citizens have left the industry to the private sector (which sector is not obligated to protect the health and welfare of Kentucky citizens), and therefore, as instructed by Justice Roberts in United Haulers, any regulation pertaining to horse racing in the Commonwealth cannot discriminate against interstate commerce. See United

Haulers, supra at 343-44 (noting that regulations which govern the private sector cannot discriminate against interstate commerce). Moreover, unlike the flow control ordinances in United Haulers, the burdens imposed by Article 6 burden private parties – like Jamgotchian and out-of-state race tracks – who are not Kentucky residents and otherwise cannot participate in the political process in the Commonwealth. Article 6, the regulation at issue here, clearly shifts the burden of state regulation to interests falling outside Kentucky, and is therefore patently unconstitutional. Id. at 345 (noting that the dormant Commerce Clause cases find impermissible discrimination when a state shifts the cost of regulation to other States). The Appellees cannot point to any language in United Haulers which supports a different conclusion.

Like United Haulers, Davis also addressed a law pertaining to a governmental activity: the issuance of governmental bonds. Finding that United Haulers was controlling, the Court upheld a preferential tax break given to Kentucky citizens for investing in bonds issued by the Commonwealth and its municipalities. As with the flow control ordinances in United Haulers, the tax law in Davis addressed the government's own participation in an activity constituting a traditional government function (issuance of public bonds), and was upheld on the basis that ". . . Kentucky, as a public entity, does not have to treat itself as being 'substantially similar' to other [private] bond issuers on the market." See Davis, supra, 553 U.S. at 343 (emphasis added). ". . . [T]he Kentucky tax scheme parallels the ordinance upheld in United Haulers: it 'benefit[s] a clearly public [issuer, that is, Kentucky], while treating all private [issuers] exactly the same.'" Id. (emphasis added).

Article 6 does not benefit or regulate a public issuer or entity, and does not treat all private parties exactly the same: out-of-state race tracks and all persons desiring to race claimed horses out of state are burdened in order to favor in-state interests. Therefore, the Regulation bears no relationship to the principles set forth in United Haulers or Davis. The Regulation is clearly designed as a protectionist measure to ensure the viability of a private industry,[2] and the burdens of the Regulation squarely fall on out-of- state competitors (e.g., out-of-state tracks and persons desiring to race their Thoroughbreds outside of Kentucky) and parties, like Jamgotchian, who do not reside in Kentucky and cannot participate in the political process in Kentucky. The Appellees cannot identify any cases in which the mere act of regulating an industry for a long time constitutes a traditional government function in the sense described by the Supreme Court in United Haulers and Davis. United Haulers and Davis involve laws directed at governmental activities, not laws directed at the regulation of private markets. The Supreme Court has never allowed exceptions to the Commerce Clause simply because a State has chosen to regulate private businesses or their activities – if it did, the entire dormant Commerce Clause jurisprudence would be rendered a nullity.

## II. CHERRY HILL VINEYARDS, LLC V. LILLY DISPROVES APPELLEES' THEORY OF THE CASE.

Appellees take great pains to manipulate the holdings of United Haulers and Davis to support the conclusion that comprehensive regulation, in and of itself, can constitute a "traditional government function" that is exempt from the strict scrutiny

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2 The KHRC readily admits that the Regulation is designed to prevent ". . . the uncontrolled transfer of thoroughbred horses out of Kentucky in order to ensure larger fields of horses[;]" and that "[l]arger fields resulting from the Regulation generate more revenue at Kentucky race tracks . . . cumulatively, this leads to higher purses for owners . . . which in turn translates to additional revenues for farm wages, equipment, and other improvements. See Appellees' Brief on Appeal at pp. 21-22.

normally applied to discriminatory regulations. See Appellees' Response Brief at p. 11 ("The regulation of horse racing in the Commonwealth, of which the Regulation is a component, is a traditional government function . . . [i]n fact, Kentucky first began regulating horse racing in 1894, or 121 years ago. . .") (emphasis original). In addition to being a clear misrepresentation of the holdings of United Haulers and Davis – both of which address regulations pertaining to traditional governmental activities, not private markets – this theory is easily refuted by Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423 (6th Cir. Ky. 2008), in which the Sixth Circuit Court of Appeals affirmed the District Court's invalidation of Kentucky statutes which prohibited out-of-state wineries from directly shipping wine to Kentucky customers, thereby forcing in-person purchases.

In Cherry Hill – which was decided after United Haulers and Davis – the Sixth Circuit held that the in-person purchase requirement in portions of Kentucky's statutory scheme discriminated against interstate commerce by limiting the ability of out-of-state small farm wineries to sell and ship wine to Kentucky consumers. While the method of discrimination implemented by Kentucky in that case was slightly different than the method used with Article 6 (in Cherry Hill, the statutes prohibited certain acts in the context of importation; whereas Article 6 prohibits certain acts in the context of exportation), the laws in question in Cherry Hill, like Article 6, were part of Kentucky's comprehensive and longstanding program for the regulation of a private industry. In fact, the comprehensive regulation of alcohol sales by the individual states is so entrenched in our nation's history that it is represented in the Constitution: the Twenty First Amendment was enacted ". . . to allow States to maintain an effective and uniform

system for controlling liquor by regulating its transportation, importation, and use." Granholm v. Heald, 544 U.S. 460, 484 (2005) (emphasis added).

Despite this fact, the Supreme Court in Granholm, as well as the Sixth Circuit in Cherry Hill, have made clear that the broad authority granted to the States to regulate the transportation, importation, and use of alcohol is nevertheless limited by the rule that a state cannot give a discriminatory preference to its own private markets. See Granholm, supra at 487 ("When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.") (citing Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986)); Cherry Hill, supra, 553 F.3d. at 431 (noting that, despite a State's broad authority to regulate alcohol importation and distribution, such authority ". . . does not displace the rule that States may not give a discriminatory preference to their own producers."). In other words, even though the regulation of alcohol is a long standing focus of state legislatures; even though alcohol has been pervasively regulated by the States for at nearly a century; even though the regulation of alcohol plays an important role in protecting a state's public health, safety and welfare; the court in Cherry Hill never addressed whether the regulation of alcohol is a "traditional government function." Instead, the Court adhered to the standard Dormant Commerce Clause analysis, noting that "the threshold question is whether the [statutes] are discriminatory[,] . . . [and that] [i]f the statute is discriminatory, it is virtually per se invalid . . . ." Id. at 432.

Given that the Sixth Circuit was bound by the Supreme Court's rulings in United Haulers and Davis when it decided Cherry Hill nearly seven months after Davis, it is

obvious that those cases did not alter the Supreme Court's jurisprudence with respect to dormant Commerce Clause challenges in the context of private markets. As Jamgotchian has repeated ad nauseam throughout his briefing in this case, the purpose of United Haulers and Davis was to carve out an exception for instances in which a regulation addresses traditional governmental activity (i.e. governmental waste processing and issuance instead of governmental bonds) instead of private activity (i.e. Thoroughbred horse racing and alcohol sales). The Davis Court was explicit that " . . .market regulation without market participation prescribe[s] standard dormant Commerce Clause analysis." See Davis, supra 553 U.S. at 347-48. Kentucky does not itself participate in Thoroughbred horse racing, and Appellees' have not cited any authority which overrides this crucial determinative factor described in Davis. Jamgotchian therefore reaffirms and incorporates here the analysis of the constitutionality of Article 6 contained in his initial Brief before this Court.

## III. JAMGOTCHIAN'S CLAIM IS CLEARLY JUSTICIABLE.

Finally, Appellees' Response briefly restates their claim that there is no justiciable controversy to resolve in this case. See Appellees' Response Brief at pp. 25-26. This claim was rejected by the trial court and Court of Appeals, and was therefore not raised by Jamgotchian in his Motion for Discretionary Review. Because this issue is not before the Court, Jamgotchian maintains that it was inappropriately raised in Appellees' Response Brief. Appellees' assertion is also meritless, for the following reasons:

In order for a claim to be justiciable under the Declaratory Judgment Act, a plaintiff must simply aver his or her legal rights while the defendant claims contrary rights that, if exercised, would impair the plaintiff's rights. See Revis v. Daugherty, 215

Ky. 823 (1923) (noting that an "actual controversy" exists where there is a contention on one side and a counter-contention on the other; and that a controversy is "justiciable" where a plaintiff avers certain rights and the defendant claims contrary rights which, if exercised, would impair the plaintiff's rights). The Supreme Court of Kentucky has further defined a "justiciable cause" as a "controversy in which a present and fixed claim of right is asserted against one who has an interest in contesting it [.]" Garriga v. Sanitation District No. 1, 2003 Ky. App. LEXIS 305 (Ky. App. 2003) (internal citations omitted). Jamgotchian has asserted a present and fixed claim of the right to race horses claimed in Kentucky outside of Kentucky without the extraterritorial restrictions (and associated penalties) imposed by the KHRC through the Regulation. Therefore, the trial court properly allowed this matter to proceed on the merits.

Jamgotchian claims that the terms of Article 6 are an unconstitutional restriction on his right to engage in interstate commerce. On the other hand, the KHRC acknowledges the existence of the Regulation and admits that it prohibits Jamgotchian from racing newly claimed horses outside of Kentucky without being subject to fines and/or the loss of his Kentucky racing license, and argues that the restrictions imposed by the Regulation are enforceable because they do not violate the Commerce Clause. (See generally, Article 6; Veitch Affidavit, R.A. at 148-49; Bailey Affidavit, R.A. at 141-142, wherein Bailey states that he denied ROCHITTA's entry at Penn National as a direct result of the Regulation). A determination of the constitutionality of the Regulation will necessarily terminate the uncertainty of this controversy, and Jamgotchian is therefore entitled to apply for a Declaration of Rights under Ky. Rev. Stat. Ann. § 418.040-045. This is true even though he has not been formally charged by the KHRC with a violation

of Article 6. See Davis v. FEC, 554 U.S. 724 (2008) (holding that the injury required for standing need not be actualized so long as the threatened injury arising from the prospective operation of a statute is realistic and direct) (citing Los Angeles v. Lyons, 461 U.S. 95 (1983)).[3]

## CONCLUSION

The United States Constitution, through the Commerce Clause, invalidates ". . . local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of state." See generally C&A Carbone, supra 511 U.S. 383, 390 (1994) (emphasis added). For this reason and those set forth in his briefing to the Court, Jamgotchian respectfully requests that the Court reverse the Opinion of the Court of Appeals, and find the Regulation to be unconstitutional and unenforceable in all respects.

Respectfully submitted,

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3 Regardless of whether the KHRC charged Jamgotchian with a violation of Article 6, the record clearly shows that Jamgotchian suffered financial loss and a deprivation of his liberty of action (i.e. the inability to race ROCHITTA in Pennsylvania and the forfeiture of his entry fees) which further justify his challenge to the Regulation. (See Order, R.A. at 2-3).