

NO. D-1-GN-16-000078

TEXAS HORSEMEN’S PARTNERSHIP, LLP§

IN THE DISTRICT COURT OF

Plaintiff, §

vs. §

TRAVIS COUNTY, TEXAS §

GLEN HEGAR, in his official capacity as §
Texas Comptroller of Public Accounts; STATE §
OF TEXAS §

250th JUDICIAL DISTRICT §

Defendants. §

**ORIGINAL PETITION FOR DECLARATORY JUDGMENT AND APPLICATION FOR
TEMPORARY AND PERMANENT INJUNCTION**

The Texas Horsemen’s Partnership, LLP (the “Horsemen’s Partnership”) respectfully files this Original Petition for Declaratory Judgment and Application for Temporary and Permanent Injunction. In support of this Petition and Application, the Horsemen’s Partnership alleges as follows:

PRELIMINARY STATEMENT

This case concerns an unconstitutional appropriations rider that poses an immediate, ongoing, and existential threat to the Horsemen’s Partnership and the entire Texas horse racing industry. The rider in question (hereinafter “Rider 7”) purports to give the Legislative Budget Board (“LBB”) unlimited discretion to withhold all funds appropriated for the Texas Racing Commission’s (“Racing Commission”) central administration and other support services. Without the ability to spend these funds, the Racing Commission cannot perform any of its basic administrative or regulatory functions and, as a consequence, the Texas horse racing industry cannot operate.

Ever since Rider 7 became effective, the LBB has made clear that it will not permit the Racing Commission to spend its essential funds until the agency repeals its rules allowing a form of pari-mutuel wagering called Historical Racing. On December 15, 2015, the Racing Commission rejected a proposal to repeal the Historical Racing Rules.

Although the LBB has authorized the Racing Commission to use funds appropriated for other purposes to keep the agency open temporarily, access to those funds will expire on February 29, 2016, and the LBB has indicated that it will not approve any further stopgap measures to keep the Racing Commission operating beyond that date. In addition, defendant Glen Hegar, Texas Comptroller of Public Accounts, has indicated that he is unable to issue any warrants, electronic fund transfers, or debits to pay for the Racing Commission's central administration and other support services without the LBB's approval. Accordingly, absent relief from this Court, the Racing Commission will cease all operations on March 1, 2016, which will result in an immediate shut down of the entire Texas horse racing industry.¹ The calamitous and irreparable injury this will cause the Horsemen's Partnership, its members, and the entire Texas horse racing industry cannot possibly be overstated. To be sure, a shutdown of the Texas horse racing industry, even if temporary, could ultimately signal the death knell for horse racing in Texas.

In this action, the Horsemen's Partnership respectfully requests a judgment declaring Rider 7 unconstitutional. In addition, the Horsemen's Partnership respectfully requests a temporary and permanent injunction that prohibits Mr. Hegar from refusing to pay for the Racing Commission's central administration and other support services because of the LBB's failure to

¹ Indeed, such a shutdown already occurred on September 1, 2015 when the LBB refused to approve the expenditure of the Racing Commission's essential funds. See Sophia Bollag, *Texas Racing Commission Closed, Tracks Suspend Races*, Texas Tribune, Sep. 1, 2015, attached hereto as **Exhibit A**.

approve the expenditure of those appropriated funds pursuant to its purported authority under Rider 7.

DISCOVERY CONTROL PLAN

1. Pursuant to Texas Rule of Civil Procedure 190.4, the Horsemen's Partnership intends to conduct discovery in this case under a Level 3 Discovery Control Plan. The Horsemen's Partnership seeks only non-monetary relief. *See* Tex. R. Civ. P. 47.

PARTIES

2. The Texas Horsemen's Partnership LLP is a partnership between the Texas Horsemen's Benevolent and Protective Association and the Texas Thoroughbred HBPA, Inc. The Horsemen's Partnership is officially recognized by the Racing Commission as the organization representing owners and trainers of horses racing in Texas. Every person that starts a racehorse at a licensed Texas racetrack is automatically considered a member of the Horsemen's Partnership for that year and is entitled to the benefits and privileges of such membership. At present, the Horsemen's Partnership has approximately 4,000 members, many of whom have paid for multi-year licenses that permit them to participate in Texas horse races through the end of 2017. These members have invested significant time and money preparing to participate in Texas horse races currently scheduled to take place after February 29, 2016.

3. Defendant Glen Hegar serves as the Texas Comptroller of Public Accounts. As Comptroller, Mr. Hegar is statutorily required to "keep an account for each legislative appropriation and shall credit the account with the appropriation and charge the account with all warrants issued under the authority of the appropriation." TEX. GOV. CODE § 403.036. Mr. Hegar is also the public official responsible for issuing warrants, initiating electronic fund transfers, and authorizing debits to cover expenditures of appropriated funds by Texas agencies,

including the Racing Commission. Indeed, the Racing Commission and other Texas agencies may not spend appropriated funds except by: (1) a warrant drawn by the Comptroller or his delegate; (2) an electronic fund transfer initiated by the Comptroller; or (3) a debit to a state account by a person authorized by the Comptroller. TEX. GOV. CODE § 2103.003. Mr. Hegar may be served with process at his official office, which is located at 111 E 17th Street, Austin, TX 78774.

4. The State of Texas is a proper party in this action under Texas Civil Practice and Remedies Code § 37.006 and Texas Government Code § 402.010 because this is an action challenging the constitutionality of a state statute. The State of Texas may be served with process by serving the Attorney General at 300 West 15th Street, Austin, Texas 78701, pursuant to Texas Civil Practice and Remedies Code § 37.006 and Texas Government Code § 402.010.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction in this case under Texas Civil Practice and Remedies Code §§ 37.003, 37.004, and 65.021.

6. Venue is proper in this Court pursuant to Texas Civil Practice and Remedies Code §§ 15.002(a) and 65.023.

FACTUAL BACKGROUND

A. General Overview of the Racing Commission and the Texas Racing Act

7. In 1986, the Legislature passed the Texas Racing Act (“the Act”) “to provide for the strict regulation of horse racing and greyhound racing and the control of pari-mutuel wagering in connection with that racing.” TEX. REV. CIV. STAT. ANN. art. 179e, § 1.02.

8. The Act created the Racing Commission and broadly delegated to it the authority to regulate and supervise all horse races in the state as well as all persons and things related to

the Texas horse racing industry. *Id.* §§ 2.01 and 3.02. In connection with these broad regulatory powers, the Act authorizes the Racing Commission to adopt rules that govern the Texas racing industry and all pari-mutuel wagering associated with the industry. *Id.* § 3.02.

9. Under the Act and the rules promulgated thereunder, all participants in the Texas racing industry are required to obtain a 1 to 3 year license from the Racing Commission, and the Racing Commission is required to collect certain fees for such licenses. *Id.* §§ 7.01 – 7.10; *see also* 16 TEX. ADMIN. CODE §§ 311.1 – 311.111. In addition, the Act and the Racing Commission’s rules set forth the grounds upon which a racing industry participant’s license may be revoked or suspended, and they provide that a license may not be revoked or suspended without providing the licensee notice and an adequate hearing. TEX. REV. CIV. STAT. ANN. art. 179e, §§ 3.15 and 7.04; 16 TEX. ADMIN. CODE § 311.6.

10. The Act also requires that the Racing Commission’s operations be funded exclusively by license and other statutory fees the Racing Commission collects. TEX. REV. CIV. STAT. ANN. art. 179e, § 3.09. If any money from the General Revenue Fund is used for the administration or enforcement of the Act, it must be repaid with interest from the Racing Commission’s special fund within a year after it is used. *Id.* Thus, by statute, the Racing Commission is funded exclusively by the industry it regulates and not by general revenue funds collected by the state through taxes and other means.

11. Like all other Texas agencies, the Racing Commission may only spend its appropriated funds through warrants, electronic fund transfers, or debits initiated and authorized by the Comptroller. TEX. GOV. CODE § 2103.003. To spend its appropriated funds, the Racing Commission must submit a voucher to the Comptroller, and the Comptroller must audit and approve the voucher. *Id.* § 2103.004. If the Comptroller refuses to approve a voucher submitted

by the Racing Commission, the Racing Commission cannot, as a practical matter, spend any of the appropriated funds encompassed by that voucher.

B. General Overview of the LBB and its Role in the Budget Process

12. The LBB is a legislative committee comprised of the lieutenant governor, the Speaker of the House of Representatives, and various other members of the Texas Senate and House of Representatives. TEX. GOV. CODE. § 322.001. The day-to-day operations of the LBB are conducted by a director who is appointed by the members of the LBB and who may employ personnel as necessary to perform the functions of the LBB. *Id.* §§ 322.004 and 322.005.

13. One of the LBB's primary functions is to prepare a general appropriations bill for each regular legislative session, which itemizes proposed appropriations to the various state agencies for the upcoming biennium. The director of the LBB is tasked with preparing the general appropriations bill and transmitting it to the governor and each member of the Legislature. *Id.* § 322.008.

14. The LBB also performs several oversight functions within the budget process. For instance, the LBB is required to "establish a system of performance audits and evaluations designed to provide a comprehensive and continuing review of the programs and operations of each state institution, department, agency, or commission." *Id.* § 322.011. In addition, the LBB is permitted to conduct periodic efficiency reviews of the policies, management, fiscal affairs, and operations of state agencies, and it is authorized to hold public hearings on interim budget reduction requests submitted by the governor, lieutenant governor, or a member of the Legislature. *Id.* §§ 322.017 and 322.022.

15. Between legislative sessions, the LBB exercises what is known as budget execution authority. Under that authority, the LBB and the Governor may make certain

alterations to appropriations by following a statutorily prescribed procedure. Specifically, the LBB or the Governor “may propose that a state agency be prohibited from spending . . . part or all of an appropriation made to the agency unless the amount is reappropriated by the legislature or is released, or expenditures are approved, as provided in the proposal.” *Id.* § 317.002. Such proposals must be published in the Texas Register and they must specify why the LBB or the Governor believes the agency’s appropriated funds should be withheld or reduced. *Id.* § 317.004. To become effective, a proposal by the LBB must be adopted by the Governor in an order that is also published in the Texas Register. *Id.* § 317.005. The LBB has no authority to withhold or reduce an agency’s appropriated funds by any other procedure.

C. The Racing Commission’s Consideration and Adoption of the Historical Racing Rules

16. Historical Racing is a form of pari-mutuel wagering whereby racing patrons can wager on horse races that have already been run at licensed racetracks without knowing any identifying information about the past races. Much like simulcast races, the past races are displayed on individual video terminals that are installed at licensed racetracks.

17. On May 27, 2014, the Horsemen’s Partnership, along with all the licensed Texas racetracks and various other Texas racing industry stakeholders, petitioned the Racing Commission to adopt rules allowing and regulating Historical Racing. The Petition noted that because other states, including neighboring Arkansas, have authorized historical racing, the Texas racing industry has faced “a decided and growing competitive disadvantage.” The Petition further contends that the industry’s “proposed rules authorizing and regulating pari-mutuel wagering on historical races in Texas, if adopted, would positively affect all the stakeholders in the Texas racing industry by addressing and helping to reverse the serious problems facing them,

in particular, a declining fan base, lower purses, lower quality horses and greyhounds competing in live races, and lower revenues for the racetracks and for the State of Texas.”

18. Included with the Petition were proposed Historical Racing Rules that the industry stakeholders crafted in consultation with the Racing Commission’s staff and Advisory Committee on Pari-Mutuel Wagering. Also included was a summary of the Racing Commission’s statutory authority to adopt rules authorizing and regulating Historical Racing. The Petition, proposed Historical Racing Rules, and a summary of the Racing Commission’s authority to adopt rules authorizing Historical Racing were submitted to the Racing Commission after several months of research and deliberation by the industry stakeholders and the Racing Commission’s staff and pari-mutuel wagering committee.

19. At the Racing Commission’s June 10, 2014 meeting, the Racing Commission considered, among other things, the proposed Historical Racing Rules. After hearing testimony in support of and in opposition to Historical Racing, the Racing Commission voted to publish the proposed rules in the Texas Register and to begin accepting public comments.

20. On July 17, 2014, the Racing Commission held a public comment hearing to discuss the proposed Historical Racing Rules. At the hearing, the Racing Commission received 63 total comments pertaining to Historical Racing, 58 of which were in favor of the proposed Historical Racing Rules. In addition, from June 27, 2014 to July 28, 2014, the Racing Commission received more than 13,000 written comments and petition signatures from state legislators, industry participants, racetracks, and other interested parties. The majority of these comments and petition signatures were made in support of Historical Racing, and the industry participants and stakeholders expressed overwhelming support for the proposed Historical Racing Rules.

21. On August 29, 2014, the Racing Commission held a scheduled meeting at which it received additional oral comments regarding the proposed Historical Racing Rules. Following these comments, the Racing Commission voted 7 to 1, with one commissioner abstaining, to adopt the proposed Historical Racing Rules. The final Historical Racing Rules were published in the Texas Register on September 19, 2014 and became effective on September 28, 2014. *See* 39 Tex. Reg. 7573.

D. Litigation Concerning the Racing Commission's Authority to Promulgate the Historical Racing Rules

22. Before the Racing Commission voted to adopt the Historical Racing Rules, state Representative Matt Krause sued the Racing Commission in the 48th Judicial District Court of Tarrant County, Texas, seeking to enjoin the adoption of the rules.

23. Judge David Evans ultimately dismissed Representative Krause's suit for lack of standing, and Representative Krause did not appeal that decision.

24. Shortly thereafter, various interest groups sued the Racing Commission in the 53rd Judicial District Court of Travis County, Texas, claiming that the Racing Commission lacked the statutory authority to promulgate the Historical Racing Rules.

25. On December 5, 2014, Judge Lora Livingston entered a final judgment declaring that the Racing Commission exceeded its statutory authority in promulgating the Historical Racing Rules.

26. Several Texas racing industry participants who had intervened in the suit appealed Judge Livingston's ruling, and that appeal is currently pending in the Third Court of Appeals. *See TX Quarter Horse Ass'n v. Am. Legion Dep't of TX, Temple Post 133*, No. 03-15-00118-CV. The Racing Commission did not appeal Judge Livingston's ruling due to a lack of sufficient litigation funds and a lack of support for the appeal from the Attorney General's office.

E. Legislative Opposition to Historical Racing and the Adoption of Rider 7

27. Although the Historical Racing Rules were met with overwhelming support from the Texas racing industry, several state legislators opposed Historical Racing from the outset. Rather than seeking to prohibit Historical Racing through the traditional legislative process, however, these legislators resolved to use the budget process to secure a repeal of the Historical Racing Rules from the Racing Commission.

28. On April 1, 2015, the Texas House of Representatives passed its version of the General Appropriations Act (“GAA”), which appropriated approximately \$15.4 million to fund the Racing Commission for the 2016-17 Biennium. The Texas Senate, however, voted to completely defund the Racing Commission in its version of the GAA.

29. Thereafter, the House and Senate convened a conference committee to resolve the various differences in the chambers’ respective versions of the GAA. Ultimately, the conferees agreed to restore the Racing Commission’s funding, but they also adopted Rider 7, which requires the Racing Commission to obtain written approval from the LBB before it can spend any of the funds appropriated for its central administration and other support services. Specifically, Rider 7 provides:

None of the appropriations above in Strategy D.1.1, Central Admin & Other Support Services may be expended until the Texas Racing Commission receives written approval from the Legislative Budget Board.

See Texas Racing Commission’s Appropriation in HB 1, General Appropriations Act, 84th Legislature, Regular Session, 2015, attached hereto as **Exhibit B**.

30. The Racing Commission’s central administration and other support services funds are essential to the agency’s continued operations. Indeed, these funds include the money used to pay for rent and electricity at the Racing Commission’s headquarters as well as the money

used to pay the Racing Commission's executive director and central administrative staff who are responsible for administering the agency's day-to-day operations, including payroll and accounting. Thus, if the Racing Commission's central administration and other support services funds are withheld, the agency cannot pay rent, electricity, or any of its employees and contractors, and as a result, the Racing Commission cannot operate.

31. Rider 7 does not define what the Racing Commission must do to obtain approval from the LBB to spend its essential funds, nor does it prescribe any standards to guide the LBB in determining whether to approve such expenditures by the Racing Commission. As such, Rider 7 effectively grants the LBB absolute control over the existence of the Racing Commission and the continued viability of the entire Texas horse racing industry.

32. On May 26, 2015, the conference committee distributed its report, which included Rider 7, and both the House and the Senate adopted the conference committee report three days later. The Governor signed the GAA on June 20, 2015 and it became effective on September 1, 2015.

F. The LBB's Improper use of Rider 7 to Secure a Repeal of the Historical Racing Rules

33. Although Rider 7 does not expressly make the Racing Commission's funding contingent on the repeal of the Historical Racing Rules, the LBB has consistently employed its purported authority under Rider 7 to attempt to secure a repeal of those rules.

34. On June 8, 2015, the director of the LBB, Ursula Parks, sent an internal email to other LBB employees asking: "Would there be any legal basis, given both current law and provisions in the GAA, for the LBB to require Racing to repeal adopted rules on historical racing as a condition of approval under Rider 7?" See June 8, 2015 Email from Ms. Parks, attached hereto as **Exhibit C**.

35. On June 9, 2015, the Racing Commission held a meeting to consider, among other things, whether to publish a proposal to repeal the Historical Racing Rules. At that meeting, the Racing Commission's general counsel informed the commissioners that he had received informal information from legislative staff that the Racing Commission's funding would be contingent on its repeal of the Historical Racing Rules. Ultimately, the Racing Commission voted to publish the proposal to repeal the Historical Racing Rules and to vote on the proposal at its August meeting.

36. On August 11, 2015, the LBB informed the Racing Commission that, pursuant to Rider 7, the Racing Commission would have to make a written request for approval to spend its appropriated central administration and other support services funds. The LBB explained that such a request must address, among other things: (1) the Racing Commission's need for the funds; (2) the Racing Commission's intended use of the funds; and (3) the impact on the Racing Commission's operations and mission if the funds are not expended.

37. The next day, the Racing Commission made a detailed written request addressing the criteria identified by the LBB. In its request, the Racing Commission explained that it could not continue to operate without its appropriated central administration and other support services funds. In addition, the Racing Commission explained that, "[i]f the agency closes, all racing will also stop," because the agency would not be able to provide the required stewards, judges, investigators, auditors, licensing staff, and drug testing supervisors to ensure the integrity and safety of the races. *See* August 12, 2015 Letter, attached hereto as **Exhibit D**.

38. On August 25, 2015, the Racing Commission met to vote on several matters, including the proposal to repeal the Historical Racing Rules. Prior to the meeting, the Racing Commission received more than forty pages of written comments, both in support of and in

opposition to the proposal. Some of these comments were from legislators who expressed concern that the LBB was utilizing Rider 7 to pressure the Racing Commission to repeal the Historical Racing Rules. These concerns were echoed during the meeting when the Racing Commission's general counsel again informed the commissioners that he had been told by certain legislative staffers that the agency's funding was contingent on the repeal of the Historical Racing Rules. Ultimately, the Racing Commission rejected the proposal to repeal the Historical Racing Rules despite the threat to its funding.

39. By the end of August, the Racing Commission had not received any response from the LBB regarding its August 12, 2015 request for funding. On August 31, 2015, the Racing Commission informed the LBB that, unless it received approval to spend its essential funds, it would be forced to cease all operations at the end of the day. *See* August 31, 2015 Letter, attached hereto as **Exhibit E**.

40. The LBB did not respond to the Racing Commission, and the Racing Commission was forced to close its doors on September 1, 2015. *See* **Exhibit A**.

41. The next day, the LBB informed the Racing Commission that its request to spend its appropriated central administration and other support services funds was denied, but that the LBB would permit the Racing Commission to use funds appropriated for other purposes to keep the agency open through November 30, 2015. The LBB did not follow any of the procedures prescribed by the budget execution authority statutes when it declined the Racing Commission's request to spend its appropriated funds.

42. On September 11, 2015, the Racing Commission submitted another formal request to the LBB to spend its appropriated central administration and other support services funds beyond November 30, 2015. In a letter dated November 6, 2015, the LBB denied that

request without explanation and authorized the Racing Commission to make another transfer of funds from other appropriations to keep the agency open until February 29, 2016. Once again, however, the LBB did not follow any of the procedures prescribed by the budget execution authority statutes when it declined the Racing Commission's request.

43. The Racing Commission once again took up a proposal to repeal the Historical Racing Rules on December 15, 2015. Ultimately, the commissioners deadlocked on the vote to repeal the Historical Racing Rules, which effectively defeated the repeal effort. However, the Racing Commission voted to re-publish the proposal to repeal the Historical Racing Rules and to take yet another vote on the proposal in February 2016.

44. Following the Racing Commission's December 15, 2015 vote, several legislators, including legislators who served on the LBB, made public statements branding the Racing Commission as a rogue agency and indicating that the Racing Commission would not receive any further funding to keep itself or the Texas horse racing industry operating. For instance, state Senator Kevin Eltife, who served on the LBB, publicly stated: "I think it's terrible it might come to that . . . But the Commission is clearly going against the wishes of the Legislature, and it's just ridiculous."

45. Additionally, Mr. Hegar has made clear that, unless he receives approval from the LBB as required by Rider 7, he is not able to issue any warrants, electronic fund transfers, or debits to pay for the Racing Commission's central administration and other support services.

46. Anticipating that the LBB will not approve additional funding for the Racing Commission after February 29, 2016, newly-appointed Racing Commission Chairman, Rolando Pablos has asked the Racing Commission's staff to prepare a plan for shutting down the agency.

Mr. Pablos has stated publicly that “The Legislature has been very clear . . . if the rules aren’t repealed, funding will not be forthcoming.”

G. Harm Suffered by the Horsemen’s Partnership and its Members as a result of the LBB’s Application of Rider 7

47. Due to the LBB’s application of Rider 7, there is an imminent risk that the Racing Commission will be forced to cease all operations after February 29, 2016. As already noted, a shutdown of the Racing Commission will necessarily result in a shutdown of the entire Texas horse racing industry. Such a shutdown will cause significant irreparable harm to the Horsemen’s Partnership and its members.

48. For instance, many of the Horsemen’s Partnership’s members have paid for multi-year licenses that afford them the right to participate in Texas races through the end of 2017. A shutdown of the Texas horse racing industry would be tantamount to a revocation of these licenses and a termination of these members’ rights to conduct their businesses.

49. In addition, many Horsemen’s Partnership’s members have invested substantial amounts of time and money preparing to participate in Texas races that are currently scheduled to take place after February 29, 2016 and preparing for the Texas breeding season. This time and money will be lost if the LBB continues to withhold the Racing Commission’s essential funds and the Texas horse racing industry is forced to cease operations on March 1, 2016.

CLAIMS FOR DECLARATORY RELIEF

A. Rider 7 Constitutes an Improper Delegation of Legislative Power Under Article III, Section 1 of the Texas Constitution.

50. The Horsemen’s Partnership incorporates by reference Paragraphs 1-49 above as if fully set forth herein.

51. Article III, Section 1 of the Texas Constitution provides that “The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled ‘The Legislature of the State of Texas.’” “A settled maxim of constitutional law is that the power conferred upon the legislature to make the laws cannot be delegated by that department to any other body or authority. The essential legislative functions are . . . vested in the legislature and there they must remain.” See TEX. CONST., ART. III, Sec. 1, Interpretive Commentary.

52. Although the Legislature may delegate some degree of legislative power to agencies, legislative committees, and even private entities, delegations of legislative power are invalid unless they prescribe some reasonably ascertainable standards to guide these other entities in the exercise of the delegated power. See, e.g., *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998); *Sw. Savings and Loan Ass’n v. Falkner*, 331 S.W.2d 917, 921 (Tex. 1965). Even broad or general standards are sufficient, so long as the Legislature provides some standard to guide the delegate in the exercise of the legislative power. *Proctor*, 972 S.W.2d at 737.

53. Fundamentally, the legislative power is the power to make laws. This includes the power to repeal laws enacted by the legislature as well as the power to nullify or repeal rules adopted by executive agencies, which have the force and effect of laws.

54. Rider 7 delegates legislative power to the LBB in at least two ways. First, by granting the LBB authority to withhold funds that are essential to the Racing Commission’s operations, Rider 7 effectively delegates to the LBB the power to decide whether the State of Texas will continue to have a horse racing industry and an executive agency that regulates that industry. In this way, Rider 7 delegates to the LBB the effective power to nullify the Texas Racing Act, which both authorizes horse racing in Texas and creates the Racing Commission to

regulate the Texas horse racing industry. Second, by granting the LBB control over the continued existence of the Racing Commission, Rider 7 effectively delegates to the LBB the power to nullify any rules adopted by the Racing Commission. Indeed, by refusing to fund the Racing Commission unless it repeals the Historical Racing Rules, the LBB has consistently wielded its purported power under Rider 7 as if it were a power to nullify or force the repeal of substantive rules adopted by the Racing Commission.

55. Rider 7 violates the non-delegation doctrine of Article III, Section 1 because it purports to delegate these legislative powers to the LBB but it contains no standards whatsoever to guide the LBB in its exercise of these delegated powers. To be sure, neither Rider 7 nor any other law provides the LBB guidance regarding the factors it must consider in determining whether to withhold the Racing Commission's essential funds. Rather, by its terms, Rider 7 gives the LBB unlimited discretion to withhold the Racing Commission's essential funds for any reason or no reason at all. Accordingly, Rider 7 constitutes an improper delegation of legislative power and should be declared invalid and unconstitutional.

B. Rider 7 Violates the Separation of Powers Clause of the Texas Constitution, Article II, Section 1.

56. The Horsemen's Partnership incorporates by reference Paragraphs 1-55 above as if fully set forth herein.

57. Article II, Section 1 of the Texas Constitution requires that the legislative, executive, and judicial powers be divided among the three branches or departments of the state government, and it states that "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

58. Separation of powers is violated “when one branch of government assumes, or is delegated, to whatever degree, a power that is more ‘properly attached’ to another branch.” *TX Comm’n on Environmental Quality v. Abbott*, 311 S.W.3d 663, 672 (Tex. 2010).

59. The Texas Racing Act grants the Racing Commission, an executive agency, the power to regulate the Texas racing industry and adopt rules that assist it in implementing the legislative policy embodied in the Act. TEX. REV. CIV. STAT. ANN. art. 179e, § 3.02. Thus, the power to adopt rules governing the Texas racing industry has been properly attached to the executive branch, and in particular, the Racing Commission.

60. It is beyond dispute that the legislature could repeal or nullify any rule proposed or adopted by the Racing Commission by passing a law through the traditional legislative process. However, “when a statute commits to an administrative agency’s hands the power to promulgate rules in order to better administer the legislative policy embodied therein, neither the legislature nor one of its committees may exercise a continuing ad hoc veto over the executive discretion thus reposed.” *See* TX Atty. Gen. Op. MW-460 at 4 (1982). Indeed, “it is constitutionally impermissible for the legislature to delegate to legislative committees the power to nullify rules proposed or adopted by agencies in the executive branch of government.” *Id.* at 5.

61. By granting the LBB unlimited discretion to withhold funds that are essential to the Racing Commission’s operations, Rider 7 effectively gives the LBB the power to nullify rules proposed or adopted by the Racing Commission. Specifically, Rider 7 allows the LBB to make the funding of the Racing Commission contingent on the repeal of certain substantive rules, and the LBB has consistently exercised its purported authority under Rider 7 for this purpose by withholding the Racing Commission’s essential funds until the agency repeals the

Historical Racing Rules. The LBB's application of Rider 7 thus violates separation of powers because the LBB has assumed a power that has been properly attached to the executive branch. Accordingly, Rider 7 should be declared invalid and unconstitutional.

C. Rider 7 Violates the Horsemen's Partnership's Members' Due Process Rights Under the Texas and United States Constitutions.

62. The Horsemen's Partnership incorporates by reference Paragraphs 1-61 above as if fully set forth herein.

63. Article I, Section 19 of the Texas Constitution provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

64. Similarly, the Fourteenth Amendment to the United States Constitution provides, in part, that: "No state shall . . . deprive any person of life, liberty, or property, without the due process of law."

65. "Due process generally does not protect privileges granted under the state's police power." *Limon v. State*, 947 S.W.2d 620, 626 (Tex. 1997). However, "once the state has granted a privilege to conduct one's business or profession, such privilege may become a right protected by the due process clause." *Id.*; see also *House of Tobacco, Inc. v. Calvert*, 394 S.W.2d 654, 657 (Tex. 1965).

66. When a privilege or license to engage in a business rises to the level of a cognizable property interest, "due process applies to protect the claimant from arbitrary revocation or suspension of the right to conduct business during the term such right was granted." *Limon*, 947 S.W.2d at 626.

67. The Texas Racing Act and the rules promulgated thereunder require that all racing industry participants obtain a 1 to 3 year license and they prescribe certain fees for such licenses.

TEX. REV. CIV. STAT. ANN. art. 179e, §§ 7.01—7.10; *see also* 16 TEX. ADMIN. CODE §§ 311.1 – 311.111. In addition, the Act and the rules set forth the grounds upon which a racing industry participant's license may be revoked and they provide that a license may not be revoked without providing the licensee notice and an adequate hearing. TEX. REV. CIV. STAT. ANN. art. 179e, §§ 3.15 and 7.04; 16 TEX. ADMIN. CODE § 311.6.

68. Many of the Horsemen's Partnership's members have paid for and obtained multi-year licenses that allow them to participate in Texas horse races through the end of 2017. Moreover, these members have invested significant amounts of time and money preparing to participate in Texas horse races currently scheduled to take place after February 29, 2016 and preparing for the Texas breeding season. These members have invested this time and money with the reasonable expectation that their licenses would endure unless revoked for the reasons set forth in the Texas Racing Act and the rules promulgated thereunder, and only after they were afforded adequate notice and a meaningful opportunity to be heard. Thus, these members of the Horsemen's Partnership have a cognizable right to conduct their businesses, which is protected by due process.

69. The LBB is exercising its purported authority under Rider 7 in a way that arbitrarily deprives these members of the right to conduct their businesses without affording them adequate notice and a meaningful opportunity to be heard. Indeed, when the funds the LBB has authorized the Racing Commission to transfer from other appropriations run out on February 29, 2016, and the LBB refuses to approve further transfers of funds or expenditures of the Racing Commission's central administration and support services funds, horse racing in Texas will immediately cease (as it did on September 1, 2015) and these members' licenses will be effectively revoked or suspended. Such an arbitrary deprivation of these members' licenses

violates their due process rights under the Texas and United States Constitutions. Thus, Rider 7, as applied by the LBB, should be declared invalid and unconstitutional.

APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION

70. The Horsemen's Partnership incorporates by reference Paragraphs 1-69 above as if fully set forth herein.

71. In connection with the declaratory relief requested above, the Horsemen's Partnership respectfully requests a temporary injunction and, following a trial on the merits, a permanent injunction that prohibits Mr. Hegar from refusing to pay for the Racing Commission's central administration and other support services because of the LBB's failure to approve the expenditure of those appropriated funds pursuant to its purported authority under Rider 7.

72. To obtain a temporary injunction, the Horsemen's Partnership must plead and prove a probable right to the relief sought, a probable, imminent, and irreparable injury if the requested injunctive relief is not granted, and that it has no adequate remedy at law. *See, e.g., Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

73. The Horsemen's Partnership has established a probable right to the declaratory relief sought in its Original Petition. Specifically, for the reasons set forth above, the Horsemen's Partnership has shown that Rider 7, as applied by the LBB, violates several provisions of the Texas Constitution as well as Horsemen's Partnership's members' due process rights.

74. The Horsemen's Partnership has also established probable, imminent, and irreparable injury if the requested injunctive relief is not granted. As explained above, because the LBB will not approve the expenditure of the Racing Commission's appropriated central administration and other support services funds unless the Racing Commission repeals the

Historical Racing Rules, there is substantial likelihood that the Racing Commission will be forced to cease all operations after February 29, 2016. When this occurs, the entire Texas horse racing industry will also be forced to cease all operations as occurred on September 1, 2015. This has harmed and will harm the Horsemen's Partnership and its members in several ways. First, a shutdown of the Texas horse racing industry will obviously prevent the Horsemen's Partnership's members from conducting their businesses and deprive them of their ability to make a living. Second, a shutdown of the Texas horse racing industry will cause the Horsemen's Partnership's members to lose the time and money they have already spent preparing to participate in Texas races that are currently scheduled to take place after February 29, 2016. Finally, the ongoing threat of a shutdown will continue to cause the Horsemen's Partnership's members harm by dissuading other horsemen from participating in Texas races, which in turn, decreases the level of competition and the value of purses at Texas races. This is especially true for Texas-Bred races, which are limited to Texas-bred horses. *See* TEX. REV. CIV. STAT. ANN. art. 179e, § 9.03. Indeed, the uncertainty regarding the continued viability of the Texas racing industry is already causing breeders to move their operations from Texas to other states and thereby decimate the Texas breeding industry and any Texas-Bred races that might potentially occur in the future.

75. These harms are imminent because the LBB has made clear that it will not approve any expenditure of the Racing Commission's appropriated central administration and support services funds or permit the Racing Commission to use funds appropriated for other purposes to keep the agency open beyond February 29, 2016. Further, Mr. Hegar has indicated that, unless he receives approval from the LBB as required by Rider 7, he is not able to issue

warrants, initiate electronic fund transfers, or authorize debits to pay for the Racing Commission's appropriated central administration and support services funds.

76. The harm to Horsemen's Partnership's members described above is irreparable and there is no adequate remedy at law because these members cannot obtain money damages from the state or Mr. Hegar for their injuries.

77. For these reasons, the Horsemen's Partnership respectfully requests that Mr. Hegar be cited to appear at a hearing and show cause why a temporary injunction should not be entered that prohibits him from refusing to pay for the Racing Commission's central administration and other support services because of the LBB's failure to approve the expenditure of those appropriated funds pursuant to its purported authority under Rider 7. The Horsemen's Partnership is willing to post a reasonable bond for the injunctive relief requested herein.

78. Additionally, for the reasons set forth above, the Horsemen's Partnership respectfully requests that, after a trial on the merits, a permanent injunction be issued requiring that Mr. Hegar be permanently enjoined as set forth in the Horsemen's Partnership's application for temporary injunction, which is incorporated herein by reference.

PRAYER FOR RELIEF

For the foregoing reasons, the Horsemen's Partnership respectfully requests that:

(a) The Court issue a judgment declaring Rider 7 unconstitutional, and specifically declaring that: (i) Rider 7 constitutes an improper delegation of legislative power in violation of Article III, Section 1 of the Texas Constitution; (ii) as applied by the LBB, Rider 7 violates the separation of powers clause of Article II, Section 1 of the Texas Constitution; and (3) as applied

by the LBB, Rider 7 violates the Horsemen's Partnership's members' due process rights under the Texas and United States Constitutions;

(b) Mr. Hegar be cited to appear and answer herein and show cause why a temporary injunction should not be entered that prohibits him from refusing to pay for the Racing Commission's central administration and other support services because of the LBB's failure to approve the expenditure of those appropriated funds pursuant to its purported authority under Rider 7;

(c) Upon a hearing, pending a trial on the merits, the Court enter a temporary injunction that prohibits Mr. Hegar from refusing to pay for the Racing Commission's central administration and other support services because of the LBB's failure to approve the expenditure of those appropriated funds pursuant to its purported authority under Rider 7;

(d) After a final trial on the merits, the Court enter a permanent injunction requiring that Mr. Hegar be enjoined as set forth in the Horsemen's Partnership's application for temporary injunction; and

(e) The Court award the Horsemen's Partnership all other relief to which it may show itself justly entitled.

Respectfully submitted,

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