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Filed: September 20, 2024

United States Court of Appeals
For the Eighth Circuit

No. 23-2687

Bill H. Walmsley; Jon Moss; Iowa Horsemen's Benevolent and Protective Association,

Plaintiffs - Appellants,

v.

Federal Trade Commission; Lina M. Khan, Chair, Federal Trade Commission; Rebecca Kelly Slaughter, Commissioner, Federal Trade Commission; Melissa Holyoak,[1] Commissioner, Federal Trade Commission; Alvaro Bedoya, Commissioner, Federal Trade Commission; Horseracing Integrity and Safety Authority; Charles Scheeler; Steve Beshear; Adolpho Birch; Leonard Coleman; Joseph De Francis; Ellen McClain; Susan Stover; Bill Thomason; D.G. Van Clief,

Defendants - Appellees.

Senator Mitch McConnell; Representative Andy Barr; Representative Paul Tonko,

Amici on Behalf of Appellee(s).

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[1] Commissioner Holyoak is substituted for her predecessor under Federal Rule of Appellate Procedure 43(c).

Appeal from United States District Court
for the Eastern District of Arkansas – Northern

Submitted: June 12, 2024
Filed: September 20, 2024

Before COLLOTON, Chief Judge, MELLOY and GRUENDER, Circuit Judges.

COLLOTON, Chief Judge.

The Horseracing Integrity and Safety Act establishes a framework to regulate horseracing. The Act authorizes the Horseracing Integrity and Safety Authority to make and enforce rules relating to horseracing, subject to oversight and control by the Federal Trade Commission. Bill Walmsley, Jon Moss, and the Iowa Horsemen's Benevolent and Protective Association moved for a preliminary injunction against the enforcement of rules promulgated under the Act. They raised several constitutional challenges to the Act. The district court[2] denied the motion, and we affirm.

I.

In 2020, Congress enacted the Horseracing Integrity and Safety Act. Horseracing Integrity and Safety Act of 2020, Pub. L. No. 116-260, §§ 1201–11, 134 Stat. 1182, 3252–75 (codified as amended at 15 U.S.C. §§ 3051–60). The Act authorizes the Horseracing Integrity and Safety Authority to promulgate rules regarding horseracing. The

[2] The Honorable James M. Moody, Jr., United States District Judge for the Eastern District of Arkansas.

Authority is a private, nonprofit corporation. 15 U.S.C. § 3052(a). The federal government plays no role in the selection or removal of officers of the Authority. *Id.* § 3052(b)–(d).

Under the Act, the Authority must submit to the Federal Trade Commission proposed rules and proposed modifications to rules. *Id.* § 3053(a). The Authority's rules cover eleven enumerated areas in the realm of horseracing, from track safety to anti-doping control. *Id.* The Commission must publish each proposed rule or modification submitted by the Authority, and provide an opportunity for public comment. *Id.* § 3053(b). Within sixty days of publication, the Commission must approve or disapprove of the proposed rule or modification. *Id.* § 3053(c)(1). The Commission must approve such rules or modifications if it finds that they are consistent with the relevant statute and the Commission's approved rules. *Id.* § 3053(c)(2).

The Authority also has enforcement and adjudicatory functions under the Act. The Authority's proposed rules may cover "a schedule of civil sanctions and violations" and "a process or procedures for disciplinary hearings." *Id.* § 3053(a)(9)–(10). All sanctions are subject to *de novo* review before an administrative law judge, and the Commission may also review the imposition of sanctions *de novo*. *Id.* § 3058(b)–(c). The Authority must develop "uniform procedures and rules" authorizing access to records and property of covered persons, "issuance and enforcement of subpoenas and subpoenas duces tecum," and "other investigatory powers." *Id.* § 3054(c)(1)(A). It may also commence civil actions against covered persons or racetracks to enjoin

practices that violate a statute or rule, to enforce civil sanctions, or to seek other relief. *Id.* § 3054(j).

In 2022, a court of appeals held that the Act's rulemaking structure was unconstitutional because the Authority's rulemaking power was an unconstitutional delegation of legislative power to a private entity. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* (*NHBPA I*), 53 F.4th 869, 890 (5th Cir. 2022). Congress responded by amending § 3053(e). *Consolidated Appropriations Act, 2023*, Pub. L. 117-328, § 701, 136 Stat. 4459, 5231–32.

Section 3053(e) now provides:

> The Commission, by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Authority promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.

Walmsley and the other plaintiffs are involved in horseracing and subject to the rules of the Authority. They sued the Commission and the Authority, as well as their commissioners and board members, to enjoin the enforcement of the Act and rules issued under the Act, and to seek a judgment declaring the Act unconstitutional. The plaintiffs moved for a preliminary injunction to enjoin the rules promulgated under the Act. The district court denied the motion on the ground that the plaintiffs were

unlikely to succeed on the merits. The plaintiffs appeal; we will refer to them collectively as "Walmsley."

II.

In reviewing a request for a preliminary injunction, we consider the threat of irreparable harm to the movant, the probability that the movant will succeed on the merits, the balance between the harm to the movant and injury that an injunction would inflict on other parties, and the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). We will assume for the sake of analysis that Walmsley need only show a fair chance of success on the merits to satisfy that element of the analysis. *Cf. Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731–32 (8th Cir. 2008) (en banc); *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1040–41 (8th Cir. 2016). Because Walmsley raises a facial challenge to the Act, he must show a fair chance that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). To defeat a facial challenge, the government need only demonstrate that the Act is constitutional in some of its applications. *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024).

Walmsley contends that the Authority's rulemaking power violates the private nondelegation doctrine. Congress may not delegate its legislative power to a private entity. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). Where a private entity is subordinate to a governmental body, however, Congress may assign certain tasks to the entity. *Sunshine Anthracite Coal*

Co. v. Adkins, 310 U.S. 381, 397–99 (1940); *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023), *cert. denied*, No. 23-402, 2024 WL 3089535, at *1 (U.S. June 24, 2024).

We agree with the Sixth and Fifth Circuits that the Act's rulemaking structure does not violate the private nondelegation doctrine. Section 3053(e) as amended gives the Commission "ultimate discretion over the content of the rules that govern the horseracing industry." *Oklahoma*, 62 F.4th at 230. If the Commission disagrees with policies reflected in the Authority's rules, then the Commission may change them under its power to "abrogate, add to, and modify" the rules. *Nat'l Horsemen's Benevolent & Prot. Ass'n v. Black* (*NHBPA II*), 107 F.4th 415, 424 (5th Cir. 2024); 15 U.S.C. § 3053(e). As such, the statute "makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one." *Oklahoma*, 62 F.4th at 230.

Walmsley disputes this conclusion on the view that the Commission's authority is narrower. He maintains that the Commission's power to "add to" the rules of the Authority allows only additions to existing rules and does not allow for the addition of a new rule. The Act provides separately, however, for the Commission to "modify" existing rules. Context and the canon against surplusage indicate that the phrase "add to" gives the Commission a greater degree of authority. *See Bailey v. United States*, 516 U.S. 137, 145–46 (1995). The power to "add to . . . the rules of the Authority" thus enables the Commission to adopt new rules. *See Oklahoma*, 62 F.4th at 227. As long as the Commission has the final say over the rules, there

is no impermissible private delegation. *Adkins*, 310 U.S. at 399; *NHBPA II*, 107 F.4th at 425.

Walmsley contends that even if the Commission has power to add to the rules of the Authority, the Commission cannot do so within the sixty days allowed to consider a proposed rule promulgated by the Authority. In other words, he maintains that there inevitably will be a gap between the time when a proposed rule of the Authority takes effect and when the Commission is able to modify or add to the rule after allowing for notice and public comment. This timing argument fails because the Commission may use its power to postpone the effective date of a proposed rule or to delay the effective date of a rule. *See NHBPA II,* 107 F.4th at 425; *Oklahoma*, 62 F.4th at 232.

Walmsley also objects that the Authority's ability to expand its jurisdiction over other breeds of horses is not subordinate to the Commission. A state racing commission or breed-governing organization for non-thoroughbred horses may apply to be covered under the Act, subject to the Authority's approval. 15 U.S.C. § 3054(*l*). We reject Walmsley's contention because the Commission's power under § 3053(e) allows it to "revoke the Authority's decision or place procedural and substantive conditions on any such decision." *Oklahoma*, 62 F.4th at 232–33.

As others have recognized, Congress modeled the Act as amended on a regulatory scheme in the securities industry that has been widely approved as constitutional. *See id.* at 229 (collecting cases). We join the other two circuits in concluding that the Authority is subordinate to the Commission such that the rulemaking structure of the Act does not violate the

private nondelegation doctrine. *See NHBPA II*, 107 F.4th at 426; *Oklahoma*, 62 F.4th at 229–31.

III.

Walmsley also challenges the Authority's enforcement powers. He contends that the Act unconstitutionally delegates executive power to the Authority, a private entity. The statute provides that the Authority will have subpoena and investigative authority with respect to civil violations committed under its jurisdiction, and that it may commence a civil action against a covered person or racetrack that is violating the statute or rules. 15 U.S.C. § 3054(h), (j).

The Commission asserts that Walmsley lacks standing to challenge the enforcement power of the Authority. Walmsley challenges the rule on its face; he does not dispute a particular enforcement action. He has a cognizable injury as a covered entity subject to the rules of the Authority, *see* 15 U.S.C. § 3054(c)–(f), and we typically do not require regulated parties to violate a rule before they may challenge the rule's facial validity. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010). We thus conclude that Walmsley has standing to litigate whether the statute on its face impermissibly grants enforcement power to a private entity. *See NHBPA II*, 107 F.4th at 426–27; *Oklahoma*, 62 F.4th at 231 (addressing the merits of the claim).

Our two sister circuits reached differing conclusions on the constitutional question. We agree with the Sixth Circuit that the statute is not unconstitutional on its face because the Commission's rulemaking and revision power gives it "pervasive

oversight and control of the Authority's enforcement activities." *Oklahoma*, 62 F.4th at 231 (internal quotation omitted). The Commission may, for example, "issue rules protecting covered persons from overbroad subpoenas or onerous searches." *Id.* The Commission may choose to create rules that require the Authority to obtain the Commission's approval before the Authority acts to commence a civil action under § 3054(j). *Id.* The Commission has power to review the Authority's enforcement actions and to reverse them. 15 U.S.C. § 3058(c). In evaluating a facial challenge, we must consider circumstances in which the statute is most likely to be constitutional, not hypothetical scenarios in which the statutory scheme might raise constitutional concerns. *Rahimi*, 144 S. Ct. at 1903. Because the Commission has broad power to subordinate the Authority's enforcement activities, the statute is not unconstitutional in all of its applications.

The Fifth Circuit declared the enforcement provisions of the statute unconstitutional because it thought the Commission's power to modify and add to the rules of the Authority does not "authorize basic and fundamental changes in the scheme designed by Congress." *NHBPA II*, 107 F.4th at 432 (quoting *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023)). In the *Biden* case on student loan forgiveness, however, the Supreme Court decided that the Secretary of Education exceeded her limited authority to "modify" certain statutory provisions because she "abolished" those provisions and "supplanted them with a new regime entirely." 143 S. Ct. at 2369. The decision turned significantly on the Court's conclusion that the term "'modify' carries 'a connotation of increment or limitation,' and must be read to mean 'to change

moderately or in minor fashion.'" *Id.* at 2368 (internal quotations omitted).

By contrast, Congress here gave the Commission greater authority to "add to" existing rules of the Authority, not merely to "modify" them. To subordinate the Authority's enforcement activity, moreover, the Commission need only work within the structure of the Act as designed, not create a new statutory regime. In considering this facial challenge, we should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). Like the Sixth Circuit, we are satisfied that the statute's enforcement provisions are not unconstitutional on their face and in all of their applications.

IV.

Walmsley next argues that the Act violates the public nondelegation doctrine. Congress may not delegate the legislative power of Article I to a federal agency, but those who act under general provisions of a law may "fill up the details." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825). When Congress sets forth "an intelligible principle to guide the delegee's use of discretion," there is no unconstitutional delegation. *Gundy v. United States*, 588 U.S. 128, 135 (2019).

The Act provides an intelligible principle for the Commission to follow as it seeks to ensure fair administration of the Authority, conform rules to the requirements of the statute, and further the purposes of the statute. *See* 15 U.S.C. § 3053(e). Congress gave

the Commission jurisdiction to exercise authority over "the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces," *id.* § 3054(a)(2), by developing rules for anti-doping, racetrack safety, and discipline. The statute sets baseline rules for anti-doping and enumerates several considerations for development of the program. *Id.* § 3055. Congress specified twelve elements that must be included in a horseracing safety program. *Id.* § 3056. Congress set forth several elements of rule violations and of a disciplinary process for the industry. *Id.* § 3057. These provisions meaningfully guide the Commission's exercise of discretion.

The Supreme Court has upheld delegations made with comparable or lesser guidance. In *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946), the Court held that Congress permissibly "gave the Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not 'unduly or unnecessarily complicate[d]' and do not 'unfairly or inequitably distribute voting power among security holders.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (alteration in original) (quoting *Am. Power & Light Co.*, 329 U.S. at 104). Statutes authorizing regulation in the "public interest," when read in light of statutory purposes and requirements, also have been held to include an "intelligible principle." *E.g.*, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932). The provisions at issue here likewise pass muster.

V.

Finally, Walmsley asserts that the Act violates the Appointments Clause of the Constitution because the members of the Authority's board of directors are allegedly officers of the United States who must be appointed by the President, a court of law, or the head of a department. *See* U.S. Const. art. II, § 2, cl. 2. Under the statute, the Authority selects its own board members. 15 U.S.C. § 3052(d)(1)(c), (d)(3).

We agree with the Fifth Circuit that the Act does not conflict with the Appointments Clause. The requirements of the Clause apply only to officers of the United States. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. 448, 459 (2020). Walmsley relies on *Lucia v. SEC*, 585 U.S. 237 (2018), where the Supreme Court held that administrative law judges of the Securities and Exchange Commission were appointed improperly. Once the Court determined that the officials exercised "significant authority" under federal law, there was no doubt that these career appointees of a federal agency were officers of the United States. *Id.* at 251.

The Authority, however, is a "private, independent, self-regulatory, nonprofit corporation." 15 U.S.C. § 3052(a). A private corporation must be regarded as a governmental entity for constitutional purposes only in limited circumstances: where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995); *see Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 54–

56 (2015). The *Lebron* standard is not satisfied here. The Act did not create the Authority; the Authority incorporated under Delaware law before the Act's passage. *NHBPA II*, 107 F.4th at 438. None of the board members are public officials, and the government plays no role in selecting or retaining them. 15 U.S.C. § 3052(b)–(d). The members of the Board are thus not officers of the United States, so their appointments are not governed by the Appointments Clause.

* * *

Walmsley has not established a fair chance of success on the merits, so the district court did not abuse its discretion in denying the motion for a preliminary injunction. The order of the district court is affirmed.

GRUENDER, Circuit Judge, concurring in part and dissenting in part.

I concur in Parts II, IV, and V of the court's opinion. However, I respectfully dissent with respect to Part III, which addresses the enforcement provisions of the Horseracing Integrity and Safety Act of 2020 ("HISA").

HISA empowers the Horseracing Integrity and Safety Authority ("Authority"), a private corporation, with "developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program" for horseracing nationwide. 15 U.S.C. §§ 3051, 3052(a). Both the Fifth and Sixth Circuits considered whether HISA's enforcement provisions facially violate the private nondelegation doctrine. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024);

Oklahoma v. United States, 62 F.4th 221 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024). The court agrees with the Sixth Circuit, holding that HISA's enforcement provisions do not facially violate the private nondelegation doctrine because the Federal Trade Commission ("FTC") could purportedly enact rules that reign in the Authority's broad enforcement powers. *Ante*, at 7–8. In my view, the Fifth Circuit has the better of the argument.

I agree with the Fifth Circuit that the plain text of HISA creates a clear delegation of enforcement power between the FTC and the Authority, "each within the scope of their powers and responsibilities under this chapter." 15 U.S.C. § 3054(a); *see Black*, 107 F.4th at 431–33. HISA expressly provides that the Authority's "powers" include full investigatory authority, 15 U.S.C. § 3054(h), and the ability to bring suit against alleged violators for injunctive relief, *id.* § 3054(j). Therefore, by the plain text of the statute, the FTC cannot impede upon the power granted to the Authority, nor can the FTC compel Authority enforcement action. In this fashion, the Authority does not "function subordinately" to an agency with "authority and surveillance" over it, in violation of the private nondelegation doctrine. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

The Fifth Circuit also correctly rejected the Authority's attempt to justify the constitutionality of HISA by analogizing its enforcement role to the role of self-regulatory organizations like the Financial Industry Regulatory Authority ("FINRA"). *See Black*, 107 F.4th at 433–35. FINRA is a private entity that assists the Securities and Exchange Commission ("SEC") in enforcing securities laws. The relationship

between the SEC and FINRA is governed by the Maloney Act, which has been widely approved as constitutional. *See Oklahoma*, 62 F.4th at 229 (collecting cases). The Authority points out that the Maloney Act provides that the SEC "may abrogate, add to, and delete from" the rules of FINRA, 15 U.S.C. § 78s(c), while HISA similarly provides that the FTC "may abrogate, add to, and modify the rules of the Authority," *id.* § 3053(e). Despite the inclusion of this single sentence in HISA, the FTC-Authority relationship materially differs from the relationship between the SEC and FINRA. *See Black*, 107 F.4th at 434–35. As the Fifth Circuit noted, the Maloney Act empowers the SEC with, among other things, investigatory authority, 15 U.S.C. § 78u(a)(1), the power to seek criminal sanctions, injunctive relief, or disgorgement, *id.* § 78u(c), (d), and the ability to step in and enforce any written rule itself, *id.* § 78o(b)(4). *See Black*, 107 F.4th at 434–35. "HISA gives the FTC none of these tools." *Id.* at 434. Thus, even though Congress may have purportedly modeled HISA on a regulatory scheme in the securities industry that has been widely approved as constitutional, the inclusion of some similar language in HISA alone does not make the Authority's enforcement role identical or even substantially similar to the role of FINRA in the securities context.

The court's opinion today does not undermine the reasoning of the Fifth Circuit. The court takes issue with the Fifth Circuit's reliance on the student loan case of *Biden v. Nebraska*, 600 U.S. ----, 143 S. Ct. 2355 (2023), where the Supreme Court held that "statutory permission to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress." *Id.* at 2368. The court points

out that HISA grants the FTC the ability to "abrogate, add to, and modify the rules of the Authority," 15 U.S.C. § 3053(e), while the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act") at issue in *Nebraska* granted the Secretary of Education the power to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs," 20 U.S.C. § 1098bb(a)(1). *Ante*, at 7–8. The language "add to," the court contends, allows the FTC to make basic and fundamental changes to the statute that the Secretary of Education could not make under the HEROES Act. *Ante*, at 7–8.

I do not agree with the court's attempt to distinguish *Nebraska* on this basis. In *Nebraska*, the Supreme Court considered whether mass student loan cancellation was authorized by the HEROES Act. Notably, the plain text of the HEROES Act gave the Secretary of Education the power to waive or modify *the statute* itself, as opposed to the plain text of HISA which allows the FTC to "abrogate, add to, and modify *the rules* of the Authority." 15 U.S.C. § 3053(e) (emphasis added). Even though the HEROES Act goes even further than HISA in allowing the Secretary of Education to waive or modify the statute itself, the Supreme Court rejected the government's attempt to rewrite the statute. *See Nebraska*, 143 S. Ct. at 2368–71. The Court stated: "However broad the meaning of 'waive or modify,' that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here." *Id.* at 2371. Just as the Court held that the language "waive or modify any statutory or regulatory provision" could not authorize the kind of exhaustive rewriting of the statute that had taken place in *Nebraska*, here, the language "abrogate, add

to, and modify the rules of the Authority" cannot authorize the FTC to subordinate the Authority's enforcement role when that role has been expressly granted to the Authority by statute. Allowing the FTC to do so would subvert the text of the statute as written. The Fifth Circuit's reliance on *Nebraska* was therefore proper.

The court also asserts that, "[t]o subordinate the Authority's enforcement activity, . . . the [FTC] need only work within the structure of [HISA] as designed, not create a new statutory regime." *Ante*, at 8. But, as the Fifth Circuit noted at length in its well-reasoned opinion, the FTC cannot work within the structure of HISA as designed because the plain text of HISA empowers the Authority, and not the FTC, with broad enforcement power. *See Black*, 107 F.4th at 433. The FTC cannot rewrite the statutory scheme that Congress enacted. *See id.*

In a case such as this, where Congress has avoided the limitations of the Appointments Clause by vesting in a private entity the wholesale power to regulate doping, medication, and safety issues in the horseracing industry nationwide, it is imperative that the private nondelegation doctrine carry force to prevent broad delegation of governmental powers to unsupervised private parties. The court's opinion fails to reckon with the plain language of HISA, which grants to the Authority a broad enforcement power that is not subordinate to the FTC. Like the Fifth Circuit, I conclude that HISA's enforcement provisions facially violate the private nondelegation doctrine. I respectfully dissent from Part III of the court's opinion.

U.S. District Court

Eastern District of Arkansas

The following transaction was entered on 7/11/2023 at 3:33 PM CDT and filed on 7/11/2023

Case Name: Walmsley et al v. Federal Trade Commission et al
Case Number: 3:23-cv-00081-JM
Filer:
Document Number: 43 (No document attached)

Docket Text:
(This is a TEXT ENTRY ONLY. There is no pdf document associated with this entry.) CLERK'S MINUTES for proceedings held before Judge James M. Moody Jr.: MOTION HEARING held on 7/11/2023. John Kerkhoff, Brett Watson, and Caleb Kruckenberg for Plaintiffs; Grant Fortson, Alexander Sverdlov, Stephen Ehrlich, Joshua Newton, John Roach, Lide Paterno, and Patrik Shah for Defendants. After argument from counsel, the Court DENIES [5] Plaintiffs' MOTION for Preliminary Injunction, for the reasons stated on the record. (Court Reporter: Graham Higdon.) (kog)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

BILL WALMSLEY, et al,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION, et al.

Defendant.

No. 3:23-CV-00081

Tuesday, July 11, 2023,
Little Rock, Arkansas
1:30 p.m.

TRANSCRIPT OF MOTION
FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE
JAMES M. MOODY, JR.,
UNITED STATES DISTRICT JUDGE

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THE COURT: We are on the record in Walmsley versus the Federal Trade Commission, essentially, et al., case four -- excuse me, 3:23CV81.

Where is Mr. Watson? Is he not here today? Oh, there you are.

MR. WATSON: Hello.

THE COURT: It's been a minute.

MR. WATSON: It has been a while.

THE COURT: Yeah. Your hair's a little grayer than last time I saw you.

MR. WATSON: Grayer and thinner.

THE COURT: No. You look like you got a head full of it. I just didn't recognize you over there.

So we are here on arguments on a preliminary injunction. I have read -- and if you all will bear with me, I'm going to try to get on the computer.

Casey, I'm missing my link.

(Discussion held off the record.)

THE COURT: Gentlemen, thank you for your patience. I appear to be online for the moment.

So in preparation for this hearing I've reviewed the complaint, which is document one, the motion in support of the plaintiff's motion for preliminary injunction, document six. I looked at document 19, which is Authority Defendant's opposition, and document number 20, which is the opposition to plaintiff's preliminary injunction. There are also a number of declarations that I had available. And then it looks like an HISS letter from Lisa Lazarus, L-a-z-a-r-u-s. And there's an HISS announcement which is in addition to the declaration. So that's what I've had the benefit of.

Who would like to speak on behalf of the Walmsley Plaintiffs to fill me in on the rest?

MR. KERKHOFF: I would. John Kerkhoff for the plaintiffs.

THE COURT: All right. You're up.

MR. KERKHOFF: And, Your Honor, we also have physical copies of the declaration and letters and exhibit list if you would like those.

THE COURT: I think -- you all may have sent me the exhibit list before. And let me get to -- what's the document number that you would have listed exhibits under?

MR. KERKHOFF: We actually submitted them yesterday via e-mail.

THE COURT: Okay. So they're not attached. Okay. I need to find them on my e-mail then. Okay. Let me give it a shot. Okay. I've got -- which one -- do you have an order that you're going to refer them so I can at least try to reopen one?

MR. KERKHOFF: I'm sorry?

THE COURT: Do you know which exhibit you might refer to first because I was going to try to open it to make sure that I was able to.

MR. KERKHOFF: Oh, yeah, sure. I will be referring to Exhibit 1 and 4 which are the declarations.

THE COURT: Right. I'm just trying to get whatever -- it came up. So -- it came up back there. I was just making sure it was going to come up here. So, proceed.

MR. KERKHOFF: Okay. Thank you, Your Honor. And may it please the Court.

THE COURT: Thank you.

MR. KERKHOFF: This case turns on a simple question, which is whether a private nonprofit corporation may wield the federal government's power. And the answer to that question is no. To ask that question is to answer it. Our constitution vests legislative, judicial, and executive powers in branches of government to protect democratic accountability. The Horseracing Integrity and Safety Act of 2020 upends that constitutional structure, and plaintiffs are -- should receive a preliminary injunction in this case.

THE COURT: What is different about this case that you didn't try after the -- after the Congress tried to initiate its fix? I mean, what's different than the cases that have already been ruled on since it went back to Congress?

MR. KERKHOFF: Well, Your Honor, we --

THE COURT: What about your complaint is different or what angles are you trying to ask me to consider that are different from those that have already been ruled on since I'm going to refer to it as the fix, but I think we know what we're talking about. Congress is kind of redue to bootstrap -- or not bootstrap -- but to fill in the gaps that caused the circuit court's problems. Can you kind of tell me what's different about that or are you asking for a second opinion or are you giving me any kind of different arguments that weren't heard since the fix?

MR. KERKHOFF: Right, Your Honor. Well, we submit that the fix did not actually cure the problem

that the Fifth Circuit identified as a constitutional problem initially. And we understand that the Sixth Circuit came out the other way, but we respectively disagree with the Sixth Circuit on its ruling --

(Court reporter interruption.)

THE COURT: Fair enough.

MR. KERKHOFF: My apologies.

THE COURT: So are you asking me for a second opinion on the Sixth Circuit or are you just giving me some different arguments that they didn't address?

MR. KERKHOFF: Well, our arguments are similar to the ones made in the Sixth Circuit --

THE COURT: How are they different?

MR. KERKHOFF: Well, we make various arguments as to why the so-called fix, Section 3053(e), does not actually fix any part --

THE COURT: Did you make those to the Sixth Circuit?

MR. KERKHOFF: We did not make the arguments to the Sixth Circuit because we're not counsel at the Sixth Circuit. We're --

THE COURT: Fair enough. Let me rephrase then. Were those made to the Sixth Circuit or are those new arguments that you're asking me to resolve that the Sixth Circuit didn't address?

MR. KERKHOFF: The Sixth Circuit heard argument and had briefing before the congressional statute -- before the statute was amended. They then ordered supplemental briefing, but they did not have a fulsome record or argument as to the entire statute

that we're presenting here because there was not that full argument at that time. And so we think the Sixth Circuit made an error as to Section 3053(e), but it did not also consider all the other ways in which the Horseracing Integrity and Safety Authority is not subject to the FTC's control here, which we point out in our briefs and I'm happy to talk about.

So although the Sixth Circuit did address the subsection (e) of 3053, we think that the Sixth Circuit was incorrect for several reasons.

First of all, we don't think that that section properly read actually permits the FTC to create any new policy or any rules that it wishes. In fact, in the FTC's own order ratifying the anti-doping and medication rules in this case --

THE COURT: Keep going. That just means I'm trying to show mercy on my court reporter.

MR. KERKHOFF: And I'm sorry, please --

THE COURT: Continue.

MR. KERKHOFF: That the FTC stated in that order that they are limited to only modifying existing rules of the Authority. And so we maintain that the fact that the front end review, the consistency review under the Act, coupled with the fact under 3053(e) that the FTC cannot initiate its own policy -- it may change, admittedly, it may ultimately change in Authority rule, but it cannot initiate rulemaking on its own policies that it wants to impose, and the Authority then is the entity setting all policy in this case. And that sets it apart from different entities.

And another factor here is that the FTC has no control over the Authority, its board, or any way in

which it functions. The Authority exists by dint of congressional statute under Section 3052(a), whereas FINRA, for example, in the Maloney Act, that exists by dint of FTC grace because the FTC can just derecognize FINRA if it so wishes. So this is a congressional statutory problem in which there is not sufficient control over the Authority by the FTC.

We think the Sixth Circuit did not properly put weight on those factors. It was also incorrect, we think, on the 3053(e) topic which is that the FTC cannot initiate rulemaking on its own policies.

THE COURT: So Oaklawn's meet's over. Why do you need a preliminary injunction pending ruling on the merits in this case? I mean, what's the hurry? Why would I enjoin this case with no active meet going on?

MR. KERKHOFF: Well, first, Your Honor, there is an active meet going on in Prairie Meadows in Iowa. And the plaintiffs here are Iowa HBPA members. And some of those members are here in -- live and work here in Arkansas and go to Prairie Meadows to race.

THE COURT: When is -- when's that meet?

MR. KERKHOFF: I believe in September. We have it in Mr. Moss's declaration. I believe it is in September that that meet would end.

THE COURT: So it -- it's in -- they're racing now and are going to continue to race through September all summer long.

MR. KERKHOFF: That's correct, Your Honor.

THE COURT: Okay. And that's in Meadows or --

MR. KERKHOFF: Prairie Meadows.

THE COURT: I'm sorry. I misspoke. What I meant to say was whose declaration? Moss?

MR. KERKHOFF: Yes. And Mr. Moss who is the head of the Iowa HBPA. And, again, that goes to why we filed this case here because Iowa members did race during the Oaklawn meet as well. So we understand that that's over, but the Prairie Meadows meet is continuing.

And another harm here that we would emphasize is that the horsemen here are not challenging the specifics of rulemaking by the Authority or FTC; they are challenging the statute, and they are challenging the very existence and fundamental nature of the Horseracing Authority. And the Supreme Court just clarified in its acts on the FTC decision, that when you make a fundamental existential claim against a federal agency, that injury is impossible to remedy. Those are the words of the Supreme Court, quote, impossible to remedy if you are forced to endure that very proceeding in which you would be subjected to.

And so we think that the constitutional harm here itself is an irreparable harm and that the loss -- there are many cases we cited in our brief that say that the loss of a constitutional harm even for just a moment is an irreparable harm.

And another thing that we laid out in the declaration of Mr. Moss and Mr. Walmsley is that the HBPAs in this case, they have to pay fees to -- to the Authority. And in this case that's hundreds of thousands of dollars that has not yet been paid, but they will be forced to pay -- they will be forced to pay that amount if they have to under 15 USC Section 3052(f), I believe it is. The Authority by statute is

responsible for equitably dividing how fees are to be split among covered members. Well, the covered members here --

THE COURT: Have they been invoiced for any fees like that or been sent a tax bill or I don't know what to call it, but I think you get my drift. Have they been sent a bill for any fees that they are due and owing at this point?

MR. KERKHOFF: The Arkansas HBPA is currently paying on a monthly basis. And the Iowa HBPA, that's Exhibit 2 that we submitted, their equitable distribution has been approved by the Authority. And so that -- although -- I don't think there would be any dispute here that the Authority will collect on that if it is not enjoined here. And so we submit that is a harm that the Iowa HBPA, its members will suffer immediately if this case is not enjoined.

And, relatedly, that money as we state -- or as Mr. Moss states in the declaration, that money comes from the horsemen's purse fund. And so any time they have a race now, the amount of money available to the winner or the amount of purse money available in that race is now necessarily smaller, which is, in our view, an irreparable harm because it can never be given back.

We also raise, in addition to those harms, the fact that there are vast compliance costs associated with this, these rules from the Authority. Both the anti-doping and medication rules and racetrack safety rules cover all kinds and all manners of things in terms of testing, horseshoes, how many times a jockey

may whip a horse, for example, during a race. And these all --

THE COURT: What's the cost of whipping a horse?

MR. KERKHOFF: I don't know the specific cost, but part of that goes to the changes in rules during a sporting event, which is to say if you change the rules of a sporting event it may alter the outcome of that particular sporting event, which itself is an irreparable harm. So we don't know if -- for example, if the whip rule was different we wouldn't know if the outcome could have been different, which is part of the point of the irreparable harm when you change rules to a sporting event. So we think there are multiple irreparable harms here that we have specifically -- specifically allege.

And we also think nothing that the Authority or FTC raises defeats the irreparable harms or the likelihood of success on the merits. For starters, the plaintiffs here didn't wait to game any system or anything. The Fifth Circuit struck down this statute as unconstitutional. It is only after the fix and after the anti-medication and doping rules were submitted and to be ratified by the FTC that we filed this case. And that's specifically because the plaintiffs knew that they wanted to challenge these rules with upcoming meets, both at Oaklawn and at Prairie Meadows. So there's no gamesmanship going on or anything of that short.

THE COURT: Has anybody accused you of that?

MR. KERKHOFF: No, sir. I don't mean to -- I just want to be clear, there has been some suggestion that there are -- because there are other cases filed, you know, that we were just picking a new lawsuit. But it

was specifically, just to be clear, that for the Oaklawn and Prairie Meadows meets that have been --

THE COURT: I just --

MR. KERKHOFF: Yes.

THE COURT: I don't think there's anything untoward about filing another lawsuit. And I just didn't know if there was something I missed about the gamesmanship other than just searching for a venue that was appropriate to, which I don't see any problem with, but --

MR. KERKHOFF: Then that's all it is, Your Honor. I don't mean to suggest anything else.

There were also -- there were also other arguments that there -- the FTC could maybe issue a rule that could delay the effect of the Authority's rules such that they could preemptively modify the Authority's rules which would save the statute from being unconstitutional.

We don't -- this is part of what the Sixth Circuit relied on. We certainly disagree with that. For one thing, it's not unclear under what authority the FTC would be able to issue such a rule. We don't know what -- how the FTC would raise that rule and what rulemaking would come from. And agencies are, of course, creatures of statute, and what statute allows such a rule under Section 352 -- no, 352 -- 353, I'm sorry, (c), the FTC must approve or disprove an Authority rule within 60 days. And so they would -- they argue that they could, well, delay the effective date of a rule by 180 days, but we don't see where the statute allows that kind of rulemaking.

Secondly, our -- we do not think that the constitutionality of this statute rises and falls with how the FTC and Authority decide to exercise their power. The problem is that the power was delegated at all. And this is the Whitman case of the Supreme Court which says it is not the constitutionality of a statute, a delegation problem from a statute terms on what Congress passed, not on how the agency decides to wield that power. It is the fact that the agency has the power in the first place. So we think that the Sixth Circuit errored for that reason as well.

And so we -- we think that under the private nondelegation doctrine, there is not -- the test that has been used in Supreme Court opinions is pervasive control and surveillance. And we think that's wholly absent here, Your Honor. The front end consistency review by the FTC, as the Fifth Circuit explained in detail in the Black opinion, says very clearly that that is not -- that is basically a toothless review. The Sixth Circuit didn't even necessarily disagree with that, but they just look to Section 3053(e) which is the abrogate or modified provision which the FTC says allows it to issue its own rules on its own policies.

But, first of all, the title of that section of the statute, Section (e), is amendments of rules to the Authority. And the Supreme Court has been very clear in recent opinions that Congress does not bury such sweeping authority in such vague or obscure language. The word modify, which comes before the word add to, we know means small incremental changes. That's the MCI case -- that's a recent student loans case that just came out. So we know that they can't use the modified provision for that. And so their entire case then hinges on the word add to, and we

don't think those words can bear that much weight, Your Honor.

And to emphasize the point, if you look at the Authority's brief on page 13 and 14 of their brief --

THE COURT: You didn't slow down any.

MR. KERKHOFF: I'm so sorry, Your Honor. I'll slow down.

If you look on pages 13 and 14 of their brief, they specifically say that consistency review is not relevant to the constitutionality of the statute. And we don't think that's right. We don't think there's any case that would say that the add to or modify provision alone would be able to save this statute. And specifically, for example, under the Maloney Act, the FTC has much stronger consistency review, they're able to derecognize FINRA, they're able to remove board members from FINRA.

And so this is the -- the horse act here creating the Authority is quite simply of -- on its own -- in the FTC's own words, in fact, when they promulgated rules, unprecedented. And the courts addressing this issue have called it novel and, quote, pushes the boundaries.

So this is a very new type of statute. We think there is not sufficient control here by the FTC. Plaintiffs are irreparably harmed.

And as to balance of the harms, the equities, we think that the Supreme Court has been clear on these issues. This is -- the recent OSHA case, the Alabama Association of Realtors case which says when there is a constitutional problem, you don't balance the equities and harms, that by itself favors injunctive relief. And that's exactly the case here, Your Honor.

Our plaintiffs here are subject to what we say are unconstitutional rules every day and they have to comply with those or face serious repercussions, thousands of dollars in fines. They can be banned from the industry under the Authority's rules. The Authority itself can bring federal law enforcement actions to seek an injunction in federal court. And so they're subject to all of these things, Your Honor, and we think that those unconstitutional harms are reason that this Court should issue the preliminary injunction now.

And, Your Honor, I'm happy to answer any other questions you have.

THE COURT: So help me a little bit on these, I guess what I would call claims, or -- so I have one which appears to be about the Appointments and Vesting Clause. Two would be the private nondelegation doctrine issue. Three would be the public or traditional nondelegation doctrine. And then you have four and five. Are those meant to be independent? Four seems to be taken care of by five. Can you help me distill your complaint with regard to once we get past claim number three -- which I'm calling claim number three. And I'm trying to scan down to get back where I am.

So count one is on page 25, two on 28, three on 30 -- at least it starts there. And then we get down to count four which is due process. And as I read that it deals with, essentially, the argument that there is a conflict of interest between in judging yourself, and then how does that -- how's that different than five?

MR. KERKHOFF: In claim five I believe, was that the --

THE COURT: Well, the count -- so let me help you. I'm not sure what you got there in front of you, but I'm on page 32 which is count four. And it appears to talk about that the board shouldn't be able to adjudicate itself because there's a conflict of interest. And I paraphrase. And that there's -- then it goes to count five which talks about the judicial power, the Authority cannot wield judicial power, which seems like the same argument.

Help me figure out where we are on four, count four which is on page 32, at least that's where count four starts. And then count five, which starts on page 35 of your complaint, which is docket one. So anybody following behind us will know where we're talking about.

MR. KERKHOFF: Right. Well, first I'll just note that counts four and five are not at issue for the preliminary injunction. We just -- the first three claims were included as a means -- or as a reason for granting preliminary injunction. But I am happy to talk about it.

The due process claim is just what you identified which is the conflict of interest problem and that you have a partial adjudicator --

THE COURT: Well, I think you answered my question off the bat that I don't need to consider four and five for today's hearing.

MR. KERKHOFF: Correct, Your Honor. We don't raise those in the preliminary injunctions. Just the first three. And those would be maybe subject to, you know, a full merits briefing and our claim for declaration as well.

THE COURT: All right. Thanks for answering that.

MR. KERKHOFF: And I'm happy to answer anymore questions if you have any, Your Honor.

THE COURT: I likely will once I have heard from both sides. So thank you.

MR. KERKHOFF: Thank you.

THE COURT: You got a date, Grant? You keep looking at the clock.

MR. FORTSON: No. And I'm not taking medicine either, Your Honor. I was just noting starting and stopping times.

THE COURT: Okay. Well, thank you for that.

Okay. Yes, sir. What's your name?

MR. SVERDLOV: Good morning. My name is Alexander Sverdlov. I'm here on behalf of the FTC defendants.

THE COURT: That's S-v-e-r-d-l-o-v.

MR. SVERDLOV: It is.

THE COURT: For those of us who aren't used to that name, for the benefit of my court reporter, so.

MR. SVERDLOV: It's just every letter down the line. Just hit every one.

THE COURT: All right. Go ahead.

MR. SVERDLOV: May it please the Court.

THE COURT: Thank you.

MR. SVERDLOV: Your Honor, for over two years we have been litigating facial constitutional

challenges to HISA. And we have had two district courts that have sustained the constitutionality of the statute right off the bat. And then something unusual happened, or unusual in this day and age. After the Fifth Circuit found a constitutional defect, Congress went back and it amended the law. And in doing so, Congress followed the exact framework that the Fifth Circuit had laid out.

And so when that amendment was addressed by both Judge Sutton writing on behalf of the full Sixth Circuit and by Judge Hendrix down in the Northern District of Texas who had initially sustained the constitutionality of the Act, those courts looked at the revised statute. They looked at the roadmap that the Fifth Circuit had laid out, and they actually addressed all the same arguments that plaintiffs here present. Now, we don't fault plaintiffs for wanting to get a second opinion on those cases. But the fact of the matter is that those cases address every single one of the types of arguments that -- that the plaintiffs have raised.

Whatever doubts existed about HISA's constitutionality previously have now been fully cured by what Judge Sutton termed, quote, the productive dialogue Congress and the federal courts. And so having received a constitutionality -- a constitutionally tested and corrected statute, plaintiffs are entitled to no more.

There are several points, Your Honor, that plaintiffs raise that I think I want to kind of address in order. And all of them deal with the construction of this new statutory fix, Section 1353(e).

Plaintiffs place a lot of emphasis in their briefs and in arguments today on the fact that this -- that the way the FTC reviews the rules in the first go-around when Authority drafts a proposal and submits it to the FTC is under a consistency standard.

Well, as Judge Cole, writing in concurrence in the Sixth Circuit recognized and, of course, that the district courts prior to the Fifth Circuit's decision recognized, consistency review is itself just fine. Both precedent prior to the Fifth Circuit's Black decision included from the Supreme Court made clear that whether we're talking about the Maloney Act or the Coal Act that was at issue in the Adkins decision in the Supreme Court, consistency review is totally fine for purposes of a private nondelegation challenge because the standard for private nondelegation is whether an entity functions subordinably to a federal agency. And if, ultimately, it's the federal agency that has control over whether a rule is promulgated or not, that's fine.

On that point, Your Honor, I would just like to emphasize that consistency review is exactly the statutory framework that existed -- that the Court -- that the Supreme Court analyzed in Adkins. And that existed and continues to exist under the Maloney Act which has been sustained by circuits -- circuit courts around the country.

But that's -- that's just the preliminary step. That's just the first matter.

Now supplementing the consistency review that the FTC does is this broad plenary power to, quote, under 3053(e) which allows the commission, quote, by

rule in accordance with the APA, to abrogate, add to, and modify the rules of the Authority.

Plaintiffs ask this Court to read that language very narrowly, but Judge Hendrix on remand from the Fifth Circuit detailed all the reasons statutory construction dictates that the term add to must be read as allowing the FTC to create its own rules separate and apart from whatever the Authority submits to it.

So what we have now is a regime where the Authority submits a draft, the FTC reviews it for consistency with the Act and all prior rules. But running overtop of all of that is independent authority that the commission has to come in at any point and do its own ruling. And that rulemaking can take the form of like a blanket delay of effectiveness for any rule that the Authority submits to the FTC for review. It can take the form of supplements to existing rules. It can take the form of modifications of existing rules. And whenever the FTC promulgates a rule under that authority and under the APA, whatever further proposals the -- sorry -- whenever the commission, whenever the FTC promulgates a rule under this new authority, whatever further proposals the Authority submits have to conform to those new FTC rules.

So the power that the FTC has been granted is indeed, as Judge Hendrix and Judge Sutton and Judge Cole recognized, it is truly that of a superior body. It is no longer the case, arguably it was never the case that -- that the Authority could set policy independent of the FTC. But even if there were doubt on that point, all doubt has now been removed.

Plaintiffs make a couple other points that I think are worth quickly addressing.

One, plaintiffs note that the FTC can't derecognize the Authority because the Authority is -- it is part of -- recognized in the statutory regime. But, again, as both the Sixth Circuit and Judge Hendrix recognized, the power to derecognize is not itself constitutionally meaningful. What matters is the private entity has been given power that the federal agency can't oversee. And that's not the case.

The FTC can promulgate rules that effectively nullify any proposals for any rules that the Authority submits or has submitted previously. And that's -- that's a functional equivalent to derecognizing the Authority. There's no constitutional infirmity with Congress explicitly calling out and soliciting the help of a private entity for a federal agency.

I think it's worth -- worth emphasizing several more things.

The FTC can, of course, under the new authority, the FTC can initiate its own rules, Section 3053(e) explicitly refers to Section 553 of Title V of the APA; FTC can utilize all the powers that it has under the APA to promulgate rulemaking.

And the narrow construction, as I mentioned, the narrow construction of 3053(e) that plaintiffs advocate was explicitly rejected both by the Sixth Circuit and by Judge Hendrix.

We haven't heard a lot today about the ways in which the enforcement powers of the Authority are subordinate to the FTC, but even before the amendment, even before the statutory amendment,

FTC had the power of de nova review of the Authority's enforcement actions.

And, once again, as the Sixth Circuit and Judge Hendrix recognize now with the new statutory fix, as this Court referred to it, but the power that Congress gave the FTC, the FTC can promulgate a whole variety of rulemaking to exercise even firmer control. For example, preclearance requirements for any enforcement actions that the Authority takes.

And I think this connects back to or segues into one of the most kind of important points in considering these types of challenges. As the Sixth Circuit noted, the Supreme Court has established a clear standard for how facial constitutional challenges are to be evaluated. Citing Salerno, the Sixth Circuit, as other courts of appeals have as well, have noted that when bringing a facial challenge the plaintiff must show that the Act is unconstitutional in all its applications. In other words, that there is no set of circumstances under which the Act can be constitutionally applied. And so long as the statute can be interpreted either by a court or by an agency to permit a constitutional application, then it must be sustained.

As Judge Hendrix pointed out, a constrained reading of the new authority that Congress gave the FTC would run afoul of the constitutional avoidance doctrine. And so in addition to being counter-intricated by all the other canons of construction, it is just implausible to adopt the kind of reading that the plaintiffs are advocating here. And once that they are reading it is properly rejected, it's clear that a facial challenge must fail.

I'd like to make one additional point, Your Honor, and that is plaintiff's characterization of what the FTC has said about its own policy because I think it's worth just being clear so there is no misunderstanding. On footnote two of our brief we --

THE COURT: Let me get there. Hang on a second. So are you in 19 or 20?

MR. SVERDLOV: I believe we are 20, Your Honor, but I can tell you that. One second. Yeah. We are 20.

THE COURT: Document 20?

MR. SVERDLOV: It's on page -- I apologize.

MR. PATERNO: 12.

MR. SVERDLOV: Page 12. Thank you.

THE COURT: Page 12 of 20.

MR. SVERDLOV: Yeah.

THE COURT: Page 12, document 20, footnote two, contrary to plaintiffs.

MR. SVERDLOV: That's right.

THE COURT: From there?

MR. SVERDLOV: Yes. Yes. Exactly right. Plaintiffs are, both in their briefs and here at argument, plaintiffs are referring to a statement that the FTC made in its -- in its ADMC rule. Post amendment the FTC said of course our powers to review are still limited to the consistency review, right. And plaintiffs take this statement out of context, unintentionally, I'm sure, and suggest that the -- that this somehow demonstrates that the FTC views its 3053 amended authority as being one of the -- the fact is that statement says nothing of the kind,

right. That statement says that consistency review was the case before Congress amended the statute, it continues to be the case after Congress amended the statute. The FTC has all the power in the world that Congress has granted it now under 3053(e) to set its own policy which is the major fault that the Fifth Circuit identified. It has -- it can initiate its own rulemaking, it can do all sorts of things in parallel to the track of reviewing the Authority's rules or the Authority's proposals. But, of course, in reviewing the Authority's proposals, it's still constrained by the consistency review.

I guess it takes me full circle from where I started in saying that consistency review, in our eyes, has never been a problem, but to the extent that a court -- this Court or the Fifth Circuit or any court believes that, in addition, an agency must have power to initiate its own rulemaking, amend rules, set its own policy, Congress has given the FTC that power.

THE COURT: Are you done? You were looking at me. I didn't mean to suggest otherwise, but I was -- I was following along and then you stopped talking.

MR. SVERDLOV: I stopped because I think I'm starting to go in circles, Your Honor. So I'm happy to stop and address any questions that the Court may have.

THE COURT: I may have some in a moment. I'm going to give Mr. Kruckenberg last word since it's his motion, so to speak.

MR. SVERDLOV: Your Honor, if I may just put a word in from my co-counsel from Authority. I think they may also wish to have a turn to address these issues.

THE COURT: Okay.

MR. SVERDLOV: I would be happy to return here and address any questions.

THE COURT: All right.

MR. SVERDLOV: Thank you.

THE COURT: Good afternoon.

MR. PATERNO: Good afternoon, Your Honor. My name is Lide Paterno. I represent the Horseracing Integrity and Safety Authority.

THE COURT: Let me make sure I've got -- oh, Paterno, there we go.

MR. PATERNO: Yes, Your Honor.

THE COURT: JoePa.

MR. PATERNO: JoePa. You got it.

THE COURT: Got it.

MR. PATERNO: We also submitted exhibits yesterday by e-mail, but, to be clear, it's just the same six declarations that were filed with our opposition brief. That's 19-1.

THE COURT: Okay. That's probably -- well, are you going to be dialing me into them?

MR. PATERNO: Your Honor, I don't think we need to go through it in detail. I just wanted you to be aware that they are in the record.

THE COURT: No, I got that. I'm just trying to find out the easiest way, if you're going to be referring me to them, what's the easiest way to pull them up.

So it's probably going through -- you said 19 and following on that document. Let me get back to there.

MR. PATERNO: Yes, Your Honor. Docket 19 is our opposition brief and these were the six exhibits attached to it.

THE COURT: Okay. I see where to click if you're sending me to a particular exhibit. So I'm readily directable at this point. Go ahead.

MR. PATERNO: Wonderful. Well, I certainly don't want to repeat anything that the attorney for the FTC has already discussed, but I do think it's worth noting, Your Honor, at the beginning you asked counsel for plaintiffs if there were any new arguments. And just to be absolutely clear, the answer is no. There are no new arguments here that the Sixth Circuit and the Northern District of Texas have not already reviewed thoroughly, discussed thoroughly. I encourage you to look at those two lengthy opinions. They both -- Judge Sutton, Judge Cole in his concurrence, and Judge Hendrix discussed and rejected every single argument that plaintiffs made today.

Just, for example, Your Honor, if you look at page 230 of the Sixth Circuit decision.

THE COURT: Give me a second.

MR. PATERNO: It encapsulates Judge Sutton's view there.

THE COURT: Give me a second.

MR. PATERNO: Sure.

THE COURT: What page did you --

MR. PATERNO: This is 230 of the Sixth Circuit opinion. I'm happy to read it to you, Your Honor.

THE COURT: I'd rather read along, but unfortunately I'm not getting the same pages. Two what? I found 25 -- 225. What number were you on?

MR. PATERNO: 230.

THE COURT: Okay. Well, it just dropped out from under me. What big paragraph -- okay, so does it start with, as amended the Horseracing Act?

MR. PATERNO: Yes, sir. It follows there, yes, Your Honor. It says, before the amendment the Fifth Circuit determined that the FTC could not question the Horseracing Authority's policy choices or modify its rules. Not so anymore. With its new ability to have, quote, the final word on the substance of the rules, the FTC bears ultimate responsibility.

And the Sixth Circuit goes on at length to talk about how the congressional fix really did address all of the Fifth Circuit's concerns. It said, for example, that this is -- later on, Your Honor, it says that the lack of a modification power was, quote, the key distinction the Fifth Circuit identified between the Maloney Act, which is the Act that governs the SEC and FINRA relationship, and the Horseracing Act. The amendment to Section 3053(e) eliminates that distinction.

So, Your Honor, there really can be no question here that both of the courts that have considered the congressional amendment in direct -- which was passed in direct response to the Fifth Circuit's constitutional concerns fully cured the private nondelegation issues that plaintiffs have raised today.

I think to show how desperate plaintiffs are, they really have pushed this afternoon the argument that the FTC cannot create new rules or they said today

cannot initiate its own policies. And that's just flat wrong, Your Honor. Judge Hendrix in the Northern District of Texas said that the only fair reading of the statute is that the FTC can exercise its new power to create new rules to accomplish its policy preferences consistent with the guardrails that Congress set for it.

So I really think it's a nonstarter that the FTC cannot initiate its rules, and if there are any doubts about that, the FTC has already created its own rules. For example, it promulgated a rule that delayed the effective date of the anti-doping and medication control rule and it promulgated a rule that gives the FTC budget oversight over the Authority. That wasn't crystal clear from the statute itself and the FTC initiated its own rulemaking and said under our newfound powers conferred by Congress in this statutory amendment to ensure the fair administration of the Authority and to carry out the purposes of the Act, we consider it necessary that the Authority submits its proposed budget to the FTC, the FTC reviews the budget and has to sign off on it. The FTC can make line item modifications to the budget. So that's, you know, the other side talked about how there's no control. That's comprehensive oversight which is the word that Judge Sutton of the Sixth Circuit used.

Plaintiffs counsel also talked about footnote two of the ADMC, the anti-doping and medication control order which Mr. Sverdlov discussed. I would just point Your Honor to the ratification order. This is the FTC's January 3rd order after the congressional amendment where the FTC passed an order saying everything we've done we're ratifying just for the avoidance of

doubt to make sure that everyone knows that we're using this new power post-congressional amendment.

And in that order, this is the January 3rd order that's cited in the briefs, the FTC says that the agency, quote, now has a broader rulemaking power with respect to horse racing rules, such that it can exercise its own policy choices whenever it determines that the Authority's proposals, even if consistent with the Act, are not the policies that the commission thinks would be best for horse racing integrity or safety.

So I just think that it's -- the Court should be weary of looking solely at the one footnote that plaintiff's counsel drew your attention to, and obviously that needs to be read in the context of that order and in the context of all the orders that the FTC has issued. And if you look at the full record, there really can be no question, or as Judge Hendrix said, the only fair reading of the statute is that the FTC has independent rulemaking power.

Of course, that's -- that's one of the problems the Fifth Circuit identified with the prior statute, and that's the exact response that Congress passed in response to that concern.

So we're here on a PI. One of the factors that the Court has to consider obviously is the balance of equities. And here you've had not just one Congress, but two Congresses show their support for this statute in direct response to the Court. We have two different administrations that have supported this new regulatory regime.

And on the other side plaintiffs raised a few points about irreparable harm. Obviously we think, Your Honor, we don't even need to get there because we

think there's no success on the merits. But if you do get to irreparable harm, we think it's difficult to show irreparable harm given that the vast majority of the rules, the racetrack safety rules have been in effect for over a year, since July 1 of 2022. And as plaintiffs' counsel said, both in Iowa and in Arkansas races have happened throughout that time. In fact, throughout the whole Arkansas racing season happened and has concluded under those rules. And plaintiffs' declarations really don't show any harm that arose from that. They talk about some extra cost, but they don't talk about the balance of the costs, Your Honor.

And our declarations discuss how -- how the cost that they mention are offset by different savings, whether it's fewer medications or it's the fact that the State costs are lower because now the states aren't engaged in a lot of the same activities like the anti-doping and medication control regulations. The declarations show that the purse amounts have actually increased over the past year. So even if some funds are coming out to pay fees, the overall amount of purses have increased. The record just really doesn't substantiate there's any irreparable harm.

And if plaintiffs are turning to the newer anti-doping and medication control rules, which have been in place for over a month now, they also have raced under those rules. There's nothing in the record that talks about any kind of sanctions that were imposed on their specific members. Of course, even before the Authority and the FTC, before the FTC promulgated the anti-doping and medication control rules, the horsemen were racing under similar anti-doping regimes in the states. There wasn't a vacuum and the Authority came in; there were state regulations in

place that everyone was racing under. And what -- what has happened now is instead of having a whole patchwork of state-by-state regulations, there's one uniform system across all covered horse races throughout the states.

And plaintiffs declarations really don't identify any -- any concrete harm that has come from that. And, of course, if there ever were a real threat of an enforcement action, then the statute also lays out a comprehensive scheme for how the person who has been alleged to have violated something in the statute, how they can challenge that, how there's review. There's two layers of de novo FTC review. So it's just very difficult to see how they can say that there's irreparable harm requiring this court to enjoin the whole regulatory regime right now.

And, of course, Your Honor, even if there were any irreparable harm, the balance of equities, as mentioned, tilt heavily in the other way. As discussed, not only in two different Congresses and two different administrations have supported this statute, but the Authority -- the records show that the Authority has poured countless, countless, countless hours, years at this point into rolling out this new regime, over 70,000 horse racing participants have registered and embraced the new regime or at least are racing under it and have adjusted to the new standards. The kind of injunction they are seeking would really cause massive upheaval.

And most importantly, Your Honor, our declarations show, and this is really undisputed, but these new rules are really saving lives. They're helping horses, they're preventing injuries, they're preventing fatalities. The declaration for Mr. Nader

which is Exhibit Number 2 talks about how a lot of these rules were in place in California and some other jurisdictions and we saw real decreases in types of injuries that have caused a lot of harm in the industry over the past few years and are the exact reason why Congress passed HISA, not once, but twice, and why two different administrations have supported it.

And so we think that the balance of equities really leave no doubt that an injunction would be inappropriate in this context.

THE COURT: Thank you.

MR. PATERNO: I'm happy to answer any questions Your Honor might have.

THE COURT: Not right now.

MR. PATERNO: Thank you.

THE COURT: You want to note the time, Graham.

MR. PATERNO: Thank you, Your Honor.

THE COURT: Last word -- or last words. Just give them to me slowly.

MR. KERKHOFF: Sure. Thank you, Your Honor. I'll just make a couple brief points.

I want to start with one of the footnote two of the FTC's order ratifying the anti-doping rules.

THE COURT: And I think I know where to find that now. So it was in document 20, page 12.

MR. KERKHOFF: I think that was the footnote in their brief. What I'm actually talking about is the footnote in the March 27th order that the FTC had issued ratifying the anti-doping rules.

THE COURT: Is that going to be different from what I'm reading in that footnote?

MR. KERKHOFF: I don't have that brief in front of me, so I'm not sure.

THE COURT: Where do you want me to go?

MR. KERKHOFF: The order -- and I would -- I don't think this is disputed, but what it says is that the FTC does not have the authority to modify proposed rules. And that is a point of why we pointed that out because that sets this case aside from Adkins which the FTC counsel referenced, because in that case they could -- the government could modify proposed rules. In this case that's just not -- that's not -- that's not possible under the Horseracing Integrity and Safety Act.

THE COURT: How so?

MR. KERKHOFF: Because the rules allow modification under Section 3053(e) of rules already approved by the FTC. So to reach the FTC's power to ever make any rules, they must be changing already approved rules such that they would already have approved a rule and then later say we want to modify or add to that rule. They cannot look at an Authority rule that is issued so long as -- if it's consistent with the Act and then modify that proposed rule. They can only change already approved rules.

THE COURT: That's your interpretation or it just reads that way? I guess what I'm saying is is that -- that seems nonsensical to me. So I guess that's why I'm trying to follow along --

MR. KERKHOFF: That is one of the reasons, Your Honor, that does not say in the statute.

THE COURT: Take me to where you're reading so I can read along. And maybe I was going to the wrong footnote or the wrong order that you were referring to, but if you can get me on the same page or the same document that you're talking about so I can go from abstract to reality.

MR. KERKHOFF: I don't have the briefs in front of me right here, but I'd be happy to get it.

THE COURT: So would it be in your brief --

MR. KERKHOFF: It should be in our brief, yes --

THE COURT: -- preliminary.

MR. KERKHOFF: Yes. But I don't have the page number.

THE COURT: So in six -- I'm in six. And do you want to take a minute because it -- if it's a point worth you making, I'll take all the time you need to get me on the right page.

MR. KERKHOFF: And, I'm sorry, Your Honor.

THE COURT: Don't be.

MR. KERKHOFF: But I will get you there. So in our brief, document six, page 17.

THE COURT: Okay. Give me a second. I'm as far as 11. Okay. I'm on 17, roman numeral small four.

MR. KERKHOFF: Yes. In the second paragraph.

THE COURT: Indeed?

MR. KERKHOFF: Yes. And in the second sentence the FTC itself says --

THE COURT: Hang on a second. That first one's long. Talking about, thus, when the Authority -- or did I skip over?

MR. KERKHOFF: Yeah. I think the one right before then.

THE COURT: Okay. As the FTC itself says.

MR. KERKHOFF: Yes. The statute extends only to changing existing Authority rules and does not allow the commission to modify a proposed rule.

And so the FTC said that in its anti-doping order, and so our position is that sets this case totally -- it's totally different from Adkins where the government could look at the rule proposed by the private board and modify that proposal. But here the FTC does not have that power.

THE COURT: But didn't -- didn't the district judge say that that doesn't make any sense, too? I mean in the Texas case? And I guess what I'm saying is if the FTC had said this is perfectly constitutional, would you have had to take their word for it? I mean, I know what they're saying. I'm reading -- and I'm assuming that there's no issue that that's a correct quote. But I'm still --

MR. KERKHOFF: If you look, Your Honor, at the Sixth Circuit case, for example -- and I don't -- I don't believe this is a disputed point, but if you look at the Sixth Circuit's opinion, they didn't say that the FTC could propose modified rules. The way to get around this to try to save the statute was to say that the FTC could delay the effective date of a proposed rule, such that they could delay it for, say, 180 days, and during that interim time draft its own rule that would then

modify or add to the rule which the FTC must approve and then modify or add to.

And so that is how the Sixth Circuit explained the FTC getting around that provision. In our view, there's a couple of problems with that, which is number one, and I haven't heard it here, is what authority under the statute does the -- does the FTC have to issue such a rulemaking?

THE COURT: Is it fair, to follow your argument, I'd have to go against the Sixth Circuit?

MR. KERKHOFF: Yes, Your Honor, you would. We think the Sixth Circuit errored in that respect. And another point on that is there was some discussion in defendant's presentation about how the FTC has already issued rules about the budget and other matters. But, again, we would point you back to Supreme Court case law including the Whitman case that says it is the statute which must be interpreted for constitutionality. What the agency does not create the constitutionality of a delegation problem.

And so here we don't think the FTC, respectfully, had the authority to issue a budget rule. And the fact they did it doesn't mean they are correct, it means they have a different interpretation of the statute. But our entire view of 3053(e) is they don't have that rulemaking power to begin with.

And so I also just wanted to point out a couple of other things, and I'll be brief. Is that there is a lot that the Authority does that has no oversight from the FTC at all. One of them is issuing issuance of guidance under Section 3054(g), I believe. So this is what's governing horsemen on the ground every single day. The Horseracing Integrity and Safety Authority can

issue guidance interpreting a new rule and that will guide how the horsemen on the ground at Prairie Meadows today must comply with new rules. And that does not have to have approved by the FTC. Now, it has to be submitted to the FTC, but the FTC does not have to approve that guidance or play any role in it.

THE COURT: If it has to be submitted, what's the point? If the FTC has no power, why must it be submitted to them? I mean, it's nonsensical. If I say -- I'm not going to go there. But if something must be submitted to me and I have no say over it whatsoever, it's almost implied that if it has to be submitted to me I have some say-so in whether or not it gets enacted or acted upon or whatever you want to fill in the blank on. So are you saying that it just has to be submitted so I can look at it before I have no say-so in what to do about it?

MR. KERKHOFF: That is how the statute reads, Your Honor, and --

THE COURT: That's how you read it.

MR. KERKHOFF: Yes.

THE COURT: I mean, let's be clear that that's -- that's a stretch.

MR. KERKHOFF: Although, I don't believe, Your Honor, I mean, I could be wrong, but I don't think the FTC has ever asserted the power or said that they can modify the Authority's guidance in any of these cases.

THE COURT: Well, that doesn't mean they don't have it or have the ability to. If it has to be submitted to me, why else would it have to be submitted to me unless I had some say over it or if I'm the FTC or whatever you want to say, put me in the shoes of

whomever. I think we understand my question to you is that why would it ever have to be submitted to anyone unless that person had a say-so in the matter?

MR. KERKHOFF: I don't know, Your Honor, but a good example might be in the Maloney Act. Again, and this is why we think things like removal or derecognizing the Authority altogether is important. Because, for example, the FTC, if you could remove members of FINRA or here if the FTC could remove members of the Authority, that's why that kind of power would matter. The guidance would be submitted to you, we don't like what you're doing and we can have the oversight over you. Here that is wholly absent. You cannot -- the Authority exists because of a congressional statute and the FTC cannot change that. And so we just think there are all these things within the statute that, Your Honor, we think show there is no real control here.

A couple of just really quick points I wanted to make was one on the purse amounts. The first --

THE COURT: I didn't hear the last part.

MR. KERKHOFF: On the purse amounts.

THE COURT: Purse amounts.

MR. KERKHOFF: We claim that as being irreparable harm --

THE COURT: It came out as one word. I'm sorry.

MR. KERKHOFF: No, I'm sorry. I keep speaking too quickly. I apologize.

We don't dispute that purses have gone up overall.

THE COURT: Point taken. You don't have to go there. Just because they've gone up doesn't mean they wouldn't have gone up more. I'm with you.

MR. KERKHOFF: The second -- the second point was that in the OSHA vaccine case at the Supreme Court, this precise argument was made that a particular policy was saving lives or creating safety -- better safety -- and the Supreme Courts said that is not proper as in terms of -- it could be a laudable goal, but it is not proper to consider the laudable goal in dealing whether it's constitutional. So we just think that the OSHA case is clearly distinguishing there.

THE COURT: Another point taken. Go ahead.

MR. KERKHOFF: Another couple of things -- we also raise two more claims in our preliminary injunction motion that haven't been talked about today, but I just wanted to make sure I alerted to them, and that's the public nondelegation and the Appointments Clause claims. And I'd be happy to answer any questions on those.

But given all that, Your Honor, we think that -- or we respectfully request that you issue the preliminary injunction. And I'm happy to answer anymore questions.

THE COURT: Thank you, sir.

MR. KERKHOFF: And I did have one more, like just housekeeping thing I forgot to do at the beginning was we'd like to move our exhibits into the record, which I did not do from the outset.

THE COURT: I'm not sure you have to, but you can and they will be moved into the record to the extent

they're not in a couple places already, but it's better to be safe than have a hole in the record. Thank you, sir.

MR. KERKHOFF: Thank you.

THE COURT: I'm prepared to rule at this time and I'm going to deny the motion for preliminary injunctive relief. After I read the Sixth Circuit opinion in -- whether it's Black one, two, or three -- I just can't get passed at this point in time the lack of probability of success on the merits. And so I'm not sure that I get to any of the other analyses once I get to that point.

And so I want to thank you gentlemen for the briefing. It was chewy, but it was concise to the extent you all could be and I appreciate the education on everything. Your arguments were great, too, to the extent that I could keep up on the documents from page to page.

But wish you safe travels. And if we need to -- you all get together on when we need to set this for a final hearing, I guess, from there. I'm not sure the timing you all had in mind on that and whether or not it -- you all have even talked about it, but I ask that you all do before you ask for a particular setting.

MR. KRUCKENBERG: And, Your Honor, just one question, does the Court intend to issue a written opinion?

THE COURT: I do not. On the preliminary issue?

MR. KRUCKENBERG: Yes.

THE COURT: No.

Anything else? Nobody? Okay. Court will be in recess.

(Proceedings concluded at 2:40 p.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ B. Graham Higdon, RMR, CRR Date: July 19, 2023.
United States Court Reporter

U.S. Constitution

Article I. The Congress

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * * * *

U.S. Constitution

Article II. The President

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the

said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the

President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

15 U.S.C. § 3051.
Definitions

In this chapter the following definitions apply:

(1) Authority

The term "Authority" means the Horseracing Integrity and Safety Authority designated by section 3052(a) of this title.

(2) Breeder

The term "breeder" means a person who is in the business of breeding covered horses.

(3) Commission

The term "Commission" means the Federal Trade Commission.

(4) Covered horse

The term "covered horse" means any Thoroughbred horse, or any other horse made subject to this chapter by election of the applicable State racing commission or the breed governing organization for such horse under section 3054(k) of this title, during the period—

(A) beginning on the date of the horse's first timed and reported workout at a racetrack that participates in covered horseraces or at a training facility; and

(B) ending on the date on which the Authority receives written notice that the horse has been retired.

(5) Covered horserace

The term "covered horserace" means any horserace involving covered horses that has a substantial

relation to interstate commerce, including any Thoroughbred horserace that is the subject of interstate off-track or advance deposit wagers.

(6) Covered persons

The term "covered persons" means all trainers, owners, breeders, jockeys, racetracks, veterinarians, persons (legal and natural) licensed by a State racing commission and the agents, assigns, and employees of such persons and other horse support personnel who are engaged in the care, training, or racing of covered horses.

(7) Equine constituencies

The term "equine constituencies" means, collectively, owners, breeders, trainers, racetracks, veterinarians, State racing commissions, and jockeys who are engaged in the care, training, or racing of covered horses.

(8) Equine industry representative

The term "equine industry representative" means an organization regularly and significantly engaged in the equine industry, including organizations that represent the interests of, and whose membership consists of, owners, breeders, trainers, racetracks, veterinarians, State racing commissions, and jockeys.

(9) Horseracing anti-doping and medication control program

The term "horseracing anti-doping and medication control program" means the anti-doping and medication program established under section 3055(a) of this title.

(10) Immediate family member

The term "immediate family member" shall include a spouse, domestic partner, mother, father, aunt, uncle, sibling, or child.

(11) Interstate off-track wager

The term "interstate off-track wager" has the meaning given such term in section 3002 of this title.

(12) Jockey

The term "jockey" means a rider or driver of a covered horse in covered horseraces.

(13) Owner

The term "owner" means a person who holds an ownership interest in one or more covered horses.

(14) Program effective date

The term "program effective date" means July 1, 2022.

(15) Racetrack

The term "racetrack" means an organization licensed by a State racing commission to conduct covered horseraces.

(16) Racetrack safety program

The term "racetrack safety program" means the program established under section 3056(a) of this title.

(17) Stakes race

The term "stakes race" means any race so designated by the racetrack at which such race is run, including, without limitation, the races comprising the Breeders' Cup World Championships and the

races designated as graded stakes by the American Graded Stakes Committee of the Thoroughbred Owners and Breeders Association.

(18) State racing commission

The term "State racing commission" means an entity designated by State law or regulation that has jurisdiction over the conduct of horseracing within the applicable State.

(19) Trainer

The term "trainer" means an individual engaged in the training of covered horses.

(20) Training facility

The term "training facility" means a location that is not a racetrack licensed by a State racing commission that operates primarily to house covered horses and conduct official timed workouts.

(21) Veterinarian

The term "veterinarian" means a licensed veterinarian who provides veterinary services to covered horses.

(22) Workout

The term "workout" means a timed running of a horse over a predetermined distance not associated with a race or its first qualifying race, if such race is made subject to this chapter by election under section 3054(k) of this title of the horse's breed governing organization or the applicable State racing commission.

15 U.S.C. § 3052.
Recognition of the Horseracing Integrity and Safety Authority

(a) In general

The private, independent, self-regulatory, nonprofit corporation, to be known as the "Horseracing Integrity and Safety Authority", is recognized for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces.

(b) Board of directors

(1) Membership

The Authority shall be governed by a board of directors (in this section referred to as the "Board") comprised of nine members as follows:

(A) Independent members

Five members of the Board shall be independent members selected from outside the equine industry.

(B) Industry members

(i) In general

Four members of the Board shall be industry members selected from among the various equine constituencies.

(ii) Representation of equine constituencies

The industry members shall be representative of the various equine constituencies, and shall include

not more than one industry member from any one equine constituency.

(2) Chair

The chair of the Board shall be an independent member described in paragraph (1)(A).

(3) Bylaws

The Board of the Authority shall be governed by bylaws for the operation of the Authority with respect to—

(A) the administrative structure and employees of the Authority;

(B) the establishment of standing committees;

(C) the procedures for filling vacancies on the Board and the standing committees;

(D) term limits for members and termination of membership; and

(E) any other matter the Board considers necessary.

(c) Standing committees

(1) Anti-doping and medication control standing committee

(A) In general

The Authority shall establish an anti-doping and medication control standing committee, which shall provide advice and guidance to the Board on the development and maintenance of the horseracing anti-doping and medication control program.

(B) Membership

The anti-doping and medication control standing committee shall be comprised of seven members as follows:

(i) Independent members

A majority of the members shall be independent members selected from outside the equine industry.

(ii) Industry members

A minority of the members shall be industry members selected to represent the various equine constituencies, and shall include not more than one industry member from any one equine constituency.

(iii) Qualification

A majority of individuals selected to serve on the anti-doping and medication control standing committee shall have significant, recent experience in anti-doping and medication control rules.

(C) Chair

The chair of the anti-doping and medication control standing committee shall be an independent member of the Board described in subsection (b)(1)(A).

(2) Racetrack safety standing committee

(A) In general

The Authority shall establish a racetrack safety standing committee, which shall provide advice and guidance to the Board on the development and maintenance of the racetrack safety program.

(B) Membership

The racetrack safety standing committee shall be comprised of seven members as follows:

(i) Independent members

A majority of the members shall be independent members selected from outside the equine industry.

(ii) Industry members

A minority of the members shall be industry members selected to represent the various equine constituencies.

(C) Chair

The chair of the racetrack safety standing committee shall be an industry member of the Board described in subsection (b)(1)(B).

(d) Nominating committee

(1) Membership

(A) In general

The nominating committee of the Authority shall be comprised of seven independent members selected from business, sports, and academia.

(B) Initial membership

The initial nominating committee members shall be set forth in the governing corporate documents of the Authority.

(C) Vacancies

After the initial committee members are appointed in accordance with subparagraph (B), vacancies shall be filled by the Board pursuant to rules established by the Authority.

(2) Chair

The chair of the nominating committee shall be selected by the nominating committee from among the members of the nominating committee.

(3) Selection of members of the Board and standing committees

(A) Initial members

The nominating committee shall select the initial members of the Board and the standing committees described in subsection (c).

(B) Subsequent members

The nominating committee shall recommend individuals to fill any vacancy on the Board or on such standing committees.

(e) Conflicts of interest

To avoid conflicts of interest, the following individuals may not be selected as a member of the Board or as an independent member of a nominating or standing committee under this section:

(1) An individual who has a financial interest in, or provides goods or services to, covered horses.

(2) An official or officer—

(A) of an equine industry representative; or

(B) who serves in a governance or policymaking capacity for an equine industry representative.

(3) An employee of, or an individual who has a business or commercial relationship with, an individual described in paragraph (1) or (2).

(4) An immediate family member of an individual described in paragraph (1) or (2).

(f) Funding

(1) Initial funding

(A) In general

Initial funding to establish the Authority and underwrite its operations before the program effective date shall be provided by loans obtained by the Authority.

(B) Borrowing

The Authority may borrow funds toward the funding of its operations.

(C) Annual calculation of amounts required

(i) In general

Not later than the date that is 90 days before the program effective date, and not later than November 1 each year thereafter, the Authority shall determine and provide to each State racing commission the estimated amount required from the State—

(I) to fund the State's proportionate share of the horseracing anti-doping and medication control program and the racetrack safety program for the next calendar year; and

(II) to liquidate the State's proportionate share of any loan or funding shortfall in the current calendar year and any previous calendar year.

(ii) Basis of calculation

The amounts calculated under clause (i) shall—

(I) be based on—

(aa) the annual budget of the Authority for the following calendar year, as approved by the Board; and

(bb) the projected amount of covered racing starts for the year in each State; and

(II) take into account other sources of Authority revenue.

(iii) Requirements regarding budgets of Authority

(I) Initial budget

The initial budget of the Authority shall require the approval of 2/3 of the Board.

(II) Subsequent budgets

Any subsequent budget that exceeds the budget of the preceding calendar year by more than 5 percent shall require the approval of 2/3 of the Board.

(iv) Rate increases

(I) In general

A proposed increase in the amount required under this subparagraph shall be reported to the Commission.

(II) Notice and comment

The Commission shall publish in the Federal Register such a proposed increase and provide an opportunity for public comment.

(2) Assessment and collection of fees by States

(A) Notice of election

Any State racing commission that elects to remit fees pursuant to this subsection shall notify the Authority of such election not later than 60 days before the program effective date.

(B) Requirement to remit fees

After a State racing commission makes a notification under subparagraph (A), the election shall remain in effect and the State racing commission shall be required to remit fees pursuant to this subsection according to a schedule established in rule developed by the Authority and approved by the Commission.

(C) Withdrawal of election

A State racing commission may cease remitting fees under this subsection not earlier than one year after notifying the Authority of the intent of the State racing commission to do so.

(D) Determination of methods

Each State racing commission shall determine, subject to the applicable laws, regulations, and contracts of the State, the method by which the requisite amount of fees, such as foal registration fees, sales contributions, starter fees, and track fees, and other fees on covered persons, shall be allocated, assessed, and collected.

(3) Assessment and collection of fees by the Authority

(A) Calculation

If a State racing commission does not elect to remit fees pursuant to paragraph (2) or withdraws its election under such paragraph, the Authority shall, not less frequently than monthly, calculate the applicable fee per racing start multiplied by the number of racing starts in the State during the preceding month.

(B) Allocation

The Authority shall allocate equitably the amount calculated under subparagraph (A) collected among covered persons involved with covered horseraces pursuant to such rules as the Authority may promulgate.

(C) Assessment and collection

(i) In general

The Authority shall assess a fee equal to the allocation made under subparagraph (B) and shall collect such fee according to such rules as the Authority may promulgate.

(ii) Remittance of fees

Covered persons described in subparagraph (B) shall be required to remit such fees to the Authority.

(D) Limitation

A State racing commission that does not elect to remit fees pursuant to paragraph (2) or that withdraws its election under such paragraph shall not impose or collect from any person a fee or tax relating

to anti-doping and medication control or racetrack safety matters for covered horseraces.

(4) Fees and fines

Fees and fines imposed by the Authority shall be allocated toward funding of the Authority and its activities.

(5) Rule of construction

Nothing in this chapter shall be construed to require—

(A) the appropriation of any amount to the Authority; or

(B) the Federal Government to guarantee the debts of the Authority.

(g) Quorum

For all items where Board approval is required, the Authority shall have present a majority of independent members.

15 U.S.C. § 3053.
Federal Trade Commission oversight

(a) In general

The Authority shall submit to the Commission, in accordance with such rules as the Commission may prescribe under section 553 of Title 5, any proposed rule, or proposed modification to a rule, of the Authority relating to—

(1) the bylaws of the Authority;

(2) a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and methods;

(3) laboratory standards for accreditation and protocols;

(4) standards for racing surface quality maintenance;

(5) racetrack safety standards and protocols;

(6) a program for injury and fatality data analysis;

(7) a program of research and education on safety, performance, and anti-doping and medication control;

(8) a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons;

(9) a schedule of civil sanctions for violations;

(10) a process or procedures for disciplinary hearings; and

(11) a formula or methodology for determining assessments described in section 3052(f) of this title.

(b) Publication and comment

(1) In general

The Commission shall—

(A) publish in the Federal Register each proposed rule or modification submitted under subsection (a); and

(B) provide an opportunity for public comment.

(2) Approval required

A proposed rule, or a proposed modification to a rule, of the Authority shall not take effect unless the proposed rule or modification has been approved by the Commission.

(c) Decision on proposed rule or modification to a rule

(1) In general

Not later than 60 days after the date on which a proposed rule or modification is published in the Federal Register, the Commission shall approve or disapprove the proposed rule or modification.

(2) Conditions

The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—

(A) this chapter; and

(B) applicable rules approved by the Commission.

(3) Revision of proposed rule or modification

(A) In general

In the case of disapproval of a proposed rule or modification under this subsection, not later than 30 days after the issuance of the disapproval, the Commission shall make recommendations to the Authority to modify the proposed rule or modification.

(B) Resubmission

The Authority may resubmit for approval by the Commission a proposed rule or modification that incorporates the modifications recommended under subparagraph (A).

(d) Proposed standards and procedures

(1) In general

The Authority shall submit to the Commission any proposed rule, standard, or procedure developed by the Authority to carry out the horseracing anti-doping and medication control program or the racetrack safety program.

(2) Notice and comment

The Commission shall publish in the Federal Register any such proposed rule, standard, or procedure and provide an opportunity for public comment.

(e) Amendment by Commission of rules of Authority

The Commission, by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Authority promulgated in

accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.

15 U.S.C. § 3054.
Jurisdiction of the Commission and the Horseracing Integrity and Safety Authority

(a) In general

Beginning on the program effective date, the Commission, the Authority, and the anti-doping and medication control enforcement agency, each within the scope of their powers and responsibilities under this chapter, as limited by subsection (j), shall—

(1) implement and enforce the horseracing anti-doping and medication control program and the racetrack safety program;

(2) exercise independent and exclusive national authority over—

(A) the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces; and

(B) all horseracing safety, performance, and anti-doping and medication control matters for covered horses, covered persons, and covered horseraces; and

(3) have safety, performance, and anti-doping and medication control authority over covered persons similar to such authority of the State racing commissions before the program effective date.

(b) Preemption

The rules of the Authority promulgated in accordance with this chapter shall preempt any provision of State law or regulation with respect to matters within the jurisdiction of the Authority under this chapter, as limited by subsection (j). Nothing

contained in this chapter shall be construed to limit the authority of the Commission under any other provision of law.

(c) Duties

(1) In general

The Authority—

(A) shall develop uniform procedures and rules authorizing—

(i) access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses;

(ii) issuance and enforcement of subpoenas and subpoenas duces tecum; and

(iii) other investigatory powers of the nature and scope exercised by State racing commissions before the program effective date; and

(B) with respect to an unfair or deceptive act or practice described in section 3059 of this title, may recommend that the Commission commence an enforcement action.

(2) Approval of Commission

The procedures and rules developed under paragraph (1)(A) shall be subject to approval by the Commission in accordance with section 3053 of this title.

(d) Registration of covered persons with Authority

(1) In general

As a condition of participating in covered races and in the care, ownership, treatment, and training of covered horses, a covered person shall register with the Authority in accordance with rules promulgated by the Authority and approved by the Commission in accordance with section 3053 of this title.

(2) Agreement with respect to Authority rules, standards, and procedures

Registration under this subsection shall include an agreement by the covered person to be subject to and comply with the rules, standards, and procedures developed and approved under subsection (c).

(3) Cooperation

A covered person registered under this subsection shall, at all times—

(A) cooperate with the Commission, the Authority, the anti-doping and medication control enforcement agency, and any respective designee, during any civil investigation; and

(B) respond truthfully and completely to the best of the knowledge of the covered person if questioned by the Commission, the Authority, the anti-doping and medication control enforcement agency, or any respective designee.

(4) Failure to comply

Any failure of a covered person to comply with this subsection shall be a violation of section 3057(a)(2)(G) of this title.

(e) Enforcement of programs

(1) Anti-doping and medication control enforcement agency

(A) Agreement with USADA

The Authority shall seek to enter into an agreement with the United States Anti-Doping Agency under which the Agency acts as the anti-doping and medication control enforcement agency under this chapter for services consistent with the horseracing anti-doping and medication control program.

(B) Agreement with other entity

If the Authority and the United States Anti-Doping Agency are unable to enter into the agreement described in subparagraph (A), the Authority shall enter into an agreement with an entity that is nationally recognized as being a medication regulation agency equal in qualification to the United States Anti-Doping Agency to act as the anti-doping and medication control enforcement agency under this chapter for services consistent with the horseracing anti-doping and medication control program.

(C) Negotiations

Any negotiations under this paragraph shall be conducted in good faith and designed to achieve efficient, effective best practices for anti-doping and medication control and enforcement on commercially reasonable terms.

(D) Elements of agreement

Any agreement under this paragraph shall include a description of the scope of work, performance

metrics, reporting obligations, and budgets of the United States Anti-Doping Agency while acting as the anti-doping and medication control enforcement agency under this chapter, as well as a provision for the revision of the agreement to increase in the scope of work as provided for in subsection (k), and any other matter the Authority considers appropriate.

(E) Duties and powers of enforcement agency

The anti-doping and medication control enforcement agency under an agreement under this paragraph shall—

(i) serve as the independent anti-doping and medication control enforcement organization for covered horses, covered persons, and covered horseraces, implementing the anti-doping and medication control program on behalf of the Authority;

(ii) ensure that covered horses and covered persons are deterred from using or administering medications, substances, and methods in violation of the rules established in accordance with this chapter;

(iii) implement anti-doping education, research, testing, compliance and adjudication programs designed to prevent covered persons and covered horses from using or administering medications, substances, and methods in violation of the rules established in accordance with this chapter;

(iv) exercise the powers specified in section 3055(c)(4) of this title in accordance with that section; and

(v) implement and undertake any other responsibilities specified in the agreement.

(F) Term and extension

(i) Term of initial agreement

The initial agreement entered into by the Authority under this paragraph shall be in effect for the 5-year period beginning on the program effective date.

(ii) Extension

At the end of the 5-year period described in clause (i), the Authority may—

(I) extend the term of the initial agreement under this paragraph for such additional term as is provided by the rules of the Authority and consistent with this chapter; or

(II) enter into an agreement meeting the requirements of this paragraph with an entity described by subparagraph (B) for such term as is provided by such rules and consistent with this chapter.

(2) Agreements for enforcement by State racing commissions

(A) State racing commissions

(i) Racetrack safety program

The Authority may enter into agreements with State racing commissions for services consistent with the enforcement of the racetrack safety program.

(ii) Anti-doping and medication control program

The anti-doping and medication control enforcement agency may enter into agreements with State racing commissions for services consistent with the enforcement of the anti-doping and medication control program.

(B) Elements of agreements

Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, budgets, and any other matter the Authority considers appropriate.

(3) Enforcement of standards

The Authority may coordinate with State racing commissions and other State regulatory agencies to monitor and enforce racetrack compliance with the standards developed under paragraphs (1) and (2) of section 3056(c) of this title.

(f) Procedures with respect to rules of Authority

(1) Anti-doping and medication control

(A) In general

Recommendations for rules regarding anti-doping and medication control shall be developed in accordance with section 3055 of this title.

(B) Consultation

The anti-doping and medication control enforcement agency shall consult with the anti-doping and medication control standing committee and the

Board of the Authority on all anti-doping and medication control rules of the Authority.

(2) Racetrack safety

Recommendations for rules regarding racetrack safety shall be developed by the racetrack safety standing committee of the Authority.

(g) Issuance of guidance

(1) The Authority may issue guidance that—

(A) sets forth—

(i) an interpretation of an existing rule, standard, or procedure of the Authority; or

(ii) a policy or practice with respect to the administration or enforcement of such an existing rule, standard, or procedure; and

(B) relates solely to—

(i) the administration of the Authority; or

(ii) any other matter, as specified by the Commission, by rule, consistent with the public interest and the purposes of this subsection.

(2) Submittal to Commission

The Authority shall submit to the Commission any guidance issued under paragraph (1).

(3) Immediate effect

Guidance issued under paragraph (1) shall take effect on the date on which the guidance is submitted to the Commission under paragraph (2).

(h) Subpoena and investigatory authority

The Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.

(i) Civil penalties

The Authority shall develop a list of civil penalties with respect to the enforcement of rules for covered persons and covered horseraces under its jurisdiction.

(j) Civil actions

(1) In general

In addition to civil sanctions imposed under section 3057 of this title, the Authority may commence a civil action against a covered person or racetrack that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, to enforce any civil sanctions imposed under that section, and for all other relief to which the Authority may be entitled.

(2) Injunctions and restraining orders

With respect to a civil action commenced under paragraph (1), upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(k) Limitations on authority

(1) Prospective application

The jurisdiction and authority of the Authority and the Commission with respect to the horseracing anti-doping and medication control program and the racetrack safety program shall be prospective only.

(2) Previous matters

(A) In general

The Authority and the Commission may not investigate, prosecute, adjudicate, or penalize conduct in violation of the horseracing anti-doping and medication control program and the racetrack safety program that occurs before the program effective date.

(B) State racing commission

With respect to conduct described in subparagraph (A), the applicable State racing commission shall retain authority until the final resolution of the matter.

(3) Other laws unaffected

This chapter shall not be construed to modify, impair or restrict the operation of the general laws or regulations, as may be amended from time to time, of the United States, the States and their political subdivisions relating to criminal conduct, cruelty to animals, matters unrelated to antidoping, medication control and racetrack and racing safety of covered horses and covered races, and the use of medication in human participants in covered races.

(l) Election for other breed coverage under chapter

(1) In general

A State racing commission or a breed governing organization for a breed of horses other than Thoroughbred horses may elect to have such breed be covered by this chapter by the filing of a designated election form and subsequent approval by the Authority. A State racing commission may elect to have a breed covered by this chapter for the applicable State only.

(2) Election conditional on funding mechanism

A commission or organization may not make an election under paragraph (1) unless the commission or organization has in place a mechanism to provide sufficient funds to cover the costs of the administration of this chapter with respect to the horses that will be covered by this chapter as a result of the election.

(3) Apportionment

The Authority shall apportion costs described in paragraph (2) in connection with an election under paragraph (1) fairly among all impacted segments of the horseracing industry, subject to approval by the Commission in accordance with section 3053 of this title. Such apportionment may not provide for the allocation of costs or funds among breeds of horses.

15 U.S.C. § 3055.
Horseracing anti-doping and medication control program

(a) Program required

(1) In general

Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Authority shall establish a horseracing anti-doping and medication control program applicable to all covered horses, covered persons, and covered horseraces in accordance with the registration of covered persons under section 3054(d) of this title.

(2) Consideration of other breeds

In developing the horseracing anti-doping and medication control program with respect to a breed of horse that is made subject to this chapter by election of a State racing commission or the breed governing organization for such horse under section 3054(k) of this title, the Authority shall consider the unique characteristics of such breed.

(b) Considerations in development of program

In developing the horseracing anti-doping and medication control program, the Authority shall take into consideration the following:

(1) Covered horses should compete only when they are free from the influence of medications, other foreign substances, and methods that affect their performance.

(2) Covered horses that are injured or unsound should not train or participate in covered races, and the use of medications, other foreign substances, and treatment methods that mask or deaden pain in order to allow injured or unsound horses to train or race should be prohibited.

(3) Rules, standards, procedures, and protocols regulating medication and treatment methods for covered horses and covered races should be uniform and uniformly administered nationally.

(4) To the extent consistent with this chapter, consideration should be given to international anti-doping and medication control standards of the International Federation of Horseracing Authorities and the Principles of Veterinary Medical Ethics of the American Veterinary Medical Association.

(5) The administration of medications and treatment methods to covered horses should be based upon an examination and diagnosis that identifies an issue requiring treatment for which the medication or method represents an appropriate component of treatment.

(6) The amount of therapeutic medication that a covered horse receives should be the minimum necessary to address the diagnosed health concerns identified during the examination and diagnostic process.

(7) The welfare of covered horses, the integrity of the sport, and the confidence of the betting public require full disclosure to regulatory authorities regarding the administration of medications and treatments to covered horses.

(c) Activities

The following activities shall be carried out under the horseracing anti-doping and medication control program:

(1) Standards for anti-doping and medication control

Not later than 120 days before the program effective date, the Authority shall issue, by rule—

(A) uniform standards for—

(i) the administration of medication to covered horses by covered persons; and

(ii) laboratory testing accreditation and protocols; and

(B) a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and methods.

(2) Review process for administration of medication

The development of a review process for the administration of any medication to a covered horse during the 48-hour period preceding the next racing start of the covered horse.

(3) Agreement requirements

The development of requirements with respect to agreements under section 3054(e) of this title.

(4) Anti-doping and medication control enforcement agency

(A) Control rules, protocols, etc

Except as provided in paragraph (5), the anti-doping and medication control program enforcement agency under section 3054(e) of this title shall, in consultation with the anti-doping and medication control standing committee of the Authority and consistent with international best practices, develop and recommend anti-doping and medication control rules, protocols, policies, and guidelines for approval by the Authority.

(B) Results management

The anti-doping and medication control enforcement agency shall conduct and oversee anti-doping and medication control results management, including independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations. Any final decision or civil sanction of the anti-doping and medication control enforcement agency under this subparagraph shall be the final decision or civil sanction of the Authority, subject to review in accordance with section 3058 of this title.

(C) Testing

The anti-doping enforcement agency shall perform and manage test distribution planning (including intelligence-based testing), the sample collection process, and in-competition and out-of-competition testing (including no-advance-notice testing).

(D) Testing laboratories

The anti-doping and medication control enforcement agency shall accredit testing laboratories based upon the standards established under this chapter, and shall monitor, test, and audit accredited laboratories to ensure continuing compliance with accreditation standards.

(5) Anti-doping and medication control standing committee

The anti-doping and medication control standing committee shall, in consultation with the anti-doping and medication control enforcement agency, develop lists of permitted and prohibited medications, methods, and substances for recommendation to, and approval by, the Authority. Any such list may prohibit the administration of any substance or method to a horse at any time after such horse becomes a covered horse if the Authority determines such substance or method has a long-term degrading effect on the soundness of a horse.

(d) Prohibition

Except as provided in subsections (e) and (f), the horseracing anti-doping and medication control program shall prohibit the administration of any prohibited or otherwise permitted substance to a covered horse within 48 hours of its next racing start, effective as of the program effective date.

(e) Advisory committee study and report

(1) In general

Not later than the program effective date, the Authority shall convene an advisory committee comprised of horseracing anti-doping and medication

control industry experts, including a member designated by the anti-doping and medication control enforcement agency, to conduct a study on the use of furosemide on horses during the 48-hour period before the start of a race, including the effect of furosemide on equine health and the integrity of competition and any other matter the Authority considers appropriate.

(2) Report

Not later than three years after the program effective date, the Authority shall direct the advisory committee convened under paragraph (1) to submit to the Authority a written report on the study conducted under that paragraph that includes recommended changes, if any, to the prohibition in subsection (d).

(3) Modification of prohibition

(A) In general

After receipt of the report required by paragraph (2), the Authority may, by unanimous vote of the Board of the Authority, modify the prohibition in subsection (d) and, notwithstanding subsection (f), any such modification shall apply to all States beginning on the date that is three years after the program effective date.

(B) Condition

In order for a unanimous vote described in subparagraph (A) to effect a modification of the prohibition in subsection (d), the vote must include unanimous adoption of each of the following findings:

(i) That the modification is warranted.

(ii) That the modification is in the best interests of horse racing.

(iii) That furosemide has no performance enhancing effect on individual horses.

(iv) That public confidence in the integrity and safety of racing would not be adversely affected by the modification.

(f) Exemption

(1) In general

Except as provided in paragraph (2), only during the three-year period beginning on the program effective date, a State racing commission may submit to the Authority, at such time and in such manner as the Authority may require, a request for an exemption from the prohibition in subsection (d) with respect to the use of furosemide on covered horses during such period.

(2) Exceptions

An exemption under paragraph (1) may not be requested for—

(A) two-year-old covered horses; or

(B) covered horses competing in stakes races.

(3) Contents of request

A request under paragraph (1) shall specify the applicable State racing commission's requested limitations on the use of furosemide that would apply to the State under the horseracing anti-doping and medication control program during such period. Such limitations shall be no less restrictive on the use and administration of furosemide than the restrictions set forth in State's laws and regulations in effect as of September 1, 2020.

(4) Grant of exemption

Subject to subsection (e)(3), the Authority shall grant an exemption requested under paragraph (1) for the remainder of such period and shall allow the use of furosemide on covered horses in the applicable State, in accordance with the requested limitations.

(g) Baseline anti-doping and medication control rules

(1) In general

Subject to paragraph (3), the baseline anti-doping and medication control rules described in paragraph (2) shall—

(A) constitute the initial rules of the horseracing anti-doping and medication control program; and

(B) except as exempted pursuant to subsections (e) and (f), remain in effect at all times after the program effective date.

(2) Baseline anti-doping medication control rules described

(A) In general

The baseline anti-doping and medication control rules described in this paragraph are the following:

(i) The lists of permitted and prohibited substances (including drugs, medications, and naturally occurring substances and synthetically occurring substances) in effect for the International Federation of Horseracing Authorities, including the International Federation of Horseracing Authorities International Screening Limits for urine, dated May 2019, and the International Federation of Horseracing

Authorities International Screening Limits for plasma, dated May 2019.

(ii) The World Anti-Doping Agency International Standard for Laboratories (version 10.0), dated November 12, 2019.

(ii) The Association of Racing Commissioners International out-of-competition testing standards, Model Rules of Racing (version 9.2).

(iv) The Association of Racing Commissioners International penalty and multiple medication violation rules, Model Rules of Racing (version 6.2).

(B) Conflict of rules

In the case of a conflict among the rules described in subparagraph (A), the most stringent rule shall apply.

(3) Modifications to baseline rules

(A) Development by anti-doping and medication control standing committee

The anti-doping and medication control standing committee, in consultation with the anti-doping and medication control enforcement agency, may develop and submit to the Authority for approval by the Authority proposed modifications to the baseline anti-doping and medication control rules.

(B) Authority approval

If the Authority approves a proposed modification under this paragraph, the proposed modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

(C) Anti-doping and medication control enforcement agency veto authority

The Authority shall not approve any proposed modification that renders an anti-doping and medication control rule less stringent than the baseline anti-doping and medication control rules described in paragraph (2) (including by increasing permitted medication thresholds, adding permitted medications, removing prohibited medications, or weakening enforcement mechanisms) without the approval of the anti-doping and medication control enforcement agency.

15 U.S.C. § 3056.
Racetrack safety program

(a) Establishment and considerations

(1) In general

Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Authority shall establish a racetrack safety program applicable to all covered horses, covered persons, and covered horseraces in accordance with the registration of covered persons under section 3054(d) of this title.

(2) Considerations in development of safety program

In the development of the horseracing safety program for covered horses, covered persons, and covered horseraces, the Authority and the Commission shall take into consideration existing safety standards including the National Thoroughbred Racing Association Safety and Integrity Alliance Code of Standards, the International Federation of Horseracing Authority's International Agreement on Breeding, Racing, and Wagering, and the British Horseracing Authority's Equine Health and Welfare program.

(b) Elements of horseracing safety program

The horseracing safety program shall include the following:

(1) A set of training and racing safety standards and protocols taking into account regional differences and the character of differing racing facilities.

(2) A uniform set of training and racing safety standards and protocols consistent with the humane treatment of covered horses, which may include lists of permitted and prohibited practices or methods (such as crop use).

(3) A racing surface quality maintenance system that—

(A) takes into account regional differences and the character of differing racing facilities; and

(B) may include requirements for track surface design and consistency and established standard operating procedures related to track surface, monitoring, and maintenance (such as standardized seasonal assessment, daily tracking, and measurement).

(4) A uniform set of track safety standards and protocols, that may include rules governing oversight and movement of covered horses and human and equine injury reporting and prevention.

(5) Programs for injury and fatality data analysis, that may include pre- and post-training and race inspections, use of a veterinarian's list, and concussion protocols.

(6) The undertaking of investigations at racetrack and non-racetrack facilities related to safety violations.

(7) Procedures for investigating, charging, and adjudicating violations and for the enforcement of civil sanctions for violations.

(8) A schedule of civil sanctions for violations.

(9) Disciplinary hearings, which may include binding arbitration, civil sanctions, and research.

(10) Management of violation results.

(11) Programs relating to safety and performance research and education.

(12) An evaluation and accreditation program that ensures that racetracks in the United States meet the standards described in the elements of the Horseracing Safety Program.

(c) Activities

The following activities shall be carried out under the racetrack safety program:

(1) Standards for racetrack safety

The development, by the racetrack safety standing committee of the Authority in section 3052(c)(2) of this title of uniform standards for racetrack and horseracing safety.

(2) Standards for safety and performance accreditation

(A) In general

Not later than 120 days before the program effective date, the Authority, in consultation with the racetrack safety standing committee, shall issue, by rule in accordance with section 3053 of this title—

(i) safety and performance standards of accreditation for racetracks; and

(ii) the process by which a racetrack may achieve and maintain accreditation by the Authority.

(B) Modifications

(i) In general

The Authority may modify rules establishing the standards issued under subparagraph (A), as the Authority considers appropriate.

(ii) Notice and comment

The Commission shall publish in the Federal Register any proposed rule of the Authority, and provide an opportunity for public comment with respect to, any modification under clause (i) in accordance with section 3053 of this title.

(C) Extension of provisional or interim accreditation

The Authority may, by rule in accordance with section 3053 of this title, extend provisional or interim accreditation to a racetrack accredited by the National Thoroughbred Racing Association Safety and Integrity Alliance on a date before the program effective date.

(3) Nationwide safety and performance database

(A) In general

Not later than one year after the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Authority, in consultation with the Commission, shall develop and maintain a nationwide database of racehorse safety, performance, health, and injury information for the purpose of conducting an epidemiological study.

(B) Collection of information

In accordance with the registration of covered persons under section 3054(d) of this title, the Authority may require covered persons to collect and submit to the database described in subparagraph (A) such information as the Authority may require to further the goal of increased racehorse welfare.

15 U.S.C. § 3057.
Rule violations and civil sanctions

(a) Description of rule violations

(1) In general

The Authority shall issue, by rule in accordance with section 3053 of this title, a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons.

(2) Elements

The description of rule violations established under paragraph (1) may include the following:

(A) With respect to a covered horse, strict liability for covered trainers for—

(i) the presence of a prohibited substance or method in a sample or the use of a prohibited substance or method;

(ii) the presence of a permitted substance in a sample in excess of the amount allowed by the horseracing anti-doping and medication control program; and

(iii) the use of a permitted method in violation of the applicable limitations established under the horseracing anti-doping and medication control program.

(B) Attempted use of a prohibited substance or method on a covered horse.

(C) Possession of any prohibited substance or method.

(D) Attempted possession of any prohibited substance or method.

(E) Administration or attempted administration of any prohibited substance or method on a covered horse.

(F) Refusal or failure, without compelling justification, to submit a covered horse for sample collection.

(G) Failure to cooperate with the Authority or an agent of the Authority during any investigation.

(H) Failure to respond truthfully, to the best of a covered person's knowledge, to a question of the Authority or an agent of the Authority with respect to any matter under the jurisdiction of the Authority.

(I) Tampering or attempted tampering with the application of the safety, performance, or anti-doping and medication control rules or process adopted by the Authority, including—

(i) the intentional interference, or an attempt to interfere, with an official or agent of the Authority;

(ii) the procurement or the provision of fraudulent information to the Authority or agent; and

(iii) the intimidation of, or an attempt to intimidate, a potential witness.

(J) Trafficking or attempted trafficking in any prohibited substance or method.

(K) Assisting, encouraging, aiding, abetting, conspiring, covering up, or any other type of intentional complicity involving a safety, performance, or anti-doping and medication control

rule violation or the violation of a period of suspension or eligibility.

(L) Threatening or seeking to intimidate a person with the intent of discouraging the person from the good faith reporting to the Authority, an agent of the Authority or the Commission, or the anti-doping and medication control enforcement agency under section 3054(e) of this title, of information that relates to—

(i) an alleged safety, performance, or anti-doping and medication control rule violation; or

(ii) alleged noncompliance with a safety, performance, or anti-doping and medication control rule.

(b) Testing laboratories

(1) Accreditation and standards

Not later than 120 days before the program effective date, the Authority shall, in consultation with the anti-doping and medication control enforcement agency, establish, by rule in accordance with section 3053 of this title—

(A) standards of accreditation for laboratories involved in testing samples from covered horses;

(B) the process for achieving and maintaining accreditation; and

(C) the standards and protocols for testing such samples.

(2) Administration

The accreditation of laboratories and the conduct of audits of accredited laboratories to ensure compliance with Authority rules shall be administered by the anti-doping and medication control enforcement agency. The anti-doping and medication control enforcement agency shall have the authority to require specific test samples to be directed to and tested by laboratories having special expertise in the required tests.

(3) Extension of provisional or interim accreditation

The Authority may, by rule in accordance with section 3053 of this title, extend provisional or interim accreditation to a laboratory accredited by the Racing Medication and Testing Consortium, Inc., on a date before the program effective date.

(4) Selection of laboratories

(A) In general

Except as provided in paragraph (2), a State racing commission may select a laboratory accredited in accordance with the standards established under paragraph (1) to test samples taken in the applicable State.

(B) Selection by the Authority

If a State racing commission does not select an accredited laboratory under subparagraph (A), the Authority shall select such a laboratory to test samples taken in the State concerned.

(c) Results management and disciplinary process

(1) In general

Not later than 120 days before the program effective date, the Authority shall establish in accordance with section 3053 of this title—

(A) rules for safety, performance, and anti-doping and medication control results management; and

(B) the disciplinary process for safety, performance, and anti-doping and medication control rule violations.

(2) Elements

The rules and process established under paragraph (1) shall include the following:

(A) Provisions for notification of safety, performance, and anti-doping and medication control rule violations.

(B) Hearing procedures.

(C) Standards for burden of proof.

(D) Presumptions.

(E) Evidentiary rules.

(F) Appeals.

(G) Guidelines for confidentiality and public reporting of decisions.

(3) Due process

The rules established under paragraph (1) shall provide for adequate due process, including impartial hearing officers or tribunals commensurate with the

seriousness of the alleged safety, performance, or anti-doping and medication control rule violation and the possible civil sanctions for such violation.

(d) Civil sanctions

(1) In general

The Authority shall establish uniform rules, in accordance with section 3053 of this title, imposing civil sanctions against covered persons or covered horses for safety, performance, and anti-doping and medication control rule violations.

(2) Requirements

The rules established under paragraph (1) shall—

(A) take into account the unique aspects of horseracing;

(B) be designed to ensure fair and transparent horseraces; and

(C) deter safety, performance, and anti-doping and medication control rule violations.

(3) Severity

The civil sanctions under paragraph (1) may include—

(A) lifetime bans from horseracing, disgorgement of purses, monetary fines and penalties, and changes to the order of finish in covered races; and

(B) with respect to anti-doping and medication control rule violators, an opportunity to reduce the applicable civil sanctions that is comparable to the opportunity provided by the Protocol for Olympic Movement Testing of the United States Anti-Doping Agency.

(e) Modifications

The Authority may propose a modification to any rule established under this section as the Authority considers appropriate, and the proposed modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

15 U.S.C. § 3058.
Review of final decisions of the Authority

(a) Notice of civil sanctions

If the Authority imposes a final civil sanction for a violation committed by a covered person pursuant to the rules or standards of the Authority, the Authority shall promptly submit to the Commission notice of the civil sanction in such form as the Commission may require.

(b) Review by administrative law judge

(1) In general

With respect to a final civil sanction imposed by the Authority, on application by the Commission or a person aggrieved by the civil sanction filed not later than 30 days after the date on which notice under subsection (a) is submitted, the civil sanction shall be subject to de novo review by an administrative law judge.

(2) Nature of review

(A) In general

In matters reviewed under this subsection, the administrative law judge shall determine whether—

(i) a person has engaged in such acts or practices, or has omitted such acts or practices, as the Authority has found the person to have engaged in or omitted;

(ii) such acts, practices, or omissions are in violation of this chapter or the anti-doping and medication control or racetrack safety rules approved by the Commission; or

(iii) the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(B) Conduct of hearing

An administrative law judge shall conduct a hearing under this subsection in such a manner as the Commission may specify by rule, which shall conform to section 556 of Title 5.

(3) Decision by administrative law judge

(A) In general

With respect to a matter reviewed under this subsection, an administrative law judge—

(i) shall render a decision not later than 60 days after the conclusion of the hearing;

(ii) may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the final civil sanction of the Authority; and

(iii) may make any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record.

(B) Final decision

A decision under this paragraph shall constitute the decision of the Commission without further proceedings unless a notice or an application for review is timely filed under subsection (c).

(c) Review by Commission

(1) Notice of review by Commission

The Commission may, on its own motion, review any decision of an administrative law judge issued under subsection (b)(3) by providing written notice to

the Authority and any interested party not later than 30 days after the date on which the administrative law judge issues the decision.

(2) Application for review

(A) In general

The Authority or a person aggrieved by a decision issued under subsection (b)(3) may petition the Commission for review of such decision by filing an application for review not later than 30 days after the date on which the administrative law judge issues the decision.

(B) Effect of denial of application for review

If an application for review under subparagraph (A) is denied, the decision of the administrative law judge shall constitute the decision of the Commission without further proceedings.

(C) Discretion of Commission

(i) In general

A decision with respect to whether to grant an application for review under subparagraph (A) is subject to the discretion of the Commission.

(ii) Matters to be considered

In determining whether to grant such an application for review, the Commission shall consider whether the application makes a reasonable showing that—

(I) a prejudicial error was committed in the conduct of the proceeding; or

(II) the decision involved—

(aa) an erroneous application of the anti-doping and medication control or racetrack safety rules approved by the Commission; or

(bb) an exercise of discretion or a decision of law or policy that warrants review by the Commission.

(3) Nature of review

(A) In general

In matters reviewed under this subsection, the Commission may—

(i) affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge; and

(ii) make any finding or conclusion that, in the judgement of the Commission, is proper and based on the record.

(B) De novo review

The Commission shall review de novo the factual findings and conclusions of law made by the administrative law judge.

(C) Consideration of additional evidence

(i) Motion by Commission

The Commission may, on its own motion, allow the consideration of additional evidence.

(ii) Motion by a party

(I) In general

A party may file a motion to consider additional evidence at any time before the issuance of a decision by the Commission, which shall show, with particularity, that—

(aa) such additional evidence is material; and

(bb) there were reasonable grounds for failure to submit the evidence previously.

(II) Procedure

The Commission may—

(aa) accept or hear additional evidence; or

(bb) remand the proceeding to the administrative law judge for the consideration of additional evidence.

(d) Stay of proceedings

Review by an administrative law judge or the Commission under this section shall not operate as a stay of a final civil sanction of the Authority unless the administrative law judge or Commission orders such a stay.

15 U.S.C. § 3059.
Unfair or deceptive acts or practices

The sale of a covered horse, or of any other horse in anticipation of its future participation in a covered race, shall be considered an unfair or deceptive act or practice in or affecting commerce under section 45(a) of this title if the seller—

(1) knows or has reason to know the horse has been administered—

(A) a bisphosphonate prior to the horse's fourth birthday; or

(B) any other substance or method the Authority determines has a long-term degrading effect on the soundness of the covered horse; and

(2) fails to disclose to the buyer the administration of the bisphosphonate or other substance or method described in paragraph (1)(B).

15 U.S.C. § 3060.
State delegation; cooperation

(a) State delegation

(1) In general

The Authority may enter into an agreement with a State racing commission to implement, within the jurisdiction of the State racing commission, a component of the racetrack safety program or, with the concurrence of the anti-doping and medication control enforcement agency under section 3054(e) of this title, a component of the horseracing anti-doping and medication control program, if the Authority determines that the State racing commission has the ability to implement such component in accordance with the rules, standards, and requirements established by the Authority.

(2) Implementation by State racing commission

A State racing commission or other appropriate regulatory body of a State may not implement such a component in a manner less restrictive than the rule, standard, or requirement established by the Authority.

(b) Cooperation

To avoid duplication of functions, facilities, and personnel, and to attain closer coordination and greater effectiveness and economy in administration of Federal and State law, where conduct by any person subject to the horseracing medication control program or the racetrack safety program may involve both a medication control or racetrack safety rule violation and violation of Federal or State law, the Authority

and Federal or State law enforcement authorities shall cooperate and share information.