No.

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASS'N, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the enforcement provisions of the Horseracing Integrity and Safety Act of 2020, 15 U.S.C. 3051 *et seq.*—which allow the Horseracing Integrity and Safety Authority, a private entity, to assist the Federal Trade Commission in enforcing the statute—violate the private nondelegation doctrine on their face.

PARTIES TO THE PROCEEDING

The following parties are petitioners here and were defendants-appellees below: the Federal Trade Commission, Chair Lina Khan, and Commissioners Rebecca Kelly Slaughter, Alvaro Bedoya, Melissa Holyoak, and Andrew N. Ferguson.

The following parties are respondents here and were defendant-appellees below: Horseracing Integrity and Safety Authority, Inc., Charles Scheeler, Steve Beshear, Adolpho Birch, Leonard Coleman, Joseph De Francis, Susan Stover, Bill Thomason, D.G. Van Clief, Nancy Cox, Katrina Adams, Jerry Black, Joseph Dunford, Frank Keating, Kenneth Schanzer, Ellen McClain, and Lisa Lazarus.

The following parties are respondents here and were plaintiff-appellants below: National Horsemen's Benevolent and Protective Association, Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, Nebraska Horsemen's Benevolent and Protective Association, Oklahoma Horsemen's Benevolent and Protective Association, Oregon Horsemen's Benevolent and Protective Association, Pennsylvania Horsemen's Benevolent and Protective Association, Washington Horsemen's Benevolent and Protective Association, Tampa Bay Horsemen's Benevolent and Protective Association, Gulf Coast Racing L.L.C., LRP Group Ltd., Valle de Los Tesoros Ltd., Global Gaming Lsp. L.L.C., and Texas Horsemen's Partnership L.L.P.

The following parties are respondents here and were intervenor-appellants below: the State of Texas and the Texas Racing Commission.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

National Horsemen's Benevolent & Protective Ass'n v. *Black*, No. 21-cv-71 (May 4, 2023)

United States Court of Appeals (5th Cir.):

National Horsemen's Benevolent & Protective Ass'n v. *Black*, No. 22-10387 (Nov. 18, 2022)

National Horsemen's Benevolent & Protective Ass'n v. *Black*, No. 23-10520 (July 5, 2024)

United States Supreme Court:

Horseracing Integrity & Safety Authority, Inc. v. *National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (filed Sept. 19, 2024)

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v.

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASS'N, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General—on behalf of the Federal Trade Commission, Chair Lina Khan, and Commissioners Rebecca Kelly Slaughter, Alvaro Bedoya, Melissa Holyoak, and Andrew N. Ferguson—respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 107 F.4th 415. The memorandum opinion and order of the district court (App., *infra*, 46a-107a) is reported at 672 F. Supp. 3d 220.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2024. A petition for rehearing was denied on

September 9, 2024 (App., *infra*, 108a-110a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted and President Trump signed the Horseracing Integrity and Safety Act of 2020 (Horseracing Act or Act), Pub. L. No. 116-260, Div. FF, Tit. XII, 134 Stat. 3252 (15 U.S.C. 3051 *et seq.* Supp. IV 2022), in order to prevent doping and improve safety in the horseracing industry. Congress modeled the Act's framework on the longstanding regulatory scheme used in the securities industry, in which industry participants are subject to rules proposed by self-regulatory private entities, which are in turn overseen by the Securities and Exchange Commission (SEC). See *Oklahoma* v. *United States*, 62 F.4th 221, 229 (6th Cir. 2023), cert. denied, 144 S. Ct. 2679 (2024).

The Horseracing Act "recognized" the Horseracing Integrity and Safety Authority (Authority)—a "private, independent, self-regulatory, nonprofit corporation"—"for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program." 15 U.S.C. 3052(a). The Authority's Board of Governors consists of four members from the horseracing industry and five members from outside the industry. See 15 U.S.C. 3052(b)(1). The Authority operates under the oversight of the Federal Trade Commission (FTC or Commission). See 15 U.S.C. 3053.

The Horseracing Act directs the Authority to propose rules concerning doping, racetrack safety, and other subjects. See 15 U.S.C. 3055-3057. The Authority must submit its proposals to the FTC "in accordance with such rules as the Commission may prescribe." 15 U.S.C. 3053(a). The FTC must approve a proposed rule

if it determines that the rule "is consistent with" the Act and the Commission's regulations. 15 U.S.C. 3053(c)(2). A proposal takes effect only if the Commission approves it. See 15 U.S.C. 3053(b)(2).

The Act requires various "[c]overed persons"—*i.e.*, owners, breeders, trainers, jockeys, and other persons involved in the horseracing industry—to register with the Authority and to comply with the rules approved by the FTC. See 15 U.S.C. 3051(6), 3054(d)(1) and (2). The Authority may investigate violations of the rules. See 15 U.S.C. 3054(h). The Authority also may conduct disciplinary proceedings and impose civil sanctions upon violators. See 15 U.S.C. 3057(c) and (d). A final decision by the Authority to impose discipline is subject to de novo review by an FTC administrative law judge (ALJ), see 15 U.S.C. 3058(b), who "may conduct a hearing in such a manner as the Commission may specify by rule," 15 U.S.C. 3058(b)(2)(B). The ALJ's decision is in turn subject to de novo review by the Commission, and the Commission may consider additional evidence that was not presented to the Authority or the ALJ. See 15 U.S.C. 3058(c).

2. In 2021, various organizations including the National Horsemen's Benevolent and Protective Association (private respondents) brought this suit in the U.S. District Court for the Northern District of Texas. See 53 F.4th 869, 875. The private respondents named as defendants the Authority and its officials (collectively Authority), as well as the FTC and its members, and their complaint asserted various constitutional challenges to the Act. See *ibid.* The State of Texas and the Texas Racing Commission (state respondents) intervened to support the private respondents' challenges. See *ibid.*

In an earlier phase of this litigation, the Fifth Circuit held that the Act, as originally enacted, violated a constitutional principle that is sometimes known as the private nondelegation doctrine. See 53 F.4th at 880. The court explained that, under that doctrine, a private entity may aid a governmental agency in implementing a federal regulatory scheme, but only if the private entity "functions subordinately" to the agency and is subject to the agency's "authority and surveillance." *Id.* at 881; see *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 399 (1940). The court determined that, under the Horseracing Act in its original form, the FTC lacked constitutionally sufficient control over the Authority's activities. See 53 F.4th at 880-890.

In reaching that conclusion, the Fifth Circuit highlighted a "key distinction" between the Horseracing Act and the securities-industry self-regulatory scheme on which the Act was modeled. 53 F.4th at 887. The securities-industry scheme, the court emphasized, allows the SEC to "abrogate, add to, and delete from" the rules of self-regulatory organizations as the SEC deems "necessary or appropriate." *Ibid.* (quoting 15 U.S.C. 78s(c)). The Act in its original form, in contrast, did not grant the FTC comparable authority to abrogate or modify the Authority's rules. See *ibid.* Because the FTC lacked the "final word on the substance of the rules," the court concluded that the FTC possessed insufficient control over the Authority's actions. *Ibid.*

Congress responded by amending the Horseracing Act to empower the FTC to "abrogate, add to, and modify" the rules promulgated under the Act "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 [Act] and

applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this [Act]." 15 U.S.C. 3053(e); see Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. O, Tit. VII, § 701, 136 Stat. 5231-5232. That language is substantially identical to the language used in the statutes that empower the SEC to oversee self-regulatory organizations in the securities industry. See 15 U.S.C. 78s(c).

3. After Congress enacted the statutory amendments described above and the case was remanded for further proceedings, the district court conducted a bench trial and granted final judgment to the defendants. See App., *infra*, 46a-107a. As relevant here, the court rejected the private-nondelegation challenge to the amended Act. See *id.* at 81a-94a, 98a-99a.

The district court first held that the Authority's role in the rulemaking process does not violate the private nondelegation doctrine. See App., *infra*, 83a-93a. The court explained that, by amending the Act to give the FTC the final word on the content of the rules, Congress had "cured the constitutional issues identified by the Fifth Circuit." *Id.* at 83a.

The district court also held that the Authority's role in enforcing the Act does not violate the private nondelegation doctrine. See App., *infra*, 98a-99a. The court noted that "any Authority enforcement decision will be reviewed by an ALJ and the FTC." *Id.* at 98a.

4. The Fifth Circuit affirmed in part and reversed in part. See App., *infra*, 1a-45a.

The court of appeals agreed with the district court that, by amending the Act, Congress had "cured the private nondelegation flaw in the Authority's rulemaking power." App., *infra*, 45a. "Because the FTC has [the] ultimate say on what the rules are," the court stated,

"the Authority's power to propose horseracing rules does not violate the private nondelegation doctrine." *Id.* at 14a.

The court of appeals concluded, however, that "the FTC lacks adequate oversight and control over the Authority's enforcement power." App., *infra*, 33a. The court concluded that "the Authority," not "the agency," decides "whether to investigate a covered entity," "whether to subpoena the entity's records or search its premises," "whether to sanction it," and "whether to sue the entity for an injunction or to enforce a sanction it has imposed." *Id.* at 21a. The court noted the argument that the FTC possesses sufficient control because it "can review sanctions at the back end" and can adopt rules "to rein in the Authority's enforcement actions." *Id.* at 22a, 25a. The court rejected that potential defense of the Act's enforcement provisions, however, concluding that the Authority can still exercise substantial enforcement powers "without any supervision by the FTC." *Id.* at 23a. The court accordingly declared that the Act's "enforcement provisions are facially unconstitutional." *Id.* at 4a.

The court of appeals denied petitions for rehearing filed by the Authority and the government. See App., *infra*, 108a-110a. The Authority applied to this Court for a stay of the court of appeals' mandate. See Stay Appl., *Horseracing Integrity & Safety Authority, Inc.* v. *National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (filed Sept. 19, 2024).

REASONS FOR GRANTING THE PETITION

In the decision below, the Fifth Circuit held that the Horseracing Act's enforcement provisions are unconstitutional on their face. That decision is incorrect. The Fifth Circuit misapplied the private nondelegation doc-

trine, contravened this Court's precedents limiting facial challenges, and misconstrued the scope of the FTC's statutory power to oversee the Authority.

The Fifth Circuit's decision warrants this Court's review. It holds an Act of Congress unconstitutional on its face, conflicts with decisions of the Sixth and Eighth Circuits rejecting facial challenges to the same statutory provisions, and produces harmful practical consequences. This Court should grant certiorari and reverse.

A. The Fifth Circuit's Decision Is Incorrect

The Act's enforcement provisions comply with the private nondelegation doctrine. At a minimum, the provisions do not violate the Constitution on their face. The court of appeals' stated bases for its contrary conclusion lack merit.

1. In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), this Court explained that the Constitution prohibits the federal government from vesting a private entity with unchecked governmental power. The statute at issue in that case allowed producers of two-thirds of the coal in a particular district to set wages and hours for all producers in that district, without review by any federal agency. See *id.* at 281-283. The Court held that the statute violated the Constitution by delegating to "private persons" the unchecked "power to regulate the affairs of an unwilling minority." *Id.* at 311.

In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), however, this Court clarified that the federal government may rely on private entities to assist it in the performance of its functions. The statute at issue in that case authorized local boards consisting of private coal producers to propose minimum prices for coal, but empowered the National Bituminous Coal Commission

(a governmental body) to approve, disapprove, or modify those prices. See *id.* at 388. The Court upheld the scheme because the private boards "function[ed] subordinately" to a federal agency. *Id.* at 399. The Court emphasized that the agency, not the boards, ultimately "determine[d] the prices" and that the agency "ha[d] authority and surveillance over the [private boards'] activities." *Ibid.*

The Horseracing Authority's role in the enforcement of the Act satisfies those standards. The Authority "function[s] subordinately" to the FTC and is subject to the FTC's "authority and surveillance." *Sunshine Anthracite*, 310 U.S. at 399.

On the front end, the Commission can control the Authority's enforcement activities through the exercise of the FTC's rulemaking power. The Act requires the Authority to propose rules concerning "investigatory powers," "issuance and enforcement of subpoenas," "access to offices, racetrack facilities, other places of business, books, records, and personal property," "procedures for disciplinary hearings," and "civil sanctions for violations." 15 U.S.C. 3053(a)(9) and (10), 3054(c)(1)(A). Those rules take effect only if the FTC approves them. See 15 U.S.C. 3053(b)(2), 3054(c)(2). The Commission may "abrogate, add to, and modify" those rules, just as it may abrogate, add to, and modify the substantive rules that govern the conduct of regulated parties. 15 U.S.C. 3053(e); see 15 U.S.C. 3054(c)(2).

On the back end, the FTC may review any sanctions that the Authority imposes upon regulated parties. The Commission or an aggrieved party may ask an FTC ALJ to conduct de novo review of any such sanction. See 15 U.S.C. 3058(b)(1). The Commission itself may then review the ALJ's decision de novo and may take

additional evidence as needed. See 15 U.S.C. 3058(c)(1) and (3). The Act also empowers the ALJ or the Commission to stay a sanction pending review. See 15 U.S.C. 3058(d).

Longstanding practice confirms the statute's constitutionality. Since 1938, Congress has authorized self-regulatory organizations in the securities industry to discipline their members subject to oversight by the SEC. See Maloney Act, ch. 677, § 1, 52 Stat. 1070. Like the scheme at issue here, the securities laws empower the SEC to review self-regulatory organizations' disciplinary decisions. See 15 U.S.C. 78s(e). Multiple courts of appeals have rejected private nondelegation challenges to those organizations' role in implementing the securities laws, citing the SEC's power to supervise the organizations' activities. See *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.), cert. denied, 344 U.S. 855 (1952); *First Jersey Securities, Inc.* v. *Bergen*, 605 F.2d 690, 697 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *Sorrell* v. *SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982).

2. At a minimum, the court of appeals erred in holding that the Horseracing Act's enforcement provisions violate the private nondelegation doctrine on their face. "For a host of good reasons, courts usually handle constitutional claims case by case, not en masse." *Moody* v. *NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024). "'Claims of facial invalidity often rest on speculation' about the law's coverage and its future enforcement." *Ibid.* (citation omitted). "And 'facial challenges threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." *Ibid.* (citation omitted).

"This Court has therefore made facial challenges hard to win." *NetChoice*, 144 S. Ct. at 2397. Indeed, a facial challenge to a federal statute is the "most difficult challenge to mount successfully." *United States* v. *Rahimi*, 144 S. Ct. 1889, 1898 (2024) (citation omitted). The challenger must "establish that no set of circumstances exists under which the Act would be valid." *Ibid.* (citation omitted). If the Act complies with the Constitution in even "some of its applications," the facial challenge fails. *Ibid.*

In this case, the court of appeals made no meaningful effort to rebut the government's argument that the Act's enforcement provisions have at least "some" valid applications. *Rahimi*, 144 S. Ct. at 1898. The Authority provides (24A287 Stay Appl. at 16) a simple example: The Authority could seek to enforce its crop rule (which limits how often a jockey may strike a horse with a riding crop during a horse race) by reviewing a video of the race, and the Commission or an ALJ could then review the Authority's decision de novo by rewatching the same video. In that scenario, the Authority would not exercise any independent power. In practical effect, the Authority would simply provide a recommendation that the ALJ and the FTC could accept or reject. A private entity's provision of such a recommendation does not raise any constitutional concerns.

3. The court of appeals nonetheless concluded that the Act is facially invalid under the private nondelegation doctrine. See App., *infra*, 4a. The court's stated reasons for that conclusion lack merit.

First, the court of appeals distinguished the Act from the securities-law self-regulatory scheme on the ground that the SEC retains independent power to investigate violations of the laws that agency administers. See

App., *infra*, 31a. But the FTC likewise retains independent power to investigate violations of the Horseracing Act. The Act directs "the Commission" to "implement and enforce" the Act's provisions, 15 U.S.C. 3054(a)(1). The Act also requires covered persons to "cooperate with the Commission" "during any civil investigation" and to "respond truthfully" "if questioned by the Commission." 15 U.S.C. 3054(d)(3).

Second, the court of appeals denied that the FTC could make rules to control the Authority's investigative activities, stating that such an interpretation of the Act "would rewrite the enforcement scheme Congress enacted." App., *infra*, 29a. But under the enforcement scheme that Congress enacted, the Commission may approve, add to, abrogate, or modify rules governing matters such as "investigatory powers" and "procedures for disciplinary hearings." 15 U.S.C. 3053(a)(10), 3054(c)(1)(A)(iii). To the extent the statute contains any ambiguity on that point, the principle of constitutional avoidance requires courts to resolve that ambiguity in a way that saves the statute from constitutional attack. See, *e.g.*, *United States* v. *Hansen*, 599 U.S. 762, 781 (2023).

Third, the court of appeals described the Act as "facially permit[ting]" the Authority to engage in a broad range of investigative activities. App., *infra*, 23a n.12. For example, the court credited contested allegations that, in one case, the Authority's investigators had subjected an individual to "a coercive interrogation." *Ibid.* (citation omitted). Treating such allegations as a ground for facial invalidation conflicts with this Court's precedents. A court reviewing a facial challenge should focus on the circumstances in which the challenged statute is "most likely to be constitutional," not those in

which the statute "might raise constitutional concerns." *Rahimi*, 144 S. Ct. at 1903.

Finally, the court of appeals emphasized that the Act permits the Authority to "issue subpoenas" and "seek injunctions." App., *infra*, 3a. But the Authority has explained (24A287 Stay Appl. at 17) that it has never issued a subpoena or sought an injunction. Any constitutional challenge to the Authority's ability to undertake those enforcement measures is, at a minimum, premature. The "delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases." *United States* v. *Raines*, 362 U.S. 17, 22 (1960).

B. The Question Presented Warrants This Court's Review

The Fifth Circuit's decision warrants this Court's review because it conflicts with the decisions of two other courts of appeals. Before the Fifth Circuit issued the decision below, the Sixth Circuit rejected a facial challenge to the Act's enforcement provisions. See *Oklahoma* v. *United States*, 62 F.4th 221 (2023), cert. denied, 144 S. Ct. 2679 (2024). The Sixth Circuit explained that the "FTC's rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities." *Id.* at 231 (citation omitted). The court also observed that "the FTC has full authority to review the Horseracing Authority's enforcement actions." *Ibid.* The court determined that the Commission's oversight powers "suffice[d] to defeat a facial challenge," leaving further issues to be resolved as needed in "as-applied challenge[s]" to "individual enforcement action[s]." *Id.* at 231, 233.

After the Fifth Circuit issued the decision below, the Eighth Circuit similarly rejected a facial challenge to the Act's enforcement provisions. See *Walmsley* v. *FTC*,

No. 23-2687, 2024 WL 4248221 (Sept. 20, 2024), petition for cert. pending, No. 24-420 (filed Oct. 10, 2024). In affirming the district court's denial of a preliminary injunction in that case, the court stated that, "[b]ecause the Commission has broad power to subordinate the Authority's enforcement activities, the statute is not unconstitutional in all of its applications." *Id.* at *4.

The Fifth and Eighth Circuits have acknowledged the circuit conflict. In the decision below, the Fifth Circuit stated that it was "part[ing] ways with" the Sixth Circuit, App., *infra*, 4a, and expressly rejected the arguments that had "persuaded the Sixth Circuit," *id.* at 25a. In *Walmsley*, the Eighth Circuit similarly recognized that the Fifth and Sixth Circuits had "reached differing conclusions," but "agree[d] with the Sixth Circuit that the statute is not unconstitutional on its face." 2024 WL 4248221, at *4.

Even apart from the circuit conflict, the decision below warrants further review because it invalidates a federal statute. Judging the constitutionality of an Act of Congress is "the gravest and most delicate duty" that courts are called on to perform. *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). "[W]hen a lower court has invalidated a federal statute," this Court's "usual" approach is to grant review, even in the absence of a circuit conflict. *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019); see, *e.g.*, *Haaland* v. *Brackeen*, 599 U.S. 255, 272 (2023); *Torres* v. *Texas Department of Public Safety*, 597 U.S. 580, 586 (2022); *United States* v. *Vaello Madero*, 596 U.S. 159, 164 (2022). This Court should follow its usual approach here.

The practical significance of the question presented underscores the need for this Court's review. Congress adopted the Act in response to a series of scandals and

accidents in the horseracing industry. See H.R. Rep. No. 554, 116th Cong., 2d Sess. 17 (2020). In 2019, for example, 441 thoroughbred horses in the United States suffered fatal injuries—a fatality rate between two and a half and five times greater than the rates in Europe and Asia. See *ibid.* The decision below thwarts Congress's efforts to protect the horseracing industry from those problems.

C. The Court Should Grant Both This Petition And The Authority's Petition For A Writ Of Certiorari

The Authority has filed its own petition for a writ of certiorari seeking review of the decision below. See Pet. at i, *Horseracing Integrity & Safety Authority, Inc.* v. *National Horsemen's Benevolent & Protective Ass'n* (filed Oct. 15, 2024). The Court should grant both this petition and the Authority's petition and should consolidate the cases.

Two other cases that are pending before this Court overlap with this case. First, before the Fifth Circuit issued the decision below, this Court denied a petition for a writ of certiorari in *Oklahoma*, the case in which the Sixth Circuit rejected a facial challenge to the Act's enforcement provisions. See *Oklahoma* v. *United States*, 144 S. Ct. 2679 (2024) (No. 23-402). After the Fifth Circuit issued its decision, the plaintiffs in that case filed a petition for rehearing asking the Court to reconsider the denial of certiorari. See Pet. for Reh'g, *Oklahoma*, *supra* (No. 23-402). Second, the challengers in *Walmsley*, the case from the Eighth Circuit, have filed their own petition for a writ of certiorari. See Pet. at i, *Walmsley*, *supra* (No. 24-420).

The petitions filed by the Authority and the government in this case provide better vehicles for resolving the question presented than do the petitions in *Okla-*

homa and *Walmsley*. Granting certiorari in this case would enable the Court to directly review the reasoning of the only court of appeals that has held the Act facially unconstitutional. The *Oklahoma* and *Walmsley* petitions, moreover, raise additional issues apart from the facial validity of the Act's enforcement provisions—issues on which there is no circuit conflict and which do not warrant the Court's review at this time. See Gov't Br. in Opp. at 7-16, *Oklahoma*, *supra* (No. 23-402).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10520

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; ARIZONA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; ARKANSAS HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; INDIANA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; ILLINOIS HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; LOUISIANA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; MOUNTAINEER PARK HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; NEBRASKA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; OKLAHOMA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; OREGON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; PENNSYLVANIA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; WASHINGTON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; TAMPA BAY HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; GULF COAST RACING, L.L.C.; LRP GROUP, LIMITED; VALLE DE LOS TESOROS, LIMITED; GLOBAL GAMING LSP, L.L.C.; TEXAS HORSEMEN'S PARTNERSHIP, L.L.P., PLAINTIFFS-APPELLANTS

STATE OF TEXAS; TEXAS RACING COMMISSION, INTERVENOR PLAINTIFFS-APPELLANTS

v.

JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN; MD NANCY COX; JOSEPH DUNFORD; FRANK KEATING; KENNETH SCHANZER; HORSERACING INTEGRITY AND SAFETY AUTHORITY, INCORPORATED; FEDERAL TRADE COMMISSION; COMMISSIONER NOAH PHILLIPS;

COMMISSIONER CHRISTINA WILSON; LISA LAZARUS; STEVE BESHEAR; ADOLPHO BIRCH; ELLEN MCCLAIN; CHARLES SCHEELER; JOSEPH DEFRANCIS; SUSAN STOVER; BILL THOMASON; LINA KHAN, CHAIR; REBECCA SLAUGHTER, COMMISSIONER; ALVARO BEDOYA, COMMISSIONER; D.G. VAN CLIEF,
DEFENDANTS-APPELLEES

Filed: July 5, 2025

Appeal from the United States District Court
for the Northern District of Texas
USDC Nos. 5:21-CV-71, 5:23-CV-77

Before KING, DUNCAN, and ENGELHARDT, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

We again consider constitutional challenges to the Horseracing Integrity and Safety Act of 2020 ("HISA"). In HISA, Congress empowered a private corporation—the Horseracing Integrity and Safety Authority ("Authority")—to create and enforce nationwide rules for thoroughbred horseracing. Last time, we held HISA facially unconstitutional under the private nondelegation doctrine because the Authority's rulemaking was not subordinate to the Federal Trade Commission ("FTC"). *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* (*Horsemen's I*), 53 F.4th 869 (5th Cir. 2022). At the time, we did not consider a separate nondelegation challenge to the Authority's enforcement power. Congress responded to our decision by amend-

ing HISA, giving the FTC power to abrogate, add to, or modify the Authority's rules.

On remand, the district court held the amendment cured HISA's constitutional deficiencies because the FTC now has general rulemaking power over the Authority's activities. It also rejected claims raised by a new plaintiff, Gulf Coast Racing LLC ("Gulf Coast"), that HISA violates the Constitution's Appointments Clause because the Authority wields significant governmental authority. The plaintiffs all appealed, arguing HISA is still constitutionally deficient under the private nondelegation doctrine, the Due Process Clause, the Appointments Clause, and the Tenth Amendment.

We agree with nearly all of the district court's well-crafted opinion. Specifically, we agree that the FTC's new rulemaking oversight means the agency is no longer bound by the Authority's policy choices. In other words, the amendment solved the nondelegation problem with the Authority's rulemaking power. We also agree that HISA does not violate the Due Process Clause by putting financially interested private individuals in charge of competitors. Further, we agree that, under current Supreme Court precedent, *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), the Authority does not qualify as a government entity subject to the Appointments Clause. Finally, we agree that plaintiff Gulf Coast lacks standing to bring its Tenth Amendment challenge.

We disagree with the district court in one important respect, however: HISA's enforcement provisions violate the private nondelegation doctrine. The statute empowers the Authority to investigate, issue subpoenas, conduct searches, levy fines, and seek injunctions—all

without the FTC's say-so. That is forbidden by the Constitution. We therefore DECLARE that HISA's enforcement provisions are facially unconstitutional on that ground. In doing so, we part ways with our esteemed colleagues on the Sixth Circuit. *See Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023) (rejecting nondelegation challenge to HISA's enforcement provisions).

Accordingly, the district court's judgment is AFFIRMED in part and REVERSED in part.

I. BACKGROUND

A. HISA Framework

In 2020, HISA created a framework for enacting and enforcing nationwide rules governing doping, medication control, and racetrack safety in the thoroughbred horseracing industry. *See* 15 U.S.C. § 3054(a). *See generally Horsemen's I*, 53 F.4th at 873-75. To "develop[] and implement[]" these rules, HISA empowers a "private, independent, self-regulatory, nonprofit corporation, to be known as the 'Horseracing Integrity and Safety Authority,'" subject to the "oversight" of the FTC. §§ 3052(a), 3053.

Under HISA, the Authority writes all the rules—that is, rules fleshing out the substantive areas covered by HISA, as well as rules governing investigation, adjudication, and sanctions.[1] The Authority submits proposed

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[1] *See* § 3057(a)(1), (c)(1) (power to establish substantive rules governing medication controls); § 3056(a)(1) (power to establish racetrack safety rules); §§ 3054(c), 3057(c) (power to "develop uniform procedures and rules" governing investigations and adjudications that afford due process); § 3057(d) (power to establish civil sanctions); §§ 3054(c), 3054(c), (h) (investigatory and subpoena powers).

rules to the FTC, which publishes them for public comment. § 3053(b)(1), (c)(1). Rules take effect only after FTC approval, which must occur within 60 days of publication. The FTC "shall approve" a proposed rule if it finds the rule "consistent" with the Act and with "applicable rules approved by the [FTC]." § 3053(c)(2). Originally, this "consistency review" did not allow the FTC to reject a proposed rule based on its disagreement with the Authority's policy choices. *Horsemen's I*, 53 F.4th at 884-87. In *Horsemen's I*, we held that this arrangement violated the private nondelegation doctrine by making a private entity superior to a government agency. *Ibid.* In response, Congress amended HISA to give the FTC power to "abrogate, add to, and modify" the Authority's rules. § 3053(e).

The Authority also has the power to enforce HISA. It does so by (1) exercising "subpoena and investigatory authority," § 3054(h); (2) imposing civil sanctions, §§ 3054(i), 3057; and (3) filing civil actions seeking injunctions or enforcement of sanctions, § 3054(j). The actual work of enforcing HISA involves a further delegation to other entities, however. For instance, HISA directs the Authority to contract enforcement of doping and medication rules to a private non-profit, the U.S. Anti-Doping Agency ("USADA"), or other comparable entity. § 3054(e)(1)(A), (B).[2] USADA then acts as "the independent . . . enforcement organization" for those rules, "implement[s]" HISA's anti-doping programs, and exercises related powers "including inde-

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[2] *See Frequently Asked Questions*, USADA, https://www.USADA.org/resources/faq (last visited June 13, 2024) ("USADA is an independent, non-profit organization. It is not a branch or office of the federal government.").

pendent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations." § 3054(e)(1)(E)(i), (iii), (iv); § 3055(c)(4)(B).[3] USADA's decisions on such matters "shall be the final decision or civil sanction of the Authority," subject to *de novo* review by an administrative law judge ("ALJ") and the FTC. § 3055(c)(4)(B); § 3058.

B. Procedural History

Horsemen's I concluded that HISA's delegation of rulemaking power was facially unconstitutional. HISA delegated rulemaking power to a private organization (the Authority) whose policy choices could not be second-guessed by the agency (FTC). The Authority's rulemaking powers were therefore not subordinate to the FTC, meaning HISA facially violated the private nondelegation doctrine. *Horsemen's I*, 53 F.4th at 872. We did not consider the plaintiffs' distinct nondelegation challenges to the Authority's investigative and enforcement powers nor their due process claims. *Id.* at 890 n.37. Finally, as noted, Congress responded to *Horsemen's I* by empowering the FTC to "abrogate, add to, and modify" the Authority's rules. § 3053(e).

On remand, the National Horsemen's Association ("Horsemen") and Texas continued to press their private nondelegation claims, arguing Congress's amendment did not actually subordinate Authority rulemaking to the FTC. They also continued to press their non-

[3] Similarly, the Authority may contract out enforcement of the racetrack safety program to "State racing commissions" or "other State regulatory agencies." § 3054(e)(2), (3); *see also* § 3056 (discussing racetrack safety program).

delegation challenge to the Authority's enforcement powers (as well as their due process claims). In addition, a new plaintiff, Gulf Coast Racing ("Gulf Coast"), raised separate challenges to HISA in a different division of the same district. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* (*Black*), 672 F. Supp. 3d 220, 224 (N.D. Tex. 2023). Gulf Coast claimed (1) HISA's directors qualify as "officers of the United States" and are therefore subject to Article II's appointment and removal requirements; and (2) HISA commandeers Texas in violation of the Tenth Amendment. Gulf Coast's suit was consolidated with the remanded *Horsemen's I* case. *Id.* at 230-31. Following a one-day bench trial, the district court rejected all the plaintiffs' claims.

As to private nondelegation, the district court followed the Sixth Circuit's decision in *Oklahoma*, 62 F.4th 221. That court reasoned that Congress's amendment empowering the FTC to "abrogate, add to, and modify" proposed rules "cured the constitutional issues identified by [*Horsemen's I*]" by making the Authority's rulemaking power "subordinate" to the FTC. *Black*, 672 F. Supp. 3d at 241, 243 (citing *Oklahoma*, 62 F.4th at 230, 232). As to the separate challenge to the Authority's enforcement powers, the district court largely relied on its previous order rejecting the claim because those powers "comport with due process." *See id.* at 248. The court also relied on the fact that the FTC could review civil sanctions and control enforcement through rulemaking. *Id.* at 248-49; *see also Oklahoma*, 62 F.4th at 231. Finally, the court rejected the due process claims because the Horsemen failed to show the Authority's directors have financial interests in regulating competitors. *Black*, 672 F. Supp. 3d at 252.

As to Gulf Coast's claims, the district court concluded that our *Horsemen's I* decision required it to reject them. Specifically, the court reasoned that *Horsemen's I* necessarily decided the Authority was a private entity, and so its directors were not subject to the Appointments Clause. *Id.* at 234-37. Alternatively, the court reasoned that the Authority is private because "it is not government created, and its directors are not government appointed." *Id.* at 234 (citing *Lebron*, 513 U.S. 374). Finally, the court rejected the Tenth Amendment commandeering argument for lack of standing. *Id.* at 250.

Accordingly, the district court entered final judgment dismissing all claims. The Horsemen, Texas, and Gulf Coast timely appealed.

II. Standard of Review

We review the district court's legal conclusions following a bench trial *de novo*. *Deloach Marine Servs., L.L.C. v. Marquette Transp. Co.*, 974 F.3d 601, 606 (5th Cir. 2020). To prevail on their facial challenge, the plaintiffs "must show that no set of circumstances exists under which [HISA] would be valid." *Horsemen's I*, 53 F.4th at 878 (cleaned up) (citations omitted).

III. Discussion

The various plaintiffs raise these issues on appeal:

(A) Did Congress's amendment to HISA cure the private nondelegation problem with the Authority's rulemaking powers?

(B) Do the Authority's enforcement powers separately violate the private nondelegation doctrine?

(C) Does HISA violate due process by permitting self-interested industry participants to regulate their competitors?

(D) Are the Authority's directors subject to the Appointments Clause?

(E) Does HISA violate the Tenth Amendment's anti-commandeering rule by forcing States to administer a federal program?

We consider each issue in turn.

A. Private Nondelegation Challenge to Authority's Rulemaking.

We previously discussed the origins of the private nondelegation doctrine in *Horsemen's I*. *See id.* at 880-81. In essence, the doctrine teaches that "a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Id.* at 881 & n.21 (citing *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021)); *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128 (3d Cir. 1989)).[4] Or, as our sister circuit has explained: "Congress may formalize the role of private parties in proposing regulations so long as that role is merely as an aid to a government agency that retains the discretion to approve, disapprove, or modify them." *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.* (*Amtrak I*), 721 F.3d 666, 671 (D.C. Cir. 2013) (cleaned up) (quoting *Adkins*, 310 U.S. at 388), *va-*

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[4] *See also generally A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

cated and remanded on other grounds, *U.S. Dep't of Transp. v. Ass'n of Am. R.R.s* (*Amtrak II*), 575 U.S. 43 (2015).

In *Horsemen's I*, we ruled the Authority's rulemaking power was an unconstitutional private delegation. Our analysis focused on the fact that the Authority's proposed rules were subject only to the FTC's limited "consistency review," which did not permit the agency to second-guess the Authority's policy choices. *See Horsemen's I*, 53 F.4th at 882-87. In response, Congress amended HISA to provide that:

> [the FTC], 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. § 3053(e). This new provision was borrowed from the Maloney Act, which allocates authority between the SEC and private, self-regulatory organizations (such as the Financial Industry Regulatory Authority ("FINRA")). *See Oklahoma*, 62 F.4th at 231-32. Although HISA was originally modeled on the Maloney Act, it lacked this provision until the recent amendment. *See* Consolidated Appropriations Act, 2023, Pub. L. 117-328, div. O, tit. VII, § 701, 136 Stat. 4459, 5231-32. As noted, the district court followed the Sixth Circuit in ruling that the amendment cured the nondelegation problem with the Authority's rulemaking power. *See*

Black, 672 F. Supp. 3d at 241 (citing *Oklahoma*, 62 F.4th at 230, 232).

We agree with the district court and the Sixth Circuit that the amendment cured the nondelegation defect identified in *Horsemen's I*. That defect lay in the agency's being at the mercy of the Authority's policy choices. *See Horsemen's I*, 53 F.4th at 872 ("[T]he FTC concedes it cannot review the Authority's policy choices."). For instance, when the Authority issued rules on the kinds of horseshoes permitted during races, the FTC told objecting commenters it lacked the power to question the Authority's views. *See id.* at 885 (discussing *Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority*, 26, FED. TRADE COMM'N (Mar. 25, 2022)). The amendment has corrected that imbalance. Now, the FTC may "abrogate, add to, and modify" the Authority's rules. § 3053(e). So, unlike before, if the FTC now disagrees with the policies reflected in the Authority's rules, it may change them. *See Oklahoma*, 62 F.4th at 230 (noting recent rule explaining that FTC's "new 'rulemaking power' allows it to 'exercise its own policy choices'" (quoting *Order Ratifying Previous Commission Orders* 3, FED. TRADE COMM'N (Jan. 3, 2023))). As the Sixth Circuit correctly observed, "§ 3053(e)'s amended text gives the FTC ultimate discretion over the content of the rules," which "makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one." *Ibid.* (citing *Adkins*, 310 U.S. at 388).

Appellants' arguments to the contrary do not persuade us.

First, the Horsemen argue the Authority remains superior because it continues to write the rules in the first place and the agency must approve them if they hurdle the low bar of consistency review. We disagree. The problem was never that the private entity proposed the rules; the problem was that the agency lacked power to second-guess them once they were proposed. *See Horsemen's I*, 53 F.4th at 884 ("The FTC's oversight is too limited to ensure the Authority functions subordinately to the agency." (cleaned up) (quoting *Adkins*, 310 U.S. at 399)). Now the FTC has been given that power: it can "abrogate" or "modify" Authority rules it disagrees with. § 3053(e). And that new power gives consistency review new bite. Previously, consistency review "*exclude[d]* . . . the Authority's policy choices in formulating rules." *Id.* at 885. Now it implicitly includes review of those choices. The FTC must approve only those rules "consistent with . . . applicable rules approved by the [FTC]," and, thanks to the amendment, it is the FTC that has final word over what those rules are. § 3053(c)(2); *see also Oklahoma*, 62 F.4th at 231 (explaining that "the FTC's later authority to modify *any* rules for any reason at all, including policy disagreements, ensures that the FTC retains ultimate[] authority over the implementation of the Horseracing Act").[5]

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[5] Texas contends § 3053(e) does not solve the nondelegation problem because it gives the FTC only limited rulemaking authority—*i.e.*, "to ensure the fair administration of the Authority." Because the FTC lacks plenary rulemaking authority, Texas argues, the Authority still effectively calls the shots. We disagree. Section 3053(e) empowers the FTC to engage in rulemaking, not only for specified purposes, but also "otherwise in furtherance of the purposes of [HISA]." This language, borrowed from the Maloney Act,

Next, the Horsemen argue the FTC's new review power creates a timing problem. Because the FTC may alter only rules "promulgated" by the Authority, § 3053(e), regulated entities may end up being subject to the Authority's rules until the FTC can intervene and fix them. We disagree. The FTC has 60 days to approve or disapprove a proposed rule. § 3053(c)(1). If the FTC is concerned about a proposed rule going into effect, then it can intervene and create safeguards to prevent that from happening. *See* § 3053(a) (requiring Authority to submit proposed rules to FTC "in accordance with such rules as the [FTC] may prescribe"). For instance, the agency could adopt a rule postponing the effective date of a newly enacted rule. *See Oklahoma*, 62 F.4th at 232 (suggesting this). Or the agency could engage in emergency rulemaking to delay the effective date of a rule. In any event, these are hypothetical problems that, if they arise, can be addressed in as-applied challenges. *See Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 762 (5th Cir. 2008) (holding that "as-applied challenges are preferred"). This is a facial challenge, however, and we cannot say that a potential timing gap in FTC's § 3053(e) review makes HISA unconstitutional in all its applications. *See United States v. Salerno*, 481 U.S.739,745(1987) (holding that a facial challenger "must establish that no set of circumstances exists under which the Act would be valid").[6]

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gives the agency "broad authority to oversee and to regulate the rules adopted by the [Authority] . . . , including the power to mandate the adoption of any rules it deems necessary." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987).

[6] The Horsemen also argue that the Authority can circumvent the FTC by issuing unreviewable guidance documents, such as dear colleague letters. We disagree. The Authority admits such guidance

Finally, the Horsemen point to the SEC's supervisory authority over private self-regulatory organizations like FINRA. They argue that, notwithstanding § 3053(e), the FTC still has less sway over the Authority than the SEC does over FINRA. We again disagree. We previously pointed out that the "key distinction" between the FTC and the SEC was the FTC's lack of general rulemaking power. *See Horsemen's I*, 53 F.4th at 887–88. "The SEC itself," we explained, "can make changes to FINRA rules, but the FTC can only recommend changes to the Authority's rules." *Id.* at 888 (citation omitted). But Congress has now amended HISA to give the FTC the same general rulemaking authority that the SEC has with respect to FINRA. *See Oklahoma*, 62 F.4th at 225 (reaching this conclusion).

In sum, we agree with the district court and the Sixth Circuit that, in light of Congress's amendment to HISA in § 3053(e), the Authority's rulemaking power is subordinate to the FTC's. Because the FTC has ultimate say on what the rules are, the Authority's power to propose horseracing rules does not violate the private nondelegation doctrine.

B. Private Nondelegation Challenge to Authority's Enforcement.

Appellants next argue that, apart from its rulemaking powers, the Authority's enforcement powers violate the private nondelegation doctrine. Recall that the Authority enforces HISA by levying sanctions, which are ultimately subject to FTC review, and by bringing

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would not have the force of law and, even if it did, the FTC has authority to review guidance documents, § 3054(g)(2), and to promulgate a rule overruling guidance it disagrees with.

lawsuits. The Authority also has power to investigate potential violations, although the actual investigatory work is contracted to other private organizations, such as USADA in the case of doping rules, or to state racing commissions in the case of racetrack safety rules. *See supra* I.A. Our *Horsemen's I* decision did not address this challenge to the Authority's enforcement powers, *see* 53 F.4th at 890 n.37, and on remand the district court treated it as a due process claim and rejected it. *See Black*, 672 F. Supp. 3d at 248-49. Appellants now bring the claim to us, arguing that the Authority's enforcement power is not subordinate to FTC oversight.

1.

Before addressing the merits of this claim, we must address the Authority's argument that it is premature. Arguing both in terms of standing and ripeness, the Authority contends that it has not yet tried to enforce HISA against the Horsemen and that any challenge to the Authority's enforcement power can be raised if and when it does. We disagree for several reasons.

First, the Authority misunderstands the Horsemen's claim. They do not challenge some particular enforcement action undertaken by the Authority—claiming, for instance, that the Authority issued an overbroad subpoena for medical records or lacked probable cause to search a racetrack. Instead, the Horsemen argue that HISA, on its face, vests the Authority with enforcement power that is effectively unreviewable by the agency. When a regulated entity raises "a purely legal challenge" like this one, "it is unnecessary to wait for the Regulation to be applied in order to determine its legality." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 267 (5th Cir. 2015) (cleaned up) (citations

omitted); *see also Nat'l Env't Developmental Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1008 (D.C. Cir. 2014) ("Petitioner's challenge in this case presents a purely legal question . . . It is unnecessary to wait for the [statute] to be applied in order to determine its legality."); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014) ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.").

Second, the Horsemen have a cognizable injury for standing purposes. Pursuant to HISA, they have already had to agree "to be subject to and comply with [Authority's] rules, standards, and procedures"—including rules requiring they cooperate with investigations, consent to searches, and comply with subpoenas. *See* 15 U.S.C. § 3054(c)-(f). In other words, the Horsemen are themselves "objects of the Regulation," and so "there is ordinarily little question" that they have standing to challenge it. *Contender Farms*, 779 F.3d at 264-65 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992)). And courts typically do not require a regulated party to "bet the farm" by violating a regulation before allowing it to test its validity. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 490 (2010); *see also, e.g.*, *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991) (explaining that a separation-of-powers challenge to a board's veto powers was "ripe even if the veto power ha[d] not been exercised to respondents' detriment").

Finally, the record shows several instances in which the Authority has enforced HISA against the Horsemen. For example, the Authority has threatened one

of the Horsemen's members with sanctions if it did not repair a racetrack railing. Additionally, the Authority has both threatened and actually barred member racetracks in Texas from broadcasting races out of state because they failed to register with the Authority. More generally, the Horsemen represent some 30,000 members and, when the parties filed their briefs, the Authority's website already listed hundreds of enforcement actions—and that number has now grown to over 1,500.[7] So, at a minimum, the Horsemen have shown a credible threat that the Authority will bring enforcement actions against their members in the future. *See Driehaus*, 573 U.S. at 164.

In sum, the Horsemen have standing to challenge the Authority's enforcement powers and that challenge is ripe. We proceed to the merits.

2.

The Horsemen's (as well as Texas's) basic contention is that HISA grants the Authority enforcement power that is effectively unreviewable by the FTC. That claim turns on the same standard as the challenge to the Authority's rulemaking addressed in *Horsemen's I*: the delegation is constitutional if, when enforcing HISA, the Authority "'functions subordinately' to an agency with 'authority and surveillance' over it." 53 F.4th at 881 (quoting *Rettig*, 987 F.3d at 532). In other words, the Authority may constitutionally enforce HISA only if it acts "as an aid" to the FTC, which "retains the discretion to approve, disapprove, or modify" the private en-

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[7] *See generally Rulings*, HORSERACING INTEGRITY & SAFETY AUTH., https://portal.hisausapps.org/public-rulings (last visited June 12, 2024) (listing 1,772enforcement rulings).

tity's enforcement actions. *Ibid.* (cleaned up) (quoting *Amtrak I*, 721 F.3d at 671).[8]

While the constitutional standard is the same, the nature of the delegated authority is different this time around. *Horsemen's I* addressed delegation of legislative authority—the power to make rules. *See Myers v. United States*, 272 U.S. 52, 186 (1926) ("The essence of the legislative authority is to . . . prescribe rules for the regulation of the society[.]"). Logically, we focused on which actor—government agency or private entity?—had final say over the content of those rules. *See Horsemen's I*, 53 F.4th at 884-87 (analyzing FTC's lack of authority over the Authority's policy choices). Today, by contrast, we address delegation of executive authority. The power to launch an investigation, to search for evidence, to sanction, to sue—these are all quintessentially executive functions.[9] And they have

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[8] As explained in *Horsemen's I*, the D.C. Circuit's *Amtrak I* decision was vacated only because the Supreme Court found Amtrak was a governmental, as opposed to private, entity. 53 F.4th at 881 n.22 (citing *Amtrak II*, 575 U.S. at 46, 50-55). The D.C. Circuit's private nondelegation analysis, however, remains sound and has been approved by our court. *See ibid.* (explaining that *Amtrak I* "expressed the [private nondelegation doctrine] more precisely" than prior formulations).

[9] *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."); *Morrison v. Olson*, 487 U.S. 654, 696 (1988) (reasoning "the power to initiate an investigation" is executive power that must be subject to the Attorney General's "unreviewable discretion"); *Buckley v. Valeo*, 424 U.S. 1, 138, 140 (1976) (per curiam) (concluding the "discretionary power to seek judicial relief" and "conduct[] civil litigation in the courts of the United States for vindicating public rights" are exercises of Article II executive power); *Seila L. LLC v. CFPB*, 591 U.S. 197, 225 (2020)

been considered so from our Nation's founding.[10] As much as legislative power, the private nondelegation

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(holding the CFPB director unconstitutionally exercised "executive power" to "set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties"); *id.* at 219 (holding the "power to seek daunting monetary penalties against private parties . . . [is] a quintessentially executive power"); *Free Enter. Fund*, 561 U.S. at 504 (holding the "power to start, stop, or alter individual Board investigations" is part of the executive power); *Collins v. Yellen*, 594 U.S. ---, 141 S. Ct. 1761, 1786 (2021) (holding the power "to issue subpoenas" is an "executive power"); *id.* at 1806 (Sotomayor, J., concurring in part and dissenting in part) (noting "the power to impose fines" is an "executive power"); *id.* at 1805 (Sotomayor, J. concurring in part and dissenting in part) (arguing the FTC had significant executive power because it had "wide powers of investigation" and "broad authority to issue complaints and cease-and-desist orders" (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620-21 (1935))); *United States v. Grubbs*, 547 U.S. 90, 98 (2006) (describing a search as an "exercise of executive power"); *California v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) ("The Fourth Amendment is a restraint on Executive power.").

[10] *See generally* Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1545 (2015) (discussing "[c]ertain types of tasks that seem quintessentially executive," including "the tasks of law enforcement—that is, of forcing compliance with the law"); *id.* at 1546 ("Ratification-era history further supports the understanding that law enforcement consists of forcing compliance or imposing sanctions on law violators" (citing THE FEDERALIST No. 21, at 134-35 (Alexander Hamilton) (Clinton Rossiter ed. 1961))); Aditya Bamzai & Saikrishna B. Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756,1764 (2023) ("Law execution was the executive power's principal component."); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 737 (2003) ("Executive officers investigate, apprehend, and prosecute potential lawbreakers. As the wielder of the executive power, the president is the chief of these law enforcement executives."); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93,

doctrine forbids unaccountable delegations of executive power. *See, e.g.*, *Amtrak II*, 575 U.S. at 62 (Alito, J., concurring) ("Private entities are not vested with 'legislative powers.' Art. I, § 1. Nor are they vested with the 'executive Power,' Art. II, § 1, cl. 1, which belongs to the President."). Accordingly, we must determine whether HISA delegates enforcement power to private entities and, if so, whether that power is subordinate to the FTC.

HISA divides enforcement authority among the FTC, the Authority, and USADA, "each within the scope of their powers and responsibilities under this chapter." § 3054(a). Recall that USADA is the private non-profit to whom the Authority must delegate anti-doping and medication enforcement. *See* § 3054(e)(1)(A).[11] So, the answer to the question before us turns on what "powers and responsibilities" each of these three entities has under HISA. Although HISA somewhat confusingly disperses the relevant provisions throughout the Act, we can discern the following division of labor.

First, the Authority has responsibility for (1) investigating potential violations, including by issuing subpoenas (§ 3054(h)); (2) levying sanctions (§§ 3054(j)(1), 3057, 3058(a)); and (3) bringing suit against violators for in-

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146-47 (2020) (arguing that law enforcement and prosecution powers have been considered core executive functions since the Founding).

[11] The Authority also "may enter into agreements" with State racing commissions to enforce the racetrack safety program. *See* § 3054(e)(2)(A)(i), (3); §3056(c). The Authority remains in charge, however, and dictates the "scope of work, performance metrics, reporting obligations, budgets, and any other matter [it] considers appropriate." § 3054(e)(2)(B).

junctive relief or to enforce sanctions (§ 3054(j)(1)-(2)). Second, actual enforcement of doping and medication rules is done by USADA, which "implements" those rules "on behalf of the Authority." § 3054(e)(1)(E)(i). In this regard, USADA's responsibilities include "independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations." § 3055(c)(4)(B); *see also* § 3054(e)(1)(E)(iv). Third, the FTC may ask an ALJ to review any sanction *de novo*, § 3058(b)(1), and the FTC may itself review the ALJ's decision *de novo*, either on its own motion or upon petition by an aggrieved party. § 3058(c).

The Act's plain terms permit only one conclusion: HISA is enforced by a private entity, the Authority. The Authority decides whether to investigate a covered entity for violating HISA's rules. The Authority decides whether to subpoena the entity's records or search its premises. The Authority decides whether to sanction it. And the Authority decides whether to sue the entity for an injunction or to enforce a sanction it has imposed. To be sure, the Authority does not perform these functions itself. Rather, HISA requires the Authority to contract with another private entity, USADA, which undertakes enforcement "on behalf of the Authority." § 3054(e)(1)(E)(i). The bottom line, though, is that a private entity, not the agency, is in charge of enforcing HISA.

Consider also what HISA does not say. It does not empower the FTC to decide whether to investigate a covered entity, whether to subpoena its records, whether to search its premises, whether to charge it with a violation, or whether to sanction or sue it. Nor does the

Act empower the FTC to countermand any of the Authority's investigatory or charging decisions (or, more precisely, USADA's decisions). Nor does it require the Authority or USADA to seek the FTC's approval before investigating, searching, charging, sanctioning, or suing. All these actions are enforcement actions, and, by the plain terms of the Act, they can be done by the private entities without the FTC's involvement.

The inescapable conclusion is that the Authority does not "function subordinately" to the FTC when enforcing HISA. *Horsemen's I*, 53 F.4th at 881. That is not permitted under the private nondelegation doctrine. A private entity that can investigate potential violations, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the say-so of the agency—does not operate under that agency's "authority and surveillance." *Ibid.* Put another way, with respect to enforcement, HISA's plain terms show that the Authority does not merely act "as an aid" to the FTC because the FTC does not "retain[] the discretion to approve, disapprove, or modify" the Authority's enforcement actions. *Ibid.* (cleaned up) (quoting *Amtrak I*, 721 F.3d at 671).

3.

One might counter, though, that the FTC at least partially supervises the Authority because it can review sanctions at the back end, after ALJ review. *See* §§ 3055(c)(4)(B), 3058(b)(3)-(c)(3). That is true, and it is the Authority's best argument for why its enforcement power is subordinate to the FTC.

The argument nonetheless fails. Suppose the Authority sanctions a horse owner for a doping violation, but the sanction is later reversed by the FTC. Does

that make the Authority's enforcement power subordinate to the agency? No, it does not. Consider everything the Authority was permitted to do up to that point: launch an investigation into the owner, subpoena his records, search his facilities, charge him with a violation, adjudicate it, and fine him.[12] Each and every one of those actions is "enforcement" of HISA. Each can occur under HISA without any supervision by the FTC. Moreover, penalties imposed by the Authority are not automatically stayed pending appeal. *See* 16 C.F.R. § 1.148(a). So, any penalty goes into effect as soon as the Authority makes its decision, unless the ALJ or FTC

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[12] Not only does HISA facially permit that, but it has already happened. For example, in one currently active and undecided FTC appeal, it is uncontested that three private Authority investigators showed up at the appellant's residence and served her with a notice of an alleged doping violation (there is no personal service requirement under the statute). The investigators then "subjected [the appellant] to a coercive interrogation in a small room" and searched "her barn and . . . her mother's car" for banned substances. Statement of Contested Facts and Specification of Additional Evidence, *In re Lynch*, 9423 F.T.C. 1, 3-4 (Mar. 1, 2024). She was then fined $55,000 and banned from racing for 48 months. *Id.* at 5-6. Authority investigators have also searched defendants' property and extracted fines under HISA's strict liability regime for possession of banned substances. For example, one veterinarian forgot to clean out his trailer and still had two buckets of a newly banned substance two weeks after the effective date. Private Authority investigators searched his trailer, found the buckets, fined him $5,000, and banned him from practice for 14 months. The ALJ affirmed on appeal. All this despite the fact that the Authority and the ALJ conceded that the appellant purchased the substance long before it was banned, forgot it was in his trailer, and did not even attempt to use it on a horse. *In re Perez*, 9420 F.T.C. 1, 5-6 (Mar. 18, 2024); *see also In re Poole*, 9417 F.T.C. 1, 5-6, 10 (Nov. 13, 2023) (affirming an $18,000 fine and banning him from practice for 22 months for a similar inadvertent possession of a newly banned substance).

exercises its discretion to implement a stay pending appeal. *See* § 3058(d).

It is no answer to say that the FTC can come in at the tail-end of this adversarial process and review the sanction. As far as enforcement goes, the horse was already out of the barn. (You knew that was coming.) Besides, what if the sanctioned owner, instead of fighting the process, opts to settle for a lower fine? In that case, according to the Authority's logic, *no one* has enforced HISA. That is obviously not true. To the contrary, the settlement scenario—which will likely happen often—only underscores that it is the private entity that acts as HISA's enforcer in any meaningful sense.

Consider a hypothetical. Suppose a city structures its speeding laws to let a group of private car enthusiasts monitor speeds with their own radar guns, pull speeders over, and ticket them. Fines are reviewed by the police department and, ultimately, the mayor. Who *enforces* the speeding laws? Anyone would say the private group. After all, consider how many cases we decide concerning whether the police have wrongly stopped someone or used excessive force during the stop. *See, e.g.*, *Terrell v. Town of Woodworth*, No. 23-30510, 2024 WL 667690 (5th Cir. Feb. 19, 2024) (per curiam). All would agree that the police were "enforcing" the law when they stopped the person. The same goes for the private entity in the hypothetical.

The Authority's argument, moreover, does not work even on its own terms. In addition to levying fines, HISA empowers the Authority to sue people and racetracks to enjoin past, present, or impending violations. *See* § 3054(j)(1) (providing "the Authority may commence a civil action against a covered person or race-

track that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter . . . to enjoin such acts or practices"); § 3054(j)(2) (allowing issuance of "a permanent or temporary injunction or restraining order . . . without bond"). HISA gives the FTC no role in this process, either before or after the fact. So, even assuming the Authority is correct (and it is not) that the agency's after-the-fact supervision of sanctions makes the Authority subordinate, the Authority is demonstrably *not* subordinate when it comes to suing violators for injunctions. That is plainly an unsupervised delegation of executive power that the Constitution does not tolerate. *See Buckley*, 424 U.S. at 138 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts [this] responsibility[.]").

4.

The Authority next argues that the FTC could use its new rulemaking authority to rein in the Authority's enforcement actions or even require the Authority to preclear lawsuits with the agency. *See* § 3053(e) (empowering FTC to "abrogate, add to, and modify" the Authority's rules). This argument persuaded the Sixth Circuit that at least a *facial* challenge to the Authority's enforcement powers should fail. *See Oklahoma*, 62 F.4th at 231 (through § 3053(e) rulemaking, "the FTC *could* subordinate every aspect of the Authority's enforcement," which "suffices to defeat a facial challenge"). And we have already found that the FTC's rulemaking power has some purchase in turning back a facial challenge to the Authority's *rulemaking* power: as explained, the agency could ensure via rulemaking that no

Authority rule could go into effect until the agency had time to review it. *See supra* III.A. With great respect to our colleagues on the Sixth Circuit, however, we are not convinced that this rulemaking argument can save the Authority's enforcement powers.

The Authority's rulemaking argument would let the agency rewrite the statute. In HISA, Congress set out a definite enforcement scheme, dividing responsibilities among the FTC, the Authority, and USADA. *See* §§ 3054(e)(2), 3054(c)(1), 3054(e). HISA is quite clear about this: it provides that those three entities "implement and enforce" the Act, "*each within the scope of their powers and responsibilities under this chapter*." § 3054(a)(1) (emphasis added). A mere agency cannot alter that statutory division of labor. *See*, *e.g.*, *Gulf Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020) ("We will not defer to 'an agency interpretation that is inconsistent with the design and structure of the statute as a whole.'" (quoting *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 321(2014))); 5 U.S.C. § 706(2)(C) (authorizing courts to set aside agency action "in excess of statutory jurisdiction, authority, or limitations").[13] As the Supreme Court re-

[13] *See also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (holding that agency rulemaking "has no bearing upon" whether a statutory delegation is constitutional); *Hartford Underwriters Ins. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6-7 (2000) ("Where a statute names the parties granted the right to invoke its provisions, such parties only may act." (cleaned up) (citation omitted)); *Bayou Lawn & Landscape Servs. v. Sec'y of Lab.*, 713 F.3d 1080, 1084-85 (11th Cir. 2013) (holding it "axiomatic that an agency's power to promulgate legislative regulations is limited to the authority delegate[d]to it by Congress" and that courts cannot "locate . . . power in one agency where it had been specifically and ex-

cently reiterated, even "statutory permission to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress." *Biden v. Nebraska*, 600 U.S. ---, 143 S. Ct. 2355, 2368 (2023) (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994)). Yet that is just what the Authority says the FTC could do through rulemaking.

Take the Authority's power to seek injunctions. HISA empowers the Authority to file suit to enjoin violations, while saying nothing about FTC involvement in the process. *See* § 3054(j)(1). Yet the Authority suggests the FTC could, by rule, require the Authority to preclear any such action with the agency. We disagree. That would let the agency amend the enforcement scheme delineated by statute.[14] The same goes for investigatory and subpoena power: HISA unqualifiedly gives that power to the Authority, *see* § 3054(h),

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pressly delegated by Congress to a different agency"); *Union Pac. R.R. v. Surface Transp. Bd.*,863 F.3d 816, 823 (8th Cir.2017) (finding express delegation to the Federal Railroad Administration precluded implied authority claimed by the private Board); *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam) ("We agree with the general proposition that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor[.]"); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 509 (2014) (relying on the statute's "plain text and structure [to] establish a clear chronology of federal and State responsibilities").

[14] Nor could the Authority claim that the statute is merely silent about FTC pre-approval and that gap could be filled by rulemaking. Our circuit has repeatedly rejected this "nothing-equals-something argument" for conjuring agency authority out of thin air. *Gulf Fishermen's*, 968 F.3d at 460-61 (citing *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015), *aff'd by equally divided court*, 579 U.S. 547 (2016) (per curiam)).

and then requires the Authority to delegate it to USADA, *see* §§ 3054(e)(1)(E)(iv), 3055(c)(4) (the Authority "shall" contract with USADA to "conduct and oversee" anti-doping and medication enforcement "including independent investigations"). And the same goes for charging and adjudicating violations and levying sanctions. *See ibid.* (the Authority "shall" contract with USADA to "conduct and oversee . . . charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations"); § 3054(j) (recognizing Authority's power to impose "civil sanctions"). Congress enacted this reticulated scheme. The agency cannot amend it by promulgating a rule.

Furthermore, when Congress wanted to put the FTC in charge of enforcement, it knew how. Section 3059, for instance, is a separate part of HISA targeting certain "unfair or deceptive" practices in selling horses.[15] With respect to *that* section, the Authority can only "recommend" that the FTC "commence an enforcement action."[16] § 3054(c)(1)(B). In other words, only here did Congress limit the Authority's enforcement discretion to "recommending" agency enforcement. *Cf.* § 3054(j)(1) (providing "the Authority may commence a civil action" seeking an injunction). Yet the Authority contends that the agency could, by rulemaking, make

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[15] *See* § 3059 (deeming it an unfair or deceptive practice under 15U.S.C. § 45(c) to fail to disclose to a buyer that a horse was administered "a bisphosphonate" before its fourth birthday or any other prohibited substance).

[16] *See* § 3054(c)(1)(B) (providing the "Authority . . . 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").

every enforcement action subject to similar FTC approval. That would rewrite the enforcement scheme Congress enacted. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (cleaned up) (citation omitted)).

Additionally, the Sixth Circuit believed the FTC could supervise the Authority through a slightly different kind of rulemaking—that is, by issuing rules governing *how* the Authority enforces HISA. *See Oklahoma*, 62 F.4th at 231. For instance, the agency could issue rules against "overbroad subpoenas or onerous searches" or "provid[ing] a suspect with a full adversary proceeding and with free counsel." *Ibid.* Unhappily, we again disagree with our sister circuit.

The Horsemen are not complaining about *how* the Authority exercises its enforcement power. They are complaining about *where* the enforcement power is lodged: on its face, HISA empowers private entities to enforce it and permits agency oversight only after the enforcement process is over and done with (and then only with respect to fines, not injunctions). If the Horsemen were objecting only to overbroad subpoenas, unwarranted searches, or lack of free counsel, perhaps those complaints could be addressed through rulemaking or as-applied challenges. But their complaint is different. They contend that HISA facially delegates un-

supervised enforcement power to private actors. They are right.[17]

In sum, HISA's clear delineation of enforcement power between the FTC, the Authority, and USADA cannot be altered through rulemaking.

5.

Finally, the Authority defends its enforcement role by analogizing it to the role of self-regulatory organizations ("SROs")—specifically, FINRA—which assist the SEC in enforcing securities laws. The Authority seeks support in circuit cases concluding that FINRA's enforcement role presents no private nondelegation problem. *See, e.g.*, *Oklahoma*, 62 F.4th at 229, 232 (gathering cases).[18] For their part, the Horsemen argue that,

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[17] Moreover, consider the revealing premise of this line of argument. Suppose the FTC issued a rule saying, "The Authority can search racetracks only if it has probable cause." Well and good, but that rule still presupposes *the Authority* is the one doing the search. Merely because the Authority would have to obey the Fourth Amendment does not change the fact that a private entity is searching your racetrack without agency say-so. And it is no answer to say that the agency could issue a rule saying, "The Authority can search racetracks only if the FTC approves the search." That rule, as explained, would amend the statute's division of authority. *See* § 3054(h) ("The Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.").

[18] The Sixth Circuit relied on several cases upholding the constitutionality of FINRA to hold that "[i]n case after case, the courts have upheld [the Maloney Act's] arrangement, reasoning that the SEC's ultimate control over the rules and their enforcement makes the SROs permissible aides and advisors." *Oklahoma*, 62 F.4th at 229. We do not read those cases quite so broadly. They relied largely on the grounds that the SEC ultimately approves any proposed rules and has its own generalized rulemaking power. *See, e.g.*, *R. H.*

for enforcement purposes, the FTC-Authority relationship is meaningfully different from the SEC-FINRA relationship. As we have before noted, HISA was modeled on the Maloney Act, which created FINRA. *See Horsemen's I*, 53 F.4th at 887; *supra* III.A. Moreover, we concluded in *Horsemen's I* that HISA lacked a key feature of the Maloney Act empowering the SEC to "abrogate, add to, and delete" rules proposed by FINRA. *Horsemen's I*, 53 F.4th at 887. As discussed, Congress added a similar provision to HISA, which remedied the nondelegation problem with the Authority's rulemaking powers. *Supra* III.A.

We agree with the Horsemen that, for enforcement purposes, HISA gives the Authority an enforcement role meaningfully different from FINRA's. Unlike the SEC-FINRA relationship, HISA does not give the FTC potent oversight power over the Authority's enforcement such as the power to enforce HISA itself, deregister the Authority as the enforcing entity, or remove its directors.

To begin with, Congress empowered the SEC to enforce FINRA's rules if needed. The SEC can "in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate" the Maloney Act. 15 U.S.C. § 78u(a)(1). The SEC can also, on its own ac-

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Johnson & Co. v. SEC, 198 F.2d 690, 696 (2d Cir. 1952) (considering only whether the SEC abused its discretion); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977) (considering only a nondelegation challenge to the SEC's legislative rulemaking authority); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (same); *Sorrell v. SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982) (same). But none addressed a nondelegation challenge to executive power.

cord, seek criminal sanctions, injunctive relief, or disgorgement. § 78u(c), (d), (d)(4). The FTC cannot. *See* § 3054(c)(iii) (granting the Authority investigatory power); § 3054(e) (granting the Authority and USADA enforcement responsibility). The SEC has power to issue subpoenas, *see* §§ 77s(c), 78u(c), while HISA gives the Authority that power, § 3054(h), (c)(ii). The SEC can also revoke FINRA's ability to enforce its rules, § 78s(g)(2), and step in and enforce any written rule itself, § 78o(b)(4). HISA gives the FTC none of these tools.

Moreover, HISA diverges radically from the Maloney Act in empowering the Authority to sue. The SEC alone has the power to bring civil suits, §§ 78u-1(a), 78u(d)(1), while HISA gives that power exclusively to the Authority, § 3054(j)(1). Giving a private entity the sole power to sue in federal court to enforce a statute cuts to the core of executive power. *See Buckley*, 424 U.S. at 138 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts [this] responsibility[.]").[19]

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[19] One may reasonably ask whether HISA's delegation of enforcement authority is supported by an analogous delegation in qui tam statutes. We think not. The Horsemen note our decision in *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001) (en banc), where we held that the False Claims Act ("FCA") does not violate Article I's Take Care Clause. They argue that *Riley* does not support HISA's delegation because qui tam relators are episodic and do not have a continuing relationship with the government. That is true, but we see a more fundamental distinction between the two statutes: under the FCA, the executive branch has substantial power over qui tam relators that the FTC does not have over the Authority. For example, the United States can intervene in any qui tam litigation, take control of the litigation, veto settle-

Finally, the SEC "retains formidable oversight power to supervise, investigate, and discipline [FINRA] for any possible wrongdoing or regulatory missteps." *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 101 (2d Cir. 2007). The FTC does not. This "formidable" power is manifest in the SEC's ability to derecognize FINRA's regulatory role entirely, §§ 78s(a)(3), (h)(1); remove FINRA board members for cause, § 78s(h)(4); remove any individual FINRA member, § 78s(h)(2); and bar any person from associating with FINRA, § 78o-3(g)(2). HISA, on the other hand, "recognize[s] for purposes of developing and implementing" the Act only "[t]he private, independent, self-regulatory, nonprofit corporation, to be known as the 'Horseracing Integrity and Safety Authority.'" § 3052(a). And only the Authority's Board can remove members: directors by a two-thirds vote and committee members for any reason.[20]

* * *

In sum, we agree with the Horsemen that the FTC lacks adequate oversight and control over the Authority's enforcement power. HISA's explicit division of enforcement responsibility empowers the Authority with quintessential executive functions and gives the FTC scant oversight until enforcement has already occurred. Such backend review by the FTC does not subordinate the Authority. And the FTC's general rule-

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ment agreements, and dismiss the suit "notwithstanding the objections of the [relator]." *Id.* at 753-54. HISA gives the FTC none of those powers.

[20] In saying all this, we express no opinion on whether the SEC-FINRA relationship poses any constitutional issues under the private nondelegation doctrine (or any other doctrine). Such questions are not posed by this case.

making power provides no answer because executive rulemaking cannot amend the plain division of enforcement power laid out in HISA's text. Such a radical delegation differs materially from the SEC-FINRA relationship because the FTC lacks any tools to ensure that the law is properly enforced. HISA's enforcement provisions thus violate the private nondelegation doctrine.

C. Due Process Challenge

We turn next to the Horsemen's challenge based on the Fifth Amendment's Due Process Clause. They argue that HISA, both facially and as-applied, deprives them of due process by permitting economically self-interested actors to regulate their competitors. *See Carter Coal*, 298 U.S. at 311 (government violates due process by allowing regulation by "private persons whose interests may be and often are adverse to the interests of others in the same business"). Specifically, the Horsemen contend that *Carter Coal* does not require proof of economic self-interest, only that the private person "may be" adverse to those he regulates. They then argue that several members of the Board and standing committees violate the conflict of interest provisions due to their professions and prior financial interests. Finally, the Horsemen contend that the statute fails to properly protect against self-interested actors because it does not cover financial interests other than interests in a covered horse, as opposed to a racetrack or other facility.

The district court correctly rejected these claims. As to the Horsemen's facial challenge, the court concluded it was defeated by HISA's conflict-of-interest provisions. *See Black*, 672 F. Supp. 3d at 252. Those provisions prohibit a range of individuals from serving

as Board or independent committee members, § 3052(e), including individuals with financial interests in, or who provide goods or services to, covered horses; officials, officers, or policy makers for an equine industry; and employees, contractors, or immediate family members of the prior individuals. § 3052(e)(1)-(4).

As to the as-applied challenge, the district court rejected it on the facts. Following a bench trial, the court found the Horsemen relied only on the committee members' biographical information but adduced no other evidence showing their adverse interests, financial or otherwise. *See Black*, 672 F. Supp. 3d at 252 ("HISA affords sufficient protection through its conflicts-of-interest provisions, and the plaintiffs have not met their burden to show unconstitutional self-dealing by directors, committee members, or others associated with the Authority."). At most, the court observed that the biographical information may show the members do not qualify as "independent members." *Ibid.*; § 3052(b)(1)(A) ("[I]ndependent members [must be] selected from outside the equine industry."). But, as the court pointed out, even assuming that to be true, it says nothing about the members' financial interests. *Black*, 672 F. Supp. 3d at 252. On appeal, the Horsemen fail to show any error by the district court here.

D. Appointments Clause Challenge

A separate plaintiff, Gulf Coast, challenges the Authority's structure under the Appointments Clause of Article II.[21] Recall that Gulf Coast raised this distinct

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[21] The Appointments Clause reads "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Ap-

challenge in a suit later consolidated with the Horsemen's. *See id.* at 230. Gulf Coast argues that, for constitutional purposes, the Authority is governmental, not private, and so is subject to the Appointments Clause. This means the Authority's directors, if they are principal officers, must be appointed by the President with Senate confirmation or, if they are inferior officers, by the President, courts, or department heads according to law. *See Free Enter. Fund*, 561 U.S. at 487-88; *Cochran v. SEC*, 20 F.4th 194, 198 (5th Cir. 2021) (en banc). The Authority's directors are not appointed in any of these ways,[22] and so, if Gulf Coast is right, their appointment would violate Article II.

The Authority and the FTC first respond that we previously decided this question in *Horsemen's I*. By applying the *private* nondelegation doctrine to the Authority, they argue we necessarily determined the Authority is not governmental for constitutional purposes. The district court took this view as well. *See Black*, 672 F. Supp. 3d at 234. That is understandable. Challenges based on private nondelegation, on the one hand, and the Appointments Clause, on the other, appear mutually exclusive. For constitutional purposes, an entity is either governmental or not. *See, e.g.*, *Lebron*, 513 U.S. at 378-79; *Amtrak II*, 575 U.S. at 50-51. That is why the Horsemen themselves call Gulf Coast's claim "fun-

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pointments are not herein otherwise provided for" but provides "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." U.S. Const. art. II, § 2, cl. 2.

[22] The directors are appointed by the Authority itself. *See* § 3052(d)(3) (Board members are selected by the Authority's nominating committee).

damentally incompatible" with their private nondelegation challenge. Texas seems to agree, noting that Gulf Coast's Appointments Clause theory would apply only if "the Court disagree[s]" with its assumption that the Authority is private.

That said, however, we cannot agree that we decided this question in *Horsemen's I*. The Appointments Clause question was never posed. Party presentation is a fundamental constraint on appellate decision-making. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020) ("Courts . . . wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties." (cleaned up) (citation omitted)). The fact is that in *Horsemen's I*, all parties proceeded on the assumption that the Authority is private for constitutional purposes. *See Horsemen's I*, 53 F.4th at 875 n.11 ("The Horsemen also claimed HISA was unconstitutional under the . . . Appointments Clause. The district court did not rule on those claims and so they are not before us."). No one suggested that the Authority might qualify as a government entity or that its directors were subject to the Appointments Clause. So, because we did not settle the question previously, we can address it now. *See Companion Prop. & Cas. Ins. v. Palermo*, 723 F.3d 557, 561 (5th Cir. 2013) ("Appellate powers are limited to reviewing issues raised in, *and decided by*, the district court." (cleaned up) (citation omitted)); *Alpha/Omega Ins. Servs. v. Prudential Ins. of Am.*, 272 F.3d 276, 281 (5th Cir. 2001) ("[T]he law of the case doctrine only applies to issues we actually decided[.]").

The basic premise of Gulf Coast's argument is that the Authority is part of the federal government for Ap-

pointments Clause purposes. *See Amtrak II*, 575 U.S. at 50-51. We of course recognize that HISA calls the Authority private, as does the Authority's own charter. *See* § 3052(a) ("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 [HISA]."); HISA Charter ("The Corporation is organized and shall be operated as a nonprofit business league[.]"). But deeming an entity "private" does not settle whether it is legally part of the federal government. Otherwise, the government could evade constitutional restrictions by mere labeling. *See Lebron*, 513 U.S. at 397 ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). So, we must determine whether the Authority qualifies as part of the federal government for constitutional purposes.

The analysis guiding that inquiry comes from *Lebron*. In that case, the Supreme Court examined "the long history of corporations created and participated in by the United States for the achievement of governmental objectives." *Id.* at 386.[23] The specific question before the Court was whether "Amtrak, though nominally a private corporation, must be regarded as a Government entity for First Amendment purposes." *Id.* at

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[23] *See also id.* at 386-91 (discussing corporations such as the first and second Banks of the United States, the Panama Railroad Company, the United States Grain Corporation, the Reconstruction Finance Corporation, the Federal Deposit Insurance Corporation, the Communications Satellite Corporation, the Corporation for Public Broadcasting, and the Legal Services Corporation).

383. The answer was yes. That was so, the Court held, because "the Government create[d] [the Amtrak] corporation by special law, for the furtherance of governmental objectives, and retain[ed] for itself permanent authority to appoint a majority of the directors of that corporation." *Id.* at 399. The Supreme Court and circuit courts have since used *Lebron*'s analysis to discern whether corporations are part of the government for constitutional purposes. Applying *Lebron*, we conclude that the Authority is not a federal instrumentality for purposes of the Appointments Clause.

First, the Authority was not created by the federal government "by special law," *ibid.*, but was incorporated under Delaware law shortly before HISA's passage. Contrast this with Amtrak, which "Congress established" by enacting the Rail Passenger Service Act of 1970. *Id.* at 383-84; *see also Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454 (1985) (observing "Congress established the National Railroad Passenger Corporation, a private, for-profit corporation that has come to be known as Amtrak").

Second, the Authority was not created to further "governmental objectives," *Lebron*, 513 U.S. at 399, but instead as a private association to address doping, medication, and safety issues in the thoroughbred racing industry. Again, contrast this with Amtrak, which Congress created "to avert the threatened extinction of passenger trains in the United States" and for other goals Congress itself "establish[ed]." *Id.* at 383.

Third, the federal government does not "control[] the operation of the [Authority]," nor has it "retain[ed] for itself permanent authority to appoint a majority of the

[Authority's] directors." *Ibid.* To the contrary, the government has no role in appointing the Authority's Board. Once again, contrast this with Amtrak—where a majority of its directors was appointed by the President. *Id.* at 397-98; *see also Amtrak II*, 575 U.S. at 51 (observing that seven of nine Amtrak board members "are appointed by the President and confirmed by the Senate"); *cf. Free Enter. Fund*, 561 U.S. at 484, 484-85 (noting the PCAOB—despite being statutorily deemed "private"—is a "Government-created, Government-appointed entity," whose five members are "appointed . . . by the [SEC]").

Instead of engaging with *Lebron*, Gulf Coast argues that *Lebron*'s analysis is not "the *only* way" to tell whether a corporation is a government instrumentality. That takes too narrow a view of precedent, however. *Lebron* canvassed "the long history of corporations created and participated in by the United States" and set out a detailed analysis to determine whether a particular corporation—despite its designation as "private"—counts as a government instrument for constitutional purposes. *See* 513 U.S. at 386, 386-91. That is precisely the question we must answer with respect to the Authority. How can we, as an inferior court, simply bypass *Lebron*? We cannot.

Gulf Coast tries to offer us a way around *Lebron*, but it is a dead end. Gulf Coast argues that *Lebron* addressed only government-created corporations "that in no way exercised government power." But *Lebron* did not limit itself in that way—to the contrary, it relied on cases where Congress turned to private corporations to "accomplish purely governmental purposes." 513 U.S. at 395 (quoting *Cherry Cotton Mills, Inc. v. United*

States, 327 U.S. 536, 539 (1946)).[24] Furthermore, the corporation actually addressed in *Lebron*—Amtrak—itself exercised regulatory power, as the Supreme Court, the D.C. Circuit, and our court have all recognized. *See Amtrak II*, 575 U.S. at 51 ("Amtrak . . . cannot constitutionally be granted the regulatory power[.]" (citation and quotation omitted)); *Amtrak I*, 721 F.3d at 671 ("No case prefigures the unprecedented regulatory powers delegated to Amtrak."); *Horsemen's I*, 53 F.4th at 889 (discussing how Congress gave "regulatory power to the 'economically self-interested Amtrak'" (citation omitted)).

Gulf Coast tries to offer us a way around *Lebron*, but it is a dead end. Gulf Coast argues that *Lebron* addressed only government-created corporations "that in no way exercised government power." But *Lebron* did not limit itself in that way—to the contrary, it relied on

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[24] *See Nebraska*, 143 S. Ct. at 2366–67 (applying *Lebron* to conclude that the Missouri Higher Education Loan Authority is "an instrumentality of Missouri"); *Free Enter. Fund*, 561 U.S. at 486 (citing *Lebron* when referencing parties' agreement that the Public Company Accounting Oversight Board ("PCAOB") "is 'part of the Government' for constitutional purposes"); *Amtrak II*, 575 U.S. at 54-55 (explaining *Lebron* "provides necessary instruction" and "teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status"); *Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152, 158–59 (4th Cir. 2018) (applying *Lebron* to conclude that the Metropolitan Washington Airports Authority ("MWAA") is not "a federal entity" because "MWAA was not created by the federal government" and "is not controlled by the federal government"); *Montilla v. Fed. Nat'l Mortg. Ass'n*, 999 F.3d 751, 759-61 (1st Cir. 2021) (applying *Lebron* to conclude that Fannie Mae and Freddie Mac are not government actors).

cases where Congress turned to private corporations to "accomplish purely governmental purposes." 513 U.S. at 395 (quoting *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539 (1946)).[25] Furthermore, the corporation actually addressed in *Lebron*—Amtrak—itself exercised regulatory power, as the Supreme Court, the D.C. Circuit, and our court have all recognized. *See Amtrak II*, 575 U.S. at 51 ("Amtrak . . . cannot constitutionally be granted the regulatory power[.]" (citation and quotation omitted)); *Amtrak I*, 721 F.3d at 671 ("No case prefigures the unprecedented regulatory powers delegated to Amtrak."); *Horsemen's I*, 53 F.4th at 889 (discussing how Congress gave "regulatory power to the 'economically self-interested Amtrak'" (citation omitted)). Gulf Coast also argues that, to determine whether directors of a private entity are "Officers of the United States," we should focus on their duration in office and the nature of the entity's power. We disagree. The two principal cases Gulf Coast relies on for this argument addressed whether individuals *already part* of the government should be considered "Officers." So, *Buckley* examined whether Federal Election Commission appointees wielded "significant authority pursuant to the laws of the United States." 424 U.S. at 126. And *Lucia v. SEC* applied this same test to SEC ALJs. 585 U.S. 237, 244-45 (2018). Gulf Coast urges us to extend *Buckley* and *Lucia* well beyond their facts to analyze whether persons in a *private* entity are "Officers." Even if we were inclined to take that step, however, *Leb-*

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[25] *See also Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 n.4 (1940) ("The corporations, of course, perform 'governmental' functions." (citation omitted)); *id.* at 522 ("The banking system which Congress thus established embodied a blend of governmental and private purposes.").

ron would remain an insuperable hurdle. As explained, *Lebron* addressed when a private entity qualifies as part of the government for constitutional purposes. That is precisely the question before us. Post-*Lebron*, no case has applied *Buckley* to private actors. Instead, the Supreme Court has repeatedly applied *Lebron* for three decades. *See supra* note 23. We are not at liberty to displace the Supreme Court's governing framework.[26]

Finally, Gulf Coast argues that if *Lebron* is the test, then the federal government can simply vest all executive power in a private corporation and avoid the Appointments Clause. This argument ignores the role of the private nondelegation doctrine. The government cannot delegate core governmental powers to unsupervised private parties. *Pittston*, 368 F.3d at 394. A private entity can only act "subordinately to an agency with authority and surveillance over it." *Horsemen's I*, 53 F.4th at 881 (quotations omitted). The private nondelegation doctrine thus corrals any attempts to evade *Lebron* by giving unaccountable governmental power to a pre-existing private entity.

In sum, *Lebron* is the governing test to determine whether an entity is private or public and, under that

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[26] That principle also answers Gulf Coast's reliance on a 2007 Office of Legal Counsel ("OLC") opinion. The opinion argued that the Appointments Clause applies to someone with significant and continuing government authority, whether he is a private or a government employee. *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 121-22 (2007). If the opinion was suggesting its analysis as an alternative to *Lebron* (a decision, it should be noted, the opinion cited, *see id.* at 121), that is a suggestion only the Supreme Court could act upon, not a circuit court bound by *Lebron*.

test, the Authority is a private entity not subject to Article II's Appointments Clause.

E. Anti-Commandeering Challenge

Finally, we turn to Gulf Coast's argument that HISA unconstitutionally commandeers state officials. The Constitution forbids Congress from "command[ing] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997); *see also New York v. United States*, 505 U.S. 144, 165, 188 (1992). Gulf Coast argues HISA violates that principle by coercing state racing commissions to remit fees to fund the Authority's operations. If state officials refuse, the Authority collects fees directly from covered persons—but, in that event, HISA prohibits the state from imposing taxes or fees to finance the state's own horseracing programs. *See* § 3052(f). This scheme, argues Gulf Coast, "puts a gun to the head of Texas" by coercing state officials to administer a federal program rather than a state program.

The problem with this claim, as the district court pointed out, is that Gulf Coast lacks standing to raise it. Specifically, Gulf Coast's alleged injury—that it prefers Texas's racetrack safety rules to HISA's—is "no injury at all." *Black*, 672 F. Supp. 3d at 250. As the district court correctly reasoned, "[a] party cannot establish constitutional injury by suggesting that he may be subject to rules he does not prefer." *Ibid.*; *see also, e.g.*, *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 91 F.4th 342, 350 (5th Cir. 2024) (holding that "merely being subject to . . . regulations, in the abstract, does not create an injury").

On appeal, Gulf Coast fails to explain how the district court erred. It merely argues that the coercive pressure the funding scheme allegedly places on Texas will lead it to implement HISA's rules rather than the current Texas regulations, which makes Gulf Coast subject to "a new set of unwanted (federal) regulations." Again, though, this does not explain why Gulf Coast experiences an injury sufficient to assert an anti-commandeering challenge to HISA.

IV. CONCLUSION

In sum, we affirm the district court's judgment that (1) Congress's recent amendment to HISA cured the private nondelegation flaw in the Authority's rulemaking power; (2) HISA does not violate due process; (3) the Authority's directors are not subject to the Appointments Clause under *Lebron*; and (4) Gulf Coast lacks standing to challenge HISA on anti-commandeering grounds.

We reverse the district court's judgment in one respect. Insofar as HISA is enforced by private entities that are not subordinate to the FTC, we DECLARE that HISA violates the private nondelegation doctrine.

Accordingly, the district court's judgment is AFFIRMED in part and REVERSED in part.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

No. 5:21-CV-071-H

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, ET AL., PLAINTIFFS

THE STATE OF TEXAS AND THE TEXAS RACING COMMISSION, INTERVENOR-PLAINTIFFS

v.

JERRY BLACK, ET AL., DEFENDANTS

Filed: May 4, 2023

MEMORANDUM OPINION AND ORDER

In hopes of standardizing horseracing regulation, the Horseracing Integrity and Safety Act of 2020 (HISA) empowered a private entity to draft nationwide regulations subject to the Federal Trade Commission's review and approval. In response, the plaintiffs claimed that HISA was unconstitutional because it did not give the FTC meaningful oversight—violating the private-nondelegation doctrine. Although this Court recognized that the plaintiffs' concerns were legitimate, it construed binding precedent as permitting Congress's approach in its March 2022 order. The Fifth Circuit disagreed, explaining that precedent could not justify

HISA and that it was unconstitutional because the FTC lacked discretion to approve, disapprove, or modify the proposed regulations. Answering the Fifth Circuit's call, Congress amended HISA to empower the FTC to "abrogate, add to, and modify" the entity's regulations. Nevertheless, the plaintiffs continue to allege constitutional violations. But because Congress remedied the offending provisions and brought the law within the Fifth Circuit's stated requirements, the plaintiffs' claims fail.

Specifically, after remand, the original plaintiffs continue to claim that HISA violates the private-nondelegation doctrine under Article I and the Due Process Clause. Dkt. No. 116. Texas and the Texas Racing Commission, as intervenor-plaintiffs, raise the same arguments. Dkt. No. 155 at 22-25. Additionally, also after remand, another court transferred a related case to this Court. *Gulf Coast Racing LLC v. Horseracing Integrity & Safety Authority*, No. 2:22-CV-146-Z (N.D. Tex.), Dkt. No. 53. Those plaintiffs make the same private-nondelegation claim, but only as an alternative to their primary claim that HISA violates Article II's Appointments Clause and Article I's Vesting Clause. Dkt. No. 136. In their view, the private entity at issue —the Horseracing Integrity and Safety Authority—is, in reality, a public entity subject to the same requirements applicable to all public officers. No. 5:23-CV-077, Dkt. No. 36 at 33. They also allege, albeit briefly, that HISA violates the Tenth Amendment's anti-commandeering principles by requiring Texas to do the federal government's bidding. *Id.* at 57.

In light of Congress's amendment to HISA and the undisputed evidence following a bench trial, each of

these arguments falls short. First, the plaintiffs' private-nondelegation argument reveals too much and is barred by precedent. Previously, the plaintiffs argued that "HISA violates the private nondelegation doctrine because the FTC cannot modify the Authority's rules." Dkt. No. 38 at 26. Now that Congress expressly authorizes the FTC to modify the Authority's rules, the plaintiffs retreat and admit their true view: that there is nothing Congress could do to bring the HISA-Authority arrangement within constitutional bounds. Dkt. No. 182 at 31-33, 37-38. But this argument ignores the long history of the executive branch leveraging—with court approval—expertise from private industry so long as the industry remains subordinate to a supervisory federal agency. *E.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 399 (1940) (allowing private parties to participate in price setting because the private entities "function[ed] subordinately to the Commission" and because the Commission retained "pervasive surveillance and authority" over the activities of the private parties); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 386-90 (1995) (detailing the "long history of corporations created and participated in by the United States for the achievement of governmental objectives" beginning in the 18th Century). The Court understands the plaintiffs' concerns with these arrangements, especially given how long horseracing has been regulated at the local level. But because Congress brought HISA within the Constitution's limits as defined by the Fifth Circuit, the Court concludes that HISA does not violate the private non-delegation doctrine.

Second, the plaintiffs' facial and as-applied Fifth Amendment Due Process argument fails for the same

reasons this Court explained in its first order rejecting it. The Court finds that the Authority is not a self-interested industry competitor creating a constitutional violation. As a facial matter, HISA explicitly protects against self-interest through structural safeguards while preserving industry representation in the Authority. And the as-applied challenge fails because there is no evidence of actual, unconstitutional self-dealing that has harmed industry competitors.

Third, the plaintiffs' appointment and removal arguments fail for a simple reason—the challenged entity at issue (the Authority) is not a public, governmental actor subject to these constitutional limitations. The Fifth Circuit held as much in its panel opinion, so the plaintiffs' assertion otherwise at this point is both contrary to the law of the case and foreclosed by precedent. Moreover, even assuming that the Fifth Circuit left this issue open, precedent makes clear that the Authority is private because it was not created by the government, and it retains for itself permanent authority to appoint its directors.

Finally, the plaintiffs lack standing to raise their Tenth Amendment argument that HISA unconstitutionally commandeers the states. Although private plaintiffs are not automatically barred from bringing Tenth Amendment claims, they must still demonstrate injury that is traceable to the defendant's conduct and redressable by the Court. But the private plaintiffs have no traceable, redressable injury to assert because HISA allows Texas to either elect to collect fees of covered persons or, if not, the Authority will. HISA allows states to "elect[]" to assess and collect fees on covered persons. 15 U.S.C. § 3052(f)(2)(A). But if the state does not

make such an election, then the Authority steps in to do so. § 3052(f)(3). In this way, covered persons like the Gulf Coast plaintiffs will be regulated and subject to assessments even if they were to succeed on the anti-commandeering claim. Although the private plaintiffs clearly prefer to be regulated by Texas instead of the Authority, the preference alone is insufficient to establish a redressable injury.

For all these reasons, the Court rejects the plaintiffs' arguments and conclude that Congress cured the unconstitutional aspects of HISA's original approach. Given the parties' desire for an expeditious resolution, the Court's opinion is sufficient to permit appellate review but does not exhaust every possible vein of analysis.[1]

1. Findings of Fact

Following remand from the Fifth Circuit, the plaintiffs filed multiple motions for a preliminary injunction. Dkt. Nos. 116; 124; 139. Given the plaintiffs' requests for expedited treatment and temporary emergency relief, the Court consolidated the hearing on the plaintiffs' motions for preliminary injunction with the trial on the merits. Dkt. No. 135; *See also* Fed. R. Civ. P. 65(a)(2). The Court finds the following facts.

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[1] As explained *infra* in Parts 1.I through 1.L, the Court is operating on an expedited timeframe. After resolving multiple emergency motions, the Court consolidated these cases on April 11—roughly three weeks ago. Trial was held last week on April 26. Although the ADMC rule's effective date was delayed until May 22 (Dkt. No. 180), the plaintiffs request resolution "as soon as possible." Dkt. No. 181 at 8.

A. Congress enacts HISA with broad bipartisan support.

American horseracing has existed for centuries, and throughout it "has been regulated by the States, local communities, and private organizations." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 873 (5th Cir. 2022). Although popular even in the colonial era, the growth of American horseracing in the 1850s was met with "a growing interest in the formation of a national governing board to regulate racing." Joan S. Howland, *Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS. L. REV. 473, 483 (2004). But it would take more than 170 years for the first national horseracing legislation to be signed into law. *Nat'l Horsemen's*, 53 F.4th at 873.

After an increase in doping scandals and racetrack fatalities, Congress passed HISA with broad bipartisan support. Pub. L. No. 116-260, §§ 1201-12, 134 Stat. 1182, 3252-75 (2020) (codified at 15 U.S.C. §§ 3051-60). On December 27, 2020, HISA was signed into law. *Id.* For the first time in the long history of American horseracing, HISA established a framework for national regulation of certain aspects of the industry. 15 U.S.C. §§ 3051-60. Specifically, HISA aims to establish nationwide rules over racetrack safety and anti-doping and medication control (ADMC). *Nat'l Horsemen's*, 53 F.4th at 873. HISA applies to all covered horses (thoroughbreds (§ 3051(4)), covered persons (all trainers, owners, breeders, jockeys, racetracks, and veterinarians, among others (§ 3051(6)), and covered horseraces (those horseraces with a substantial effect on interstate com-

merce (§ 3051(5)). In other words, "[t]he Act's reach is broad," and HISA creates a truly nationwide, comprehensive regulatory scheme for racetrack safety and ADMC. *Nat'l Horsemen's*, 53 F.4th at 873.

B. A private entity, the Authority, is incorporated in aid of HISA.

The Authority was incorporated as a nonprofit on September 8, 2020. GPX 6 at 1; No. 5:23-CV-077, Dkt. No. 47 at 5. HISA "recognize[d]" the Authority, a "private, independent, self-regulatory, nonprofit corporation . . . 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." 15 U.S.C. § 3052(a). HISA prescribes the makeup of the Authority's board of directors, including the number of total directors (nine), independent directors (five), and industry-member directors (four). § 3052(b)(1). The initial directors are chosen by a nominating committee, "comprised of seven independent members . . . set forth in the governing corporate documents of the Authority." § 3052(d). HISA also directs the Authority to establish racetrack-safety and ADMC standing committees. § 3052(c).

C. HISA creates a rulemaking procedure that attempts to allow the Authority to aid the FTC in regulating thoroughbred horseracing.

HISA creates a regulatory framework that allows the Authority to operate in aid of the FTC: The Authority first drafts proposed rules, which are then submitted for FTC approval. § 3053(a). Once a rule is received by the FTC, it goes through notice and comment.

§ 3053(a)-(b). HISA also requires FTC approval before a proposed rule can take effect. § 3053(b)(2). The FTC is given sixty days to "approve or disapprove the proposed rule or modification," and the FTC "shall approve" a proposed rule if it is consistent with the statute and applicable rules. § 3053(c).

D. With oversight by the FTC, the Authority is tasked with enforcement.

The Authority is empowered to enforce the rules it aids the FTC in creating by investigating violations, imposing civil sanctions, and suing to enforce sanctions or obtain injunctive relief. §§ 3058(a), 3057(d), 3054(h)-(j). The Authority's investigatory powers are subject to "uniform procedures" reviewed and approved by the FTC. § 3054(c). All civil sanctions imposed by the Authority are subject to two layers of FTC oversight. First, all civil sanctions are subject to de novo review by an Administrative Law Judge appointed by the FTC. § 3058(b). And the FTC can review de novo the ALJ's final decision. § 3058(c).

E. The Authority is funded by private parties.

At its initial stage, the Authority is funded by loans. *See* § 3052(f)(1). After that initial stage, the majority of the Authority's funding will derive from fees collected from covered persons or state racing commissions. § 3052(f)(1)-(4). Any "proposed increase" in fees for covered persons must be reported to the FTC for review and submitted for notice and comment. § 3052(f)(1)(c)(iv).

F. Multiple parties challenge HISA's constitutionality.

This case involves many parties, consisting of the lead-case plaintiffs,[2] the member-case plaintiffs,[3] the intervenor-plaintiffs,[4] the FTC defendants,[5] and the Authority defendants.[6] Both plaintiff groups sued FTC-related defendants and Authority-related defendants.

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[2] The plaintiffs in the lead case are National Horsemen's Benevolent and Protective Association, Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, Nebraska Horsemen's Benevolent and Protective Association, Oklahoma Horsemen's Benevolent and Protective Association, Oregon Horsemen's Benevolent and Protective Association, Pennsylvania Horsemen's Benevolent and Protective Association, Tampa Bay Horsemen's Benevolent and Protective Association, and Washington Horsemen's Benevolent and Protective Association (hereinafter the Horsemen plaintiffs). Dkt. No. 149 at 2-10.

[3] The plaintiffs in the member case are Gulf Coast Racing LLC, LRP Group Ltd., Valle de Los Tesoros Ltd., Global Gaming LSP, LLC, and the Texas Horsemen's Partnership LLP (hereinafter the Gulf Coast plaintiffs). Dkt. No. 142 at 7-8.

[4] The intervenor-plaintiffs are the State of Texas and the Texas Racing Commission. Dkt. No. 155.

[5] The Authority defendants are Jerry Black, the Horseracing Integrity and Safety Authority, Lisa Lazarus, Steve Beshear, Adolpho Birch, Leonard Coleman, Ellen McClain, Charles Scheeler, Joseph DeFrancis, Susan Stover, Bill Thomason, D.G. Van Clief, Katrina Adams, Nancy Cox, Joseph Dunford, Frank Keating, and Kenneth Schanzner. Dkt. Nos. 142; 149.

[6] The FTC defendants are the Federal Trade Commission, Lina Khan, in her official capacity as Chair of the Federal Trade Commis-

G. The Fifth Circuit holds HISA unconstitutional.

In March 2021,the National Horsemen's Benevolent and Protective Association and twelve of its affiliates (the Horsemen plaintiffs) filed suit against the FTC, its commissioners, the Authority, and the Authority's Nominating Committee members, challenging HISA's constitutionality on several grounds. Dkt. No. 1 at 19-26. In due time, the FTC defendants and the Authority defendants separately filed motions to dismiss (Dkt. Nos. 34; 36), and the Horsemen filed a partial motion for summary judgment, seeking declaratory and injunctive relief on their private-nondelegation and due-process claims (Dkt. No. 37). After considering the briefing of the parties and various *amici*, and after oral argument, the Court concluded, based on what it viewed as binding precedent, that HISA did not result in a constitutional violation. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 596 F. Supp. 3d 691, 725 (N.D. Tex. 2022), *rev'd and remanded*, 53 F.4th 869 (5th Cir. 2022). Thus, the Court denied the partial motion for summary judgment (Dkt. No. 37) and noted that the plaintiffs had abandoned their remaining claims (*Nat'l Horsemen's Benevolent & Protective Ass'n*, 596 F. Supp. 3d at 728). The Court dismissed the plaintiffs' complaint (Dkt. No. 23) with prejudice.

On appeal, the Fifth Circuit reversed in a thorough opinion, holding that the FTC-Authority regulatory scheme was unconstitutional because it gave the FTC too little control over a private entity with regulatory authority. *Nat'l Horsemen's*, 53 F. 4th at 872. The

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sion, Rebecca Kelly Slaughter, Alvaro Bedoya, Noah Phillips, and Christine Wilson, all in their official capacities as Commissioners of the Federal Trade Commission. Dkt. Nos. 142; 149.

court explained that "[a] cardinal constitutional principle is that federal power can be wielded only by the federal government." *Id.* As a result, "a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Id.* at 881. To explain the concept "more precisely," the court noted that it is within constitutional bounds for Congress to "formalize the role of private parties in proposing regulations so long as that role is merely 'as an aid' to a government agency that retains the discretion to 'approve[ ], disapprove[ ], or modif[y]' them." *Id.* (quoting *Ass'n of Am. R.R.s v. Dep't of Transp. [Amtrak I]*, 721 F.3d 666, 671 (D.C. Cir. 2013)). But "[i]f the private entity does not function subordinately to the supervising agency, the delegation of power is unconstitutional." *Id.*

Applying these principles, the court held that the Authority was not subordinate to the FTC. *Id.* at 872-73. "An agency does not have meaningful oversight if it does not write the rules, cannot change them, and cannot second-guess their substance." *Id.* at 872. It was the Authority, not the FTC, that had "the last word over what rules govern our nation's thoroughbred horseracing industry," which rendered HISA unconstitutional. *Id.*

Three aspects of HISA and the FTC-Authority relationship led the panel to this conclusion. First, the court noted the Authority's "sweeping rulemaking power" and observed that "HISA's generous grant of authority to the Authority to craft entire industry 'programs' strongly suggests it is the Authority, not the FTC," that is in control. *Id.* at 882-83. Moreover, the court explained that the FTC's ability to adopt interim final

rules did not meaningfully alter the scope of the Authority's power because such rulemaking is narrow and reserved for emergencies. *Id.* at 883.

Second, the court relied on the FTC's limited power to review proposed rules, which prevented the FTC from reviewing the Authority's policy choices. *Id.* at 884. The FTC's review of proposed rules for consistency with HISA was "too limited to ensure the Authority 'functions subordinately' to the agency." *Id.* "[S]uch arms-length review hardly subjects the Authority's rules to 'independent' oversight." *Id.* at 885. Perhaps more importantly, the court explained that, whatever the FTC's consistency review would entail, it excludes review of the Authority's policy choices. *Id.* Similarly, the FTC could not force the Authority to modify those choices; it could only make recommendations to the Authority. *Id.* at 886. "The Act's division of labor is clear: the Authority writes the rules; the agency may suggest certain changes, but the Authority can take them or leave them." *Id.*

Finally, the Fifth Circuit noted that HISA's FTC-Authority relationship was materially different from the Maloney Act's SEC-FINRA model, which has consistently withstood non-delegation challenges. *Id.* at 887. Although FINRA, like the Authority, "is a private entity empowered to draft and propose regulations" to a federal agency, there was "a key distinction" between the two. *Id.* "Unlike HISA, the Maloney Act empowers the SEC to 'abrogate, add to, and delete from' FINRA rules 'as the [SEC] deems necessary or appropriate[.]'" *Id.* (quoting 15 U.S.C. § 78s(c) and citing *Aslin v. Fin. Indus. Regulatory Auth., Inc.*, 704 F.3d 475, 476 (7th Cir. 2013) (observing that the SEC "may abrogate, add

to, and delete from all FINRA rules as it deems necessary")). The SEC's rulemaking power, the court explained, "meaningfully distinguishes the SEC-FINRA relationship from the FTC-Authority relationship." *Id.* The court recognized that while "FINRA plays an important role in formulating securities industry rules, its role is ultimately 'in aid of' the SEC, which has the final word on the substance of the rules." *Id.* The Authority, in contrast, has the final word on formulating and proposing rules because of "the limits built into the FTC's oversight." *Id.* Thus, the Fifth Circuit held that "the FTC's power to *recommend* modifications is not equivalent to the power to *require* modifications." *Id.* at 888.

These reasons—combined with the Fifth Circuit's view that precedent did not require affirmance—led the Court to hold that the Authority was not subordinate to the FTC and, thus, the FTC-Authority structure violated the Constitution's guarantee against private nondelegation. *Id.* at 890.

H. Congress amends HISA.

Roughly six weeks after the Fifth Circuit's decision, Congress enacted, and the President signed into law, an amendment to HISA. As amended, § 3053(e) now provides the FTC with authority to "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. § 3053(e). The defendants sought rehearing in the Fifth Circuit in

light of the amendment, but the panel remanded the case to this Court for further proceedings. *Nat'l Horsemen's*, No. 22-10387, Dkt. Nos. 223-24 (5th Cir. Jan. 31, 2023) (denying rehearing and issuing mandate).

I. The plaintiffs allege several post-remand emergencies.

Following remand, the plaintiffs in *National Horsemen's* filed a Motion for a Preliminary Injunction (Dkt. No. 116), asking the Court to enjoin the Authority from implementing and enforcing HISA while the parties dispute whether Congress's recent modification to HISA makes the statute constitutional. *Id.* at 6. The plaintiffs proposed that the Court order an expedited briefing schedule on the motion so the Court could issue its order by March 27, 2023—the date an anti-doping rule was scheduled to (and eventually did) go into effect. Dkt. No. 117. After considering the parties' respective positions, the Court declined to order expedited briefing and instead set a regular briefing schedule. Dkt. No. 121.

On March 27, 2023—the very day that the anti-doping rule was approved and went into effect—the plaintiffs filed their Motion for an Emergency Preliminary Injunction Against the Medication Rule. Dkt. No. 124. The emergency motion focused specifically on the anti-doping rule, alleging that it violated the Administrative Procedure Act. *Id.* The Court ordered expedited briefing for the emergency motion only. Dkt. No. 127. In its order, the Court found that the anti-doping rule issued without the notice required under the APA and delayed the Rule's effective date until May 1, 2023. Dkt. No. 134.

Five days later, the plaintiffs in *Gulf Coast*—a case originally pending in the Amarillo Division—moved for a temporary restraining order and preliminary injunction, seeking to enjoin the defendants from enforcing HISA while the Court resolved the pending dispositive motions. No. 2:22-CV-146-Z, Dkt. No. 50. This case was transferred to the Lubbock Division of this Court because of the substantial overlap of the claims in *Gulf Coast* and *National Horsemen's*, the similarity of the parties, and the likelihood that the evidence involved and objective of the plaintiffs in both cases would be nearly identical. *Gulf Coast*, No. 5:23-CV-077-H, Dkt. No. 53 at 4. After the transfer, the Court denied the motion for temporary restraining order but reserved its ruling on the motion for preliminary injunction. *Gulf Coast*, No. 5:23-CV-077-H, Dkt. No. 59.

J. The plaintiffs bring numerous constitutional claims.

The Court found that *Gulf Coast* and *National Horsemen's* involved "a common question of law or fact" and consolidated the two cases pursuant to Federal Rule of Civil Procedure 42(a)(2). Dkt. No. 135 at 1.

i. Gulf Cost Racing

The Gulf Coast plaintiffs' operative complaint makes the following constitutional claims: (1) the Authority's leadership-appointment process violates Article II's Appointments Clause, (2) the Authority leadership-removal process violates Article II's Vesting Clause, (3) the Authority's rulemaking constitutes "a naked delegation" of legislative power, (4) the rulemaking authority that is delegated to the Authority violates the nondelegation doctrine because Congress has not supplied an

intelligible principle, (5) the delegation of power to the Authority violates the private-nondelegation doctrine, (6) the Authority's power to seek civil penalties from covered persons violates the Seventh Amendment right to a jury trial, (7) the Authority's ability to adjudicate private rights violates Article III, (8) HISA's elect-or-preempt provision violates the Tenth Amendment's guarantee that the federal government cannot command States to enforce federal law, and (9) HISA Rule 8400, which requires covered persons to consent to inspection as a condition of registration, violates the Fourth Amendment. Dkt. No. 142.

At the April 18, 2023 pretrial conference, the parties discussed with the Court the possibility that the claims might be narrowed in advance of trial. Dkt. No. 163 at 16-17. During the conference, the Gulf Coast plaintiffs indicated they were abandoning an argument related to the breed-expansion authority, which they called a subclaim of the private-nondelegation challenge. *Id.* at 13. The next day, the Gulf Coast plaintiffs filed an advisory that they would be willing to abandon "Claims 3-4 (public nondelegation), Claim 6 (Seventh Amendment), Claim 7 (Article III), and Claim 9 (Fourth Amendment)," provided the defendants would not hold that abandonment against them in another case or in an enforcement proceeding. Dkt. No. 161. The defendants filed a notice advising that they agreed to these conditions (Dkt. Nos. 164; 165), so the Gulf Coast plaintiffs have abandoned their third, fourth, sixth, seventh, and ninth claims.

Thus, the Gulf Coast plaintiffs' remaining claims are:

- An Article I, Section 2, Clause 2 Appointments Clause challenge (Claim 1)

- An Article II, Section 1 removal challenge (Claim 2)
- A private-nondelegation challenge (Claim 5),[7] and
- An anti-commandeering challenge under the Tenth Amendment (Claim 8).

ii. National Horsemen's

The Horsemen plaintiffs' Original Complaint (Dkt. No. 1) and First Amended Complaint (Dkt. No. 23)—which was the operative complaint when the Court previously heard the defendants' motions to dismiss and the plaintiffs' partial motion for summary judgment—included an intelligible-principle claim and an Appointments Clause claim, but those were recognized as abandoned in the Court's memorandum opinion and order (Dkt No. 92 at 60 ("The plaintiffs abandoned their Appointments Clause claim (Claim II) and public nondelegation claim (Claim III), so they are dismissed.")).

The Horsemen plaintiffs' live complaint (Dkt. No. 149) asserts that HISA violates the Constitution in three claims, none of which are abandoned:

- Delegation of legislative powers to a private entity in violation of Article I, Section 1,
- Delegation of executive powers to a private entity in violation of Article II, Section 1, and

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[7] The plaintiffs do not identify the constitutional source of this claim. Dkt. No. 142 at 45-49. The Fifth Circuit noted that "[c]ourts and commentators differ over the locus of the constitutional violation" (*Nat'l Horsemen's*, 53 F.4th at 881 n.23), but the parties do not dispute that such a violation is cognizable under the Constitution, so the Court does not reach this question.

- A violation of the Fifth Amendment's Due Process Clause—alleging that self-interested industry participants are given regulatory power over their competitors.

iii. The intervenor-plaintiffs

The claims in the intervenor-plaintiffs' operative complaint mirror those in the Horsemen plaintiffs' complaint. The intervenor-plaintiffs assert that HISA violates the constitution in two claims:

- Delegation of legislative and executive powers to a private entity under Article I, Section I and Article II, Section II, and
- Violation of the Due Process Clause because self-interested industry participants regulate their competitors.

K. Multiple motions are currently pending.

Pending before the Court is the Horsemen plaintiffs' Motion for a Preliminary Injunction (Dkt. No. 116). Also before the Court is the Gulf Coast plaintiffs' Motion for Summary Judgment (Dkt. No. 136) and Motion for a Preliminary Injunction (Dkt. No. 139); the Authority Defendants' Motion to Dismiss (Dkt. No. 137); and the FTC Defendants' Motion for Summary Judgment (Dkt. No. 138).

The Horsemen plaintiffs' Motion for Preliminary Injunction (Dkt. No. 116) asserts that HISA is facially unconstitutional on three bases: First, the Horsemen argue that "the Authority is not subordinate when exercising legislative powers." *Id.* at 8. They argue that the Authority is delegated with rulemaking authority, more so (according to the plaintiffs) than other permissible

private delegations. *Id.* at 8-9. They also argue that, post-amendment, HISA still requires the FTC to approve rules that are consistent with the statute. *Id.* at 9-12. The Horsemen argue that the FTC must be able to approve, disapprove, or modify a rule at the time the Authority proposes it. *Id.* at 11. And they argue that the FTC is subordinate to the Authority because the FTC cannot initiate rulemaking. *Id.* at 12-13. They say the FTC cannot issue interim final rules. *Id.* at 13. And they argue that the Authority has behaved inconsistently with the Act and the Rules by, for instance, extending effective dates of Rules without FTC permission. *Id.* at 13-14. They also argue that the Authority exercises taxing-and-spending powers by issuing assessments. *Id.* at 15-16.

Excluding the abandoned claims, the Gulf Coast plaintiffs' Motion for Summary Judgment and Motion for a Preliminary Injunction argue that HISA violates Article II's Appointments Clause because the Authority's directors are "Officers of the United States" under *Lucia v. SEC*, 138 S. Ct. 2044 (2018). No. 5:23-CV-077, Dkt. No. 36 at 28. They also argue that HISA violates Article II's Vesting Clause because the President cannot remove the Authority's directors. *Id.* at 34. They then argue that HISA violates the nondelegation doctrine because the Authority exercises legislative power in violation of the nondelegation doctrine (regardless of whether the Authority is a private or public entity). *Id.* at 37. The plaintiffs next argue that even if the Authority is a private entity, it violates the nondelegation doctrine. *Id.* at 45. Finally, the plaintiffs argue that HISA violates the anti-commandeering doctrine. No. 5:23-CV-077, Dkt. No. 36 at 57.

In addition to responding to the plaintiffs' arguments, the FTC defendants argue in their Motion to Dismiss (Dkt. No. 137) that the plaintiffs do not have standing to assert an anti-commandeering claim because they cannot enforce the rights of a state and Texas is not joined in that claim. No. 5:23-CV-077, Dkt. No. 46 at 27-30. In their motion for summary judgment, the Authority defendants argue that the plaintiffs' fail to prove their claims. Dkt. No. 137.

L. The Court received evidence and heard argument at trial.

On April 26, the Court held a trial on the merits consolidated with the hearings of the plaintiffs' motions for preliminary injunction. Dkt. No. 178. The plaintiffs admitted a number of exhibits, as well as witness testimony by declaration. Dkt. No. 179. The Horsemen admitted 57 exhibits, including matters of public record (e.g., HPX 14—HISA Racetrack Safety, 87 Fed. Reg. 435 (2022)); Authority guidance (e.g., HPX 26—Guidance of the Horseracing Integrity and Safety Authority (November 29, 2022)); and biographies of Authority board members (e.g., HPX 53-I—Biography of Jerry Black). The Horsemen also presented three witnesses by declaration, who testified regarding the economic and practical effects of HISA (HPXs 58; 59; 61). The Gulf Coast plaintiffs admitted exhibits in the public record, as well as the meeting minutes of the Authority's board of directors (GPXs 41-53) and the Authority's balance sheet (GPX 40). The Gulf Coast plaintiffs also presented three witnesses by declaration—all agents of the plaintiff entities—who testified regarding the effect of HISA on their businesses or association members. GPXs 29-32.

The FTC presented no evidence. The Authority presented seven witnesses, who are agents of the Authority, veterinarians, and horse trainers. DXs 1-8. Lisa Lazarus, the CEO of the Authority, testified regarding the benefits of HISA and the Authority on the horseracing industry. DXs 1-2. The Authority's CFO, Jim Gates, disputed the economic impact estimated by the Gulf Coast plaintiffs. DX 3. Sara Langsam (DX 4), Susan Stover (DX 7), and Mary Scollay (DX 8) are veterinarians who testified regarding the benefits, in their view, of the Authority's anti-doping and medication control (ADMC) program. And Mark Casse (DX 5) and Graham Motion (DX 6), horse trainers, testified about the positives of uniform regulation. After the parties closed, the Court heard oral argument and took its ruling under advisement.

2. Standard of Review

When challenging the facial constitutionality of a statute, a plaintiff must show "that no set of circumstances exists under which the [statute] would be valid." *United States v. McGinnis*, 956 F.3d 747, 752 (5th Cir. 2020) (alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). As a result, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745. "Facial challenges to the constitutionality of statutes should be granted sparingly and only as a last resort." *McGinnis*, 956 F.3d at 752-53 (citations omitted).

In addition to clearing this high bar, a plaintiff must also overcome the constitutional-doubt canon: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise

and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co*, 213 U.S. 366, 408 (1909); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247 (2012) ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt."). The canon is not without limits, but "[i]t is the Court's settled policy, however, to 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, 858 (1989). In light of this standard of review and the Court's findings of fact, the Court reaches the following conclusions of law detailed in Parts 3-7.

3. The plaintiffs' Article II claims fail because the Authority is a private entity.

The Gulf Coast plaintiffs allege two violations of Article II of the Constitution. First, they claim that HISA violates Article II's Appointments Clause by creating public officers—the Authority's directors—who were not appointed by the President with the advice and consent of the Senate. No. 5:23-CV-077, Dkt. No. 36 at 21. Second, they claim that HISA violates Article II's Vesting Clause because neither the President nor the FTC on his behalf may remove the Authority's directors, which Gulf Coast believes are executive officials. *Id.* at 34. The Gulf Coast plaintiffs concede that their arguments fail if the Authority is a private entity. No. 5:23-CV-077, Dkt. No. 61 at 9. More broadly, the plaintiffs recognize that their Article II arguments and private-nondelegation arguments are mutually exclusive. Dkt. No. 182 at 75.

For two reasons, the Court finds that the Authority is a private entity. First, in light of the Fifth Circuit's opinion, it is both the law of the case and foreclosed by binding precedent. Second, even if that were not the case, the Authority is a private entity under *Lebron* and other relevant precedent because it is not government created, and its directors are not government appointed. This matters because private entities are not subject to the constitutional requirements governing appointment and removal of officers, and governmental entities are not subject to private-nondelegation claims. Like the rest of Article II, "the Appointments Clause says nothing" about private entities. *Fin. Oversight & Mgmt. Bd. For P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020).

Despite the Gulf Coast plaintiffs' admission that finding the Authority to be private forecloses their arguments, they fail to squarely address the issue. Instead, they merely state that the Authority is different than other self-regulatory organizations (SROs) because it is not a voluntary association. No. 5:23-CV-077, Dkt. No. 61 at 14. But this argument ignores both the Fifth Circuit's opinion in this case and *Lebron*'s application here, which weighs heavily in favor of the defendants' argument that the Authority is private.

A. The Fifth Circuit's holding in this case rests necessarily on finding that the Authority is a private entity.

On appeal, the Fifth Circuit held that the Authority was a private entity that was improperly delegated government authority. *Nat'l Horsemen's*, 53 F.4th at 872. The Court explained that "HISA empowers a private entity called [the Authority]" to operate "under [FTC]

oversight." *Id.* The Court further explained that "[t]he end result is that Congress has given a private entity the last word over what rules govern our nation's thoroughbred horseracing industry." *Id.* This was a constitutional issue, the Court concluded, because "Congress defies[the nondelegation doctrine]by vesting government power in a private entity not accountable to the people . . . [C]ourts have distilled the principle that a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Id.* at 873, 881. This holding is necessarily predicated on the Authority being a private entity. Moreover, there is the simple fact that the Fifth Circuit called the Authority a private entity throughout its opinion. *Id.* at 872, 873, 881, 887 (the terms "private entity" and "private entities" appear a combined 31 times in the Fifth Circuit opinion).[8]

Of course, "[n]ot all text within a judicial decision serves as precedent." BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 44 (2016) (collecting cases). Only an appellate court's holding—those parts of the decision consisting of the "court's determination

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[8] Like the Fifth Circuit, other courts to consider challenges to the FTC-Authority structure have called the Authority a private entity. *Oklahoma v. United States*, 62 F.4th 221 *passim* (6th Cir. 2023) (calling the Authority "a private entity beyond public control" and referring to private entities more than 40 times); *Oklahoma v. United States*, No. 5:21-CV-104-JMH,2022 WL 1913419, at *11 (E.D. Ky.) ("Plaintiffs make several alternative arguments in case the Court finds the Authority to be a public entity, including that its structure violates the Appointments Clause, its officers are not properly removable under Article II and the separation of powers, and it violates the public nondelegation doctrine. However, as repeatedly stated herein, . . . the Authority is a private entity.").

of a matter of law pivotal to its decision"—are given the weight of binding precedent (and therefore, likewise become the law of that particular case). *Id.* (quoting Francis Bacon, "The Lord Keeper's Speech in the Exchequer" (1617), in 2 THE WORKS OF FRANCIS BACON 477, 478 (Basil Montagu ed., 1887)). While "commentators and judges don't uniformly define what counts as a holding," all agree that those propositions that are logically necessary to the outcome of the case are counted within the holding. *Id.* at 45; *see also United States v. Johnson*, 256 F.3d 895, 914-15 (9th Cir. 2001) (en banc) (discussing whether a holding is limited to that which is "necessary in some strict logical sense" or the broader "necessarily decided"); *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004) (defining a holding as a statement "necessary to the result or constitut[ing] an explication of the governing rules of law").

Additionally, in the Fifth Circuit, "[t]he law of the case doctrine states that absent manifest error, or an intervening change in the law, an appellate court's decision of a legal issue, whether explicitly or by necessary implication, establishes the law of the case and must be followed in all subsequent proceedings in the same case." *Carnival Leisure Indus., Ltd. v. Aubin*, 53 F.3d 716, 718-19 (5th Cir. 1995). Although the doctrine "does not include determination of all questions which were within the issues of the case and which, therefore, might have been decided," the doctrine "does mean that the duty of a lower court to follow what has been decided at an earlier stage of the case comprehends things decided by necessary implication as well as those decided explicitly." *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir. 1974) (cleaned up). Thus, an issue of law or fact decided on appeal may not be reex-

amined either by the district court on remand or by the appellate court on a subsequent appeal. *Todd Shipyards Corp. v. Auto Transp.,* 763 F.2d 745, 750 (5th Cir. 1985).

For example, in *Cooper Tire & Rubber Co. v. Farese*, the Fifth Circuit explained that a prior panel "held that the effective date of the separation agreement was ambiguous as a matter of law." 248 F. App'x 555, 560-61 (5th Cir. 2007). In doing so, "the prior panel necessarily had to consider whether the contract's apparent ambiguities could or should be resolved by applying the discretionary canons of construction." *Id.* As a result, the court explained that the contract's ambiguity became "the law of the case, and the question of whether the effective date of the separation agreement can be determined on summary judgment is now closed." *Id.*

Here, the Fifth Circuit's decision is necessarily predicated on a finding that the Authority is a private entity. The Fifth Circuit held that HISA violates the private-nondelegation doctrine because the statute delegates legislative and executive powers to a private entity. *Nat'l Horsemen's*, 53 F.4th at 873 (applying "the settled constitutional principle that forbids private entities from exercising unchecked government power"). The Fifth Circuit recognized that "HISA empowers a 'private, independent, self-regulatory, nonprofit corporation" —the Authority. *Id.* And the Fifth Circuit expressly disclaimed the idea that it was addressing the public-nondelegation doctrine. *Id.* at 883. The animating concern of the Fifth Circuit's opinion—the "obnoxious" delegation of governmental authority to unaccountable private actors—is meaningless if the entity to whom power is delegated is considered a public body. Thus,

the Fifth Circuit has already held—either expressly or, at the very least, by necessary implication—the Authority is a private entity, and the recent Congressional amendment does nothing to disturb that holding. Bound by both precedent and the law of the case, the Court must deny the Gulf Coast plaintiffs' Article II claims.

The plaintiffs insist that the Court is not bound by the Fifth Circuit's private-entity holding. At trial, counsel for the Gulf Coast plaintiffs argued that the Authority's private-entity status was an uncontested assumption of the Fifth Circuit. Dkt. No. 182 at 70-72. When asked, counsel indicated that *Lebron* was his best case on this point, citing the following language: "[W]e think that *Atchison*'s assumption of Amtrak's nongovernmental status (a point uncontested by the parties in that case . . .) does not bind us here." *Id.* at 68.

But the plaintiffs misread *Lebron*, which held that Amtrak is a public entity for purposes of the First Amendment. *Lebron*, 513 U.S. at 399. In *Lebron*, Amtrak argued that another case, *Atchison*, foreclosed the question of Amtrak's status as a private entity. *Id.* at 393-94. The Supreme Court identified two reasons it was not bound by *Atchison*, and neither was that *Atchison* rested on an uncontested assumption that Amtrak was a private entity. First, in *Atchison*, Amtrak's governmental status was irrelevant because in any event no contractual obligation was imposed. *Nat'l R.R. Passenger Corp. v. Atchison Topeka & S.F. RR. Co.*, 470 U.S. 451, 471 (1985) (stating that "neither the Act nor the Basic Agreements created a contract between railroads and the United States"); *Lebron*, 513 U.S. at 393 (explaining that "[t]he Court said it did not

have to consider th[e] question" of whether Amtrak was a governmental entity). Therefore, with no contractual obligation, the *Atchison* court "ha[d] no need to consider whether an allegation of a governmental breach of its own contract warrants application of the more rigorous standard of review that the railroads urge[d] [it] to apply," much less whether Amtrak was a governmental entity in the first place. *Atchison*, 470 U.S. at 470. Second, *Lebron* concluded that even if Amtrak were a governmental entity, there was an independent basis for the court's decision. *See Lebron*, 513 U.S. at 394. (concluding that "even if Amtrak *is* a Government entity," the statute claiming otherwise "suffices to disable that agency from incurring contractual obligations on behalf of the United States"—resolving the challenge). Thus, *Lebron* did not say that *Atchison* did not bind it because Amtrak's governmental status in that case was an uncontested assumption; rather, *Atchison* simply did not need to resolve that issue—either expressly or by implication.

Moreover, the Fifth Circuit's affirmative grant of relief in this case makes clear that it did not decide the case based on an uncontested assumption. Writing for the court, Judge Duncan emphasized that "Congress defies [the nondelegation doctrine] by vesting government power in a private entity." *Nat'l Horsemen's*, 53 F.4th at 872-73. The Fifth Circuit identified private-entity status as an element—a necessary condition—of a private-nondelegation claim. *See id.* Thus, unlike where *Lebron* distinguished *Atchison*—which denied relief—here the opinion in question granted relief and, therefore, necessarily decided certain issues, including the Authority's status as a private entity. And not only was that decision made in this same case, invoking the

law-of-the-case doctrine, it was made by a superior court that precedentially binds the Court.

Finally, while the Supreme Court may be able to consider the reach of its own precedent based on whether a case had "the benefit of full briefing or argument on the issue," *McCutcheon v. Fed. Elec. Comm'n*, 572 U.S. 185, 202-03 (2014), the district court is in a different position. It is accepted that "[a]n inferior court cannot decide adversely to a decision of [a superior court] and send the case up to that court again upon the ground that in the former decision of the court . . . certain points were not sufficiently argued." Basil Jones, *Stare Decisis*, *in* 26 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 158, 170 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1904).

Thus, the Court is bound by the Fifth Circuit's holding that the Authority is a private entity, and that holding forecloses the Gulf Coast plaintiffs' appointments and removal arguments. But even if the Fifth Circuit had never addressed the issue, the Court independently finds that the Authority is a private entity.

B. Even if the Fifth Circuit's opinion only assumed the Authority's status as a private entity, the Court finds that the Authority is not a government actor.

The Court now addresses the question that it previously assumed without deciding: whether the Authority is a private entity. *Nat'l Horsemen's Benevolent and Protective Ass'n*, 596 F. Supp. 3d at 699. Before the Fifth Circuit's remand, the Court assumed the Authority's private-entity status, "respecting the contours of the claims before it" but noting the Authority's

"unique genesis." *Id.* at 699 n.7. The Court now finds that the Authority is a private entity because it is neither government-created nor government-appointed.

"[A]ctions of private entities can sometimes be regarded as governmental action for constitutional purposes." *Lebron*, 513 U.S. at 378 (collecting cases); *see also Free Enter. Fund v. Pub. Co. Accounting Bd.*, 561 U.S. 477, 485-86 (2010) (citing to *Lebron* for purposes of determining whether another nonprofit corporation was "'part of the government' for constitutional purposes"). Even the Supreme Court has admitted that the "cases deciding when private action might be deemed that of the state have not been a model of consistency." *Lebron*, 513 U.S. at 378 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1972) (O'Connor, J., dissenting)). But one proposition that is clear is that corporations become more than a private entity when created or "selected by Government to accomplish purely governmental purposes." *Id.* at 395 (quoting *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946)).

Lebron explained that to determine whether the Authority is a private entity for constitutional purposes, the Court need only look to other "corporations created and participated in by the United States for the achievement of governmental objectives." *Id.* at 386. The first such corporation was the Bank of the United States, created in 1791. *Id.* And the federal government has had close ties with specially created private corporations throughout our nation's history, chartering or buying outright banks, railroad companies, and grain corporations. *Id.* at 387-88; *e.g.*, *Lebron*, 513 U.S. 374 (1995) (Amtrak); *McGinn, Smith & Co., Inc. v. FINRA*, 786 F. Supp. 2d 139, 147 (D.D.C. 2011) (FINRA);

McCulloch v. Maryland, 4 Wheat. 316 (1819) (second Bank of the United States); *Osborn v. Bank of United States*, 9 Wheat. 738 (1824) (same).

This case law teaches that to be considered a government entity for constitutional purposes, a corporation must be created by the government. *Lebron*, 513 U.S. at 394. In *Lebron*, for example, the Supreme Court determined that Amtrak is a government entity "for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.* The Supreme Court found it significant that "Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals." *Id.* at 397. The Supreme Court also noted that six of the board's nine directors were named by the President himself and that the government's influence over Amtrak was not temporary. Instead, Amtrak was "established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees." *Id.* at 398.

Courts continue to emphasize the requirement that a corporation is only "part of the government" if it is created by special law. "A corporation is part of the government for constitutional purposes when (1) the government creates the corporation by special law, (2) for the furtherance of governmental objectives, and (3) retains for itself permanent authority to appoint a majority of the directors of that corporation." *Herron v. Fannie Mae*, 861 F.3d 160, 167 (D.C. Cir. 2017) (cleaned up). And in response to a challenge to Congress's restrictions on removal of Fair Housing Finance Agency officers, the Supreme Court rejected an argument that an agency can be considered a private entity when "its

authority stems from a special statute." *Collins v. Yellen*, 141 S. Ct. 1761, 1785 (2021).

Unlike Amtrak and the FHFA, the Authority is a private entity. First, the Authority is a private corporation incorporated under Delaware law. It was not created by the government through special law. No. 5:23-CV-077, Dkt. No. 47 at 5-10. Moreover, the government has no say over the appointment of the Authority's directors—that's the point of the Gulf Coast plaintiffs' appointments argument. *See also* 15 U.S.C. § 3052(c)-(d) (establishing that appointment of the Authority's directors is to be controlled by the corporate bylaws and the initial nominating committee).

Like FINRA, the Authority is a private entity. *Nat'l Horsemen's*, 53 F.4th at 887. Courts have determined that FINRA, like its predecessor NASD, is a private entity. *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999) ("The NASD is a private actor . . . It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee."); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 699 n.5 (3d Cir. 1979) ("NASD is not a state agency."); *see also United States v. Solomon*, 509 F.2d 863, 867 (2d Cir. 1975) (holding that the New York Stock Exchange is not an agency). To be sure, FINRA and the Authority were created in anticipation of aiding a federal agency, but that alone is insufficient to render it part of the government. *Nat'l Horsemen's Benevolent & Protective Ass'n*, 596 F. Supp. 3d at 696 ("Had the Authority been created by Congress, it may have been subject to certain Article II requirements. . . . But because

Congress 'recognized' it . . . the Authority avoids some of the strictures of governmental entities, just as other private, self-regulatory organizations that operate nationwide do."). Ultimately, because the Authority "is a private corporation" that "receives no federal or state funding," whose "creation was not mandated by statute," and whose directors, executives, and employees are not "government appoint[ed]," the Authority is a private entity. *See Desiderio*, 191 F.3d at 206.

Nor does *Cherry Cotton Mills* change the fact that the Authority is a private entity under relevant precedent. The plaintiffs neither cite nor rely on *Cherry Cotton Mills*, but because *Lebron* quotes its reference to corporations "selected by Government," the Court notes here why that case is distinguishable. 327 U.S. at 539. In *Cherry Cotton Mills*, the Supreme Court held that a debt owed to the Reconstruction Finance Corporation was a debt owed to the federal government, which allowed the debt to be set off against a tax refund. *Id.* But *Cherry Cotton Mills* does not control this case because the RFC was clearly government-created and government-controlled. The RFC was created by special law. 47 Stat. 5 ("That there be, and is hereby, created a body corporate with the name 'Reconstruction Finance Corporation.'"). Its directors were appointed by the President by and with the advice and consent of the Senate. *Cherry Cotton Mills*, 327 U.S. at 539. "[A]ll of its money c[ame] from the Government; its profits if any [went] to the Government; its losses the Government must bear." *Id.* Thus, *Cherry Cotton Mills* is inapposite, and its statement that corporations "selected by" government are equivalent to corporations "created by" government is dicta. *See id.*

At trial, counsel for the Gulf Coast plaintiffs indicated that the *Lebron* standard was inapplicable in cases involving the power to appoint and remove federal officials. Dkt. No. 182 at 83. Instead, the plaintiffs argue that *Lucia* sets forth the standard for determining whether the Authority is subject to the Appointments Clause. *E.g.*, No. 5:23-CV-077, Dkt. No. 51 at 10 (citing *Lucia* for the proposition that "[t]he Authority's Directors . . . are officers subject to the Appointments Clause"). But *Lucia* does not resolve an Appointments Clause question where the challenged entity is private. The Supreme Court in *Lucia* noted that *Freytag*, a case involving special trial judges of the United States Tax Court, "necessarily decide[d] th[e] case." 138 S. Ct. at 2052. Thus, both *Lucia* and the case on which it relied resolved Appointments Clause challenges involving individuals who were clearly federal employees. There was never any possibility that the parties at issue were private employees from outside the government. And in any event, "[t]he sole question" in *Lucia* was "whether the Commission's ALJs are 'Officers of the United States' or simply employees of the Federal Government." *Id.* at 2051. Thus, *Lucia* does not answer the question presented by the parties.

Gulf Coast's argument is further undermined by the fact that other courts apply *Lebron*—not *Lucia*—in cases involving private-nondelegation or Appointments Clause challenges. For instance, the Fourth Circuit rejected an Appointments Clause challenge to the Metropolitan Washington Airports Authority, an interstate compact, after finding that it was not a public entity under the *Lebron* standard. *Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152, 159 (4th Cir. 2018) ("MWAA does not satisfy either prong [of the *Lebron* test]. In the

first place, MWAA was not created by the federal government. . . . MWAA is not controlled by the federal government . . . [b]ecause the[] [federal] appointees are a distinct minority of the Board."); *Free Enter. Fund*, 561 U.S. at 485-86 (relying on *Lebron* in stating that the Public Company Accounting Oversight Board is "part of the government" for constitutional purposes in an Appointments Clause challenge) (citing *Lebron*, 513 U.S. at 397).

Finally, while *Lucia* would be applicable if the Court found that the Authority were part of the government, the plaintiffs provide no argument or authority explaining why a private entity should be considered part of the government for purposes of the Appointments Clause. To the contrary, the current state of jurisprudential affairs indicates that the Authority's directors are not "Officers of the United States" within the Constitution's original public meaning. "[T]he phrase 'of the United States' limit[s] the Appointments Clause to 'federal' officers." *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1666 (Thomas, J., concurring in the judgment). "'Officers of the United States' was probably not a term of art that the Constitution used to signify some special type of official. Based on how the Founders used it and similar terms, the phrase 'of the United States' was merely a synonym for 'federal.'" *Lucia*, 138 S. Ct. at 2056 (Thomas, J., with whom Gorsuch, J. joins, concurring); *see also* Jennifer Mascott, *Who are "Officers of the United States"?*, 70 STAN. L. REV. 443, 531 (2018) (explaining that the First Congress provided that "individuals involved with [the] operation" of the national bank, such as the "bank directors," "were not appointed in accordance with Article II's requirements"; and that "the probable explanation is that Congress saw the bank as a

public-private nongovernmental entity"). True, neither the Fifth Circuit nor the Supreme Court has explained in detail the meaning of "Officers of the United States," but the currently available precedent suggests that the Authority's directors and committee members do not meet that definition. Thus, *Lebron*—rather than *Lucia*—supplies the appropriate standard, and the plaintiffs fail to prove their Article II appointments and removal claims.

4. As amended, HISA does not create an unconstitutional delegation of governmental power to a private entity.

A. The Constitution requires a private entity wielding government power to function subordinately to a federal agency's authority and surveillance.

A pair of 80-year-old cases—*Carter Coal* (1936) and *Adkins* (1940)—lay the foundation for our modern nondelegation doctrine: "a private entity may wield government power only if it functions subordinately to an agency with authority and surveillance over it." *Nat'l Horsemen's*, 53 F.4th at 881 (internal marks omitted). In *Carter Coal*, the Supreme Court called private nondelegation "legislative delegation in its most obnoxious form" and held that it was "so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." *Carter v. Carter Coal*, 298 U.S. 238, 311 (1936). A few years later, however, the Supreme Court clarified in *Adkins* that an agency can rely on a private entity as long as the private entity "function[s] subordinately to the" agency, which has "author-

ity and surveillance" over the private entity. *Adkins*, 310 U.S. at 399.

From these twin holdings spring our modern nondelegation jurisprudence, cemented in recent cases like the *Amtrak* line of cases,[9] *Texas v. Rettig*,[10] *National Horsemen's*, and *Oklahoma v. United States*. In *Texas v. Rettig*, the Fifth Circuit held that an agency may subdelegate an accounting task to a private entity where the agency "reviewed and accepted," "ha[d] the ultimate authority to approve," and "superintended . . . in every respect" the private-entity determination. 987 F.3d at 533. Before the Supreme Court held that Amtrak was a public entity in *Amtrak II*, the D.C. Circuit concluded that Amtrak was a private entity that was delegated too much power. *Amtrak I*, 721 F.3d at 672, *rev'd on other grounds by Amtrak II*, 575 U.S. 43. Amtrak was impermissibly delegated government authority because, unlike the agency in *Adkins*, the Federal Railroad Administration did not have the authority

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[9] In *Amtrak I*, the D.C. Circuit struck down Section 207 of the Passenger Rail Investment and Improvement Act (PRIIA) because it unlawfully delegated "regulatory power to a private entity." 721 F.3d 666, 668 (D.C. Cir. 2013), *rev'd on other ground by Dep't of Transp. v. Ass'n of Am. R.R.* (*Amtrak II*), 575 U.S. 43 (2015). While not disturbing the D.C. Circuit's private-nondelegation analysis, the Supreme Court vacated *Amtrak I*, holding that Amtrak was a governmental—not private—entity. *Amtrak II*, 575 U.S. at 55. On remand, the D.C. Circuit held that Section 207 of PRIIA violated the Due Process Clause because it gave Amtrak, a self-interested entity with a statutorily required profit-seeking motive, regulatory power over its competitors. *Amtrak III*, 821 F.3d 19, 27-34 (D.C. Cir. 2016).

[10] 987 F.3d 518, 533 (5th Cir. 2021).

to "unilaterally change regulations proposed to it." *Amtrak I*, 721 F.3d at 671.

In *National Horsemen's*, the Fifth Circuit surveyed this jurisprudence, noting that the private-nondelegation doctrine is rooted in "the government's promised accountability to the people." 53 F.4th at 880. The Fifth Circuit also reconciled this general principle with *Carter Coal* and *Adkins*, which together allow a private entity to "wield government power" so long as the private entity "'functions subordinately' to an agency with 'authority and surveillance' over it." *Id.* at 881. Thus, the court explained it is within constitutional bounds for Congress to "formalize the role of private parties in proposing regulations so long as that role is merely 'as an aid' to a government agency that retains the discretion to 'approve[ ], disapprove[ ], or modif[y]' them." *Id.* at 881 (quoting *Amtrak I*, 721 F.3d at 671).

B. As amended, HISA functions subordinately to the FTC and addresses the Fifth Circuit's concerns.

The Court finds that the congressional amendment to § 3053(e) cured the constitutional issues identified by the Fifth Circuit. First, the Fifth Circuit identified that HISA improperly granted the Authority "sweeping rulemaking power," but the FTC's new power to "abrogate, add to, and modify" the "rules of the Authority" closed the necessary gap in the relative rulemaking power between the FTC and the Authority. 15 U.S.C. § 3052(e). Second, the Fifth Circuit noted that the FTC's review of Authority rulemaking was limited to so-called consistency review, which gave the Authority the final word on policy. But because the FTC now has the right to make its own policy choices, the amendment remedied that concern. Finally, the Fifth Circuit noted that the FTC

had less control over the Authority than the SEC does over FINRA. The congressional amendment cured these issues as well.

i. Although the Authority retains its generous grant of authority to craft and propose rules, the amended statute significantly broadens the FTC's rulemaking power.

The parties disagree on the correct reading of § 3053(e) as amended. The amended statute says that the FTC can "abrogate, add to, and modify" Authority rules. Does this mean, as the plaintiffs assert, that the FTC can abrogate, add to, and modify only the *content* of existing rules? *See* Dkt. No. 145 at 6 (claiming that "Congress granted only the power to modify, add to, or abrogate existing rules, not to issue new rules"). The defendants, in contrast, believe the amendment allows the FTC to "modify, add to, or abrogate" the entire body of Authority rules, meaning the FTC can promulgate new rules, as well as modify or abrogate existing rules. *E.g.*, Dkt. No. 128-1 at 18-19; Dkt. No. 129 at 10. Based on a plain reading of the statute and the canon of constitutional avoidance—and confirmed by the only other court to interpret this amended subsection—the Court concludes that the FTC has the power to "abrogate, add to, or modify" the body of Authority rules, rather than a single, proposed rule. In other words, the FTC can create new substantive rules, so it is the FTC that now has "sweeping rulemaking authority." *See Nat'l Horsemen's*, 53 F.4th at 882. If in practice, the FTC is derelict in performing its oversight, as-applied challenges may be brought. But this facial challenge must fail.

A plain reading of the statute confirms that the FTC can "abrogate, add to, or modify" the entire body of the

Authority rules. Congress's amendment included a single, yet significant, change: Section 3053(e), which previously gave the FTC the ability solely to issue interim final rules, was amended to read:

> 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. § 3053(e). As a result, the FTC now has the power to "add to . . . the rules of the Authority." *Id.* When the FTC promulgates a new rule, it "add[s] to" the rules of the Authority. Thus, a plain, fair reading of this section confirms that the FTC can initiate rulemaking.

Even if the statute's language were not clear, three additional reasons support this plain reading: the surplusage canon, the canon of avoidance, and the Sixth Circuit's persuasive opinion. First, the surplusage canon confirms that the FTC can initiate rulemaking. Under the plaintiffs' reading, only existing rules can be "abrogate[d], add[ed] to, [or] modif[ied]." But if this were the case, why did Congress include both "modify" and "add to" in the statute? If the FTC adds language to a rule promulgated under HISA, clearly it has modified the rule. *See* MODIFY, WEBSTER'S THIRD INT'L DICTIONARY UNABRIDGED (2002) (defining Modify as to "make a basic or important change in: alter"). Thus, the plaintiffs' proposed reading of the statute—prohibiting the

FTC from initiating rulemaking—would render "add to" a nullity. And it is a "cardinal principle of statutory construction" that the Court ought to give effect to every word of a statute. *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *see also Wash. Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("As early as in Bacon's Abridgement, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'").

Second, the canon of constitutional avoidance favors the defendants' reading of the statute. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail. . . . " *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (Scalia, J.). Here, the Court agrees with the defendants' reading of § 3053(e), which demonstrates HISA's constitutionality.[11] The Fifth Circuit previously noted that the Authority was not subordinate to the FTC because it was the Authority who wrote the rules. *Nat'l Horsemen's*, 53 F.4th at 883. And the Fifth Circuit explained that the FTC's authority to issue temporary rules "on a break-glass-in-case-of-an-emergency basis" was not enough to subordinate the Authority to the FTC. *Id.* That being the case, the Court finds that

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[11] For the reasons previously stated, the Court finds implausible the plaintiffs' reading of § 3053(e). But even if the Court found that the plaintiff's reading were plausible, the canon of avoidance instructs that the Court should adopt the defendants' reading, which is also plausible and does not call into question the statute's constitutionality.

the proper reading of the statute gives the FTC the authority to initiate rulemaking because Congress does not ordinarily write statutes to be unconstitutional, particularly in cases of an amendment in direct response to a successful constitutional challenge.

Throughout its persuasive opinion, the Sixth Circuit —the only court to interpret the amended HISA's constitutionality—confirms this reading. The court explained that "[t]he FTC now may create new rules." *Oklahoma*, 62 F.4th at 230. It noted expressly that the FTC could decide to act either "by abrogating one of the Horseracing Authority's rules or introducing its own." *Id.* Leaving no doubt, it described the "FTC's new discretion to adopt and modify rules" and its "complete authority to initiate new rules." *Id.* at 232. And while the plaintiffs may disagree with the Sixth Circuit's reading of the amended statute by pointing to the "nearly identical" language of the Maloney Act (Dkt. No. 116 at 12), the textual differences in the two subsections reveal that "add to" in HISA gives the FTC the power to initiate rulemaking. The Maloney Act gives the SEC the power to "abrogate, add to, and delete from" proposed rules submitted by FINRA. 15 U.S.C. §78S(c). While the language is similar, Congress's choice to use "modify" rather than "delete from" reveals that the FTC has the power to initiate rules. The term "modify" encompasses the power to both "add to" and "delete from" the content of rules. After all, to modify is to change, and regulations are only changed by adding to or deleting from the statutory text. But HISA's grant of power to both "add to" and "modify" ensures the FTC can initiate rulemaking.

Finally, a recent example confirms the FTC's power to create new rules. The Court previously delayed the effective date of the ADMC Rule to May 1, 2023. Dkt. No. 134. In response to "substantial uncertainty regarding the criteria and procedures under which anti-doping and medication control protocols will be implemented as the thoroughbred horseracing industry nears the Triple Crown events," the FTC issued a new, substantive rule delaying the effective date of the ADMC rule to May 22, 2023. Dkt. No. 180 at 6-7. Relying on its § 3053(e) authority, the FTC noted that it has the authority to initiate rulemaking, including in emergency circumstances. *Id.* at 8 ("Here, the Commission finds, for good cause, that notice and comment is impracticable and unnecessary with respect to the final rule."). This example is just one additional datapoint of the FTC's rulemaking authority in practice.

In sum, the only fair reading of the statute is that the FTC can create new rules as necessary to accomplish its policy preferences. This is confirmed by the canons of surplusage and constitutional avoidance, as well as the only court to address the issue. It is no secret that Congress amended HISA in response to the Fifth Circuit's opinion. For Congress to amend the law without addressing one of the critical issues identified by the Fifth Circuit would be, to say the least, unusual.

ii. The FTC is no longer limited to reviewing the Authority's proposed rules for consistency with HISA; to the contrary, Congress expressly empowered it to review and change policy choices.

The second constitutional flaw identified by the Fifth Circuit was that, prior to the congressional amendment, the FTC was limited to consistency review and "lack[ed] the power to review the Authority's policy choices." *Nat'l Horsemen's*, 53 F.4th at 884. But the amendment changes this. Through its rulemaking authority explained above, the FTC can now exercise its own policy choices. And while it is true that the FTC is limited to reviewing the Authority's proposed rules for consistency with HISA, this does not change that the Authority is subordinate to the FTC for three reasons. First, the FTC's ability to abrogate, add to, and modify rules nullifies any material concern over consistency review. Second, the FTC's power to promulgate new rules according to its own policy preferences transforms consistency review from a "high-altitude" standard of review into a substantive analysis that includes rejection or modification of the proposals. Finally, the FTC can cure any urgent problems that result from a delay between its consistency review and typical rulemaking by initiating its own expedited rulemaking, as it has already done.

At the outset, the Court notes that the congressional amendment now gives the FTC the power to write rules according to its policy preferences. The amended statute gives the FTC the power to abrogate, add to, and modify the rules of the Authority "as the Commission finds necessary or appropriate to ensure the fair admin-

istration 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. § 3053(e). This final phrase—"or otherwise in furtherance of the purposes of this chapter"—gives the FTC the clear authority to promulgate rules according to its own policy choices. As Chief Judge Sutton phrased it, "[t]he final catchall indicates that § 3053(e) spans the Horseracing Authority's jurisdiction." *Oklahoma*, 62 F.4th at 230. And while the plaintiffs apparently do not dispute this, they claim that the front-end consistency review still poses an issue of constitutional magnitude because "the legislative rules of the Authority govern for at least some period of time." No. 5:23-CV-077, Dkt. No. 61 at 31.

Again, however, the FTC's front-end consistency review poses no constitutional problem because the FTC can abrogate, add to, and modify rules. As an initial matter, the plaintiffs identify no authority—on-point, analogous, or otherwise—to support their argument that short-term applicability of a rule approved under consistency review creates a constitutional defect. Dkt. No. 182 at 42-43 (the Court: "What is your authority, your legal authority for the fact that the delay . . . render[s] [HISA] unconstitutional? . . . I'm genuinely asking, is this just a novel argument or novel scenario that you're responding to and so, Judge, I can't point you to a case? . . . Mr. Suhr: Yeah, I think that's right"). But more critical—and fatal to the plaintiffs' arguments regarding consistency review—is the Fifth Circuit's view of the SEC's consistency review of FINRA rules: "[W]e find irrelevant Appellee's argument that the SEC engages in the same 'consistency'

review as the FTC . . . This again overlooks the separate provision empowering the SEC to 'abrogate, add to, and delete from' FINRA rules 'as the [SEC] deems necessary or appropriate." *Nat'l Horsemen's*, 53 F.4th at 888 n.35. Thus, as the Fifth Circuit previously indicated, it is "irrelevant" that the FTC conducts an initial review for consistency with the statute and rules, given that the FTC can later abrogate, add to, and modify Authority rules. *See id.*

Moreover, the FTC's power to initiate rulemaking according to its policy preferences gives consistency review teeth. As the FTC continues to promulgate new rules or modify existing rules according to its policy preferences, its consistency review will transform from "high-altitude oversight" to substantive analysis to ensure the proposed rule is consistent with the FTC's view of the proper national horseracing policy. And if the plaintiffs are concerned that the timing gap subjects the industry to regulation by a private entity in the meanwhile, the FTC's ability to initiate rulemaking on an expedited basis, as well as its ability to promulgate rules concerning the effective date of rules approved under consistency review, resolves the issue. The plaintiffs are under the impression that "for the FTC to do a rulemaking takes months to years." Dkt. No. 182 at 43. But as explained above, the FTC has already exercised its emergency rulemaking powers to, for instance, change the effective date of a rule. *See* Dkt. No. 180. Thus, the Court finds that front-end consistency review poses no constitutional problem, particularly because the Fifth Circuit has already identified the ability to modify rules as the key distinction.

iii. Heeding this Court's call, Congress amended HISA to expressly mirror the SEC-FINRA relationship.

In holding HISA unconstitutional, the Fifth Circuit looked to the SEC-FINRA model and noted that "the FTC has less supervisory power than the SEC." *Nat'l Horsemen's*, 53 F.4th at 887. But as amended, this is no longer the case. Congress noted the "key distinction" identified by the Fifth Circuit—that the SEC can "abrogate, add to, and delete from" FINRA rules. *Id.* And by giving the FTC a similar, if not greater, rulemaking authority, Congress eliminated the only difference that "meaningfully distinguishe[d] the SEC-FINRA relationship from the FTC-Authority relationship." *Id.* In this way, Congress considered the reasoning of the Fifth Circuit opinion and adjusted accordingly. Dkt. No. 182 at 110. No longer is the FTC limited to "recommend[ing] modifications"; now the FTC, like the SEC, "has the final word on the substance of the rules." *Nat'l Horsemen's*, 53 F.4th at 887-88. And the Authority is now on equal footing to FINRA in its role "in aid of" the federal agency that retains ultimate rulemaking authority. *Id.*

iv. Combined, these changes allow HISA to survive a facial challenge.

Congress answered the call—identifying the three constitutional concerns that led the Fifth Circuit to hold HISA unconstitutional and rectifying each with the amendment to § 3053(e). The FTC can now initiate rulemaking according to its own policy preferences. And while it still conducts an initial consistency review of the Authority's proposed rules, the FTC can abrogate, add to, or modify those rules by following the typ-

ical agency rulemaking procedure—or step in to resolve emergency situations by exercising its good-cause emergency rulemaking authority. And post-amendment, the FTC has at least as much supervisory control over the Authority as the SEC does FINRA. All told, "a productive dialogue occurred in this instance," as the Fifth Circuit ably did the work to identify the constitutional flaws in HISA while Congress quickly worked to correct them. *Oklahoma*, 62 F.4th at 225.

C. The only court to address the issue post-amendment agrees.

Parallel challenges to HISA have been brought throughout the country. *See, e.g.*, *Louisiana v. Horseracing Integrity & Safety Authority, Inc.*, 2020 WL 17074823 (5th Cir. Nov. 18, 2022). One such challenge was brought in the Eastern District of Kentucky and appealed to the Sixth Circuit. *Oklahoma*, 62 F.4th 221. But before the court could resolve the case, Congress amended HISA. As noted above, Chief Judge Sutton wrote for the panel and explained in detail how the congressional amendment cured the defects identified by the Fifth Circuit. *Id.* at 236. Notably, the Sixth Circuit held the amended HISA constitutional not because it disagreed with the Fifth Circuit's private-nondelegation jurisprudence but because it agreed. *Id.* at 230.[12] Like the Court does today, the Sixth Circuit analyzed the Fifth Circuit's opinion and noted the one-to-one

[12] In a separate concurrence, Judge Cole explained that he agreed with the amended Act's constitutionality but also would have held HISA constitutional before the amendment. *Id.* at 236 (Cole, J., concurring).

match between the issues identified in that opinion and the solutions passed by Congress. *Id.* at 229-32.

D. Plaintiffs' remaining assertions of unconstitutionality fall short.

In addition to the arguments rejected above, the plaintiffs wage an assortment of other post-amendment challenges. First, in three sentences, the plaintiffs rely on the fact that the FTC can no longer issue interim final rules. Dkt. No. 116 at 13. The plaintiffs understand "[t]he FTC [to] have less power today . . . because it can no longer promulgate an interim final rule." *Id.* But as the defendants point out (Dkt. No. 128-1 at 22-23), the FTC can now issue rules without delay under the APA's good-cause standard. *Compare* 15 U.S.C. § 3053(e) (conferring to the FTC rulemaking authority "in accordance with section 553 of Title 5"), *with* 5 U.S.C. § 553(b)(B) (allowing an agency to forego notice requirements where "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"); *see also United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011) (stating that notice and comment "may be bypassed if 'good cause' exists"). Thus, the plaintiffs do not need to "hop[e] no emergencies happen in horseracing" because the FTC will be able to respond with the same emergency toolkit afforded to all federal agencies. Dkt. No. 116 at 13.

Next the plaintiffs argue that the FTC cannot police the Authority if it does not follow the rules. Dkt. No. 116 at 13. But as previously discussed, "[t][he FTC now may create new rules." *Oklahoma*, 62 F.4th at 230. The FTC's new power to surveille and supervise includes the ultimate authority to control "the Horseracing Author-

ity's implementation of th[e] rules." *Id.* Section 3053(e) gives HISA "the tools to step in" (*id.* at 231) should the Authority choose to "adopt[] policies which in practice amend the Act and the rules" (Dkt. No. 116 at 13). The plaintiffs cite a number of examples in support of their argument that the Authority has allegedly rewritten HISA and the rules, but these challenges are better asserted through as-applied challenges, which the plaintiffs have omitted from this lawsuit. *See* Dkt. No. 149 (bringing only facial challenges).

The plaintiffs next claim that the FTC has no control over fees, spending, or the Authority's budget. Dkt. No. 116 at 15-16. But this is not true. On fees—the Authority "shall" report to the FTC any "proposed increase" in fees. 15 U.S.C. § 3052(f)(1)(C)(iv)(I). The proposed increase must then undergo a notice-and-comment period. § 3052(f)(1)(C)(iv)(II). And FTC rules govern how fees are determined and allocated. §§ 3052(f)(2)(B), (3)(B)-(C), 3053(a)(11). On budget and spending—the FTC has interpreted HISA to require the Authority to propose its annual budget for FTC approval. Procedures for Oversight of the Horseracing Integrity and Safety Authority's Annual Budget, 88 Fed. Reg. 18034 (March 27, 2023). Finally, the FTC retains the power to issue rules "as necessary or appropriate" to govern the Authority's assessment and allocation of fees. 15 U.S.C. § 3053(e).

Additionally, the Gulf Coast plaintiffs' reliance on *A.L.A. Schechter Poultry Corp. v. United States* is misplaced. 295 U.S. 495, 537 (1935). They insist that this 1935 Supreme Court case, on its own, controls the outcome of the private-nondelegation analysis. No. 5:23-CV-077, Dkt. No. 58 at 9-10. The plaintiffs believe

their reliance on *Schechter Poultry* to be a case-winning argument, noting that neither the Fifth nor Sixth Circuit has addressed the case and claiming that the "[d]efendants ignore *Schechter Poultry* because they have no answer for it." *Id.* While *Schechter Poultry* does hold that certain delegations to private industry groups are unconstitutional (295 U.S. at 551), it does not control this case for one simple reason—the fact here are nowhere near as extreme as in *Schechter Poultry*. The Third Circuit recognized that *Schechter Poultry* is "aberrational" and is one of just two instances of the Supreme Court departing from its "generous recognition of congressional power to delegate rulemaking authority." *United States v. Frank*, 864 F.2d 992, 1010 (3d Cir. 1988); *see also Milk Indus. Found. v. Glickman*, 949 F. Supp. 882, 889 (D.D.C. 1996) (stating that *Schechter Poultry* must be understood in its "unique historical context" and describing the relevant statute as "the most sweeping congressional delegation of all time"). The statute in question in *Schechter Poultry*, the National Industrial Recovery Act, gave the President "blanket authority . . . to prescribe and approve mandatory 'codes of fair competition' for various industries without additional congressional approval." *South Dakota v. Dep't of Interior*, 423 F.3d 790, 795 (8th Cir. 2005). *Schechter Poultry* is inapposite because it involves the most extreme example of delegation in this nation's history, and it precedes *Carter Coal* and *Adkins*, which serve as the foundation of our modern nondelegation jurisprudence. *See Nat'l Horsemen's*, 83 F.4th at 880 (explaining that *Carter Coal* and *Adkins* are "key to applying the [nondelegation] doctrine).

Finally, at trial, the plaintiffs argued that because an agency must exercise "pervasive surveillance and con-

trol" over regulation, HISA must fail. Dkt. No. 182 at 21-22 ("[T]his case comes down to four words: pervasive surveillance and control."). But as explained above and by the Fifth and Sixth Circuits, binding precedent makes clear that the FTC's new power to "abrogate, add to, and modify the rules of the Authority" amounts to pervasive surveillance and control. Perhaps the plaintiffs disagree with that precedent, but the Court is bound by its role as an inferior court to faithfully apply it. Nevertheless, at trial, plaintiffs took the position that no version of a HISA-empowered Authority could ever pass constitutional muster because, in their view, the SEC-FINRA model is likewise unconstitutional. Dkt. No. 182 at 31-33, 37-38. When the Court asked what else Congress could have done to bring HISA in bounds, plaintiffs explained that only a newly created federal agency could properly do this work. *Id.* at 37-38. The plaintiffs believe "the entire model [allowing private entities to have any role] is flawed, because, as the Fifth Circuit said, people outside government can't wield government power." *Id.* at 39. But that is not what the Fifth Circuit said. To the contrary, the panel explained that "a private entity may wield government power" as long as it "'functions subordinately' to an agency with 'authority and surveillance' over it." *Nat'l Horsemen's*, 53 F. 4th at 871. Thus, regardless of the equities of the plaintiffs' argument, precedent teaches that pervasive surveillance and control is satisfied by HISA as amended, and this Court is bound by precedent.

5. The plaintiffs' executive-delegation argument has already been resolved.

The plaintiffs also bring a claim under Article II, claiming that the executive power has been improperly delegated. The plaintiffs claim that the Authority is not subordinate because: (1) the FTC does not have meaningful oversight of investigations, (2) the FTC cannot review the Authority's prosecutorial discretion, (3) the FTC cannot prevent the Authority from seeking a temporary restraining order or preliminary injunction, (4) the FTC does not have oversight of the Authority's programs, (5) the FTC does not have oversight of the Authority's leadership, and (6) the FTC lacks the power to derecognize the Authority. In response, the defendants note that several of the complained-of activities are nongovernmental—such as hiring and contracting. Dkt. No. 128-1 at 24-25. And the defendants point out that any Authority enforcement decision will be reviewed by an ALJ and the FTC, a process which "is even more substantial than the SEC's review of FINRA decisions." *Id.* at 25 (quoting *Nat'l Horsemen's Benevolent & Protective Ass'n*, 596 F. Supp. 3d at 726).

The Court declines to readdress its prior finding that the Authority's exercise of enforcement and investigatory powers does not disturb the Constitution.[13] When

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[13] Like the plaintiffs' other arguments concerning "non-legislative regulatory functions," the Court finds the due-process argument was resolved by the Court's prior order (*Nat'l Horsemen's Benevolent & Protective Ass'n*, 596 F. Supp. 3d 691). The Court previously found that "the Horsemen's alternative due-process theory fails." *Id.* at 728. And again, the Fifth Circuit's opinion and the intervening congressional amendment change nothing about the Court's

it first heard this case (pre-amendment and pre-remand), the Court found that the Authority's "non-legislative regulatory functions" did not violate the private-nondelegation doctrine because "[t]hese functions . . . comport with due process as articulated" by binding precedent. *Nat'l Horsemen's Benevolent & Protective Ass'n*, 596 F. Supp. 3d at 725 (citing *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 708 (5th Cir. 2017)). And while there has since been an opinion by the Fifth Circuit, a congressional amendment, and a remand, none of these intervening events have disturbed the Court's prior finding or analysis. Specifically, the Fifth Circuit declined to address the Court's finding that the Authority's non-legislative functions did not offend the private-nondelegation doctrine. *Nat'l Horsemen's*, 53 F.4th at 890 n.37 ("[W]e do not address . . . the Authority's investigative and enforcement measures —without the rulemaking authority, the investigative and enforcement powers are nugatory. . . . "). Thus, the Court's prior finding is the law of the case, which has not been disturbed by either the Fifth Circuit opinion or the congressional amendment.

6. The plaintiffs lack standing to bring the anti-commandeering claim.

The Gulf Coast plaintiffs argue that "HISA unconstitutionally commandeers the states" in violation of the Tenth Amendment. No. 5:23-CV-077, Dkt. No. 36 at 57. The Authority defendants challenge the plaintiffs' standing to bring an anti-commandeering claim on behalf of the states and claim that any Tenth Amendment violation would not harm these private-party plaintiffs.

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prior findings on the due-process argument. Thus, the Court will not revisit the issue here.

No. 5:23-CV-077, Dkt. No. 46 at 29-30. The FTC defendants argue that the anti-commandeering claim fails because HISA takes a conditional-preemption approach, which has repeatedly been upheld as constitutional. No. 5:23-CV-077, Dkt. No. 49 at 39-42. First evaluating its jurisdiction to hear the claim, as it must, the Court finds the private-entity Gulf Coast plaintiffs do not have standing to bring a Tenth Amendment challenge to HISA.

"[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). Thus, Congress cannot require the States to implement federal programs. *Printz v. United States*, 521 U.S. 898, 925 (1997). "Nor may the federal government issue 'orders directly to the States' to carry out this or that federal program." *Oklahoma*, 62 F.4th at 234 (quoting *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018)). But these limitations do not prevent Congress from "encourag[ing] a State to regulate or hold[ing] out incentives in hopes of influencing a State's policy choices." *Id.* (internal marks and citation omitted).

To establish the irreducible constitutional minimum of Article III standing, a plaintiff must show "(1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 399 (5th Cir. 2020). True, it is no longer the case that "a private citizen, acting on his own behalf and not in an official capacity or on behalf of the state citizenry, lacks standing to raise a Tenth Amendment claim." *United States v.*

Torres, 573 F. Supp. 2d 925, 950 (W.D. Tex. 2008), *abrogated by Bond*, 564 U.S. at 223 (holding that a plaintiff does not lack standing to assert a Tenth Amendment claim purely because he is not a state). But nothing in *Bond* contradicts the settled notion that "[a]n individual who challenges federal action on [Tenth Amendment] grounds is, of course, subject to the Article III requirements." *Bond*, 564 U.S. at 225.

To the contrary, *Bond* reinforces this requirement. There, the indicted defendant challenged the constitutionality of a chemical-weapons statute criminalizing her conduct on Tenth Amendment grounds. *Id.* at 214. The Court of Appeals held that the defendant could not challenge the law under the Tenth Amendment because no state was a party to the criminal proceeding. *Id.* The Supreme Court disagreed, holding private individuals can seek redress for their own injuries under the Tenth Amendment. *Id.* at 226. Notably, however, the *Bond* court emphasized throughout its opinion that the litigant still must assert a claim based on his own injury. *Id.* at 225 ("Individuals have 'no standing to complain simply that their Government is violating the law.'") (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)); *id.* (stating that the litigant relying on the Tenth Amendment must still suffer from injury in fact, traceable to the defendant's conduct, and redressable by a favorable decision).

Here, the plaintiffs cannot show Article III standing to assert their Tenth Amendment claim. The plaintiffs' professed injury—"[t]hey are harmed by the commandeering scheme because Plaintiffs prefer Texas's [ADMC] and racetrack-safety rules"—is no injury at all. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 (1992)

(providing that a plaintiff cannot seek relief "that no more directly and tangibly benefits him than it does the public at large). A party cannot establish constitutional injury by suggesting that he may be subject to rules that he does not prefer. *Compare TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (explaining that the concrete harm necessary to establish an injury in fact is that with a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts), *with Lujan*, 504 U.S. at 573 ("We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy.").

Additionally, even if this were a valid injury, it is not redressable by a court order. HISA allows states to "elect[]" to assess and collect fees on covered persons. 15 U.S.C. § 3052(f)(2)(A). But if the state does not make such an election, then the Authority steps in. 15 U.S.C. § 3052(f)(3). In this way, covered persons like the Gulf Coast plaintiffs will be regulated and subject to assessments even if they were to succeed on the anti-commandeering claim. Because the plaintiffs' Tenth Amendment argument is independent of their other claims, the Court examines it as such. And assuming that HISA survives the plaintiffs' other challenges, the plaintiffs will be subject to fees and assessments through either HISA or Texas law, so any alleged Tenth Amendment injury is not redressable by this Court. Because it cannot "provide [the] plaintiff[s] "with any effectual relief," the Court finds that the private-party plaintiffs lack standing to bring the anti-commandeering claim. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

The plaintiffs respond to the defendant's standing argument in a footnote. No. 5:23-CV-077, Dkt. No. 61 at 51 n.12 (citing No. 5:23-CV-077, Dkt. No. 24 at 17). They first argue that the defendants are changing their position because the defendants previously represented (in opposition to Texas's motion to intervene) that Texas's interests are adequately represented. The defendants correctly point out that a party's representation has no bearing on the constitutional standing analysis. *Id.* But more importantly, Judge Kacsmaryk found (prior to the transfer) that the "State Intervenors cannot show their interests are inadequately represented" because Texas's claims, legal arguments, and prayers for relief have largely mirrored that of the plaintiffs. No. 5:23-CV-077, Dkt. No. 32 at 9. Moreover, the Court previously gave Texas a choice: intervene late in this litigation, but be limited to the current claims, or file a separate suit and raise as many arguments as you like. Dkt. No. 84 at 3 ("[T]he Court notifies the parties that it is inclined to grant permissive intervention, subject to the following condition[:] the proposed intervenors . . . may not pursue their anti-commandeering claim."). Texas chose the former, yet it later moved to intervene in the Gulf Coast litigation (before it was transferred here). No. 5:23-CV-077, Dkt. No. 18. Judge Kacsmaryk properly denied that motion. No. 5:23-CV-077, Dkt. No. 31. The intervenor-plaintiffs joined this lawsuit with eyes wide open, and the Court does not find that any misrepresentation occurred.

7. The plaintiffs' due-process challenges fail.

The plaintiffs claim that the Authority allows economically self-interested industry participants to regulate their competitors in violation of the Due Process Clause. Dkt. No. 176 at 16-21. First, to the extent the plaintiffs assert a facial due process claim, the Court denies that claim for the reasons articulated in its prior order. Prior to the remand, the plaintiffs moved for summary judgment on their claim that the Authority is a self-interested entity possessing regulatory authority over its competitors. *Nat'l Horsemen's Benevolent & Protective Ass'n*, 596 F. Supp. 3d at 725; *see also Amtrak III*, 821 F.3d at 31. The Court denied that claim because of HISA's statutory protections against conflicts of interest, the Authority's nonprofit, self-regulatory nature, and, in the Court's view, the Authority's subordinate role to the FTC. Dkt. No. 38 at 7, 32. The Fifth Circuit's opinion did not address the Court's due-process analysis. *Nat'l Horsemen's*, 53 F.4th at 830 n.37 ("[W]e do not address the district court's conclusion rejecting the Appellants' due process claims on the ground that the Authority is not a self-interested industry participant."). And there has been no intervening change in law. Thus, the Court's prior finding of no facial due-process violation stands as the law of the case and, in any event, fails for the reasons stated in the Court's prior order. *Nat'l Horsemen's Benevolent & Protective Ass'n*, 596 F. Supp. 3d at 725.

The Court also rejects the plaintiffs' as-applied due-process challenge. Dkt. No. 176 at 17. The plaintiffs claim that, from a boots-on-the-ground perspective, the Authority is made up of self-interested competitors. *Id.* At trial, the plaintiffs identified members of the

Board, nominating committee, and the two policy-making committees whom they believe do not meet the requirement that certain directors or committee members be "'independent,' i.e., 'from outside the equine industry.'" *Id.* (quoting 15 U.S.C § 3052(d)).

In support, the plaintiffs submitted a number of exhibits that are effectively biographical information of the board and committee members. HPX 40-54 (HPX 53 consists of 28 biographies).

Other than five pages in the plaintiffs' trial brief, the parties did not brief the due-process claim. *See* Dkt. No. 176 at 16-21. The standard the plaintiffs set out, derived from *Amtrak III*, is that the Due Process Clause of the Fifth Amendment is violated when an "economically self-interested actor . . . regulate[s] its competitors." *Id.* at 21 (quoting *Amtrak III*, 821 F.3d at 23). But the plaintiffs fail to show either element. At the outset, the Authority does not "regulate[] its competitor." *See id.* As the Court previously explained, the Authority's power to submit proposed rules is cabined by the FTC's unilateral right to "abrogate, add to, and modify" the rules of the Authority. *Supra* Part. 4.B.i.

Nor is the first requirement—that the Authority or its directors be "economically self-interested"—met here. "[T]he statute . . . [and] bylaws are replete with conflict-of-interest provisions." Dkt. No. 182 at 131; *see* 15 U.S.C. § 3052(e). The plaintiffs admit that directors and committee members, and their family members, cannot have a financial interest in covered horses, but they argue that Authority officials can be self-interested if their involvement in the industry is related to racetracks or some other portion of the industry not related

to covered horses. Dkt. No. 176 at 20. The plaintiffs apparently overlook section 3052(e)(2), which prohibits Authority officials from serving as "official[s] or officer[s]" of—or "in a governance or policymaking capacity" for—an "equine industry representative." 15 U.S.C. § 3052(e)(2). HISA defines an equine industry representative as "an organization regularly and significantly engaged in the equine industry, including organizations that represent the interests of . . . racetracks." 15 U.S.C. § 3051(8).[14] Thus, HISA adequately protects against self-interested directors and committee members. And the plaintiffs do not cite any director or committee member who is economically self-interested; they only point out directors and committee members who they believe do not qualify as "independent members" under the statute. Dkt. No. 176 at 17-20. How this alleged defect qualifies as economic self-interest is unclear, and the plaintiffs do not explain. But even if this were economic self-interest, HISA gives the FTC the authority to step in and define what it means to be an independent member. *See supra* Part 4.B.i; 15 U.S.C. § 3053(e) (explaining that the FTC can initiate rulemaking as necessary "to ensure the fair administration of the Authority").

There are two final issues with the plaintiffs' argument. First, even with the introduction of evidence and the passage of time, this as-applied challenge is essentially no different than the facial challenge the Court has already decided. The directors and nominating committee members are the same as when the plaintiffs

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[14] The section also covers those who "represent the interests of, and whose membership consists of, owners, breeders, trainers, racetracks, veterinarians, State racing commissions, and jockeys." *Id.*

originally brought their claim. Dkt. No. 182. at 130; Dkt. No. 39-1 at 13-15. None of the biographical evidence submitted changes the Court's conclusion—the Authority is not a self-interested industry participant. And second, the plaintiffs have not identified a rule, policy, or enforcement decision that resulted in a worse outcome for one of the plaintiffs. *See* Dkt. No. 182 at 131. Basic notions of justiciability require that the plaintiffs do more than "complain simply that their Government is violating the law." *Bond*, 564 U.S. at 225. In short, HISA affords sufficient protection through its conflicts-of-interest provisions, and the plaintiffs have not met their burden to show unconstitutional self-dealing by directors, committee members, or others associated with the Authority.

8. Conclusion

Given the Court's findings of fact and conclusions of law, the plaintiffs fail to establish that HISA, as amended following the Fifth Circuit's opinion, continues to violate the Constitution. The Court finds that Horsemen plaintiffs have failed to prove Counts 1-3, and the intervenor plaintiffs have failed to prove Counts 1-2. Similarly, the Gulf Coast plaintiffs fail to prove Counts 1, 2, 5, and 8. The Gulf Coast plaintiffs voluntarily withdrew Counts 3, 4, 6, 7, and 9. The Court denies all other requested relief. The Court will enter a final judgment by separate order. So ordered on May 4, 2023.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10520

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; ARIZONA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; ARKANSAS HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; INDIANA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; ILLINOIS HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; LOUISIANA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; MOUNTAINEER PARK HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; NEBRASKA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; OKLAHOMA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; OREGON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; PENNSYLVANIA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; WASHINGTON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; TAMPA BAY HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; GULF COAST RACING, L.L.C.; LRP GROUP, LIMITED; VALLE DE LOS TESOROS, LIMITED; GLOBAL GAMING LSP, L.L.C.; TEXAS HORSEMEN'S PARTNERSHIP, L.L.P.,
PLAINTIFFS-APPELLANTS

STATE OF TEXAS; TEXAS RACING COMMISSION,
INTERVENOR PLAINTIFFS-APPELLANTS

v.

JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN; MD NANCY COX; JOSEPH DUNFORD; FRANK KEATING; KENNETH SCHANZER; HORSERACING INTEGRITY AND SAFETY AUTHORITY, INCORPORATED; FEDERAL TRADE

COMMISSION; COMMISSIONER NOAH PHILLIPS; COMMISSIONER CHRISTINA WILSON; LISA LAZARUS; STEVE BESHEAR; ADOLPHO BIRCH; ELLEN MCCLAIN; CHARLES SCHEELER; JOSEPH DEFRANCIS; SUSAN STOVER; BILL THOMASON; LINA KHAN, CHAIR; REBECCA SLAUGHTER, COMMISSIONER; ALVARO BEDOYA, COMMISSIONER; D.G. VAN CLIEF,
DEFENDANTS-APPELLEES

Filed: Sept. 9, 2024

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:21-CV-71
USDC No. 5:23-CV-77

ON PETITIONS FOR REHEARING EN BANC

Before KING, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Treating the petitions for rehearing en banc filed by Mr. Alvaro Bedoya, FTC, Ms. Lina Khan, Mr. Noah Phillips, Ms. Rebecca Slaughter, Ms. Christine Wilson, Mr. Jerry Black, Ms. Katrina Adams, Mr. Leonard Coleman, Ms. Nancy Cox, Mr. Joseph DeFrancis, Mr. Joseph Dunford, Horseracing Integrity and Safety Authority, Incorporated, Mr. Frank Keating, Ms. Ellen McClain, Ms. Lisa Lazarus, Mr. Steve Beshear, Mr. Adolpho Birch, Mr. Charles Scheeler, Ms. Susan Stover, Mr. Bill Thomason, Mr. D. G. Van Clief, and Mr. Kenneth Schanzer as petitions for panel rehearing (5TH CIR. R. 35 I.O.P.), the petitions for panel rehearing are DENIED. Because no

member of the panel or judge in regular active service requested that the court be polled on rehearings en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petitions for rehearing en banc are DENIED.