No. 24-___

In the Supreme Court of the United States

STATE OF TEXAS AND TEXAS RACING COMMISSION,
PETITIONERS

v.

JERRY BLACK, 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

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

BETH KLUSMANN
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Aaron.Nielson@oag.texas.gov
(512) 936-1700

QUESTION PRESENTED

In 2020, Congress enacted the Horseracing Integrity and Safety Act (HISA) to, for the first time, federally regulate the horseracing industry. 15 U.S.C. §§3051-60. HISA gives the power to "develop[] and implement[] a horseracing anti-doping and medication control program and a racetrack safety program" to a "private, independent, self-regulatory, nonprofit corporation"—the Horseracing Integrity and Safety Authority (the Authority). *Id.* §3052(a). Under HISA, the Authority proposes rules that are reviewed by the Federal Trade Commission (the FTC), *id.* § 3053(a), but the FTC is prohibited from rejecting the rules unless they violate HISA or other applicable rules, *id.* §3053(c)(2). The Fifth Circuit initially held that this delegation of legislative authority is unconstitutional.

Congress reacted, not by altering this process, but by giving the FTC the option (but not the duty) to undertake its own notice-and-comment rulemaking to abrogate, add to, and modify the Authority's rules. *Id.* §3053(e). Accordingly, unless and until the FTC decides to intervene, the horseracing industry remains governed by the Authority—a private entity operating outside of any constitutional safeguards. And even if the FTC choses to intervene, its statutory powers are limited.

The question presented is whether Congress has unconstitutionally delegated legislative authority to a private entity in HISA.

PARTIES TO THE PROCEEDING

Petitioners the State of Texas and the Texas Racing Commission were intervenor plaintiffs-appellants below.

Respondents Jerry Black; Katrina Adams; Leonard Coleman; MD Nancy Cox; Joseph Dunford; Frank Keating; Kenneth Schanzer; Lisa Lazarus; Steve Beshear; Adolpho Birch; Ellen McClain; Charles Scheeler; Joseph DeFrancis; Susan Stover; Bill Thomason; D.G. Van Clief; the Horseracing Integrity and Safety Authority, Incorporated; the Federal Trade Commission; Chair Lina Khan; Commissioner Rebecca Slaughter; Commissioner Alvaro Bedoya; Commissioner Melissa Holyoak; and Commissioner Andrew Ferguson were defendants-appellees below.[1]

Respondents 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

[1] Pursuant to Supreme Court Rule 35.3, Commissioners Holyoak and Ferguson were automatically substituted for their predecessors, Commissioners Christine Wilson and Noah Phillips.

Protective Association; Gulf Coast Racing, L.L.C.; LRP Group, Limited; Valle de Los Tesoros, Limited; Global Gaming LSP, L.L.C.; and Texas Horsemen's Partnership, L.L.P. were plaintiffs-appellants below.

RELATED PROCEEDINGS

Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, No. 5:21-CV-00071-H, U.S. District Court for the Northern District of Texas. Judgment entered May 4, 2023.

Gulf Coast Racing, LLC v. Horseracing Integrity & Safety Auth., No. 5:23-CV-00077-H, U.S. District Court for the Northern District of Texas. Case transferred and consolidated April 11, 2023.

Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, No. 22-10387, U.S. Court of Appeals for the Fifth Circuit. Judgment entered November 18, 2022.

Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, No. 23-10520, U.S. Court of Appeals for the Fifth Circuit. Judgment entered July 5, 2024.

Horseracing Integrity & Safety Auth., Inc. v. Nat'l Horsemen's Benevolent & Protective Ass'n, No. 24A287, U.S. Supreme Court. Administrative stay entered September 23, 2024.

Horseracing Integrity & Safety Auth., Inc. v. Nat'l Horsemen's Benevolent & Protective Ass'n, No. 24-433, U.S. Supreme Court. Petition for writ of certiorari filed October 15, 2024.

Fed. Trade Comm'n v. Nat'l Horsemen's Benevolent & Protective Ass'n, No. 24-429, U.S. Supreme Court. Petition for writ of certiorari filed October 16, 2024.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases (Ctd.):

Constitutional Provisions, Statutes, and Rules (Ctd.):

Constitutional Provisions, Statutes, and Rules (Ctd.):

Other Authorities:

Other Authorities (Ctd.):

PETITION FOR A WRIT OF CERTIORARI

For more than two centuries, the States regulated horseracing. Yet at the end of 2020, Congress enacted the Horseracing Integrity and Safety Act, 15 U.S.C. §§3051-60, to nationalize standards for track conditions and the use of certain medications in the Thoroughbred horseracing industry. Unable to reach consensus about what those federal standards should be, however, Congress instead opted to create a rough blueprint for regulation, but with no specifics. And rather than giving authority to "fill up the details" to a federal agency, *Gundy v. United States*, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting) (citation omitted), Congress entrusted that awesome regulatory power to a private entity: the Horseracing Integrity and Safety Authority.

The Authority has no history of regulating horseracing, and with members privately selected, lacks the Constitution's "checkpoints" designed "[t]o ensure the Government remains accountable to the public." *Texas v. Comm'r for Internal Revenue* (*CIR*), 142 S.Ct. 1308, 1309 (2022) (Alito, J., concurring in denial of review). No wonder the Fifth Circuit has twice held that HISA flunks the private-nondelegation doctrine. After all, "handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'" *Dep't of Transp. v. Ass'n of Am. R.Rs.* (*Amtrak II*), 575 U.S. 43, 62 (2015) (Alito, J., concurring) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)).

Under our Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress," U.S. Const. art. I, § 1, and "[t]he executive Power"—all of it—"shall be vested in a President," *id.* art. II, §1; *see also Seila L. LLC v. CFPB*, 591 U.S. 197, 213 (2020). Here, by handing off sovereign authority with preemptive force to

set and enforce rules governing private conduct to a private entity, Congress not only tossed aside federalism, it also violated both Vesting Clauses.

After the Fifth Circuit initially concluded that HISA's grant of rulemaking power to the Authority violates the Constitution, Congress amended HISA to give the Federal Trade Commission additional power to oversee the Authority's rulemaking process. 15 U.S.C. §3053(e). Bound by circuit precedent, the Fifth Circuit concluded that the amendment cured HISA's unconstitutionality with respect to rulemaking. The Fifth Circuit also concluded, however, that nothing about that amendment salvaged HISA's grant of enforcement power to the Authority. The upshot is that the Fifth Circuit has held that a federal statute is unconstitutional in a decision with far-reaching legal and practical implications for an entire industry.

The State of Texas and the Texas Racing Commission (collectively, Texas) agree with the Authority and the FTC "that this case presents an important separation-of-powers question," *CIR*, 142 S.Ct. at 1309 (Alito, J., concurring in denial of review)—indeed, *two* such questions—and thus merits this Court's review. Texas thus does not oppose certiorari in petitions, which concern whether HISA's vesting of executive power in a private entity violates the private-nondelegation doctrine. *See* Pet. for Writ of Cert. at i, *Horseracing Integrity & Safety Auth. v. NHBPA*, No. 24-433 (U.S. Oct. 15, 2024); Pet. for Writ of Cert. at I, *FTC v. NHBPA*, No. 24-429 (U.S. Oct. 16, 2024). The Court, however, should also address the antecedent question of whether HISA's vesting of legislative power in that same private entity also violates the private-nondelegation doctrine. It makes little sense for this Court to resolve whether the Authority can

enforce the rules it creates without first determining whether the Authority lawfully can create those rules in the first place.

OPINIONS BELOW

The opinions of the court of appeals are reported at 107 F.4th 415 (Pet.App. 1a-44a) and 53 F.4th 869 (Pet.App. 107a-46a). The opinion of the district court is reported at 672 F.Supp.3d 220 (Pet.App. 45a-103a). The unreported order of the court of appeals denying en banc review is reproduced at Pet.App. 104a-06a.

JURISDICTION

The Fifth Circuit entered its judgment on July 5, 2024, and denied the Authority's and FTC's timely filed petitions for en banc review on September 9, 2024. Texas invokes the Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional provisions and the Horseracing Integrity and Safety Act, 15 U.S.C. §§3051-60, are set forth in the appendix to this brief. Pet.App. 147a-91a.

STATEMENT

I. Horseracing Integrity and Safety Act

A. The Authority

Bucking more than 200 years of history, Congress in 2020 decided, for the first time, that horseracing should be federally regulated. Congress thus enacted HISA as part of the must-pass Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, §§1201-12, 134 Stat. 1182, 3252-75 (2020) (codified at 15 U.S.C. §§3051-60). HISA is intended to broadly regulate every aspect of the horseracing industry, encompassing:

- "all trainers, owners, breeders, jockeys, racetracks, veterinarians, persons (legal and natural) licensed by a State racing commission and the agents, assigns, and employees of such persons and other horse support personnel who are engaged in the care, training, or racing of covered horses," 15 U.S.C. §3051(6);
- "any Thoroughbred horse, or any other horse made subject to this chapter by election of the applicable State racing commission or the breed governing organization for such horse," *id.* §3051(4); and
- "any horserace involving covered horses that has a substantial relation to interstate commerce, including any Thoroughbred horserace that is the subject of interstate off-track or advance deposit wagers," *id.* §3051(5).

HISA thus regulates more than 67,000 horses and 35,000 individuals. *See* Auth. Defs. Mot. to Stay Mandate Ex. 1 ¶ 4, *NHBPA v. Black*, No. 23-10520 (5th Cir. Sept. 16, 2024). And that is just for now. Under HISA, any state racing commission or other specified group may ask for another breed to be subject to the Authority's jurisdiction, without input from Congress and subject only to the Authority's approval. 15 U.S.C. §3054(l).

Yet, although Congress concluded that there should be nationwide standards, it bypassed the Constitution's "careful design … for making law," *CIR*, 142 S.Ct. at 1309 (Alito, J., concurring in denial of review), neither setting those standards itself in HISA nor even requiring a federal agency to do so. Instead, Congress gave that "sweeping" power, Pet.App. 129a, to the Authority, a "private, independent, self-regulatory, nonprofit corporation," 15 U.S.C. §3052(a), that was incorporated in

anticipation of HISA's passage, ROA.4223-28 (incorporation), 4229-51 (bylaws).[1]

The Authority is governed by a nine-member Board of Directors, none of whom is appointed or removable by the President or another federal official. *See* 15 U.S.C. §3052(b), (d); ROA.4236; *but see Lucia v. SEC*, 585 U.S. 237 (2018) (holding that the Appointments Clause governs anyone who exercises significant authority under federal law); *Collins v. Yellen*, 594 U.S. 220 (2021) (explaining that those wielding executive power must be removable by the President). And while the FTC must review the Authority's rules, it does so only to ensure that they are "consistent" with federal law; the FTC cannot second guess the Authority's policy choices. *See* 15 U.S.C. §3053(c)(2). Furthermore, the FTC—perhaps the most prominent member of the headless fourth branch of government—itself exists outside of the President's plenary control. *See Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *but see Seila L.*, 591 U.S. at 216 & n.2, 219 & n.4 (suggesting that the FTC's removal restrictions are, and have always been, unconstitutional).

Nor is the Authority funded by appropriations from Congress. *See* 15 U.S.C. §3052(f)(5). Instead, it charges fees allocated against each State. *See id.* §3052(f)(2). At the State's putative option, a state racing commission—a state entity that traditionally has been tasked with overseeing horseracing—may collect and remit the required fees to the Authority or, if the state racing commission declines, the Authority will collect the fees directly from covered persons within the State. *Id.* §3052(f)(2), (3). If a state racing commission refuses to

[1] "ROA" refers to the paginated record on appeal on file with the Fifth Circuit.

remit fees to the Authority, HISA may strip it of the power to "impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters for covered horseraces," *id.* §3052(f)(3)(D)—effectively nullifying most such commissions' ability to perform the functions traditionally assigned to them by their States' respective legislatures, *see* Pet. for a Writ of Cert. at 28-29, *Oklahoma v. United States*, No. 23-402 (U.S. Oct. 13, 2023).

B. The Authority's rulemaking power

1. In HISA, Congress empowered the Authority to create a comprehensive regulatory regime to govern an industry that has been an "integral part of Texas culture"—as well as that of other States—"since before the first settlers arrived." Caroline McLeod, *Down to the Wire: The Desperate Need for the Texas Racing Industry to Catch Up to Other States*, 50 Tex. Tech L. Rev. 307, 310 (2018). For example, Congress delegated power to the Authority to "develop[] and implement[]" by rule a horseracing anti-doping and medication-control program, 15 U.S.C. §3052(a), thus allowing the Authority to impose federal restrictions on administering medication to horses, create standards for "laboratory testing accreditation and protocols," and determine which medications and substances will be permitted and at what levels, *id.* §3055. Congress also empowered the Authority to develop and implement a racetrack-safety program complete with training and racing standards, lists of permitted and prohibited practices, a racing-surface quality-maintenance system, and programs for injury- and fatality-data analysis. *Id.* §3056. The Authority's rules preempt any conflicting state laws. *Id.* §3054(b).

By the time this case reached the Fifth Circuit (for the second time, *infra* pp.15-16), the Authority had

already created rules on racetrack safety, ROA.3246-93; enforcement, ROA.3294-329; the assessment methodology for determining each State's share of fees, ROA.3330-54; registration of covered persons, ROA.3355-59; and anti-doping and medication control, ROA.3388-454. The Authority also has proposed "new set[s] of supplemental rules relating to topics such as cleanliness and security of receiving barns, the number and location of restrooms on the backside, disclosure of consumption of Prohibited Substances, and entering a horse on the Veterinarian's List."[2] The Authority's now nearly 250 pages of rules are not in the Code of Federal Regulations but rather are found on a private website. *See* HISA, *Regulations*, https://hisaus.org/regulations.

2. When the Authority submits proposed rules to the FTC, 15 U.S.C. §3053(a), the FTC is obligated to (1) publish them in the Federal Register for notice and comment, *id.* §3053(b)(1); and (2) approve them if they are "consistent" with HISA and applicable FTC rules, *id.* §3053(c)(2)—what the Fifth Circuit called "consistency review," Pet.App. 134a. Given that HISA broadly defines the Authority's power to create "standards," "programs," and "procedures," such consistency review has few, if any, teeth with respect to significant issues.

In fact, as recognized by the FTC itself on multiple occasions, consistency review does not permit it to alter or reject the Authority's policy choices. *E.g.*, ROA.3288

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[2] HISA, Other Announcements, *Proposed Supplemental Rule Series* (Sept. 18, 2024), https://perma.cc/7AJN-B9WS; *see also, e.g.*, HISA, Press Release, *HISA Releases Request for Proposals on Furosemide* (July 30, 2024), https://perma.cc/7XP3-S9PV; HISA, Operational Bulletin, *New Treatment Record Type: Mandatory Attending Veterinarian Inspection* (June 25, 2024), https://perma.cc/M39L-22R9.

(noting the Authority's proposed rule was consistent with HISA and that commenters raised only policy disagreements); 3319 (explaining that the FTC does not review "general policy"); 3326 (noting that policy differences do not demonstrate inconsistency with HISA). Thus, unless the Authority outright violates federal law, HISA broadly allows the Authority to make policy decisions respecting the horseracing industry.

3. After the Fifth Circuit held that Congress unconstitutionally delegated legislative power to the Authority, Pet.App. 145a-46a, Congress amended one subsection of HISA by, again, including it in a must-pass consolidated appropriations act. *See* Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, §701, 136 Stat. 4459, 5231-32 (2022). Specifically, the FTC may now:

> by rule in accordance with section 553 of title 5 … abrogate, add to, and modify the rules of the Authority promulgated in accordance with [HISA] as the [FTC] finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of [HISA] and applicable rules approved by the [FTC], or otherwise in furtherance of the purposes of [HISA].

15 U.S.C. §3053(e).

To date, the FTC has used this new power to adopt rules (1) requiring the Authority to submit its budget for approval, 16 C.F.R. §§1.150-.152 (2024), and (2) requiring strategic plans, year-end reports, risk management, and transparency, *id.* §§1.153-.156. The FTC, however, has not created any substantive regulations governing private conduct, nor has it undone or altered any of the Authority's regulations of private conduct.

C. The Authority's enforcement power

1. In addition to making the rules, the Authority also enforces (and adjudicates) them—again, without meaningful oversight. Congress gave the Authority the ability to determine what conduct is sanctionable and to set the penalties for rule violations. *See* 15 U.S.C. §3057. Congress also empowered the Authority to issue rules "authorizing" "access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons," "issuance and enforcement of subpoenas and subpoenas duces tecum," and "other investigative powers." *Id.* §3054(c)(1)(A). Unsurprisingly, the Authority has issued a rule giving itself wide-ranging investigative authority. *See* HISA Rule 8400.

Congress further authorized the Authority to contract with another entity to act as the anti-doping and medication-control "enforcement agency." 15 U.S.C. §3054(e)(1)(A). Accordingly, the Authority has contracted with Drug Free Sport International (DFSI), another independent, private entity.[3] In that contractual role, DFSI is to, among other duties, implement the anti-doping and medication-control program on behalf of the Authority, as well as "testing, compliance and adjudication programs." *Id.* §3054(e)(1)(E).

Sanctions issued by the Authority may include "lifetime bans from horseracing, disgorgement of purses, monetary fines and penalties, and changes to the order of finish in covered races." *Id.* §3057(d)(3)(A). In the last two years, the Authority has assessed $1.6 million in

[3] *See* HISA, Press Release, *HISA Announces Selection of Drug Free Sport International as Partner to Build Independent Anti-Doping and Medication Control Enforcement Agency* (May 3, 2022), https://perma.cc/MW6Y-GNPF.

fines.[4] The Authority has also empowered itself to provisionally suspend individuals for certain violations prior to their final adjudication. HISA Rule 3247. Further, the Authority may bring suit in federal court to obtain injunctive relief to stop alleged rule violations and to enforce civil sanctions. 15 U.S.C. §3054(j).

2. Any civil sanctions imposed by the Authority may be reviewed by an administrative law judge (ALJ) within the FTC, followed by FTC review. *Id.* §3058(b)-(c); *but see Jarkesy v. SEC*, 34 F.4th 446, 463-64 (5th Cir. 2022) (holding that removal protections for ALJs within independent agencies are unconstitutional under *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010)), *aff'd on different grounds*, 144 S.Ct. 2117 (2024). While ALJ review of claimed violations of the Authority's rules is *de novo*, review of any sanctions the Authority chooses to assess is limited to whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 15 U.S.C. §3058(b)(2)(A). Additionally, the Authority may recommend that the FTC commence an action for unfair or deceptive acts. *See id.* §3054(c)(1)(B).

II. Procedural History

A. Texas's complaint

1. Although Texans have always loved horses, the development of *horseracing* in Texas has been uneven due to its longstanding associations with gambling. *See* McLeod, *supra*, at 310-14. Gambling within Texas has generally been banned "[f]or as long as the State of Texas has been the State of Texas." *City of Fort Worth v. Rylie*, 602 S.W.3d 459, 460 (Tex. 2020). Indeed, parimutuel wagering on horseracing is constitutionally

[4] *See* HISA, *2024 Q2 Metrics Report* at 6, https://perma.cc/37TF-HG6P.

permissible in Texas only because it depends not on chance but rather on the speed of the horse and the skill of the jockey. *Cf. Panas v. Tex. Breeders & Racing Ass'n*, 80 S.W.2d 1020, 1024 (Tex. App.—Galveston 1935, writ dism'd); Tex. Att'y Gen. Op. No. DM-302, at 5-6, 6 n.6 (1994).

For nearly four decades, the Texas Racing Commission has been tasked with regulating horseracing and associated wagering in Texas. *See* Tex. Occ. Code §2021.002. The nine-member Commission—comprised of seven members appointed by the Governor and two ex officio members, *id.* §2022.001(a)—has done so by adopting rules covering racetrack licenses, 16 Tex. Admin. Code §§309.1-.53; licenses for owners, trainers, and jockeys, among others, *id.* §§311.101-.112; racetrack operations, *id.* §§309.101-.299; the rules of horseracing, *id.* §§313.1-.450; medical treatment of horses, *id.* §§319.1-.112; and testing for prohibited substances, *id.* §§319.301-.364. The Commission may also pursue administrative penalties for violations of relevant law, as well as suspend, revoke, or refuse to renew a license issued under its authority. Tex. Occ. Code §§2033.051, .151. The Commission has licensed over 14,000 individuals in Texas as part of its comprehensive operations. ROA.6117.

2. To protect its sovereign interests, Texas and the Commission intervened as plaintiffs in a suit brought by a group of Horsemen's Benevolent and Protective Associations (collectively, the NHBPA Plaintiffs) challenging the constitutionality of HISA. ROA.1328-38. As relevant here, Texas asserts that HISA's delegation of legislative and executive power to a private entity—the Authority—violates the private-nondelegation doctrine. ROA.2529-32. Following summary-judgment motions, the district

court rejected such claims, ROA.2706-60, and all plaintiffs appealed. ROA.1562-65.

Unable to obtain relief before the statute went into effect, Texas was forced to choose: (1) become subject to HISA and surrender control over horseracing and its associated gambling activities or (2) avoid application of HISA by surrendering the ability to simulcast Texas races to other States. ROA.3083, 3086-87, 6123. Because the former created complications under state law that the Commission deemed untenable, the Commission has opted for the latter. ROA.3086-87. This places Texas racetracks "at a 'competitive disadvantage' to their … peers." *Ohio v. EPA*, 144 S.Ct. 2040, 2053 (2024); *see also* ROA.4594, 6124 (describing industry losses in Texas due to the decision not to simulcast).

B. Texas's first appeal

The first time the case was before the Fifth Circuit, that court focused on the Authority's rulemaking authority. *See* Pet.App. 109a-11a. Surveying the handful of cases to address the private-nondelegation doctrine, the Fifth Circuit held that "a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." Pet.App. 127a. It then held that the Authority was *not* subordinate to the FTC: Congress granted the Authority "'sweeping' power," Pet.App. 129a-33a, that permitted it "to craft entire industry 'programs,'" which "strongly suggests it is the Authority, not the FTC, that is in the saddle," Pet.App. 131a. The Fifth Circuit rejected the argument that the FTC provided the necessary oversight because consistency review is "too limited to ensure the Authority 'function[s] subordinately' to the agency." Pet.App. 134a-39a.

The Fifth Circuit then distinguished the relationship that HISA creates between the Authority and the FTC from that which the Maloney Act creates between the Financial Industry Regulatory Authority (FINRA) and the Securities Exchange Commission. *See* Pet.App. 139a-41a. The court explained that Congress gave the SEC authority to "abrogate, add to, and delete from" FINRA rules as the SEC deemed "necessary or appropriate." 15 U.S.C. §78s(c). Because the FTC lacked such power, the court concluded that the FTC served as an advisor, rather than a supervisor, to the Authority. Pet.App. 140a.[5]

Instead, the Fifth Circuit focused on litigation concerning Amtrak, which Congress had tasked with "jointly" developing railroad performance standards with the Federal Railroad Administration (FRA). *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.* (*Amtrak I*), 721 F.3d 666, 669 (D.C. Cir. 2013). There, the D.C. Circuit concluded that "Amtrak enjoys authority equal to the FRA," *id.* at 671, which "vitiates the principle that private parties must be limited to an advisory or subordinate role in the regulatory process," *id.* at 673. Although this Court reversed the D.C. Circuit's judgment because Amtrak (for entity-specific reasons) is a public, not private, entity, *see Amtrak II*, 575 U.S. at 46, the Fifth Circuit found the D.C. Circuit's analysis persuasive with respect to the Authority, Pet.App. 143a-45a. The Fifth Circuit accordingly concluded that HISA delegated "unsupervised government power to a private entity" and was therefore unconstitutional. Pet.App. 145a-46a.

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[5] For similar reasons, the Fifth Circuit also distinguished *Texas v. Rettig*, in which it had upheld a subdelegation by the Department of Health and Human Services to a private board to certify that certain rates in Medicaid contracts were "actuarially sound." 987 F.3d 518, 526 (5th Cir. 2021). *See* Pet.App. 142a-43a.

That conclusion never reached this Court because, as noted above, *see supra* p.8, Congress amended HISA to give the FTC the power to "abrogate, add to, and modify the rules of the Authority," 15 U.S.C. §3053(e). The Fifth Circuit remanded the case for consideration of the impact of that statutory amendment. *See* Order, *NHBPA v. Black*, No. 22-10387 (5th Cir. Jan. 31, 2023).

C. Subsequent proceedings

1. On remand, a separate case raising similar (but not identical) challenges, brought by a group of racetrack owners and other interested parties (collectively, the Gulf Coast Plaintiffs), was consolidated with this case. ROA.2213-18. After a bench trial, ROA.3028-205, the district court again found no constitutional infirmity, Pet.App. 49a.

Regarding Texas's only claim—private nondelegation—the district court concluded that the FTC's new authority to abrogate, add to, and modify the Authority's rules empowered the FTC to make its own policy choices, thus supposedly curing any constitutional problem. Pet.App. 81a-88a. The court also submitted that HISA now paralleled FINRA's relationship with the SEC, Pet.App. 88a-89a, and leaned heavily on the Sixth Circuit ruling upholding the constitutionality of HISA as amended, Pet.App. 87a, 90a (discussing *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), *cert. denied*, 144 S.Ct. 2679 (2024) (rehearing pending)). With respect to the Authority's enforcement powers, the district court found no constitutional violation due, in large part, to the FTC's ability to review sanctions *de novo*. Pet.App. 94a-96a.

2. All plaintiffs again appealed. ROA.2825-31. This time, the Fifth Circuit affirmed in part and reversed in part.

First, the Fifth Circuit agreed with the Sixth Circuit that the amendment to the FTC's authority cured the private-nondelegation problem with respect to the Authority's rulemaking powers. Pet.App. 9a-11a. The court focused on the FTC's ability to "exercise its own policy choices" through rulemaking if it disagreed with the Authority—a power it did not previously have. Pet.App. 11a. The court believed that allowing the FTC to make its own rules would give consistency review "new bite" because the FTC could adopt its own policies via rulemaking that the Authority would then be bound to follow. Pet.App. 12a. Concluding that this was sufficient to ensure that the Authority functions subordinately to the FTC, the court held that there was no unconstitutional delegation of legislative authority. Pet.App. 14a.

Second, the Fifth Circuit held that the Authority's largely unsupervised ability to enforce HISA violated the private-nondelegation doctrine with respect to executive power. Pet.App. 17a-33a. After all, the power to investigate, sanction, and sue—all of which the Authority can do—are "quintessentially executive functions." Pet.App. 18a. Asking the same constitutional question as before, the court considered whether the Authority "functions subordinately to an agency with authority and surveillance over it." Pet.App. 17a (cleaned up). The court rejected the argument that the FTC's general (and limited) back-end review gave it adequate supervisory control over the Authority, emphasizing that the Authority can and does perform significant enforcement functions before the FTC reviews anything. Pet.App. 22a-25a. The Fifth Circuit also disagreed that the FTC could further subordinate the Authority's enforcement powers by exercising its rulemaking authority. Pet.App. 25a-

29a.[6] Accordingly, the court declared HISA unconstitutional to the extent it is enforced by private entities. Pet.App. 44a.

The Authority and FTC defendants filed petitions for rehearing en banc, which were denied. Pet.App. 104a-06a. Upon the Authority's request, this Court administratively stayed the issuance of the mandate. Order, *Horseracing Integrity & Safety Auth. v. NHBPA*, No. 24A287 (U.S. Sept. 23, 2024).

REASONS FOR GRANTING THE PETITION

I. Delegation of Legislative Power to a Private Entity Is an Important Question of Federal Law That Should Be Decided by This Court.

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, §1. Accordingly, it follows that "the lawmaking function belongs to Congress and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996) (citation omitted). And while the Court has struggled with whether and how much authority Congress may delegate to a *public* entity, *see, e.g.*, *Gundy*, 588 U.S. 128, delegating such authority to a *private* entity is "unknown to our law" and "utterly inconsistent with the constitutional prerogatives and duties of Congress," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).[7]

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[6] The Fifth Circuit also rejected the private Respondents' remaining constitutional claims based on the Due Process Clause, Appointments Clause, and anticommandeering doctrine. Pet.App. 34a-43a. As Texas raised no such claims, it does not discuss them here.

[7] Texas bases its argument on the understanding that the Authority is, in fact, a *private* corporation. 15 U.S.C. §3052(a). Should the Court disagree, HISA would be unconstitutional under the Appointments and Vesting Clauses for the reasons explained by the

Any delegation of rulemaking authority to a private entity thus lacks "even a fig leaf of constitutional justification." *Amtrak II*, 575 U.S. at 62 (Alito, J., concurring).

Multiple members of this Court have recognized the need for greater clarity with respect to delegation doctrines. To do so, the Court previously granted certiorari in the *Amtrak* litigation to determine whether a provision of federal law "effect[ed] an unconstitutional delegation of legislative power to a private entity." Pet. for a Writ of Cert. at I, *Amtrak II*, 575 U.S. 43 (2015) (No. 13-1080), 2014 WL 953507, at *I; *see Dep't of Transp. v. Ass'n of Am. R.Rs.*, 573 U.S. 930 (2014) (granting certiorari). But the Court could not answer the question because the delegatee in that case—Amtrak—is public. Justice Alito, however, used both precedent and first principles to explain why enforcing the private-nondelegation doctrine is essential, noting that "[e]ven the United States accepts that Congress cannot delegate regulatory authority to a private entity." *Amtrak II*, 575 U.S. at 61 (Alito, J., concurring) (quotation marks omitted).

Since *Amtrak II*, at least five members of the Court have called for reexamination of the standards applicable to the nondelegation doctrine. *See Gundy*, 588 U.S. at 148-49 (Alito, J., concurring); *id.* at 149 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *Paul v. United States*, 140 S.Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari). And at least three Justices have also specifically recognized "the need to clarify the private non-delegation doctrine in an

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Gulf Coast Plaintiffs in a forthcoming certiorari petition. Either way, HISA cannot stand.

appropriate future case." *CIR*, 142 S.Ct. at 1308 (Alito, J., concurring in denial of review).

As described below, *see infra* pp.19-27, HISA falls on the wrong side of the constitutional line, but that conclusion has not been apparent to the Circuits. In addition to the Fifth Circuit, Pet.App. 14a, the Sixth and Eighth Circuits have concluded that Congress's delegation of legislative authority to the Authority in HISA is consistent with the Constitution's declaration that all such power is vested in Congress. U.S. Const. art. I, §1; *Oklahoma*, 62 F.4th at 230; *Walmsley v. FTC*, No. 23-2687, 2024 WL 4248221, at *2 (8th Cir. Sept. 20, 2024), *petition for cert. filed*, No. 24-420 (U.S. Oct. 10, 2024). No further percolation is likely to alter this trend.

Guidance from this Court is necessary, even more so because Congress appears to see this type of rulemaking delegation as a model for other industries. *See* Amicus Br. of Sen. McConnell at 4, *Horseracing Integrity & Safety Auth. v. NHBPA*, No. 24A287 (U.S. Sept. 24, 2024). The Court should grant review to clarify whether and when legislative authority may be given to a private entity before delegation of rulemaking power to private entities becomes further entrenched. Granting certiorari here would allow the Court to do just that.

II. The Fifth Circuit's Decision Conflicts with This Court's Precedent.

Certiorari is especially warranted because the Fifth Circuit's analysis conflicts with this Court's cases. Although the Constitution vests legislative authority in Congress alone, this Court's precedent indicates that private entities can play a role in the formulation of law—albeit a limited one, such as suggesting an element of a regulatory scheme to a federal agency. *See, e.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381,

388 (1940). But HISA far transcends that limited role by (1) granting a private entity the ability to craft rules governing an entire industry-wide program, 15 U.S.C. §§3052(a), 3053(a); (2) precluding the FTC from rejecting those rules in most circumstances, *id.* §3053(c)(2); and (3) giving the FTC only the option—not the duty—to review any policies, *id.* §3053(e).

In holding this delegation meets constitutional standards, three Circuits have misconstrued the nature of the constitutional principles at issue. Pet.App. 9a-14a; *Oklahoma*, 62 F.4th at 230; *Walmsley*, 2024 WL 4248221, at *2. Merely giving the FTC the *option*—but not the *obligation*—to engage in its own notice-and-comment rulemaking, 15 U.S.C. §3053(e), does not cure the constitutional violation that results from giving the Authority the power to make the rules in the first place.

A. The Fifth Circuit's decision is contrary to the Court's private-nondelegation precedent.

The People agreed to submit to laws enacted by Congress, U.S. Const. art. I, §1—not "laws" adopted by private entities. That is why delegation to private entities is "delegation in its most obnoxious form." *Carter Coal*, 298 U.S. at 311; *see also Amtrak II*, 575 U.S. at 62 (Alito, J., concurring). Yet for far too long lower courts have applied a private-nondelegation doctrine derived, not from what the Constitution says, but from fundamental misunderstandings about a pair of 80-year-old cases: *Carter Coal* and *Adkins*. Properly understood, those cases confirm the Fifth Circuit's error here.

In *Carter Coal*, Congress delegated the ability to set maximum labor hours and minimum wages to private groups of producers and miners. 298 U.S. at 310-11. Because this allowed "one person … to regulate the business of another," the Court declared the law

unconstitutional. As the Court put it, the law created "an intolerable and unconstitutional interference with personal liberty and private property." *Id.* at 311.

As it did here, Congress then rewrote the law. In *Adkins*, the Court examined the revised statute, the Bituminous Coal Act of 1937, which provided for the creation of twenty "district boards" that were to "operate as an aid to the [National Bituminous Coal] Commission but subject to its pervasive surveillance and authority." 310 U.S. at 388. The Act provided that the number of members of each district board was subject to approval by the Commission; the Commission could remove board members in certain circumstances; the board's bylaws and rules of procedure were subject to the Commission's approval; and the Commission had some authority to approve, disapprove, or modify proposed rules of each board regarding the sale of coal. *See* Bituminous Coal Act of 1937, Pub. L. No. 75-48, §4(I)(a), (II)(a)-(c), 50 Stat. 72, 76-80 (1937). Significantly, although Congress gave the boards the authority to *propose* minimum coal prices, those proposed prices could be approved, disapproved, or modified by the Commission, but would not go into effect absent action by the Commission. *Id.* §4(II)(a), 50 Stat. at 78. This time around, the Court rejected a claim that private parties impermissibly set the minimum prices because the Commission, not the district boards, made the decision. *Adkins*, 310 U.S. at 399.

Even apart from constitutional first principles, the Fifth Circuit's error (and that of the Sixth and Eighth Circuits) is thus apparent. HISA hews much closer to *Carter Coal* than *Adkins*. In *Adkins*, the private board (1) had members subject to removal by the Commission and (2) proposed only a small piece of a regulatory scheme, which (3) could be approved, disapproved, or

modified by the Commission. *Id.* at 388, 399. Here, by contrast, the Authority (1) has members who cannot be appointed or removed by the FTC and (2) writes the entire regulatory scheme to govern the horseracing industry, which (3) the FTC must approve so long as it falls within HISA's broad delegation. 15 U.S.C. §§3052(b), 3053(a), (c)(2). That the FTC can now also engage in separate rulemaking (if it wants to) does not save this unconstitutional structure. *See infra* pp.21-27. Thus, as in *Carter Coal*, Congress has delegated legislative authority to a private party, "legislative delegation in its most obnoxious form." 298 U.S. at 311.

B. The Circuits wrongly treated the FTC's optional supervision as sufficient.

The Fifth, Sixth, and Eighth Circuits have all concluded that the delegation of legislative power to the Authority is permissible because the FTC *could* override the Authority through its own rulemaking. Pet.App. 9a-11a; *Oklahoma*, 62 F.4th at 229-31; *Walmsley*, 2024 WL 4248221, at *2-3. But that is not the constitutional standard. As this Court has already explained, "[e]nacting general rules through the required notice and comment procedures is obviously a poor means of micromanaging [an entity]'s affairs." *Free Enter. Fund*, 561 U.S. at 504. The possibility that the FTC *might* choose to make rules does not detract from Congress's decision to give the Authority the power to make rules in the first place.

1. In upholding HISA's delegation of legislative authority, the Circuits have taken comfort in the FTC's new power to "abrogate, add to, and modify" the Authority's rules. 15 U.S.C. §3053(e). When it adopted that subsection, though, Congress left intact the original unconstitutional delegation, *id.* §§3053(a)-(c), and instead merely delegated additional authority to the FTC, *id.*

§3053(e). Accordingly, it is now up to the FTC to decide whether it wishes to supervise the Authority (assuming it can) or whether it wants to allow the Authority to continue to make the rules. *Id.* This amended scheme therefore is just as unconstitutional as the original.

Whether a delegation of authority is unconstitutional is based on "the terms of Congress' delegation"—in this instance HISA—"*not* on the terms of the agency's subsequent exercise of the delegated authority." *United States v. Martinez-Flores*, 428 F.3d 22, 27 (1st Cir. 2005) (emphasis added) (following *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-73 (2001)); *see also United States v. Palazzo*, 558 F.3d 400, 404 n.4 (5th Cir. 2009) (change in the underlying regulations did not impact the delegation analysis). "Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial"—or in this case, voluntary exercise (or not) of a supervisory power—"has no bearing upon the answer." *Whitman*, 531 U.S. at 473. Accordingly, just as an agency cannot "cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute," *id.* at 472, Congress cannot remedy the constitutional violation here by giving the FTC the discretionary power to act respecting the Authority's rules.

The D.C. Circuit concluded that even the possibility that a private entity might make industry rules violates the Constitution. *See Amtrak I*, 721 F.3d at 669. Finding that the statute permitted a private arbitrator to break a stalemate between Amtrak and the FRA, the court concluded that it was possible for Amtrak's standards to take effect without the approval of a single government official, violating the private-nondelegation doctrine. *Id.* at 673-74. Even though a private arbitrator had not been

used, "that the recipients of illicitly delegated authority opted not to make use of it is no antidote. It is *Congress's* decision to delegate that is unconstitutional." *Id.* at 674. Justice Alito agreed in *Amtrak II*, explaining that "even the *possibility* of a private arbitrator" would violate the Constitution. 575 U.S. at 62 (Alito, J., concurring). In other words, the violation is complete upon the unlawful delegation. Other circuits are in accord.[8]

Constitutional logic is also supported by common sense. The FTC is a busy agency—and may not always have a quorum or a working majority. It thus cannot plenarily create or revise (or likely even read) every rule for the horseracing industry. Instead, the Authority's decisions will have a massive anchoring effect. Put another way, Congress "could not, even if they wished, vote all power to the President and adjourn *sine die*," *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting), even if Congress technically could revise such presidential regulations later. The same principle applies here. Given inertia, competing priorities, and the like, the power to create rules in the first instance is too important for Congress to give away, and certainly to a private entity.

Regardless, even if the FTC somehow could regulate every aspect of horseracing, it would take time. Yet the Authority's rules apply *today*. Because the FTC may "abrogate, add to, and modify the rules of the Authority,"

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[8] *See also, e.g.*, *W.V. ex rel. Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1140 (11th Cir. 2023) (applying *Whitman* to hold a challenge is not mooted when the agency "had disclaimed an intention to enforce the alleged unconstitutional provision at all"); *Martinez-Flores*, 428 F.3d at 27 (holding that, under *Whitman*, a memorandum from the U.S. Attorney General is "irrelevant to the nondelegation question").

15 U.S.C. §3053(e), the Authority's rules remain in effect unless and until the FTC acts. And because the FTC cannot act instantaneously, the Authority's rules necessarily govern for some periods of time. This timing element was a key feature of the Fifth Circuit's decision with respect to the Authority's enforcement powers, Pet.App. 22a-24a, and logically should apply with at least equal force to the Authority's antecedent rulemaking powers.

2. Clawing back sufficient power to remedy the unconstitutional delegation here faces another hurdle: "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *UARG v. EPA*, 573 U.S. 302, 328 (2014). But that would be required here because HISA is structured to give primary rulemaking authority to the Authority, not the FTC.

The Authority has the primary obligation to "develop[] and implement[] a horseracing anti-doping and medication control program and a racetrack safety program." 15 U.S.C. §3052(a). To that end, it may (among other things) establish committees, *id.* § 3052(c); propose rules setting laboratory and racetrack standards, identifying permitted substances, and setting a civil sanctions schedule, *id.* §3053(a); develop procedures regarding access to offices, issuance of subpoenas, and other investigatory powers, *id.* §3054(c); issue guidance, *id.* §3054(g); investigate civil violations, *id.* §3054(h); bring lawsuits, *id.* §3054(j); and extend its authority to new breeds of horses, *id.* §3054(l)(1). By contrast, the FTC is generally limited to publishing items in the Federal Register, *e.g.*, *id.* §3053(b)(1); approving the Authority's proposals, *id.* §§3053(c), 3054(c)(2); and reviewing the Authority's assessment of sanctions, *id.* §3058.

But, under the Fifth Circuit's theory, the FTC can change all of this by using its own authority to modify the

Authority's rules. Yet "permission to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress." *Biden v. Nebraska*, 143 S.Ct. 2355, 2368 (2023) (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994)). There is no way to read HISA to conclude that the FTC, rather than the Authority, is the primary regulator.

3. Relatedly, the Fifth Circuit also misunderstood the grant of rulemaking authority to the FTC to be more significant that it is. The Authority submits proposed rules and proposed modifications of rules to the FTC for publication and a limited consistency review, 15 U.S.C. §3053(a)-(c). Now, the FTC can also "abrogate, add to, and modify the rules of the Authority promulgated in accordance with" HISA. *Id.* §3053(e). In other words, both the FTC and the Authority can propose and modify rules. Thus, at most, the Authority serves as the FTC's equal in the rulemaking endeavor which, under the D.C. Circuit's rule in *Amtrak I*, is constitutionally insufficient.

The only non-ministerial legal *obligation* the FTC has is to review proposed rules for compliance with HISA, *id.* §3053(c)(2)—not unlike what a district court might do with respect to a legal question in an APA challenge, 5 U.S.C. §706. But no one says that district courts thereby supervise agencies. In fact, Congress itself could perform the same function as the FTC by overriding rules it dislikes. But "Congress could not say: 'The defense budget is whatever Lockheed Martin wants it to be, unless Congress intervenes to revise it.'" *Consumers' Rsch. v. FCC*, 109 F.4th 743, 771 (5th Cir. 2024) (en banc), *petition for cert. filed*, No. 24-354 (U.S. Sept. 30, 2024).

Indeed, if the FTC disagrees with a rule proposed by the Authority, it cannot disapprove the rule on policy grounds but must either (1) allow it to become law and

then engage in notice-and-comment rulemaking to modify it or (2) attempt to out-maneuver the Authority by its own notice-and-comment rulemaking. As the Fifth Circuit hypothesized, if the FTC did not want a proposed rule to take effect, it could adopt its own rule postponing the effective date of the Authority's rule or engage in emergency rulemaking. Pet.App. 13a. But the FTC's notice-and-comment process could take years—all the while private parties and the States would be subject to a rule promulgated by an entity without constitutional authority to act at all.

4. Even putting the foregoing aside, the FTC has no power to review—let alone reject—the Authority's "guidance." 15 U.S.C. §3054(g)(2); *accord SEC v. Chenery Corp.*, 332 US 194 (1947) (regulators can make policy either by rulemaking or particular cases). Although the Authority must submit any guidance to the FTC, 15 U.S.C. §3054(g)(2), the guidance "take[s] effect on the date on which the guidance is submitted," no matter what the FTC thinks about it, *id.* §3054(g)(3). Guidance, however, can be used as a shortcut to effectively change the law without notice-and-comment rulemaking. *See, e.g.*, Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* at 4, Admin. Conf. of United States (Oct. 12, 2017). And such material can have so great an impact that an agency may be forced to maintain it even if a "memorandum" was not properly adopted at the outset. *See DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 33 (2020). HISA provides no apparent mechanism for the FTC to prevent the Authority from using its broad statutory authority to issue sub-regulatory diktats.

This last power by itself is fatal to the Authority—while also illustrating why the Court should not grant the

Association's and FTC's petitions without granting this one. One reason guidance is so dangerous, even when it is not formally binding, is that regulated parties know that the regulator may *act* on that guidance by bringing an enforcement action, the prospect of which is inherently coercive. *See, e.g.*, Parrillo, *supra*, at 11 & n.15, 187-88. Both the sovereign power to issue guidance and the sovereign power to bring enforcement actions therefore must be subject to plenary presidential control to prevent regulators from strongarming compliance with unlawful directions simply by threatening a lengthy and costly investigation. In light of that reality, it is impossible to separate the Authority's power to bring enforcement actions from its power to issue guidance.

* * *

When all these points are combined, the truth emerges: the Authority now governs the horseracing industry—both *de facto* and *de jure*. The Fifth Circuit should not have changed its conclusion about whether Congress delegated legislative power to the Authority merely because Congress added the words "abrogate," "add," and "modify" to the list of verbs comprising the FTC's authority. 15 U.S.C. §3053(e). Given that three circuits have now concluded this delegation is constitutional, the Court should intervene, especially because this threshold question is logically antecedent to the question presented in the Authority's own petition. It makes no sense for this Court to decide whether the Authority can enforce its rules until it is first clear that the Authority lawfully can create rules to begin with.

III. The Circuits Do Not Agree on the Constitutional Test.

Even apart from the Fifth Circuit's and other Circuits' conflicts with this Court's precedent, they also do not even agree among themselves. The private-nondelegation doctrine is the subject of general confusion in the lower courts and has prompted muddled and inconsistent tests. From helper to aid to advisor, however, none of the tests employed by the circuit courts goes so far as to encompass the Authority's role under HISA.

A. Finding a private-nondelegation violation, the D.C. Circuit in *Amtrak I* explained that private entities may "help a government agency make its regulatory decisions." 721 F.3d at 670-71. In concluding that Amtrak did not function subordinately to the FRA, that court reiterated that a private entity can be "an aid" to a federal agency as long as the agency retains the discretion to "approve[], disapprove[], or modif[y]" any proposed rule. *Id.* at 671 (citing *Adkins*, 310 U.S. at 388). But unlike in *Adkins*, in which the agency could "unilaterally change regulations proposed to it by private parties," Amtrak "enjoy[ed] authority equal to the FRA," making the delegation of authority unconstitutional if Amtrak were private. *Id.*

Here, by contrast, the Authority's role cannot be described as "helping" the FTC make its decisions, because the only decision the FTC is *required* to make is to decide whether the Authority's rules are contrary to statute—not whether they are good policy, much less policy that the President can defend to voters. 15 U.S.C. §3053(e). For similar reasons, the Authority is not "an aid" to the FTC. The FTC must approve any proposed rule that is consistent with HISA, *id.* §3053(c)(2), and, again, can counter them only with its own rulemaking, *id.* §3053(e).

So even if the FTC believes one of the Authority's rules is outright harmful, it is still uncertain whether the FTC will fix it, rather than using its resources elsewhere. By the D.C. Circuit's measure, the Authority has been unconstitutionally delegated legislative authority.

B. Other circuits applying the private-nondelegation doctrine have allowed private entities to perform only limited, advisory roles. The Fourth Circuit has said that the doctrine permits agencies to "employ private entities for *ministerial* or *advisory* roles, but [agencies] may not give these entities governmental power over others." *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004). And the Third Circuit permitted a private entity to serve "advisory" and "ministerial" functions. *United States v. Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989). The Ninth Circuit rejected a challenge to the Secretary of Agriculture's reliance on the Navel Orange Administrative Committee, explaining that "the Secretary is free to seek advice from whatever sources he deems appropriate, so long as he or his delegate in the Department retains ultimate authority to issue the regulation." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) (citing *Adkins*, 310 U.S. at 399).

The Authority's role here is far from "ministerial" or "advisory," given that it was tasked with creating an elaborate (and still growing) regulatory program from scratch. 15 U.S.C. §3052(a). And the FTC has not sought the Authority's "advice." Instead, the Authority is effectively equal to the FTC in some respects—and superior in others. The Authority can make rules and issue guidance that the FTC can check only through its own rulemaking. *Id.* §3053(e).

Thus, in the words of the Fifth Circuit's sister circuits, the Authority is not a "help" or an "aid" or a source

of "advice," nor is it performing "ministerial" or "advisory" functions. *Amtrak I*, 721 F.3d at 670-71; *Riverbend Farms*, 958 F.2d at 1488; *Pittston Co.*, 368 F.3d at 395. It is writing rules to govern an industry, and the FTC is largely powerless to disapprove them. 15 U.S.C. §3053(c)(2). The FTC's ability to make its own rules to counteract those of the Authority merely demonstrates (at most) its equality with the Authority, not its supervision. The Fifth Circuit (along with the Sixth and Eighth) stands contrary to the Third, Fourth, Ninth, and D.C. Circuits in concluding that this type of delegation is constitutionally permissible. The Court's intervention is warranted.

IV. This Question is Exceptionally Important.

The question presented here is also exceptionally important. The horseracing industry is worth billions of dollars and employs tens of thousands of people. Few questions are more important than whether Congress can delegate authority to a private entity to create (and then enforce) an elaborate regulatory apparatus to govern an entire industry.

Congress, moreover, apparently intends to use HISA as a model to govern other industries, Amicus Br. of Sen. McConnell, *supra*, at 4—thus potentially creating a country full of private entities empowered by Congress to boss around not just other people but also the *States*. The federalism implications are enormous. It is one thing for the States to be subject to preemptive rules issued by a federal agency subject to checks and balances and the President's political control; it is something else entirely for separate Sovereigns to be regulated by private citizens no one voted for and not even the President can fire. This Court's review is essential before Congress

federalizes in this unconstitutional way even more industries that have been governed by the States for centuries.

Furthermore, as explained above, the question presented here is logically antecedent to the questions in the Authority's (No. 24-433) and the FTC's (No. 24-429) petitions. The Court's ability to effectively resolve those questions presented thus may well hinge on its resolution of this one. And no one disputes that the Authority's and FTC's petitions warrant certiorari. Especially given that multiple members of the Court have already publicly expressed interest in addressing the circumstances under which Congress can delegate regulatory power to private entities, *see supra* pp.17-18, the Court should make sure that the entire issue, rather than just part of it, is before the Court.

Finally, the Authority's rulemaking power threatens the health, safety, and welfare of tens of thousands of workers and horses. Horseracing injuries were already decreasing before Congress created this scheme.[9] That is unsurprising. Because of federalism, States can experiment, and successful innovation can spread. "This Court," however, "has the power to prevent an experiment." *New State Ice Co v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). It should not do so. And the Court certainly should not allow Congress to empower a private entity—subject to capture and acting outside of the Constitution—to write the rules. "The Constitution's deliberative process was viewed by the Framers as a valuable feature, not something to be

[9] *See* Supplemental Tables of Equine Injury Database Statistics for Thoroughbreds, The Jockey Club (Mar. 12, 2020) https://jockeyclub.com/pdfs/eid_11_year_tables.pdf (cited in H.R. Rep. No. 116-554, at 17 n.1 (2020)).

lamented and evaded." *Amtrak II*, 575 U.S. at 62 (Alito, J., concurring) (citing John F. Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 202 (2007)). It is always in the public interest for this Court to vindicate a core feature of the Constitution that, by design, "exists to protect liberty." *Id.* at 61.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

BETH KLUSMANN
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Aaron.Nielson@oag.texas.gov
(512) 936-1700

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APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 5, 2024
Lyle W. Cayce
Clerk

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,

versus

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 CHRISTINE 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.

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 amending 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 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.

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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).

§ 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 independent 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

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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.").

[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).

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 nondelegation 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), *vacated and*

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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).

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]

Next, the Horsemen argue the FTC's new review power creates a timing problem. Because the FTC may

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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, 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).

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]

Finally, the Horsemen point to the SEC's supervisory authority over private self-regulatory organizations

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[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 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.

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

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

[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).

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 been considered so

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[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) (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

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

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

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 injunctive 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*,

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[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).

§ 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

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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

"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 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

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"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).

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 racetrack 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 recently 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

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[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 expressly 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").

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), 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

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[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)).

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 *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

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[15] *See* § 3059 (deeming it an unfair or deceptive practice under 15 U.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").

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 unsupervised 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

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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.").

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, 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

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[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. 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.

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 accord, 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]

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

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

Board can remove members: directors by a two-thirds vote and committee members for any reason.[20]

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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 rulemaking 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-

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[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.

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 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.

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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 Appointments 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).

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 "fundamentally 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 Appointments 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 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.[24]

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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).

[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).

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)).[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*,

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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.").

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, *Lebron* 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]

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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

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 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

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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*.

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
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

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	No. 5:21-CV-071-H

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 (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.

A. Congress enacts HISA with broad bipartisan support.

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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.

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 commerce (§ 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 Commission, 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.

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 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 sub-claim 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

[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.

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 non-delegation 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
- 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 of a matter of law pivotal to its decision"—are given the weight of binding precedent (and therefore, likewise

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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.").

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 reexamined 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 (1991) (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 "authority 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*

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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).

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 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

[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

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 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"

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instructs that the Court should adopt the defendants' reading, which is also plausible and does not call into question the statute's constitutionality.

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 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 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 typical 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 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

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[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).

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 Authority'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*, 53 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 control" 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 non-governmental—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 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

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

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. 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 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

[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.*

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.

/s/ James W. Hendrix
JAMES WESLEY HENDRIX
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 9, 2024
Lyle W. Cayce
Clerk

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,

versus

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 CHRISTINE 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.

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. Steven Beshear, Mr. Adolpho Birch, Mr. Charles Scheeler, Ms. Susan Stover, Mr. Bill Thomason, Mr. D. G. Van Clief, and Mr. Kenneth Schanzer as petitioners for panel rehearing (5TH CIR. R. 35 I.O.P.), the petitioners 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.

APPENDIX D

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 18, 2022
Lyle W. Cayce
Clerk

No. 22-10387

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,

Plaintiffs—Appellants,

STATE OF TEXAS; TEXAS RACING COMMISSION,

Intervenor Plaintiffs—Appellants,

versus

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 KELLY SLAUGHTER; COMMISSIONER ROHIT CHOPRA; COMMISSIONER NOAH PHILLIPS; COMMISSIONER CHRISTINE WILSON,

Defendants—Appellees.

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

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

STUART KYLE DUNCAN, *Circuit Judge*:

We consider challenges to the Horseracing Integrity and Safety Act ("HISA" or the "Act").[1] Enacted in 2020, HISA is a federal law that nationalizes governance of the thoroughbred horseracing industry. To formulate detailed rules on an array of topics, HISA empowers a private entity called the Horseracing Integrity and Safety Authority (the "Authority"), which operates under Federal Trade Commission oversight. Soon after passage, HISA was challenged by various horsemen's

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[1] Pub. L. No. 116–260, §§ 1201–12, 134 Stat. 1182, 3252–75 (2020) (codified at 15 U.S.C. § 3051–60).

associations, who were later joined by Texas and the state's racing commission. The plaintiffs argued HISA is facially unconstitutional because it delegates government power to a private entity without sufficient agency supervision. The district court acknowledged that the plaintiffs' "concerns are legitimate," that HISA has "unique features," and that its structure "pushes the boundaries of public-private collaboration." Nonetheless, the court rejected the private non-delegation challenge, concluding HISA "stays within current constitutional limitations as defined by the Supreme Court and the Fifth Circuit."

We cannot agree. While we admire the district court's meticulous opinion, we conclude that HISA is facially unconstitutional. A cardinal constitutional principle is that federal power can be wielded only by the federal government. Private entities may do so only if they are subordinate to an agency. *See generally A.L.A. Schechter Poultry Corp. v. United States* [*Schechter Poultry*], 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* [*Adkins*], 310 U.S. 381, 399 (1940). But the Authority is not subordinate to the FTC. The reverse is true. The Authority, rather than the FTC, has been given final say over HISA's programs.

While acknowledging the Authority's "sweeping" power, the district court thought it was balanced by the FTC's "equally" sweeping oversight. Not so. HISA restricts FTC review of the Authority's proposed rules. If those rules are "consistent" with HISA's broad principles, the FTC *must* approve them. And even if it finds inconsistency, the FTC can only suggest changes. What's more, the FTC concedes it cannot review the

Authority's policy choices. When the public has disagreed with those policies, the FTC has disclaimed any review and instead told the public to "engag[e] with the Authority."[2] An agency does not have meaningful oversight if it does not write the rules, cannot change them, and cannot second-guess their substance. As the district court correctly put it: "Only an Act of Congress could permanently amend any Authority rule or divest it of its powers. The FTC may never command the Authority to change its rules or divest it of its powers." *Horsemen's Benevolent & Protective Ass'n v. Black* [*Black*], No. 5:21-CV-071, 2022 WL 982464, at *69 (N.D. Tex. Mar. 31, 2022). The end result is that Congress has given a private entity the last word over what rules govern our nation's thoroughbred horseracing industry.

The Constitution forbids that. For good reason, the Constitution vests federal power only in the three branches of the federal government. Congress defies this basic safeguard by vesting government power in a private entity not accountable to the people. That is what it has done in HISA. The Authority's power outstrips any private delegation the Supreme Court or our court has allowed. We must therefore declare HISA facially unconstitutional. In doing so, we do not question Congress's judgment about problems in the horseracing industry. That political call falls outside our lane. Nor do we forget that "[t]he judicial power to declare a law unconstitutional should never be lightly invoked." *Sveen v. Melin*, 138 S. Ct. 1815, 1831 (2018) (Gorsuch, J., dissenting). We only apply, as our duty demands, the settled

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[2] *See Order Approving the Assessment Methodology Rule Proposed by the Horseracing Integrity and Safety Authority* 20, FEDERAL TRADE COMM'N (Apr. 1, 2022).

constitutional principle that forbids private entities from exercising unchecked government power.

The district court's judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

I. BACKGROUND

A. Facts

American horseracing is older than the founding. "Despite the disapproval of the Puritan hierarchy, by the mid 1600s, horse racing had become a popular and largely unregulated recreation throughout the colonies." 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).[3] For nearly all our subsequent history, horseracing has been regulated by the States, local communities, and private organizations. See *id.* at 491–92.[4] That changed in 2020. Alarmed by a spate of doping scandals and racetrack fatalities, Congress enacted HISA. *See* 15 U.S.C. § 3051–60.[5] It passed with wide bipartisan support on December 21, 2020, and was signed by President Trump six days later.

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[3] *See generally* JOAN S. HOWLAND & MICHAEL J. HANNON, A LEGAL RESEARCH GUIDE TO AMERICAN THOROUGHBRED RACING LAW FOR SCHOLARS, PRACTITIONERS, AND PARTICIPANTS 112 (1998); ROGER LONGRIGG, THE HISTORY OF HORSE RACING 10 (1972).

[4] *See also* Lauren Stelly, *Uniform Drug Reform in Horseracing*, 6 MISS. SPORTS L. REV. 71, 73 (2016) (noting that states "realize that more trainers will want to run their horses in the more lenient states").

[5] Unless otherwise noted, all statutory references are to HISA.

1. HISA Framework. HISA creates a framework for enacting nationwide rules governing racetrack safety, anti-doping, and medication control. *See* § 3054(a). The Act's reach is broad. It applies to all "covered" horses, persons, and horseraces. *See* §§ 3055(a)(1), 3056(a)(1), 3057(a)(1). "Covered horses" means "any Thoroughbred," but other breeds may be brought under the Act's purview by a State racing commission or breed governing organization. § 3051(4); *see also* § 3045(l). "Covered horseraces" are those with "a substantial relation to interstate commerce." § 3051(5). "Covered persons" includes "all trainers, owners, breeders, jockeys, racetracks, [and] veterinarians"; licensees of State racing commissions and their "agents, assigns, and employees"; and "other horse support personnel who are engaged in the care, training, or racing of covered horses." § 3051(6).

2. The Authority. To "develop[] and implement[]" the rules it envisions, HISA empowers a "private, independent, self-regulatory, nonprofit corporation, to be known as the 'Horseracing Integrity and Safety Authority[.]'" § 3052(a). The Authority's board of directors is set at nine members—five of whom "shall be independent members selected from outside the equine industry." § 3052(b)(1). Choosing board members is left up to a nominating committee. § 3052(d). The Act contains provisions to protect the board from conflicts of interest.[6] The Authority is

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[6] For example, no board member or independent committee member may (1) have a "financial interest in, or provide[] goods or services to, covered horses"; (2) be "[a]n official or officer ... of an equine industry representative" or serve in a "governance or policymaking capacity for an equine industry representative"; (3) be "[a]n employee of, or an individual who has a business or commercial relationship with" people who have financial interests in covered

placed under the "oversight" of the Federal Trade Commission (the "FTC"). *See* § 3053.

3. Rule Enactment, Approval, and Preemption. HISA divides responsibility for enacting rules between the Authority and the FTC. The Authority formulates proposed rules. The Act provides that the Authority "shall establish ... program[s]" in the three key areas of anti-doping, medication control, and racetrack safety. *See* §§ 3055(a)(1), 3056(a)(1). Additionally, the Authority "shall issue ... a description of safety, performance, anti-doping, and medication control rule violations[.]" § 3057(a)(1). The Act outlines various "considerations," "activities," or "elements" the Authority must incorporate into the programs and rule violations. *See* §§ 3055(b)–(g), 3056(b)–(c), 3057(a)(2)–(e).

The Authority submits proposed rules to the FTC, § 3053(a), which publishes them in the Federal Register for public comment, § 3053(b)(1). A proposed rule "shall not take effect" unless the FTC approves it, § 3053(b)(2), which must occur no later than 60 days after publication, § 3053(c)(1). 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). Conversely, the FTC can "make recommendations" to the Authority to modify proposed rules, and the Authority "may resubmit" proposed rules incorporating those modifications. § 3053(c)(3). The FTC itself may adopt an "interim final rule" under the APA's good cause standard, provided it finds this "necessary to protect—(1) the health and safety of covered horses; or (2) the integrity

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horses or equine industry officers; or (4) be "[a]n immediate family member of" an individual described in (1) or (2). § 3052(e)(1–4).

of covered horseraces and wagering on those horseraces." § 3053(e); *see also* 5 U.S.C. § 553(b)(B).

Rules promulgated by the Authority in accordance with HISA "shall preempt any provision of State law or regulation with respect to matters within the jurisdiction of the Authority[.]" § 3054(b).[7]

4. Enforcement. The Authority can investigate violations (including by issuing subpoenas) and enforce the rules by imposing civil sanctions or by suing to enforce sanctions or obtain injunctive relief. §§ 3058(a), 3057(j), 3054(h–j). Any civil sanction is subject to *de novo* review by both an administrative law judge and the FTC. § 3058(b)(1), (c)(3)(B). Additionally, the Authority must seek an agreement with the United States Anti-Doping Agency (or comparable entity) to act as the enforcement agency for anti-doping and medication control rules. § 3054(e)(1). It may enter into similar agreements with State racing commissions. § 3054(e)(2). The Authority may also issue guidance on how it interprets or enforces the rules, which must be submitted to the FTC but which "shall take effect" upon submission. § 3054(g)(1–3). Finally, as a condition of participating in covered races, covered persons must register with the Authority, agree to comply with the rules, and cooperate with enforcement measures. § 3054(d).

5. Funding. After an initial stage funded by loans obtained by the Authority, the Authority is primarily funded by fees collected from covered persons or State

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[7] The rules, however, do not preempt state or federal laws "relating to criminal conduct, cruelty to animals, matters unrelated to antidoping, medication control and racetrack and racing safety of covered horses and covered races, and the use of medication in human participants in covered races." § 3054(k)(3).

racing commissions. § 3052(f)(1–4). As with other proposed rules, the Authority must submit for the FTC's approval its "formula or methodology for determining [fee] assessments." § 3053(a)(11).

6. Approved Rules. To date, the FTC has approved the Authority's proposed fee assessment methodology, in addition to three sets of rules concerning racetrack safety, enforcement procedures, and registration requirements and procedures.[8] These rules cover numerous topics and they are minutely detailed. For example, the rules regulate necropsies on horses that die at racetracks; specify continuing education requirements for thirteen categories of persons including trainers, owners, grooms, jockeys, and starters; set out comprehensive regulations for veterinarians; regulate the "traction devices" (such as "toe grabs") on horseshoes; regulate jockeys' health, safety, and equipment; and specify the composition, weight, length, and diameter of riding crops, as well as the maximum number of times a jockey may use a crop to "activate and focus" a horse during a race ("6 times ... in increments of 2 or fewer strikes").[9] The rules also create a detailed scheme of sanctions.[10]

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[8] *See* HISA Assessment Methodology Rule, 87 Fed. Reg. 9349 (Feb. 18, 2022); HISA Racetrack Safety, 87 Fed. Reg. 435 (Jan. 5, 2022); HISA Enforcement Rule, 87 Fed. Reg. 4023 (Jan. 26, 2022); HISA Registration Rule, 87 Fed. Reg. 29862 (May 17, 2022).

[9] *See* HISA Racetrack Safety, 87 Fed. Reg. at 453 (§ 2170) (necropsies); id. at 453 (§ 2182) (continuing education); *id.* at 454–57 (§§ 2220–72) (veterinarians); *id.* at 457 (§ 2276) (horseshoes); *id.* at 457 (§§ 2280–82) (riding crops); *id.* at 458 (§§ 2290–93) (jockeys).

[10] *See* HISA Enforcement Rule Modification, 87 Fed. Reg. at 4025.

B. Procedural History

In March 2021, the National Horsemen's Benevolent and Protective Association and twelve affiliates (collectively, "Horsemen") sued the FTC and the Authority (collectively, "Appellees") in federal district court. The Horsemen claimed HISA was facially unconstitutional on various grounds, including the private non-delegation doctrine and the Fifth Amendment's Due Process Clause.[11] Appellees moved to dismiss, while the Horsemen moved for summary judgment on their private non-delegation and due process claims. After briefing was completed, the State of Texas and the Texas Racing Commission (collectively, "Texas") intervened and joined the Horsemen's summary judgment motion. Texas's complaint added an anti-commandeering claim. The district court ruled it would not consider that claim until it had resolved the outstanding motions.

On March 31, 2022, the district court denied the Horsemen's summary judgment motion and granted Appellees' motion to dismiss. Black, 596 F.Supp.3d 691. We discuss the district court's reasoning below. A few days after the ruling, the court ordered the parties to confer and file a joint status report regarding Texas's remaining anti-commandeering claim. On April 14, 2022, Texas filed a notice dismissing that claim under Federal Rule of Civil Procedure 41(a), leading to the court's entry of a final judgment on April 19, 2022. The Horsemen and Texas each filed notices of appeal on April 19 and 20, 2022, respectively.

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[11] The Horsemen also claimed HISA was unconstitutional under the public non-delegation doctrine and the Appointments Clause. The district court did not rule on those claims and so they are not before us.

In the district court, Appellants subsequently filed an emergency motion under Federal Rule of Civil Procedure 59(e) to amend the final judgment, realizing that the district court had improperly dismissed the case based on Texas's Rule 41(a) dismissal. On April 25, 2022, the district court denied the Rule 59(e) motion, ruling instead that the previous final judgment was a "nullity" and certifying the court's March 31 order as a final judgment under Rule 54(b). As the district court explained, it did so to remove any doubt as to our court's jurisdiction over the pending appeal. The district court then entered a new final judgment on April 25, 2022.

C. District Court Ruling

The district court upheld HISA in a thorough opinion which we only summarize here. The court first concluded the Horsemen had standing to bring their private nondelegation and due process claims. *Black*, 2022 WL 982464 at *4–8. The Horsemen faced a concrete, "certainly impending injury," because HISA requires passage of regulations that will aggrieve the Horsemen. *Id.* at *7. That injury is fairly traceable to HISA and would be redressed by a decision finding HISA unconstitutional, because the Horsemen "would no longer be subject to certainly impending regulatory control ... and would be able to continue administering the race-day medications to their horses that the Authority's rules would inevitably prohibit." *Id.* at *8. The court also concluded that the claims were ripe. *Id.* at *8–10. It reasoned that the case "requires the [c]ourt to resolve a dispute over Congress's choice to create a hybrid rulemaking scheme and the words it used to do so." *Id.* at *10.

Turning to the merits, the district court first considered the claim that HISA unconstitutionally delegates

government power to a private entity. Synthesizing precedent from the Supreme Court and our circuit, the court framed the pertinent inquiry as (1) whether HISA contains an "intelligible principle guiding the Authority and the FTC"; and (2) whether the Authority "function[s] subordinately to the FTC." *Id.* at 13. On the first question, the court concluded that HISA laid down sufficiently intelligible principles to guide the Authority and the FTC. *Id.* at *14–16.

The second question—whether the Authority is subordinate to the FTC—was more difficult. The court candidly "recognize[d] that HISA's regulatory model pushes the boundaries of public-private collaboration." *Id.* at *27. Nonetheless, the court found no violation of the private non-delegation doctrine, at least "within current constitutional limitations as defined by the Supreme Court and the Fifth Circuit." *Ibid.* Principally, the court reasoned that while the Authority drafts and proposes rules, those rules become law only after "the FTC's independent review and approval." *Id.* at *17. In this regard, HISA draws on the securities-regulation framework, which uses private organizations (like FINRA and its predecessor, the NASD)[12] to govern industry members under SEC oversight. *Ibid.* "[T]he SEC-FINRA model, which inspired the FTC-Authority relationship," the court pointed out, has been "uniformly" upheld against private non-delegation challenges. *Ibid.* (citing *Sorrell v. SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982);

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[12] FINRA stands for the "Financial Industry Regulatory Authority." *See, e.g.*, *Saad v. S.E.C.*, 873 F.3d 297, 299 (D.C. Cir. 2017). NASD stood for the "National Association of Securities Dealers." *See, e.g.*, *Nat'l Ass'n of Securities Dealers, Inc. v. S.E.C.*, 431 F.3d 803, 804 (D.C. Cir. 2005).

Todd & Co. v. SEC, 557 F.2d 1008, 1012 (3d Cir. 1977); *R. H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952)). And while our circuit has not addressed any such challenges, we recently upheld an agency's subdelegating to a private body the authority to certify state medicaid-reimbursement rates. *Id.* at *17–18 (discussing *Texas v. Rettig*, 987 F.3d 518 (5th Cir. 2021)). There was no private non-delegation problem, we found, because the agency "independently" reviewed the private entity's activities. *Rettig*, 987 F.3d at 532 (citation omitted). So too here, thought the district court: while the Authority's rule-drafting authority "appears sweeping," the FTC's "review is equally so." *Black*, 2022 WL 982464 at *18.

All the same, the district court acknowledged that the challengers raised "compelling arguments" against HISA's "novel regulatory scheme" and its delegation to the Authority. *Id.* at *1, *10, *19. For instance, the court noted that the FTC's "limited ability to draft rules" was an "uncommon feature in public-private partnerships." *Id.* at *19. And while the FTC itself could adopt interim final rules under a "good cause" standard, the narrowness of that emergency power made it "not much of an answer to the Horsemen's concerns." *Ibid.* Still, the court found the restrictions on the agency did not render it subordinate to the Authority under existing precedent. *Id.* at *19–21 (relying principally on *Currin v. Wallace*, 306 U.S. 1 (1939) and *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.* [*Amtrak IV*], 896 F.3d 539 (D.C. Cir. 2018)).

The court also acknowledged that the FTC can review the Authority's proposed rules only for "consistency" with HISA and existing rules, thus giving the Authority unreviewable power to "fill up the details" of regulation and relegating the FTC to an "adjudicative, rather than a regulatory, function." *Id.* at *22 (quoting

Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting)). Still, the court noted that the Act sought to cabin "consistency" review by incorporating various "elements, considerations, baseline rules, and express prohibitions." *Ibid.* And the court pointed out that the SEC also reviews FINRA rules only for consistency with the enabling statute. *Ibid.* (citing 15 U.S.C. § 78s(b)(2)(C)(i)).

Finally, the court conceded that, unlike the agencies examined in any other private non-delegation case, the FTC lacked any power "to formally modify the Authority's rules." *Id.* at *23. But this was "not fatal" to the Act's constitutionality, because relevant precedents did not turn on the agency's power to modify the private entity's rules, only on its power to "approve or disapprove" them. *Ibid.* (discussing *Adkins*, 310 U.S. 381; *Rettig*, 987 F.3d at 532; *Todd & Co.*, 557 F.2d at 1012). Nonetheless, the court conceded that "the Horsemen's grievance is understandable" and highlighted the following:

> Unlike the SEC-FINRA relationship, the FTC needs the Authority to function as a typical regulator. Only an Act of Congress could permanently amend any Authority rule or divest it of its powers. The FTC may never command the Authority to change its rules or abolish its role in the administrative process.

Ibid. (citations omitted). Yet the court again found no private non-delegation problem, based on what it deemed controlling precedents from the Supreme Court and our court. *Id.* at *23–24 (discussing *Currin*, 306 U.S. at 16; *Rettig*, 987 F.3d at 532; *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 708–09 (5th Cir. 2017)). Given that "the FTC controls the promulgation of

binding rules," there was no private non-delegation problem. *Id.* at *24.

The district court then turned to the due process challenges. The court dismissed those claims, concluding that the Authority is not a self-interested industry competitor because: the Act requires a majority independent board and standing committees; includes a conflicts-of-interest section that precludes those with financial and familial relations from serving on the board; and enrolls impartial hearing officials or tribunals to conduct adjudications for rule violations, which are approved by the FTC. *Id.* at *25–26.[13]

In sum, the district court concluded that (1) the Horsemen had standing; (2) their claims were ripe; (3) and HISA did not violate the private non-delegation doctrine or the Due Process Clause.

II. STANDARD OF REVIEW

"We review de novo a district court's rulings on a motion to dismiss and a motion for summary judgment, applying the same standard as the district court." *TOTAL Gas & Power N. Am., Inc. v. FERC*, 859 F.3d 325, 332 (5th Cir. 2017).

Appellants facially challenge HISA's constitutionality. To sustain such a challenge, they 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)). "Facial challenges to the constitutionality of statutes should

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[13] The Authority's ability to charge fees also did not disturb the district court because the Authority is not obligated to operate as a for-profit corporation. *Id.* at *26.

be granted sparingly and only as a last resort." *Id.* at 752–53 (citations omitted).

III. APPELLATE JURISDICTION

We must first address our appellate jurisdiction. *See Chandler v. Phoenix Servs., L.L.C.*, 45 F.4th 807, 812 (5th Cir. 2022). The Authority[14] argues we lack jurisdiction because the Horsemen did not file a timely notice of appeal from a valid final judgment and because Texas lacks appellate standing. We reject the first argument and so need not reach the second.

The district court entered final judgment on April 19, 2022. That same day, the Horsemen filed a notice of appeal seeking review of the March 31, 2022 order dismissing all of their claims with prejudice. The April 19 final judgment was invalid, however, because it also purported to dismiss without prejudice Texas's anti-commandeering claim under Rule 41(a). Our precedent does not allow that.[15] As a result, the Horsemen's notice of appeal was premature. *See* FED. R. APP. P. 4(a)(2) (referring to a notice of appeal "filed after the court announces a decision or order ... but before the entry of the judgment or order").[16]

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[14] The FTC does not contest our jurisdiction.

[15] *See Exxon Corp. v. Maryland Cas. Co.*, 599 F.2d 659, 662–63 (5th Cir. 1979) (explaining Rule 41(a) does not allow dismissal of individual claims); *see also Williams v. Taylor Seidenbach, Inc.*, 958 F.3d 341, 345 (5th Cir. 2020) (en banc) (citing *Exxon Corp.* for this proposition).

[16] *See also, e.g.*, *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 539 n.1 (5th Cir. 2005) (notice of appeal was "premature" because filed "before the district court entered a final decision"); *Young v. Equifax Credit Info. Serv's, Inc.*, 294 F.3d 631, 634 n.2 (5th

But the district court subsequently cured any problem with the premature notice. On April 25, 2022, the court certified its March 31, 2022 order as final and appealable under Federal Rule of Civil Procedure 54(b).[17] That Rule 54(b) certification made the Horsemen's original notice effective to appeal the March 31, 2022 order. "Under [Federal Rule of Appellate Procedure] 4(a)(2), an appeal from a nonfinal decision may serve as an effective notice of appeal from a subsequently entered final judgment if the nonfinal decision '*would be* appealable if immediately followed by the entry of judgment.'" *Cousin v. Small*, 325 F.3d 627, 631 (5th Cir. 2003) (quoting *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 276 (1991)). Our court "has applied [this] rule in the context of the entry of a rule 54(b) certification after a prematurely filed notice of appeal, precisely the situation presented by this case." *Ibid.* (citing *Barrett v. Atl. Richfield Co.*, 95 F.3d 375 (5th Cir. 1996)). The Horsemen's notice of appeal, then, is deemed filed on the date of and after entry of the Rule 54(b) judgment. FED. R. APP. P. 4(a)(2). It was therefore timely and effective to bring the March 31, 2022 order before us.

Appellees nevertheless contend that Appellants' joint Rule 59(e) motion—filed on April 22, 2022—made the previously filed notices of appeal "nullities," thus

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Cir. 2002) (a notice of appeal was "technically premature" because district court's order was not a valid final judgment).

[17] See FED. R. CIV. P. 54(b) (providing "the [district] court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties, only if the court expressly determines that there is no just reason for delay"). Here, the district court's Rule 54(b) order expressly determined that no just reason for delay existed.

requiring the Horsemen to file a new or amended notice. Appellees cite no authority for that proposition. Rather, they cite cases holding that a notice of appeal is ineffective if filed while a Rule 59(e) motion remains pending before the district court.[18] Those cases, however, do not mean that a Rule 59(e) motion somehow "nullifies" a previously filed notice of appeal. Here, the district court denied the Rule 59(e) motions in the same order that it certified its March 31, 2022 order under Rule 54(b). As discussed, that Rule 54(b) certification had the effect of perfecting the premature notice of appeal. FED. R. APP. P. 4(a)(2); *Cousin*, 325 F.3d at 631; *Barrett*, 95 F.3d at 379.

The Horsemen's notice of appeal was therefore timely and effective to appeal the district court's March 31, 2022 order. No one disputes the district court's conclusion that the Horsemen have standing. We therefore need not consider whether Texas does also. *See Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

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[18] *See, e.g.*, *Lawson v. Stephens*, 900 F.3d 715, 717–20 & n.3 (5th Cir. 2018) (explaining notice of appeal was "ineffective" because district court had never ruled on pending Rule 59(e) motion); see also FED. R. APP. P. 4(a)(4)(B)(i) (a notice of appeal filed before court disposes of various motions, including a Rule 59(e) motion, "becomes effective" only upon court's disposing of the pending motion); *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020) (explaining that, whereas a timely Rule 59(e) motion means "there is no longer a final judgment to appeal from," the disposition of that motion "restores the finality of the original judgment, thus starting the 30-day appeal clock" (cleaned up)); *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 177 (1989) (explaining "Federal Rule of Appellate Procedure 4(a)(4) renders ineffective any notice of appeal filed while a Rule 59(e) motion is pending").

We proceed to the merits.

IV. PRIVATE NON-DELEGATION DOCTRINE

Our Constitution permits only the federal government to exercise federal power. This is why each of the first three articles begins by "vest[ing]" legislative, executive, and judicial power "in" specific entities: "a Congress," "a President," and a "supreme Court" and other federal "Courts."[19] If it were otherwise—if people outside government could wield the government's power—then the government's promised accountability to the people would be an illusion. *See* THE FEDERALIST No. 51 ("A dependence on the people is, no doubt, the primary control on the government[.]"); *Amtrak II*, 575 U.S. at 61 (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty."). This point is reflected in the Supreme Court's non-delegation cases. While the Court has allowed limited delegations of authority to government agencies, see *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–76

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[19] *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); art. II, § 2 ("The executive Power shall be vested in a President of the United States of America."); art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."); *see also Dep't of Transp. v. Ass'n of Am. R.R.s* [*Amtrak II*], 575 U.S. 43, 67 (2015) (Thomas, J., concurring) ("[T]he Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government.... These grants are exclusive."); Steven G. Calabresi, *The Vesting Clauses As Power Grants*, 88 NW. U.L. REV. 1377, 1390 (1994) ("[T]he three powers of government described in the Vesting Clauses constitute a finite set of all the governmental powers that our Constitution sanctions.").

(2001), it has set its face against giving public power to private bodies. "Such a delegation of legislative power," the Court thundered nearly a century ago, "is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *Schechter Poultry*, 295 U.S. at 537; *see also Amtrak II*, 575 U.S. at 62 (Alito, J., concurring) ("When it comes to private entities, ... there is not even a fig leaf of constitutional justification" for delegation). Not content merely to reject the idea, the Court has also called it insulting names. *See Carter Coal Co.*, 298 U.S. at 311 (conferring power on private persons is "legislative delegation in its most obnoxious form").

This commonsense principle has come to be known as the "private non-delegation doctrine." *See, e.g.*, *Tex. v. Comm'r of Internal Revenue*, 142 S. Ct. 1308 (2022) (statement of Alito, J., respecting the denial of certiorari) (noting "the need to clarify the private non-delegation doctrine").[20] Key to applying the doctrine are two eighty-year-old Supreme Court cases, *Carter Coal* (1936) and *Adkins* (1940). In *Carter Coal*, the Court invalidated a federal law that authorized a majority of coal producers to fix wages and hours for all producers. 298 U.S. at 311–12. Giving regulatory power to "private persons whose interests may be and often are adverse to the interests of others in the same business" was, the Court held, an unconstitutional "legislative delegation" of a

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[20] *See also, e.g.*, Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J. L. & PUB. POL'Y 931, 970 (2014) (discussing the "private non-delegation doctrine"); Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1721–28 (same).

"governmental function." *Id.* at 311. Congress then rewrote the law and, four years later, the Court upheld it in *Adkins*. 310 U.S. at 388. Under the new law, private boards only proposed prices—and those prices now had to be "approved, disapproved, or modified by the [agency]." *Ibid.* The private entities "operate[d] as an aid" to the agency "but [were] subject to its pervasive surveillance and authority." *Ibid.* The Court found the new scheme "unquestionably valid." *Id.* at 399. The Court emphasized that the private entities "function[ed] subordinately to the [agency]," that the agency and not the private entities "determine[d] the prices," and that the agency had "authority and surveillance over the [private entities]." *Ibid.*

From these decisions, courts 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.[21] The D.C. Circuit has expressed the idea more precisely: "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 modif[y]' 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) (quoting *Adkins*, 310 U.S. at 388), *vacated and*

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[21] *See, e.g.*, *Rettig*, 987 F.3d at 532 ("Agencies may subdelegate to private entities so long as the entities 'function subordinately to' the federal agency and the federal agency 'has authority and surveillance over [their] activities.'" (alternation in original)); *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (delegation to a private entity impermissible unless the entity "function[s] subordinately" to an agency with "'authority and surveillance' over [it]"); *United States v. Frame*, 885 F.2d 1119, 1128 (3d Cir. 1989) (same) (all quoting *Adkins*, 310 U.S. at 399).

remanded on other grounds by Amtrak II, 575 U.S. 43.[22] If the private entity does not function subordinately to the supervising agency, the delegation of power is unconstitutional.[23]

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[22] The D.C. Circuit's *Amtrak I* decision was vacated and remanded because the Supreme Court found Amtrak was a governmental entity, not the private entity it purported to be. *Amtrak II*, 575 U.S. at 46, 50–55. The Supreme Court thus had no occasion to discuss the circuit court's private non-delegation analysis. *See ibid.*

[23] Courts and commentators differ over the locus of the constitutional violation. Some suggest the Due Process Clause. *See, e.g.*, Alexander Volokh, *The Shadow Debate over Private Nondelegation in DOT v. Association of American Railroads*, 2014–2015 CATO SUP. CT. REV. 359, 376 (2015) ("[D]elegation to a private, self-interested party is a due process problem, not a non-delegation problem."); Volokh, *supra* note 11, at 932 ("The Due Process Clause is a potential limit on the private exercise of regulatory power."). Others suggest the Vesting Clauses. *See, e.g.*, *Pittston Co.*, 368 F.3d at 394 ("[W]hen the Constitution vests 'all legislative Powers' in a Congress of the United States, 'the executive Power' in a President of the United States, and 'the judicial Power' in one Supreme Court and such courts as Congress may establish, ... a non-delegation principle serves both to separate powers as specified in the Constitution, and to retain power in the government Departments so that delegation does not frustrate the constitutional design.") (internal citations omitted); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation To Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2168 (2004) ("A more plausible source of constraint on delegations to nonfederal actors is the Constitution's implicit design principle limiting the federal government to three branches."). We need not weigh in. Whatever the constitutional derivation, all parties and the district court agree that the outcome turns on whether the private entity is subordinate to the agency. *See Amtrak I*, 721 F.3d at 671 n.3 ("While the distinction [in constitutional provenance] evokes scholarly interest, ... neither court nor scholar has suggested a change in the label would effect a change in the inquiry.").

In this case, the parties agree on these basic parameters, as did the district court. *See Black*, 2022 WL 982464, at *25. But they differ sharply over whether the Authority functions subordinately to the FTC. As noted, the district court found the Authority subordinate because the Authority's proposed rules become law only after the FTC "independently" reviews and approves them. *Id.* at *17. Appellants say the reverse is true: the FTC's arms-length oversight makes the agency subordinate to the Authority. We must decide which one, agency or Authority, has the whip hand.[24]

A. The Authority Has Sweeping Rulemaking Power.

We start where we and the district court firmly agree: the Authority's rulemaking power is "sweeping." *Id.* at *18. HISA itself does not create anti-doping, medication, or racetrack safety programs. Nor does HISA empower the FTC to do so. Instead, as Texas's brief

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[24] As discussed, the district court thought the private non-delegation analysis includes the question (more familiar in the public non-delegation realm) whether Congress has provided an "intelligible principle" to guide the agency and the private entity. *Black*, 2022 WL 982464, at *11; *see, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (public non-delegation question is "whether Congress has supplied an intelligible principle to guide the delegee's use of discretion"). The parties do not join argument on whether the intelligible-principle analysis belongs in the private non-delegation context, so we do not address the point. We address only whether the Authority functioned subordinately to the FTC. All agree that this question is determinative, quite apart from whether HISA provides an "intelligible principle" to guide a private delegee. *See Black*, 2022 WL 982464, at *12 ("An intelligible principle ... cannot rescue a statute empowering private parties to wield regulatory authority" unless "they function subordinately to an agency." (citing *Amtrak I*, 721 F.3d at 671; *Adkins*, 310 U.S. at 399) (cleaned up))).

points out, "HISA delegates the task of creating such programs to the Authority." That follows from the Act's plain terms. It is "the Authority"—not the FTC—that "shall establish" the anti-doping, medication, and racetrack safety programs. §§ 3055(a)(1), 3056(a)(1). It is "the Authority"—not the FTC—that "approv[es]" a request (by a state racing commission or breed governing organization) to include breeds other than Thoroughbreds and that "consider[s]" how to adapt its programs to those breeds. §§ 3054(l)(1), 3055(a)(2).[25] And it is "the Authority"—not the FTC—that "shall issue" descriptions of rule violations, § 3057(a)(1), and "shall establish" sanctions for them, § 3057(d)(1). As the district court correctly found, in HISA, Congress empowered "the Authority" with "sweeping" power to make "myriad" rules for the horseracing industry. *Black*, 2022 WL 982464, at *18.

To be sure, Congress also included various "considerations" and other factors to guide the Authority's development of the rules. But that only underscores the point that it is the Authority, not the agency, that is tasked with weighing polices that go into formulating rules. For instance, HISA broadly instructs the Authority to create a program that includes "[a] uniform set of training and safety standards and protocols consistent

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[25] The Authority's approval of a request to expand HISA's reach to other breeds appears not to be subject to any FTC review whatsoever. *See* § 3054(*l*)(1). Texas argues that this feature of HISA independently violates the private non-delegation doctrine and, additionally, does not even include an intelligible principle to govern Authority's exercise of power. Appellees respond that Texas waived this argument by not raising it in the district court and, in any event, lacks standing to raise it. Because we conclude that HISA is unconstitutional on other grounds, we need not address this question.

with the humane treatment of covered horses," § 3056(b)(2), while leaving the policy details up to the Authority. (And, as we shall see, the FTC has affirmatively disclaimed any authority to second-guess the Authority's policy choices). Keep in mind, moreover, that we are not considering here whether the "considerations" provide a sufficiently intelligible principle to satisfy the *public* non-delegation doctrine. *See Big Time Vapes, Inc. v. F.D.A.*, 963 F.3d 436, 443–444 (5th Cir. 2020) (concluding the Tobacco Control Act provided a sufficiently intelligible principle). Instead, we are deciding whether the Authority is subordinate to the agency. And, on its face, 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 the saddle.

The district court was candid about this aspect of the FTC-Authority relationship, calling it "unique," "unusual," and "uncommon." *Black*, 2022 WL 982464, at *19, *22. Still, the court insisted this did "not necessarily convert the Authority into an insubordinate entity in the rulemaking scheme." *Id.* at *19. To explain why, the court first pointed to the FTC's power to adopt "interim final rules." *Ibid.* (citing § 3053(e)). But in the same breath the court acknowledged this was "not much of an answer." *Ibid.* We agree. After all, as the court noted, the FTC's interim rulemaking power is subject to the APA good cause standard, which means it is "narrow[]" authority reserved for "emergency situations." Ibid. (citation omitted); *see* 5 U.S.C. § 553(b)(B) (good cause standard).[26] That the agency can make temporary rules on a

[26] *See also United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011) ("Further, it is well established that the 'good cause' exception to notice-and-comment should be read narrowly in order to avoid providing agencies with an escape clause from the requirements

break-glass-in-case-of-an-emergency basis does not suggest the agency is superior to the Authority. It suggests the opposite—that the Authority is in charge.[27]

The district court placed heavier reliance on the Supreme Court's *Currin* decision. In that case, Congress established tobacco regulations that would go into effect only if approved by two-thirds of growers in a particular market. 306 U.S. at 6. This was not a private delegation, the Court held, because it only let the growers "determine exactly when [Congress's] exercise of the legislative power should become effective." *Id.* at 16 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928)). The Court emphasized, though, that the power to write the regulations "ha[d] already been exercised legislatively by the body vested with that power under the Constitution." *Ibid.*

The district court thought HISA's restrictions on the FTC's rulemaking power "parallels the private veto allowed in *Currin*." *Black*, 2022 WL 982464, at *19. We disagree. As the Supreme Court explained, the growers' veto "[wa]s not a case where a group of producers may make the law and force it upon a minority." *Currin*, 306

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prescribed." (internal quotation marks omitted)); *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) ("[T]he 'good cause' exception is to be narrowly construed and only reluctantly countenanced." (internal quotation marks omitted)).

[27] At oral argument, Appellees suggested the FTC's interim rulemaking power mirrors the SEC's ability to "abrogate, add to, and delete from" FINRA rules "as the [SEC] deems necessary or appropriate to insure the fair administration of the self-regulatory organization ...." *Id.* § 78s(c); *see also* O.A. Rec. at 24:52–27:30. We disagree. As discussed below, *see infra* Part IV.B.2., the SEC's power to change FINRA rules is not limited to emergency situations or situations meeting the "good cause" standard.

U.S. at 15–16 (citing *Carter Coal*, 298 U.S. at 310, 318). Nonetheless, the district court tried to analogize the growers' veto to "ultimately determin[ing] ... what the substance of that rule would be." *Black*, 2022 WL 982464, at *19. But this limping analogy was rejected by *Currin*: "While in a sense one may say that [the growers] are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution." 306 U.S. at 16. The bottom line is that *Currin* involved no delegation of authority to make rules, whereas HISA does. The *Currin* growers had only a veto over regulations—important to them, no doubt—but they did not write the regulations. The Authority does.[28]

B. The FTC Has Limited Power To Review Proposed Rules.

Despite the Authority's "sweeping" rulemaking power, the district court found the Authority was subordinate to the FTC. The court's reasoning proceeded in multiple steps. First, citing *Adkins*, the court reasoned that the "FTC's independent review and approval" meant that "[l]awmaking ... [was] 'not entrusted to the [Authority].'" *Black*, 2022 WL 982464, at *17 (quoting *Adkins*, 310 U.S. at 399). Second, the court reasoned that HISA followed the securities industry model of using private self-regulatory organizations under SEC oversight, a model that has "consistently withstood private non-delegation challenges." *Ibid.* Third, the court believed that our rejection of a private non-delegation claim in

[28] As explained below, the Authority *also* has a veto every bit as effective as the growers' veto in *Currin*. *See infra* Part IV.B.4. But the point here is that, in addition to that veto, the Authority writes the rules, which far outstrips the growers' role in *Currin*.

Rettig forecloses the challenge to HISA. *Id.* at *18. Fourth, the court declined to follow the D.C. Circuit's *Amtrak I* decision. *Id.* at *20–21. We address each point in turn.

1. The FTC lacks power to review the Authority's policy choices.

We turn first to the FTC's supposedly "independent" review and approval of the Authority's proposed rules. *Id.* at *17. Once the Authority submits proposed rules to the FTC, the agency must do two things. *See* § 3053(a), (c). First, it must publish the proposed rules in the Federal Register for public comment. § 3053(b)(1). Second, it must determine within 60 days whether a proposed rule is "consistent" with HISA and prior rules. § 3053(c)(1)–(2). If so, then the FTC "shall approve" the proposed rule. § 3053(c)(2). The district court principally relied on this "consistency" review to find the Authority operated subordinately to the agency. *Id.* at *22. The court was mistaken. The FTC's oversight is too limited to ensure the Authority "function[s] subordinately" to the agency. *Adkins*, 310 U.S. at 399.

The FTC's limited review of proposed rules falls short of the "pervasive surveillance and authority" an agency must exercise over a private entity. *Adkins*, 310 U.S. at 388. The district court itself could not even define what consistency review entailed. *Black*, 2022 WL 982464, at *22. "At a minimum," the court supposed the FTC would measure rules against the Act's purposes (such as ensuring "the safety, welfare, and integrity of covered horses," etc.), *see* § 3054(a)(2)(A), or against "the elements, considerations, baseline rules, and express prohibitions the Act contains." *Black*, 2022 WL 982464, at *22. The court likened this to "an adjudicative ... function akin to courts reviewing agency action for whether

it is 'in excess of statutory jurisdiction, authority, or limitations.'" *Ibid.* (quoting 5 U.S.C. § 706(2)(C)).

Even assuming any of those notions can be read into HISA, such arms-length review hardly subjects the Authority's rules to "independent" oversight. What would it mean, for instance, to say a rule is "consistent" with the proposition that medication "should be the minimum necessary to address the diagnosed health concerns identified during the examination and diagnostic process"? *See* § 3055(b)(7). Or the aspiration that a safety program include "[a] uniform set of training and racing safety standards and protocols consistent with the humane treatment of covered horses"? *See* § 3056(b)(2). Even the "baseline" medication principles the district court cited are open-ended: for instance, the Authority must "take into consideration" that horses "should compete only when they are free from the influence of medications, other foreign substances, and methods that affect their performance." § 3056(b)(1). Saying a rule is or is not "consistent" with that standard says next to nothing. Such high-altitude oversight, the district court itself acknowledged, "largely gives the Authority the power to 'fill up the details' of the Act in places with less specific directives," and "[f]illing up the details has long been recognized as the very business of regulating." *Black*, 2022 WL 982464, at *22 (citing *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting); *United States v. Grimaud*, 220 U.S. 506, 517 (1911)).

In any event, whatever "consistency" review includes, we know one thing it *excludes*: the Authority's policy choices in formulating rules. This blunt fact has been repeatedly confirmed by the FTC itself. For example, when approving the Authority's hearing rules (the "Proposed Rule Series 8300"), the FTC explained it

"reviews the Authority's proposals for their consistency with the Act and the [FTC's] rule, *not for general policy*."[29] It thus disregarded "comments [that] offered *policy recommendations* without identifying any inconsistency between the proposed rule provisions and the Act."[30] Similarly, when reviewing a rule on "toe grabs"—basically, cleats for horses—the FTC complained that commenters did not challenge the "rule's consistency with the Act;" instead they "challenge[d] certain details in the Authority's choice of permitted horseshoes, but *these are essentially policy disagreements*."[31] One more example: when addressing complaints about the Authority's fee-assessment methodology, *see* HISA Assessment Methodology Rule, 87 Fed. Reg. 9349 (Feb. 18, 2022), the FTC encouraged commenters to "continue engaging with the Authority":

> While the [FTC] concludes that the interstate methodology proposed by the Authority is

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[29] *Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority* ("*Order Approving Enforcement Rule*"), 26, FEDERAL TRADE COMM'N (Mar. 25, 2022) (emphasis added).

[30] *Id.* at 26–27 (emphasis added). As the same order explained elsewhere, the FTC's "statutory mandate to approve or disapprove a proposed Authority rule is limited to considering only whether the proposed rule 'is consistent with' the Act and the Commission's procedural rule." *Id.* at 4 (citing § 3053(c)(2)). "Nevertheless," the order continued, "the [FTC] received many comments that were unrelated to [consistency] ... and those comments *have little bearing on the [FTC's] determination*." *Ibid.* (emphasis added). While the FTC would not consider them, the order noted "*the Authority* has stated that it will use those comments when it proposes future rule modifications." *Ibid.* (emphasis added).

[31] *Order Approving Enforcement Rule* at 43.

> consistent with the Act, it is worth noting that there are likely multiple methodologies that the Authority could have proposed that would be consistent with the Act. Accordingly, *the [FTC] encourages states that would prefer another methodology to continue engaging with the Authority*, which in its response committed to keeping an open mind about the interstate methodology of the Assessment Methodology proposed rule ....

Order Approving the Assessment Methodology Rule Proposed by the Horseracing Integrity and Safety Authority 20, FEDERAL TRADE COMM'N (Apr. 1, 2022) (emphasis added). In short, the conclusion is inescapable that the FTC's consistency review does not include reviewing the substance of the rules themselves.[32]

If the FTC cannot review the policy choices behind the rules, then logically the FTC cannot make the Authority modify those policies. That is again confirmed by HISA's plain terms. The modification power the Act gives the FTC is limited in two ways. It pertains only to

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[32] This answers two additional arguments made by the Authority. First, the Authority invokes the constitutional-avoidance canon, but that canon applies only to "ambiguous" text. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). There is nothing ambiguous here: HISA explicitly limits agency review to "consistency." Second, the Authority invokes the distinction between facial and as-applied challenges. But the curtailment of agency review appears on the statute's *face*. *See* § 3053(c). Nor does our using three examples of the agency's limited review convert this to an as-applied analysis. We do not invoke those examples to critique "a defined subset of [HISA's] applications," as one would in an as-applied challenge. *United States v. Stevens*, 559 U.S. 460, 473 n.3 (2010). Rather, we invoke them to show that the agency is applying HISA exactly as written—to cabin the agency's review to "consistency" and to exclude it from second-guessing the Authority's policy choices.

whether a rule is "consistent" with the Act and does not include review of the policies informing the rule. *See* § 3053(c)(3)(A).[33] And, even then, the FTC can only make "recommendations" to the Authority. *Ibid.* In response, the Authority "may resubmit" a rule incorporating the "recommended" modification. § 3053(c)(3)(B). The Act thereby confirms—in the district court's words—the FTC's "inability to formally modify the Authority's rules." *Black*, 2022 WL 982464, at *23. Not only does HISA speak of a mere "recommendation" to modify, but it says the Authority "may" choose to modify, or not. *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' ... contrasts with the legislators' use of a mandatory 'shall' in the very same section."); *cf.* § 3053(d)(2) (the FTC "shall publish" proposed rules in Federal Register). 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. Indeed, this was conceded by the district court itself: "The FTC *may never* command the Authority to change its rules or abolish its role in the administrative process." *Black*, 2022 WL 982464, at *23 (emphasis added).

Despite finding the FTC unable to modify rules, the district court deemed this "not fatal" to HISA. *Ibid.* Again, we disagree. The district court reasoned that "the agency in *Currin* could not modify its regulation without industry approval." *Ibid.* But, as explained, the private

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[33] That follows from the text and is confirmed by the way the FTC reads the provision. As discussed, in responding to commenters, the agency sharply distinguishes comments as to "inconsistency" with the Act (which the FTC considers) from comments as to "policy recommendations" (which the FTC disregards).

growers in *Currin* could only stop regulations from going into effect; they could not rewrite them. Here, the Authority writes the regulations and the FTC cannot modify them. The court also reasoned that Adkins "did not rely" on the fact that the agency could modify the prices proposed by private parties. *Ibid.* That is mistaken. In finding no delegation, *Adkins* stated: "The members of the code [i.e., the private entity] function subordinately to the Commission [i.e., the agency]. *It, not the code authorities, determines the prices*." 310 U.S. at 399 (emphasis added). The opposite is true here. The Authority, not the FTC, determines the rules. The FTC's "consistency" review cannot touch the Authority's policy judgments when it does so.

In sum, we conclude that the FTC's limited review of proposed rules does not make the Authority function subordinately to the agency.

2. The FTC has less supervisory power than the SEC.

The district court also relied on sister-circuit cases affirming the constitutionality of the Maloney Act, which created the SEC-FINRA model and after which Congress modeled HISA. *Black*, 2022 WL 982464, at *17 ("[E]very court to consider a non-delegation challenge to the Maloney Act has concluded that there is 'no merit in the contention that the Act unconstitutionally delegates power to' a private entity." (quoting *Sorrell v. SEC*, 679 F.2d 1323, 1326 (9th Cir. 1982))); *see also, e.g.*, *Todd & Co.*, 557 F.2d at 1012. Like the Authority, FINRA is a private entity empowered to draft and propose regulations to the SEC. *See* 15 U.S.C. § 78s(b)(1) (providing a "self-regulatory organization shall file with the [SEC] ... copies of any proposed rule"). Appellees also press this argument on appeal.

The argument misses a key distinction, however. Unlike HISA, the Maloney Act empowers the SEC to "abrogate, add to, and delete from" FINRA rules "as the [SEC] deems necessary or appropriate[.]" 15 U.S.C. § 78s(c); *see also Aslin v. Fin. Indus. Regul. 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") (citation omitted). This rulemaking power meaningfully distinguishes the SEC-FINRA relationship from the FTC-Authority relationship, as the district court acknowledged: "[B]ecause Congress withheld the FTC's ability to modify proposed rules, the Authority wields greater power than FINRA and the private entities in *Adkins*." *Black*, 2022 WL 982464, at *22. Said another way: although 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. *See Adkins*, 310 U.S. at 388. Not so here. The Authority not only formulates and proposes horseracing industry rules but, given the limits built into the FTC's oversight, it also has the final word on what those rules are. Again, the district court conceded this: "Unlike[] the SEC-FINRA relationship, the FTC needs the Authority to function as a typical regulator." *Black*, 2022 WL 982464, at *23; *see also In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008) ("Absent the unique self-regulatory framework of the securities industry, [FINRA's] responsibilities would be handled by the SEC.").

We therefore cannot agree with the district court and Appellees that the Maloney Act supports the constitutionality of HISA's delegation of rulemaking power to

the Authority.[34] For similar reasons, we reject Appellees' argument that the FTC's "revise-and-resubmit power," *i.e.*, the FTC's power to deny a proposal and suggest modification, puts the FTC here on similar footing to the SEC. *See* § 3053(c)(3). As explained, the FTC's power to *recommend* modifications is not equivalent to the power to *require* modifications. The SEC itself can make changes to FINRA rules, *see* 15 U.S.C. § 78s(c), but the FTC can only recommend changes to the Authority's rules (and then, only to the extent that the rules are "inconsistent" with HISA). Because we are considering whether the private entity is subordinate to the agency for rulemaking purposes, that distinction makes all the difference.[35]

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[34] Moreover, as the district court recognized, our circuit has never addressed a private non-delegation challenge to the Maloney Act. *Black*, 2022 WL 982464, at *17. The district court observed, however, that in *Rettig* we "approvingly cited" *R.H. Johnson*, a Second Circuit decision that first upheld the Maloney Act on non-delegation grounds. *Ibid.*; *see Rettig*, 987 F.3d at 532 n.12 (citing *R.H. Johnson & Co. v. S.E.C.*, 198 F.2d 690, 695 (2d Cir. 1952)). Respectfully, that reads too much into a "see also" footnote citation. Nothing in *Rettig* suggests our court was adopting wholesale our sister circuits' non-delegation analysis of the Maloney Act. And, as discussed *infra* Part IV.B.3., *Rettig* itself is consistent with our decision finding in HISA an impermissible private delegation.

[35] For the same reason, we find irrelevant Appellee's argument that the SEC engages in same "consistency" review as the FTC. *See id.* § 78s(b)(2)(C)(i) ("The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations issued under this title that are applicable to such organization."). 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 to

3. Texas v. Rettig *does not foreclose the challenge to HISA.*

The district court also concluded our private non-delegation decision in *Rettig* supported the constitutionality of HISA. *Black*, 2022 WL 982464, at *18. We disagree.

In *Rettig*, we considered a private non-delegation challenge to a Department of Health and Human Services ("HHS") subdelegation rule requiring a private board to certify as "actuarially sound" the rates states must pay insurers in their Medicaid contracts. 987 F.3d at 526. We rejected that challenge, in relevant part, because the private board "function[ed] subordinately to" HHS. *Id.* at 532 (quoting *Adkins*, 310 U.S. at 399). That was so because HHS "reviewed and accepted" the board's accounting standards. *Id.* at 533 (citation omitted). Moreover, HHS "ha[d] the ultimate authority to approve" the states' contracts and the agency "superintended" the contract approval process "in every respect." *Ibid.*

We agree with Appellants that *Rettig* is distinguishable from the delegation here. As they point out, in *Rettig*, HHS "retained the power to unilaterally rescind or modify the rule incorporating the private organization's standards." The power to strip the private organization's power altogether is on par with the SEC's power to abrogate the private organization's rules—a clear hierarchy exists in both cases. By contrast, the FTC has only limited review over the Authority's primary rulemaking power by design and, additionally, lacks the power to change the Authority's proposed rules. § 3053(c). Again, as the district court itself recognized, "[o]nly an act of

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insure the fair administration of the self-regulatory organization ...." *Id.* § 78s(c).

Congress could permanently amend any Authority rule or divest it of its powers." *Black*, 2022 WL 982464, at *23.

Another distinction lies in the scope of the private entity's power. In *Rettig*, the private board contributed to a small part of the regulatory scheme, merely acting as an aid to HHS. *Cf. Adkins*, 310 U.S. at 388. By contrast, HISA entrusts the entire regulatory scheme to the Authority, fettered only by the FTC's limited review. As the district court correctly put it: whereas "the subdelegated power in *Rettig* concerned only 'a small part of the [contract] approval process,'" "[i]n HISA, by contrast, Congress instructs the Authority to draft myriad medication control and racetrack safety rules." *Black*, 2022 WL 982464, at *18 (quoting *Rettig*, 987 F.3d at 533).

Consequently, *Rettig* does not compel finding that HISA's delegation to the Authority clears the hurdle of the private non-delegation doctrine.

4. **Amtrak I *shows why HISA is unconstitutional.***

Finally, to support their case against HISA, Appellants rely on the Amtrak litigation, which unspooled for years in the D.C. Circuit and the Supreme Court. *See Amtrak I*, 721 F.3d 666; *Amtrak II*, 575 U.S. 31; *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.* [*Amtrak III*], 821 F.3d 19 (D.C. Cir. 2016); *Amtrak IV*, 896 F.3d 539. Those cases addressed a federal law (section 207 of the Passenger Rail Investment and Improvement Act of 2008) that empowered a putative private entity (Amtrak) and an agency (the Federal Railroad Administration or "FRA") to "jointly develop" railroad performance standards. *Amtrak I*, 721 F.3d at 668. If Amtrak and FRA disagreed, either could have an arbitrator settle the disagreement. *Id.* at 669. In *Amtrak I*, the D.C. Circuit found a private non-delegation problem. *Id.* at 677. In *Amtrak II*, the Supreme Court vacated and remanded because it

concluded Amtrak was really a government actor. In *Amtrak III*, the D.C. Circuit found section 207 violated due process by giving regulatory power to the "economically self-interested Amtrak." 821 F.3d at 39. Finally, in *Amtrak IV*, the D.C. Circuit held that striking the arbitration provision cured that constitutional problem by "eliminat[ing] Amtrak's ability and power to exercise regulatory authority over its competitors." 896 F.3d at 548.

We agree with Appellants that the private non-delegation analysis in *Amtrak I* supports their claim that HISA is unconstitutional. The D.C. Circuit found the delegation to Amtrak exceeded what the Supreme Court approved in either *Currin* or *Adkins*. Unlike the private growers in *Currin*, Amtrak helped craft the regulations. 721 F.3d at 671. Unlike the industry actors in *Adkins*, Amtrak could check FRA's regulatory authority. *Ibid.* And, "more damningly," the agency in *Adkins* could "unilaterally change" proposed rules, whereas Amtrak's authority was "equal" to FRA. *Ibid.* Each of those features also condemns HISA. Unlike in *Currin*, the Authority writes the rules. Unlike in Adkins, the Authority can effectively veto the FTC's suggested modifications. And, "more damningly," the FTC cannot unilaterally change the Authority's proposed rules. *Ibid.* Indeed, given its limited review, the FTC can merely recommend modifications to rules insofar as they are "inconsistent" with the Act, but the agency cannot second-guess the Authority's policy choices. So, "should the [FTC] prefer an alternative to [the Authority's] proposed [rules], [HISA] leaves it impotent to choose its version without [the Authority's] permission." *Ibid.* These are not the marks of a private entity that "functions subordinately" to and "in aid of" an agency with "pervasive surveillance and

authority" over it. *Adkins*, 310 U.S. at 388. *Amtrak I* therefore supports our conclusion that HISA is unconstitutional.

The district court found more persuasive the D.C. Circuit's later decisions in *Amtrak III* and *Amtrak IV*. *Black*, 2022 WL 982464, at *20–21. We disagree. Those decisions sound in public non-delegation and due process and so have little bearing here.[36] And, regardless, the district court misapplied them. Severing the arbitration provision in *Amtrak IV* solved the constitutional problem there because, without it, Amtrak no longer had the "power to make law" without the FRA's agreement. *Amtrak IV*, 896 F.3d at 548 (quoting *Amtrak III*). Not so here. If the Authority's proposed rules pass the FTC's limited consistency review, the FTC has no choice but to approve the rules. *See* § 3053(c)(2). And, as already discussed, HISA gives the FTC no power to exercise its own policy judgment during the review process. *See supra* Part IV.B.1. Thus, the district court erred in finding that the FTC "always has 'the final say,'" over the rules. *Black*, 2022 WL 982464, at *21 (quoting *Boerschig*, 872 F.3d at 708). The agency in *Amtrak IV* may have had the final say over railway standards, but the Authority has the final say over horseracing rules. Instead of *Amtrak IV*, we conclude that *Amtrak I* better illuminates HISA's constitutional flaws.

V. Conclusion

By delegating unsupervised government power to a private entity, HISA violates the private non-delegation

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[36] That is because they were both decided after the Supreme Court recognized Amtrak's governmental status in *Amtrak II*, 575 U.S. at 55.

doctrine. We therefore DECLARE that HISA is unconstitutional on that ground.[37]

The district court's decision is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

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[37] Because we resolve the case on that ground, we 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. Likewise, we need not examine the Appellants' additional arguments concerning the Authority's investigative and enforcement measures—without the rulemaking authority, the investigative and enforcement powers are nugatory and no party suggests otherwise.

APPENDIX E

Relevant Provisions of the United States Constitution

Article I, Section 1 provides:

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

Article II, Section 1, cl. 1 provides, in relevant part:

> The executive Power shall be vested in a President of the United States of America.

APPENDIX F

Horseracing Integrity and Safety Act
15 U.S.C.

§ 3051. Definitions

In this chapter the following definitions apply:

(1) Authority

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

(2) Breeder

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

(3) Commission

The term "Commission" means the Federal Trade Commission.

(4) Covered horse

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

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

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

(5) Covered horserace

The term "covered horserace" means any horserace involving covered horses that has a substantial relation to interstate commerce, including any Thoroughbred horserace that is the subject of interstate off-track or advance deposit wagers.

(6) Covered persons

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

(7) Equine constituencies

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

(8) Equine industry representative

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

(9) Horseracing anti-doping and medication control program

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

(10) Immediate family member

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

(11) Interstate off-track wager

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

(12) Jockey

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

(13) Owner

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

(14) Program effective date

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

(15) Racetrack

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

(16) Racetrack safety program

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

(17) Stakes race

The term "stakes race" means any race so designated by the racetrack at which such race is run, including, without limitation, the races comprising the Breeders' Cup World Championships and the races designated as graded stakes by the American Graded Stakes Committee of the Thoroughbred Owners and Breeders Association.

(18) State racing commission

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

(19) Trainer

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

(20) Training facility

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

(21) Veterinarian

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

(22) Workout

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

§ 3052. Recognition of the Horseracing Integrity and Safety Authority

(a) In general

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

(b) Board of directors

(1) Membership

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

(A) Independent members

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

(B) Industry members

(i) In general

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

(ii) Representation of equine constituencies

The industry members shall be representative of the various equine constituencies, and shall include not more than one industry member from any one equine constituency.

(2) Chair

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

(3) Bylaws

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

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

(B) the establishment of standing committees;

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

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

(E) any other matter the Board considers necessary.

(c) Standing committees

(1) Anti-doping and medication control standing committee

(A) In general

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

(B) Membership

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

(i) Independent members

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

(ii) Industry members

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

(iii) Qualification

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

(C) Chair

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

(2) Racetrack safety standing committee

(A) In general

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

(B) Membership

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

(i) Independent members

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

(ii) Industry members

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

(C) Chair

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

(d) Nominating committee

(1) Membership

(A) In general

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

(B) Initial membership

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

(C) Vacancies

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

(2) Chair

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

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

(A) Initial members

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

(B) Subsequent members

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

(e) Conflicts of interest

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

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

(2) An official or officer--

(A) of an equine industry representative; or

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

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

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

(f) Funding

(1) Initial funding

(A) In general

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

(B) Borrowing

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

(C) Annual calculation of amounts required

(i) In general

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

(I) to fund the State's proportionate share of the horseracing anti-doping and medication control program

and the racetrack safety program for the next calendar year; and

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

(ii) Basis of calculation

The amounts calculated under clause (i) shall--

(I) be based on--

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

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

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

(iii) Requirements regarding budgets of Authority

(I) Initial budget

The initial budget of the Authority shall require the approval of $^{2}/_{3}$ of the Board.

(II) Subsequent budgets

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

(iv) Rate increases

(I) In general

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

(II) Notice and comment

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

(2) Assessment and collection of fees by States

(A) Notice of election

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

(B) Requirement to remit fees

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

(C) Withdrawal of election

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

(D) Determination of methods

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

(3) Assessment and collection of fees by the Authority

(A) Calculation

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

(B) Allocation

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

(C) Assessment and collection

(i) In general

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

(ii) Remittance of fees

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

(D) Limitation

A State racing commission that does not elect to remit fees pursuant to paragraph (2) or that withdraws its election under such paragraph shall not impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters for covered horseraces.

(4) Fees and fines

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

(5) Rule of construction

Nothing in this chapter shall be construed to require-

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

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

(g) Quorum

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

§ 3053. Federal Trade Commission oversight

(a) In general

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

(1) the bylaws of the Authority;

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

(3) laboratory standards for accreditation and protocols;

(4) standards for racing surface quality maintenance;

(5) racetrack safety standards and protocols;

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

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

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

(9) a schedule of civil sanctions for violations;

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

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

(b) Publication and comment

(1) In general

The Commission shall--

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

(B) provide an opportunity for public comment.

(2) Approval required

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

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

(1) In general

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

(2) Conditions

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

(A) this chapter; and

(B) applicable rules approved by the Commission.

(3) Revision of proposed rule or modification

(A) In general

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

(B) Resubmission

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

(d) Proposed standards and procedures

(1) In general

The Authority shall submit to the Commission any proposed rule, standard, or procedure developed by the Authority to carry out the horseracing anti-doping and

medication control program or the racetrack safety program.

(2) Notice and comment

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

(e) Amendment by Commission of rules of Authority

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

§ 3054. Jurisdiction of the Commission and the Horseracing Integrity and Safety Authority

(a) In general

Beginning on the program effective date, the Commission, the Authority, and the anti-doping and medication control enforcement agency, each within the scope of their powers and responsibilities under this chapter, as limited by subsection (j)1, shall--

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

(2) exercise independent and exclusive national authority over--

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

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

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

(b) Preemption

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

(c) Duties

(1) In general

The Authority--

(A) shall develop uniform procedures and rules authorizing--

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

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

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

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

(2) Approval of Commission

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

(d) Registration of covered persons with Authority

(1) In general

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

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

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

(3) Cooperation

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

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

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

(4) Failure to comply

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

(e) Enforcement of programs

(1) Anti-doping and medication control enforcement agency

(A) Agreement with USADA

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

(B) Agreement with other entity

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

(C) Negotiations

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

(D) Elements of agreement

Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, and budgets of the United States Anti-Doping Agency while acting as the anti-doping and medication control enforcement agency under this chapter, as well as a provision for the revision of the agreement to increase in the scope of work as provided for in subsection (k)2, and any other matter the Authority considers appropriate.

(E) Duties and powers of enforcement agency

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

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

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

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

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

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

(F) Term and extension

(i) Term of initial agreement

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

(ii) Extension

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

(I) extend the term of the initial agreement under this paragraph for such additional term as is provided by

the rules of the Authority and consistent with this chapter; or

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

(2) Agreements for enforcement by State racing commissions

(A) State racing commissions

(i) Racetrack safety program

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

(ii) Anti-doping and medication control program

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

(B) Elements of agreements

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

(3) Enforcement of standards

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

(f) Procedures with respect to rules of Authority

(1) Anti-doping and medication control

(A) In general

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

(B) Consultation

The anti-doping and medication control enforcement agency shall consult with the anti-doping and medication control standing committee and the Board of the Authority on all anti-doping and medication control rules of the Authority.

(2) Racetrack safety

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

(g) Issuance of guidance

(1) The Authority may issue guidance that--

(A) sets forth--

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

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

(B) relates solely to--

(i) the administration of the Authority; or

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

(2) Submittal to Commission

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

(3) Immediate effect

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

(h) Subpoena and investigatory authority

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

(i) Civil penalties

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

(j) Civil actions

(1) In general

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

(2) Injunctions and restraining orders

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

(k) Limitations on authority

(1) Prospective application

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

(2) Previous matters

(A) In general

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

(B) State racing commission

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

(3) Other laws unaffected

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

(l) Election for other breed coverage under chapter

(1) In general

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

(2) Election conditional on funding mechanism

A commission or organization may not make an election under paragraph (1) unless the commission or organization has in place a mechanism to provide sufficient funds to cover the costs of the administration of this

chapter with respect to the horses that will be covered by this chapter as a result of the election.

(3) Apportionment

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

§ 3055. Horseracing anti-doping and medication control program

(a) Program required

(1) In general

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

(2) Consideration of other breeds

In developing the horseracing anti-doping and medication control program with respect to a breed of horse that is made subject to this chapter by election of a State racing commission or the breed governing organization for such horse under section 3054(k)1 of this title, the Authority shall consider the unique characteristics of such breed.

(b) Considerations in development of program

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

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

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

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

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

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

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

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

(c) Activities

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

(1) Standards for anti-doping and medication control

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

(A) uniform standards for--

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

(ii) laboratory testing accreditation and protocols; and

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

(2) Review process for administration of medication

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

(3) Agreement requirements

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

(4) Anti-doping and medication control enforcement agency

(A) Control rules, protocols, etc

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

medication control rules, protocols, policies, and guidelines for approval by the Authority.

(B) Results management

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

(C) Testing

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

(D) Testing laboratories

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

(5) Anti-doping and medication control standing committee

The anti-doping and medication control standing committee shall, in consultation with the anti-doping and medication control enforcement agency, develop lists of permitted and prohibited medications, methods, and substances for recommendation to, and approval by, the Authority. Any such list may prohibit the administration

of any substance or method to a horse at any time after such horse becomes a covered horse if the Authority determines such substance or method has a long-term degrading effect on the soundness of a horse.

(d) Prohibition

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

(e) Advisory committee study and report

(1) In general

Not later than the program effective date, the Authority shall convene an advisory committee comprised of horseracing anti-doping and medication control industry experts, including a member designated by the anti-doping and medication control enforcement agency, to conduct a study on the use of furosemide on horses during the 48-hour period before the start of a race, including the effect of furosemide on equine health and the integrity of competition and any other matter the Authority considers appropriate.

(2) Report

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

(3) Modification of prohibition

(A) In general

After receipt of the report required by paragraph (2), the Authority may, by unanimous vote of the Board of

the Authority, modify the prohibition in subsection (d) and, notwithstanding subsection (f), any such modification shall apply to all States beginning on the date that is three years after the program effective date.

(B) Condition

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

(i) That the modification is warranted.

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

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

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

(f) Exemption

(1) In general

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

(2) Exceptions

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

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

(B) covered horses competing in stakes races.

(3) Contents of request

A request under paragraph (1) shall specify the applicable State racing commission's requested limitations

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

(4) Grant of exemption

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

(g) Baseline anti-doping and medication control rules

(1) In general

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

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

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

(2) Baseline anti-doping medication control rules described

(A) In general

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

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

Screening Limits for urine, dated May 2019, and the International Federation of Horseracing Authorities International Screening Limits for plasma, dated May 2019.

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

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

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

(B) Conflict of rules

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

(3) Modifications to baseline rules

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

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

(B) Authority approval

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

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

The Authority shall not approve any proposed modification that renders an anti-doping and medication

control rule less stringent than the baseline anti-doping and medication control rules described in paragraph (2) (including by increasing permitted medication thresholds, adding permitted medications, removing prohibited medications, or weakening enforcement mechanisms) without the approval of the anti-doping and medication control enforcement agency.

§ 3056. Racetrack safety program

(a) Establishment and considerations

(1) In general

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

(2) Considerations in development of safety program

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

(b) Elements of horseracing safety program

The horseracing safety program shall include the following:

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

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

(3) A racing surface quality maintenance system that--

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

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

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

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

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

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

(8) A schedule of civil sanctions for violations.

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

(10) Management of violation results.

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

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

(c) Activities

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

(1) Standards for racetrack safety

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

(2) Standards for safety and performance accreditation

(A) In general

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

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

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

(B) Modifications

(i) In general

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

(ii) Notice and comment

The Commission shall publish in the Federal Register any proposed rule of the Authority, and provide an opportunity for public comment with respect to, any

modification under clause (i) in accordance with section 3053 of this title.

(C) Extension of provisional or interim accreditation

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

(3) Nationwide safety and performance database

(A) In general

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

(B) Collection of information

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

§ 3057. Rule violations and civil sanctions

(a) Description of rule violations

(1) In general

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

(2) Elements

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

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

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

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

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

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

(C) Possession of any prohibited substance or method.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Testing laboratories

(1) Accreditation and standards

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

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

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

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

(2) Administration

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

(3) Extension of provisional or interim accreditation

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

(4) Selection of laboratories

(A) In general

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

(B) Selection by the Authority

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

(c) Results management and disciplinary process

(1) In general

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

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

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

(2) Elements

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

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

(B) Hearing procedures.

(C) Standards for burden of proof.

(D) Presumptions.

(E) Evidentiary rules.

(F) Appeals.

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

(3) Due process

The rules established under paragraph (1) shall provide for adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness of the alleged safety, performance, or anti-doping and medication control rule violation and the possible civil sanctions for such violation.

(d) Civil sanctions

(1) In general

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

(2) Requirements

The rules established under paragraph (1) shall--

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

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

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

(3) Severity

The civil sanctions under paragraph (1) may include-

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

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

(e) Modifications

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

§ 3058. Review of final decisions of the Authority

(a) Notice of civil sanctions

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

(b) Review by administrative law judge

(1) In general

With respect to a final civil sanction imposed by the Authority, on application by the Commission or a person

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

(2) Nature of review

(A) In general

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

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

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

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

(B) Conduct of hearing

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

(3) Decision by administrative law judge

(A) In general

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

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

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

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

(B) Final decision

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

(c) Review by Commission

(1) Notice of review by Commission

The Commission may, on its own motion, review any decision of an administrative law judge issued under subsection (b)(3) by providing written notice to the Authority and any interested party not later than 30 days after the date on which the administrative law judge issues the decision.

(2) Application for review

(A) In general

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

(B) Effect of denial of application for review

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

(C) Discretion of Commission

(i) In general

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

(ii) Matters to be considered

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

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

(II) the decision involved--

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

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

(3) Nature of review

(A) In general

In matters reviewed under this subsection, the Commission may--

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

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

(B) De novo review

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

(C) Consideration of additional evidence

(i) Motion by Commission

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

(ii) Motion by a party

(I) In general

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

(aa) such additional evidence is material; and

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

(II) Procedure

The Commission may--

(aa) accept or hear additional evidence; or

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

(d) Stay of proceedings

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

§ 3059. Unfair or deceptive acts or practices

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

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

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

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

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

§ 3060. State delegation; cooperation

(a) State delegation

(1) In general

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

(2) Implementation by State racing commission

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

(b) Cooperation

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