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

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, AND
WASHINGTON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,

Plaintiffs,

v.

JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN; MD NANCY COX; JOSEPH DUNFORD; FRANK KEATING; KENNETH SCHANZER; the HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.; the FEDERAL TRADE COMMISSION; REBECCA KELLY SLAUGHTER, in her official capacity as Acting Chair of the Federal Trade Commission; ROHIT CHOPRA, in his official capacity as Commissioner of the Federal Trade Commission; NOAH JOSHUA PHILLIPS, in his official capacity as Commissioner of the Federal Trade Commission; and CHRISTINE S. WILSON, in her official capacity as Commissioner of the Federal Trade Commission,

Defendants.

No. 5:21-cv-00071-H

MOTION TO DISMISS AND BRIEF IN SUPPORT BY DEFENDANTS JERRY BLACK, KATRINA ADAMS, LEONARD COLEMAN, NANCY COX, JOSEPH DUNFORD, FRANK KEATING, KENNETH SCHANZER, AND HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.

TABLE OF LIVE PLEADINGS

Pleading	Party	Date	Docket No.
First Amended Complaint for Declaratory and Injunctive Relief	Plaintiffs National Horseman'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, and Washington Horsemen's Benevolent and Protective Association	4/02/2021	23
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Defendants Jerry Black, Katrina Adams, Leonard Coleman, Nancy Cox, Joseph Dunford, Frank Keating, Kenneth Schanzer, and the Horseracing Integrity and Safety Authority, Inc. ("the Authority") move to dismiss Plaintiffs' First Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), and (6), and submit the following brief in support of their motion.

INTRODUCTION

In response to tragic deaths, injuries, and related problems afflicting horseracing, constituents from across the sport established a private standards-setting organization ("the Authority") to develop uniform health-and-safety standards. Several months later, Congress enacted bipartisan (and widely praised) legislation to address the same concerns. The Horseracing Integrity and Safety Act ("HISA" or the "Act") draws on the experience and expertise of the Authority to supplant the current web of inconsistent state-based horseracing regulations with a new federal regulatory regime. Modeled on enduring and effective statutory schemes in other sectors, the Act provides that the Authority may propose and implement certain medication-control and track-safety standards, subject to the independent adoption and oversight of the Federal Trade Commission. Absent the FTC's promulgation as an enforceable regulation after notice-and-comment rulemaking, the Authority's proposed standards have no legal effect.

Plaintiffs challenge HISA on several constitutional grounds. But their suit falters out of the starting gate, as Plaintiffs have no injury that satisfies Article III standing and no claim that is ripe for review. The FTC has not considered or subjected to notice-and-comment a single proposed rule under the Act, and any such rule that the FTC may ultimately adopt would not take effect until July 2022. Nor has the Authority, which still lacks permanent Board members and remains largely in the organizational phase, yet developed any proposed standards for the FTC even to evaluate. Any claim of harm from the Authority's actions is thus conjectural at best.

Beyond those threshold stumbling blocks, Plaintiffs fail to state a claim on the merits. Their central theory is that the Act unconstitutionally delegates legislative power to the Authority. But recent Fifth Circuit cases reinforce longstanding Supreme Court precedent that private entities may lawfully assist the development and implementation of federal regulation so long as the agency retains final review. Congress ensured that independent agency role on both the front end and the back end of HISA's regulatory scheme: (i) the FTC evaluates and promulgates, after notice-and-comment, any proposed standard the Authority submits before it can take legal effect as a rule, and (ii) any sanction for a rule violation is subject to two layers of *de novo* FTC review. Congress provided a more-than-intelligible principle to the FTC to guide those functions, precluding Plaintiffs' public-nondelegation claim too. Given the critical federal agency process governing any standard the Authority proposes—on top of the Act's robust conflict-of-interest provisions that Plaintiffs ignore—Plaintiffs' speculative assertions of hypothetical self-dealing fail to state a due process claim. And Plaintiffs' own allegations that the Authority is a private (rather than federal) entity foreclose their claim under the Appointments Clause. The suit should be dismissed.

STATEMENT OF THE CASE

A. The Horseracing Community Recognizes The Need For A Centralized Standards-Setting Organization To Curb Health And Safety Risks

"[A] beloved tradition in the United States since the early days of the Republic," horseracing is a fixture of American culture and a "major source of jobs and economic opportunity for our people." 166 CONG. REC. H4981-4982 (daily ed. Sept. 29, 2020) (statement of Rep. Barr). In recent years, however, "[t]he joy of the races [has been] marred by accidents that endanger both the horses and the riders." *Id.* at H4980 (statement of Rep. Pallone). In 2019 alone, 441 Thoroughbred racehorses died in the United States from race-related injuries—a fatality rate two to five times greater per race start than in Europe or Asia. H.R. REP. NO. 116-554, at 17 (2020).

These casualties sparked investigations by officials, deep concern within the industry, and "even call[s] for this sport to be abolished altogether." 166 CONG. REC. S5514 (daily ed. Sept. 9, 2020) (statement of Sen. McConnell).

"Many factors contribute to [the] breakdowns," including shortfalls relating to training methods, racing protocols, track surfaces, testing regimens, performance-enhancing drugs, and certain therapeutic medications. H.R. REP. NO. 116-554, at 17-18. These serious lapses underscored the need for a national governing body for horseracing to replace the "patchwork system" of state-by-state regulation, which had led to "wide disparit[ies]" in standards and enforcement. 166 CONG. REC. H4981 (daily ed. Sept. 29, 2020) (statement of Rep. Tonko).

Recognizing the need for reform, a broad coalition of stakeholders—including owners, breeders, trainers, racetracks, jockeys, and veterinarians—formed a "nonprofit business league" (known as the "Authority") to develop uniform standards for the horseracing industry, similar to self-regulating or accrediting organizations that set and oversee integrity standards in other fields. Certificate of Incorporation ("Certificate") § 3, App'x 26. [1] Incorporated in Delaware on September 8, 2020, the Authority aims to "improve the safety and welfare of equine and human participants" by "establish[ing] safety and performance standards for horseracing" and "develop[ing] and implement[ing] a horseracing anti-doping and medication control program and

[1] The Authority's Certificate of Incorporation and Bylaws are contained in the attached appendix. Under Rules 12(b)(1) and 12(b)(2), the Court may consider documents supplemental to the complaint. *See Sangha v. Navig8 ShipManagement Private Ltd.,* 882 F.3d 96, 101 (5th Cir. 2018); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Under Rule 12(b)(6), courts "must consider *** documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011). The First Amended Complaint refers to and relies on the Certificate of Incorporation, including the specific provision of the Certificate that incorporates the Bylaws. *See* FAC ¶¶ 50-51. Additionally, there is "no actual asserted factual dispute" concerning the Certificate or Bylaws. *See Funk*, 631 F.3d at 783.

a racetrack safety program." Bylaws § 1.5, App'x 34. The Authority's bylaws name seven members of an initial Nominating Committee who, upon five votes, will recommend the appointment of nine Directors of the Board to manage the Authority. *Id.* § 3.10(c), App'x 41-42. The bylaws ensure that the Authority will receive insight and experience from a broad range of stakeholders. *Id.* § 3.2(c), App'x 36-37. Four Board Directors will represent distinct equine constituencies that include owners, breeders, trainers, racetracks, veterinarians, state racing commissions, and jockeys. *Id.* § 3.2(c)(ii), App'x 36. Another five Directors will be drawn from outside the equine industry. *Id.* § 3.2(c)(i), App'x 36. And as a further safeguard against potential conflicts of interest, no Director may have, or may be related to or employed by anyone who has, a financial interest in horseracing. *Id.* § 3.2(c)(iii), App'x 36-37.

To date, the Nominating Committee has held meetings to discuss candidates for the Board, but no permanent Directors have been appointed.

B. Congress Enacts Bipartisan And Broadly Supported Legislation To Address The Health And Safety Risks Within Horseracing

Over much of the last decade, Congress has considered legislation to bring about uniform regulation of the horseracing industry, including by designating an independent organization to develop medication-and-safety standards. 166 CONG. REC. H4981 (daily ed. Sept. 29, 2020) (statement of Rep. Tonko); *see, e.g.*, Horseracing Integrity Act of 2017, H.R. 2651, 115th Cong. (2017); Thoroughbred Horseracing Integrity Act of 2015, H.R. 3084, 114th Cong. (2015); Horseracing Integrity and Safety Act of 2013, S. 973, 113th Cong. (2013). The legislative effort gained new urgency and support in 2019, after the highly publicized equine fatalities brought greater awareness to the need for consistent regulation. 166 CONG. REC. H4981-4982 (daily ed. Sept. 29, 2020) (statement of Rep. Barr).

Shortly after the Authority was incorporated, the House Energy and Commerce Committee debated and amended the Horseracing Integrity and Safety Act of 2020, and reported it to the full House by a 46-5 vote. *See* H.R. REP. NO. 116-554, at 22. Senator McConnell, joined by Senators Gillibrand, McSally, and Feinstein, introduced the bill on the Senate floor the same day, receiving unanimous consent to enter the bill into the record after explaining that it represented "bipartisan, bicameral progress" toward remedying "tragedies on the track." 166 CONG. REC. S5514-5515 (daily ed. Sept. 9, 2020). In open debate, the bill was hailed for creating "a single, nationwide set of rules that will result in smarter, more effective, and streamlined regulation for the industry." 166 CONG. REC. H4982 (daily ed. Sept. 29, 2020) (statement of Rep. Barr).

With the widespread support of both the horseracing industry and major animal welfare groups, and with sponsors from both sides of the aisle, the bill passed on December 21, 2020, as part of a consolidated appropriations act. Pub. L. No. 116-260, div. FF, tit. XII, § 1201, 134 Stat. 1182, 3252 (2020) ("HISA") (App'x 1); *see, e.g.*, 166 CONG. REC. H4980 (daily ed. Sept. 29, 2020) (statement of Rep. Pallone) ("[T]he Humane Society, the Jockey Club, the Breeders' Cup, Animal Welfare Action, several racetracks, and many horsemen support this bill."). The passage was celebrated as "a blue ribbon moment in the history of American horseracing": It not only represented an outcome that will "restore confidence with [the sport's] fans that the competition is clean, the game is fair and the horse and rider are protected," but also a collaborative and inclusive legislative process that provided "a reminder that goodwill is indispensable in our politics." Press Release, *McConnell Leads Senate Passage of Horseracing Integrity and Safety Act* (Dec. 21, 2020).[2] President Trump signed HISA into law on December 27, 2020.

[2] *Available at* https://www.mcconnell.senate.gov/public/index.cfm/2020/12/mcconnell-leads-senate-passage-of-horseracing-integrity-and-safety-act (last visited Apr. 27, 2021).

C. HISA Rules Cannot Take Effect Without FTC Adoption After Notice-And-Comment And, Even Then, Until July 2022

HISA recognizes the Authority as a "private, independent, self-regulatory nonprofit corporation" that will "develop[] and implement[] a horseracing anti-doping and medication control program and a racetrack safety program." HISA § 1203(a). The Act provides that the Authority may submit to the Federal Trade Commission "any proposed rule, or proposed modification to a rule" relating to the programs, including those concerning health-and-safety standards, assessments, procedures for investigations and disciplinary hearings, and sanctions for violations. *Id.* § 1204(a). No proposed rule or modification may take effect under HISA unless the FTC independently adopts it following notice and public comment. *Id.* § 1204(b). And any final Authority decision to impose sanctions—the range of which must also be approved by the FTC after notice-and-comment—"shall be subject to de novo review by an administrative law judge" appointed by the FTC, and further de novo review by the commissioners. *Id.* § 1209(b).

Neither the Authority nor the FTC may take action with legal effect on private horseracing participants until the "program effective date" of July 1, 2022. HISA §§ 1202(14), 1205(a). As a practical matter, rules promulgated under the Act will apply only to subjects that are already federally regulated "in order to further the horseracing and legal off-track betting industries in the United States." 15 U.S.C. § 3001(b); *see* HISA § 1202(4)-(6), (11) (defining "covered horse," "covered persons," and "covered horserace" by their relation to races that are the "subject of interstate off-track or advance deposit wagers," as regulated by "the Interstate Horseracing Act of 1978," 15 U.S.C. §§ 3001 *et seq.*); 15 U.S.C. § 3003 (effectively prohibiting such races "except as provided in" the Interstate Horseracing Act of 1978, as amended).

LEGAL STANDARD

A complaint must be dismissed under Rule 12(b)(1) if the Court lacks subject-matter jurisdiction. *See Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). To establish Article III standing, an association must demonstrate that it or one of its members has "(i) an injury-in-fact that is (ii) fairly traceable to the defendant's challenged action and (iii) redressable by a favorable outcome." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). "A court should dismiss a case for lack of 'ripeness,' when the case is abstract or hypothetical." *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003). Plaintiffs have the burden to show standing and ripeness. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013); *Samaad v. City of Dallas*, 940 F.2d 925, 933 n.16, 934 (5th Cir. 1991).

Plaintiffs also bear the burden of demonstrating that the Court can exercise personal jurisdiction over all defendants in the case under Rule 12(b)(2). *See Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982). Plaintiffs can satisfy that burden with *prima facie* evidence that jurisdiction exists. *Sangha v. Navig8 ShipManagement Private Ltd.*, 882 F.3d 96, 101 (5th Cir. 2018). But the facts alleged must be "sufficient to *affirmatively* show personal jurisdiction." *Felch v. Transportes Lar-Mex SA DE CV*, 92 F.3d 320, 327 (5th Cir. 1996).

Finally, Rule 12(b)(6) requires that plaintiffs state a claim for relief that is "plausible on its face." *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 570 (2007). While the Court accepts as true the well-pleaded factual allegations in the complaint, plaintiffs must set forth allegations that "raise a right to relief above the speculative level." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

ARGUMENT

I. PLAINTIFFS' COMPLAINT IS NOT JUSTICIABLE

A. Plaintiffs Lack Standing

Plaintiffs have not alleged an injury-in-fact to support Article III standing. Plaintiffs must suffer "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]" *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017) (alteration in original). Plaintiffs' claimed harm falls well short.

Plaintiffs' allegations of injury arise mainly from their assertions that the Nominating Committee and Authority will act pursuant to unconstitutional delegations from Congress when they nominate the Directors and develop proposed health-and-safety standards. First Am. Compl. ("FAC") ¶¶ 101, 107 (Apr. 2, 2021), Dkt. No. 23. But these functions are provided for in the Authority's certificate of incorporation and bylaws—which, like the Authority itself, existed before, and operate wholly apart from, any congressional authorization. *See* Certificate § 3, App'x 26; Bylaws § 1.5, App'x 34-35. Even if HISA did not exist or were struck down, the Authority still would nominate Board members and develop industry standards like any other private self-regulating or accrediting organization. *See* Certificate §§ 3, 7, App'x 26-27. Because the purportedly unconstitutional delegation does not have any actual effect on the specified activities, it cannot confer standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("A 'concrete' injury must be '*de facto*'; that is, it must actually exist."); *cf. Rivera v. Wyeth-Ayerst Labs*, 283 F.3d 315, 320 (5th Cir. 2002) (holding that plaintiffs "cannot have a legally protected" interest because they "would be in the same position they occupy now" regardless of alleged legal violation). And Plaintiffs have not identified any basis—in the Constitution, the Act, or the Authority's governing

documents—to enjoin the private body from acting pursuant to its own bylaws, especially with respect to such quintessential corporate activities as appointing a Board.[3]

To the extent the Authority's actions might ever affect Plaintiffs or their members, it would only be because—and *after*—the FTC itself promulgates as a final rule, pursuant to notice-and-comment, a standard that the Authority proposes. *See* HISA § 1204(b)(2). As explained below (pp. 14-24), there is nothing unconstitutional or unprecedented about that arrangement. Regardless, Plaintiffs "have no standing to complain simply that the[] Government is violating the law" based solely on a statutory scheme that "upset[s] the constitutional balance." *Bond v. United States*, 564 U.S. 211, 222, 225 (2011) (internal quotation marks omitted). They must show that the purported constitutional violation harms them in a "real and immediate" way. *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992) (en banc). Plaintiffs have not come close to doing so.

Plaintiffs claim that "they are subject to a regulatory process that they are forced to finance with fees imposed on them by the Authority," and that "they are subject to new and onerous Authority rules." FAC ¶¶ 102, 117. But these allegations only confirm that Plaintiffs face no immediate, concrete prospect of harm. None of Plaintiffs' members "are subject to" *any* regulatory process under HISA—nor could they be for over a year. *See* HISA § 1205(a) (providing that neither the FTC nor the Authority will "implement and enforce" programs or exercise authority prior to the "program effective date" of July 1, 2022). Nor have Plaintiffs established that any

[3] Plaintiffs' lack of standing also comes into focus through the other two prongs of the standing analysis. *City of Austin*, 943 F.3d at 1002 (discussing causation and redressability). Enjoining all Defendants "from taking any action to implement" the Act (FAC at 28) would not prevent the appointment of the private Board or the development of industry standards under the Authority's own bylaws. Any harm from those actions thus would not be fairly traceable to an unconstitutional delegation from Congress.

particular members will ever incur fees greater or face regulations more burdensome than the existing patchwork of "State Racing Commission rules on which their training and racing businesses have long relied." FAC ¶ 102. It is at least possible that, rather than effecting "more regulation," HISA may yield "streamlined regulation for the industry" that benefits Plaintiffs' members. 166 CONG. REC. H4982 (daily ed. Sept. 29, 2020) (statement of Rep. Barr). And the Act expressly provides that State racing commissions may continue to conduct various functions, including collecting fees and enforcing standards, under certain conditions. HISA §§ 1203(f)(2), 1205(e)(2). Because the FTC has not considered—let alone adopted as an enforceable rule—any yet-to-be-developed standards, and because States have not made any elections about how they want to proceed under the Act, Plaintiffs' allegations of possible harm from those hypothetical conditions "rest on mere conjecture about *possible* governmental actions" that may or may not ever affect Plaintiffs' members. *Clapper*, 568 U.S. at 420 (emphasis added). That "theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending'" to constitute an injury-in-fact. *Id.* at 401.

B. Plaintiffs' Claims Are Not Ripe

Even if Plaintiffs had standing, they could not show that "the harm asserted has matured sufficiently to warrant judicial intervention." *Mississippi State Democratic Party v. Barbour*, 529 F.3d 538, 544 (5th Cir. 2008); *see Roman Catholic Diocese of Dallas v. Sebelius*, 927 F. Supp. 2d 406, 423 (N.D. Tex. 2013) (explaining that ripeness and standing, though related, "serve separate and distinct purposes, and it is possible for [a] claim to be unripe despite the existence of standing to raise that claim"). Reviewing Plaintiffs' claims before any rules have even been proposed would frustrate the basic rationales of the ripeness doctrine: to avoid premature adjudication of "abstract disagreements over administrative policies," and to "protect the agencies from judicial interference

until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Texas Indep. Producers & Royalty Owners Ass'n v. EPA*, 413 F.3d 479, 482 (5th Cir. 2005). The "key considerations" of ripeness—"the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration"—require dismissal here. *Monk*, 340 F.3d at 282.

Although Plaintiffs style their constitutional claims as turning primarily on legal questions of statutory interpretation, development of an administrative record would "significantly advance [the court's] ability to deal with the legal issues presented." *National Park Hosp. Ass'n v. Department of Interior*, 538 U.S. 803, 812 (2003). Any future harm Plaintiffs may conceivably suffer will necessarily flow from agency action that is not yet "final," or even in the works yet. *Id.* Adjudicating the scope of Congress's directives to the FTC and of the agency's oversight of the Authority now "would necessarily prematurely cut off [the agency's own] interpretive process" before the FTC has an opportunity to consider any standards the Authority may propose. *Texas Indep. Producers & Royalty Owners Ass'n*, 413 F.3d at 483. For example, Plaintiffs argue that HISA gives the FTC only a "limited oversight" role with a "purely ministerial" function of rubberstamping the Authority's recommendations. FAC ¶¶ 82, 100. But the extent to which the FTC will exercise its independent judgment, the limits the Act places on the FTC's discretion, and the nature of the relationship between the FTC and the Authority, are all issues that are impossible (and imprudent) to evaluate before the FTC has a chance to administer HISA. Awaiting the proposal and promulgation of a final rule would "enhance the accuracy of [the court's] decision[]" by permitting the Court to benefit from the agency's understanding of its statutory and constitutional role in the context of a concrete rule. *Roman Catholic Diocese of Dallas*, 927 F. Supp. 2d at 424 (quoting *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003)).

Moreover, in light of the statutory responsibilities the FTC must fulfill before any proposed rule goes into effect—*e.g.*, publish a proposed rule, solicit public comment, and determine that the rule is consistent with HISA, *see* HISA § 1204—Plaintiffs' claims of regulatory harm rest upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). The Court should "avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial." *Roman Catholic Diocese of Dallas*, 927 F. Supp. 2d at 424 (quoting *Simmonds*, 326 F.3d at 357).

Awaiting further agency action is particularly appropriate in a case like this, where Plaintiffs will not suffer any injury in the interim. *See Central & Sw. Servs. v. E.P.A.*, 220 F.3d 683, 690 (5th Cir. 2000) ("[E]ven where an issue presents purely legal questions the plaintiff must show some hardship in order to establish ripeness."). Because HISA "imposes no new, affirmative obligation" apart from intervening government action, the "hardship prong of the ripeness inquiry" is not satisfied. *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 716 (5th Cir. 2012). And "[g]iven that the effective date of [any future rule under HISA] is now [over] a year away," Plaintiffs will not suffer "significant hardship if [the Court] decline[s] to supersede the administrative process." *Texas Indep. Producers & Royalty Owners Ass'n*, 413 F.3d at 483.

C. The Court Lacks Personal Jurisdiction Over All But One Nominating Committee Member Defendant

Beyond standing and ripeness, this case suffers from another threshold defect with respect to the six Nominating Committee member defendants who live and work outside Texas: the Court lacks personal jurisdiction over them because they have no connections with Texas.

Personal jurisdiction is consistent with due process when "(1) the defendant has purposefully availed himself of the benefits and protections of the forum state by establishing

minimum contacts" there, and (2) exercising jurisdiction is consistent with "traditional notions of fair play and substantial justice." *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 867-868 (5th Cir. 2001); *see Luv N' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006) (explaining that federal constitutional requirements and Texas long-arm statute merge into single inquiry whether due process permits jurisdiction over defendants). Defendants Adams, Coleman, Cox, Dunford, Keating, and Schanzer have not established minimum contacts in the State sufficient to render them subject to general or specific jurisdiction.

As to general jurisdiction, Plaintiffs expressly acknowledge that no Nominating Committee member other than Jerry Black resides or works in Texas. FAC ¶¶ 30-36; *see Frank v. PNK (Lake Charles) LLC*, 947 F.3d 331, 337 (5th Cir. 2020) (general jurisdiction exists in the State of a natural person's domicile). As to specific jurisdiction, Plaintiffs do not allege that any of the six non-Texas Committee members have *any* contacts with Texas—let alone contacts that are related to the dispute in this case. *See Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 378 (5th Cir. 2002) (specific jurisdiction requires proof that, *inter alia*, cause of action arises out of defendant's forum-related contacts). Plaintiffs do not attempt to show that the defendants do business in Texas, visit Texas, own property in Texas, conduct their professional activities in Texas, or have even set foot on Texas soil. The Committee's task of selecting officers for a Delaware non-profit corporation lacks any connection to the State. FAC ¶ 51. In the absence of *any* Texas contacts, jurisdiction over these Committee members is inappropriate. And even if Plaintiffs (which also lack a Texas connection) had pointed to some relevant contacts, exercising jurisdiction over the out-of-state Committee members would still be unfair and unreasonable. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (considering, among other things, the burden on the nonresident defendant and the forum state's interest in the lawsuit).

The Court should find that it lacks personal jurisdiction over these six individual defendants and dismiss them from the case.

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR RELIEF

A. HISA Does Not Unconstitutionally Delegate Legislative Authority To A Private Entity

Plaintiffs' first claim alleges that "HISA violates Article I, Section 1 of the United States Constitution because it delegates legislative authority to a private entity." FAC at 20 (formatting omitted). But that contention conflates "a different nondelegation doctrine, the one that prevents Congress from delegating too much authority to executive branch agencies," with a "doctrine preventing governments from delegating too much power to private persons and entities." *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 707 (5th Cir. 2017). The latter "arises from *** the Due Process Clause." *Id.*; *see Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding delegation to private entity implicated "rights safeguarded by the due process clause of the Fifth Amendment"). Plaintiffs' allegations of unlawful delegations to a private entity thus cannot state a claim under Article I or the related separation-of-powers principles on which the complaint relies. FAC ¶¶ 91-93, 99.

Even if Plaintiffs had pleaded their claim under the proper constitutional provision, they still would not have alleged a violation of the "largely dormant" and "seldom invoked" "so-called 'private nondelegation' doctrine," which has not "been used by the Supreme Court to strike down a statute since the early decades of the last century." *Boerschig*, 872 F.3d at 703, 707. The claim falters on multiple levels.

1. HISA does not unconstitutionally delegate legislative authority to the Nominating Committee.

Plaintiffs seek a declaration "that delegating legislative authority to the private Nominating Committee to select the Board members of the Authority violates the private nondelegation

doctrine." FAC at 28; *see also id.* at 28-29 (seeking to enjoin Nominating Committee from appointing Board). But that request rests on two faulty premises: The appointment of the Board is neither the product of congressional "delegating" nor an exercise of "legislative authority."

Plaintiffs acknowledge that "[t]he Nominating Committee is a private entity and not a governmental body," comprising "seven private citizen members" who will appoint the Board of "a private, nongovernmental entity." FAC ¶¶ 57, 59, 96. Plaintiffs also concede that the Authority's internal governance documents "direct[]" the "appoint[ment] [of] the Board of Directors," as both the Authority and its Nominating Committee existed prior to HISA's enactment. FAC ¶ 51; *see id.* ¶¶ 50-55; *see also* Certificate § 7, App'x 27; Bylaws §§ 3.2, 3.10(c), App'x 35-38, 41-42. It follows that, in carrying out the bedrock corporate function that Plaintiffs challenge—which would occur even if HISA had never been enacted—the Nominating Committee will act pursuant to the Authority's autonomous certificate of incorporation and bylaws, not any statutory command. Relatedly, Plaintiffs do not explain how selecting private citizens to serve on the Board of a private entity is an exercise of "legislative authority." FAC at 28. In appointing the Directors, the Nominating Committee does not "mak[e] laws" or "enact" them, but rather fulfills its corporate responsibilities under the Authority's bylaws. *Legislative*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) (legislative function is one that establishes "standards of legal obligation").

To be sure, HISA sets certain parameters for the Board's appointment. *See* HISA § 1203. But Congress has long placed guardrails around the boards of similar self-regulatory organizations to advance legislative interests that align with the standard-setting entity. *See, e.g.*, 15 U.S.C. §§ 78f(b)(3), 78o-3(b)(4) (requirements to "assure a fair representation" on boards of private organizations federally recognized as national securities exchanges and associations). If anything,

Plaintiffs read the statutory scheme backwards: HISA *imposes restrictions* on the Nominating Committee, rather than *delegating powers* to it. Plaintiffs fail to state a non-delegation claim against the Nominating Committee.

2. The Authority's proposal of standards is a reasonable condition for FTC action, not a subdelegation of authority to a private entity.

Like the Nominating Committee, the Authority—a "non-governmental private, independent, self-regulatory, nonprofit corporation," FAC ¶ 56—predates HISA and acts pursuant to "powers[] and duties *** as provided in [its] Bylaws," Certificate § 7, App'x 27; *see* FAC ¶¶ 50-55 (acknowledging Authority incorporated before HISA enacted). Similar to other standards-setting organizations, the Authority operates privately when prescribing and enforcing health-and-safety conditions for its industry members. *See* Certificate § 3, App'x 26; Bylaws § 1.5, App'x 34-35. That work is independent of, and would occur in the absence of, HISA or any purported "delegated regulatory authority." FAC ¶ 96.

Plaintiffs nevertheless allege that "Congress has subjugated Plaintiffs" to the horseracing community's self-regulation. FAC ¶ 98. But HISA imposes potential legal effects on private parties only once the FTC promulgates as final rules, after notice-and-comment, standards that the Authority has submitted for the agency's consideration. HISA § 1204. As the Fifth Circuit has explained, Congress does not "improperly subdelegate [an agency's] authority when it 'reasonabl[y] condition[s]' federal approval on an outside party's determination of some issue; such conditions only amount to legitimate requests for input." *Texas v. Rettig*, 987 F.3d 518, 531 (5th Cir. 2021) (alterations in original) (quoting *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 566-567 (D.C. Cir. 2004)). "In fact, federal law encourages precisely this practice" across several sectors, as "incorporating private standards eliminate[s] the cost to the Federal government of developing its own standards and further[s] the reliance upon private sector expertise to supply the

Federal government with cost-efficient goods and services." *American Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 442 (D.C. Cir. 2018) (alterations in original) (internal quotation marks omitted).

"A condition is reasonable if there is 'a reasonable connection between the outside entity's decision and the federal agency's determination.'" *Rettig*, 987 F.3d at 531 (quoting *United States Telecom Ass'n*, 359 F.3d at 567). Thus, in *Rettig*, the Fifth Circuit rejected plaintiffs' nondelegation argument that a federal law "unlawfully vested in [a private Actuarial Standards Board] the legislative power to set rules on actuarial soundness," because relying on the private Board's "institutional expertise in actuarial principles and practices" was "reasonably connected to ensuring actuarially sound rates." *Id.* at 530-531; *see id.* n.10 (noting that the fact that the challenged law "incorporates the standards of and requires approval by private entities," rather than public entities, did not alter analysis).[4]

The Authority's proposal of standards to the FTC likewise does not constitute a "delegation of legislative authority to a private entity." FAC ¶ 99. To the extent the proposed standards take on legal effect, it is because the FTC has decided to "incorporate[] the [Authority's] standards into its [own rules], a common and accepted practice by federal agencies." *Rettig*, 987 F.3d at 531-

[4] *Rettig* concerns a purported subdelegation to a private entity by an agency, not Congress. That distinction—critical to the judges who dissented from the Fifth Circuit's decision to deny rehearing en banc in *Rettig*—puts this case on even firmer constitutional footing. *See Texas v. Rettig*, 993 F.3d 408, 2021 WL 1324382, at *5 (5th Cir. Apr. 9, 2021) (Ho, J., dissenting from denial of rehearing en banc) ("There is good reason to limit these [Supreme Court] precedents [permitting involvement of private entities in the rulemaking process] to only those delegations authorized by Congress itself," not an agency.); *id.* at *6 ("[A]ny 'subdelegation[] to outside parties [is] assumed to be improper *absent an affirmative showing of congressional authorization*.'") (alterations in original) (emphasis added); *id.* at *7 ("[I]t is one thing to bless a Congressional decision to involve private parties in the rulemaking process. It is quite another to allow an agency—already acting pursuant to delegated power—to *re*-delegate that power out to a private entity.").

532. By design, the Authority (and its committees) will have considerable experience and expertise representing the full spectrum of equine constituencies, and representing sport-, medication-, and safety-management more broadly, to advance its purpose of "improv[ing] the safety and welfare of equine and human participants" in the horseracing industry. Certificate § 3, App'x 26; *see also, e.g.*, Bylaws § 3.10(c), App'x 41-42. Those aligned purposes and qualifications amply connect the Authority's development of horseracing standards and HISA's goal to implement a "horseracing anti-doping and medication control program" and "racetrack safety program" to improve "the safety, welfare, and integrity" of the sport. HISA § 1205(a). Accordingly, the FTC's "incorporation of the [Authority's] practice standards are reasonable conditions, not subdelegations." *Rettig*, 987 F.3d at 532.

3. HISA's requirement for FTC review, approval, and oversight of any binding action prevents an unlawful delegation of regulatory power to the Authority.

To the extent HISA nevertheless were deemed to delegate regulatory functions to the Authority, the Fifth Circuit recently affirmed longstanding Supreme Court precedent that "such subdelegations [a]re not unlawful *** so long as the [private] entities 'function subordinately to' the federal agency and the federal agency 'has authority and surveillance over [their] activities.'" *Rettig*, 987 F.3d at 532 (third alteration in original) (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). In other words, private involvement is permissible provided it is subject to agency oversight and approval. Indeed, even Plaintiffs' central authority for the proposition that "Federal lawmakers cannot delegate regulatory authority to a private entity," FAC ¶ 95, acknowledges that "such entities may, however, help a government agency make its regulatory decisions, for '[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality' that such schemes facilitate." *Association*

of Am. R.R. v. United States Dep't of Transp., 721 F.3d 666, 671 (D.C. Cir. 2013) (quoting *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935)), *vacated on other grounds*, 575 U.S. 43 (2015).

"An agency retains final reviewing authority if it 'independently perform[s] its reviewing, analytical and judgmental functions.'" *Rettig*, 987 F.3d at 532 (alteration in original) (quoting *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974)). Such agency review bookends HISA's regulatory scheme in two critical respects. As explained, the Authority must submit to the FTC all proposed standards (and proposed modifications), including substantive medication and safety standards, schedules of fee assessments, and procedures governing the Authority's implementation and enforcement of FTC rules. HISA §§ 1204(a), 1205(c)(2), 1205(*l*)(3), 1208(a)(1), 1208(b)(1), 1208(c)(1). After subjecting the proposed standards to proper notice-and-comment procedures, the FTC makes an independent determination of whether to approve, disapprove, or consider modifications before promulgating any final rule. HISA § 1204(b), (c). That arrangement is similar to the statute at issue in *Adkins*, which formalized the role of the private coal industry in serving "as an aid" to the National Bituminous Coal Commission by providing that the Commission would "approve[], disapprove[], or modif[y]" proposed regulations submitted by the private entities. 310 U.S. at 388. Indeed, the FTC's responsibility over ultimate promulgation of the regulation is significantly greater under HISA than for the agency under the scheme upheld in *Rettig*. *See* 987 F.3d at 527 ("HHS gave authority to the [private] Board to promulgate binding rules through Actuarial Standards of Practice" that the agency incorporated "without notice and comment."); *see also Texas v. Rettig*, 993 F.3d 408, 2021 WL 1324382, at *5 (5th Cir. Apr. 9, 2021) (Ho, J., dissenting from denial of rehearing en banc) ("HHS neither sets the regulatory standard nor exercises final authority over the application of that standard. Private actors wield 'final reviewing authority.'"). Because the FTC must exercise its own judgment in "'review[ing] and

accept[ing]' the [Authority's] standards" before any rule incorporating the proposed standards has binding effect on private parties, HISA's provisions allowing for the Authority to recommend the health-and-safety standards "d[o] not divest [the FTC] of its final reviewing authority." *Rettig*, 987 F.3d at 533.

The FTC also oversees the Authority's implementation and enforcement of any final rules. The Authority "shall promptly submit to the [FTC]" notice of any sanction imposed for violation of a rule. HISA § 1209(a). "[O]n application by the [FTC] or a person aggrieved," the Authority's decision "shall be subject to de novo review by an administrative law judge" ("ALJ") appointed by the FTC. HISA § 1209(a), (b), (d). The ALJ's decision is subject to yet further review by the FTC itself, based on "the discretion of the [FTC]." *Id.* § 1209(c)(1), (2). In reviewing the ALJ's decision, the FTC will apply a de novo standard to both "the factual findings and conclusions of law," "may *** allow the consideration of additional evidence," and may "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part," and "make any finding or conclusion that, in the judgment of the Commission, is proper and based on the record." *Id.* § 1209(c)(3).

This robust federal check on the Authority's actions closely parallels the relationship between the Securities Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"), a private organization that has participated in the regulation of the securities brokerage industry for decades.[5] "Despite FINRA's seemingly broad power, Congress mandated that the SEC exercise close supervision over the association." *Scottsdale Cap. Advisors Corp.*, 844 F.3d at 418; *see Austin Mun. Sec., Inc. v. NASD*, 757 F.2d 676, 680 (5th Cir. 1985) ("Congress

[5] "FINRA, a private not-for-profit corporation, is the successor organization to the National Association of Securities Dealers, Inc. ('NASD')," which was formed in the 1930s. *Scottsdale Cap. Advisors Corp. v. FINRA*, 844 F.3d 414, 417 n.1 (4th Cir. 2016).

granted the SEC broad supervisory responsibilities over these self-regulatory organizations."). Like the Authority-FTC model, "[b]efore any FINRA rule goes into effect, the SEC must approve the rule and specifically determine that it is consistent with the purposes of the Exchange Act." *Scottsdale Capital Advisors Corp.*, 844 F.3d at 418 (citing 15 U.S.C. §§ 78*o*-3(b)(6), 78s(b)(2)(C)). And like HISA, "[r]eview of final FINRA action invokes the SEC's role under the Exchange Act in overseeing FINRA's authority to discipline members." *Id.* FINRA must "promptly file notice" with the SEC when it "imposes any final disciplinary sanction"; adverse FINRA actions may be appealed to the SEC; the SEC reviews FINRA's decision to ensure that any rule allegedly violated was "applied in a manner[] consistent with the purposes" of the Exchange Act; and the SEC may affirm, modify, or set aside FINRA's decision or remand for further proceedings. 15 U.S.C. § 78s(d), (e).[6]

Courts have uniformly rejected non-delegation challenges to the decades-old FINRA model as having "no merit." *Sorrell v. SEC*, 679 F.2d 1323, 1326 (9th Cir. 1982) (citing SEC's power "to approve or disapprove the association's Rules" and SEC's "review of any disciplinary action"); *see also Todd & Co. v. SEC*, 557 F.2d 1008, 1010 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 694-695 (2d Cir. 1952). As the Authority's actions are "superintended by [the FTC] in every respect" that FINRA's actions are overseen by the SEC, any powers that HISA delegates to the Authority should also be upheld. *Rettig*, 987 F.3d at 533.

[6] In certain respects, the FTC's review of Authority decisions is more substantial than the SEC's review of FINRA decisions. *Compare, e.g.*, HISA § 1209(c)(3)(C) (providing for "consideration of additional evidence"), *with* 15 U.S.C. § 78s(e)(1) (providing that SEC hearing "may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction").

4. A nondelegation doctrine challenge further fails because HISA channels the Authority's discretion and subjects the Authority's decisions to judicial review.

Interpreting the three early twentieth century Supreme Court cases on which Plaintiffs rely, *see* FAC ¶ 94, the Fifth Circuit has summarized the private nondelegation doctrine as providing that "when private parties have the unrestrained ability to decide whether another citizen's property rights can be restricted, any resulting deprivation happens without 'process of law.'" *Boerschig*, 872 F.3d at 708 (discussing *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-311 (1936); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 118-119 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 140-141 (1912)). Thus, a statute violates the doctrine only if it suffers from "the twin ills that doomed" the laws at issue in those *Lochner*-era cases: (1) the "delegation to private parties involves the unfettered discretion that violates due process" because the statute does not "impose[] a standard to guide" the private entities; and (2) the private entities' actions are not "subject to judicial review." *Id.*

HISA easily clears both hurdles. As to the first, the Act "imposes a standard to guide" the Authority that is considerably more detailed than the standard the Fifth Circuit approved in *Boerschig*. 872 F.3d at 708. In that case, which concerned an eminent domain scheme allowing gas pipeline companies to condemn property, the court held that the private companies' discretion was sufficiently constrained through the law's bare requirement that, before proceeding with a condemnation, the companies render a determination that "the taking is necessary for 'public use.'" *Id.* By contrast, HISA directs that, in developing rules and standards relating to anti-doping and medication control, the Authority "shall take into consideration" seven enumerated factors, HISA § 1206(b); cannot approve standards that are "less stringent" than various "baseline rules" described in the Act, outside of specified circumstances, *id.* § 1206(g); and must meet express qualifications, such as "prohibit[ing] the administration of any substance or method" only "if the

Authority determines such substance or method has a long-term degrading effect on the soundness of a horse," *id.* § 1206(c)(5). In developing rules and standards relating to racetrack safety, the Authority "shall take into consideration existing safety standards" expressly listed in the Act, *id.* § 1207(a), and must account for twelve "elements" Congress enumerated, *id.* § 1207(b). HISA similarly imposes detailed guidance regarding the calculation of fees and the imposition and adjudication of sanctions, including the requirement that the Authority must "provide for adequate due process" by ensuring "impartial hearing officers or tribunals commensurate with the seriousness of the alleged *** violation." *Id.* § 1208(c)(3); *see id.* §§ 1203(f), 1208. Against this carefully reticulated scheme, Plaintiffs cannot allege that "no standard exist[s] to guide" the Authority's work under the Act. *Boerschig*, 872 F.3d at 708.[7]

As to the second, any deprivation of property under HISA "is subject to judicial review." *Boerschig*, 872 F.3d at 708. In this respect, HISA's requirements again are significantly more substantial than the "seemingly feeble" judicial review provided for in the scheme that was upheld in *Boerschig*. *Id.* at 709. Under that law, "review is deferential," with the state court "not determin[ing] 'public use' or 'necessity' as an original matter, but only review[ing] the pipeline's decision for either 'fraud, bad faith, abuse of discretion, or arbitrary and capricious action.'" *Id.* at 708-709. As explained, under HISA, decisions by the Authority "shall be subject to de novo review" by an ALJ, who will conduct an independent hearing to determine whether the aggrieved person has committed a violation and whether the sanction is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." HISA § 1209(b). Those "factual findings

[7] For the same reason, Plaintiffs cannot state a claim that "if the Authority were considered a public, governmental entity, HISA's delegation of authority to it still would be unconstitutional because Congress also failed to give it an 'intelligible principle' to guide its discretion." FAC ¶ 108. The complaint wholly ignores the statutory provisions discussed above that provide considerable guidance. *See id.* ¶ 109 (focusing exclusively on sections 1203(a) and 1204(a)).

and conclusions of law" are then subject to further de novo review by the FTC, which may consider newly presented evidence. *Id.* § 1209(c). And a determination by the ALJ or the FTC constitutes final agency action that is subject to judicial review in federal court. *See id.* § 1209(b)(3)(B); *see also* 5 U.S.C. §§ 702-704 (APA review provisions). Because "the judicial [and administrative] oversight of [the Authority's] power further distinguishes this case from the *Eubank-Roberge-Carter Coal* situation in which the actions of the private party are unreviewable," no constitutional violation arises here. *Boerschig*, 872 F.3d at 709.

B. HISA Does Not Unconstitutionally Delegate Legislative Authority To The FTC

Plaintiffs' second claim alleges that HISA violates the "public nondelegation doctrine" because the Act "gives the FTC no standards upon which to base its decision to approve or disapprove rules proposed by the Authority." FAC ¶¶ 105-106. "Delegations are constitutional so long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized [to exercise the authority] is directed to conform.'" *Big Time Vapes, Inc. v. Food & Drug Admin.*, 963 F.3d 436, 441-442 (5th Cir. 2020) (alterations in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). Under that doctrine, "it is 'constitutionally sufficient if Congress (1) clearly delineates its general policy, (2) the public agency which is to apply it, and (3) the boundaries of that delegated authority.'" *Id.* at 443-444 (alterations omitted) (quoting *Mistretta v. United States*, 488 U.S. 361, 372-373 (1989)). "'Those standards *** are not demanding'": in fact, the Supreme Court "has found only two delegations to be unconstitutional. Ever. And none in more than eighty years." *Id.* at 442, 446 (ellipsis in original) (quoting *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality)).

HISA satisfies each intelligible-principle factor. As to the first, the Act explicitly delineates Congress's policy goal of developing a national "horseracing anti-doping and medication control

program" and "racetrack safety program" to improve "the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces," through uniform (and uniformly enforced) federal rules. HISA § 1205; *see also id.* §§ 1206, 1207. Although Plaintiffs criticize the Act for "contain[ing] no 'statement of purpose' and no 'findings' provisions," FAC ¶ 109, the Supreme Court and the Fifth Circuit have rejected that "blinkered brand of interpretation" in this context. *Big Time Vapes, Inc.*, 963 F.3d at 443 (quoting *Gundy*, 139 S. Ct. at 2126). No such labels are necessary. Moreover, rather than limiting the constitutional analysis "to the text alone, *** when evaluating whether Congress laid down a sufficiently intelligible principle, [courts are] meant also to consider the purpose of the [Act], its factual background, and the statutory context." *Id.* (internal quotation marks omitted). HISA's "legislative history backs up everything" in its text, by making clear the purpose that "was front and center in Congress's thinking," *Gundy*, 139 S. Ct. at 2127: "improv[ing] the integrity and safety of horseracing by requiring uniform safety and performance standards, including a horseracing anti-doping and medication control program and a racetrack safety program," in light of the many injuries and fatalities suffered in recent years, H.R. REP. NO. 116-554, at 17.

As to the second factor, HISA leaves no doubt that the FTC is the public agency directed to apply the Act. HISA charges the FTC (on the front end) with deciding, after notice-and-comment, whether to promulgate the Authority's proposed standards as an enforceable rule, and (on the back end) with reviewing the Authority's implementation of any such rule. *See* HISA §§ 1204, 1209.

HISA satisfies the third intelligible-principle factor by providing several "signposts to direct the exercise of the authority it delegate[s]" to the FTC. *Big Time Vapes, Inc.*, 963 F.3d at 446. For example, the agency's jurisdiction is limited to authority over "horseracing safety,

performance, and anti-doping and medication control matters for covered horses, covered persons, and covered horseraces," where each of those "covered" terms is expressly defined. HISA §§ 1202(4)-(6), 1205(a). These provisions have "the effect of constricting the [FTC's] discretion to a narrow and defined category" of rules it may promulgate. *Big Time Vapes, Inc.*, 963 F.3d at 445 ("[C]ontrolling definition[s] *** necessarily restrict[] the [agency's] power[.]"). Within that bounded category, the Act provides that the FTC may approve and promulgate a rule only if it "is consistent with" the many provisions delineating the considerations the Authority must account for when developing proposed standards. HISA §§ 1204(c)(2), 1206(b)-(c), 1207(b); *see* pp. 22-23, *supra*. And Congress further "restricted the [FTC's] discretion by making many of the key regulatory decisions itself." *Big Time Vapes, Inc.*, 963 F.3d at 445; *see, e.g.*, HISA § 1206(d) (prohibiting administration of substance to covered horse within 48 hours of racing start), *id.* § 1206(g) (providing baseline rules). These detailed guardrails, among others, cabin Congress's delegation to the FTC far more than the many statutes the Supreme Court has upheld despite "very broad delegations" to agencies to, for example, "regulate in the 'public interest,'" "set 'fair and equitable' prices and 'just and reasonable' rates," and issue standards that are "requisite to protect the public health." *Gundy*, 139 S. Ct. at 2129. Thus, "if [HISA's] delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs." *Id.* at 2130.

C. HISA Does Not Violate The Appointments Clause

Plaintiffs' third claim alleges that, "*if a court were to conclude that the grant of power to the Authority was sufficient to render it a public entity*, *** appointment of its Board of Directors violates the Appointments Clause of the United States Constitution." FAC ¶ 112 (emphasis added). But Plaintiffs do not actually allege that a grant of power, or any other feature of HISA, renders

the Authority a public entity. On the contrary, Plaintiffs repeatedly allege the opposite: the Authority is "a non-governmental private, independent, self-regulatory non-profit corporation." FAC ¶ 56; *see, e.g.*, *id.* ¶¶ 1, 50, 65, 81, 89. Plaintiffs' own allegations thus foreclose their Appointments Clause claim.

Plaintiffs' view of the Authority as a private entity is consistent with Congress's understanding. *See* HISA § 1203(a). It is confirmed by the Authority's governing documents. *See* Certificate, App'x 25 (showing incorporation in Delaware before HISA enacted). And it is supported by case law. *See, e.g.*, *Free Enter. Fund v. Public Co. Account. Oversight Bd.*, 561 U.S. 477, 484-485 (2010) (contrasting "private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to [SEC] oversight" with the "Government-created, Government-appointed" PCAOB); *compare Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995) (where government "creates a corporation by special law" and "retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of [constitutional obligations]"), *with* FAC ¶ 62 ("HISA does not give any governmental entity the authority to approve, disapprove, or modify the selection" of Authority Board members). In fact, "[c]ourts have held without exception that FINRA"—the Authority's analogue in material respects, *see* pp. 20-21, *supra*—"is a private entity and not a state actor," for purposes of rejecting a host of constitutional challenges. *Mohlman v. Financial Indus. Regul. Auth., Inc.*, No. 3:19-cv-154, 2020 WL 905269, at *6 (S.D. Ohio Feb. 25, 2020) (collecting cases), *aff'd*, 977 F.3d 556 (6th Cir. 2020); *see, e.g.*, *Desiderio v. National Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206-207 (2d Cir. 1999) ("[FINRA] 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 [FINRA] board or committee.").

Because the Authority's Directors "are not officers of the United States, *** the Appointments Clause says nothing about them." *Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020). It follows that the Authority's identity as a private organization, rather than as "a federal entity[,] is fatal to [Plaintiffs'] claim[] under the Appointments Clause." *Kerpen v. Metropolitan Wash. Airport Auth.*, 907 F.3d 152, 160 (4th Cir. 2018); *see, e.g.*, *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757 (5th Cir. 2001) (en banc) (holding that False Claim Act's qui tam provisions do not violate Appointments Clause because "the constitutional definition of an 'officer' encompasses, at a minimum, a continuing and formalized relationship of employment with the United States Government" and "[t]here is no such relationship with regard to qui tam relators").[8]

D. HISA Does Not Violate The Due Process Clause

Plaintiffs' fourth claim alleges that "Congress violated the Due Process Clause" "[b]y granting [private] self-interested actors the authority to regulate their competitors." FAC ¶ 123. Plaintiffs' allegations of self-dealing, however, do not rise "above the speculative level." *Twombly*, 550 U.S. at 555.

[8] Even if the Authority could be considered a federal entity, the Directors would not be considered "officers" under the Appointments Clause because they do not "hold a continuing office established by law." *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018). Instead of a "position created by statute," *id.*, each Director's position is established by the Authority's governing documents under state law, *see* Certificate § 7, App'x 27; Bylaws §§ 3.1-3.2, App'x 35-38. Rather than enjoying "a career appointment," *Lucia*, 138 S. Ct. at 2053, Directors are barred from "serv[ing] more than two (2) consecutive full (three-year) terms," Bylaws § 3.2(d), App'x 37. And far from exercising "significant discretion" with "independent effect," *Lucia*, 138 S. Ct. at 2053, any rule proposed by the Board that could have legal effect requires the FTC's approval, and any final decision by the Board is subject to two layers of de novo administrative review (by an ALJ and the FTC), *see* HISA §§ 1204, 1209.

Plaintiffs' theory would require multiple leaps of conjectural, improbable, and unexplained acts of bad faith: special interests would motivate the Nominating Committee members' selection; at least five members of the Nominating Committee would advance those special interests in appointing the Board; a majority of the Board would seek to circumvent internal and statutory constraints to advance those special interests; the Board majority would successfully tailor proposed standards to benefit only the special interests; the FTC would violate its statutory duties and disregard public comment to promulgate those standards into enforceable rules; and those final rules would have a disparate or unfair effect. Several provisions of HISA (and the Authority's own bylaws) foreclose that chain of possibilities by safeguarding against the hypothetical self-dealing Plaintiffs allege. For example, a majority of the Board must be "independent"—*i.e.*, "selected from outside the equine industry." HISA § 1203(b)(1)(B)(i). Of the remaining members, the Act ensures fair representation among each of the six equine constituencies (trainers, owners, breeders, tracks, veterinarians, state racing commissions, and jockeys). *Id.* § 1203(b)(1)(B)(ii). No member of the Board may (1) "ha[ve] a financial interest in, or provide[] goods or services to, covered horses"; (2) serve as an official or officer in the horseracing industry; or (3) be employed by or have a familial or business relationship with anyone covered under categories (1) and (2). *Id.* § 1203(e). The Authority is also required to "provide for adequate due process" by ensuring "impartial hearing officers." *Id.* § 1208. And HISA ensures the FTC's independent review and approval of all Board actions that could have legal effect on private parties. *Id.* §§ 1204, 1209.

CONCLUSION

For the foregoing reasons, this Court should dismiss the First Amended Complaint.

Respectfully submitted,

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April 30, 2021

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, I served the foregoing motion and brief in support upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

/s/ Pratik A. Shah
Pratik A. Shah