UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, et al.,

Plaintiffs,

v.

JERRY BLACK, et al.,

Defendants.

No. 5:21-cv-00071-H

BRIEF AMICI CURIAE OF SENATOR MITCH McCONNELL AND REPRESENTATIVES PAUL TONKO AND ANDY BARR IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Unenacted Bills

Other Legislative Materials

INTERESTS OF AMICI CURIAE

Republican Leader Mitch McConnell is the senior United States Senator from Kentucky. He was Majority Leader of the Senate when Congress enacted the Horseracing Integrity and Safety Act of 2020 ("HISA"). As Kentucky's Senator for more than 36 years, he is acutely aware of all issues facing the horseracing industry. He has fought to preserve the integrity of the sport, and to protect both horses and jockeys. His strong interest in horseracing led him to introduce HISA in the Senate on September 9, 2020. *See* S. 4547, 116th Cong. Leader McConnell's experience as a leading member of the Senate, together with his long-term interest in horseracing and his specific involvement with HISA, enable him to offer this Court an important perspective on this matter.

Congressman Paul Tonko is a Democrat who represents New York's Twentieth District in the U.S. House of Representatives. Horseracing is a key industry in both his district and his state. He therefore has a strong interest in maintaining the integrity and vitality of the sport. On the same day that Leader McConnell introduced HISA in the Senate, Congressman Tonko introduced the same bill in the House as an amendment during a committee debate. In addition to introducing an earlier bill that became HISA, *see* H.R. 1754, 116th Cong. (2019), he co-sponsored precursors to that legislation in 2015 and 2017. *See* H.R. 3084, 114th Cong. (2015) (first co-sponsor); H.R. 2651, 115th Cong. (2017) (first co-sponsor).

Congressman Andy Barr represents Kentucky's Sixth District in the House of Representatives. Horseracing is one of the signature industries of his district. He is therefore keenly aware of the many challenges that the industry faces. His years of experience on the House Financial Services Committee contributed significantly to HISA's use of the FINRA model, as discussed more fully below. In addition to being a co-sponsor of HISA, *see* H.R. 1754, 116th Cong. (2019) (first co-sponsor), he introduced precursors to that legislation in 2015 and 2017. *See* H.R. 3084, 114th Cong. (2015) (sponsor); H.R. 2651, 115th Cong. (2017) (sponsor).

ARGUMENT

The Horseracing Integrity and Safety Act of 2020 ("HISA") is both vital and constitutional legislation. This Court should therefore grant Defendants' motion to dismiss.

Race horses are large, muscular animals — equine athletes. They engage in intense physical activity both in training and in competition. On rare occasions, but not rarely enough, they perish while racing. Sometimes — and even more tragically — jockeys perish as well or are injured, typically because of an injury to a horse. In recent years, acute and widespread concerns about the safety and integrity of horseracing presented the industry with an existential crisis. Congress enacted HISA in response to that crisis.

HISA is the product of extensive legislative attention. Its long history dates back to the 113th Congress in 2013. Over that period, the House and Senate considered at least eight different bills addressing the integrity and safety of horseracing. Each was different in some respect. From this variety of approaches emerged the legislation now before the Court. HISA and its precursors were also the subject of two separate hearings. The legislation was debated and voted on in committee. It was the subject of a committee report. It was debated and passed on the House floor. HISA is the opposite of a bill that was enacted without deliberation or scrutiny, as Plaintiffs attempt to paint it.

Finally, HISA adheres to a well-established model of federal regulation by authorizing a private entity called the Horseracing Integrity and Safety Authority ("the Authority") to propose, *not promulgate*, rules that a federal agency — the Federal Trade Commission ("FTC") — may approve, reject, or functionally modify. The Maloney Act, a critical element of the regulatory infrastructure of federal securities markets, similarly authorizes a private entity called the Financial Industry Regulatory Authority ("FINRA") to propose rules that a federal agency — the Securities and Exchange Commission ("SEC") may approve, reject, or modify. And the Bituminous Coal

Act of 1937, which the Supreme Court blessed in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), similarly authorized individual entities to propose rules subject to the oversight and control of the federal National Bituminous Coal Commission.

Because HISA is vitally important legislation addressing a matter of national concern, and because its structure is consistent with regulatory configurations long used by Congress and long sustained by the federal courts, Defendants' motion to dismiss should be granted.

I. HISA is vital legislation.

Congress enacted HISA in response to a crisis in the horseracing industry. The House Energy and Commerce Committee reported 441 fatal injuries to Thoroughbreds alone in the United States in 2019. *See* H.R. Rep. No. 116-554, at 17 (2020) (hereinafter "House Report"). In addition, 129 jockeys died in training or racing accidents in the United States in the 72 years between 1940 and 2012, often because of the catastrophic injury to, or sudden death of, a horse. *See id.*

The industry recognized that this acute safety crisis was creating an existential crisis of public confidence. As the Vice Chairman of The Jockey Club stated in a hearing on HISA: "***We are facing an existential threat.*** If our response to that threat is or even appears to be business as usual, we're going to lose." Statement by William M. Lear, Jr. at 3 (emphasis added), Legislation to Promote the Health and Safety of Racehorses: Hearing on H.R. 1754, the Horseracing Integrity Act of 2019, Before the Subcommittee on Consumer Protection and Commerce of the House Committee on Energy and Commerce, 116th Cong. (Jan. 28, 2020) (hereinafter "2020 Hearing").[1] Testifying in support of a precursor to HISA, a spokeswoman for the Humane Society similarly

[1] Mr. Lear's testimony is available at https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Lear_Testimony_012820.pdf.

A video of the hearing is available at https://energycommerce.house.gov/committee-activity/hearings/hearing-on-legislation-to-promote-the-health-and-safety-of-racehorses.

described the bill as "neither an impulsive government intervention nor an unnecessary one. It comes after the death of thousands of horses, declining fan interest, and ***a general crisis of confidence in the sport***." Statement of Kitty Block, Transcript of Hearing on H.R. 2651, the Horseracing Integrity Act of 2017, Before the Subcommittee on Digital Commerce and Consumer Protection of the House Committee on Energy and Commerce, 115th Cong. 34 (June 22, 2018) (hereinafter "Transcript of 2018 Hearing") (emphasis added).[2] Likewise, the Chairman of the Humane Society of the United States National Horseracing Advisory Council (and former Chief Executive Officer and controlling shareholder of the Maryland Jockey Club) observed:

> If the general public loses confidence that the people responsible for the health and safety of these equine athletes are mistreating them — as survey after survey unequivocally proves is happening to an increasing extent — then ***the*** "***invisible hand***" ***of the marketplace will drive horse racing into extinction*** as surely as it has Ringling Brothers Circus.

Testimony of Joe De Francis at 1 (emphasis added), 2020 Hearing.[3]

The crises described above are largely the result of the regulatory patchwork to which horseracing is subject. In the absence of national standards, trainers, jockeys, track officials, and other players in the industry are subject to a different regulatory regime in each of the 38 states that have horseracing tracks. *See* House Report at 18-19. Such a patchwork may have made sense when horseracing was an intensely local, rather than national, activity. But horseracing is no longer distinctly local. Two things transformed the industry:

---

[2] This transcript is available at https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/20180622-DCCP%20HR%202651%20the%20Horseracing%20Intergrity%20Act%20of%202017.pdf.

A video of this hearing is available at https://energycommerce.house.gov/committee-activity/hearings/hearing-on-hr-2651-the-horseracing-integrity-act-of-2017-subcommittee-on. Ms. Block's testimony can be found at 47:30 in the video.

[3] Mr. De Francis' testimony is available at https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/De%20Francis_Testimony_012820.pdf.

> First, people learned how well horses travel. They can step off a van in the morning, run well in the afternoon, and then travel home that night without a problem. Second, interstate simulcasting was introduced. In 1978, Congress passed the Interstate Horseracing Act, which enabled simulcasting and wagering across State lines.

Statement of Stuart S. Janney III, Chairman of the Jockey Club, Transcript of 2018 Hearing at 27 (34:50 in video). The industry thus became a matter of both national and international concern. As one horseman testified:

> Over the last couple of weeks alone, I have run horses in New York, New Jersey, Maryland, and Kentucky. In total, I need licenses in nine States, every one with a different set of rules.
>
> These are the facts of Thoroughbred racing today. Our sport is international. Our horses are sold to buyers around the world. Our stallions shuttle among continents, and bets cross State and national borders. And that is the fastest growing segment of our wagering.

Id. at 28 (35:30 in video). Another witness representing a different horseracing constituency similarly observed that an "international sport deserves the most advanced form of regulatory mechanism, not one based on 38 different State agencies with varying levels of funding, expertise, and experience." Statement of Craig Fravel, President and CEO of the Breeders' Cup, *id.* at 41 (57:28 in video).

Regulation remained a state-level patchwork until Congress took action. HISA addresses these safety and public confidence concerns by mandating both adequate and uniform equine health and safety rules nationwide. Most importantly, it requires "a horseracing anti-doping and medication control program applicable to all covered horses, covered persons, and covered horseraces." HISA § 1206(a)(1). It goes on to provide that "[c]overed horses should compete only when they are free from the influence of medications, other foreign substances, and methods that affect their performance." *Id.* § 1206(b)(1). HISA also establishes a "racetrack safety program applicable to all covered horses, covered persons, and covered horseraces." *Id.* § 1207(a)(1).

HISA's mandate to create national, uniform equine health and safety rules is vital to the stability and growth of horseracing. Like any regulatory regime, not everyone agrees with HISA's objectives or the means by which the statute achieves those objectives. But the question for this Court is only whether Congress had an adequate and legitimate basis for enacting HISA. Without doubt, addressing the safety and public-confidence crises described above is an adequate and legitimate basis for this legislation.

II. HISA is the result of extensive legislative deliberation.

In their Motion for Partial Summary Judgment, Plaintiffs intimate that HISA passed without legislative scrutiny. *See* ECF No. 38 at 2. This is not the case. HISA was the well-considered culmination of a variety of approaches that Congress considered over the course of several years, each of which took a different approach to addressing the problems that afflicted horseracing. For example, the Horseracing Integrity and Safety Act of 2013, introduced by Representative Joseph Pitts of Pennsylvania and Senator Tom Udall of New Mexico, would have modified the Interstate Horseracing Act ("IHA"), 15 U.S.C. § 3004(a), to require the "consent" of a newly established private "independent anti-doping organization" before tracks could legally accept interstate off-track wagers. *See* H.R. 2012, 113th Cong. (2013); S. 973, 113th Cong. (2013). This is in contrast to HISA as enacted, which provides for the Authority's rules to be directly binding once they are approved by the FTC. *See* HISA § 1204. Similarly, the Horseracing Integrity Act of 2017, H.R. 2651, introduced by Representatives Barr and Tonko, would have created a regime similar to HISA, but would have terminated the jurisdiction of the FTC and the Authority under the statute if 75 percent of states where covered races took place could agree to an interstate compact, provided that at least 90 percent of total racing starts of covered horses took place in those states. *See id.* § 4(e).

Congress held two different hearings on HISA and its precursors, both under the auspices of the House Committee on Energy and Commerce. The first took place before the Subcommittee on Digital Commerce and Consumer Protection on June 22, 2018, and the second before the Subcommittee on Consumer Protection and Commerce on January 28, 2020. *See supra* pp. 3–4 & nn.1–2. Fourteen witnesses representing diverse constituencies across horse racing testified in the two hearings. Among these witnesses were four who opposed the legislation, including the lead Plaintiff's Chief Executive Officer.[4]

H.R. 1754, the House bill that became HISA, was introduced by Congressman Paul Tonko of New York on March 14, 2019. It was the subject of the Consumer Protection and Commerce Subcommittee hearing in January 2020. It was also the subject of an extensive debate in the House Committee on Energy and Commerce on September 9, 2020. *See* https://www.youtube.com/watch?v=P1GRksch590. This debate lasted 55 minutes and included comments from eight different members, including two members who opposed the bill. The committee held two votes. The first was on Representative Tonko's amendment, which substituted a new version of the bill that included measures to address racetrack safety. The Committee approved the substitute 46 to 5 and then passed the entire bill as amended by the same margin. On the same day, Republican Leader McConnell and a bipartisan coalition of Senators comprising Republican Martha McSally and Democrats Kirsten Gillibrand and Dianne Feinstein introduced in the Senate the same bill that Rep. Tonko introduced as the substitute amendment during the committee debate. *See* S. 4547, 116th Cong. (2020).

---

[4] The written testimony of Eric Hamelback, Chief Executive Officer of the National Horsemen's Benevolent and Protective Association, is available at https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Hamelback-DCCP-Hrg-on-H.R.-2651-the-Horseracing-Integrity-Act-of-2017-2018-06-22.pdf.

The House bill was also the subject of the above-cited House Report. The bill was debated on the House floor with 261 co-sponsors, where it enjoyed such overwhelming bipartisan support that the House agreed to suspend the rules and pass it by a voice vote. *See* 166 Cong. Rec. H4973–83 (daily ed. Sept. 29, 2020). The record of the House proceedings thus refutes Plaintiffs' claim that H.R. 1754 passed the House "with no debate." ECF No. 38 at 6 (¶ 19). The bill passed the Senate on December 22, 2020, as part of the Consolidated Appropriations Act of 2021. HISA was closely and carefully considered, and ultimately enacted with broad and bipartisan support.

Plaintiffs suggest *sotto voce* that HISA is illegitimate because it "slipped through as part of" the annual appropriations bill. *See* ECF No. 38 at 2. But Congress routinely enacts uncontroversial authorizing legislation that enjoys broad bipartisan support, like HISA, as part of its annual appropriations legislation. Such authorizing legislation can be included in appropriations legislation that is considered on the floors of the two chambers only if it is so uncontroversial that the senior Republican and Democratic members of leadership and the committees of jurisdiction *of both chambers* approve its inclusion — a total of eight senior legislators in both houses. HISA was so uncontroversial and so widely bipartisan that it was selected for inclusion in the annual appropriations bill consistent with this informal process — and consequently enacted by large bipartisan majorities in both chambers.

III. HISA is structurally constitutional.

HISA adheres to a sound regulatory model that Congress has long used. Contrary to Plaintiffs' claims, it comports fully with the non-delegation doctrine. To satisfy the separation-of-powers aspect of this doctrine, the Fifth Circuit requires a statute to "clearly delineate[]" Congress' "general policy"; to "identif[y] the public agency which is to apply [that policy]"; and to "set[] forth the boundaries of [the agency's] delegated authority." *Big Time Vapes, Inc. v. FDA*, 963

F.3d 436, 443–44 (5th Cir. 2020) (brackets modified) (quoting *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989)). HISA easily meets this test. First, its "general policy" is unmistakable — to "implement and enforce the horseracing anti-doping and medication control program and the racetrack safety program." HISA § 1205(a)(1). Second, all major decisions are routed through the FTC. *See id.* §§ 1204 (rule-making), 1204(a)(11) (rate-making), 1209(c) (adjudication). Third, it contains more than enough "intelligible principle[s]" to guide the Authority in proposing rules and to guide the FTC in approving, rejecting, or functionally modifying them. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (quoting *Mistretta*, 488 U.S. at 372).

The support for this third point is overwhelming. For example, the "baseline anti-doping and medication control rules" that the Authority proposes and that the FTC approves must track "the most stringent" of a series of specific rules, beginning with the "lists of permitted and prohibited substances . . . in effect for the International Federation of Horseracing Authorities." HISA § 1206(g). In addition, in formulating anti-doping rules for the FTC to approve, the Authority is required to take into account a long list of principles, including:

> (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.

HISA § 1206(b). Similarly, the section of HISA devoted to racetrack safety requires the Authority to take existing standards into consideration, *see* HISA § 1207(a)(2), and to incorporate twelve specific "elements" into the program that it proposes, *see* HISA § 1207(b)(1).

Plaintiffs separately argue that HISA is unconstitutional because it "delegate[s] legislative power to a private entity" in violation of Article I, Section 1 of the Constitution. ECF No. 38 at 2.

Putting aside that this species of argument actually sounds in due process, not non-delegation, *see Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 707 (5th Cir. 2017), this argument also misses the mark.

HISA is modeled on the Maloney Act, which authorizes private entities like FINRA to propose rules governing the securities industry that the SEC either approves or rejects. *See* 15 U.S.C. § 78o-3(a). HISA works the same way by authorizing the Authority to propose rules that the FTC may either approve, reject, or functionally modify. *See* HISA § 1204(b)(2). Also like HISA, the Maloney Act authorizes private entities to perform certain investigative and adjudicative functions, subject to the SEC's oversight. *See* 15 U.S.C. § 78o-3(h)(3). This aspect of the Maloney Act has been upheld against constitutional challenges on many occasions. *See Otto v. SEC*, 253 F.3d 960 (7th Cir. 2001); *Sorrell v. SEC*, 679 F.2d 1323, 1326 n.2 (9th Cir. 1982); *Todd & Co., Inc. v. SEC*, 557 F.2d 1008, 1014 (3d Cir. 1977); *cf. Austin Municipal Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*, 757 F.2d 676, 680 (5th Cir. 1985) ("To prevent the misuse of . . . Congressionally-mandated power, Congress granted the SEC broad supervisory responsibilities over . . . self-regulatory organizations," including FINRA's predecessor, the National Association of Securities Dealers.).

In *Sorrell*, for example, the Ninth Circuit observed:

> Sorrell's claim of unconstitutional delegation appears to rest on his mistaken idea that the SEC does not engage in an independent review of NASD decisions. As we stated in *Sartain v. SEC*, 601 F.2d 1366, 1371 n.2 (9th Cir. 1979), SEC review is de novo.

679 F.2d at 1326 n.2. The same is true under HISA. A decision by the Authority to impose a final sanction is subject to de novo review by an administrative law judge. *See* HISA § 1209(b)(1). The decision of the ALJ is in turn subject to de novo review by the FTC. *See* HISA § 1209(c)(3)(B). In fact, HISA authorizes the FTC, on its own motion or on the motion of a party, to consider

evidence not previously submitted. *See* HISA § 1209(c)(3)(C). This is not the case with the SEC's oversight of FINRA. *See* 15 U.S.C. § 78s(e)(1). Finally, any determination by an ALJ or the FTC under HISA is a "Final Decision" (*i.e.*, final agency action) for purposes of judicial review. *See* HISA § 1209(b)(3)(B); *see also* HISA § 1208(c)(3) (requiring Authority to "provide for adequate due process, including impartial hearing officers," pursuant to rules proposed to FTC). There is accordingly no basis for the claim that Congress has effected a private delegation in this vital piece of legislation.

The Authority-FTC and FINRA-SEC frameworks are consistent with the statutory scheme that the Supreme Court upheld in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). Under the Bituminous Coal Act of 1937, private groups (entities that acceded to the terms of the "Bituminous Coal Code") proposed floor and ceiling coal prices set by the National Bituminous Coal Commission ("NBCC"), whose members were appointed by the President, by and with the advice and consent of the Senate, to serve four-year terms. Because prices were in fact set by a public entity, the Supreme Court concluded that the Act did not delegate legislative power. The Court explained:

> Nor has Congress delegated its legislative authority to the industry. The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is ***unquestionably valid***.

Id. at 399 (emphasis added). Notably, Congress enacted the Bituminous Coal Act in response to *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the case on which Plaintiffs principally rely.

Plaintiffs try to distinguish *Sunshine Anthracite Coal* on the ground that the NBCC could "modify" prices proposed by private groups, whereas (they argue) the FTC has no such power under HISA. This argument fails for two reasons. First, nowhere did the Court suggest in *Sunshine*

Anthracite Coal that the ability of the NBCC to modify proposed prices was central to its decision. What mattered to the Court was the fact that the NBCC "determine[d] the prices." 310 U.S. at 399. Under HISA, the FTC similarly *determines the rules* because it approves or rejects them. *See* HISA § 1204(c)(1). Second, Plaintiffs' argument improperly exalts form over substance. Because the FTC has power to *reject* the Authority's proposed rules, *see* HISA § 1204(c)(1), and because it has a responsibility to *recommend modifications* of any rule that it rejects, *see* HISA § 1204(c)(3), the FTC necessarily has power to withhold approval of a rule proposed by the Authority unless the Authority adopts the FTC's proposed modifications. This power is functionally the power to modify the Authority's rules, thereby substantively placing the FTC and the NBCC on the same footing. Plaintiffs' attempt to distinguish the Maloney Act and all of the cases sustaining the relationship between the SEC and FINRA, *see* ECF No. 38 at 24, fails for the same reasons.

Given the FTC's undoubted power to reject *anything* proposed by the Authority, *see* HISA § 1204(c)(1), Plaintiffs' reliance on *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999), is misplaced. In that case, as Plaintiffs themselves acknowledge, the FCC had given "blanket approval to the decisions of private operators." ECF No. 38 at 21. HISA does not work that way. Rather, as described above, the statute sets forth many principles governing any rules that the Authority might propose. *See*, *e.g.*, HISA §§ 1206(b) (setting forth parameters for the anti-doping program), 1207(b) (same for the racetrack safety program). In addition, the FTC must publish proposed rules in the Federal Register, giving interested parties — like Plaintiffs — the opportunity to provide comment before the FTC decides to approve or reject those proposed rules. *See* HISA § 1204(b)(1).

For similar reasons, Plaintiffs' reliance on Judge Duncan's recent opinion in the Fifth Circuit's en banc consideration of the Indian Child Welfare Act ("ICWA") is likewise misplaced.

See ECF No. 38 at 17–18 (discussing *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (opinion of Duncan, J.)). As Plaintiffs themselves note, Judge Duncan objected to a private entity "be[ing] given the ***sole authority*** to draft regulations." ECF No. 38 at 18–19 (emphasis added). As Judge Duncan explained, ICWA authorizes a tribe to "'amend[] the standards' Congress enacted" for child placement, with immediate consequences for parties outside the federal government. 994 F.3d at 336 (quoting *INS v. Chadha*, 462 U.S. 919, 954 (1983)). Under HISA, by sharp contrast, ***nothing*** happens unless and until the FTC, after notice and comment, approves a rule proposed by the Authority. *See* HISA § 1204(b).

Plaintiffs' reliance on Judge Ho's recent dissent from denial of rehearing en banc in *Texas v. Rettig*, 987 F.3d 518 (5th Cir. 2021), is similarly misplaced. *See* ECF No. 38 at 22–23. The Fifth Circuit has specifically recognized that a "private delegation" does not occur when a federal entity reasonably relies on the "input" of a private entity. *Rettig*, 987 F.3d at 531. Here, of course, it was not the FTC that enlisted the input of the Authority, but Congress, and it did so explicitly. This distinction was critical to Judge Ho's dissent. *See Texas v. Rettig*, 993 F.3d 408, 415 (5th Cir. 2021). Moreover, the agency in *Rettig* had painted itself into a corner by giving a private entity power to adopt standards that the agency could not later review. The agency's only option, as Judge Ho emphasized, was to withdraw the entire delegation. *See id.* at 413 ("If HHS disagrees with the Board's standards regarding capitation rates, its only recourse is to amend or repeal the rule delegating power to the Board in the first place. HHS has thus semi-permanently subjugated its regulatory power to that of the Board."). HISA involves no such subjugation. To the contrary, the statute requires all rules to be approved by the FTC, and it more than adequately cabins the FTC's (and the Authority's) discretion.

Plaintiffs assert that HISA allows private persons to regulate their competitors, but that assertion is wrong. Under HISA, a majority of the Authority's board must be independent of the horseracing industry. *See* HISA § 1203(b)(1). And members of the board who are part of that industry must be free of conflicts of interest. *See* HISA § 1203(e). In addition, the Authority's discretion is subject to numerous constraints, thus satisfying the Fifth Circuit's test in *Boerschig*. In that case, the court explained that a delegation to a private entity must be struck down only if it suffers from the "twin ills" of "unfettered discretion that violates due process" and the absence of judicial review. 872 F.3d at 708.

HISA clears these hurdles with ease. On the substantive side, it specifies the "baseline" rules for the anti-doping program, *see* HISA § 1206(g), and it provides seven principles to guide the development of that program, *see* HISA § 1206(b). As for the safety program, HISA requires the Authority to consider existing standards, *see* HISA § 1207(a), and to include twelve specific "elements" in the program that it ultimately proposes, HISA § 1207(b). On the procedural side, all rules must be approved by the FTC after notice and comment, *see* HISA § 1204(b), and all adjudications are subject to de novo review by both an ALJ and the FTC, *see* HISA §§ 1209(b) (ALJ), 1209(c) (FTC). In light of these provisions, Plaintiffs' claim that a "minority" of the industry will be able to dictate to the majority, *see* ECF No. 38 at 7 (¶ 23), is difficult to credit.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' motions to dismiss.

Dated: May 14, 2021

Respectfully submitted,

s/ *Eric Grant*

Paul E. Salamanca*
Kentucky Bar No. 90575
psalaman@uky.edu
279 Cassidy Avenue
Lexington, Kentucky 40502
Telephone: (859) 338-7287

* Application for admission *pro hac vice* pending

Eric Grant
Texas Bar No. 24076167
grant@hicks-thomas.com
Hicks Thomas LLP
700 Louisiana Street, Suite 2300
Houston, Texas 77002
Telephone: (713) 547-9100
Facsimile: (713) 547-9150

Counsel for Senator Mitch McConnell and Representatives Paul Tonko and Andy Barr

CERTIFICATE OF SERVICE

On May 14, 2021, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

s/ *Eric Grant*
Eric Grant

Counsel for Senator Mitch McConnell and
Representatives Paul Tonko and Andy Barr