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

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, *et al.*, Plaintiffs, v. JERRY BLACK, *et al.*, Defendants.	)	Civil Action No. 5:21-cv-71-H

BRIEF IN SUPPORT OF DEFENDANTS THE FEDERAL TRADE COMMISSION, ACTING CHAIR KELLY SLAUGHTER, COMMISSIONER ROHIT CHOPRA, COMMISSIONER NOAH PHILLIPS, AND COMMISSIONER CHRISTINE WILSON'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The day after Defendants filed their motions to dismiss in this action, Medina Spirit beat the pre-race favorite to win the Kentucky Derby. It did not take long for reports to emerge that, after the race, Medina Spirit tested positive for a banned drug.[1] The positive test sparked enormous controversy, though it did not stop the horse from competing in the next Triple Crown race several days later, which was being held in another state. Altogether, the saga illustrated why Congress decided that uniform drug and safety standards were necessary to maintain the integrity of horseracing—and why it passed the Horseracing Safety and Integrity Act, Pub. L. No. 116-260, 134 Stat. 1182 (2020) (HISA), which Plaintiffs are now asking the Court to strike down in this case.

As a legal matter, Plaintiffs' challenge to HISA is unavailing. In moving for partial summary judgment on Counts I and IV of their amended complaint, Plaintiffs do nothing to remedy the jurisdictional failures Defendants identified in Plaintiffs' pleadings. *See* FTC Def. Mot. Dismiss at 6-10, ECF No. 36 (Def. Mot. Dismiss). Plaintiffs offer no evidence to show that they are at risk of suffering an imminent injury or that their constitutional claims are ripe for review. *See* Pls. Mot. Partial SJ Br. at 3-8, ECF No. 38 (Pls. Br.). These threshold jurisdictional failures make it unnecessary for the Court to evaluate the merits of Plaintiffs' summary judgment claims.

If the Court were nevertheless to consider the merits of those claims, Plaintiffs would still not be entitled to summary judgment. Although Plaintiffs raised several constitutional claims in their amended complaint, they seek summary judgment on only their claims that HISA (1) unconstitutionally delegates legislative power to the "private, independent, self-

[1] *See, e.g.*, Joe Drape, *Kentucky Derby Winner Medina Spirit Fails Drug Test*, N.Y. Times, May 9, 2021, available at https://www.nytimes.com/2021/05/09/sports/horse-racing/bob-baffert-kentucky-derby-medina-spirit-drug-test.html; Editorial Board, *Medina Spirit and Horse Racing's Deadly Drug Scandals*, N.T. Times, May 15, 2021, available at https://www.nytimes.com/2021/05/15/opinion/horses-racing-preakness-drugs-medina-spirit.html ("In the Balkanized world of horse racing, there is no central commission to rule on [drug suspensions], as there is in most professional sports.").

regulatory, nonprofit" Horseracing Integrity and Safety Authority (Authority); and (2) violates due process by allowing self-interested actors to regulate their competitors. But the Supreme Court and courts of appeals around the country have made clear that private entities do not wield legislative power when they provide assistance or advice to a federal agency, as the Authority does under HISA. Indeed, in promulgating HISA Congress was careful to ensure that the ultimate authority to approve rules rested with the Federal Trade Commission (FTC), and relegated the Authority to a clearly subordinate role. The oversight that the FTC exercises over the Authority defeats Plaintiffs' nondelegation arguments—and that oversight, along with HISA's built-in protections against conflicts of interest, also defeats Plaintiffs' speculative and unsupported due process claims.

BACKGROUND

I. HISA'S ENACTMENT

Most popular sports in the United States are regulated by central governing bodies—national organizations that establish and enforce uniform national rules. Horseracing has been a notable exception. The 38 states that permit horseracing have regulated the sport independently, creating a patchwork of inconsistent, and inconsistently applied, rules. H.R. REP. NO. 116-554, at 17 (2020). Congressional hearings and public reporting over the past decade have regularly documented the resulting prevalence of doping and other unsafe practices that contribute to accidents and threaten the lives of horses and jockeys alike.[2] *See generally* Amicus Br. of Senator Mitch McConnell, *et al.* at 3-5, ECF No. 53 (McConnell Br.).

[2] *See, e.g.*, *Medication and Performance-Enhancing Drugs in Horse Racing: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, S. Hrg. 112-562 (2012), available at https://www.govinfo.gov/content/pkg/CHRG-112shrg76248/pdf/CHRG-112shrg76248.pdf; *see also* Benjamin Weiser and Joe Drape, *More Than Two Dozen Charged in Horse Racing Doping Scheme*, N.Y. Times, Mar. 9, 2020, available at https://www.nytimes.com/2020/03/09/sports/horse-racing-doping.html ("[R]eliance on performance-enhancing drugs combined with lax state regulations has made American racetracks among the deadliest in the world."); Joe Drape, *Horse Deaths Are Threatening the Racing Industry. Is the Sport Obsolete?*, N.Y. Times, Apr. 29, 2019, available at https://www.nytimes.com/2019/04/29/sports/horse-deaths-kentucky-derby.html; (the fatality rate for "American racetracks . . . . is anywhere from two and a half to five times greater than in the rest of the

Recognizing the need for reform, Congress has repeatedly considered ways to provide the sport with independent oversight and regulation. *See, e.g.*, Horseracing Integrity Act of 2017, H.R. 2651, 115th Congress (2017); Thoroughbred Horseracing Integrity Act of 2015, H.R. 3084, 114th Congress (2015); Horseracing Integrity and Safety Act of 2013, S. 973, 113th Congress (2013). However, none of those proposals advanced to a vote.

HISA was more successful. The legislation was first introduced in the House in 2019 and referred to the House Committee on Energy and Commerce. In September 2020, the Committee debated and amended the bill and reported it to the full House by a 46-5 vote. *See* H.R. REP. NO. 116-554, at 22. Senator McConnell, along with Senators Gillibrand, McSally, and Feinstein, introduced the bill on the Senate floor the same day. 66 CONG. REC. S5514-15. The legislation was supported both by members of the horseracing industry and by animal-rights groups. *See, e.g.*, 66 CONG. REC. H4980 (Rep. Pallone) ("[T]he Humane Society, the Jockey Club, the Breeders' Cup, Animal Welfare Action, several racetracks, and many horsemen support this bill.").

HISA passed as part of a consolidated appropriations act on December 21, 2020. Pub. L. No. 116-260, 134 Stat. 1182 (2020). The President signed HISA into law on December 27, 2020.

II. HISA'S STRUCTURE

Prior to HISA, Congress had considered creating an independent organization to oversee horseracing and enforce anti-doping rules. *See, e.g.*, Thoroughbred Horseracing Integrity Act of 2015, H.R. 3084, 114th Congress (2015); Horseracing Integrity and Safety Act of 2013, S. 973, 113th Congress (2013). But HISA takes a different approach. Rather than creating a new organization, HISA vests oversight in the FTC, and gives it power to

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racing world"); Walt Bogdanich *et al.*, *Mangled Horses, Maimed Jockeys*, N.Y. Times, Mar. 24, 2012, available at https://www.nytimes.com/2012/03/25/us/death-and-disarray-at-americas-racetracks.html (discussing how "industry practices continue to put animal and rider at risk").

enact rules and standards. HISA § 1204. Appreciating, however, that the FTC lacks independent expertise in the horseracing industry, Congress enlisted an already-existing "private, independent, self-regulatory, nonprofit corporation . . . known as the" Authority, to provide the FTC expert assistance and advice. *Id.* § 1203(a).

Thus, HISA directs the Authority to propose draft rules covering anti-doping and medication control, *id.* § 1206; racetrack safety, *id.* § 1207; and oversight and disciplinary proceedings, *id.* § 1208. HISA makes clear, however, that the Authority lacks the power to enact any of these proposals into law. *See id.* § 1203. Rather, HISA directs the Authority to provide "any proposed rule, or proposed modification to a rule" to the FTC for approval. *Id.* § 1204(b). No such proposed rule can take effect unless the FTC finds it consistent with its prior rules and HISA—and independently approves the rule following notice and public comment. *Id.*

HISA also empowers the Authority to conduct investigations of rule violations and to assess penalties when it determines that an enacted rule has been violated. *Id.* § 1208. Here again, HISA provides for extensive FTC oversight. The FTC must review, through its rule approval process, any procedures the Authority proposes on how the Authority will conduct investigations and assess any penalties. *Id.* And any final decisions by the Authority to impose penalties are "subject to de novo review by an administrative law judge" appointed by the FTC, as well as possible further de novo review by the commissioners. *Id.* § 1209.

The relationship between the private Authority and the FTC mirrors the relationship between the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA)—a private self-regulatory organization that has the power to propose rules and take certain enforcement actions, but whose actions are independently overseen and reviewed by the SEC. *Compare* 15 U.S.C. § 78s (codifying SEC oversight of self-regulatory organizations) *with* HISA §§ 1204-1205, 1209 (FTC oversight). Indeed, in their amicus brief filed in this case, Senator McConnell and the other sponsors of HISA explain

that the relationship between the Authority and the FTC was modeled on the relationship between FINRA and the SEC. McConnell Br. at 1, 10-11.

The FTC has begun to consider how to implement the directives Congress established. At present, it has neither proposed nor enacted any rules. Under HISA's provisions, no rule governing the conduct of horseracing participants can take effect before the "program effective date" of July 1, 2022. HISA §§ 1202(14), 1205(a).

LEGAL STANDARD

"The party invoking federal jurisdiction bears the burden of establishing standing—and, at the summary judgment stage, such a party can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 411-412 (2013) (internal quotation marks omitted). "Summary judgment is proper when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *State v. Rettig*, 987 F.3d 518, 526 (5th Cir. 2021) (quoting Fed. R. Civ. P. 56(a)).

ARGUMENT

I. PLAINTIFFS' MOTION CONFIRMS THAT THIS CASE IS NOT JUSTICIABLE

Defendants' motion to dismiss explained that Plaintiffs failed to establish an imminent injury that would give them standing to bring this action, or a ripe controversy that this Court could properly adjudicate. *See generally* Def. Mot. Dismiss at 6-10. As Defendants noted, HISA currently imposes no burden or requirement on the Plaintiffs. Instead, the statute merely establishes a framework for the development of *future* standards and rules. *See generally* HISA § 1204 (a)-(e) (setting procedures for establishment of rules); *id.* §§ 1206, 1207 (setting forth factors that should be considered when rules are developed). Before they can take effect, any regulations relating to doping, medication, track safety, enforcement procedures, or the collection of fees must be drafted by the FTC or the Authority, subjected to public notice and comment, and approved by the FTC. *Id.* § 1204(a)-(e). No such rules have even been proposed.

Plaintiffs' motion for partial summary judgment does nothing to remove these jurisdictional barriers. Plaintiffs have offered no evidence of a rule that imminently harms them, nor have they "set forth by affidavit or other evidence specific facts" establishing an injury-in-fact. *Clapper*, 568 U.S. at 412; Pls. Br. at 3-8. Instead, their motion differs from their facially-inadequate complaint only in that it adds declarations generally stating that Plaintiffs "are regulated by HISA and by the Authority" and that they "compete with those who selected the [Authority's] Nominating Committee and advocated for passage of HISA." Pls. Br. at 7-8 (citing Pls. Br. App'x 2, 3). But these generalized assertions do not alter the fact that Plaintiffs are not *currently* subject to any rule under HISA—and will not be until, at the earliest, "July 1, 2022." HISA § 1204(14).

If anything, Plaintiffs motion only confirms that their claims are unripe. For example, several of their legal arguments question whether the FTC will exercise adequate supervision and control over the activities of the Authority. *See, e.g.*, Pls. Br. at 16-17. Indeed, Plaintiffs go so far as to contend that the FTC's oversight will amount to "reflexive [] rubber stamping" of what the Authority does. *Id.* at 17 (citation omitted). That, however, is a strictly factual inquiry that cannot be evaluated on the record presented because to date, the Authority has not proposed any action for the FTC to approve or disapprove. *DM Arbor Ct., Ltd. v. City of Houston*, 988 F.3d 215, 218 (5th Cir. 2021) ("A case becomes ripe when it 'would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now.'" (internal quotes and citation omitted)). Plaintiffs' assertions thus illustrate that the Court would "benefit from further factual development of the issues presented," and should not adjudicate the merits of the case as it stands. *Texas Indep. Producers & Royalty Owners Ass'n v. U.S. E.P.A.*, 413 F.3d 479, 483 (5th Cir. 2005).

II. THE AUTHORITY'S ROLE UNDER HISA DOES NOT IMPLICATE DELEGATION CONCERNS

Putting aside the threshold jurisdictional defects of their case, Plaintiffs are not entitled to summary judgment on their claim that HISA violates the nondelegation doctrine. Pls. Br. at 9. Derived from the vesting clause of Article I, Section 1 of the U.S. Constitution, the nondelegation doctrine prohibits Congress from transferring "powers which are strictly and exclusively legislative." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (internal quotes and citations omitted). Because the doctrine "is rooted in the principle of separation of powers," the relevant inquiry is whether Congress has improperly "delegate[d] its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371 (1989); *see also Boerschig v. Trans-Pecos Pipeline*, L.L.C., 872 F.3d 701, 707-708 (5th Cir. 2017) (explaining the scope of the doctrine). Plaintiffs do not pose that question here, however. Instead, they contend that, in promulgating HISA, Congress contravened Article I, Section 1 by granting "legislative authority to a private entity." Pls. Br. at 1-2.

Plaintiffs' argument is a non-starter. As Defendants detailed in their motion to dismiss, ECF 36 at 10-16, Congress's decision to enlist the Authority's expertise in the development of horseracing safety and drug rules does not raise delegation concerns at all, because Congress did not grant the Authority any "lawmaking" power. *Loving v. United States*, 517 U.S. 748, 758 (1996). The powers that the Authority wields are not legislative, and entirely consistent with the roles that other private entities play in regulated industries.

A. Drafting and Advisory Roles Do Not Constitute Legislative Power

In analyzing delegation challenges, the Supreme Court has consistently equated "legislative" or "lawmaking" power with the power to promulgate general "rule[s] of prospective force." *Loving v. United States*, 517 U.S. 748, 758 (1996); *see generally Gundy*, 139 S. Ct. at 2129 (summarizing the Court's nondelegation cases, all of which involved grants of rulemaking power). Plaintiffs embrace this formulation, Pls. Br. at 9-10, which was also advanced by the *Gundy* dissent. *See Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting)

(framers understood "legislative power . . . to mean the power to adopt generally applicable rules of conduct governing future actions by private persons" (citations omitted)); *see also Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring) (describing legislative function as "the formulation of generally applicable rules of private conduct").

Consistent with this framing, the Supreme Court has repeatedly recognized that no "law-making is [] entrusted to" private entities that merely assist or advise an agency in its rulemaking process. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). Thus, in *Adkins*, the Court sustained a statute that allowed industry groups to "aid" a public agency by proposing minimum prices, which the agency could then "approve [], disapprove[], or modif[y]." *Id.* at 388, 399. As the Court explained, the fact that the agency exercised "authority and surveillance over the activities of" the private entities and "determine[d] the prices" meant that Congress had not "delegated its legislative authority to the industry." *Id.* at 399. And this principle extends further. Applying similar logic, the Supreme Court has rejected delegation challenges to statutory schemes giving industry members the power to *constrain* agency rulemaking by disapproving rules that an agency wishes to promulgate. *Currin v. Wallace*, 306 U.S. 1 (1939); *see also United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 577-78 (1939). Such schemes "do[] not involve any delegation of legislative authority," the Court noted, because it is still the government "that exercises its legislative authority in making the regulation" and the industry's approval serves merely as a "restriction" or "condition[]" on an agency's otherwise broad rulemaking power. *Currin*, 306 U.S. at 15.

This common-sense proposition—that lawmaking is exercised by the entity that actually has power to enact a binding rule—finds regular application in delegation challenges. For instance, the Court of Appeals for the Sixth Circuit has concluded that Congress did "not delegate legislative power to private parties" when it allowed horseracing groups to exempt themselves from "Congress' general prohibition of interstate off-track betting," because that

veto "does not allow a private party to 'make the law and force it upon'" others. *Kentucky Div., Horsemen's Benev. & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406, 1416 (6th Cir. 1994) (citation omitted) (*Turfway*); *see also United States v. Frame,* 885 F.2d 1119 (3d Cir. 1989) (same conclusion for different statutory scheme permitting an industry referendum). Other courts of appeals, including the Fifth Circuit, have applied this logic when analyzing whether agencies improperly delegate their statutory authority to private entities. *See Rettig*, 987 F.3d at 531 (finding that no delegation of an agency's authority occurred where the agency "'reasonabl[y] condition[ed]' federal [action] on an outside party's determination" that a private Board's standards were followed; "such conditions only amount to legitimate requests for input" (citing *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566–67 (D.C. Cir. 2004)); *see also Cospito v. Heckler*, 742 F.2d 72, 87-89 (3d Cir. 1984) (finding that no delegation occurred where the Secretary, in deciding to decertify a hospital under Medicare following hospital's loss of accreditation by private accreditation commission, nonetheless retained "ultimate authority over decertification decision"); *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 759 (9th Cir. 1992) (agency's decision to implement amendments approved by majority of industry "was not an unconstitutional delegation of power" to private entities).

These cases all make clear that private entities can participate—extensively—in rulemaking without implicating delegation concerns. Where an agency retains ultimate authority to enact binding rules, enlisting private parties to develop standards, offer proposals, or provide input on a rule's scope does not constitute legislative delegation. *See generally Pittston Co. v. United States*, 368 F.3d 385, 395-96 (4th Cir. 2004) (granting an entity powers "of an administrative or advisory nature" does not "violate the nondelegation doctrine"); *Perot v. FEC*, 97 F.3d 553, 556, 559–60 (D.C. Cir. 1996) (per curiam) (no legislative delegation occurred when regulation allowed private entities to establish their own criteria because the agency had authority to reject those criteria); *cf. Brackeen v. Haaland*, 994 F.3d 249, 351 (5th Cir. 2021) ("Courts have repeatedly affirmed Congress's authority to allow another party to

override the federal default for specific applications of a law without violating nondelegation principles.").

B. Under HISA, the FTC, not the Authority, Controls Rulemaking

The Authority's drafting and advisory roles under HISA fall squarely within the category of "subordinate[]" assistance do not rise to the level of "law-making." *Adkins*, 310 U.S. at 399.

1. The Authority Lacks Power to Enact Rules

While HISA "recognize[s]" the "self-regulatory, nonprofit" Authority "for purposes of *developing and implementing*" anti-doping and racetrack safety rules, HISA § 1203(a) (emphasis added), it does not give the Authority the ability to *enact* those rules. To the contrary, section 1204 of HISA, titled "Federal Trade Commission Oversight," provides that any rules the Authority develops on a specified list of topics shall be "proposed" to the FTC "in accordance with such rules as the [FTC] may prescribe" and "publish[ed]" in the Federal Register for public comment. HISA § 1204(a), (b)(1). The FTC may "approve or disapprove" those proposed rules depending on whether it finds them consistent with HISA and its prior rulemaking. *Id.* § 1204(c)(1)-(3). If the FTC "disapproves" a rule, the Authority may make modifications based on the FTC's recommendations and resubmit a proposal. *Id.* § 1204(c)(1)-(3). But the proposed rules *will not* "*take effect* unless . . . approved by" the FTC. HISA § 1204 (b)(2) (emphasis added); *see also* § 1205(c)(1) (FTC approval required for "anti-doping and medication control program").

Under these conditions, the Authority clearly wields no legislative power, and there is therefore no legislative delegation. Like the private entities in *Adkins*, *Currin*, *Turfway*, and the other cases discussed above, the Authority can draft proposals and provide input on appropriate standards, but it is powerless to enact substantive rules on its own: the statute does not allow it to "make the law and force it upon" others. *Currin*, 306 U.S. at 15-16; *see also Turfway*, 20 F.3d at 1416; *Adkins*, 310 U.S. at 399. Indeed, the Authority is even required to "submit to the [FTC] any proposed rule, standard, or procedure developed by the Authority

to *carry out*" previously enacted rules—which the agency also reviews and subjects to public comment. HISA § 1204(d) (emphasis added); *id.* § 1205(g) (Authority must submit to the FTC "any guidance" setting forth "an interpretation of an existing rule, standard, or procedure" or "policy or practice with respect to the administration or enforcement" of such rules). In other words, the Authority functions under the FTC's supervision, and is dependent on the FTC's approval. *Adkins*, 310 U.S. at 399.

True, the Authority's power to draft rules and to revise them based on the FTC's feedback may affect the content of rules that the FTC ultimately approves. Congress plainly wanted the FTC to receive expert advice on the operation of the horseracing industry. Yet the Authority providing such input does not alter the fact that the FTC oversees and controls the rulemaking process. The Authority's input is, at most, a condition that Congress imposed on how the *FTC* is to implement the statutory scheme. *See Currin*, 306 U.S. at 15-16; *see also Turfway*, 20 F.3d at 1416.

2. The Authority's Drafting and Advisory Roles are Subordinate to the FTC

Attempting to inflate the Authority's role, Plaintiffs endeavor to identify some "unprecedented" ways in which the Authority is involved with rulemaking. Pls. Br. at 12, 15. But Plaintiffs misread both HISA and the relevant precedent, and fail to establish that Congress vested the Authority with any legislative power.

Contrary to what Plaintiffs claim, Pls. Br. at 14-15, HISA does not "give[] only the Authority . . the power to draft regulatory rules"—nor does it give the Authority the ability to "stop, or veto, the FTC from acting." Pls. Br. at 14-15. Congress explicitly granted FTC the authority to "adopt [] interim final rule[s]" that the agency finds "necessary to protect [] (1) the health and safety of covered horses; or (2) the integrity of covered horseracing and wagering on those horseraces." *Id.* § 1204(e). The FTC is not required to consult with the Authority before exercising these powers. *Id.* Rather, the agency can exercise its rulemaking power whenever it deems appropriate, consistent with the provisions of HISA and the Administrative Procedure Act. Thus, if the Authority fails to draft rules that the FTC thinks

are "consistent with" HISA and "applicable rules approved by the" FTC—or fails to alleviate the FTC's concerns about some proposed rule—the FTC can simply take up the pen and promulgate a regulation itself. *Id.* § 1204(c).

Plaintiffs' various complaints that the FTC is improperly relegated to giving the Authority recommendations on proposals that it is not allowed to "modify" are therefore nonsensical. Pls. Br. at 20-21. Plaintiffs' fixation on the formalized way in which the FTC provides feedback to the Authority misses the functional reality: no proposal that the Authority submits can become a binding rule until the FTC is satisfied that the proposal is consistent with the statute and prior rulemaking. *See* HISA § 1204(c). As a practical matter, the FTC can "modify" a regulation proposed by the Authority either by denying approval of a rule until the Authority makes the necessary modification, or by promulgating an interim final rule of its own. This reality defeats Plaintiffs' reliance on *City of Dallas, Tex. v. F.C.C.*, 165 F.3d 341, 357–58 (5th Cir. 1999), *National Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 9 (D.D.C. 1999), and the *dissent* from a denial for rehearing *en banc* in *Rettig*. Pls. Br. at 20-22. By Plaintiffs' own characterization, those cases—none of which addressed *congressional* delegation—considered circumstances where agencies "gave blanket approval," retained "virtually no control," and could "approve but not disapprove" private entities' decisions. *Id.* at 21-22 (discussing *City of Dallas*, 165 F.3d at 358, *Stanton*, 54 F. Supp. 2d at 11, and *Texas v. Rettig*, 993 F.3d 408, 415–16 (5th Cir. 2021) (Ho, J., dissenting), respectively) (internal quotations omitted). That is plainly not true here.

Likewise, the broad power that Congress granted the FTC to review the Authority's proposed rules—and to promulgate its own rules whenever it finds appropriate—defeats Plaintiffs' reliance on the D.C. Circuit's decision in *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, which forms the mainstay of their claims. 721 F.3d 666 (D.C. Cir. 2013) *vacated and remanded sub nom. Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43 (2015) (*Amtrak*). In that case, the D.C. Circuit confronted a scheme in which Amtrak—which the Court treated as a private entity, only to be reversed on that ground by the Supreme Court—could both

develop proposed rules and stop rules proposed by the Federal Railroad Administration from going into effect. *Id.* at 668-69. The D.C. Circuit found this combination impermissible, reasoning that the nondelegation doctrine prohibited this sort of power-sharing between an agency and a private entity. *Id.* at 671, 673-74. No such power-sharing exists here, where the FTC does not need the Authority's "permission" to promulgate regulations, and has unilateral authority to disapprove the proposals the Authority makes. *Id.* at 671. The Authority cannot take a dispute with the FTC to "binding arbitration," nor can it compel the FTC to do something the agency does not think appropriate, as Amtrak could do. *Id.* at 673-74 (quotes and citation omitted). The Authority cannot, in other words, force the FTC's hand.

Plaintiffs attempt to wield the *Amtrak* case for the more general proposition that private entities cannot have a hand in both drafting a regulation and input on its approval—which Plaintiffs claim distinguishes HISA from *Adkins*, *Currin*, and the other Circuit precedent. *See* Pls. Br. at 15-16, 19-20. This derivation is unpersuasive. The Supreme Court and Circuit cases discussed above make clear that neither proposing regulations to an agency nor the power to withhold consent for an agency's proposals are legislative powers when considered separately. *See Adkins*, 310 U.S. at 399; *Currin*, 306 U.S. at 15-16; *Turfway*, 20 F.3d at 1416. There is no analytical basis to find that these functions suddenly constitute legislative power when combined. The lodestar in the Supreme Court's analysis is not the amount of input that a private entity provides in rulemaking—rather, it is where ultimate control over promulgating the governing rules lies. *See, e.g.*, *Currin*, 306 U.S. at 15-16.. Not surprisingly then, the Supreme Court has found that the "state itself exercises its legislative authority" even in the context of a statutory scheme that gave private entities the ability to propose aspects of a regulatory program *and* the power to subsequently approve an agency's rules. *Parker v. Brown*, 317 U.S. 341, 352 (1943). HISA is no different. Plaintiffs thus cannot differentiate HISA from the regimes upheld in *Adkins*, *Currin*, *Turfway* and the other cases

finding that private entities acting in subordinate roles lack legislative authority. *See* Pls. Br. at 23-24.

3. The FTC's Control is More than Adequate

Plaintiffs separately question whether the FTC will exercise sufficient "independent judgment" given the timetable provided for the agency to review the Authority's proposals and the agency's lack of pre-existing industry expertise. Pls. Br. at 14, 16-17. As a legal matter, this concern is irrelevant to the constitutional question of whether the Authority has been granted lawmaking power in the first instance. *See, e.g.*, *Rettig*, 987 F.3d at 531-32 (distinguishing question of whether delegation has occurred at all from the question of whether a delegation is unlawful, and explaining that the extent of an agency's "authority and surveillance" is relevant to the latter). But regardless, Plaintiffs' claims on this ground are entirely speculative, and do not entitle them to relief.

To the extent Plaintiffs assert that the FTC will not, as a practical matter, exercise adequate control and will instead be "rubber stamping" what the Authority submits, Pls. Br. at 16, they have not presented any evidence of any such thing occurring—nor can they, given that they brought this case as a facial challenge, before any rulemaking has taken place. *See generally* Defs. Mot. Dismiss at 6-7, 9. If Plaintiffs wanted to explore how the FTC exercises its role under HISA, they should have waited until the relationship between the Authority and the FTC was elucidated by some concrete action. By rushing to Court, Plaintiffs deprived themselves and the Court of the "benefit from [] factual development of the issues presented," and have to endure the consequences. *Texas Indep. Producers*, 413 F.3d at 483.

More fundamentally, Plaintiffs' speculation ignores that HISA provides detailed parameters for rules that are to be enacted, which gives the FTC a detailed framework for scrutinizing and evaluating the Authority's proposals. *See* § 1204(c)(2); *see, e.g., id.* §§ 1206(b)-(d), (g), 1207(a)-(b). This detailed framework, coupled with the FTC's authority for review, defeats any suggestion that the statute leaves the FTC incapable of "exercis[ing] proper oversight over the rules and regulations drafted by the Authority." Pls. Br. at 14. And

Plaintiffs identify no case standing for the proposition that a private entity's drafting and advisory roles shift into rulemaking unless the agency is given more than the 60 days that HISA provides the FTC to consider the proposals. *See generally* Pls. Br. at 14, 16-17; *see generally Rettig*, 987 F.3d at 532 (explaining that, what is required is that the agency "independently perform[s] its reviewing, analytical and judgmental functions").

Ultimately, Plaintiffs' complaints on this ground come down to their apparent dissatisfaction with the fact that Congress recruited a private entity to provide the FTC advice and assistance. Pls. Br. at 16-17. But it is entirely permissible for agencies to rely on the expertise of private entities. *See generally American Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 442 (D.C. Cir. 2018); *Rettig*, 987 F.3d at 532. Even the cases that Plaintiffs cite in their brief support the well-established principle that such entities can play an appropriate role. *See, e.g., Pittston*, 368 F.3d at 393; *Amtrak*, 721 F.3d at 671 (noting that private entities may 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") (quoting *Panama Ref Co. v. Ryan*, 293 U.S. 388, 421 (1935)); *Rettig*, 993 F.3d at 412 (Ho, J., dissenting) (arguing that the agency had improperly delegated its authority by allowing a private entity to set conditions for its certification, but noting that precedent allows "Congress itself to involve private parties in the rulemaking process").

As the Fifth Circuit recently noted in an en banc decision, there is not even "binding precedent to support a rule that *regulatory* power cannot be delegated outside the federal government." *Brackeen v. Haaland*, 994 F.3d 249, 352 (5th Cir. 2021) (en banc per curiam) (emphasis added). Plaintiffs' attempts to "rely[] entirely on concurrences and secondary sources for" their theory that mere involvement of a private entity in the rule drafting process are thus doomed to fail. *Id.* (discussing theory advanced by the dissent). Plaintiffs may hope that some court revisits the scope of the nondelegation doctrine in the future. But binding

precedent from the Supreme Court and the Fifth Circuit preclude the Court from doing so in this case.

C. The Authority's Other Functions Do Not Implicate Rulemaking, and are Otherwise Constitutionally Proper

Plaintiffs separately challenge three other powers wielded by the Authority as supposedly violative of the nondelegation doctrine. Pls. Br. at 25-26. These include the power of the Authority to select its board and committee members, and the power to issue subpoenas and investigate rule violations. Pls. Br. at 25-26. But none of these other powers are "delegat[ions] of legislative authority," *id.* at 25, because they do not involve the power to *make* rules governing behavior. *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (legislative function is one that establishes "standards of legal obligation"). Indeed, the powers relevant to the Authority's organization are not even *governmental* in the constitutional sense. *See, e.g.*, *Pittston*, 368 F.3d at 397 (noting that a private entity "enacting rules and regulations governing its operations" "in no way impinges upon others" and "clearly do[es] not violate the nondelegation doctrine"). The conferral of such powers to the Authority does not implicate legislative delegation concerns. *See, e.g.*, *United States v. Bruce*, 950 F.3d 173, 176 (3d Cir. 2020) (holding that "exercise of executive, not legislative, power" "does not implicate the non-delegation doctrine").

As explained in the Defendants' motion to dismiss, Plaintiffs' challenge on this ground appears to conflate the legislative nondelegation doctrine—which arises out of Article I, Section 1—with the much more prosaic principle that empowering some private parties over others can raise Due Process concerns. *See Boerschig*, 872 F.3d at 707 (distinguishing between the two doctrines). Indeed, Plaintiffs' confusion of the doctrines is apparent from their insistence that their delegations claim is controlled by the Supreme Court's decision in *Carter v. Carter Coal Co.*, Pls. Br. at 11—a case in which the Supreme Court found a conferral of authority on private entities to constitute "a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. 238, 311 (1936). Contrary to what Plaintiffs

suggest, Pls. Br. at 26, the Due Process inquiry is not interchangeable with the non-delegation analysis. *Boerschig*, 872 F.3d at 707. As the Fifth Circuit has explained, a statute empowering private entities violates the doctrine if it suffers from "the twin ills that doomed" the statutes in the Supreme Court's *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." *Boerschig*, 872 F.3d at 708 (emphasis added) (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)). Neither is true here.

HISA provides a detailed scheme for establishing how the Authority will investigate alleged violations—and provides for extensive agency review of the enforcement actions that the Authority ultimately takes. *See generally* HISA §§ 1208-1209. Among other things, HISA requires the Authority to "promptly submit to the" FTC notice of any sanction. HISA § 1209(a). HISA grants the FTC or the "person aggrieved" the right to seek "de novo review" of the sanction "by an administrative law judge" appointed by the FTC. HISA § 1209(a), (b), (d). FTC retains the discretion to then further review that judge's decision, *again* applying de novo review. *Id.* § 1209(c)(1), (2). Indeed, HISA explicitly grants FTC the discretion to "allow the consideration of additional evidence;" the ability to "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part;" and the power to "make any finding or conclusion that, in the judgment of the [FTC], is proper and based on the record." *Id.* § 1209(c)(3). And, ultimately, the decisions FTC makes constitute "final" agency action, subject to judicial review. HISA § 1209(b)(3)(B); *see* 5 U.S.C. §§ 702-704 (APA review provisions).

Against this backdrop, the Plaintiffs' complaint that the Authority is endowed with power to issue compulsory process or conduct investigations is unavailing. Pls. Br. at 26. As explained in the amicus brief submitted by the legislators who sponsored HISA, the statute

was "modeled" on the relationship between FINRA and the SEC. McConnell Br. at 1, 10-11 ("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."). Like the Authority, FINRA possesses investigatory powers. *See* 15 U.S.C. § 78o-3(h)(3). Yet, as the FTC does with the Authority, SEC "exercise[s] a significant oversight function over [FINRA's] rules and activities." *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 700 n.6 (1975). These include the power to review proposed rules before they go into effect, 15 U.S.C. §§ 78o-3(b)(6), 78s(b)(2)(C), and the power to review disciplinary sanctions, 15 U.S.C. § 78s(d), (e). This scheme has been upheld against constitutional challenges on many occasions, including on delegation grounds. *See Otto v. SEC*, 253 F.3d 960 (7th Cir. 2001); *Sorrell v. SEC*, 679 F.2d 1323, 1326 (9th Cir. 1982); *Todd & Co., Inc. v. SEC*, 557 F.2d 1008, 1014 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 694-695 (2d Cir. 1952). Those results should control here.

III. PLAINTIFFS' DUE PROCESS CHALLENGE FAILS

As an alternative ground for summary judgment, Plaintiffs contend that the Authority's role under HISA violates Due Process because it permits "economically self-interested actors" to "regulate their competitors" and charge fees that will "artificially increase[] the costs . . . of participation." Pls. Br. at 27-28. But, as explained in Defendants' motion to dismiss, these allegations do not rise "above the speculative level" necessary to withstand dismissal—and so definitionally cannot form a basis for the Court to grant summary judgment. *Bell Atl. Corp. v Twombly*, 550 U.S. 544 (2007); see Fed. R. Civ. P. 65(c)(1) (requiring that parties support an assertion of fact); Defs. Mot. Dismiss at 20-21.

Simply put, Plaintiffs offer no evidence to support their unadorned speculation that they will be subject to the actions of an "economically self-interest[ed]" entity or the whimsy of a small number of industry insiders. Pls. Br. at 27. HISA expressly provides that a majority of the Authority's board shall be "independent members selected from outside the equine industry," and that the board shall have an independent chair. HISA § 1203(b)(1)-(2). The

four "industry members," meanwhile, are required to "be representative of the *various* equine constituencies, and shall not include more than one [] member from any one [] constituency" such as owners or trainers. *Id.* § 1203(b)(1)(ii) (emphasis added). More than that, HISA has an explicit "[c]onflicts of [i]nterest" section, which provides that, to "avoid conflicts of interest," a person "who has a financial interest in, or provides goods or services to, covered horses," as well as that person's family members, "*may not be selected* as a member of the Board" or various committees. *Id.* § 1203(e) (emphasis added). These protections are designed to ensure that the very thing the Plaintiffs complain about does not occur.

Even more fundamentally, HISA does not give the Authority or its Board the ability to "regulate" anybody without the FTC's independent oversight and approval. *Id.* §§ 1204, 1208, 1209. As discussed above, the Authority lacks the power to impose binding rules or regulations, and any disciplinary actions it takes are subject to multiple layers of independent review. *Id.* Even its "formula or methodology for determining assessments" of fees is subject to FTC review, approval, and oversight. HISA § 1204(a). Congress recruited the Authority to assist the FTC in an area over which the agency currently lacks independent expertise, but it was very careful to ensure that the FTC maintained control.

For the Plaintiffs to be harmed in the way they claim, Pls. Br. at 26-27, there would have to be multiple levels of statutory violations by the Authority and failure to exercise independent control by the FTC. But the Plaintiffs do not—and, given the premature posture of this case, cannot—offer any evidence of any such thing occurring. Because their "unadorned, the-defendant-[may]-unlawfully-harm[]-me accusation[s]" are supported not by any evidence but by "mere conclusory statements," Plaintiffs' Due Process assertions fall well short of the standard for summary judgment, and entitle them to no relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), Fed. R. Civ. P. 56(a).

CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for partial summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2021, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Alexander V. Sverdlov
ALEXANDER V. SVERDLOV