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 HORSEMAN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,

Plaintiffs,

v.

JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN, JR.; 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

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT

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INTRODUCTION

On December 27, 2020, Congress unconstitutionally delegated legislative authority to a private entity. With little fanfare and no Senate debate, the Horseracing Safety and Integrity Act ("HISA") was hidden in the 2,000-page Consolidated Appropriations Act, 2021, which is more popularly known as the second COVID-19 stimulus bill. HISA nationalized regulation of the horseracing industry, which state racing commissions have regulated for over 125 years. But instead of writing the regulations itself, Congress unconstitutionally delegated its legislative authority to a newly-created private entity, the Horseracing Integrity and Safety Authority (the "Authority"). Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (H.R. 133), §§ 1202(1), 1203(a), 134 Stat. 1182, 3252-53. *See* Appendix at 009, 010. This delegation of legislative authority to a private entity violated Article I, Section 1 of the U.S. Constitution, which states that, "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. Const. Art. I, § 1. *See also Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) (*vacated and remanded on other grounds by Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 135 S. Ct. 1225 (2015)).

In further dereliction of its duty under Article I, Section 1, Congress did not even select the members to serve on the Authority or assign that role to any other federal official. Instead, Congress allowed a private Nominating Committee to nominate members to the Authority. § 1203(d), 134 Stat. at 3255. The members of

the Nominating Committee were so brazen in exercising legislative authority without direction from Congress that they accepted their appointment in October, prior to the enactment of HISA. *See* Appendix at 007-008. Plaintiffs bring this Motion for Preliminary Injunction, pursuant to Federal Rule of Civil Procedure 65, against the members of the Nominating Committee, asking the Court to enjoin them from further exercising authority by nominating board directors to the Authority. In addition, Plaintiffs ask this Court to enjoin all Defendants from implementing or enforcing HISA in any way. In support of their motion, Plaintiffs submit the following memorandum of law and facts.

FACTS

Plaintiffs Arizona Horsemen's Benevolent and Protective Association (HBPA), Arkansas HBPA, Indiana HBPA, Illinois HBPA, Louisiana HBPA, Mountaineer Park HBPA, Nebraska HBPA, Oklahoma HBPA, Oregon HBPA, Pennsylvania HBPA, and Washington HBPA are all affiliates of Plaintiff National HBPA (collectively, "Plaintiffs" or "Horsemen"). The Horsemen include thousands of trainers, breeders, and owners committed to the betterment of horseracing and the benevolent care of each other. Traditionally in the industry, if a horseman was sick or down on his luck, others would "pass the hat" to take up collections on his behalf. The HBPAs grew out of this time-honored tradition of racetrackers providing for burial services, medical attention, and feeding and housing for the many needy families in the industry. They

also advocate for the interests of horsemen throughout society, including in the legislative, executive, and judicial branches of government at the state and federal level.

On September 8, 2020, the Horseracing Integrity and Safety Authority, Inc. filed a Certificate of Incorporation in Delaware. *See* Appendix at 001-006.

On September 29, 2020, the Horseracing Integrity and Safety Act of 2020, H.R. 1754, passed the U.S. House of Representatives. It contained an unconstitutional delegation of legislative authority to the Nominating Committee, to the Horseracing Integrity and Safety Authority, and to the Federal Trade Commission and its Commissioners (collectively, the "FTC"). The legislation was never discussed either in committee or on the floor of the U.S. Senate.

On October 6, 2020, the Horseracing Integrity and Safety Authority, Inc. selected and publicized the members of the Nominating Committee, who plan to nominate the members of the Board of the Horseracing Integrity and Safety Authority. *See* News Release, Oct. 6, 2020, Appendix at 007-008.[1]

On December 21, 2020, Congress enacted House Resolution 133, the Consolidated Appropriations Act, 2021, which was signed into law on December 27, 2020 as Public Law No. 116-260. This law included appropriations for fiscal year 2021, a second round of COVID-19 relief funds, and various miscellaneous provisions.

[1] Available at https://www.paulickreport.com/news/the-biz/blue-ribbon-nominating-committee-formed-to-select-horseracing-integrity-and-safety-authority-board-members/ (retrieved Feb. 14, 2021).

One of the miscellaneous provisions was the text of the Horseracing Integrity and Safety Act, which had earlier existed as the stand-alone legislation, H.R. 1754. The Horseracing Integrity and Safety Act comprises Title XII of Division FF. *See* Appendix at 009-032.

LEGAL STANDARD

"To obtain a preliminary injunction, a litigant must demonstrate four elements: '(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction does not issue; (3) that the threatened injury outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction is in the public interest.'" *Gonzales v. Mathis Indep. Sch. Dist.*, 978 F.3d 291, 294 (5th Cir. 2020).

ARGUMENT

I. The Horsemen have a substantial likelihood of success on the merits because HISA violates the nondelegation doctrine.

A. Delegating authority to the private Nominating Committee to select the Board members of the Authority violates the private nondelegation doctrine.

Under the private nondelegation doctrine, "Federal lawmakers cannot delegate regulatory authority to a private entity." *Ass'n of Am. R.R.*, 721 F.3d at 670. But that is exactly what has occurred in this case. Congress has delegated to the private Nominating Committee the regulatory task to nominate the members of the

Board of the Authority. There is no oversight from the FTC whatsoever over this decision.

The private nondelegation doctrine is the law of the land because it bans "legislative delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S. Ct. 855, 873 (1936). As explained in *Association of American Rail Roads*, it is "a principle upon which both sides agree." 721 F.3d at 670. While *Association of American Rail Roads* was overturned by the Supreme Court, the Court did so only because it determined that the alleged private entity in that case, Amtrak, was a public entity. *Dep't of Transp.*, 575 U.S. at 54-56. Therefore, the principle in the Circuit Court opinion remains valid: when Congress delegates authority to a private entity, it violates the Constitution. And in this case, it is undisputed that the Nominating Committee is a private entity. Congress specified as much in HISA, calling the Nominating Committee "independent members selected from business, sports, and academia." §1203(d), 134 Stat. at 3255. Neither Congress nor any other governmental actor played a role in selecting the Nominating Committee. Instead, a sole private unelected individual appointed temporary Directors to the Authority, who then appointed the Nominating Committee. *See* HISA Certificate of Incorporation, ¶ Seventh, Appendix at 004. Because this private entity, the Nominating Committee, was delegated the legislative authority to select the members of the Authority with no governmental involvement, the Horsemen are likely to succeed on the merits of their claim that this delegation violates Article I,

Section 1 of the Constitution.

B. Delegating regulatory power to the Authority violates the private nondelegation doctrine.

1. HISA unconstitutionally delegated authority to a private entity.

Congress unconstitutionally delegated the authority to regulate the horseracing industry to the Authority. Congress acknowledged that the Authority was a private entity in HISA, describing it as a "private, independent, self-regulatory, nonprofit corporation." § 1203(a), 134 Stat. at 3253. Congress then delegated to this private entity the power to "develop[ ] and implement[ ] a horseracing anti-doping and medication control program and a racetrack safety program." *Id.* Further compounding the problem, Congress then gave the Authority the power to enforce these two programs and even to draft governmental rules enforcing them. § 1204(a), 134 Stat. at 3257-58. This delegation of power to a private entity is immense and unprecedented.

2. The veneer of FTC oversight does not negate the violation of the private nondelegation doctrine.

Under the statute enjoined by the D.C. Circuit Court of Appeals in *Association of American Rail Roads*, the allegedly private entity, Amtrak, was allowed to draft rules and regulations in addition to the governmental agency, the Federal Railroad Administration. *See* 721 F.3d at 669-70. But in this case, the governmental agency is not allowed to draft rules at all. Therefore, the delegation of authority in this case violates the Constitution even more than the delegation in *Association of American*

Rail Roads. The FTC may only "approve or disapprove" rules that the Authority has already drafted. § 1204(c)(1), 134 Stat. at 3258. The role of the FTC is limited to a mere afterthought. It is deprived of the primary purpose of including a governmental agency in the statute in the first place: to draft the rules necessary to enforce the law.

Indeed, unlike Amtrak in *Association of American Rail Roads*, the FTC can only "make recommendations to the Authority to modify the proposed rule" if it disapproves of a rule. *Id.* at § 1204(c)(3)(A). Thus, the government is left making recommendations to the private entity rather than the other way around. "This proposition [that all that is required is the government's active oversight, participation, and assent is] one we find nowhere in the case law[, and it] vitiates the principle that private parties must be limited to an advisory or subordinate role in the regulatory process." *Ass'n of Am. R.R.*, 721 F.3d at 673. In practice, HISA turns the advisory role on its head.

In response, the government may point to the cases of *Currin v. Wallace*, 306 U.S. 1, 59 S. Ct. 379 (1939), and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S. Ct. 907 (1940), as it did in *Association of American Rail Roads*. But in those cases, the private entity was given much less power than in this case, and this Court should distinguish the two cases as did the D.C. Circuit Court. As *Association of American Rail Roads* points out, "The industries in *Currin* did not craft the regulations . . . ." 721 F.3d at 671. But in HISA, the industry directly crafts the regulations; therefore, the delegation is much greater, and *Currin* should be

distinguished on this count.

Meanwhile, in *Adkins*, the governmental oversight body was given the ability to modify the minimum prices proposed to it. 310 U.S. at 388, 60 S. Ct. at 910. But in this case, no modification is allowed. The FTC may only make suggestions to the Authority on how to modify its proposed rules, but the power to modify is left with the private entity. § 1204(c), 134 Stat. at 3258. Furthermore, in *Adkins*, the governmental oversight body was given an "intelligible principle" on which to make its modifications: "when in the public interest it deems it necessary in order to protect the consumer against unreasonably high prices" 310 U.S. at 397, 60 S. Ct. at 914. In this case, the FTC was given no "intelligible principle." *See* discussion *infra* Section C.1. Therefore, this Court should distinguish *Currin* and *Adkins* as the D.C. Circuit Court did.

As the Fifth Circuit Court of Appeals has explained, when a private entity drafts a document for a governmental agency regulation, the situation is "particularly troubling" because "an agency may not delegate its public duties to private entities . . . ." *Sierra Club v. Sigler*, 695 F.2d 957, 962, n.3. (5th Cir. 1983). In *Sigler*, a private consulting firm had prepared an environmental impact statement for the U.S. Army Corps of Engineers, and the court was concerned that the government was "abdicat[ing] its duties by 'reflexively rubberstamping a statement prepared by others.'" *Id*. (quoting *Sierra Club v. Lynn*, 502 F.2d 43, 58-59 (5th Cir. 1974)). In particular, the government was not given enough time to exercise its independent

judgment. *Id*. ("The Corps had only brief opportunities to review the [report] it received before it issued the final [report].").

The same issue arises in this case because HISA gives the FTC only 60 days to review the rules the Authority drafts before it must give its approval or disapproval. § 1204(c)(1), 134 Stat. at 3258. If the FTC needs more time to investigate the efficacy of a proposed rule, it is out of luck. Again, HISA has turned the advisory role on its head. The FTC should be drafting the rules, and private entities should be given a time period in which to comment on them.

"Perhaps the most telling indication of the severe constitutional problem with the [Authority] is the lack of historical precedent for this entity." *Ass'n of Am. R.R.*, 721 F.3d at 673 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, ., 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part, and remanded by* 561 U.S. 477, 505, 130 S. Ct. 3138, 3159 (2010)); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, __ U.S. __, 140 S. Ct. 2183, 2201 (2020). Like the entities enjoined in the three cases above, the Authority was given unprecedented powers. In addition to drafting its own rules, the Authority assesses its own fees. Persons subject to HISA, including the Horsemen, are "required to remit such fees to the Authority." § 1203(f)(3)(C)(ii), 134 Stat. at 3257.[2]

[2] In an even further delegation of authority, HISA contains an odd provision which allows state racing commissions to elect to remit fees to the Authority, but if they elect not to, the Authority imposes fees directly on horsemen. § 1203(f)(2), (3), 134 Stat. at 3256-57.

It is unprecedented for the government to require one private party to fund another private entity. It is akin to the situation enjoined in *Carter v. Carter Coal Company*, in which large coal producers were given the authority to set wage and hour regulations for smaller producers. 298 U.S. 238, 56 S. Ct. 855. In two other cases from that era that remain good law, the Supreme Court enjoined statutes for giving some private persons veto power over other private persons' construction projects. *See Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 118-19 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 140-41 (1912). The arrangement in HISA is worse. Rather than allowing indirect extraction of profit from another, HISA allows direct extraction by one private entity from another.

In addition, the Authority is given the power to assess civil penalties to private individuals. It may issue rule violations for running afoul of its anti-doping and medication control program. § 1208(a), 134 Stat. at 3269-72. It is also given "subpoena and investigatory authority with respect to civil violations committed under its jurisdiction." § 1205(h), 134 Stat. at 3262. It is unprecedented that one private entity may compel another to come before it and give testimony under oath. Importantly, there is no FTC oversight over this subpoena and investigatory authority. It is a pure delegation of governmental authority to a private entity. The Authority may also assess civil penalties and civil sanctions. §§ 1205(i) and 1208(d), 134 Stat. at 3262, 3271-72. It is also unprecedented that one private entity may impose the ultimate loss of revenue on a horseman: a lifetime ban from horse racing.

Finally, the Authority may commence civil actions to enforce its rules. § 1205(j), 134 Stat. at 3262. But lawsuits to enforce laws of the United States must "be discharged only by persons who are Officers of the United States . . . ." *Buckley v. Valeo*, 424 U.S. 1, 140 (1976). Thus, once again, the Authority has been delegated a governmental function. The sheer breadth of these enforcement powers shows the lack of historical precedent for this entity and that the Horsemen have a substantial likelihood of success on the merits of their claim that HISA violates the private nondelegation doctrine.

3. Even if the Authority were public, there was no "intelligible principle" given to the Authority to guide its discretion.

As explained more fully, *infra,* in Section C, the standard for delegating legislative authority to a public entity is that it must be given an "intelligible principle" to guide its discretion. *Gundy v. U. S.*, __U.S.__,139 S. Ct. 2116, 2123 (2019). This is a much lower standard to meet when delegating authority to a governmental agency because delegating authority to a private entity is the "most obnoxious form" of delegation. *Carter*, 298 U.S. at 311, 56 S. Ct. at 873. But HISA does not even meet this lower standard that would have been necessary were the Authority considered a public entity.

Unlike many acts of Congress, HISA contains no statement of purpose nor a findings provision. The only instruction given to the Authority for its rulemaking authority is to "develop[ ] and implement[ ] a horseracing anti-doping and medication

control program and a racetrack safety program . . . .", § 1203(a), 134 Stat. at 3253. But the Authority is given no "intelligible principle" to guide its discretion in creating the two programs. Is the purpose of its rules to protect the public from fraud in horserace betting? To protect the horse? To protect the jockey? To protect the racetrack? Worse still, is it to protect the interests of its owners, trainers, and breeders from competition from others? The Authority is left to guess. When Congress fails to articulate *any* policy or standard to confine discretion, its delegation of authority is unconstitutional. *Gundy*, 139 S. Ct. at 2129. Because the Authority is given no "intelligible principle" to guide its discretion, HISA fails to meet even the lower standard afforded to public entities. Therefore, the Horsemen are likely to succeed on their claim that HISA violates the nondelegation doctrine.

C. HISA violates the public nondelegation doctrine.

Decisions like the Nominating Committee's selection of Authority members and the Authority's exercise of its subpoena and investigatory power require no FTC approval whatsoever, so they are easy to identify as nondelegation violations. For other Authority decisions, the government may claim that FTC approval cures the nondelegation violation. But the law requires HISA to give the FTC an "intelligible principle" on which to base its decisions, and it failed to do so.

1. The FTC was not given an "intelligible principle" on which to act.

The private nondelegation doctrine "is the lesser-known cousin of the doctrine that Congress cannot delegate its legislative function to an agency of the Executive

Branch." *Ass'n of Am. R.R.*, 721 F.3d at 670. When it does delegate authority to the Executive Branch, it must provide an "intelligible principle": "The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy*, 139 S. Ct. at 2123. In this case, Congress has not supplied the FTC with an "intelligible principle" to guide its use of discretion; therefore, HISA violates the nondelegation doctrine.

In the all-important rulemaking authority, HISA gives the FTC no standards upon which to base its decision. Its guidance is completely circular: "The [FTC] shall approve a proposed rule . . . if [it] finds that the proposed rule . . . is consistent with—(A) this Act; and (B) applicable rules approved by the [FTC]." § 1204(c)(2), 134 Stat. at 3258. Thus, the FTC is to look to rules proposed by the private entity and approved by the FTC to determine whether to approve rules proposed by the private entity. This nonsensical direction is exactly what makes a principle unintelligible and violative of the nondelegation doctrine. The only other guidance given to the FTC is to look to the Act. But the guidance does not point to a specific section of the Act. In one subsection, the Act gives a list of topics on which the Authority may draft rules, § 1204(a), 134 Stat. at 3257-58, but it provides no direction about what principle it should follow in doing so or what principle the FTC should follow in deciding whether to approve the proposed rules. For example, HISA states that the Authority may draft a rule relating to "a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and

methods," but it does not give direction as to what medications should be placed on the list or why. § 1204(a) 134 Stat. at 3257. By contrast, the Controlled Substances Act listed the initial substances prohibited by name and gives the Attorney General eight factors to consider when deciding whether to add or remove a drug from the list:

> (1) Its actual or relative potential for abuse.
> (2) Scientific evidence of its pharmacological effect, if known.
> (3) The state of current scientific knowledge regarding the drug or other substance.
> (4) Its history and current pattern of abuse.
> (5) The scope, duration, and significance of abuse.
> (6) What, if any, risk there is to the public health.
> (7) Its psychic or physiological dependence liability.
> (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

21 U.S.C. § 811(c). Such intelligible principles withstand constitutional scrutiny. *See Touby v. United States*, 500 U.S. 160, 165-66 111 S. Ct. 1752 (1991) (delegation of authority to the Attorney General to schedule controlled substances as necessary to avail an imminent public hazard had an "intelligible principle" and was not an unconstitutional delegation of legislative power). But they are entirely lacking from HISA. Because HISA gives the FTC no "intelligible principle" to follow in determining whether to approve or disapprove of rules proposed by the Authority, the Horsemen are likely to succeed on the merits of their claim that it violates the public nondelegation doctrine.

2. The "intelligible principle" standard should be overruled.

In the alternative, the "intelligible principle" standard should be overruled. The Supreme Court has not enjoined a statute for violating the public nondelegation

doctrine since 1935. *See A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241 (1935). Some blame this inaction on "death by association" because the two cases "happened to be handed down during the same era as certain of the Court's now-discredited substantive due process decisions." *Gundy*, 139 S. Ct. at 2138 (Gorsuch, J., dissenting). Admittedly, in the years since, courts have hesitated to find statutes to unlawfully delegate authority. But unlike substantive due process decisions from the same era, *Schechter Poultry* and *Panama Refining* have never been overruled.

Justice Gorsuch blames their dormancy on the "evolving 'intelligible principle' doctrine," which he and two other justices assert has outlived its usefulness. *Id.* (Gorsuch, J., dissenting, joined by Roberts, C.J. and Thomas, J.).

"Indeed, where some have claimed to see intelligible principles[,] many less discerning readers have been able only to find gibberish." *Id.* at 2140 (internal quotations and brackets omitted). Justice Thomas has been arguing to abandon the "intelligible principle" test for years. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486-87, 121 S. Ct. 903, 919 (2001) (Thomas, J., concurring); *see also Dep't of Transp. v. Ass'n of Am. R. R.*, 575 U.S. 43, 66-67, 135 S. Ct. 1225, 1240-41 (2015) (Thomas, J., concurring); *Michigan v. EPA*, 576 U.S. 743, 760-64, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 112-33, 135 S. Ct. 1199, 1213-25 (2015) (Thomas, J., concurring). The three justices in *Gundy* offer a more expansive replacement for the "intelligibly principle"

test:

> To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.

139 S. Ct. at 2141 (Gorsuch, J. dissenting).

Under this test, HISA would certainly fail. In his concurring opinion in *Gundy*, Justice Alito says he would join the effort to rethink the "intelligible principle" test in the future: "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort." *Id*. at 2131 (Alito, J., concurring). Finally, Justice Kavanaugh, who did not participate in *Gundy*,[3] also might join the effort in a future case like this one: "Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases." *Paul v. United States*, __U.S.__, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari). Justice Barrett's position on the "intelligible principle" standard is unknown at this time, but she did describe it as "notoriously lax" in a law review article. *See* Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. R. 251, 318 (2014).

[3] Justice Kavanaugh had not been confirmed to the Supreme Court in time for oral argument in the case. Therefore, had Justice Alito not concurred in the judgment but, instead, sided with the dissenters, the outcome would have been the same with a 4-4 decision, but there would have been no chance for Justice Gorsuch to write his dissenting opinion.

Because the "intelligible principle" standard rests on "misunderstood historical foundations," it should be overruled. *Gundy*, 139 S. Ct. at 2139-2140 (Gorsuch, J. dissenting). If it is overruled and replaced with a more stringent standard, the Horsemen are even more likely to succeed on the merits of their claim that HISA violates the nondelegation doctrine.

II. The Horsemen have a substantial threat of irreparable harm because they are being denied their constitutional right to be regulated by Congress and not by a private entity.

"When an alleged deprivation of a constitutional right is involved, most courts hold that that no further showing of irreparable [harm] is necessary." *Nat'l Solid Wastes Mgmt. Ass'n v. City of Dallas*, 903 F. Supp. 2d 446, 470 (N.D. Tex. 2012) (citation omitted). This rule, followed by the Northern District, applies in this case because the Horsemen have a constitutional right under Article I, Section 1 to be regulated by the duly elected members of Congress and not by the Authority or the Nominating Committee, which are private entities.

Additionally, on information and belief, the appointment of the Authority board members by the Nominating Committee is imminent and will occur prior to April 1, 2021. These Authority members will have substantial regulatory authority over the Horsemen. The Authority board members will impose fees, draft rules, investigate violations, and bring civil enforcement actions. §§ 1203(f); 1204(a); 1205(h), (j), 134 Stat. at 3255-58, 3262. This will cause a regulatory harm to the Horsemen, a financial harm to the Horsemen, and a physical harm to their horses.

Ostensibly, the Authority's purpose is to develop and implement a racetrack safety program and a horseracing anti-doping and medication control program. § 1203(a), 134 Stat. at 3253. But allowing a small number of participants in the horseracing industry to regulate the vast majority of the industry will harm thousands of horsemen and drive many of them out of business.

HISA will artificially increase the costs and fees of participation in the industry and will eliminate the use of therapeutic medication prescribed by veterinarians for the health and safety of horses. HISA prohibits all therapeutic medicines from being administered to racehorses within 48 hours of their next race even if they are otherwise permitted and have been prescribed by a veterinarian. § 1206(d), 134 Stat. at 3265. This prohibition begins on the effective date of the Act, July 1, 2022, without any further action from Defendants. §1202(14) 134 Stat. at 3253. Because of this Act, some of the Horsemen's horses will be injured because they need therapeutic drugs to race. The internal bleeding that can occur in some of these horses without the necessary drugs will even cause some of them to die. In addition to the constitutional violation and financial harm, this loss of precious life and health constitutes irreparable harm.

III. The threatened injury to the Horsemen outweighs any harm that will result if the injunction is granted because the only harm is the *status quo* that has existed for over 125 years.

When the threatened injury is loss of a constitutional right, as it is in this case, that injury is substantial. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-cv-

00066-C, 2016 WL 3766121, at *39, 2016 U.S. Dist. LEXIS 89694, at *125 (N.D. Tex. June 27, 2016). (Cummings, J.) (entering nationwide injunction against the Department of Labor's interpretation of the "'Advice'" Exemption in Section 203(c) of the Labor Management Reporting and Disclosure Act" and citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). On the other side of the scale, there is no harm in delaying implementation of a law when that law is invalid. No. 5:16-cv-00066-C, 2016 WL 3766121 at *45, U.S. Dist. LEXIS 89694 at *127. Because Plaintiffs have shown a likelihood of success on the merits that HISA is unconstitutional, no harm will result in delaying its implementation.

Furthermore, the threatened injury of loss of a constitutional right outweighs any harm that will result from an injunction that asks only to "continue[ ] the status quo." *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013). In this instance, the status quo requested by Plaintiffs is the highly developed regulation of the horseracing industry by state racing commissions, which have existed for over 125 years. *See, e.g.,* Percy-Gray Racing Law, 1895 N.Y. Laws, Ch. 570. No harm will result by keeping this system in place preliminarily. *See Nat'l Fed'n of Indep. Bus.*, 2016 WL 3766121 at *45, 2016 U.S. Dist. LEXIS 89694, at *127 (When the status quo has been in place for decades, no harm results from a preliminary injunction.).

IV. The grant of an injunction is in the public interest because upholding the Constitution is always in the public interest and because the FTC will not waste valuable resources enforcing an unconstitutional law.

The grant of an injunction is in the public interest because "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014).

Furthermore, it is in the public interest that the FTC not waste its valuable resources in an effort to develop expertise in a new area of law in which it has no experience and which is likely to be found unconstitutional. The FTC's "unique dual mission [is] to protect consumers and promote competition."[4] "The FTC protects consumers by stopping unfair, deceptive[,] or fraudulent practices in the marketplace." *Id*. The FTC promotes competition "[b]y enforcing antitrust laws." *Id*. Because the FTC has no experience regulating the horseracing industry, it will require considerable resources to develop expertise in the field. These considerable resources will take away from its ability to stop unfair, deceptive, or fraudulent practices in the marketplace and to enforce antitrust laws. Therefore, granting an injunction in this case is in the public interest, so the FTC will not waste valuable public resources developing expertise in a law which is likely to be found unconstitutional.

[4] FTC, What We Do, available at https://www.ftc.gov/about-ftc/what-we-do (retrieved Feb. 19, 2021).

CONCLUSION

The Horsemen request that this Court enjoin the Nominating Committee members from nominating the members of the Board of the Authority. In addition, the Horsemen request that this Court enjoin all Defendants from implementing HISA. For the foregoing reasons, the Motion for Preliminary injunction should be granted.

Dated: March 15, 2021

Respectfully Submitted,

/s/ Fernando M. Bustos

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CERTIFICATE OF CONFERENCE

A conference was not held regarding this Motion because the Complaint has not been served yet, and no opposing counsel has made an appearance in the case. Accordingly, under Local Rule 7.1(b)(3), it is presumed that Defendants oppose this motion.

/s/ Fernando M. Bustos

CERTIFICATE OF SERVICE

I, Fernando M. Bustos, an attorney, hereby certify that I caused to be served a true and correct copy of the foregoing motion concurrently with the Complaint filed in this case by placing both with Landmark Legal, located at 619 Broadway Street, Lubbock, Texas 79401, on March 15, 2021, for service to all Defendants at the addresses listed below.

/s/ Fernando M. Bustos

Service List

Jerry Black 6002 CR 1440 Lubbock, Texas79407	Katrina Adams 25 Bank Street, Apartment 220 H White Plains, NY 10606
Leonard Coleman, Jr. 247 Monmouth Avenue Atlantic Highlands, NJ 07716	Dr. Nancy Cox 1241 Summit Drive Lexington, KY40502
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Kenneth Schanzer 35 Greystone Ct, # 35 Beaver Creek, CO 81620	Rebecca Kelly Slaughter Federal Trade Commission 600 Pennsylvania Avenue NW Washington, DC 20580 United States
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