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

MOTION TO DISMISS AND BRIEF IN SUPPORT BY DEFENDANTS THE FEDERAL TRADE COMMISSION, ACTING CHAIR KELLY SLAUGHTER, COMMISSIONER ROHIT CHOPRA, COMMISSIONER NOAH PHILLIPS, AND COMMISSIONER CHRISTINE WILSON

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There are currently no other live pleadings in this case.

Defendants the Federal Trade Commission (FTC), Rebecca Kelly Slaughter in her official capacity as Acting Chair of the FTC, Rohit Chopra in his official capacity as Commissioner of the FTC, Noah Joshua Phillips in his official capacity as Commissioner of the FTC, and Christine S. Wilson in her official capacity as Commissioner of the FTC, move to dismiss Plaintiffs' First Amended Complaint, ECF No. 23 (FAC), pursuant to Federal Rules of Civil Procedure 12(b)(1), and 12(b)(6). In support of their motion, Defendants submit the following brief.

INTRODUCTION

Plaintiffs jumped the gun bringing this constitutional challenge. Their complaint questions the validity of a law that currently subjects them to no obligation or penalty. *See generally* Horseracing Integrity and Safety Act, Pub. L. No. 116-260, 134 Stat. 1182 (2020) ("HISA"). Instead, that law merely creates a framework for the FTC, with the subordinate aid of the "private, independent, self-regulatory, nonprofit" Horseracing Integrity and Safety Authority (Authority), to enact future standards and rules. *Id.* § 1203(a). Congress established this framework because it concluded that, in the absence of independent national oversight and uniform drug and safety standards, the horseracing industry was failing to adequately protect its participants. But, recognizing that rulemaking in a new area should proceed carefully and with proper deliberation, Congress provided that no regulations governing the conduct of horseracing can take effect *before July 1, 2022*. *Id.* § 1202 (12). Regulations the FTC enacts under HISA may (or may not) impact Plaintiffs in the future. But there is not even a proposed regulation for Plaintiffs to complain about today.

Plaintiffs thus fail the most basic requirement for invoking this Court's jurisdiction: they cannot establish that they have been harmed in any concrete way by the law they protest. Nor can Plaintiffs establish that their challenges to the statute are ripe for judicial review. Adjudicating the merits of Plaintiffs' legal claims now would require the Court to evaluate HISA's framework in the abstract, unaided by any concrete facts or history of agency action.

There is no justification for the Court treading this path under any circumstances, and it is doubly improper when Plaintiffs are asking this Court to resolve constitutional claims.

Beyond jurisdiction, Plaintiffs' arguments also fail on the merits. Plaintiffs' central claim is that HISA unlawfully delegates legislative power to the FTC and the private Authority. But HISA is far more detailed than the statutory schemes that the Supreme Court has sustained against delegation challenges over the past 80 years. And both the Supreme Court and courts of appeals around the country have repeatedly confirmed that private entities can properly provide extensive assistance to federal agencies, so long as those agencies retain final decision-making authority and control, as the FTC does here. This control, along with HISA's built-in protections against conflict of interest, also defeats Plaintiffs' conclusory Due Process allegations. And the Authority's undisputed status as a private entity forecloses Plaintiffs' Appointments Clause claim.

Accordingly, Plaintiffs' complaint should be dismissed pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction or, in the alternative, pursuant to Rule 12(b)(6) for failure to state a claim.

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.[1]

[1] *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*

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.

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 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").

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 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. HISA § 1203(a).[2]

Thus, HISA directs the Authority to propose draft rules covering anti-doping and medication control, HISA § 1206; racetrack safety, HISA § 1207; and oversight and disciplinary proceedings, HISA § 1208. HISA makes clear, however, that the Authority lacks the power to enact any of these proposals into law. *See* HISA § 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. HISA § 1208. Here again, HISA provides for extensive FTC oversight. The FTC must review, through its rule approval process, any procedures the Authority proposed on how the Authority will conduct investigations and assess any penalties. *Id.* And any final decisions by the Authority

[2] The Authority does not receive money from the federal government, HISA § 1203(f)(5), and the government has no ability to appoint or remove members of the Authority's board or various committees. HISA § 1203(b).

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.[3]

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).

STANDARD OF REVIEW

A complaint must be dismissed under Rule 12(b)(1) if the Court lacks subject-matter jurisdiction. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter . . . 'is inflexible and without exception.'" (citation omitted)). A Plaintiff always bears the burden of establishing that the Court has jurisdiction to entertain its claims. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) ("[T]he plaintiff constantly bears the burden of proof that jurisdiction does in fact exist."); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013). When addressing a motion to dismiss for lack of subject matter jurisdiction, the Court can base its decision upon "(1) the complaint standing alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the [C]ourt's resolution of disputed facts." *Montez v. Dept. of Navy*, 392 F.3d 147, 149 (5th Cir. 2004).

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must state a claim for relief that is "plausible on its face." *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 570 (2007). While the Court accepts as true the well-pleaded factual allegations in the complaint,

[3] 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);

plaintiffs must set forth allegations that "raise a right to relief above the speculative level." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

ARGUMENT

I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED FOR LACK OF STANDING

Article III of the Constitution limits the judicial power of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2; *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To invoke that power, the Plaintiffs must first establish standing by, at a minimum, showing that they have suffered an "injury in fact," *i.e.* "'an invasion of a legally protected interest' that is 'concrete and particularized' and "actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The standing inquiry is "especially rigorous when reaching the merits" of a dispute would require the Court to adjudicate a constitutional question. *Clapper*, 568 U.S. at 408 (internal quotes and citations omitted). And as the party invoking this Court's jurisdiction, the Plaintiffs bear the burden of establishing these requirements. *Spokeo*, 136 S. Ct. at 1547. They cannot.

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); §§ 1206, 1207 (setting forth factors that should be considered when rules are developed). Before they can take effect, any regulations relating to doping, medication, or track safety must be drafted by the FTC or the Authority, approved by the FTC, and subjected to public notice and comment. *Id.* § 1204(a)-(e). And *none* of the rules affecting the conduct of racing can take effect before "July 1, 2022." HISA § 1202(14).

Consistent with this timeframe, neither the FTC nor the Authority have even *proposed* rules that they could endeavor to enact. There has been no proposal for rules regarding permissible and impermissible drugs; no proposal for rules regarding racetrack safety; and no proposals for rules regarding enforcement procedures or penalties (a necessary precondition

to any such enforcement occurring, *see* HISA § 1208). There has not even been a rule crafted to govern how the Authority is to "propose" any rules to the FTC—which is all fitting, given that HISA is only four months old.

Not surprisingly, then, the Plaintiffs' allegations of injury are entirely threadbare and conclusory. Their assertions of harm consist of a repeated mantra that HISA subjects them to a "regulatory process that they are forced to finance with fees" as well as "new and onerous Authority rules on equine medication and safety that change and supersede" existing state requirements. FAC ¶¶ 102, 117. But there are *not* any current rules setting any requirements or imposing fees. *See generally* HISA §§ 1203 (f)(2)(B), 1203(f)(3) (providing that any fees shall be determined and assessed "according to such rules" as may be enacted). The Plaintiffs may well not be subject to any additional fees beyond what they already contribute to their state associations. *See generally id.* § 1203(f)(3) (providing that Authority will collect fees to the extent they are not collected by the state racing commissions). And Plaintiffs have pointed to nothing in support of the contention that any future rules governing the conduct of racing itself would be "onerous" or in excess of the requirements currently in effect in their states. *See* FAC ¶¶ 102, 117.

At best, Plaintiffs' complaint could be read to suggest that the Plaintiffs *might* be subject to some rules they dislike in the future. But "allegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (internal quotes and alteration omitted; emphasis in original). To constitute injury-in-fact, an injury must be "*certainly impending*" and cannot rely on a "highly attenuated chain of possibilities." *Id.* 409-10 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) and *Lujan*, 504 U.S. at 565 n.2) (emphasis added); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) ("[I]njury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" (citations omitted)).

The Plaintiffs' challenge at this point therefore amounts to nothing more than a request for an advisory opinion on the constitutionality of HISA. This Court is not empowered to provide that. The "oldest and most consistent thread in the federal law of justiciability is that

the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (citation omitted). Plaintiffs "have 'no standing to complain simply that their Government is violating the law.'" *Bond v. United States*, 564 U.S. 211, 225 (2011) (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)). And this is particularly true when the advisory opinion Plaintiffs seek would have the Court pronounce on a constitutional question. *See Clapper*, 568 U.S. at 408; *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

Plaintiffs may be able to show a concrete injury from HISA on some future occasion when a specific rule affects their interests. Until then, however, the Court lacks jurisdiction to entertain their claims.

II. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE THIS CASE IS UNRIPE

In addition to their failure to establish injury, the Plaintiffs have also failed to establish that this case is ripe for review. The ripeness doctrine exists "'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]'" *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 148- 49 (1967)). To assess ripeness, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Texas v. United States*, 523 U.S. 296, 300–01 (1998). Neither of those factors favor Plaintiffs.

First, although Plaintiffs style this case as a purely legal challenge to HISA, the substance of their challenge turns principally on the nature of the relationship between the FTC and the Authority. *See generally* FAC ¶¶ 97, 98, 100 (questioning whether the FTC's oversight is "sufficient" as a constitutional matter). HISA is not silent on this point—it provides detailed instructions. *See generally* HISA §§ 1204-1205, 1209. But the statute is not complete either. Congress explicitly left room for the FTC to determine how it will receive proposals from the Authority, *id.* § 1204(a); how it will ascertain whether those proposals are

consistent with HISA and the prior rules FTC has approved or promulgated, *id.* § 1204(c); and what procedures it will use for reviewing enforcement actions that the Authority takes, *id.* §§ 1209 (b), (c). In exercising each of these statutory functions—which will involve both internal deliberation and public input—the FTC may well identify nuances or ambiguities in the statute that are not immediately apparent today, and which may require further development or elaboration. This iterative process is likely to shed significant light on the scope of oversight that the FTC will exercise over the Authority—and give concrete contours to any dispute about whether the agency's oversight is "sufficient." FAC ¶¶ 100.

Adjudicating such questions before that rulemaking process is complete would not only "inappropriately interfere with [future] administrative action" but also deprive the Court of the "benefit from further factual development of the issues presented." *Texas Indep. Producers & Royalty Owners Ass'n v. U.S. E.P.A.*, 413 F.3d 479, 483 (5th Cir. 2005); *see also 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)). As the Supreme Court has cautioned, courts should be careful in using the "power of imagination to affirm" that there are "no circumstances" under which a statute is lawful: "[t]he operation of [a] statute is better grasped when viewed in light of a particular application." *Texas*, 523 U.S. at 301. Prior to any such application, the evaluation of HISA's constitutionality "involves too remote and abstract an inquiry for the proper exercise of judicial function," and should not be undertaken by this or any other Court. *Id.* (internal quotes and citations omitted).

Second, and for largely the same reasons, the Plaintiffs will not suffer any hardship from this Court deferring its constitutional analysis until the FTC approves or promulgates some concrete rule implementing HISA. As noted above, nothing in HISA has "a direct effect on the day-to-day business" of the Plaintiffs: they are "not required to engage in, or to refrain from, any conduct, unless and until" the scope of any prohibition is defined. *Texas*, 523 U.S.

at 301; *see also Choice Inc.*, 691 F.3d at 716. Congress deliberately crafted HISA not as a set of fully-defined restrictions but rather as a flexible framework for regulatory action. The Plaintiffs suffer no hardship while the FTC considers the contours of that framework, solicits public input (a process in which the Plaintiffs will have an opportunity to participate), and begins to take action to effectuate the policy goals that Congress defined. There is no basis for this Court to adjudicate this dispute before any of that happens. *See, e.g.*, *Texas Indep. Producers & Royalty Owners Ass'n v. U.S. E.P.A.*, 413 F.3d 479, 482 (5th Cir. 2005) (courts entertain "pre-enforcement review of an administrative regulation . . . only after finding that the 'regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance'" (citation omitted)).

Accordingly, even if the Court were to conclude that the Plaintiffs have plausibly pled an injury, the Court should dismiss this case because it is unripe.

III. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

Even if this Court were to move past jurisdiction, it should still dismiss the Plaintiffs' complaint pursuant to Rule 12(b)(6). Plaintiffs' legal theories are foreclosed by binding precedent, and they have failed to state a "plausible" claim for relief. *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 570 (2007).

A. The Authority's Role Under HISA Does Not Implicate Delegation Concerns (Count I)

Plaintiffs' main charge in this case is that HISA "violates Article I, Section 1 of the [] Constitution because it delegates legislative authority to a private entity," *i.e.*, the Authority. *See, e.g.*, FAC at 20, ¶¶ 99. But Congress's decision to enlist the Authority's help in the development of horseracing safety and drug rules does not raise legislative delegation concerns at all, because Congress did not grant the Authority "lawmaking" power—that is, the ability to "make a rule of prospective force." *Loving v. United States*, 517 U.S. 748, 758 (1996); *see also Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (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)). Those powers remain firmly vested with the FTC.

1. HISA's Text Establishes that the FTC, not the Authority, Controls Rulemaking

The Authority's lack of rulemaking power is apparent from HISA's plain language. 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), the statute 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 developed by the Authority 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, not the Authority, gets to control how rules are proposed—and the FTC, not the Authority, is responsible for publishing proposed rules in the Federal Register and soliciting public comments. *Id.* § 1204(b). HISA then grants the FTC power to "approve or disapprove" these proposed rules, and "make recommendations to the Authority to modify" proposed rules. *Id.* § 1204(c)(1)-(3). And, crucially, the rules *cannot* "*take effect* unless . . . approved by the Commission." HISA § 1204 (b)(2) (emphasis added); *see also* § 1205(c)(1) (FTC approval required for "anti-doping and medication control program").

As a result, the FTC ultimately oversees and controls the rulemaking process: the Authority is powerless to satisfy the statutory preconditions for enacting rules without the FTC's approval, and powerless to enact any rules on its own. Indeed, the Authority is even required to "submit to the [FTC] any proposed rule, standard, or procedure developed by the Authority to *carry out*" the rules that the FTC enacts—which the agency will also subject to public comment. HISA § 1204(d) (emphasis added); § 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). By contrast, the FTC "may adopt [] interim final rule[s]" that it finds "necessary to protect [] (1) the health and safety of covered horses; or (2) the integrity of covered horseracing and wagering on those horseraces" without *any* requirement for consultation with the Authority whatsoever. *Id.* § 1204(e).[4]

Contrary to what the Plaintiffs claim, the role of the FTC is thus neither "purely ministerial" nor "subservient" to the Authority. FAC ¶¶ 82, 100. Rather, Congress vested the FTC with broad discretion to determine which rules to enact based on the FTC's interpretation of HISA and the agency's prior rulemaking, HISA § 1204(c), as informed by public comment. Of course, HISA contemplates that the Authority will have substantial input on the rules—both because the Authority can draft those rules and because it can consider the FTC's proposals for modification. HISA §§ 1204(a), (c). That is entirely appropriate, given that the FTC has no prior independent experience regulating horseracing, and can therefore benefit substantially from detailed industry expertise. *Cf. American Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 442 (D.C. Cir. 2018). Yet despite structuring HISA in a way that would provide the FTC this outside expertise input, Congress deliberately made the FTC the ultimate arbiter of what rules will apply to horseracing—and endowed the Authority with *no* "legislative" power at all. FAC ¶ 99.

2. The Authority's Drafting and Advisory Roles Do Not Amount to Legislative Power

Any lingering doubts about whether Congress's recruitment of the Authority amounted to legislative delegation are laid to rest by considering how courts have analyzed similar relationships between agencies and private entities.

The Supreme Court has made clear that no delegation issues arise when private entities are given a drafting or advisory role in the rulemaking process. In *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), the Court sustained a statute that also allowed industry groups

[4] This latter provision makes clear that the Plaintiffs are wrong in alleging that "the FTC may not draft rules on its own initiative." FAC ¶ 100.

to propose minimum prices to a public agency—which could then "approve [ ], disapprove[ ], or modif[y]" the proposal. 310 U.S. at 388. As the Court explained, industry acting "as an aid" to the governmental agency in this way was perfectly permissible: no "law-making is [] entrusted to" private entities when they "function subordinately to" a federal agency and the federal agency "has authority and surveillance over the [entities'] activities." *Adkins*, 310 U.S. at 388, 399. Similarly, the Supreme Court has upheld several statutory schemes that gave industry members the power to disapprove via referendum rules proposed by an agency before those rules took effect. *Currin v. Wallace*, 306 U.S. 1 (1939); *see also United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939); *Parker v. Brown*, 317 U.S. 341, 352 (1943). In those cases, too, the Court reasoned that conditioning the effectiveness of rules on industry approval "does not involve any delegation of legislative authority" to the industry—because in that instance the industry's approval was merely a "restriction" or "condition[]" on broad rulemaking authority that Congress is free to impose. *Currin*, 306 U.S. at 15; *see also Parker*, 317 U.S. at 352 (law which became effective only on a majority vote of producers was exercise of legislative power by the state, not by producers).

Courts of appeals have applied similar logic when analyzing whether agencies improperly delegate authority to private entities. For example, the Fifth Circuit has recently explained that no delegation of an agency's authority occurs when the agency "'reasonabl[y] condition[s]' federal [action] on an outside party's determination of some issue; such conditions only amount to legitimate requests for input." *State v. Rettig*, 987 F.3d 518, 531 (5th Cir. 2021) (alterations in original) (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"); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) (finding no unconstitutional delegation where "[a]lthough the Secretary [of Agriculture] normally follows the [private] NOAC's

suggestions, he retains the authority to depart from or ignore them altogether"). As long as the agency retains the ultimate authority, enlisting private parties to offer non-binding proposals or advice does not constitute legislative delegation. *See generally Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) (adopting "standard that Congress may employ private entities for ministerial or advisory roles" when delegating authority)); *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).

So too here. The Authority's power to draft rules and to revise them based on the FTC's proposals may affect the content of the rules that FTC ultimately approves—unless, of course, the FTC is promulgating an interim rule, for which it does not need to receive input. HISA § 1204(e). But these are merely conditions on the *FTC*'s otherwise broad authority to enact rules that implement a statute Congress entrusted it to administer, which do not "divest [the FTC] of its final reviewing authority." *Rettig*, 987 F.3d at 533. The FTC remains firmly in control, and the imposition of conditions on the FTC does not constitute delegations of "law-making" powers to the Authority, just as the industry's ability to propose minimum prices or the ability to block new rules by referendum did not constitute delegation in *Adkins* or *Currin* eighty years ago.[5]

[5] That fact among others distinguishes the relationship between the FTC and the Authority from the equal-power arrangement the D.C. Circuit found suspect in the *American Railroads* case. *See Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013) *vacated and remanded sub nom. Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43 (2015). Unlike in that case, the FTC does not need the Authority's "permission" to promulgate regulations—the FTC can decline to approve the Authority's drafted rule wholesale and instead issue its own interim final rule. *Id.* Further, the Authority does not have the ability to take a dispute with the FTC to "binding arbitration." *Id.* at 669 (quotes and citation omitted). The Authority cannot, in other words, force the FTC's hand.

3. The Authority's Other Functions are Not Legislative

The Plaintiffs separately complain that the Authority is given numerous other "regulatory" powers. FAC ¶¶ 97, 98. These include the power of the Authority to nominate its board members, FAC ¶ 101; to assess fees for its own operations, to impose "civil penalties," "to issue subpoenas and otherwise investigate purported violations, and to commence civil actions in federal court." FAC ¶¶ 97, 101. But, contrary to what Plaintiffs claim, none of these other powers are "delegations of legislative authority," FAC ¶ 99, because they do not involve the power to *make* binding 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 or financing are not even *governmental*. *See, e.g.*, *Pittston*, 368 F.3d at 397 (noting that a private entity "enacting rules and regulations governing its operations" is not a legislative power and the ability of an entity "to sue for monies owed to itself . . . is not a governmental power, but a private one"). These powers therefore cannot form the basis for a legislative delegation claim.

In challenging Congress's conferral of such powers on the Authority, the Plaintiffs appear to be conflating 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 v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 707 (5th Cir. 2017) (distinguishing between the two doctrines). Indeed, the cases that the Plaintiffs cite in this portion of their complaint, FAC ¶ 94, analyzed Congress's grants of authority to private entities under "the due process clause of the Fifth Amendment." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *see also Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). This makes sense: Congress's delegation of legislative power to a *private* entity hardly implicates "the principle of separation of powers" in which the "nondelegation doctrine is rooted." *Mistretta v. United States*, 488 U.S. 361, 371 (1989); *Loving*, 517 U.S. 757 ("separation of powers" is the

"basic principle . . . that one branch of the Government may not intrude upon the central prerogatives of another"). While the Due Process inquiry is, somewhat confusingly, sometimes labeled the "private nondelegation doctrine," it is a different conceptual analysis—and one that does not address whether Congress contravened Article I, section 1. *Boerschig*, 872 F.3d at 708.

Regardless, the Plaintiffs' complaints on this ground have no merit. The Plaintiffs assert that HISA endows the Authority with these non-legislative "regulatory" powers without "sufficient" FTC oversight. FAC ¶¶ 97-98, 100. That is simply not true. HISA provides a detailed scheme for the FTC to review the enforcement actions that the Authority takes. *See generally* HISA § 1209. Among other things, HISA requires the Authority to "promptly submit to the" FTC notice of any sanction. *Id.* § 1209(a). HISA grants the FTC or the "person aggrieved" to seek "de novo review" of the sanction "by an administrative law judge" appointed by the FTC. *Id.* §§ 1209(a), (b), (d). The 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 the FTC 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).

Against this backdrop, the Plaintiffs' complaint that the Authority is endowed with power to issue compulsory process or conduct investigations is unavailing. FAC ¶ 97. Indeed, courts have repeatedly upheld similar arrangements where private entities are given the authority to investigate and discipline their members—most notably in the financial context. *See, e.g.*, *Sorrell v. SEC*, 679 F.2d 1323, 1325 (9th Cir. 1982) (finding that agency did not unconstitutionally delegate powers to FINRA's predecessor, which developed rules for and conducted disciplinary proceedings of their members because the agency retained power to approve or disapprove rules and to review disciplinary actions); *R.H. Johnson & Co. v. SEC,* 198 F.2d 690, 695 (2d Cir. 1952), *cert. denied* 344 U.S. 855, 73 S.Ct. 94, 97 L.Ed. 664

(1952) (same). Thus, even if the Authority's enforcement powers were relevant to the legislative delegation analysis, the FTC's oversight would be more than sufficient. The Plaintiffs' challenge on this ground should therefore be dismissed.

B. HISA's Delegation of Authority to the FTC Is Not Unconstitutional (Count II)

Established precedent likewise disposes of the Plaintiffs' alternative claim that HISA improperly delegates legislative functions to the FTC. FAC ¶¶ 104-110. Some degree of "[d]elegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." *Adkins*, 310 U.S. at 398. "Only twice in this country's history (and that in a single year)" has the Supreme Court "found a delegation excessive." *Gundy*, 139 S. Ct. at 2129 (citing *Panama Refining Co. v. Ryan,* 293 U.S. 388, 421 (1935) and *Schechter Corporation v. United States*, 295 U.S. 495 (1935)). Those decisions, rendered at the twilight of the *Lochner* era, remain something of anomalies. Since 1935, the Supreme Court has consistently upheld varied and "broad delegations" of rulemaking power, requiring only that "Congress [] ma[ke] clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority.'" *Id.* (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

These standards "are not demanding." *Id.* In *Gundy*, for instance, the Supreme Court sustained a grant of authority to the Attorney General "to specify the applicability of the requirements of [the statute] to sex offenders convicted before the [statute's] enactment . . . and to prescribe rules for [their] registration." *Gundy*, 139 S. Ct. at 2122. "Yes," Justice Gorsuch's dissent noted, "that's it." *Id.* at 2132 (Gorsuch, J., dissenting). And, as the majority observed in sustaining that delegation, before that the Court had "approved delegations to various agencies to regulate in the 'public interest'; *id.* at 2129 (quoting *National Broadcasting Co.*, 319 U.S. 190, 216 (1943); *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24 (1932)); "to set 'fair and equitable' prices and 'just and reasonable' rates;" *id.*

(quoting *Yakus v. United States*, 321 U.S. 414, 422, 427 (1944); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)); and "to issue whatever air quality standards are 'requisite to protect the public health.'" *Id.* (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 472 (2001).

Compared to these, HISA is in a different horse race. HISA clearly articulates the Act's governing purpose: the "develop[ment] and implement[ation] [of] a horseracing anti-doping and medication control program and a racetrack safety program." HISA §§ 1203(a), 1205(a). The statute sets out in great detail, over the course of seven sections and numerous subsections the parameters of the medication control program, including the seven "[c]onsiderations" that should animate the program, *id.* § 1206(b)(1)-(7); the "activities" that are to be "carried out" under the program, § 1206(c); and the baseline program rules, § 1206(g). It does the same for the racetrack safety program, specifying the 12 separate "[e]lements" that the program must contain. *Id.* § 1207(a)-(c). It provides detailed parameters for rules regarding how violations are to be investigated and adjudged, requiring that, among other things, procedures be established to "provide for adequate due process." *Id.* § 1208(c). And it provides extensive parameters for FTC review of the Authority's decisions. *Id.* § 1209.

Against this litany, the Plaintiffs' charge that HISA does not offer FTC adequate guidance or "direction about what principles the FTC should follow in deciding" what rules to approve is downright perplexing. FAC ¶¶ 106, 109. The text and the legislative history clearly establish a policy that the FTC should, with the assistance of the Authority, enact rules to "improve the integrity and safety of horseracing by requiring uniform safety and performance standards, including a horseracing anti-doping and medication control program and a racetrack safety program," to reduce in light of the many injuries and fatalities suffered in recent years. H.R. REP. NO. 116-554, at 17. *See generally Big Time Vapes, Inc. v. Food & Drug Admin.*, 963 F.3d 436, 443 (5th Cir. 2020) (noting that determination of the statutory purpose for delegation analysis "should not be limited to the [statutory] text alone"). This detailed purpose, the litany of factors that Congress directed the rules to reflect, and the baseline

standards that Congress itself specified are more than enough "direction" and "principle[]" for an agency to follow. FAC ¶ 106. As the Supreme Court has repeatedly noted, the non-delegation doctrine does not require legislation to be drafted in exhaustive detail. *See Mistretta*, 488 U.S. at 372 (when analyzing "congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives").

C. The Appointment Clause is Inapplicable (Count III)

Disposing of Plaintiffs' delegation claims leaves little else for the Court to consider. In the third count of their amended complaint, the Plaintiffs present an alternative constitutional challenge to the Authority, asserting that "*if a court were to conclude* that the grant of power to the Authority" rendered it a public entity then the "appointment of its Board of Directors [would] violate[] the Appointments Clause." FAC ¶ 112. There is, however, no dispute that the Authority is a *private* entity. Plaintiffs themselves characterize it as private throughout their complaint. *See, e.g.*, FAC ¶¶ 65, 96. And that characterization is consistent with Congress's identification of the Authority as a "private, independent, self-regulatory, non-profit corporation." HISA § 1203(a).

Indeed, the Authority has none of the features that courts typically identify with a government entity. The Authority was created independently, not by operation of "special law," and the Government has no ability "to appoint" *any* "of the directors of that corporation," or the members of any committees. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995); *see also Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 54–55 (2015); HISA § 1203(b); FAC ¶ 62 ("HISA does not give any governmental entity the authority to approve, disapprove, or modify the selection" of Authority Board members). The Authority does not even receive federal funding. *See, e.g.* HISA § 1203(f)(5). Like the self-regulatory organizations in the financial space, which the Authority mirrors, the Authority is therefore not a government creature. *See, e.g.*, *Desiderio v. Nat'l Ass'n of Sec. Dealers,*

Inc., 191 F.3d 198, 206-207 (2d Cir. 1999) (FINRA's predecessor "is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any [] board or committee."); *cf. Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 484-485 (2010) (contrasting "private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to [SEC] oversight" with the "Government-created, Government-appointed" PCAOB).

Plaintiffs do not allege that the Appointments Clause applies to board members of private organizations. FAC ¶¶ 112, 116. Nor can they. Those private citizens are indisputably not officers of the United States. *See, e.g.*, *Kerpen v. Metro. Washington Airports Auth.*, 907 F.3d 152, 160 (4th Cir. 2018); *see also Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757 (5th Cir. 2001) (en banc). Accordingly, Plaintiffs' invocation of the Appointments Clause "in the alternative" fails on its own terms. FAC ¶ 112.

D. Plaintiffs' Due Process Challenge Fails (Count IV)

Finally, the Plaintiffs' Due Process challenge should be dismissed because it fails to state a claim that is "plausible." *Twombly*, 550 U.S. at 570. In three short paragraphs, the Plaintiffs summarily allege that, because HISA permits four members of the Authority's nine-member board "to be economically self-interested actors" who can "regulate their competitors," "the businesses of the small group of owners and trainers" who supported HISA "will thrive" to the detriment of the industry's other members. FAC ¶¶ 120-122. The Plaintiffs offer no support for this unadorned speculation, which flies in the face of the statute, and has quite a number of remarkable gaps.

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 as an independent member of a nominating or standing committee." *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.* Congress enlisted 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 allege, 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 having occurred. And they offer *no* "factual matter (taken as true) to suggest" a likelihood of the whole chain of violations and failures occurring in the future. *Twombly*, 550 U.S. at 556. Because their "unadorned, the-defendant-[may]-unlawfully-harm[]-me accusation[s]" are "supported by mere conclusory statements," Plaintiffs' Due Process assertions fall well short of the standard required to set forth a claim for relief and should be dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

CONCLUSION

For these reasons, the Court should dismiss Plaintiffs' first amended complaint for lack of subject-matter jurisdiction or, in the alternative, for failure to state a claim.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2021, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Alexander V. Sverdlov
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