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, TAMPA BAY HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, and WASHINGTON HORSEMEN'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' BRIEF IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

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PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs move the Court to grant them summary judgment on Claim I, the Private Nondelegation Doctrine found in Article 1, Section 1 of the U.S. Constitution, and Claim IV, the Due Process clause of the Fifth Amendment of the U.S. Constitution, of their First Amended Complaint [Dkt. 23]. There are no genuine issues of material fact, and Plaintiffs are entitled to summary judgment on these two claims as a matter of law based on the reasons stated in the memorandum below and the materials in the accompanying appendix.

LIVE PLEADINGS

Plaintiffs' First Amended Complaint Apr. 2, 2021 Dkt. 23

SUMMARY

Pursuant to Local Rule 56.3(a)(1), Plaintiffs list the elements of their claims:

Claim I: Private Nondelegation Doctrine found in Article 1, Section 1

1. Congress delegated legislative or regulatory authority.
2. The recipient of the delegation is a private entity.

Claim IV: Due Process clause of the Fifth Amendment

1. Congress delegated legislative or regulatory authority.
2. The recipient of the delegation is a private, economically self-interested actor.
3. Competitors of the economically self-interested actor are regulated by the legislative or regulatory authority.

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 slipped through as part of the 2,000-page Consolidated Appropriations Act, 2021, 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. *See, e.g.,* Percy-Gray Racing Law, 1895 N.Y. Laws, Ch. 570. 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. 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.

Plaintiffs bring this Brief in Support of their Motion for Partial Summary Judgment, pursuant to Federal Rule of Civil Procedure 56, asking the Court to declare HISA unconstitutional and issue an injunction prohibiting Defendants from implementing or enforcing HISA.

The delegation of power to the Authority in HISA was one of the most egregious private delegations in history. *Cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936) (enjoining a large faction of the coal industry from regulating others in the

industry). Congress empowered a small faction of the Horseracing Industry to set up the private Authority and then write the rules governing its competitors in the rest of the industry. § 1203(a), 134 Stat. at 3253. In a failed attempt to rectify its unconstitutional delegation, Congress assigned minimal oversight of the Authority to a governmental body with no experience, expertise, or connection with the horseracing industry: the Federal Trade Commission ("FTC" or the "Commission"). § 1204, 134 Stat. at 3257-58. Worse than even the statute enjoined in the D.C. Circuit Court "*Amtrak*" case, HISA did not give the FTC the ability to write the regulatory rules. §§ 1204(a), (b), 134 Stat. at 3257-58; *see Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013) ("*Amtrak*") (*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)). And unlike other statutes courts have previously upheld, HISA gave the FTC no ability to rewrite or "modify" the rules. § 1204(c), 134 Stat. at 3258 (FTC may only "make recommendations to the Authority to modify the proposed rule" but may not directly modify them); *see Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940); *Todd & Co., Inc. v. S.E.C.*, 557 F.2d 1008, 1012 (3d Cir. 1977). Therefore, the delegation of power in HISA violates the private nondelegation doctrine and the Due Process clause, and this Court should enjoin Defendants from taking any actions to implement or enforce HISA.

UNDISPUTED MATERIAL FACTS

1. Plaintiffs Arizona HBPA, Arkansas HBPA, Indiana HBPA, Illinois HBPA, Louisiana HBPA, Mountaineer Park HBPA, Nebraska HBPA, Oklahoma

HBPA, Oregon HBPA, Pennsylvania HBPA, Tampa Bay HBPA, and Washington HBPA and are all affiliates of Plaintiff National HBPA (collectively, "Plaintiffs" or the "Horsemen") and have as their members thousands of men and women who own, train, and race Thoroughbred horses in the United States. (Eric Hamelback Decl., ¶ 5, App'x 2).

2. State agencies regulate and license the Thoroughbred owner and trainer members of Plaintiffs. *Id.* ¶ 6, App'x 2.

3. Defendant Jerry Black is a member of the Nominating Committee for the Authority (the "Nominating Committee") and resides in Lubbock, Texas, in the Northern District of Texas. Bylaws of Horseracing Integrity and Safety Authority, Inc., ("HISA Bylaws") (Sept. 30, 2020) (Jennings Decl. Ex. F, App'x 48); *Blue-Ribbon Nominating Committee Formed to Select Horseracing Integrity and Safety Authority Board Members,* Paulick Report (Oct. 6, 2020, 4:33 P.M.) (Jennings Decl. Ex. C, App'x 14).

4. Defendant Katrina Adams is a member of the Nominating Committee and resides in White Plains, New York. HISA Bylaws (Jennings Decl. Ex. F, App'x 48); Paulick Report (Jennings Decl. Ex. C, App'x 14).

5. Defendant Leonard Coleman, Jr. is a co-chair of the Nominating Committee and resides in Atlantic Highlands, New Jersey. HISA Bylaws (Jennings Decl. Ex. F, App'x 47); Paulick Report (Jennings Decl. Ex. C, App'x 14).

6. Defendant Nancy Cox is a co-chair of the Nominating Committee and resides in Lexington, Kentucky. HISA Bylaws (Jennings Decl. Ex. F, App'x 47);

Paulick Report (Jennings Decl. Ex. C, App'x 14).

7. Defendant Joseph Dunford is a member of the Nominating Committee and resides in Marshfield, Massachusetts. HISA Bylaws (Jennings Decl. Ex. F, App'x 48); Paulick Report (Jennings Decl. Ex. C, App'x 14).

8. Defendant Frank Keating is a member of the Nominating Committee and resides in McLean, Virginia. HISA Bylaws (Jennings Decl. Ex. F, App'x 48); Paulick Report (Jennings Decl. Ex. C, App'x 14).

9. Defendant Kenneth Schanzer is a member of the Nominating Committee and resides in Avon, Colorado. HISA Bylaws (Jennings Decl. Ex. F, App'x 48); Paulick Report (Oct. 6, 2020, 4:33 P.M.) (Jennings Decl. Ex. C, App'x 15).

10. Defendant Horseracing Integrity and Safety Authority, Inc. is a nonprofit Delaware corporation and is a private entity and not a governmental body. HISA Bylaws (Jennings Decl. Ex. F, App'x 40); Certificate of Incorporation of Horseracing Integrity and Safety Authority, Inc., State of Delaware (Sept. 8, 2020) (Stephens Decl. Ex. A, App'x 95).

11. Defendant Federal Trade Commission is a federal agency that maintains its headquarters in Washington, D.C. *FTC Headquarters,* Federal Trade Comm'n, (Jennings Decl. Ex. B, App'x 11).

12. Defendant Rebecca Kelly Slaughter is Acting Chair of the FTC. *Commissioners,* Federal Trade Comm'n, (Jennings Decl. Ex. A, App'x 8).

13. Defendant Rohit Chopra is a Commissioner of the FTC. *Id.*

14. Defendant Noah Joshua Phillips is a Commissioner of the FTC. *Id.*

15. Defendant Christine S. Wilson is a Commissioner of the FTC. *Id.*

16. Defendants Slaughter, Chopra, Phillips, and Wilson are officers of the FTC. *Id.*

17. The FTC's unique dual mission is to protect consumers and promote competition. The FTC protects consumers by stopping unfair, deceptive, or fraudulent practices in the marketplace. The FTC promotes competition by enforcing antitrust laws. FTC, *About the FTC,* ftc.gov/about-ftc (last visited April 30, 2021).

18. On September 8, 2020 the Authority filed a Certificate of Incorporation in Delaware. Certificate of Incorporation of Horseracing Integrity and Safety Authority, Inc., State of Delaware (Sept. 8, 2020) (Stephens Decl. Ex. A, App'x 99).

19. On September 29, 2020, the Horseracing Integrity and Safety Act of 2020, H.R. 1754, passed the U.S. House of Representatives on a voice vote with no debate. It was never discussed either in committee or on the floor of the U.S. Senate. Congress.gov (Jennings Decl. Ex. G, App'x 61).

20. The temporary Directors of the Authority appointed Defendants Black, Adams, Coleman, Cox, Dunford, Keating, and Schanzer to serve on the Nominating Committee, and publicized their appointment with a press release on October 6, 2020. Paulick Report (Jennings Decl. Ex. C, App'x 13-15).

21. The Consolidated Appropriations Act, 2021, was signed into law on December 27, 2020 as Public Law No. 116-260, and Title XII of Division FF constitutes the Horseracing Integrity and Safety Act of 2020. Public Law No. 116-260, §§

1201-1212, 134 Stat. 1182, 3252-75. (McQuaid Decl., ¶ 9; App'x 101-27).

22. The FTC has no experience regulating horse racing. (Hamelback Decl., ¶ 7, App'x 2).

23. HISA gives a minority of the horseracing industry the authority to regulate the majority of the industry. § 1203, 134 Stat. at 3253-57; Paulick Report (Jennings Decl. Ex. C, App'x 14-15); Charles Hayward, *Horseracing Integrity and Safety Act: Why Some Horsemen's Groups Have Got It So Wrong,* Thoroughbred Racing Commentary (March 30, 2021), (Jennings Decl. Ex. D, App'x 19-23); Gus Garcia-Roberts, *With Private Eyes and Political Muscle, Horse Racing's Elite Pushed to Punish Dopers,* The Washington Post (April 29, 2021, 2:00 p.m.) (Jennings Decl. Ex. H, App'x 63-82); *Statement from the CHRI on the passage of the Horseracing Integrity Safety Act*, Jockey Club (Dec. 22, 2020) (Jennings Decl. Ex. I, App'x 83-86); *Horseracing Integrity and Safety Act Passes Congress*, Jockey Club (Dec. 22, 2020) (Jennings Decl. Ex. J, App'x 87-91).

24. Plaintiffs are regulated by HISA and by the Authority. (Hamelback Decl., ¶ 8, App'x 2).

25. The Nominating Committee was hand-picked by a small group of self-interested actors within the horseracing industry who supported passage of HISA, over the objections of thousands of owners and trainers represented by Plaintiffs. *Horseracing Integrity and Safety Authority*, (Jennings Decl. Ex. E, App'x 28); Paulick Report (Jennings Decl. Ex. C, App'x 14); Hayward,

Horseracing Integrity and Safety Act (Jennings Decl. Ex. I, App'x 83-86); Garcia-Roberts, *With Private Eyes and Political Muscle* (Jennings Decl. Ex. H, App'x 63-82); *Statement from CHRI* (Jennings Decl. Ex. I, App'x 83-86); *HISA Passes Congress* (Jennings Decl. Ex. J, App'x 87-91).

26. Plaintiffs compete with those who selected the Nominating Committee and advocated for passage of HISA. (Hamelback Decl., ¶ 9, App'x 3).

27. The Nominating Committee has already solicited names of individuals for it to consider as initial Board members of the Authority. *Horseracing Integrity and Safety Authority*, (Jennings Decl. Ex. E, App'x 31); Paulick Report (Jennings Decl. Ex. C, App'x 15).

28. The Nominating Committee intends to appoint initial members of the Board of the Authority in Spring 2021. *Horseracing Integrity and Safety Authority*, (Jennings Decl. Ex. E, App'x 34).

LEGAL STANDARD

"[A] motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.'" *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993), quoting Fed. R. Civ. P. 56(c).

SUMMARY OF ARGUMENT

Congress cannot delegate regulatory authority to a private entity like the Authority. *See Carter Coal*, 298 U.S. at 310-11. The delegation of authority in HISA

lacks historical precedent. Where, as here, a private entity like the Authority can exclusively draft the regulatory rules and, thus, has an "effective veto" over the governmental body tasked with oversight, the FTC, the delegation is unconstitutional. *See Amtrak*, 721 F.3d at 671. In particular, when a governmental oversight body, like the FTC in this case, cannot "modify" the private entity's regulatory rules, the delegation is unconstitutional. *Cf. Adkins*, 310 U.S. at 388; *Todd & Co.*, 557 F.2d at 1012. And what's worse, some decisions under HISA require no governmental oversight whatsoever. Finally, HISA violates the private nondelegation doctrine and the Due Process clause because it gives economically self-interested actors the power to regulate their competitors. *See Ass'n of Am. R.Rs. v. Dep't of Transp.*, 821 F.3d 19, 23 (D.C. Cir. 2016) ("*Amtrak II*").

ARGUMENT

I. HISA's delegation of regulatory duties to the private Authority violates the private nondelegation doctrine.

In Article I, Section 1, the U.S. Constitution entrusts all of the federal government's legislative powers to Congress. *Gundy v. U.S.*, 139 S. Ct. 2116, 2133, 204 L. Ed. 2d 522, reh'g denied, 140 S. Ct. 579, 205 L. Ed. 2d 378 (2019) (Gorsuch, J., dissenting). This delegation includes "the power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' or the power to 'prescribe general rules for the government of society.'" *Id.* quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) and *Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87, 136, 3 L. Ed. 162 (1810); *see also* J. Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration §22, p. 13 (1947) (Locke, Second Treatise); 1 W.

Blackstone, Commentaries on the Laws of England 44 (1765). Because of this exclusive delegation of legislative authority to Congress, "[a]s Chief Justice Marshall explained, Congress may not 'delegate . . . powers which are strictly and exclusively legislative.'" *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 1, 42-43, 6 L. Ed. 253 (1825)).

When Congress delegates its legislative duties to a public entity, a line of Supreme Court cases asks whether Congress has supplied an "intelligible principle" to guide the delegee's use of discretion. *Gundy*, 139 S. Ct. at 2123; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935). In recent years, six different Supreme Court Justices have questioned whether this "intelligible principle" standard for public nondelegation is too deferential and should be overruled.[1] Regardless of the future of this standard for public delegation, the standard for private delegation is already more stringent: "Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority." *Amtrak*, 721 F.3d at 671.

The delegation of authority to a private entity, like the Authority, is "the lesser-known cousin of the doctrine that Congress cannot delegate its legislative function to an agency of the Executive Branch." *Amtrak*, 721 F.3d at 670. But it is much worse than its cousin because "the difficulties sparked by such allocations are even more

[1] *See Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting, joined by Roberts, C.J. and Thomas, J.); *Gundy*, 139 S. Ct. at 2130-31 (Alito, J., concurring); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari); Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. R. 251, 318 (2014) (describing the "intelligible principle" standard as "notoriously lax").

prevalent in the context of agency delegations to private individuals." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (D.C. Cir. 1984) (per curiam). Public agencies still have a duty to act in the public interest; whereas, private entities typically act in the best interests of themselves. *See Carter Coal*, 298 U.S. at 311.

In *Carter Coal*, large coal producers representing more than two-thirds of production and a majority of miners were given the legislative authority to set wage and hour regulations for smaller producers: "[t]he effect, in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority . . . ." 298 U.S. at 311. The Supreme Court found this to be "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id*.

Carter Coal is controlling on this Court on this issue. As in *Carter Coal*, HISA empowers a private entity hand-picked by a group selected by a tiny minority within the horseracing industry to regulate the fees, medications, and racetrack surfaces of its competitors. HISA is even more anti-democratic than the statute enjoined in *Carter Coal* because HISA gives a *minority* the authority to regulate the *majority* of the industry. *See* Facts ¶ 26; *see also* Section II, *infra*. This Court should rely on *Carter Coal* to enjoin HISA for delegating regulatory authority of an industry to a private entity.

A. The sweeping powers given to the Authority by HISA lack historical precedent.

"Perhaps the most telling indication of the severe constitutional problem with [a private regulatory entity] 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 (2010)); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020). Like the entities enjoined in the three cases above, the Authority was given unprecedented powers. In fact, HISA represents one of the most sweeping legislative delegations to a private entity in congressional history.

HISA allows a minority in the industry to select the regulatory board, which imposes its will on the majority. HISA gives the Authority virtually unchecked power to draft its own regulatory rules. § 1204(a), 134 Stat. at 3258. And it prevents the FTC from drafting rules. § 1204(c)(1), 134 Stat. at 3258. 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] Therefore, HISA gives a minority in the industry the power to tax the majority.

[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.

Additionally, 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. And there is no FTC oversight over this subpoena and investigatory authority. *Id*. 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. § 1208(d)(3)(A), 134 Stat. at 3572.

Finally, the Authority may commence civil actions to enforce its rules. § 1205(j), 134 Stat. at 3262. That power is wielded by the private Authority, even though lawsuits to enforce laws of the United States are required to "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 its creation violates the private nondelegation doctrine.

Undoubtedly, Defendants will point to the role of the FTC to attempt to legitimize this unconstitutional act. But HISA differs from—and is even worse than—the statutes considered in all the other nondelegation cases cited in this brief because of another unprecedented fact: the governmental body allegedly given oversight has

no knowledge of the industry. *See* Facts ¶ 22.

The FTC has no experience, expertise, or connection with the horseracing industry whatsoever. The FTC's "unique dual mission [is] to protect consumers and promote competition."[3] *See* Facts ¶ 17. "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*. The FTC has no experience regulating horseracing. By housing the Authority within the FTC, HISA intentionally put the FTC at a competitive disadvantage in evaluating the merit of regulations proposed by the Authority because the Authority contains four members appointed directly from the horseracing industry. § 1203(b)(1)(B)(i), 134 Stat. at 3253-54. Because the FTC has no experience in horseracing, it cannot exercise proper oversight over the rules and regulations drafted by the Authority. This lack of meaningful oversight is yet another reason why HISA is unprecedented in its delegation of powers and should be enjoined.

B. HISA violates the private nondelegation doctrine because only the Authority and not the FTC can draft regulatory rules, and the Authority has more than veto power over the government.

"Federal lawmakers cannot delegate regulatory authority to a private entity." *Amtrak*, 721 F.3d at 670. When Congress delegates authority to a private entity, that entity cannot replace the work of a governmental agency but can only "help a government agency make its regulatory decisions" *Amtrak*, 721 F.3d at 671.

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

Specifically, "private parties must be limited to an advisory or subordinate role in the regulatory process." *Amtrak*, 721 F.3d at 673. Under HISA, the Authority goes far beyond *advising* the FTC to make its regulatory decisions. Instead, the Authority makes the decisions entirely by itself. HISA gives only the Authority—and not the FTC—the power to draft the regulatory rules that govern the industry. § 1204(c)(1), 134 Stat. at 3258. The FTC may only "approve or disapprove" rules that the Authority has already drafted. § 1204(c)(1), 134 Stat. at 3258. Because only the Authority can write the regulatory rules, it can stop, or veto, the FTC from acting by never presenting the Commission with a rule on a particular subject. When a statute like HISA gives a private entity both the ability to write regulatory rules and an "effective veto" over government regulations, the statute violates the private nondelegation doctrine. *Amtrak*, 721 F.3d at 671, 673–74.[4]

In *Amtrak*, the statute enjoined allowed both the allegedly private entity, Amtrak, and the governmental agency, the Federal Railroad Administration (FRA), to draft rules and regulations for the industry. 721 F.3d at 669-70. Then the statute allowed for each party, Amtrak and the FRA, to have the power to reject any rules proposed by the other party. *Id.* at 696, 673-74. Therefore, the court noted Amtrak was given an "effective veto" over the government. *Id*. at 671, 673–74. The circuit court held that the combination of these two elements—both the ability to draft rules

[4] While *Amtrak* 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. v. Ass'n of Am. R. R.*, 575 U.S. 43, 54-56 (2015). Therefore, the principle in the Circuit Court opinion remains valid: when Congress delegates authority to a private entity, it violates the Constitution.

and the ability to veto the government rules—constituted a violation of the nondelegation doctrine. *Id.* at 674.

By comparison, HISA is even worse than the statute enjoined in *Amtrak* because it denies the FTC the ability to draft rules. § 1204, 134 Stat. at 3257-58. The role of the FTC is limited to a mere afterthought. The Commission 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, turning the advisory role appropriate to private entities on its head. Instead, it is the FTC that must "make recommendations to the Authority to modify the proposed rule." *Id.* at § 1204(c)(3)(A). Because HISA gives the Authority the ability to draft regulations and gives the FTC only an advisory role, it violates the private nondelegation doctrine.

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 had failed to exercise oversight. *Id.* (citing *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974) ("[A] responsible federal agency [may not] abdicate its statutory duties by reflexively rubber stamping a statement prepared by others.")). In addition to being spoon-fed the document, the government in *Sigler* 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 of "reflexive[ ] rubber stamping" arises with HISA. *Sierra Club*, 502 F.2d at 59. HISA gives oversight to a commission with no experience evaluating regulations for the horseracing industry. In addition, 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 were to need more time to investigate the efficacy of a proposed rule for some reason, it would be out of luck. Again, HISA has turned the advisory role on its head: the FTC should be the one drafting the rules, and private entities should be given a time period in which to comment on them.

Recently, seven judges in an *en banc* panel of the Fifth Circuit found a violation of the private nondelegation doctrine when Congress gave Indian tribes regulatory authority over the order of preference for adoptive parents of Indian children. *Brackeen v. Haaland*, No. 18-11479, 2021 WL 1263721 (5th Cir. Apr. 6, 2021) (*en banc*) Slip. Op. at *266 (opinion of Duncan, J.). The seven judges who joined that portion of the opinion were the only ones to rule on the issue. The majority of judges in the *en banc* panel failed to rule on the private nondelegation issue, finding that the Indian tribes were sovereigns and not private entities. Slip. Op. at *59-86.[5] In this case, however, it is undisputed that the Authority is a private entity. § 1203(a), 134 Stat. at 3253. As the seven judges explained, when an entity is private, it cannot be

[5] The majority left open the possibility of a violation of the private nondelegation doctrine by saying that if the Indian tribes had been private entities, a nondelegation violation would "not necessarily follow." *Id.* at *144 n.63 (opinion of Dennis, J.)

given the sole authority to draft regulations: the Indian Child Welfare Act is "unconstitutional because it delegates [regulatory] authority outside the federal government." Slip. Op. at *265 (Opinion of Duncan, J.). Similarly, HISA delegates regulatory authority outside the federal government and should be enjoined.

In response, Defendants may point to the case of *Currin v. Wallace*, 306 U.S. 1, (1939), as the defendants did in *Amtrak*. But in *Currin*, the private entity was given much less power than in this case, and this Court should distinguish the case as did the D.C. Circuit Court. As *Amtrak* 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.

Similarly, several cases from other circuits should be distinguished for the same reason. When private members of an industry are required only to consent to governmental regulations but are prohibited from drafting the regulations themselves, courts find no violation of the private nondelegation doctrine. *See Kentucky Division, Horsemen's Benevolent & Protective Association, Inc. v. Turfway Park Racing Association, Inc.*, 20 F.3d 1406 (6th Cir. 1994); *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992); *United States v. Frame,* 885 F.2d 1119 (3d Cir. 1989). In *Frame*, an order promulgated by the Secretary of Agriculture continued in operation only with the consent of a majority of cattle producers. 885 F.2d at 1124. The Third Circuit held this was not an unconstitutional delegation to private parties because the statutory scheme was drafted by Congress, and its application was

merely conditional on an industry referendum. *Id*. at 1127–28 (citing *Currin*, 306 U.S. at 15).

A similar scheme was held constitutional by the Ninth Circuit in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 754, 759 (9th Cir. 1992), where the Secretary of Agriculture could amend marketing orders regulating the sale of agricultural products only with consent from 75% of growers.

Finally, in *Kentucky Division, Horsemen's Benevolent & Protective Association, Inc. v. Turfway Park Racing Association, Inc.*, 20 F.3d 1406 (6th Cir. 1994), the plaintiff argued the Interstate Horseracing Act had unconstitutionally delegated power to private parties because it allowed the Kentucky HBPA to decide whether to waive a Congressional prohibition on interstate off-track betting. *Id.* at 1416–17. The Sixth Circuit held that this was not an unconstitutional delegation of lawmaking power because the act did not allow the Kentucky HBPA to make the law but only to condition its application. *Id.*

In another case without a violation of the private nondelegation doctrine, the private entity also was not given the power to draft regulatory rules. *See Pittston Co. v. United States*, 368 F.3d 385, 393 (4th Cir. 2004). In *Pittston*, the Coal Industry Retiree Health Benefits Act gave to a private entity the authority to collect and dispense funds to administer a federal entitlement program. 368 F.3d at 390. But Congress had "specifie[d] with particularity" who must contribute to the fund and at what amount and who must receive benefits and at what amount. *Id.* at 396. Therefore, the statute gave the private entity only "administrative tasks" with no

ability to craft the regulations. *Id.* at 398.

In all these cases, the private entities were arguably given a veto over the governmental regulations, but they were not also given the ability to draft the regulations themselves. By contrast, when a statute like HISA gives a private entity like the Authority both the ability to draft regulatory rules *and* to have an "effective veto" over rules drafted by the government, then it must be enjoined. *Amtrak*, 721 F.3d at 671, 673–74.

C. HISA violates the private nondelegation doctrine because the FTC cannot modify the Authority's rules.

Some courts have upheld statutes under the private nondelegation doctrine when they give a governmental oversight body the ability to "approve[ ], disapprove[ ], or modif[y]" a private entity's regulatory rules. *Adkins,* 310 U.S. at 388. But HISA does not give the FTC the ability to modify the rules drafted by the Authority; therefore, it violates the nondelegation doctrine. *See* § 1204(c)(1), 134 Stat. at 3258.

Under HISA, 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." *Amtrak*, 721 F.3d at 673.

When a law or rule gives a private entity unfettered discretion to make its

decision with no ability for the government to modify, the Fifth Circuit finds a violation of the nondelegation doctrine. *City of Dallas, Tex. v. F.C.C.*, 165 F.3d 341, 357–58 (5th Cir. 1999). In *Dallas*, the Federal Communications Commission (FCC) issued a rule giving private video service operators the ability to decide whether to carry a cable operator's video programming. *Id*. By issuing the rule, the FCC gave blanket approval to the decisions of private operators: "[T]hey are being permitted to choose whether they want to give cable operators access rights." *Id*. at 358. But the FCC failed to retain the ability to modify these "selective[ ]" decisions. *Id*. Therefore, the Fifth Circuit invalidated the rule as a violation of agency subdelegation, which is a subset of the private nondelegation doctrine in which the administrative agency, rather than Congress, illegally gives away its power.[6]

In another agency subdelegation case, the D.C. Circuit Court found a violation of the private nondelegation doctrine when the agency failed to maintain the ability to modify the private entity decision. *See National Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 9 (D.D.C. 1999). In *Stanton*, the National Park Service (NPS) delegated management of a river to a private local council and retained "virtually no control" over council decisions. *Id*. The management plan it entered into with the council could only be "modified by *mutual* written agreement;" therefore, like the FTC in HISA, NPS could not modify the regulation on its own. *Id*. at 11. For this reason, among others, the D.C. Circuit enjoined the National Park Service plan.

[6] The *Dallas* court also held the rule violated the relevant statute's plain meaning. *Id*. at 357.

Id. at 20.[7]

Finally, in a recent dissent from denial for rehearing *en banc*, five Fifth Circuit judges found that when a governmental oversight body has the power to approve but not disapprove or modify the decisions of a private entity, the regulation violates the private agency subdelegation doctrine. *Texas v. Rettig*, No. 18-10545, 2021 WL 1324382 (Mem) (5th Cir. Apr. 9, 2021), slip. op. at *9–11 (Ho, J., dissenting). The case involved a Department of Health and Human Services (HHS) regulation requiring Medicaid rates to be certified by qualified actuaries. *State v. Rettig*, 987 F.3d 518, 524–25 (5th Cir. 2021). The deciding panel found that the nondelegation doctrine was not applicable to the facts of the case because there is no subdelegation when an agency only "reasonabl[y] condition[s]" its decision on that of a private entity. *Id*. at 531. If a subdelegation had occurred, the panel, nonetheless, found it to be constitutional because HHS "retain[ed] final reviewing authority" with the ability to approve, disapprove, or modify the actuarial rate by issuing its own rule. *Id*. at 532. But this recitation of the facts by the panel decision should be distinguished because HISA does not give the FTC the ability to draft its own rules. The dissenting opinion from rehearing found the facts to be more similar to those of this case and would have enjoined the regulation. According to Judge Ho, HHS could approve but not disapprove or modify the actuarial rates. *Texas v. Rettig*, No. 18-10545, 2021 WL 1324382 (Mem) (5th Cir. Apr. 9, 2021), slip. op. at *20. Thus, he and his colleagues

[7] The court also enjoined the plan because, like the Authority, the private council maintained private self-interests in conflict with the public interests of the government. *Id*. at 20.

sought a rehearing for the regulation. *Id.* at *25. Because HISA does not give the FTC the ability to modify a regulation from the private Authority it should be enjoined.

By contrast, in *Adkins*, the governmental National Bituminous Coal Commission was given the ability to modify the minimum prices proposed to it by the private Coal Commission. 310 U.S. at 388. *Adkins* is often cited for the proposition that a governmental entity may delegate authority to a private entity as long as it retains the ability to "approve[ ], disapprove[ ], or modif[y]" a private entity's regulatory rules. *Id.* at 388. This phrase has been taken out of context because the Court in *Adkins* did not rely on this fact in its reasoning. 310 U.S. at 397-99. Regardless, under HISA no modification is allowed; therefore, the phrase is inapplicable. 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. Thus, this Court should distinguish *Adkins* as did the D.C. Circuit Court in *Amtrak*. 721 F.3d at 671.

For the same reason, this Court should also distinguish the holding in *Cospito v. Heckler*, 742 F.2d 72, 87–88 (3d Cir. 1984). In *Cospito*, a private commission was given the power to decertify a psychiatric hospital from receiving Medicare and Medicaid payments for its patients. 742 F.2d at 77-78. The Third Circuit seemed to interpret the statute to give the government the ability to modify the private commission's substantive provisions regarding psychiatric hospital certification. *See* 742 F.2d at 88–89; *id.* at 91 (Becker, J., dissenting). Because of this power to modify, *Cospito* differs from the case at hand and should be distinguished on that ground.

Finally, a quartet of cases upheld the Mahoney Act, which delegates authority from the governmental SEC to the NASD and its successor, FINRA. *Sorrell v. S.E.C.*, 679 F.2d 1323, 1326 (9th Cir. 1982); *Todd & Co.*, 557 F.2d at 1012; *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *R.H. Johnson & Co. v. S.E.C.*, 198 F.2d 690, 695 (2d Cir. 1952). However, a review of the Mahoney Act demonstrates that it, too, provided more oversight than HISA: the SEC could "abrogate, add to, and delete from" the NASD rules "as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization . . . ." 15 U.S.C. § 78s(c) (1976). The current version of 15 U.S.C. § 78s(c) retains similar language. Indeed, recent cases confirm the SEC's ability to modify FINRA rules. *See Aslin v. Fin. Indus. Regul. Auth., Inc.*, 704 F.3d 475, 476 (7th Cir. 2013) ("[T]he SEC may abrogate, add to, and delete from all FINRA rules as it deems necessary.") (citations omitted); *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 637 F.3d 112, 116 (2d Cir. 2011) ("[T]he SEC retains discretion to amend the rules of [the NASD], *see* 15 U.S.C. § 78s(c)."); *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 112 (D.C. Cir. 2008) ("If the SEC deems it necessary, it may also amend [NASD] rules itself.") (citing 15 U.S.C. § 78s(c)). Unlike the FTC in HISA, the SEC retains the ability to modify private entity rules; therefore, this Court should distinguish these cases upholding the Mahoney Act under the private nondelegation doctrine.

D. HISA violates the private nondelegation doctrine because it allows private entities to make some decisions with no governmental oversight whatsoever.

HISA delegates to private entities the power to make three types of decisions with no governmental oversight at all; therefore, these decisions are easy to identify as nondelegation violations because the FTC cannot even approve or disapprove them.

First, HISA delegates legislative authority to the Nominating Committee to "select the initial members of the Board" of the Authority and the initial committee members of the Authority. § 1203(d), 134 Stat. at 3255. The Nominating Committee intends to appoint the board members in Spring 2021, and there is no oversight from the FTC over the decision. *See* Facts ¶ 34. The appointment will cause harm to plaintiffs because the Authority will have significant regulatory authority over them and because the board will contain economically self-interested actors who are competitors to plaintiffs. See Section II, *infra*. It is also undisputed that the Nominating Committee is a private entity. §1203(d)(1)(A), 134 Stat. at 3255. Congress specified as much in HISA, calling the Nominating Committee "independent members selected from business, sports, and academia." §1203(d), 134 Stat. at 3255. The delegation of such an important task to a purely private entity with no governmental oversight violates the private nondelegation doctrine.

Second, neither Congress nor any other governmental actor played a role in selecting the Nominating Committee. Instead, a sole private, unelected paralegal at the Authority's law firm appointed temporary Directors to the Authority, who then

appointed the Nominating Committee. *See* App'x 96, 99. This, too, is an unlawful delegation of governmental authority. If Congress wants to imbue an entity with the power to appoint a regulatory board, it must play a role in its selection.

Third, HISA delegates to the Authority "subpoena and investigatory authority with respect to civil violations committed under its jurisdiction." § 1205(h), 134 Stat. at 3262. Once again, HISA gives the FTC no role to approve, disapprove, or modify decisions of the Authority regarding issuing subpoenas or exercising its investigatory authority. Instead, the Authority may wield this tremendous power without check. Thus, one private entity may compel one of its competitors to come before it and give testimony under oath. This unchecked power violates the private nondelegation doctrine.

II. HISA violates the private nondelegation doctrine and the Due Process clause because it gives economically self-interested actors the power to regulate their competitors.

When Congress gives an "economically self-interested actor [the power] to regulate its competitors," it violates the Due Process clause found in the Fifth Amendment. *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 821 F.3d 19, 23 (D.C. Cir. 2016) (*Amtrak II*); *see also Carter Coal*, 298 U.S. at 312. The legal analysis is the same whether the economic self-interest constitutes a violation of the Due Process clause or the private nondelegation doctrine: "neither court nor scholar has suggested a change in the label would effect a change in the inquiry." *Amtrak*, 721 F.3d at 671, n. 3. Therefore, plaintiffs will consider these two analyses together.

In two cases that remain good law, the Supreme Court used the Due Process

clause to enjoin 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 even worse: rather than allowing indirect extraction of profit from another, HISA allows the direct extraction of fees by one private entity from another. § 1203(f)(3)(C)(ii), 134 Stat. at 3257. In essence, a private entity is given the power of taxation.

HISA designates four of the members of the Board of the Authority to be economically self-interested actors, and they are given authority to regulate their competitors. § 1203(b)(1)(B), 134 Stat. at 3253-54. These four board members are given a tremendous amount of power over their competitors, including the power to charge fees and the power to ban their competitors from racing. § 1203(f)(3)(C)(ii), 134 Stat. at 3257; § 1208(d)(3)(A), 134 Stat. at 3572. In addition, because the other five board members can have no ties to horse racing, the self-interested board members will wield considerable influence and likely encourage the other board members how to vote.

Additionally, under HISA the entire Board of the Authority is selected by a private Nominating Committee. This private Nominating Committee was hand-picked by a small group of owners and trainers within the horseracing industry who supported passage of HISA, over the objections of thousands of owners and trainers represented by Plaintiffs, who will be regulated by HISA. *See* Facts ¶ 25.

Further, HISA creates two standing committees to advise and guide the Board

in drafting its regulations: one on anti-doping and medication control and one on racetrack safety. § 1203(c), 134 Stat. at 3254-55. A minority of these members will also be members of the horseracing industry, economically self-interested actors, and likely persuasive over their non-industry peers. *Id*.

HISA allows for the businesses of this small group of owners and trainers to thrive. Meanwhile, HISA will harm thousands of horsemen and drive many of them out of the industry by artificially increasing the costs and fees of participation. HISA also harms Plaintiffs by creating a regulatory body that will subject them to onerous regulations and the ability to ban them from racing. By granting these self-interested actors the authority to regulate their competitors, Congress violated the Due Process Clause and the private nondelegation doctrine.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment, declare the Horseracing Integrity and Safety Act unconstitutional, and issue an injunction prohibiting Defendants from enforcing it.

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CERTIFICATE OF SERVICE

I hereby certify that on the date I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court, the electronic filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means

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