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; KATRINA ADAMS; LEN COLEMAN; NANCY COX; JOSEPH DUNFORD; FRANK KEATING; KEN 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

BRIEF FOR AMICUS CURIAE AMERICAN QUARTER HORSE ASSOCIATION IN SUPPORT OF PLAINTIFFS

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EXHIBIT "A"

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

American Quarter Horse Association ("AQHA") is a nonprofit breed registry and membership association based in Amarillo, Texas. Established in 1940, AQHA is the largest equine breed association in the world, with over 220,000 current members and over 6 million horses registered with AQHA since its inception. AQHA functions as the official record keeping and governing body of the American Quarter Horse industry. AQHA records all American Quarter Horse ownership, processes approved show and race results, catalogs performance data, produces data on all American Quarter Horses, maintains association funds, and publicizes the American Quarter Horse industry. AQHA's core missions are the preservation of the integrity of the American Quarter Horse breed and protection of the welfare of that breed.

AQHA members have a direct and substantial interest in the constitutionality of the Horseracing Integrity and Safety Act ("HISA"), Pub. L. No. 116-260, 134 Stat. 1182 (2020), and in HISA's impact on the equine industry. Though "covered horses" under HISA explicitly include only Thoroughbred horses, HISA gives each State Racing Commission the unfettered discretion to include other breeds, including the American Quarter Horse, within the scope of "covered horses" subject to HISA's requirements. HISA § 1202(4). For this reason, AQHA members' interests in relation to HISA are aligned with the interests of Thoroughbred industry representatives. Unlike the Thoroughbred representatives, however, AQHA members have a further interest in ensuring consistency across jurisdictions, given that HISA has the potential to apply on only a state-by-state basis to American Quarter Horses.

AQHA acknowledges that HISA may have some beneficial impacts on the industry and overall welfare of racehorses, but portions of HISA will also certainly have a detrimental impact

[1] AQHA certifies that no part of this Brief was authored by counsel for any party, and no person or entity other than AQHA made any monetary contribution to the preparation or submission of this Brief.

on the industry and the welfare of racehorses. For example, HISA's prohibition on the use of furosemide (known as Lasix in the equine industry), a medication used to mitigate Exercise Induced Pulmonary Hemorrhage, is premature given that studies conducted on the medication to date indicate that it *improves* the welfare of horses, and without it, racehorses may suffer serious complications from bleeding in the lungs. AQHA also notes concern about the unspecified fees to be administered under HISA and whether those fees may force participants out of the industry.

Primarily, however, AQHA has an interest in protecting the constitutional rights of its members by ensuring that any governing, regulatory organization in the equine industry is consistent with and subject to each of the fundamental protections afforded by the U.S. Constitution.

SUMMARY OF ARGUMENT

AQHA fully supports and agrees with the motivations behind the enactment of HISA – namely, ensuring the safety, welfare, and humane treatment of racehorses. However, AQHA also supports the U.S. Constitution and the protections afforded by the Constitution, including the separation of powers vested in each branch of the government and the accountability guaranteed by the Appointments Clause and inherent removal powers of Article II. HISA's respectable goal comes at the expense of curtailing these fundamental Constitutional protections, and for this reason, AQHA cannot support HISA.

AQHA respectfully points this honorable Court to the analytical framework set forth by the U.S. Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board,* 561 U.S. 477 (2010) and the underlying appellate court decision and dissent by Justice Kavanaugh in that case, 537 F.3d 667 (D.C. Cir. 2008). While *Free Enterprise Fund* is mentioned in passing in the Motions to Dismiss filed in this case, neither Motion gives the case the deference it merits,

given the strikingly similar circumstances in which the Public Company Accounting Oversight Board ("PCAOB") was established.

Like the Horseracing Integrity and Safety Authority ("the Authority") created by HISA, the PCAOB is a private regulatory corporation created by statute that operates under the oversight of an Executive branch department, the Securities and Exchange Commission ("SEC"). In *Free Enterprise Fund,* the Supreme Court analyzed the constitutionality of the structure and function of the PCAOB. AQHA argues that the Supreme Court's analysis in *Free Enterprise Fund* makes clear that the Authority created by HISA is unconstitutional. Specifically, HISA has unconstitutionally delegated extensive legislative and regulatory power to an arguably private entity while eliminating the intended accountability afforded by the Appointments Clause and inherent removal powers of the Executive branch. The Authority created by HISA is a dangerous foray into government-sanctioned regulation of private citizens by supposed "private" corporations.

ARGUMENT

I. The PCAOB Serves as a Template for the Authority's Structure.

Although the Authority created by HISA is unusual and uncommon in form, it is not an entirely unprecedented concept. In 2002, Congress created the PCAOB as part of a series of accounting reforms in the Sarbanes–Oxley Act following a series of "celebrated accounting debacles." *Free Enter. Fund,* 561 U.S. at 484. The Sarbanes-Oxley Act created tighter regulations over the accounting industry using the regulatory power granted to the PCAOB. *Id.*

The PCAOB shares striking similarities to the Authority:

- The PCAOB is designated by statute as a private, nonprofit corporation. 15 U.S.C. § 7211(a). The Sarbanes-Oxley Act expressly stated that the PCAOB "shall not be an agency or establishment of the United States Government." 15 U.S.C. §

7211(b). Likewise, the Authority is designated by statute as a private, nonprofit corporation. HISA § 1203(a).

- The PCAOB is charged with establishing rules, conducting investigations, and imposing sanctions on those it regulates. 15 U.S.C. § 7211(c). Likewise, the Authority is charged with establishing rules, conducting investigations, and imposing sanctions on those it regulates. HISA § 1205.
- The PCAOB sets its own budget and manages its own operations. 15 U.S.C. § 7211(c). Likewise, the Authority sets its own budget and manages its own operations. HISA § 1203.
- The PCAOB is managed by a five-member Board of Directors. 15 U.S.C. § 7211(e). The Authority is managed by a nine-member Board of Directors. HISA § 1203.
- The SEC is charged with oversight over the PCAOB. 15 U.S.C. § 7217. The Federal Trade Commission ("FTC") is charged with oversight over the Authority. HISA § 1204.

As a government-created, private, presumably self-regulating organization, the PCAOB was novel in design and appeared to toe the line on constitutionality, sparking interest among legal scholars following its enactment. As later judicial scrutiny of the PCAOB's structure determined, certain features of the PCAOB placed (most of) its structure on the side of constitutional compliance. The Authority, by contrast, does not carry any of these redeeming attributes:

- The members of the PCAOB board are appointed by the SEC. 15 U.S.C. § 7211(e)(4). In contrast, the members of the Authority's board are appointed by an independent "Nominating Committee." HISA § 1203. HISA does not specify how the seven members of the initial Nominating Committee were chosen or appointed.

Rather, their names simply appear in the Bylaws of the Authority. *See* Doc. 34-1, App'x 41-42.

- The members of the PCAOB board are removable by the SEC. 15 U.S.C. § 7211(e)(6). In contrast, HISA itself contains no provision governing or allowing for removal of its board members. Rather, the Bylaws of the Authority establish that board members "shall be removable, for cause, by the affirmative vote of all Directors then in office (excluding the applicable Director subject to the vote)." *See* Doc. 34-1, App'x 38.
- The SEC has the authority to abrogate, add to, and delete from the PCAOB's proposed rules, without any buy-in or input from the PCAOB. 15 U.S.C. § 7217(b)(5); *Free Enter. Fund v. Public Co. Account. Over. Bd.,* 537 F.3d 667, 669 (D.C. Cir. 2008). In contrast, HISA does not allow the FTC to make any changes to rules proposed by the Authority – it may only "recommend" changes to the Authority. HISA § 1204.
- The SEC is empowered to "enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board" if the SEC finds that the sanction "is not necessary or appropriate . . . or is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed." 15 U.S.C. § 7217(b)(5); *Free Enter. Fund*, 537 F.3d at 670. Conversely, the FTC has no such authority under HISA. Rather, a sanction issued by the Authority may only be reviewed by an Administrative Law Judge, whose decision may later be subjected to review by the FTC in certain circumstances.

- "The [SEC] alone determines whether the PCAOB may 'sue and be sued' in any court." *Free Enter. Fund*, 537 F.3d at 670; 15 U.S.C. § 7211. HISA contains no such limitations on the capacity of the Authority to sue or be sued.
- The SEC is "empowered, by rule, to relieve the [PCAOB], consistent with the public interest, of any enforcement authority whatsoever, as well as, by order, to censure the [PCAOB] and, after notice and opportunity for a hearing, to 'impose limitations upon the activities, functions, and operations of the Board' upon finding that the Board has failed to abide by its statutory duties." *Free Enter. Fund,* 537 F.3d at 670; 15 U.S.C. § 7217(d). The FTC holds no such power over the Authority.

Each of the points identified above was described by the D.C. Circuit as indicative of the SEC's "explicit and comprehensive" control over the PCAOB. *Free Enter. Fund,* 537 F.3d at 669. This control, it turns out, is key to the constitutionality of the organization. Standing in stark contrast to the SEC's control over the PCAOB is the FTC's clear lack of control over the Authority.

II. Judicial Analysis of the PCAOB's Constitutionality Provides the Relevant Framework for this Lawsuit.

After the PCAOB was created, Free Enterprise Fund filed a lawsuit challenging the constitutionality of the PCAOB's structure, specifically alleging that the PCAOB violated separation-of-powers principles, the Appointments Clause, and the non-delegation doctrine. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,* No. CIVA 06-0217 JR, 2007 WL 891675, at *1 (D.D.C. Mar. 21, 2007). In essence, the Plaintiff "argued that the Sarbanes–Oxley Act contravened the separation of powers by conferring wide-ranging executive power on [PCAOB] members without subjecting them to Presidential control*." Free Enter. Fund,* 561 U.S. at 487.

At the outset of the lawsuit, both parties agreed that the PCAOB *was* a governmental entity, despite the explicit language of the implementing statute disclaiming such status. *Free Enter. Fund.,* 2007 WL 891675, at *3. Thus, neither the district court nor the reviewing courts above it ever reached the question of whether the Sarbanes-Oxley Act improperly delegated legislative or regulatory authority to a private entity. Instead, *Free Enterprise Fund* focused on whether the PCAOB's board members' appointment and removal provisions were constitutional. *Id.* at *4-5. The U.S. District Court for the District of Columbia granted the PCAOB's Motion for Summary Judgment as to all claims, finding that the structure was constitutional. *Id.* at *6

The lower court's decision was affirmed by the U.S. Court of Appeals for the D.C. Circuit. *Free Enter. Fund,* 537 F.3d at 685. The D.C. Circuit relied significantly on the aforementioned elements of control and authority held by the SEC (and, indirectly, by the President) over the PCAOB. *Id.* at 685 ("The key question the Supreme Court requires this court to answer is whether the Act so limits the President's ability to influence the Board as to render it unconstitutional.").

Justice Kavanaugh (then a Justice on the D.C. Circuit Court of Appeals) wrote a long and notable dissent. Under the implementing statute, PCAOB board members were removable only for cause, 15 U.S.C. § 7211(e)(6), and Justice Kavanaugh primarily took issue with that removal provision of the Act, stating:

> The President's power to remove is critical to the President's power to control the Executive Branch and perform his Article II responsibilities. Yet under this statute, the President is two levels of for-cause removal away from Board members, a previously unheard-of restriction on and attenuation of the President's authority over executive officers. This structure effectively eliminates any Presidential power to control the PCAOB, notwithstanding that the Board performs numerous regulatory and law-enforcement functions at the core of the executive power.
>
> *Id.* at 686 (Kavanaugh, J., dissenting).

Next, Justice Kavanaugh took aim at the manner in which the PCAOB board members were appointed by the SEC:

> The statute's violation of the Appointments Clause is also plain. Under Article II as interpreted in *Edmond v. United States*, 520 U.S. 651, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997), the PCAOB members are principal officers who must be appointed by the President with the advice and consent of the Senate. They are not inferior officers because they are not "directed and supervised" by the SEC, *id.* at 663, 117 S.Ct. 1573: The PCAOB members are not removable at will by the SEC; the SEC does not have statutory authority to remove them for failure to follow substantive SEC direction or supervision; and the SEC does not have statutory authority to prevent and affirmatively command, and to manage the ongoing conduct of, Board inspections, Board investigations, and Board enforcement actions. Moreover, as the statutory text demonstrates, the very purpose of this statute was precisely to create an accounting board that would operate with some substantive independence from the SEC, not one that would be "directed and supervised" by the SEC.

Id. at 687 (Kavanaugh, J., dissenting). Justice Kavanaugh concluded in summary:

> The Framers of our Constitution took great care to ensure that power in our system was separated into three Branches, not concentrated in the Legislative Branch; that there were checks and balances among the three Branches; and that one individual would be ultimately responsible and accountable for the exercise of executive power. The PCAOB contravenes those bedrock constitutional principles, as well as long-standing Supreme Court precedents, and it is therefore unconstitutional.

Id.

The Supreme Court took the case under review. The Court acknowledged that the PCAOB was "modeled on 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." *Free Enter. Fund,* 561 U.S. at 484. However, the Court was careful to distinguish the PCAOB from such private organizations, noting, "[u]nlike the self-regulatory organizations, however, the [PCAOB] is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry." *Id.* at 485.

The Supreme Court expounded on the PCAOB's broad regulatory authority under the Sarbanes-Oxley Act and noted, with apparent approval, that "the parties agree that the [PCAOB] is part of the Government for constitutional purposes and that its members are Officers of the

United States who exercise significant authority pursuant to the laws of the United States." *Id.* (internal citations and quotations omitted).

The Court noted that, while the PCAOB was subject to SEC oversight with respect to the issuance of rules or imposition of sanctions, the "individual members of the Board – like the officers and directors of the self-regulatory organizations – are substantially insulated from the [SEC's] control. The [SEC] cannot remove Board members at will, but only 'for good cause shown,' 'in accordance with' certain procedures." *Id.* at 486.

The Supreme Court held that the limitations on the SEC's ability to remove PCAOB board members contravened the Constitution's separation of powers. *Id.* at 492. In an opinion written by Chief Justice Roberts, the Court offered the following rationale for its decision:

> As explained, we have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard.
>
> The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.
>
> . . .
>
> This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.
>
> That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he can oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws

> are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions *497 of the Executive Branch."

Id. at 495-97.

Both the Supreme Court and Justice Kavanaugh, in his dissenting opinion at the appellate level, warned against the slippery slope presented by the PCAOB structure. The Supreme Court stated:

> If allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third?" Further, "the officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name.

Id. at 497. Justice Kavanaugh shared an identical concern:

> Upholding the PCAOB here would green-light Congress to create a host of similar entities. Congress could thereby splinter executive power to a degree not previously permitted, in serious tension with Article II' s conception of a single President who can control his subordinates and the exercise of executive power. Congress would have license to create a series of independent bipartisan boards appointed by independent agencies and removable only for cause by such independent agencies." "But in such a system, where is the President, in whom the Constitution vests the "executive power?

Free Enter. Fund, 537 F.3d at 699 (Kavanaugh, J., dissenting).

As predicted, in the case of HISA, Congress has not only taken a few steps onto the slippery slope but is now tumbling down it. The FTC, whose members hold 7-year terms and cannot be removed by the President except for 'inefficiency, neglect of duty, or malfeasance in office,' *Free Enter. Fund,* 561 U.S. at 493, oversees the Authority. Thus, the President already faces restrictions on the removal of FTC officers. Yet neither the President nor the FTC have the power to remove members of the Authority's board. Instead, a *third* layer has been added, in that only the Authority can remove its own officers, and they can only do so *for cause.* Accountability has not only become

attenuated, as was the case of the unconstitutional PCAOB, but has instead been eliminated altogether. "The result is a Board that is not accountable to the President, and a President who is not responsible for the Board." *Id.* at 495.

III. The Authority's Uniqueness Is a Red Flag.

The final lesson learned from *Free Enterprise Fund* is the need to be vigilant in the constitutional review of a novel governmental creation. As Justice Kavanaugh warned in 2008, "the lack of precedent for the PCAOB counsels great restraint by the Judiciary before approving this additional incursion on the President's Article II powers." *Free Enter. Fund,* 537 F.3d at 699-700 (Kavanaugh, J., dissenting). He further noted, "[p]erhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity." *Id.*

As stated in introduction, the Authority created by HISA is not entirely novel. It is predicated on the framework of self-regulating private entities that govern various industries. But the Authority is different from those self-regulating entities in fundamental ways – the Authority has been created by federal statute, carries with it governmental powers (including the power to issue subpoenas), and the initial nominating committee members have been appointed by the government.

The Authority is also predicated on the structure for the PCAOB, but there are fundamental differences there too – the SEC appoints and removes PCAOB members, and the SEC exercises significant control over the PCAOB's rulemaking and sanction authority. By contrast, the FTC has no power to appoint or remove Authority members, nor does the FTC exercise much oversight over the Authority, as detailed above in Section II.

Thus, while the Authority is not an entirely new concept, given that parts of its structure have been borrowed from self-regulating organizations and government-organized private entities

like the PCAOB, the Authority *is* unique in that it combines these various features into an unprecedented hybrid private/governmental regulating entity. The novelty of this government-created "private" organization, which is designed to operate much more independently than government-created private organizations before it, is a red flag. "In the past, when faced with novel creations of this sort, the Supreme Court has looked down the slippery slope—and has ordinarily refused to take even a few steps down the hill." *Free Enter. Fund,* 537 F.3d at 700 (Kavanaugh, J., dissenting).

CONCLUSION

AQHA supports the efforts by Congress and equine industry representatives to protect the welfare of racehorses. But those efforts cannot come at the expense of the protections guaranteed by the U.S. Constitution. AQHA accordingly supports the relief requested in Plaintiffs' First Amended Complaint.

Date: May 13, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 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.

/s/ Autum L. Flores
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