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

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
ARIZONA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
ARKANSAS HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
INDIANA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
ILLINOIS HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
LOUISIANA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
MOUNTAINEER PARK HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
NEBRASKA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
OKLAHOMA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
OREGON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
PENNSYLVANIA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, AND
WASHINGTON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,

Plaintiffs,

v.

JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN; MD 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

DEFENDANTS JERRY BLACK, KATRINA ADAMS, LEONARD COLEMAN, NANCY COX, JOSEPH DUNFORD, FRANK KEATING, KENNETH SCHANZER, AND HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.'S BRIEF IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF LIVE PLEADINGS

Pleading	Party	Date	Dkt. No.
First Amended Complaint for Declaratory and Injunctive Relief	Plaintiffs National Horseman's Benevolent and Protective Association, Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, Nebraska Horsemen's Benevolent and Protective Association, Oklahoma Horsemen's Benevolent and Protective Association, Oregon Horsemen's Benevolent and Protective Association, Pennsylvania Horsemen's Benevolent and Protective Association, and Washington Horsemen's Benevolent and Protective Association (collectively, "Plaintiffs")	4/02/2021	23
Motion to Dismiss and Brief in Support	Defendants Jerry Black, Katrina Adams, Leonard Coleman, Nancy Cox, Joseph Dunford, Frank Keating, Kenneth Schanzer, and Horseracing Integrity and Safety Authority, Inc. (collectively, "Authority Defendants")	4/30/2021	34
Motion to Dismiss and Brief in Support	Defendants Federal Trade Commission, Acting Chair Kelly Slaughter, Commissioner Rohit Chopra, Commissioner Noah Phillips, and Commissioner Christine Wilson (collectively, "Federal Defendants")	4/30/2021	36
Motion for Partial Summary Judgment and Brief in Support	Plaintiffs	4/30/2021	37, 38
Opposition to Plaintiffs' Motion for Partial Summary Judgment and Brief in Support	Authority Defendants	5/28/2021	55, 56

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Defendants Jerry Black, Katrina Adams, Leonard Coleman, Nancy Cox, Joseph Dunford, Frank Keating, Kenneth Schanzer, and the Horseracing Integrity and Safety Authority, Inc. (collectively, "Authority Defendants") oppose Plaintiffs' motion for partial summary judgment.

INTRODUCTION

The high-profile doping allegations surrounding this month's Kentucky Derby have once again drawn attention to the serious problems afflicting horseracing. In response to the tragic deaths, severe injuries, and diminished public trust increasingly threatening this fixture of American culture, constituents from across the sport established a private standards-setting organization ("the Authority") to develop uniform health-and-safety standards. Several months later, Congress enacted bipartisan (and widely praised) legislation to address the same concerns. The Horseracing Integrity and Safety Act ("HISA" or the "Act") draws on the experience and expertise of the Authority to supplant the current web of inconsistent state-based horseracing regulations with a new federal regulatory regime. Modeled on enduring and effective statutory schemes in other sectors, the Act vests in the FTC exclusive authority to promulgate (or not) rules based on certain medication-control and track-safety standards that the Authority proposes. Absent the FTC's promulgation as an enforceable regulation after notice-and-comment rulemaking, the Authority's proposed standards have no legal effect.

Although Plaintiffs challenge HISA on several constitutional grounds, they seek summary judgment on just two claims: the Act (1) unconstitutionally delegates legislative power to the Authority and (2) violates due process by allowing self-interested actors to regulate competitors. Even if Plaintiffs were able to survive the fatal Article III standing and ripeness problems that their motion underscores, their claims would fail under any reasonable reading of the statutory scheme and established precedent. Recent Fifth Circuit decisions reinforce longstanding Supreme Court case law holding that private entities may lawfully assist the development and implementation of

federal regulation so long as the agency retains final review. Congress ensured that independent agency role on both the front end and the back end of HISA's regulatory scheme: (i) the FTC evaluates and promulgates, after notice-and-comment, any proposed standard the Authority submits before it can take legal effect as a rule, and (ii) any sanction for a rule violation is subject to two layers of *de novo* FTC review. And given this critical federal agency oversight—on top of the Act's robust conflict-of-interest provisions that Plaintiffs ignore—Plaintiffs' speculative assertions of hypothetical self-dealing cannot survive summary judgment either.

Plaintiffs' heavy reliance on *dissenting* opinions makes their end game obvious: they hope to convince some court to overturn precedent and expand the nondelegation doctrine. But it is crystal clear that their claims fail under binding precedent. Their motion should be denied.

STATEMENT OF THE CASE

A. The Horseracing Community Recognizes The Need For A Centralized Standards-Setting Organization To Curb Health And Safety Risks

As chronicled in the Authority's motion to dismiss, in recent years, serious problems endangering both horses and riders have plagued the sport of horseracing. ECF No. 34, at 2-3 ("Auth. Mot.") (citing legislative record). The patchwork of state horseracing regulations, reflecting widely varying health-and-safety standards and levels of enforcement, lies at the heart of these troubles. *Id*. at 3; *see* Amicus Brief of Senator Mitch McConnell et al. 3-5, ECF No. 53 ("McConnell Br.").

The widely publicized allegations overshadowing this month's Kentucky Derby provide only the latest example of the mounting issues that have not only threatened the safety of horseracing participants but also degraded the national betting public's confidence in the integrity

of the sport.[1] The differing state-by-state treatment of the steroid at the center of the recent scandal illustrates the current inconsistencies: while some states permit a threshold level of betamethasone in a horse's bloodstream on race day, *see, e.g.*, MD. CODE REGS. 09.10.03.01-1 (setting 10 pg/ml threshold); N.Y. COMP. CODES R. & REGS. tit. 9, § 4043.3 (same), Kentucky bans any detectable concentration, 810 KY. ADMIN. REGS. 8:010.

As also described in the Authority's motion to dismiss, a broad coalition of stakeholders—including owners, breeders, trainers, racetracks, jockeys, and veterinarians—formed a "nonprofit business league" (known as the "Authority") to try to tackle these problems by developing uniform standards for the horseracing industry, similar to self-regulating or accrediting organizations that set and oversee integrity standards in other fields. *See* Auth. Mot. 3-4. Incorporated in Delaware on September 8, 2020, the Authority's bylaws provide for a Nominating Committee and nine Directors subject to strict conflict-of-interest rules. *Id* at. 4.

On May 5, 2021, following a comprehensive screening and selection process, the Nominating Committee announced the diverse nine-person Board. *See* Press Release, HISA, *HISA Nominating Committee Announces Board, Standing Committee Members to Comprise the Horseracing Integrity and Safety Authority*, May 5, 2001, Auth.App'x 4. In accordance with the Authority's bylaws, the majority of the Board comprises independent Directors from outside the equine industry: a former governor, a former federal prosecutor, a former president of the National League of Professional Baseball Clubs, and current executives with a career-empowering

[1] *See, e.g.*, ESPN News Services, *Derby winner Medina Spirit fails postrace drug test; Bob Baffert banned at Churchill Downs*, ESPN, May 9, 2021, Auth.App'x 12; John Clay, *A Triple Crown-sized black eye for horse racing, and Bob Baffert is involved again,* LEXINGTON HERALD-LEADER, May 9, 2021, Auth.App'x 16; Nathan Solis, *Bettors Sue Medina Spirit Trainer Over Kentucky Derby Win Fouled by Doping Scandal*, COURTHOUSE NEWS SERVICE, May 14, 2021, Auth.App'x 22.

nonprofit organization and with a National Football League team. *Id.*, Auth.App'x 7-8. An expert on equine injuries and three former horseracing executives and civic leaders comprise the four "industry" Directors. *Id.*, Auth.App'x 8.

B. Congress Enacts Bipartisan And Broadly Supported Legislation To Address The Health And Safety Risks Within Horseracing

After almost a decade of considering various national legislative reforms and months after the Authority was created, Congress—with the widespread support of both the horseracing industry and major animal welfare groups, and with bipartisan sponsors—ultimately passed HISA. *See* Auth. Mot. 4-5; *see also* McConnell Br. 2, 6-8.[2] President Trump signed the Act into law on December 27, 2020. *See* Pub. L. No. 116-260, div. FF, tit. XII, § 1201, 134 Stat. 1182, 3252 (2020) ("HISA"), Plf.App'x 104.

C. HISA Rules Can Take Effect Only With FTC Adoption After Notice-And-Comment And Not Until July 2022

HISA recognizes the Authority as a "private, independent, self-regulatory nonprofit corporation" that will "develop[] and implement[] a horseracing anti-doping and medication control program and a racetrack safety program." HISA § 1203(a). Far from "giv[ing] a minority of the horseracing industry the authority to regulate," Plfs' Br. 7, the Act places various constraints on the Board that ensure broad representation of the industry, require that the majority of the Board

[2] The Authority Defendants dispute many of Plaintiffs' "undisputed material facts." Br. 3-8. Several of these assertions are inaccurate. For example, the fact that the broad and bipartisan set of representatives who spoke on the House floor were unified in their support of the bill, *see* 166 CONG. REC. H4980-4983 (daily ed. Sept. 29, 2020) (statements of Reps. Pallone, Tonko, Rodgers, Barr, and Schakowsky), does not mean HISA passed "with no debate" or "discuss[ion]," Plfs' Br. 6; *see also* McConnell Br. 2, 6-8 (discussing "extensive legislative attention," including fact that "lead Plaintiff's Chief Executive Officer" participated in debate on precursor to HISA). Other of Plaintiffs' purported facts, *e.g.*, ¶¶ 19, 22-26, represent unfounded conclusions and legal assertions that the Authority Defendants obviously contest. *See, e.g.*, Plfs' Br. 7 ("HISA gives a minority of the horseracing industry the authority to regulate the majority of the industry."). And others, *e.g.*, ¶¶ 27-28, have been superseded by events discussed in the text of this opposition.

has no affiliation with the industry, and impose other conflict-of-interest safeguards. *See, e.g.*, HISA § 1203(b)(1)(B), (3).

HISA provides that the Authority may submit to the FTC "any proposed rule, or proposed modification to a rule," relating to the programs, including those concerning health-and-safety standards, assessments, procedures for investigations and disciplinary hearings, and sanctions for violations. HISA. § 1204(a). No proposed rule or modification may take effect under HISA unless the FTC independently adopts it following notice and public comment. *Id.* § 1204(b). And any final Authority decision to impose sanctions—the range of which must also be approved by the FTC after notice-and-comment—"shall be subject to de novo review by an administrative law judge" appointed by the FTC, and further de novo review by the commissioners. *Id.* § 1209(b).

Contrary to Plaintiffs' misleading assertion that they "are regulated by HISA and by the Authority," Br. 7, neither the Authority nor the FTC may take action with legal effect on private horseracing participants until the "program effective date" of July 1, 2022. HISA §§ 1202(14), 1205(a). As a practical matter, rules promulgated under the Act will apply only to subjects that are already federally regulated "in order to further the horseracing and legal off-track betting industries in the United States." 15 U.S.C. § 3001(b); *see* HISA § 1202(4)-(6), (11) (defining "covered horse," "covered persons," and "covered horserace" by their relation to races that are the "subject of interstate off-track or advance deposit wagers," as regulated by "the Interstate Horseracing Act of 1978," 15 U.S.C. §§ 3001 *et seq.*); 15 U.S.C. § 3003 (effectively prohibiting such races "except as provided in" the Interstate Horseracing Act of 1978, as amended).

LEGAL STANDARD

"The party invoking federal jurisdiction bears the burden of establishing standing—and, at the summary judgment stage, such a party can no longer rest on *** mere allegations, but must set forth by affidavit or other evidence specific facts." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398,

411-412 (2013) (internal quotation marks omitted). "Summary judgment is appropriate when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *United States v. Nature's Way Marine, L.L.C.*, 904 F.3d 416, 419 (5th Cir. 2018) (quoting FED. R. CIV. P. 56(a)).

SUMMARY OF ARGUMENT

I. Plaintiffs' motion confirms that their claims are not justiciable. The Authority has yet to propose a single standard, and the FTC has yet to consider any such standard—let alone promulgate any rules under HISA. And no regulations can have a binding effect on private parties before July 2022. Plaintiffs' speculative allegations of prospective harm based on hypothetical future events only reinforce that they lack an injury-in-fact to establish standing and that their abstract claims are not ripe for review.

II. Plaintiffs' misconstruction of HISA and misunderstanding of established precedent preclude summary judgment on their private nondelegation claim.

A. Plaintiffs incorrectly posit that Congress delegated legislative power to the Authority. Circuit precedent makes clear that, in reasonably conditioning the FTC's adoption of a final rule on the Authority's proposal of a standard that the agency determines is consistent with the Act and applicable regulations, HISA does not effect a subdelegation at all. HISA merely ensures that the FTC benefits from the Authority's expertise. Instead of confronting that precedent head on, Plaintiffs rely on a *dissenting* opinion that failed to persuade the en banc Fifth Circuit to rehear the case. In any event, because Congress (rather than the agency itself) imposed the reasonable conditions at issue here, HISA would clear the constitutional bar set by that dissent.

B. Even if Plaintiffs were correct that Congress delegated some legislative functions to the Authority, Plaintiffs could not show such a delegation would be unlawful. Plaintiffs' own authorities underscore that agency approval and oversight are all that the Constitution require for

Congress to involve a private party in the rulemaking process. HISA ensures such an agency check on both the front end of the statutory scheme (by requiring the FTC's consideration, approval, and promulgation of any standard proposed by the Authority before a rule could take effect) and on the back end (by subjecting any sanction imposed by the Authority to two layers of FTC review). Plaintiffs' attempts to exaggerate the Authority's role and minimize the FTC's review rest on a manifestly flawed reading of the statute. Their effort to paint HISA's regulatory scheme as unprecedented ignores the longstanding FINRA-SEC relationship on which it was modeled. And their last-ditch argument, that the Act is unconstitutional because the FTC cannot "modify" the Authority's proposed standards, fails as a matter of law and fact.

C. Plaintiffs' emphasis on non-legislative functions that the Authority allegedly conducts illustrates that their nondelegation challenge conflates the principles arising under Article I of the Constitution, on which their claim purportedly rests, with a different (and less demanding) doctrine under the Due Process clause. Under the latter framework, the precedent that Plaintiffs say is "controlling" permits private involvement in a regulatory scheme so long as the statute constrains private delegations through guiding standards and judicial review. Plaintiffs do not attempt to show that HISA fails either factor. Nor could they: Even setting aside the FTC's oversight role, various HISA provisions channel not only the content of the standards the Authority may propose, but also its governance and disciplinary process; and Congress ensured that any sanction the Authority may impose would ultimately be subject to judicial review in federal court.

III. Plaintiffs cannot prevail on a separate claim that HISA violates due process by allegedly empowering industry actors to regulate their competitors. Their theory would require multiple layers of conjectural, improbable, and unexplained acts of bad faith, for which they offer no evidence. They also ignore the many statutory provisions that would protect against the hypothetical self-dealing they surmise.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE

Plaintiffs' motion only underscores that, for the reasons already explained in the Authority Defendants' pending motion to dismiss, Auth. Mot. 8-14, Plaintiffs' claims are not justiciable. Plaintiffs do not "set forth by affidavit or other evidence specific facts" establishing any injury-in-fact. *Clapper*, 568 U.S. at 412 (internal quotation marks omitted); *see* Auth. Mot. 8-10. At most, Plaintiffs claim they "are regulated by HISA and by the Authority" and may be "required to remit" fees to the Authority. Br. 7, 12 (quoting HISA § 1203(f)(3)(C)(ii)); *see* Plf.App'x 2, ¶ 8 (HISA and the Authority "will regulate Plaintiffs"). But they elide the critical fact that rules promulgated under HISA—including rules pursuant to which the Authority may collect fees from covered persons involved in covered horseraces—will not take effect *for over a year*. *See* HISA §§ 1202(14), 1205(a) (establishing "program effective date" of July 1, 2022); *id.* § 1203(f)(1) ("[F]unding to establish the Authority and underwrite its operations before the effective date shall be provided by loans[.]"). Given that the Authority has not yet recommended any standards and the FTC has not yet considered (let alone promulgated) any rules, assertions that the Board "*will* cause harm to plaintiffs because the Authority *will* have significant regulatory authority over them," "*will* subject them to onerous regulations," and "*will* harm thousands of horsemen and drive many of them out of the industry by artificially increasing the costs and fees of participation," Br. 25, 27 (emphases added), are speculative allegations insufficient to confer Article III standing.[3]

[3] *Amicus* North American Association of Racetrack Veterinarians (NAARV) argues that HISA imposes harm by directing the FTC to promulgate rules consistent with "baseline anti-doping and medication control rules" and a "ban on the race day administration of furomeside." NAARV Br. 6, ECF No. 49 (citing HISA § 1206(d), (g)). But neither provision is self-executing. Both depend on the FTC's promulgation of final rules, after approval of and notice-and-comment on standards proposed by the Authority, to have binding legal effect on private parties. *See* HISA §§ 1204, 1206(a). And both provisions are subject to various exceptions. *See Id.* § 1206(e), (f), (g)(3).

Plaintiffs' arguments also illustrate that their claims are not ripe for review. *See* Auth. Mot. 10-12. Many of Plaintiffs' contentions—such as their allegations that the FTC "cannot exercise proper oversight over the rules and regulations drafted by the Authority," Br. 14, and that "the self-interested board members will wield considerable influence and likely encourage the other board members how to vote," Br. 27—reflect, at best, conjectural harm based on hypothetical future events that may never arise. Other arguments—such as Plaintiffs' claims that the FTC "would be out of luck" if consideration of a proposed standard exceeds 60 days, Br. 17, and that "HISA does not give the FTC the ability to modify" rules, Br. 20—reinforce that it would be premature to adjudicate these issues before the FTC administers the Act in the context of a concrete rule.

Finally, Plaintiffs' "undisputed material facts" confirm the absence of personal jurisdiction with respect to Defendants Adams, Coleman, Cox, Dunford, Keating, and Schanzer. *See* Auth. Mot. 12-14. Plaintiffs reiterate that no Nominating Committee member other than Jerry Black resides or works in Texas, and Plaintiffs do not show that the Committee's task of selecting Directors for the Board of "a nonprofit Delaware corporation" has any ties to this State. Br. 4-5.

II. HISA DOES NOT UNCONSTITUTIONALLY DELEGATE LEGISLATIVE OR REGULATORY AUTHORITY TO A PRIVATE ENTITY

A. To The Extent HISA Delegates Any Authority To A Private Entity, Such Delegation Is Properly Subject To Agency Review, Among Other Constraints

Plaintiffs are not entitled to summary judgment on their claim that HISA "violates the private nondelegation doctrine." Br. 9. Plaintiffs' central contention is that "Congress unconstitutionally delegated legislative authority to a private entity" by "empower[ing] a small faction of the Horseracing Industry to set up the private Authority and then write the rules governing" it. Br. 2-3. Far from "one of the most egregious private delegations in history," Br. 2, however, HISA is consistent with well-established judicial precedent and longstanding statutory models. As explained in detail in the Authority Defendants' motion to dismiss (at 14-24), the Act

does not run afoul of the "largely dormant" and "seldom invoked" "so-called 'private nondelegation' doctrine"—which has not "been used by the Supreme Court to strike down a statute since the early decades of the last century," *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 703, 707 (5th Cir. 2017)—for multiple reasons.

First, Congress has not delegated any legislative powers to the Authority. S*ee* Auth. Mot. 16-18. Standards proposed by the Authority take on legal effect under HISA only if the FTC, acting pursuant to clear congressional direction, independently decides to "incorporate[] the [Authority's] standards into its [own final rules]" promulgated after notice-and-comment. *Texas v. Rettig*, 987 F.3d 518, 531-532 (5th Cir. 2021); *see* HISA § 1204. This feature of the Act reflects a "common and accepted practice by federal agencies," *Rettig*, 987 F.3d at 531-532, which serves to "eliminate[] the cost to the Federal government of developing its own standards" from scratch, *American Soc'y for Testing & Materials v. Public.Resource.Org., Inc*., 896 F.3d 437, 442 (D.C. Cir. 2018). By design, the Authority will have considerable experience and expertise in advancing its overlapping purposes with HISA to implement a "horseracing anti-doping and medication control program" and "racetrack safety program" to improve "the safety, welfare, and integrity" of the sport. HISA § 1205(a); *see* Certificate § 3, Plf.App'x 95; Bylaws § 3.10(c), Plf.App'x 47-48. In requiring the FTC to consider standards proposed by the Authority in order to promulgate final rules, Congress established "reasonable conditions [on], not subdelegations" of, the authority assigned to the FTC to administer the Act. *Rettig*, 987 F.3d at 531-532.

Second, to the extent HISA nevertheless were deemed to delegate legislative functions to the Authority, the Fifth Circuit recently affirmed longstanding Supreme Court precedent that "such subdelegations [a]re not unlawful *** so long as the [private] entities 'function subordinately to' the federal agency and the federal agency 'has authority and surveillance over [their] activities.'" *Rettig*, 987 F.3d at 532 (third alteration in original) (quoting *Sunshine Anthracite Coal Co. v.*

Adkins, 310 U.S. 381, 399 (1940)). Such agency review bookends HISA's regulatory scheme in two key respects. *See* Defs' Mot. 18-21. On the front end, the Authority must submit to the FTC all proposed standards (and proposed modifications), including substantive medication and safety standards, schedules of fee assessments, and procedures governing the Authority's implementation and enforcement of FTC rules. HISA §§ 1204(a), 1205(c)(2), 1205(*l*)(3), 1208(a)(1), 1208(b)(1), 1208(c)(1). The FTC makes an independent determination of whether to approve, disapprove, or insist on modifications before promulgating any final rule. HISA § 1204(b), (c). On the back end, HISA subjects the Authority's decision to impose any sanction, including a sanction for failure to comply with the investigation and enforcement of final rules, to two layers of *de novo* FTC review—by an Administrative Law Judge (ALJ) and the commissioners. HISA § 1209.

Third, any other regulatory power granted to the Authority under HISA is further "[]restrained" in other critical respects. *Boerschig*, 872 F.3d at 708; *see* Defs' Mot. 22-24. The Fifth Circuit has explained that a statute violates the private nondelegation doctrine only if it fails to "impose[] a standard to guide" the private entities' regulatory actions or to "subject [them] to judicial review." *Boerschig*, 872 F.3d at 708. HISA easily clears both hurdles. As to the first, the Act substantially channels the Authority's discretion. *See, e.g.*, HISA § 1206(b), (c)(5), (g) (Authority "shall take into consideration" seven enumerated factors relating to anti-doping and medication control, cannot approve standards that are "less stringent" than "baseline rules" outside specified circumstances, and may "prohibit the administration of any substance or method" only if it is determined to have "a long-term degrading effect on the soundness of a horse"); *id.* § 1207(a), (b) (Authority must account for twelve "elements" and current standards relating to racetrack safety); *id.* § 1203(f), 1208 (providing detailed guidance on calculation of fees and imposition and adjudication of sanctions pursuant to "adequate due process"). As to the second factor, any sanction under HISA would not only be subject to multiple layers of *de novo* review by

the FTC, *see id.* § 1209, but the administrative ruling would also be subject to judicial review in federal court, *see id.* § 1209(b)(3)(B), 5 U.S.C. §§ 702-704.

B. Plaintiffs Misconstrue HISA And Misunderstand Precedent

In their attempt to paint HISA as "one of the most sweeping legislative delegations to a private entity in congressional history," Br. 12, Plaintiffs fundamentally misstate the Authority's role under HISA and its relationship to the FTC. That misconstruction of the Act is compounded by Plaintiffs' misunderstanding of the relevant case law under which the Act comfortably fits. Both errors infect Plaintiffs' deeply flawed constitutional analysis.

1. Plaintiffs incorrectly assume HISA delegates legislative power to the Authority.

a. By understating the Authority's independent nature and overstating the "sweeping powers" it supposedly exercises, Br. 12, Plaintiffs posit that HISA delegates legislative authority to the Authority. But Congress did not "empower[] a small faction of the Horseracing Industry to set up the private Authority and then write the rules governing" its industry. Br. 3; *see* Br. 13 (arguing Authority's "creation violates the private nondelegation doctrine"); Br. 25 (arguing "HISA delegates legislative authority to the Nominating Committee" to establish Board). The Authority undisputedly *predates* HISA, Pls' Br. 6—and much of the activity that Plaintiffs challenge would occur even if HISA had never been enacted, *see* Defs' Mot. 14-16. Similar to other standards-setting organizations, in selecting its Board and prescribing and enforcing health-and-safety conditions for its industry members, the Authority (including its Nominating Committee) operates pursuant to "powers[] and duties *** provided in [its] Bylaws," not any statutory command. Certificate §§ 3, 7, Plf.App'x 95-96; Bylaws §§ 1.5, 3.2, 3.10(c), Plf.App'x 40-44, 47-48. It is hardly remarkable that HISA "allows private entities to make some [private] decisions with no governmental oversight." Br. 25. Indeed, even in other contexts in which

Congress does purport to delegate certain functions, "limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Loving v. United States*, 517 U.S. 748, 772 (1996) (internal quotation marks omitted).

To be sure, HISA sets certain parameters for the Board's appointment and mandates rigid requirements for any Authority-proposed standards that the FTC may consider promulgating as a rule. *See, e.g.*, *id.* §§ 1203(b), 1206(b), (c)(5), (g), 1207(a), (b). But Congress has long placed guardrails around similar self-regulatory organizations to advance legislative interests that align with the standard-setting entity. *See, e.g.*, 15 U.S.C. §§ 78f(b)(3), 78*o*-3(b)(4) (requirements for board and rules of private organizations recognized as national securities exchanges and associations). If anything, Plaintiffs read the statutory scheme backwards: HISA provisions concerning the Nominating Committee and the Authority's independent standards-setting practice impose constraints on the private entity, rather than "delegate[] a governmental function" to it. Br. 13; *cf. Pittson Co. v. United States*, 368 F.3d 385, 396-397 (4th Cir. 2004) (distinguishing "a governmental power" from "a private one," and explaining the latter "clearly do[es] not violate the nondelegation doctrine").

b. Standards developed by the Authority can carry legal effect for private parties only if they are proposed to the FTC and the agency approves them as final rules, after subjecting them to notice-and-comment and an independent evaluation. HISA § 1204; *contra* Plfs' Br. 16 ("The role of the FTC is limited to a mere afterthought."). In other words, the FTC alone can promulgate a binding rule under HISA, and the Act "[c]onditions" the FTC's adoption of a final rule on the Authority's proposal of a standard that the FTC determines is consistent with the Act and the agency's applicable regulations. HISA § 1204(b)(2), (c). And as explained, Congress does not "improperly subdelegate [an agency's] authority when it 'reasonabl[y] condition[s]' federal

approval on an outside party's determination of some issue; such conditions only amount to legitimate requests for input." *Rettig*, 987 F.3d at 531 (second and third alterations in original).

Plaintiffs do not dispute that Congress may constitutionally establish such "reasonable conditions" for agency action, nor do they seriously confront that Congress did so in HISA. Instead, Plaintiffs' engagement with the governing circuit precedent is limited to their claim that "[t]he *dissenting* opinion [from the Fifth Circuit's decision to deny en banc review in *Rettig*] found the facts to be *** similar to those of this case." Br. 22 (emphasis added). But the dissent, of course, failed to persuade the Court to rehear the case. *Texas v. Rettig*, 993 F.3d 408, 2021 WL 1324382, at *1 (5th Cir. Apr. 9, 2021) (per curiam) (en banc). In any event, central facts about the regulation at issue in *Rettig*—critical to the judges who dissented from the denial of rehearing *en banc*—place HISA on even firmer constitutional footing. Most glaringly, the purported subdelegation in *Rettig* was "authorized by an administrative agency, rather than by Congress." *Id.* at *3 (Ho, J., dissenting from denial of rehearing en banc). That the opposite is true here—*i.e.*, *Congress* decided to reasonably condition the FTC's rulemaking—removes any doubt that this case clears the constitutional bar set not only by the *Rettig* panel decision, but also by the dissent on which Plaintiffs rely. *See, e.g.*, *id.* at *5 ("There is good reason to limit these [Supreme Court] precedents [permitting involvement of private entities in the rulemaking process] to only those delegations authorized by Congress itself," not an agency.); *id.* at *6 ("[A]ny 'subdelegation[] to outside parties [is] assumed to be improper *absent an affirmative showing of congressional authorization*.'") (second and third alterations in original) (emphasis added); *id.* at *7 ("[I]t is one thing to bless a Congressional decision to involve private parties in the rulemaking process. It is quite another to allow an agency—already acting pursuant to delegated power—to *re*-delegate that power out to a private entity.").

Another key distinction is layered on top: "Through the [regulation at issue in *Rettig*], HHS gave authority to the Board to promulgate binding rules through [the Board's] Standards," without any opportunity for the agency to review and disapprove of the standards before they become binding. 987 F.3d at 527 (panel); *Rettig*, 2021 WL 1324382, at *5 (Ho, J., dissenting from denial of rehearing en banc) ("[T]here is no agency review of the Board's established 'practice standards.' If HHS disagrees with the Board's standards regarding capitation rates, its only resource is to amend or repeal the rule delegating power to the Board in the first place."). By contrast, no standard proposed by the Authority may take legal effect unless the FTC reviews it—and also subjects it to notice-and-comment, independently determines that it is consistent with the Act and agency rules, and promulgates it as a final rule. HISA § 1204.

c. Trying another tack, Plaintiffs criticize the FTC's position in the statutory scheme on the ground that it "has no experience, expertise, or connection with the horseracing industry." Br 3, 14, 17. As an initial matter, Plaintiffs offer no authority for the proposition that the preexistence of such experience and expertise is a prerequisite to Congress's ability to task an agency with "evaluating the merit" of proposed standards. Br. 14. Tellingly, Plaintiffs do not seek summary judgment on their public nondelegation claim.

Regardless, FTC rulemaking under HISA is consistent with the agency's "dual mission *** to protect consumers and promote competition" "by stopping unfair, deceptive[,] or fraudulent practices." Plfs' Br. 14 (alteration in original). The clear purpose of the Act is to "improve the integrity and safety of horseracing" by curbing the unfair drug abuses and other deceptive and fraudulent practices that harm the participants and the betting public. H.R. Rep. No. 116-554, at 17 (2020); *see* HISA § 1205(a); *see also* HISA § 1210 (failure to disclose administration of "substance or method the Authority determines has a long-term degrading effect on the soundness of the covered horse" is "an unfair or deceptive act or practice"). The questions clouding this

month's Kentucky Derby provide just the latest illustration of how addressing the problems of unfair and fraudulent competition in the sport falls within the FTC's broad domain.

If anything, the fact that the FTC may lack particular "experience regulating horseracing," Plfs' Br. 14, *supports* Congress's decision to condition the agency's rulemaking on consideration of standards proposed by the Authority (and public comment). Far from injecting a "competitive disadvantage" between the FTC and the Authority, *id.*, the Authority's relative "institutional expertise" in the relevant subject matter demonstrates the "reasonable connection" underlying the congressionally determined condition, *Rettig*, 987 F.3d at 530-531; *see* Auth. Mot. 17-18. "[F]ederal law encourages precisely this practice" across several sectors because "reliance upon private sector expertise to supply the Federal government with cost-efficient goods and services," including "incorporating private standards" into agency rules, engenders better (and cheaper) rulemaking. *American Soc'y for Testing & Materials*, 896 F.3d at 442.

2. Plaintiffs fail to show that any legislative delegation to the Authority would be unconstitutional.

a. Even if Plaintiffs were correct that Congress delegated some legislative functions to the Authority, Plaintiffs cannot show such a delegation would be unconstitutional. Their lead argument is that HISA is improper because it "gives only the Authority—and not the FTC—the power to draft the regulatory rules that govern the industry." Br. 14-15. Even accepting that construction of the Act, *but see* pp. 20-21, 25, *infra*, "such subdelegations [a]re not unlawful *** so long as the [private] entities 'function subordinately to' the federal agency and the federal agency 'has authority and surveillance over [their] activities.'" *Rettig*, 987 F.3d at 532 (third alteration in original) (quoting *Adkins*, 310 U.S. at 399).

While Plaintiffs attempt to obscure that test, their own authorities confirm that agency approval and oversight are all that the Constitution requires for Congress to involve a private party

in the rulemaking process. Indeed, the case Plaintiffs cite most for the proposition that "when Congress delegates authority to a private entity, it violates the Constitution," Br. 15 n.4, acknowledges that "[s]uch entities may, however, help a government agency make its regulatory decisions, for '[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality' that such schemes facilitate," *Association of Am. R.R. v. United States Dep't of Transp.* ("*Amtrak*"), 721 F.3d 666, 671 (D.C. Cir. 2013) (second alteration in original) (quoting *Panama Ref Co. v. Ryan*, 293 U.S. 388, 421 (1935)), *vacated on other grounds*, 575 U.S. 43 (2015). The problem with the statutory framework in *Amtrak*, the D.C. Circuit found, was that the purportedly private entity did not occupy a "subordinate role in the regulatory process," but instead would "jointly exercise regulatory power on equal footing with an administrative agency." *Id.* at 673. Nothing in that (since-vacated) decision forecloses a private party's drafting of proposed standards subject to agency review, approval, and promulgation.

Plaintiffs' other cases, to the extent they are relevant at all, only reinforce that point. Plaintiffs rely on a footnote in *Sierra Club v. Sigler* for the broad contention that "an agency may not delegate its public duties to private entities." Br. 16 (quoting 695 F.2d 957, 962 n.3 (5th Cir. 1983)). That is misleading in several respects. For starters, *Sigler* did not involve a constitutional claim or an alleged delegation from Congress; the discussion Plaintiffs feature pertains to potential violations of statutory and regulatory duties concerning the Army Corps of Engineers' decision to permit private consultants to help prepare an environmental impact statement. 695 F.2d at 962 n.3. Moreover, the Fifth Circuit "express[ed] no legal opinion" even as to those issues, which "were not specifically presented for [the Court's] review." *Id.* If the *Sigler* footnote has any bearing on this case, its caution against an agency's "improperly rubberstamp[ing]" a private party's proposal serves only to confirm that federal law "permit[s] the participation of private [entities]" in the drafting process, subject to the agency's exercise of "independent judgment." *Id.* The Fifth Circuit

recently made clear that the Constitution does not impose a higher standard: Delegation of legislative authority to a private entity is constitutional "if [the agency] 'independently perform[s] its reviewing, analytical and judgmental functions." *Rettig*, 987 F.3d at 532 (second alteration in original) (quoting *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974)).

It is thus "unsurprising that [Plaintiffs] offer[] no binding precedent to support [their] rule that regulatory power cannot be delegated outside the federal government." *Brackeen v. Haaland*, 994 F.3d 249, 352 (5th Cir. 2021) (en banc); *contra, e.g.*, Plfs' Br. 18 (HISA "should be enjoined" because it "delegates regulatory authority outside the federal government."). Even if the *dissents* Plaintiffs cite had any binding (or persuasive) force, neither the dissent from the denial of rehearing en banc in *Rettig* nor the cited portion of the opinion that failed to "garner[] an en banc majority" in *Brackeen*, 994 F.3d at 267 (en banc per curiam), could bear that weight. As to the former, as explained, the *Rettig* dissent recognizes that "current [Supreme Court] precedent allows *** Congress itself to involve private parties in the rulemaking process." 2021 WL 1324382, at *5 (Ho, J., dissenting from denial of rehearing en banc). Here, unlike in *Rettig* but like "in *Adkins*[,] it was Congress itself, not the agency, that enlisted the assistance of [the Authority] in rulemaking" under HISA. *Id.* at *7. And in that circumstance, even the *Rettig* dissent does not dispute that the delegation is constitutional if the private entity "truly 'function[s] subordinately'" to the agency. *Id.* at *5 (quoting *Adkins*, 310 U.S. at 399).

Needless to say, the dissent from *Brackeen* on which Plaintiffs rely (at 17-18) does not compel otherwise. *See Brackeen*, 994 F.3d at 269 (en banc per curiam) (explaining "en banc majority holds that § 1915(c), which permits Indian tribes to establish an order of adoptive and foster preferences that is different from the order set forth [elsewhere in the Indian Child Welfare Act], does not violate the nondelegation doctrine"). According to the dissent, the provision at issue in that case "empowers tribes to change the substantive preferences Congress enacted *** and to

bind courts, agencies, and private persons to follow them," without any federal agency oversight or approval. *Id.* at 421 (Duncan, J., dissenting). Even in that scenario, in which the delegation is far less constrained than any role the Authority carries out under HISA's scheme, the majority went out of its way to explain that "the Supreme Court has historically upheld even delegations of authority to private entities." *Id.* at 351-352 & n.63 (en banc).

Finally, Plaintiffs' discussion of "several cases" forecloses their argument that allowing the Authority to propose draft standards is unconstitutional because in doing so "it can stop, or veto, the FTC from acting by never presenting the Commission with a rule on a particular subject." Br. 15; *see* Br. 18-20 (discussing *Currin v. Wallace*, 306 U.S. 1 (1939), *Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, 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)). Plaintiffs' own words—that courts routinely uphold statutory schemes giving private entities "a veto over the governmental regulations," with "no violation of the private nondelegation doctrine," Br. 18-20—reveal the hollowness of their concern that allowing a private party to draft and propose standards is improper because it may yield an "effective veto," *see* Br. 9, 15, 20. In holding that such "veto" statutes simply "do[] not delegate legislative power to private parties" to begin with, *Kentucky Division, Horsemen's Benevolent & Protective Association, Inc.*, 20 F.3d at 1417, the cases Plaintiffs cite in no way indicate that had the private entities also been "given the ability to draft the regulations" under the agency's review, the statutes would have "be[en] enjoined," Br. 20; *see Frame*, 885 F.2d at 1127-1129 (holding that "industry referendum" "does not involve any delegation of legislative authority" *and* that Cattlemen's Board's power to "take the initiative in planning" was not "an unlawful delegation of legislative authority" because Board was subject to agency's "surveillance and authority"). Rather, the cases underscore that

Congress's prerogative to limit an agency's ability to draft regulations in the first instance has nothing to do with the nondelegation doctrine.

b. Because Plaintiffs cannot demonstrate as a matter of precedent that the Constitution requires anything more than FTC approval and oversight over the Authority, they attempt to argue as a matter of statutory construction that the HISA scheme lacks such an agency check. They first claim that, under the Act, "the Authority makes the decisions entirely by itself," with the FTC occupying "only an advisory role." Br. 15-16. That is manifestly wrong: "Federal Trade Commission Oversight"—the title of a whole section in the Act, HISA § 1204—is critical to HISA. Congress expressly limited the Authority's role in the rulemaking process to "propos[ing]" standards to the FTC, while assigning the "decision on [a] proposed rule or modification to a rule" to the FTC. HISA § 1204(a), (c) (capitalization omitted). Any standard (or modification to a standard) that the Authority proposes "shall not take effect" under HISA unless it is "approved by the [FTC]" and promulgated as a final rule after the agency subjects it to notice-and-comment and makes an independent determination of whether the proposed standard (or modification) is consistent with the Act and with FTC regulations. *Id.* § 1204(b)-(c).

Plaintiffs nevertheless contend that the Authority can prevent the FTC from exercising its oversight function by refusing to submit a proposed rule in the first place. Br. 15. Even setting aside that HISA directs that the Authority "*shall* submit" proposed standards to the FTC "relating to" a specified list of topics covered under the Act, HISA § 1204(a) (emphasis added), Plaintiffs' abstract concern would at most result in the *absence* of a new binding rule (and of any potential injury to a private party)—*i.e.*, it would only perpetuate the status quo that Plaintiffs seek, Br. 18 (arguing HISA "should be enjoined"). In any event, in the (unlikely) scenario in which the Authority were to decline to submit proposed standards on the subjects that Congress has enumerated, HISA provides that the FTC "may adopt *** interim final rule[s]" that the agency

finds "necessary to protect *** (1) the health and safety of covered horses; or (2) the integrity of covered horseracing and wagering on those horseraces." HISA § 1204(e); *see* FTC Mot. 12 n.4 ("Plaintiffs are wrong in alleging that 'the FTC may not draft rules on its own initiative.'").

Plaintiffs ultimately concede that "HISA gives oversight" to the FTC, but they try to reduce that role to "rubber stamping." Br. 17 (quoting *Lynn*, 502 F.2d at 59). There is no support for that framing either. HISA mandates that the FTC publish each proposed standard (and modification) in the Federal Register and provide an opportunity for public comment. HISA § 1204(b). The FTC must then scrutinize every proposed standard (and modification), together with any public comments, to determine whether it comports with the agency's rules and the many HISA provisions delineating the considerations the Authority must account for when developing proposed standards. *Id.* § 1204(c)(2); *see, e.g.*, *id.* §§ 1206(b)-(d), (g), 1207(a)-(b). The Act also requires the Authority to submit to the FTC "any proposed rule, standard, or procedure developed by the Authority to carry out" rules under HISA, *id.* § 1204(d), and "any guidance issued" by the Authority setting forth its interpretations of and policies on rules under HISA, "relat[ing] solely to *** the administration of the Authority," or concerning "any other matter" the FTC specifies, *id.* § 1205(g). Additionally, the Authority's implementation of the FTC-approved rules is subject to two layers of "prompt[]" *de novo* FTC review, through which an ALJ or the commissioners "may affirm, reverse, modify, [or] set aside" any sanction that flows from the Authority's decisions and "make any finding or conclusion that, in the judgment of the [FTC], is proper and based on the record." *Id.* § 1209(b).

Against this carefully reticulated scheme, Plaintiffs' response once again boils down to a complaint that the FTC has "no experience evaluating regulations for the horseracing industry" and a worry that the Act may not give the FTC sufficient time to consider the Authority's proposals. Br. 17. But as explained, to the extent the former is even material to Plaintiffs' private

nondelegation claim, the FTC's expertise in addressing fraudulent, deceptive, and unfair actions that harm competition and consumers *is* directly related to HISA's purposes. *See* 15-16, *supra*. The 60-day consideration period afforded by the Act is twice the length of the notice-and-comment period provided in most rulemaking, *see* 5 U.S.C. § 553, and substantially longer than the time some agencies are afforded to determine whether a proposed regulation is consistent with applicable law, *see, e.g.*, 16 U.S.C. § 1854(b) (affording 15 days for the Secretary of Commerce to conduct "an evaluation of the proposed regulations [submitted by a regional fishery management council comprising private, state, and tribal actors] to determine whether they are consistent with *** applicable law"). If there were still doubts about whether the FTC's expertise is inadequate in practice, whether 60 days is insufficient to review proposed standards, and whether the agency would be truly "out of luck" if it "were to need more time," Plfs' Br. 17, this Court cannot resolve those unripe issues outside the context of a concrete rule.

c. Plaintiffs' misconstruction of the Act cannot find cover in their oft-repeated claim that "[t]he delegation of authority in HISA lacks historical precedent." Br. 8-9; *see also* Br. 12-14. The robust federal check on the Authority's actions closely parallels the relationship between the Securities Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA," or its predecessor "NASD"), a private organization that has participated in the regulation of the securities brokerage industry for decades. *See* McConnell Br. 1, 10-11 (explaining that HISA was "modeled" on the "FINRA-SEC framework[]").

Despite FINRA's seemingly broad power, Congress "authorize[d] the SEC to exercise a significant oversight function over [its] rules and activities." *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 700 n.6, 730 (1975) (holding that "the SEC's exercise of regulatory authority [over FINRA's predecessor] is sufficiently pervasive to confer an implied immunity" from allegations of antitrust violations); *see Austin Mun. Sec., Inc. v. NASD*, 757 F.2d

676, 680 (5th Cir. 1985) ("Congress granted the SEC broad supervisory responsibilities over the[] self-regulatory organization[].") Like the Authority-FTC model, before any rule proposed by FINRA may go into effect, the SEC must approve the proposed rule and specifically determine that it is consistent with specified statutory purposes. 15 U.S.C. §§ 78*o*-3(b)(6), 78s(b)(2)(C). Additionally, FINRA must "promptly file notice" with the SEC when it "imposes any final disciplinary sanction"; adverse FINRA actions may be appealed to the SEC; the SEC reviews FINRA's decision to ensure rules allegedly violated were "applied in a manner[] consistent with the [relevant statutory] purposes"; and the SEC may affirm, modify, or set aside FINRA's decision. 15 U.S.C. § 78s(d), (e).[4]

Courts have uniformly rejected nondelegation challenges to the decades-old FINRA model as having "no merit." *Sorrell v. SEC*, 679 F.2d 1323, 1326 (9th Cir. 1982) (citing SEC's power "to approve or disapprove of the association's Rules" and SEC's "review of any disciplinary action"); *see also First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Todd & Co. v. SEC*, 557 F.2d 1008, 1010 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 694-695 (2d Cir. 1952). As the Authority's actions are "superintended by [the FTC] in every respect" that FINRA's actions are overseen by the SEC, *Rettig*, 987 F.3d at 533, there is no basis in law or in fact for Plaintiffs' overblown claim that the degree of "meaningful oversight" HISA places over any "delegation of powers" is "unprecedented," Br. 14.

d. Plaintiffs make a last-ditch argument that permitting the Authority to draft the proposed standards is nevertheless unlawful "because the FTC cannot modify" them. Br. 20 (formatting

[4] In certain respects, the FTC's review of Authority decisions is more substantial than the SEC's review of FINRA decisions. *Compare, e.g.*, HISA § 1209(c)(3)(C) (providing for "consideration of additional evidence"), *with* 15 U.S.C. § 78s(e)(1) (providing that SEC hearing "may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction").

omitted). But the "ability for the government to modify" rules is hardly the linchpin of lawful delegation that Plaintiffs try to make it out to be. Br. 21. Indeed, while Plaintiffs derive this supposed element from the fact that the statute upheld in *Adkins* gave "a governmental oversight body the ability to 'approve[], disapprove[], or modif[y]' a private entity's regulatory rules," Br. 20 (alterations in original) (quoting 310 U.S. at 388), Plaintiffs explain that "the Court in *Adkins* did not rely on this fact in its reasoning," Br. 23. What mattered in *Adkins*, and what governs the Fifth Circuit's determination of whether a legislative delegation is unlawful, is whether the delegation "divest[s] [the agency] of its final reviewing authority." *Rettig*, 987 F.3d at 532-533.

None of the other cases Plaintiffs cite (at 20-24) support their suggestion that modification by the agency is a necessary consideration of the nondelegation analysis. According to Plaintiffs' own descriptions, each finding of an unlawful delegation turned primarily on the fact that the regulation at issue precluded the agency from *disapproving* the private entity's determination: In *City of Dallas v. FCC*, the rule "gave blanket approval to the decisions of private operators," Br. 21 (discussing 165 F.3d 341, 357-358 (5th Cir. 1999)); in *National Park & Conservation Association v. Stanton*, the agency "retained 'virtually no control' over council decisions," *id.* (quoting 54 F. Supp. 2d 7, 9 (D.D.C. 1999)); and the dissent from the denial of rehearing en banc in *Rettig* focused on the fact that the agency "could [only] approve but not disapprove" the private standards and actuarial certifications, Br. 22 (discussing 2021 WL 1324382, at *8 (Ho, J., dissenting from denial of rehearing en banc)). Under HISA, by contrast, the FTC undisputedly has the power to disapprove an Authority standard, HISA § 1204(c), and can also reverse or set aside an Authority decision implementing an approved standard, *id.* § 1209(b)(3)(A)(ii), (c)(3)(A)(i). Moreover, *Dallas*, *Stanton*, and *Rettig* all concern an agency's own decision to divest itself of delegated authority, rather than "a Congressional decision to involve private parties in the rulemaking process." 2021 WL 1324382, at *7 (Ho, J., dissenting from denial of rehearing en

banc). And of the "quartet of cases" upholding FINRA's authority based on the SEC oversight Congress directed, Br. 24, none so much as mentions the SEC's ability to modify FINRA's rules.

In any event, there is no functional difference between the modification power that Plaintiffs describe and HISA's direction that, "[i]n the case of disapproval of a proposed rule or modification *** , the [FTC] shall make recommendations to the Authority to modify the proposed rule or modification." HISA § 1204(c)(3)(A). Because "a proposed rule, or a proposed modification to a rule, of the Authority shall not take effect unless *** approved by the [FTC]," no Authority standard that the FTC disagrees with could ever take on binding effect unless the Authority "incorporates the modifications recommended" by the FTC. *Id.* § 1204(b)(2), (c)(3)(B). The FTC also has the power to "adopt an interim final rule, to take effect immediately," pending the Authority's resubmission of a standard that incorporates the FTC's modifications. *Id.* § 1204(e). And under the *de novo* review process that Plaintiffs largely ignore, the FTC may "modify" any sanction the Authority imposes, in addition to "mak[ing] any finding or conclusion that, in the judgment of the [FTC], is proper and based on the record." *Id.* § 1209(b)(3), (c)(3). Any alleged ambiguity in these provisions is only further reason to deny Plaintiffs' unripe claim.

3. Plaintiffs fail to show that any other delegation of power to the Authority is unconstitutional.

Many of the other Authority functions that Plaintiffs attack under their Article I claim are not exercises of "legislative powers" at all. Br. 9. For example, Plaintiffs complain that "HISA delegates legislative authority" to appoint the Nominating Committee, select the Authority's Board, "issue[] subpoenas or exercis[e] its investigat[ions]," collect "its own fees," "issue rule violations," and "commence civil actions." Br. 12-13, 25-26. None of these actions "involv[es] lawmaking" or "the power to enact laws," *Legislative*, BLACK'S LAW DICTIONARY (11th ed. 2019), to be relevant to the allegation that the Act "violate[s] Article 1, Section 1 of the U.S. Constitution,"

Br. 2; *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) (legislative function is one that establishes "standards of legal obligation"); *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gosuch, J., dissenting) ("When it came to the legislative power, the framers understood it to mean power to adopt generally applicable rules of conduct governing future actions by private persons."). Contrary to Plaintiffs' attempt to inject the delegation of non-legislative "regulatory authority" as an element in their first claim, Br. 1, "the non-delegation doctrine applies only to delegations by Congress of legislative power; it has no application to exercises of [other types of] power," *United States v. Bruce*, 950 F.3d 173, 175 (3d Cir. 2020).

Plaintiffs' emphasis on these non-legislative functions illustrates that their nondelegation challenge conflates the separation-of-powers principles arising under Article I of the U.S. Constitution with a separate "doctrine preventing governments from delegating too much power to private persons and entities," which "arises from *** the Due Process Clause." *Boerschig*, 872 F.3d at 707. Indeed, Plaintiffs' insistence that "*Carter Coal* is controlling on" Count One of their complaint underscores that their claim actually centers on due process concerns rather than concerns about dilution of Congress's legislative power. Br. 11; *see Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding delegation to private entity implicated "rights safeguarded by the due process clause of the Fifth Amendment").

Plaintiffs read *Carter Coal* to hold that Congress cannot "give[] economically self-interested actors the power to regulate their competitors." Br. 26 (formatting omitted). That categorical proposition is incorrect. The Fifth Circuit has summarized *Carter Coal* and the other early twentieth century Supreme Court cases on which Plaintiffs rely, *see* Br. 26-27, as supplying the more nuanced proposition that "when private parties have the *unrestrained* ability to decide whether another citizen's property rights can be restricted, any resulting deprivation happens without 'process of law.'" *Boerschig*, 872 F.3d at 708 (emphasis added) (discussing *Carter Coal*

Co., 298 U.S. at 310-311); *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 118-119 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 140-141 (1912)). Thus, a statute violates the doctrine only if it suffers from "the twin ills that doomed" the laws at issue in those *Lochner*-era cases: (1) the "delegation to private parties involves the unfettered discretion that violates due process" because the statute does not "impose[] a standard to guide" the private entities; and (2) the private entities' actions are not "subject to judicial review." *Id.*

Plaintiffs do not even attempt to show that HISA fails either factor. Nor could they. Even setting aside the FTC's extensive oversight, the Authority hardly exercises "unfettered discretion" that is beyond "judicial review." *Boerschig*, 872 F.3d at 708. Plaintiffs pay little attention to the HISA provisions that guide the Authority's decisions (including with respect to the composition of its Nominating Committee and Board). *See, e.g.*, HISA §§ 1203, 1206(b), (c)(5), (g), 1207(a)-(b). And Plaintiffs nowhere address the fact that any decision that "aggrieve[s]" a private party ultimately would be subject to judicial review in federal court. *See id.* § 1209(b)(1), (3)(B) (providing that Authority must "promptly" notify FTC of sanction, and FTC's determination on review constitutes "final" agency action); *see also* 5 U.S.C. §§ 702-704 (APA review provisions). Both of those undisputed features of the Act "distinguish[] this case from the *Eubank-Roberge-Carter Coal* situation in which" "no standard exist[s] to guide" the private party and "the actions of the private party are unreviewable." *Boerschig*, 872 F.3d at 708-709; *see* Auth. Mot. 22-24.[5]

[5] *Amicus* NAARV takes issue with the fact that HISA locates judicial review within federal rather than state courts. *See* NAARV Br. 10 (arguing that HISA is "problematic and significant to [its] members *** because an appeal of [the FTC's determination] *** requires an appeal to a court of law, but in the case of the Act, not to a state court"). But affording the opportunity for Article III judicial review obviously does not violate due process. NAARV also raises a concern that a "covered person has no right to review before the [FTC]," but that is at odds with *amicus*'s acknowledgment that the Act ensures "findings of fact [and] conclusions of law" from an "FTC-appointed Administrative Law Judge[]," subject to further agency review based on the Commissioners' independent determination. *Id.*

III. HISA DOES NOT GIVE ECONOMICALLY SELF-INTERESTED ACTORS THE POWER TO REGULATE THEIR COMPETITORS

Plaintiffs are not entitled to summary judgment on Count Four of their complaint. Plaintiffs concede that their due process and nondelegation claims are coterminous. *See* Br. 26 ("The legal analysis is the same whether the economic self-interest constitutes a violation of the Due Process clause or the private nondelegation doctrine."). Accordingly, for the same reasons Plaintiffs cannot prevail on their nondelegation claim, they cannot prevail on their due process claim either.

To the extent that Plaintiffs mean to articulate some additional notion that HISA raises conflict-of-interest problems by allegedly empowering industry actors to regulate their competitors, their premise does not rise "above the speculative level" necessary to clear the motion-to-dismiss standard, let alone the higher bar for summary judgment. *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 545 (2007); *see* FED. R. CIV. P. 56(c)(1) ("A party asserting that a fact cannot be *** disputed must support the assertion[.]"). Plaintiffs' theory of self-dealing would require multiple leaps of conjectural, improbable, and unexplained acts of bad faith: special interests would have motivated the Nominating Committee members' selection; at least five members of the Nominating Committee would have advanced those special interests in appointing the Board and members of the standing committees; a majority of the standing committees and Board would conspire to seek to circumvent internal and statutory constraints to advance those special interests; the Board majority would successfully tailor proposed standards to benefit only the special interests; the FTC would violate its statutory duties and disregard public comment to promulgate those standards into enforceable rules; and those final rules would have a disparate or unfair effect on unnamed competitors.

Several provisions of HISA (and the Authority's own bylaws) foreclose that chain of possibilities by protecting against the hypothetical self-dealing Plaintiffs allege. For example, a

majority of the Board must be (and is) "independent"—*i.e.*, "selected from outside the equine industry." HISA § 1203(b)(1)(A) . Of the remaining members, the Act ensures fair representation among each of the six equine constituencies (trainers, owners, breeders, tracks, veterinarians, state racing commissions, and jockeys). *Id.* § 1203(b)(1)(B)(ii). No member of the Board—including the four members that Plaintiffs charge with "be[ing] economically self-interested actors, Br. 27—may (1) "ha[ve] a financial interest in, or provide[] goods or services to, covered horses"; (2) presently serve as an official or officer in the horseracing industry; or (3) be employed by or have a familial or business relationship with anyone covered under categories (1) and (2). HISA § 1203(e). The Authority is also required to "provide for adequate due process" by ensuring "impartial hearing officers." *Id.* § 1208(c)(3). And on top of those safeguards, HISA ensures the FTC's independent review and approval of all Board actions that could have legal effect on private parties. *Id.* §§ 1204, 1209.

It is little surprise, then, that Plaintiffs do not point to any evidence to support their self-dealing allegations, much less to "show[] that there is no genuine dispute." FED. R. CIV. P. 56(a). If any doubt remains, Plaintiffs' raw speculation that certain Board members will be "economically self-interested," "will wield considerable influence and likely encourage the other board members how to vote," and will "artificially increas[e] the costs and fees of participation" in covered horseraces and subject Plaintiffs to "onerous regulations," Br. 27-28, only demonstrates that their claim is (at best) unripe.[6]

[6] Given all parties' agreement that "they do not expect discovery or an evidentiary hearing will be necessary" and that "[n]o party may file more than one motion for summary judgment without leave of court," ECF No. 16, at 2-4, Plaintiffs' decision to forgo summary judgment on their public nondelegation claim (Count II) and their appointments clause claim (Count III)

CONCLUSION

This Court should deny Plaintiffs' motion for partial summary judgment.

Respectfully submitted,

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indicates that they have (understandably) thrown in the towel on those arguments. Accordingly, the *amicus* brief by The American Quarter Horse Association, focusing on appointments arguments and removability arguments (which Plaintiffs rightly never asserted) is irrelevant. ECF No. 51. In any event, *amicus*'s predicate assertions that "the Authority has been created by federal statute" and that its "initial nominating committee members have been appointed by the government," *id.* at 11, are simply mistaken. As Plaintiffs recognize, "it is undisputed that the Authority is a private entity"; the Authority was established before HISA was enacted; and "neither Congress nor any other governmental actor played a role in selecting the Nominating Committee." Br. 5-6, 17, 25.

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2021, I served the foregoing brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

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