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

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

Plaintiffs,

v.

JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN, JR.; NANCY COX; JOSEPH DUNFORD; FRANK KEATING; KENNETH SCHANZER; the HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.; the FEDERAL TRADE COMMISSION; REBECCA KELLY SLAUGHTER, in her official capacity as Acting Chair of the Federal Trade Commission; ROHIT CHOPRA, in his official capacity as Commissioner of the Federal Trade Commission; NOAH JOSHUA PHILLIPS, in his official capacity as Commissioner of the Federal Trade Commission; and CHRISTINE S. WILSON, in her official capacity as Commissioner of the Federal Trade Commission,

Defendants.

No. 5:21-cv-00071-H

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

In accordance with this Court's Scheduling Order [Dkt. 16], and Order modifying it [Dkt. 29], Plaintiffs (the "Horsemen") file this Reply in Support of their Motion for Partial Summary Judgment [Dkt. 37] and brief in support thereof [Dkt 38] (the "Horsemen MSJ"). The Horsemen reply to 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 [Dkt. 56] (the "Authority Response") and to the Brief in Support of Defendants the Federal Trade Commission, Acting Chair Kelly Slaughter, Commissioner Rohit Chopra, Commissioner Noah Phillips, and Commissioner Christine Wilson's Opposition to Plaintiffs' Motion for Partial Summary Judgment [Dkt. 58] (the "FTC Response").

SUMMARY OF ARGUMENT

I. A. The Defendants have no response to the fatal flaw that HISA prohibits the FTC from "modif[ying]" the regulatory rules drafted by the Authority. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). At least six different cases in various circuits, including the Fifth Circuit, have analyzed private nondelegation doctrine questions based on whether a governmental agency can "approve[ ], disapprove[ ], *or modif[y]*" a private entity's regulatory rules. *Adkins*, 310 U.S. at 388 (emphasis added). The ability to modify the minimum coal prices proposed to the governmental agency in *Adkins* gave it the ability to rewrite the prices. In HISA, the government cannot rewrite the rules. Instead, the process is backward: the FTC must make recommendations to the Authority to modify its rules, but only the Authority has the power to modify them. 15 U.S.C. § 3053(c)(3) (HISA § 1204(c)(3)).

The Defendants concede that "the FTC lacks independent expertise in the horseracing

industry." FTC Response 4. Because the FTC has no expertise regulating the horseracing industry it cannot provide the proper oversight required by the Supreme Court in *Adkins*. 310 U.S. at 399.

I. B. Defendants rely on *State v. Rettig*, 987 F.3d 518 (5th Cir. 2021), but that decision is not controlling on this case. HISA does not "condition" agency action on private market approval, as *Rettig* allows. HISA conditions private action on governmental approval. Moreover, *Rettig* was not a congressional delegation case but an agency subdelegation case. The *Rettig* dissent from rehearing en banc is persuasive and supports the Horsemen's motion because those five judges found the facts to be closer to those of this case. *See Texas v. Rettig*, 993 F.3d 408, 412-13 (5th Cir. 2021) (Ho, J., dissenting).

I. C. *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (en banc) and *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701 (5th Cir. 2017), also are not controlling on this case. In *Brackeen*, a majority of the court analyzed the delegation as one to a sovereign Indian tribe; however, seven judges analyzed it as a delegation to a private entity and would have found a violation of the nondelegation doctrine; therefore, their opinion is persuasive for this case. *Boerschig* did not raise an Article I, Section 1 question because it involved a state delegation of power under the Due Process clause and not a federal delegation.

I. D. The "intelligible principle" standard applies to a public nondelegation doctrine claim but is not the appropriate test for a private nondelegation claim like the one in this case.

I. E. The Authority was created explicitly to enforce HISA, so claiming that the Court cannot enjoin all of its activities is disingenuous.

II. HISA violates the Due Process clause because it gives economically self-interested actors the power to regulate their competitors. The self-interest of the Authority board and committee members is not speculative because the statute prescribes their self-interest; the

shadowy nature of their appointment alludes to it; and the actual makeup of those named confirms their self-interest.

III. The Horsemen's claims for partial summary judgment are justiciable. The actual text of HISA shows that the FTC "shall" promulgate rules. In addition, HISA's ban on furosemide (or Lasix) is required go into effect.

III. A. Plaintiffs' members are owners and trainers of Thoroughbred horses, so all of their horses which race are covered by the act, and that gives them standing to bring the lawsuit.

III. B. HISA's delayed implementation does not defeat the Horsemen's standing. It is "irrelevant to the existence of a justiciable controversy that there will be a time delay before disputed provisions will come into effect." *Roman Catholic Diocese v. Sebelius*, 927 F. Supp. 2d 406, 420 (N.D. Tex. 2013) (J. Boyle). A future injury suffices for standing if it is certainly impending or there is a substantial risk that the harm will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). The mere prospect of having one's horse inspected at some point in the future for a potential violation is a present injury in fact. *See Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266, 268 (5th Cir. 2015).

III. C. There is no law to support the Authority's argument that Plaintiffs must show every permutation of regulations emanating from HISA will be more burdensome than the current regulatory system.

ARGUMENT

HISA represents an unprecedented and unconstitutional delegation of governmental powers to a private entity. In an attempt to make the Authority seem benign, Defendants compare it to the governing bodies of other American sports: the NFL, NBA, MLB, and the NHL. *See* Authority Response 3; FTC Response 2. But Congress has not delegated regulatory power to those

private sports leagues. The Authority is "unique in that it combines these various features into an unprecedented hybrid private/governmental regulating entity." American Quarter Horse Association Br. Amicus Curiae [Dkt. 51] 12. The "lack of historical precedent for this entity" is "[p]erhaps the most telling indication of the severe constitutional problem." *Ass'n of Am. R.R. v. U.S. Dep't. of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013) ("*Amtrak*") (*vacated and remanded on other grounds by Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 135 S. Ct. 1225 (2015)). The Authority is unprecedented in at least four ways: (1) The FTC lacks expertise in regulating horseracing; (2) HISA gives the FTC limited guidance on how to oversee the Authority; (3) The Authority is not a longstanding, known, trustworthy entity but was, in practicality, created by HISA; and (4) the FTC cannot modify rules proposed by the Authority. Horsemen Resp. Br. to Authority and FTC Motions to Dismiss [Dkt. 54] ("Horsemen Response") 4-10. The Court should find that this unprecedented delegation of power to the Authority violates the nondelegation doctrine and the Due Process clause.

In its Response, the FTC does not dispute any of Plaintiffs' proposed facts; therefore, this Court should consider the facts asserted by Plaintiffs in their Motion for Partial Summary Judgment, [Dkt. 38] at 3-8, to be undisputed between the Horsemen and the FTC. Fed. R. Civ. P. 56(c). The Authority does not dispute facts ¶¶ 1-18 and ¶¶ 20-21. Authority Response 4, n.2. The Authority attempts to dispute facts ¶ 19 and ¶¶ 22-26 but only by mischaracterizing these facts as "unfounded conclusions and legal assertions" Authority Response 4, n.2. Yet the Authority provides no counter declarations or affidavits of its own, nor is it able to dispute the declarations made by the Horsemen in the Appendix to their Motion for Partial Summary Judgment [Dkt. 39]; therefore, the Authority has failed to properly dispute the facts in accordance with Federal Rule of Civil Procedure 56(c)(1), and the Court should consider these facts undisputed. *See Am. Family*

Life Assur. Co. v. Biles, 714 F.3d 887, 896 (5th Cir. 2013) (Rule 56 does not require a court to sift through the record in search of evidence to support a party's opposition to summary judgment). For facts ¶¶ 27-28, the Authority merely states they "have been superseded by events discussed in the text of this opposition." Authority Response 4, n.2. Whether these facts have been superseded or not, this statement does not amount to a dispute of their truth; therefore, the Court also should consider these two facts to be undisputed.

For the following reasons, this Court should grant Plaintiffs' Motion for Partial Summary Judgment: (I) HISA violates the private nondelegation doctrine; (II) HISA violates the Due Process clause; and (III) Plaintiffs' claims are justiciable.

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

A. Congress cannot delegate the power to "modify" rules from the government to a private entity.

1. HISA prohibits the FTC from "modifying" the rules drafted by the Authority.

No court has ever upheld a delegation of regulatory authority to a private entity that did not allow the government to modify the rules proposed to it by the private entity. HISA's failure to allow the FTC to modify the Authority's rules is fatal to the statute's constitutionality. Defendants offer no rejoinder to this argument in their response briefs but, instead, rewrite HISA in an attempt to divert the Court's eyes from this fatal flaw. In its Motion to Dismiss, the Authority claimed the FTC could "consider modifications." Motion to Dismiss and Brief in Support by Authority Defendants [Dkt. 34] ("Authority MTD") 19. In its response brief, it now claims the FTC can "insist on modifications." Authority Response 11. It claims there is "no functional difference" between asking for modifications and making modifications. *Id*. at 25. The FTC suggests that, as a "practical matter," it can modify rules. FTC Response 12. But the Supreme

Court has recognized there *is* an important difference between the power to ask and the power to act: "Congress cannot reduce the Chief Magistrate to a cajoler-in-chief." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 502 (2010). In this case, Congress has reduced the FTC to, at most, a "cajoler-in-chief." *Id*. The Commission can only suggest modifications to the Authority, but it cannot make any modifications itself. *See* 15 U.S.C. § 3053(c)(3) (HISA § 1204(c)(3)). Congress cannot take away governmental power in such a fashion.

The FTC relies on *Currin v. Wallace*, 306 U.S. 1 (1939), and *Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406 (6th Cir. 1994), arguing that the Authority may merely "draft proposals and provide input." FTC Response 10. But in *Currin*, the private entity could not draft rules. 306 U.S. at 6. Similarly, in *Turfway*, the private entity could not draft rules but merely was given the ability to assent to their application. 20 F.3d at 1416–17. Here, the Authority does all the drafting at both the initial and the modification stages of rulemaking. The FTC claims that "legislative" or "lawmaking" power resides only in the "power to promulgate." FTC Response 7. But drafting a law is the necessary first step in promulgating it. *See Advanced Media Networks, LLC v. AT&T Mobility LLC*, No. 3:15-CV- 3496-N, 2017 WL 3987201, at *2 (N.D. Tex. August 25, 2017) ("In the standard-making process . . . a 'draft,' as the Court used the term, refers to a draft promulgated by the [standards development organization] for public comment."). The Authority's role is not "subordinate[]" to that of "law-making." FTC Response 10. It *is* law-making.

Furthermore, HISA gives the FTC only 60 days in which to approve or disapprove of the rules drafted by the Authority. 15 U.S.C. § 3053(c)(1) (HISA § 1204(c)(1)). Defendants argue this 60-day period is long enough for the FTC to act. Authority Response 22; FTC Response 15. But whether 60 days proves adequate or not in practice, the fact remains that the statute limits the

ability of the FTC to take whatever time it deems necessary to evaluate the Authority's rules.

Defendants mischaracterize the FTC ability to enact interim final rules under HISA. Authority Response 20-21, 25; FTC Response 11-13. Contrary to FTC assertions, the statute does not give the FTC the power to draft rules "whenever it deems appropriate." FTC Response 11. Rather, the HISA provision is subject to the Administrative Procedures Act, which limits interim final rulemaking to situations in which the agency has good cause to find that notice-and-comment would be impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b)(B). Such emergency gap-filling is only acceptable when a delay in rulemaking would cause real harm. *See U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 (5th Cir.), *amended*, 598, F.2d 915 (5th Cir. 1979). HISA does not abrogate these strictures of emergency rulemaking. 15 U.S.C. § 3053(e) (HISA § 1204(e)). And in all nonemergency situations, the FTC is prohibited from either drafting rules or modifying Authority rules.

The Authority argues *Amtrak* allows private entities to "help" government agencies make rules. Authority Response 17. But without the ability to modify, it is the FTC that is left to "help" the Authority draft rules. The FTC attempts to distinguish *Amtrak* because there the private entity could both propose rules and veto the government's rules while under HISA the Authority can propose rules but not veto the government's rules. FTC Response 12-13. But the government cannot draft rules under HISA, so there is nothing to veto. 15 U.S.C. § 3053 (HISA § 1204). For this reason, HISA is an even greater delegation of power than the statute enjoined in *Amtrak*.

The FTC relies on *Parker v. Brown*, 317 U.S. 341 (1943), for the proposition that a private entity can both draft regulatory rules and withhold consent for their approval. But in *Parker* these two powers were divided between different private entities. 317 U.S. at 346–47. Further, *Parker* is not a nondelegation case; it addressed the program at issue in light of the Sherman Act and the

Interstate Commerce clause. *Id*. at 344. And as with Defendants' other cases, the government was allowed to "modify the program and approve it as modified." *Id*. at 347. HISA remains unprecedented in its prohibition on government modification of rules drafted by a private party.

2. *Adkins* requires approval, modification, and oversight.

The FTC attempts to rely on *Adkins* for the proposition that a private entity may "assist and advise" or "aid" a governmental entity in its rulemaking. FTC Response 2, 4, 8, 15. But HISA is fundamentally different from the situation in *Adkins*. In *Adkins*, the government had the explicit authority to modify minimum coal prices proposed by private entities. 310 U.S. at 388. The government's ability, in effect, to rewrite the private proposals kept the private entities in an advisory role. As the FTC admits, the government in *Adkins* "determine[d] the prices." FTC Response 8. However, in this case, as the FTC admits, "the Authority's power to draft rules and to revise them based on the FTC's feedback may affect the content of rules that the FTC ultimately approves." *Id*. at 11. Whole subject matters are off limits to the FTC unless the Authority proposes rules on them. And if the FTC refuses to approve a rule, the Authority can simply withhold submitting a modified rule. In other words, the FTC is left waiting and cajoling the Authority to draft rules at the private party's discretion.

To survive the delegation analysis in *Adkins*, a statute must give the government, at a minimum, the ability to "approve[ ], disapprove[ ], or modif[y]" a private entity's rules. *Adkins*, 310 U.S. at 388. The Authority ignores this test and a host of cases that rely on it.[1] Authority Response 24. As the *Adkins* Court reasoned, the private entity must "function subordinately" to

[1] *See, e.g., Dep't. of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43 (2015); *Texas v. Rettig*, 993 F.3d 408 (5th Cir. 2021) (Ho, J., dissenting); *Amtrak*, 721 F.3d 666 (D.C. Cir. 2013); *Pittston Co. v. U.S.*, 368 F.3d 385 (4th Cir. 2004); *Agendia, Inc. v. Azar*, 420 F. Supp. 3d 985 (C.D. Cal. 2019); and *Planned Parenthood Southeast, Inc. v. Strange*, 9 F. Supp. 3d 1272 (M.D. Ala. 2014).

the government, which must maintain the power to approve and modify. *Adkins*, 310 U.S. at 399. In addition, the government must have "authority and surveillance over the activities" of the private entity. *Id*. While HISA gives the FTC the ability to approve rules, it does not give it the power to modify them or to oversee the activities of the Authority.

Defendants rely on a series of cases upholding the Financial Industry Regulatory Authority ("FINRA"), but the Maloney Act gives the Securities Exchange Commission ("SEC") all three powers: approval, modification, and surveillance. *Contra* Authority Response 22-23, 25; FTC Response 4-5, 17-18. The ability to draft by modification is key to ensuring that FINRA "functions subordinately" to the SEC. *See* 15 U.S.C. § 78s(c); Horsemen MSJ 24; Horsemen Response 15-16. Further, even the Authority admits that the SEC's "oversight" over FINRA is "pervasive." Authority Response 22. By contrast, the FTC's oversight over the Authority is nonexistent because "the FTC lacks independent expertise in the horseracing industry." FTC Response 4. The Authority claims that regulating horseracing fits with the FTC mission and that the Authority will make up for the FTC lack of experience in the industry by supplying its own expertise. Authority Response 15, 21-22. That admission proves the Horsemen's point. Because the FTC will be relying on the Authority to provide expertise in the field of horseracing, the FTC cannot properly provide the "authority and surveillance over the activities" of the Authority that courts require. *Adkins*, 310 U.S. at 399; *see also* Horsemen Response 5-6. Thus, HISA fails even the Authority's claim that the government must be given only "approval and oversight" over the private entity. Authority Response 6, 16, 20.

B. *State v. Rettig* differs from this case because it involves a condition and a subdelegation and not a delegation.

As the Authority acknowledges, *State v. Rettig*, 987 F.3d 518 (5th Cir. 2021), involves placing a "reasonable condition" on governmental action rather than a true delegation of authority

to a private entity. Authority Response 6, 10, 13-14, 16. Further, the case involves a "subdelegation" of authority from a governmental agency rather than a congressional delegation of authority. *Id*. at 14, 18. For these reasons, the Horsemen agree with the Authority and disagree with the FTC that *State v. Rettig* represents "binding precedent from . . . the Fifth Circuit" that undermines the Horsemen's claim. FTC Response 15-16.

1. HISA does not "condition" agency action on private market approval, as *State v. Rettig* allows.

In *State v. Rettig*, the Department of Health and Human Services (HHS) certified Medicaid rates based on actuarial standards used by private accountants. 987 F.3d at 524–25. Therefore, HHS made the primary policy decision, and the role of the private accountants was merely advisory. HISA does the opposite: the private entity initiates the action and performs the bulk of the work, subject to a "rubberstamping" by the FTC. *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3. (5th Cir. 1983). In *Rettig*, "certification [of the rate was] a small part of the [overall managed care organization contract] approval process." 987 F.3d at 533. By contrast, under HISA the private Authority is tasked with drafting the entire regulatory structure of the Act along with many other duties. 15 U.S.C. § 3053 (HISA § 1204). Therefore, Defendants are wrong to equate the "reasonable condition" in *State v. Rettig* with the unconstitutional delegation of authority under HISA. *Contra* Authority Response 10, 18; FTC Response 8, 11. Likewise, *American Society for Testing & Materials, et al. v. Public.Resource.Org, Inc.*, 896 F.3d 437 (D.C. Cir. 2018), also should be distinguished because in that case the government merely incorporated the preexisting standards of a private entity. *Id*. at 442.

The Authority cites a variety of cases that condition governmental action on industry approval, claiming that the ability to draft regulations is not central to these cases. *See* Authority Response 19. But this is simply not so. *See* Horsemen MSJ 18-20. The Supreme Court said

otherwise in *Currin* when it distinguished *Carter v. Carter Coal Company*, 298 U.S. 238 (1936), by stating, "This is not a case where a group of producers may make the law and force it upon a minority." 306 U.S. at 15–16. In *Currin*, "Congress ha[d] merely placed a restriction upon its own regulation by withholding its operation" unless two-thirds of the local tobacco growers voted in favor of a referendum. *Id*. at 16. Other courts have followed suit in cases in which statutes require a similar industry referendum to take effect. *See Turfway*, 20 F.3d 1406; *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992); and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989). These cases are vastly different from the present case, in which the Authority has sole authority to draft regulations.

Other cases mentioned by the FTC are also inapposite. *See* FTC Response 9. In *Cospito v. Heckler*, 742 F.2d 72 (3d Cir. 1984), the statute allowed the government to modify the private commission's decisions regarding psychiatric hospital certification. 742 F.2d at 88–89; *id.* at 91 (Becker, J., dissenting). In *Pittston*, the private entity was tasked with only the administrative action of collecting coal retiree health benefit funds that had already been set by the government. 368 F.3d at 396, 398. In *Perot v. Federal Election Commission*, 97 F.3d 553 (D.C. Cir. 1996), the private entities hosting presidential debates were merely given "discretion in interpreting" which "objective criteria" to use to select participants. *Id*. at 556, 560. Finally, in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), there was no private entity involved at all: the issue was whether the government had unconstitutionally delegated power to a government agency, a situation which adheres to a different standard. *Id.* at 430. *See also below* at 13.

2. *State v. Rettig* is an agency subdelegation case, and *Texas v. Rettig* is persuasive.

The Authority distinguishes *Texas v. Rettig* because it involves an agency subdelegation of power and not a congressional delegation. Authority Response 14. But the same distinction applies

to *State v. Rettig*, on which Defendants rely so heavily.[2] Therefore, the Authority cannot protest that Plaintiffs draw upon a dissent from rehearing en banc because, by its own reasoning, the Authority has already conceded that both *State v. Rettig* and *Texas v. Rettig* are of persuasive authority only. *Contra* Authority Response 1, 6, 14.

Of the two, *Texas v. Rettig* is more persuasive because, as explained by the five judges in the opinion, the facts are closer to those in this case. In *State v. Rettig*, the panel found that HHS retained the ability to approve, disapprove, or modify the actuarial rate by issuing its own rule. 987 F.3d at 532. However, according to Judge Ho, HHS could approve but not disapprove or modify the actuarial rates. *Texas v. Rettig*, 993 F.3d at 416. Therefore, he and his colleagues sought a rehearing. Similarly, a delegation problem exists with HISA because it does not allow the FTC to modify the Authority's rules.

C. Other Fifth Circuit cases also are persuasive but not controlling on this case.

Another Fifth Circuit case with a highly persuasive opinion is *Brackeen*. Again, Defendants protest that the Horsemen rely on an opinion that does not command a majority of the court. Authority Response 18; FTC Response 15. But the court majority did not analyze the delegation as one to a private entity but as one to a sovereign Indian tribe: "the limitations on Congress's ability to delegate its legislative power are 'less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" *Brackeen*, 994 F.3d at 346 (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975)). The majority held that the statute "validly integrates tribal sovereigns' decision-making into federal law, regardless of whether it is characterized as a prospective incorporation of tribal law or an express delegation

[2] For the same reason, the Court should distinguish *United States Telecom Ass'n v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004), cited by the FTC. FTC Response 9.

by Congress under its Indian affairs authority." *Brackeen*, 994 F.3d at 352. But the seven judges cited by the Horsemen did analyze the delegation as one to a "private entity," and they would have found a violation of the nondelegation doctrine. *Id*. at *422 (opinion of Duncan, J.). Therefore, their reasoning is persuasive: an act is "unconstitutional [when] it delegates [regulatory] authority outside the federal government." *Id*.

Defendants again rely on *Boerschig*. Authority Response 7, 11, 26-27; FTC Response 7, 16-17. They claim the case stands for the proposition that the Fifth Circuit does not recognize the nondelegation doctrine for claims such as this one but only the Due Process clause and that judicial review is all that is necessary to cure a Due Process claim. Authority Response 7, 11, 26-27; FTC Response 7, 16-17. But as the Horsemen explained in their response brief, the court analyzed *Boerschig* under the Due Process clause and not Article I, Section 1 because the statute at issue was a state statute and not a federal statute. Horsemen Response 2-3. Therefore, *Boerschig* does not foreclose a private nondelegation doctrine claim.

D. The "intelligible principle" is not the standard to evaluate a private nondelegation doctrine claim.

In their Motion for Partial Summary Judgment, the Horsemen argued that whether Congress provided an "intelligible principle" to follow is the standard for evaluating a delegation of authority to a public entity but not to a private entity. Horsemen MSJ 10. "Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority." *Amtrak*, 721 F.3d at 671. *Any* delegation of regulatory authority to a private entity is unconstitutional. Defendants' silence in their response briefs conveys their agreement with Plaintiffs on this point.[3]

[3] If this Court believes that the "intelligible principle" standard applies, Plaintiffs reserve the right to argue that this standard should be overturned. *See* Horsemen MSJ 10.

Defendants attempt to disparage some of the cases the Horsemen rely on by calling them "Lochner-era cases." Authority Response 27; FTC Response 17. But as Justice Gorsuch pointed out in his dissenting opinion in *Gundy*, these cases are still good law and should not be ignored simply because they "happened to be handed down during the same era as certain of the Court's now-discredited substantive due process decisions." *Gundy v. U.S.*, 139 S. Ct. 2116, 2138 (2019) (Gorsuch, J., dissenting). The Horsemen are not hoping to "overturn precedent"; they are simply asking that extant precedent be followed. *Contra* Authority Response 2. On the contrary, it is Defendants who are asking this Court to expand the permissible scope of private regulatory authority beyond that which any court has ever done.

E. The Authority was created explicitly to enforce HISA.

The Authority is disingenuous to state that "much of the activity that Plaintiffs challenge would occur even if HISA had never been enacted." Authority Response 12. Defendants state the Authority "predates" HISA by "months" and was "already existing" when HISA was enacted. Authority Response 1, 4, 12; FTC Response 4. But the Authority was created for the very purpose of enforcing HISA. *See* Horsemen Response 8-9. The Authority claims it merely follows its Bylaws, but its Bylaws' definitions change "upon enactment of the contemplated Horseracing Integrity and Safety Act of 2020 or a substantially similar act." Authority MTD Appendix [Dkt. 34-1], at App. 51 § 7.7. Perhaps the Authority could draft rules, issue subpoenas, and charge fees all it wants, but if HISA had not imbued these powers with governmental authority, the Authority would not exist.

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

The constitutional analysis of a delegation to a private entity is the same whether it arises from Article I, Section 1 or the Due Process clause: "neither court nor scholar has suggested a

change in the label would effect a change in the inquiry." *Amtrak*, 721 F.3d at 671 n.3. Defendants do not object to the notion that these two claims are "coterminous." Authority Response 28. Therefore, this Court may use either constitutional clause to enjoin HISA.

Defendants object that the Horsemen's assertion of conflicts of interest within the Authority are "speculative" and that any such charge is "unripe." Authority Response 7, 28, 29; FTC Response 18. Meanwhile, the Authority is moving full-steam ahead to enforce HISA, and there is nothing "speculative" about what has transpired thus far. A small group of industry elites conspired with congressional leaders to incorporate a new private entity the night before a bill was introduced to imbue that same entity with legislative powers that give its activities the force of law. Horsemen Response 8-10. The incorporation documents created a shadowy, multi-layered process which made it impossible to know who selected the Nominating Committee members and why they selected the particular Authority board members. First Amended Complaint ("FAC") ¶¶ 51, 56, 60–62, 65, 111–17. The Nominating Committee moved forward on May 5 and selected the Authority board members and Standing Committee members in the middle of this litigation.[4] The Authority board moved forward and selected its Interim Executive Director on June 16.[5] Even two of the so-called "Independent" Authority directors include both a former board member of Churchill Downs and a former president of the New York Racing Association. Therefore, the entire process thus far has been run by a minority in the industry—by the Authority's own admission, "the Humane Society, the Jockey Club, the Breeders' Cup, Animal Welfare Action, several racetracks, and many horsemen." Authority MTD 5.

[4] Horseracing Integrity and Safety Authority, *Announcements*, https://rhino-amethyst-shsh.squarespace.com/#Anno (retrieved June 16, 2021).

[5] Thoroughbred Daily News, "HISA Tabs Hank Zeitlin as Interim Executive Director," https://www.thoroughbreddailynews.com/horseracing-integrity-and-safety-authority-tabs-hank-zeitlin-as-interim-executive-director/ (retrieved June 17, 2021).

This minority of owners and breeders who are members of the Jockey Club competes directly with the thousands of owners and breeders who belong to Plaintiffs' associations. FAC ¶¶ 120-123. The Jockey Club is an invitation-only, private club.[6] The Breeders' Cup and "several racetracks" conduct races in which both groups compete. If those racetracks want to impose new standards on the horses competing in their races, they may be free to do so, as some have. But using the federal government to force thousands of other horsemen, against their will, to pay fees to this minority, to be subject to subpoenas and investigations, and to follow rules promulgated by this elite minority violates the Due Process clause of the U.S. Constitution. *See Carter*, 298 U.S. 238. For that reason, the Horsemen bring this lawsuit and are honored to be joined in their efforts by Amici American Quarter Horse Association and North American Association of Racetrack Veterinarians, who agree that this threat to the constitution is not "speculative" but real.

III. Plaintiffs' Complaint is justiciable.

"[I]n all standing inquiries, the critical question is whether at least one petitioner has 'alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.'" *Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock*, No. 5:21-cv-00114-H, 2021 WL 2385110, at *7 (N.D. Tex. June 1, 2021) (quoting *Horne v. Flores*, 557 U.S. 433, 445 (2009) (emphasis omitted)).

The FTC defends by arguing that it has not yet proposed any rules. FTC Response 5. However, such an argument cannot seriously be countenanced, as the FTC cannot propose *any* rules under HISA other than interim rules under certain specified conditions. 15 U.S.C. § 3053 (HISA § 1204). That is one of the very bases on which Plaintiffs bring their Complaint.

[6] For membership list, see http://www.jockeyclub.com/default.asp?section=About&area=11 (retrieved June 16, 2021).

The FTC also argues that whether its oversight role under HISA offends separation of powers doctrine is a "strictly factual" inquiry, but that assertion ignores the unambiguous meaning of the text. The statute reads, "The Commission *shall* approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—(A) this chapter [HISA]; and (B) applicable rules approved by the Commission." 15 U.S.C.A. § 3053(c)(2) (HISA § 1204(c)(2)) (emphasis added). The "shall" leaves the FTC no choice—it must approve those rules consistent with HISA and with rules applicable to the rule in question. And, the only rules applicable to horseracing integrity that will have been approved by the Commission are those that already (in rubberstamp fashion) have been approved by the Commission. Thus, to deny that the statute renders the FTC a rubberstamp of the Authority ignores the unambiguously expressed intent of Congress and runs afoul of the doctrines set forth in *Chevron*, which is likely why Defendants never once engage the actual text of the statute in discussing this issue. For the same reason, the FTC's reliance on language in *DM Arbor Ct., Ltd. V. City of Houston*, 988 F.3d 215 (5th Cir. 2021) and *Texas Independent Producers & Royalty Owners Ass'n v. U.S. E.P.A.*, 413 F.3d 479 (5th Cir. 2005) that cases needing further factual development are unripe is unavailing. No amount of factual development will alter the unambiguous wording of the statute.

The Authority's assertion that HISA's ban on race day furosemide (or Lasix) is not self-executing, Authority Response 8 n.3, also belies the actual text of the statute. *See* 15 U.S.C. § 3055(a), (d) (HISA § 1206(a), (d)) (the Authority "shall establish a horseracing anti-doping and medication control program," and the program "shall prohibit the administration of any prohibited *or otherwise permitted* substance to a covered horse within 48 hours of its next racing start, effective as of" July 1, 2022) (emphasis added); *see also* 15 U.S.C. § 3055(b)(1) (HISA § 1206(b)(1)) (in developing regulations, the Authority "shall take into consideration" that "horses

should compete only when they are free from the influence of medications"). It is for this reason that both amici briefs mention this issue. *See* North American Association of Racetrack Veterinarian's Amicus Brief ("NAARV Amicus Br.") [Dkt. 49] 6; American Quarter Horse Association Br. Amicus Curiae [Dkt. 51] 1-2.

A. Plaintiffs' members have suffered an actual or imminent injury that is concrete and particularized.

Because Plaintiffs' members, as owners of "covered horses," will be an object of this HISA-mandated regulation (*compare* FAC ¶¶ 1, 4-29 *with* 15 U.S.C. § 3051(4) (HISA § 1202(4)) (covered horse means any Thoroughbred horse)), there is "little question that [the statute mandating promulgation of this regulation] has caused [them] injury, and that a judgment preventing . . . [the regulation] will redress it." *Contender Farms*, 779 F.3d at 264 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). Thus, under the express holding of *Contender Farms*, Plaintiffs meet all the requirements of standing.

B. HISA's delayed implementation cannot defeat Plaintiffs' standing.

The Authority argues that the Horsemen have not submitted evidence establishing injury-in-fact because the rules promulgated under HISA will not take effect until July 1, 2022. Authority Response 16; *see also* FTC Response 6 (complaining that HISA is not yet in effect).

Defendants, however, elide a ruling from the Northern District in an analogous case:

> A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.
> ….
>
> Where the inevitability of the operation of a statute against certain individuals is patent, **it is irrelevant to the existence of a justiciable controversy that there will be a time delay before disputed provisions will come into effect.**

NAARV Amicus Br. 5 (quoting *Roman Catholic Diocese*, 927 F. Supp. 2d at 418, 420 (emphasis added)).

"An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, n.5 (2013)).

For the Authority to dismiss the Horsemen's injuries as "speculative," "theoretical," and "conjectural" ignores the fact that the offending provisions in the statute giving legislative power to the Authority are unambiguous and, therefore, cannot be saved by agency interpretation. *See Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (agencies cannot give statutes interpretation contrary to the unambiguously expressed intent of Congress); *see also* Horsemen Response 43-44 (setting forth examples of unambiguous text of offending portions of the statute).

The Fifth Circuit has held the mere prospect of being inspected at some point in the future for a potential violation is an injury in fact. *See Contender Farms*, 779 F.3d at 266, 268; *see also* 15 U.S.C. § 3056(b)(5) (HISA § 1207(b)(5)) (requiring that Defendant Authority implement a program "that may include pre- and post-training and race inspections").

In the present case, there can be no doubt that, as of July 1, 2022, the Authority will have the full panoply of unconstitutional powers complained of by Plaintiffs. *See* 15 U.S.C. 3051(14) (HISA § 1202(14)); 15 U.S.C. § 3054(a) (HISA § 1205(a)); 15 U.S.C. 3055(a)(1) (HISA § 1206(a)(1)); 15 U.S.C. 3056(a) (HISA § 1207(a)). There will also be in place a regulation "prohibiting the administration of any" therapeutic substance to a covered horse within 48 hours of its next racing start. 15 U.S.C. § 3055(d) (HISA § 1206(d)). Thus, the threatened injury in this case is "certainly impending" and is sufficient to give Plaintiffs standing.

C. The Authority's argument that HISA's regulatory framework may be less burdensome than the current "patchwork system" is unavailing.

In light of the burdensome regulations HISA explicitly compels the Authority to pass, requiring Plaintiffs to show that the system currently in place is less burdensome than the full possibility of changes that may or may not come about under HISA would require Plaintiffs to do the very thing current jurisprudence forbids. A plaintiff may not rest its case on "mere conjecture about possible governmental actions." *Clapper*, 568 U.S. 420. However, under the Authority's unworkable proposed standard, Plaintiffs must establish the complete felicific calculus contemplated by all possible future metes and bounds of both the current "patchwork system" and the regulatory regime they oppose. Defendant Authority cites no law in support of this requirement.

CONCLUSION

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

Respectfully Submitted,

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