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

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, *et al.*,	)	
Plaintiffs,	)	Civil Action No. 5:21-cv-71-H
v.	)	
JERRY BLACK, *et al.*,	)	
Defendants.	)	

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

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TABLE OF CONTENTS

TABLE OF AUTHOTIES

CASES

STATUES

TABLE OF LIVE PLEADINGS

Pleading	Party	Date	ECF No.
First Amended Complaint	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	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	Defendants the Federal Trade Commission, Commissioner Kelly Slaughter, Commissioner Rohit Chopra, Commissioner Noah Phillips, and Commissioner Christine Wilson (collectively, FTC Defendants)	4/30/2021	36
Motion for Partial Summary Judgment	Plaintiffs	4/30/2021	37

INTRODUCTION

Plaintiffs' response illustrates just how much new constitutional ground they want to break with this lawsuit. To even reach the merits of their claims, this Court would have to conclude that the mere prospect of Plaintiffs being subject to some—as yet undrafted and undefined—rules in the future is sufficient injury for Plaintiffs to have standing to challenge the constitutionality of the Horseracing Safety and Integrity Act (HISA) today. Plaintiffs cite no case that entertained the merits of a constitutional challenge in similar circumstances, and for good reason: treating Plaintiffs' general dissatisfaction with a statutory regime as a basis upon which to adjudicate that regime's legality would take federal courts far beyond the realm of deciding concrete cases or controversies, as required under Article III. Established precedent dictates that Plaintiffs' asserted injuries are far too tenuous and speculative to entitle them to invoke this Court's power, and that this case is not ripe for review.

On the merits, Plaintiffs abandon two of their four claims, offering no defense against dismissal of their public non-delegation and Apportionment Clause arguments (Counts II and III of the Amended Complaint). *See generally* Am. Compl., ECF No. 23 ¶¶ 103-117; FTC Mot. Dismiss, ECF 36 at 1, 17, 19 (FTC MTD). But the constitutional standard Plaintiffs urge on their remaining non-delegation and Due Process challenges (Counts I and IV) is no less radical than their standing analysis. For decades, the Supreme Court and courts of appeals around the country have made clear that private entities may provide assistance or advice to federal agencies, as the "private, independent, self-regulatory, nonprofit" Horseracing Integrity and Safety Authority (Authority) will do for the Federal Trade Commission (FTC) under HISA. Pub. L. No. 116-260, 134 Stat. 1182 § 1203(a) (2020) (HISA). Yet Plaintiffs would have this Court abrogate those decisions, and find that both the nondelegation doctrine and the Due Process clause foreclose a regulatory regime modeled on others that have repeatedly been sustained. The Court should decline this invitation.

Plaintiffs may have policy reservations about Congress recruiting the Authority to help the FTC implement HISA's safety and anti-doping regime. But those reservations fall far short of establishing cognizable constitutional claims. The Court should therefore dismiss this case for lack of jurisdiction or, in the alterative, for failure to state a claim.

ARGUMENT

I. PLAINTIFFS FAIL TO ESTABLISH STANDING

Plaintiffs' harm in this case consists of nothing more than asserted apprehension about "[b]eing subject to [] regulatory control" by an allegedly unconstitutional body at some point in the future. Pls. Resp. to Defs' Mot., ECF 54 at 25-26 (Pls. Resp.). This is far short of the kind of "real, immediate, and direct" injury that is required for standing. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

A. Plaintiffs Can Point to No Current or Imminent Injury from HISA that Would Give Them Standing to Bring this Action

Courts have found standing based on threat of enforcement or increased regulatory burden when an entity faced the actual or impending application of a *specific*, defined requirement or agency rule. *See, e.g.*, *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 262 (5th Cir. 2015) (plaintiff had standing to challenge a specific rule establishing mandatory penalties for certain types of conduct); *Ass'n of Am. R.R.s v. Dep't of Transp.*, 38 F.3d 582 (D.C. Cir. 1994) (plaintiffs had standing to challenge specific rule creating safety standards).[1] Plaintiffs identify no case recognizing standing in circumstances akin to this matter, where a preemptive attack on a general framework for future regulation is lodged before a single rule under that framework is ever drafted or

[1] Plaintiffs also cite, in passing, the Supreme Court's decision in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). That case too considered a specific and concrete prohibition, codified in a state statute. *Id.* at 152. Moreover, the Court did so in the distinct context of a First Amendment challenge, where there was "a history of past enforcement" "backed by the additional threat of criminal prosecution," the "combination of" which "suffice[d] to create an Article III injury." *Id.* at 165-66.

proposed. *See* Pls. Resp. at 26-30. Simply put, Plaintiffs cannot have a reasonable fear of enforcement where there is currently no specific rule that could be applied against them. HISA is not self-enforcing, and Plaintiffs are not the "object of [any] regulation" that would require them to pay fees or modify their behavior in any way. *Contender Farms*, 779 F.3d at 264.

In an effort to show impending harm where there isn't any, Plaintiffs assert that they will be the object of regulation in the future—and point to several provisions of HISA that they allege could cause them injury if they are codified in regulations down the line. Pls. Resp. 27-28. Among these is the provision authorizing programs "that may include pre- and post-training and race inspections," HISA § 1207(b)(5), and the requirement that "the horseracing anti-doping and medication control program [] prohibit the administration of" defined substances to horses "within 48 hours of [their] next racing start," *id.* § 1206(d). *See* Pls. Resp. 27-28. But these provisions are not absolute requirements; they contain exceptions. *See* HISA §§ 1206(d) (providing possible exception to the baseline rule); 1207(b)(5) (permitting but not requiring inspections). And Plaintiffs have yet to cite a case finding standing based on *possible* enforcement of *future* rules that are *likely* to contain some requirement. *See generally* Pls. Resp. 26-28. It would stretch standing jurisprudence past the breaking point to find a "certainly impending" injury in such an extended chain. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

Regardless, Plaintiffs' arguments along these lines fail for another, more fundamental, reason. As the Supreme Court has repeatedly explained, "standing is not dispensed in gross," and is not a one-injury-fits-all proposition. *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017) (internal quotes and citations omitted). Rather, a "plaintiff must demonstrate standing for each claim he seeks to press" and have "standing separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006). Here, Plaintiffs assert non-delegation and due process claims based

on their view that HISA delegates *too much* power and discretion to a private entity. *See, e.g.*, FAC ¶ 89 ("HISA gives tremendous power to a private entity, the Authority, to regulate many facets of the Horsemen's business and relegates the FTC to a minor role in the process."); ¶¶ 96-100 (alleging that HISA places the FTC "in a subservient role to the Authority"); ¶¶ 121-23 (alleging that HISA grants "self-interested actors the authority to regulate their competitors"). Such claims are fundamentally incompatible with Plaintiffs' current assertion that they are injured by specific "burdensome [requirements] HISA explicitly compels the Authority to" implement. Pls. Resp. at 31. And this incompatibility creates a remedy problem.

Striking down the specific *statutory* proscriptions that Plaintiffs now claim will prove burdensome (once they are codified in regulation) would do nothing to *reduce* the discretion afforded to the Authority and the FTC to develop rules generally. And, conversely, reducing (or even eliminating) the power of the Authority to act under HISA would not eliminate the statutory requirement of § 1206(d) or facilitate Plaintiffs' asserted interest in administering "therapeutic drugs" to their horses at a time of their choosing. Pls. Resp. at 27. As the Supreme Court has recently confirmed, this type of mismatch between what Plaintiffs claim causes them injury and what they claim is unconstitutional dooms Plaintiffs' standing. *California v. Texas*, 593 U. S. __, 2021 WL 2459255, at *9 (U.S. June 17, 2021) (states lacked standing where their injury was not traceable to the statutory provision they alleged to be unconstitutional); *id.* at *11 ("Although [plaintiffs] claim harms flowing from enforcement of certain parts of the Act, they attack only the lawfulness of a *different* provision." (emphasis in original)) (Thomas, J., concurring); *see generally Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (standing requires that plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision" (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Stuck on the horns of this dilemma, Plaintiffs wisely decline to speculate about "the full possibility of changes that may or may not come about" when those rules are ultimately developed under HISA. Pls. Resp. at 31. Contrary to what Plaintiffs claim, however, that does not entitle them to press a constitutional challenge now. The fact that Plaintiffs cannot predict their own injuries is a sure sign that those injuries are too remote and speculative to grant them standing—not that the Court should rush ahead to forestall any possibility of injury, however speculative and remote. *See Clapper*, 568 U.S. at 409 ("[W]e have repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." (citations omitted; emphasis in original)).

B. There is no Separation-of-Powers Exception to the Injury-in-Fact Requirement

Unable to establish concrete harm, Plaintiffs blithely assert that their allegations about HISA's constitutional infirmities are in themselves sufficient—and that they do not need to "point to a specific regulation that affects them in a personal or individual way." Pls. Resp. at 29-30. This remarkable argument is entirely contrary to long-established jurisprudence.

The Supreme Court has repeatedly made clear that Article III courts "sit solely[] to decide [] the rights of individuals" who have "sustained or [are] immediately in danger of sustaining some direct injury"—not abstract constitutional questions. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598-99 (2007) (plurality opinion) (internal quotes and citations omitted). To "justify [the] exercise of the court's remedial powers on [their] behalf," a plaintiff must allege a "*personal* stake in the outcome of the controversy." *Town of Chester*, 137 S. Ct. at 1650 (emphasis added). And this requirement is "especially rigorous when reaching the merits of the dispute would force [the Court] to decide

whether an action taken by one of the other two branches of the Federal Government [is] unconstitutional." *Clapper*, 568 U.S. at 408 (internal quotes and citations omitted).

Consistent with this well-established framework, the Supreme Court's observations that violation of "the separation of powers [] inflicts a 'here-and-now' injury" appear in the context of "precedents . . . permit[ing] private parties *aggrieved* by an official's exercise of executive power to challenge the official's authority." *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) (citations omitted; emphasis added). Thus, in instances where the Supreme Court held an administrative entity to be unconstitutionally structured, the challenged entity took some concrete action against plaintiffs first. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 485, 487 (2010) (*PCAOB*) (considering constitutionality of a statute granting a "Government-created, Government-appointed" board regulatory powers where the "[b]oard inspected [plaintiff], released a report critical of its auditing procedures, and began a formal investigation"); *Seila Law*, 140 S. Ct. at 2194 (adjudicating the constitutionality of the Consumer Financial Protection Bureau structure where the agency "issued a civil investigative demand" to plaintiff and brought an action "to enforce the demand in" district court).

Unlike in *PCAOB* and *Seila Law*, the entity of which Plaintiffs complain here has not done *anything* to aggrieve or impact Plaintiffs. It has merely begun internal operations. *See, e.g.*, Pls. Mot. Summary J., ECF No. 38 at 6-8 (characterizing extent of Authority's activities as "fil[ing] a Certificate of Incorporation" and beginning the process of appointing Board members). Federal courts are not a forum for Plaintiffs to generally complain that the existence or creation of some entity is an affront to the Constitution: that is nothing more than a generalized complaint that the government is not following the law. *See generally Bond v. Unites States*, 564 U.S. 211, 225 (2011) ("Individuals have 'no standing to complain simply that their Government is violating the law.'" (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)).

All of Plaintiffs' denials about seeking an advisory opinion thus ring hollow. Pls. Resp. at 28. There is no "threatened injury [that] is real, immediate, and direct" stemming from Plaintiffs' dissatisfaction with a regulatory regime that even they themselves cannot yet concretely describe as affecting them. *Davis*, 554 U.S. at 734. The standing requirement would cease to have all meaning if it could be satisfied with vague and generalized assertions about constitutional concern.

II. PLAINTIFFS' CHALLENGE IS UNRIPE

Plaintiffs' attempts to show ripeness fail for similar reasons. Plaintiffs currently suffer no hardship from HISA because they are not subject to any rule that affects their conduct. *See, e.g.*, *Texas v. United States*, 523 U.S. 296, 300–01 (1998) (no ripe controversy where entity is not currently "required to engage in, or to refrain from, any conduct"). And general apprehension about being subject to a regulatory regime they dislike without some real-world affects is not a hardship sufficient to invoke this Court's powers. *See generally id.* at 302. As the Supreme Court has explained, a claim that an entity suffers "immediate hardship of a" separation-of-powers violation "is an abstraction—and an abstraction no graver than the 'threat to personal freedom' that exists whenever an agency regulation is promulgated, which we hold inadequate to support suit unless the person's primary conduct is affected." *Id.*

Likewise, Plaintiffs' categorical assertion that this case contains only legal issues that can be adjudicated now ignores all the elements of Plaintiffs' claim that turn on *factual* questions, such as whether the FTC will exercise adequate supervision and control over the activities of the Authority, and whether the Authority will abide by HISA's conflict-of-interest provisions. *See, e.g.*, Pls. Resp. at 4 (alleging that, "as a practical matter, [the FTC] cannot subject the Authority's proposed rules to the rigorous review needed to bless them with governmental imprimatur"), *id.* at 20-23 (claiming that "self-interest permeates every aspect of the Authority"). These factual matters all remain to be

determined. It would be premature in the extreme to adjudicate such factual matters based on the kind of unadorned speculation that Plaintiffs proffer in their brief. *See generally DM Arbor Ct., Ltd. v. City of Houston*, 988 F.3d 215, 218 (5th Cir. 2021) ("A case becomes ripe when it 'would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now.'" (internal quotes and citation omitted)).

Plaintiffs present exactly the type of "[f]acial challenge" to HISA that "rest[s] on speculation" and is "disfavored" because it "raise[s] the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450–51 (2008) (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). Such challenges "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (internal cites and quotations omitted). Plaintiffs are not entitled to "to short circuit the democratic process by" having this Court decide on HISA's validity before it ever impacts them directly. The "burden created by the additional costs of—even repetitive—litigation" cannot outweigh Article III. *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 623 F.3d 348, 358 (6th Cir. 2010) (citing *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 735 (1998)).

III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR RELIEF

Beyond failing to establish jurisdiction and justiciability, Plaintiffs' response also confirms that their claims cannot survive dismissal under Rule 12(b)(6).

First, Plaintiffs fail to offer any response to the portion of Defendants' motion seeking dismissal of Counts II and III of the Amended Complaint—so those counts can be dismissed outright. *See* FTC MTD at 1, 17, 19; FAC ¶¶ 103-110 (challenging the FTC's

role under HISA as violative of the "public" non-delegation doctrine); FAC ¶¶ 111-117 (challenging the Authority's composition under the Appointments Clause). These claims have now been abandoned, and should be dismissed. *See, e.g.*, *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006).

That leaves Plaintiffs' non-delegation and Due Process challenges to the Authority's role under HISA. Both fail for all the reasons that Defendants previously detailed.

A. The Authority's Role Under HISA Does Not Implicate the Non-Delegation Doctrine

Plaintiffs cannot dispute that the Authority lacks the power to enact binding rules, which is the hallmark of legislative authority, and without which there is no legislative delegation. *See Loving v. United States*, 517 U.S. 748, 758 (1996) (equating "legislative" or "lawmaking" power with the power to promulgate general "rule[s] of prospective force"); *Currin v. Wallace*, 306 U.S. 1, 15 (1939) (finding no lawmaking power vested in private entity that did not have authority to make rules); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) (same); *see generally* HISA § 1204 (setting forth requirement for rules under HISA to be enacted). And Plaintiffs' efforts to identify some "unique" aspect of HISA's regime that would create a delegation problem are unavailing. Pls. Resp. at 10.

1. Plaintiffs' Misunderstand the FTC's Role Under HISA

As a starting point, Plaintiffs are incorrect that the FTC "cannot draft regulations either on its own initiative or by modifying Authority regulations." Pls. Rep. at 11. Congress explicitly granted the FTC authority to "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). Contrary to what Plaintiffs claim, Pls. Resp. at 10, this is a broad authorization that covers

the full gambit of HISA's statutory purposes. *See, e.g.*, *id.* § 1203(a) (recognizing the Authority "for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces"). Further, any rule that the Authority wishes the FTC to approve must account for any "modif[ication]" that the FTC "recommend[s]." *Id.* § 1204(c)(3)(A). The FTC's input is thus no mere "suggestion[]" that the Authority can disregard. Pls. Resp. at 13. No proposal that the Authority submits can become a binding rule until the FTC is satisfied that the proposal is consistent with the statute—including all its detailed prescriptions for what programs and rules must contain—and prior rulemaking. *See id.* §§ 1204(b)(2), (c)(3)(B). Plaintiffs' suggestion that the FTC cannot "modify Authority rules" is formalistic, at best. Pls. Resp. at 12.[2]

Moreover, the scope of the FTC's ability to "modify" the Authority's proposals is in no way dispositive of the delegation analysis. None of the authorities that Plaintiffs cite found an impermissible delegation on the ground that an agency—which otherwise had the sole power to approve or reject draft rules—was limited in how it could modify a private entity's proposals. The D.C. Circuit's decision in *Association of Am. R.R. v. United States Dep't of Transp.*, certainly does not support that proposition, turning as it did on the Court's finding that the private entity and the agency in that matter had equal power to reject each other's proposals. 721 F.3d 666, 673 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015)). Neither does *City of Dallas, Tex. v. F.C.C.*, 165 F.3d 341, 357–58 (5th Cir. 1999), where the agency did not exercise any power to disapprove proposals. Even the *dissents* on which Plaintiffs rely do not establish the standard Plaintiffs proffer, but focus instead on the fact that an agency "could [only] approve but not disapprove" a

[2] Plaintiffs make much of the Supreme Court's use of the word "modif[y]" in *Adkins*, 310 U.S. 388, which they attempt to endow with critical meaning. Pls. Resp. at 13. But the phrase in which the word appears was merely summarizing the statutory scheme at issue. Plaintiffs themselves assert elsewhere that this characterization was not central to the Court's decision. *Id.* at 14.

private entity's rules. Pls. Resp. at 17 (discussing *Texas v. Rettig*, No. 18-10545, 2021 WL 1324382 at *8 (5th Cir. Apr. 9, 2021) (Ho, J., dissenting)); *see also Brackeen v. Haaland,* 994 F.3d 249, 421 (5th Cir. 2021) (Duncan, J., dissenting) (arguing that impermissible delegation occurred where a statute "empowers tribes to change the substantive preferences Congress enacted" and "bind courts, agencies, and private persons").

As detailed in Defendants' prior briefs, the relevant inquiry for a delegation analysis is whether a statutory scheme gives an entity the ability to "make the law and force it upon" others. *Currin*, 306 U.S. at 15-16; *see also Kentucky Div., Horsemen's Benev. & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406, 1416 (6th Cir. 1994); *Adkins*, 310 U.S. at 399. The numerous cases upholding the constitutionality of the Financial Industry Regulatory Authority (FINRA)—which served as the model for the Authority's role—correctly noted that an agency's power "to approve or disapprove" the private entity's rules eliminated any delegation problem. *Sorrell v. SEC*, 679 F.2d 1323, (9th Cir. 1982) (quoting *R. H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952)); *see generally* Senator McConnell Amicus Br., ECF No. 53 at 1, 10-11 ("HISA is modeled on the Maloney Act, which authorizes private entities like FINRA to propose rules governing the securities industry that the SEC either approves or rejects."). So too here.

2. Plaintiffs' Complaints About the FTC's Oversight Fail to Establish a Delegation Problem

Apart from their misplaced concern about the FTC's ability to modify proposals, Plaintiffs also quibble over the kind of oversight the FTC will exercise over the Authority. Pls. Resp. at 4-9. As a legal matter, these arguments fail: the Fifth Circuit has made clear that the extent of oversight bears on whether delegation is lawful, not whether delegation has occurred at all. *See State v. Rettig*, 987 F.3d 518, 531–32 (5th Cir. 2021). In any event, Plaintiffs' complaints are unavailing.

Contrary to Plaintiffs' assertions, Pls. Resp. at 6, the FTC is not devoid of "guidance on how to oversee" the Authority's rulemaking proposals, and does not lack for "standards upon which to base its decisions" on whether to approve or disapprove rules. Pls. Resp. at 6. HISA provides extensive criteria for what elements proposed rules must contain or consider. *See, e.g.*, HISA §§ 1204(c)(2); §§ 1206(b)-(d), (g); §§ 1207(a)-(b). HISA then empowers the FTC to approve or disapprove rules based on its analysis of whether those rules are "consistent with" the Act. *Id.* § 1204(c). It makes little sense to posit, as Plaintiffs do, that an analysis of whether a rule complies with the statute would not consider and be guided by the statutory criteria for what the rule should contain. Pls. Resp. at 7. Plaintiffs should not assume that the FTC will have the same kind of blinkered vision of HISA that they do.

Plaintiffs separately complain that the Authority exercises certain powers that are removed from the FTC's oversight entirely. But the example they cite—of "subpoena and investigatory authority"—is not an exercise of legislative power at all. Pls. Resp. at 19; *see, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (framers understood "legislative power . . . to mean the power to adopt generally applicable rules of conduct governing future actions by private persons" (citations omitted)). Moreover, those functions *are* subject to FTC oversight. First, the FTC is required to approve "procedures and rules" for the "issuance and enforcement of subpoenas" and "other investigatory powers." HISA § 1205(c). Second, the FTC reviews the Authority's proposed sanction or penalty through several layers of review. *Id.* § 1209(b)(3), (c)(3). As Defendants detailed at length in their prior briefs, this scheme mirrors the one governing the activities of FINRA—a scheme that has been upheld against constitutional challenges on many occasions, including on delegation grounds. *See Otto v. SEC*, 253 F.3d 960 (7th Cir. 2001); *Sorrell v. SEC*, 679 F.2d 1323, 1326 (9th Cir. 1982); *Todd & Co., Inc. v. SEC*, 557 F.2d 1008, 1014 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 694-695 (2d Cir. 1952). And this scheme of FTC review is more than

sufficient to satisfy what the Fifth Circuit has identified as the constitutional requirements for delegating authority to private entities. *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 708 (5th Cir. 2017) (observing that Due Process problems arise "when private parties have the *unrestrained* ability to decide whether another citizen's property rights can be restricted" (emphasis added)); *see generally* FTC SJ Resp., ECF 58, at 17-18.[3]

Given the detailed scheme for oversight and review, it makes little difference that the FTC does not have longstanding expertise in horseracing or that the Authority was recently constituted. Pls. Resp. at 4-5, 8. Plaintiffs identify no case standing for the proposition that pre-existing expertise in a subject area is necessary to avoid a delegation problem, or that the determination of whether an entity wields rulemaking power turns on how long the entity has been in existence. A constitutional violation does not arise from an agency being entrusted with regulating a new subject area, or a new entity taking up the mantle of assisting the agency with its task. As the Fifth Circuit recently noted in an en banc decision, there is not "binding precedent to support a rule that *regulatory* power cannot be delegated outside the federal government." *Brackeen*, 994 F.3d at 352 (en banc per curiam) (emphasis added). Plaintiffs' attempts to distinguish established precedent on the basis of how long the Authority and the FTC have been involved with horseracing thus "shows nothing so much as want of a better argument." Pls. Resp. at 29.

[3] Plaintiffs contend that the circumstances in *Boerschig* did not give the Fifth Circuit an opportunity to consider the ways in which the "private non-delegation" doctrine could arise out of Article I, Section 1 of the Constitution. Pls. Resp. at 2-3. That is irrelevant. Article I, Section 1 only prohibits the delegation of *legislative* power, and is therefore entirely inapplicable to the subpoena and investigatory powers of which Plaintiffs complain. To the extent Plaintiffs have *any* claims about those powers of the Authority, they would have to arise in the context of the Due Process clause, which *Boerschig* analyzed.

B. Plaintiffs Fail to State a Due Process Claim

Plaintiffs' arguments on its Due Process claim fare no better than those on its non-delegation challenge. Stripped of its various aspersions against HISA empowering the horseracing "elite . . . to exercise power over the working horsemen," Plaintiffs' response offers nothing more than a generalized claim that HISA's various protections against conflicts of interest "are drafted ambiguously" and "are not so strong a bulwark as [they] might seem." Pls. Resp. at 21-22. Yet Plaintiffs' various ruminations about how the conflict-of-interest provisions could be circumvented or otherwise ignored do not rise "above the speculative level" necessary to withstand dismissal. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

For example, Plaintiffs claim that various officials of the Authority will maintain their prior "longstanding business and financial relationships," and act in ways that benefit their constituencies over Plaintiffs. Pls. Resp. at 22. Piling conjecture on speculation, they further assert that the Authority's current funding source "raises questions" about the Authority's impartiality. *Id.* at 23. But Plaintiffs completely ignore that HISA does not give the Authority or its Board the ability to "regulate" anybody without the FTC's independent oversight and approval. HISA §§ 1204, 1208, 1209. As discussed above, the Authority lacks the power to impose binding rules or regulations, and any disciplinary actions it takes are subject to multiple layers of independent review. *Id.* Even its "formula or methodology for determining assessments" of fees is subject to the FTC's review, approval, and oversight to ensure that it accords with established statutory parameters. *Id.* § 1204(a); *see also* § 1203(f) (laying out detailed parameters for calculation and collection of fees). And the statute explicitly provides that, until those fees can be collected, the Authority's funding "shall be provided by loans," *id.* § 1203(f)(1), not some shadowy members of "the industry who stand to gain from HISA precisely *because* they stand to gain from it." Pls. Resp. at 23 (emphasis in original). These structural protections all defeat Plaintiffs' generalized assertions about private parties

being presumed to "exercise power in a manner that reflects their own interests." *Id.* at 21.

The cases Plaintiffs cite in this portion of their brief only reinforce how far Plaintiffs are from stating a cognizable Due Process challenge in this action. One of those cases, *Caperton v. A.T. Massey Coal Co., Inc.*, held that, in the "extreme" circumstances where a state justice received substantial campaign contributions from an interested party, recusal was required to satisfy the Due Process guarantee of a "fair trial." 556 U.S. 868, 876 (2009). Another, *North Carolina State Bd. of Dental Exam'nrs v. FTC*, considered the application of "the doctrine of state-action antitrust immunity" under the Sherman Act. 574 U.S. 494, 499 (2015). Even in that far-afield context, the Court did not question the proposition that private entities may participate in a regulatory scheme subject to "active supervision" by a government entity. *Id.* at 515.

Given the premature posture of this case, Plaintiffs can offer no evidence or plausible allegation that HISA's structural protections will be inadequate. Because their Due Process claim offers nothing more than "unadorned, the-defendant-[may]-unlawfully-harm[]-me accusation[s]," it must be dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

CONCLUSION

For these reasons, and those articulated in Defendants' prior briefs in this case, the Court should dismiss Plaintiffs' First Amended Complaint.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2021, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Alexander V. Sverdlov
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