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

REPLY IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS JERRY BLACK, KATRINA ADAMS, LEONARD COLEMAN, NANCY COX, JOSEPH DUNFORD, FRANK KEATING, KENNETH SCHANZER, AND HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.

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	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 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	Plaintiffs	4/30/2021	37, 38
Opposition to Defendants' Motions to Dismiss	Plaintiffs	5/28/2021	54
Opposition to Plaintiffs' Motion for Partial Summary Judgment	Authority Defendants	5/28/2021	55, 56
Opposition to Plaintiffs' Motion for Partial Summary Judgment	Federal Defendants	5/28/2021	57, 58
Reply in Support of Motion to Dismiss	Authority Defendants	5/18/2021	60

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTRODUCTION

Plaintiffs' response is as notable for what it concedes as for what it contends. Plaintiffs (rightly) abandon half their claims, raising no defense whatsoever for their actions brought under the public nondelegation doctrine (Count II) and the Appointments Clause (Count III). As for their private nondelegation and due process claims (Counts I and IV)—which Plaintiffs now acknowledge are coterminous—Plaintiffs admit their standing depends on the Court finding that it is enough to allege "being subject to an unconstitutional scheme" that has no binding effect for over a year. Plaintiffs' recognition that it is "entirely unknown" how this still-nascent regulatory program will develop (let alone be implemented), and their insistence that critical provisions of HISA are "ambiguous," only confirm that their suit is not ripe for adjudication.

If the Court nevertheless reaches the merits, Plaintiffs' response reinforces that the complaint fails to state a claim under any reasonable reading of the statutory scheme and established precedent. Plaintiffs rely on authorities they confess are "not controlling" to argue for a novel nondelegation test focused on whether an agency can draft and modify the rules it reviews, approves, promulgates, and oversees. But even the dissenting opinions on which Plaintiffs lean recognize that, when Congress involves a private entity in a regulatory scheme, it is constitutionally sufficient that the private actions are subject to agency supervision in the material respects present here. Unable to refute that governing law, Plaintiffs assert that the FTC's control over the Authority's involvement in HISA's regulatory scheme will be inadequate. But baseless conjecture that the FTC will abdicate its statutory obligations cannot save the complaint from dismissal.

ARGUMENT

I. PLAINTIFFS' RESPONSE CONFIRMS THAT THEIR CLAIMS ARE NOT JUSTICIABLE

Plaintiffs contend (remarkably) that an actual, concrete harm "is of no moment." Br. 32. Plaintiffs instead rely on the alleged injury of "being subject to an unconstitutional scheme" that they acknowledge will have no binding effect on private parties for over a year. Br. 32; *see* Br. 25-26 (listing alleged constitutional violations as injuries). But Plaintiffs are wrong that a bare allegation that a statute offends the Constitution "is, in itself," sufficient for standing. Br. 29 (formatting omitted). The cases from which Plaintiffs cherry-pick language about a "'here-and-now' injury," Br. 29-30, make clear that an injury-in-fact arises only when the "private parties [are] aggrieved" in some real way by the alleged constitutional violation. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020); *see Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 487 (2010) ("The Board inspected [plaintiff], released a report critical of its auditing procedures, and began a formal investigation.").

Thus, the relevant question for standing purposes is not whether there is "doubt that, as of July 1, 2022, the Authority will exercise all the unconstitutional powers complained of by Plaintiff[s]." Plfs' Br. 27. Rather, it is whether the exercise of those alleged powers will inflict "certainly impending" harm on Plaintiffs. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *see Bond v. Unites States*, 564 U.S. 211, 225 (2011) ("Individuals have no standing to complain simply that their Government is violating the law" (internal quotation marks omitted)). Plaintiffs' only attempt to address that latter question is their contention that HISA will subject them "to regulations that forbid the use of therapeutic medication" and require "[p]ayment of fees," Br. 25-28 (discussing HISA §§ 1203, 1206(b)(1), (d)). The provisions Plaintiffs attack depend on the

FTC's future promulgation of not-yet-certain rules, in addition to other contingencies. *See* §§ 1203(f)(3), 1204, 1206(a), (e), (f), (g)(3).

Plaintiffs' arguments further refute their contention that "it is unnecessary to wait" until their claims are ripe to resolve whether HISA's "grant of authority and structural determinations *** offend[] the private nondelegation doctrine and the Due Process clause." Br. 33-34. Many of Plaintiffs' contentions—such as those resting on allegations that the FTC lacks the expertise to exercise "proper 'surveillance over the activities' of the Authority," Br. 14; *see* Br. 4-6, 15, and that the Authority's Board will be motivated by "personal ties" and "longstanding business and financial relationships," Br. 21-22—reflect, at best, conjectural harm from hypothetical future events. Plaintiffs themselves contend that "[i]t is entirely unknown" how the Authority will act under HISA. Br. 9.

That "[t]he statute itself will remain unchanged," Plfs' Br. 35, is immaterial: Plaintiffs' challenge is unripe because HISA "imposes no new, affirmative obligation" on private parties absent intervening government action that is uncertain to occur at all, let alone in the precise manner Plaintiffs anticipate. *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 716 (5th Cir. 2012). Awaiting the *development and promulgation* of a relevant agency rule is not the same as awaiting *enforcement* of that rule. For that reason, Plaintiffs' reliance on *Contender Farms, L.L.P. v. U.S. Department of Agriculture*, involving agency action already "adopted *** as a Final Rule," comes up short. 779 F.3d 258, 263 (5th Cir. 2015). "[D]etermin[ing] *** the scope of [this] legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry" to "hold that under no circumstances" could HISA rules accord with the Constitution, as required to uphold Plaintiffs' facial challenge. *Texas v. United States*, 523 U.S. 296, 301 (1998) (ellipsis omitted); *see Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-451 (2008) ("Facial challenges are disfavored" because they "often rest

on speculation" and thus risk "premature interpretation," "run contrary to the fundamental principle *** that courts should [not] anticipate a question of constitutional law in advance of the necessity of deciding it," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented.") (internal quotation marks omitted).[1]

II. PLAINTIFFS FAIL TO STATE A CLAIM

A. Plaintiffs Fail To State A Claim That HISA Unconstitutionally Delegates Legislative Authority To A Private Entity (Count I)

1. Plaintiffs' reliance on their assertion that the FTC cannot draft or modify rules misunderstands the constitutional test and misconstrues HISA.

Far from an "unprecedented delegation of legislative authority to a private entity," Plfs' Br. 4, HISA reflects three features that each guard against an impermissible delegation: (1) binding rules result only from agency action, subject to the "reasonable condition" that the agency consider privately proposed standards consistent with congressional guidance, Auth. MTD 14-18; (2) the agency controls private involvement in the regulatory scheme through extensive requirements of agency approval and oversight, *id.* at 18-21; and (3) judicial review is available for any resulting sanction, *id.* at 22-24. Rather than grapple with those tried-and-true protections, Plaintiffs respond that HISA is unconstitutional because it "does not allow the FTC to draft or modify the rules" promulgated under the Act. Br. 1. That is incorrect both as a matter of law and as a matter of fact.

a. Even if Plaintiffs were correct that HISA delegates some legislative functions to the Authority, *contra* Auth. MTD 14-18 (explaining that "reasonable conditions" are not delegations at all), "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,'" *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021) (third alteration in original)

[1] Plaintiffs do not dispute that the Court lacks personal jurisdiction over Defendants Adams, Coleman, Cox, Dunford, Keating, and Schanzer. *See* Auth. MTD 12-14; Plfs' Br. 36-37.

(quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). Plaintiffs acknowledge that their primary authority did not turn on the agency's "ability to draft rules." Br. 10. Rather, the problem there was that the purportedly private entity did not occupy a "subordinate role in the regulatory process," but "jointly exercise[d] regulatory power on equal footing with an administrative agency." *Association of Am. R.R. v. United States Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015)).

Needless to say, the cited portion of the *Brackeen v. Haaland* opinion that failed to "garner[] an en banc majority," 994 F.3d 249, 267 (5th Cir. 2021) (per curiam), cannot bear the weight that Plaintiffs place on it as the sole decision offered for their agency-must-draft-rules litmus test, *see* Br. 11. The statutory provision at issue in that case (according to the dissent) "empowers tribes to change the substantive preferences Congress enacted *** and to bind courts, agencies, and private persons to follow them," *without any federal agency approval or oversight*. 994 F.3d at 421 (Duncan, J., dissenting). Even in that scenario, where the delegation is far less constrained than any delegation here, 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 352 n.63 (en banc).

b. Plaintiffs are left to argue that HISA is unlawful "because the FTC cannot modify rules proposed by the Authority." Br. 10. But nothing supports making an agency's "ability to modify" the linchpin of lawful delegation. Plfs' Br. 14. While Plaintiffs derive this notion from the fact that the statute upheld in *Adkins* gave a governmental body "the ability to approve, disapprove, or modify a private entity's proposed rules," Br. 12-14, Plaintiffs explain that the last feature "was not 'central to [the Court's] decision,'" Br. 14. What matters under *Adkins* is whether the agency "maintain[s] 'authority and surveillance'" such that, "ultimately, the [agency] *** determine[s] the [binding rules]." *Id.* (quoting 310 U.S. at 399); *see Rettig*, 987 F.3d at 532-533. Indeed, the (inadmissible) memorandum Plaintiffs attach reiterates the "general principle[]" from *Adkins* and

related precedent that private entities may "exercise authority subject to the strict oversight and surveillance of a governmental entity." Ex. A, at 9; *id.* at 11 (finding prior bill problematic because of "no participation or supervision from a governmental entity").[2] Whatever the merits of some prior bill, Congress deliberately crafted HISA to accord with that settled precedent by "requiring the FTC to approve or disapprove of rules drafted by the Authority," and to oversee their implementation. Plfs' Br. 19.

The other cases Plaintiffs cite (at 12-18) only reinforce that the agency's power to *disapprove* a proposed standard, rather than *modify* it, is the essential requirement in the nondelegation analysis. In Plaintiffs' own words, 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. 17 (discussing 993 F.3d 408, 2021 WL 1324382, at *8 (5th Cir. Apr. 9, 2021)). Likewise, Plaintiffs do not dispute that the regulation considered in *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999), was problematic because it gave "blanket approval to the decisions of private operators." Br. 18. Although Plaintiffs argue that "modification" distinguishes the several cases rejecting nondelegation challenges to FINRA's authority, *see* Br. 16, none so much as mentions the SEC's ability to revise FINRA's rules. Instead, the unbroken line of cases upholding the FINRA-SEC model rests on "(a) the [SEC]'s power *** to approve or disapprove of [FINRA's] Rules, and (b) the [SEC]'s review of any disciplinary action." *Sorrell v.*

[2] The document appears to be a redacted and abridged analysis prepared for a single representative, and not publicly available.

SEC, 679 F.2d 1323, 1326 (9th Cir. 1982) (quoting *R. H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952)).[3]

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 with which the FTC disagrees 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). Plaintiffs' effort to cast this common-sense construction of HISA as "an attempt to rewrite the statute" fails under their own insistence that the Court should consider the Act's "functional" effect. Br. 13 (quoting *Clinton v. City of New York*, 524 U.S. 417, 444 (1998)).

2. Plaintiffs lack any basis to allege that the FTC's supervision will be inadequate.

Plaintiffs additionally argue that the FTC's check on the Authority will be inadequate in practice. That argument lacks any sound basis in the statute or reality.

---

[3] Like here, the FINRA cases concern "a Congressional decision to involve private parties in the rulemaking process," unlike *Dallas* and *Rettig*, which concern an agency's own decision to divest itself of delegated authority. *Rettig*, 993 F.3d 408, 2021 WL 1324382, at *7 (Ho, J., dissenting from denial of rehearing en banc).

a. Instead of disputing that Congress requires FTC action at both ends of the regulatory scheme, *see* Auth. MTD 19-21, Plaintiffs repeatedly assert that the FTC "lacks expertise to regulate the subject area," Br. 4; *see also* Br. 5-6, 14-15. That is irrelevant: Plaintiffs offer no authority suggesting that *prior* expertise is a prerequisite for Congress to task an agency with oversight, and they nowhere confront "that a presumption of regularity attaches to the actions of Government agencies" (or the fact that the FTC can augment its industry expertise before it must actually act). *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001). Plaintiffs' contention is also wrong: FTC rulemaking under HISA accords with the agency's longstanding experience with "stopping unfair, deceptive, or fraudulent practices." Plfs' Mot. for Partial Summ. J. at 6, ECF No. 38 (Plfs' MSJ); *see* HISA §§ 1205(a), 1210; H.R. Rep. No. 116-554, at 17 (2020) (explaining HISA's purpose to "improve the integrity and safety of horseracing" by curbing unfair drug abuses and other deceptive and fraudulent practices that harm participants and betting public). If anything, that the FTC may lack particular "expertise in the horseracing industry," Plfs' Br. 14, *supports* Congress's decision to reasonably condition the agency's rulemaking on consideration of standards proposed by the expert Authority (and public comment), *see* Auth. MTD 17-18. At the very least, Plaintiffs' surmises about "regulatory capture," "rubber stamping," or FTC "competen[ce]," Br. 4-5, illustrate that their claim is unripe.

b. Plaintiffs also contend that "HISA gives the FTC no standards upon which to base its decisions." Br. 6-8. But Plaintiffs' choice to forgo their public nondelegation claim betrays both the legal irrelevance and factual inaccuracy of their allegation that Congress gave inadequate "statutory direction" to the agency. Br. 6. In truth, HISA provides extensive markers to guide the FTC's oversight. *See* Auth. MTD 24-26. Plaintiffs attempt to discount as "completely circular" Congress's mandate that the FTC promulgate proposed standards that are consistent with the Act and "applicable rules approved by the [FTC]." Br. 6 (quoting HISA § 1204(c)(2)). But that

provision refers to procedural rules issued independent of HISA, rather than substantive "rules proposed by the private entity and approved by the FTC" under HISA. Br. 6; *see* HISA § 1204(a) (providing that the Authority shall propose standards "in accordance with such rules as the [FTC] may prescribe under section 553 of title 5"). Plaintiffs also accuse Defendants of "mistakenly conflat[ing] the criteria HISA lays out for the Authority with the criteria given to the FTC for its oversight." Br. 7. But the overlap only underscores the FTC's supervisory function—*i.e.*, Congress insists that the agency must determine that, when proposing standards or imposing sanctions, the Authority has complied with HISA's detailed rulemaking and enforcement directions. *See* HISA §§ 1204(c)(2), 1209(b)(2)(A), (c)(2)(C)(ii).

Plaintiffs' lone substantive criticism is that the Act "does not give direction as to what medications should be placed on the list [of permitted and prohibited medications, substances, and methods] or why." Br. 7-8. That is incorrect: HISA enumerates seven factors that must be "take[n] into consideration," HISA § 1206(b); requires that the list be no "less stringent" than various "baseline rules" described in the Act (with certain exceptions), *id.* § 1206(g); and directs that the list must accord with express conditions, such as prohibiting a substance only if it "has a long-term degrading effect on the soundness of a horse," *id.* § 1206(c)(5). In any event, Plaintiffs' concern that "the FTC was given limited guidance on how to oversee the Authority," Br. 6, highlights that it would be premature to adjudicate their nondelegation claim before the FTC even has a chance to exercise any oversight.

c. Plaintiffs also contend that the Authority was "newly created" "for the express purpose of enforcing the statute." Br. 8-9, 18. Even if that were true (despite the uncertainty surrounding HISA's enactment at the time), it is beside the point. Plaintiffs do not (and cannot) allege that the Authority is a federal entity. *See* Auth. MTD 26-28. Any "clear inference" that Congress participated in "scripting" the standards-setting entity, Plfs' Br. 8-9, would only further undermine

Plaintiffs' nondelegation claim. That the Authority's purposes "are nearly identical" to HISA's goals, Plfs' Br. 9, illustrates the "reasonable[ness]" of Congress's decision to condition FTC rulemaking on the agency's consideration of the Authority's proposed standards. *Rettig*, 987 F.3d at 531; *see* Auth. MTD 17-18. And again, Plaintiffs' own uncertainty about how the Authority will operate under this regulatory scheme—"[i]t may do so well; it may do so poorly; or it may do so in an entirely corrupt manner," Br. 9—only amplifies the ripeness concerns that permeate this case.

d. Finally, Plaintiffs argue that "[s]ome legislative powers given to the Authority have no FTC oversight whatsoever." Br. 19. But Plaintiffs' sole example—the Authority's "subpoena and investigatory authority," *id.*—is in fact subject to two forms of FTC oversight. *See* Auth. MTD 19-21 (explaining that, like in the FINRA-SEC model, the FTC "oversees the Authority's implementation and enforcement of any final rules" as part of the "agency review [that] bookends HISA's regulatory scheme"). On the front end, the Authority must "develop uniform procedures and rules authorizing *** [the] issuance and enforcement of subpoenas *** and *** other investigatory powers of the nature and scope [currently] exercised by State racing commissions," and these procedures and rules "shall be subject to approval by the [FTC]" following notice-and-comment. HISA § 1205(c). The FTC must also sign off on the Authority's proposed "description of *** rule violations" before any could give rise to an investigation. *Id.* § 1204(a)(8). On the back end, because any sanction for noncompliance would be subject to two layers of *de novo* FTC review, no subpoena or other investigatory action could have binding legal effect on a private party unless the FTC, exercising independent judgment, "affirm[ed]" the Authority action. *Id.* § 1209(b)(3), (c)(3); *see also id.* § 1208(c) (Authority must additionally provide "adequate due process" through "impartial hearing officers or tribunals," subject to FTC-approved rules). If any doubts remain, they should not be resolved before the above-discussed rules are proposed, promulgated, or implemented.

Moreover, Plaintiffs' argument about the Authority's enforcement powers underscores that the functions they attack do not actually "involv[e] lawmaking" or "the power to enact laws," *Legislative*, BLACK'S LAW DICTIONARY (11th ed. 2019), and thus are not relevant to an "Article I, Section 1" claim, FAC at 20.[4] As to such non-legislative functions, HISA complies with the Constitution because it channels the Authority's discretion and subjects the Authority's decisions to judicial review. Auth. MTD 22-24; *see* Plfs' Br. 7 ("considerations are given *to the Authority*"). The Fifth Circuit explained that the "deferential" judicial review afforded under the scheme in *Boerschig* distinguished that case from the unconstitutional situation "in which the actions of the private party are unreviewable." 872 F.3d at 708-709; *compare id.* at 704, 708-709 (explaining judicial review triggered "[i]f objections *** are filed," and court "does not determine 'public use' or 'necessity' as an original matter, but only reviews the pipeline's decision"), *with* Plfs' Br. 23-24 (misreading *Boerschig* to turn on "court-directed determination of the condemnation" and distinguishing HISA because "burden to file a petition for court review falls on the aggrieved party").[5]

---

[4] Plaintiffs obfuscate this point by contending broadly that "[t]he Fifth Circuit recognizes the private nondelegation doctrine." Br. 2 (formatting omitted). But that is a strawman. The issue is not whether a "so-called 'private nondelegation' doctrine" exists, but which constitutional provision gives it effect: the separation-of-powers principles arising under Article I, or the (less demanding) test "aris[ing] from *** the Due Process Clause." *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 707 (5th Cir. 2017). Even if delegations to private entities could be covered under Article I, that "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) (emphasis added).

[5] *Amicus* NAARV takes issue with the fact that HISA locates judicial review within federal courts. *See* NAARV Br. 10, ECF No. 49 (arguing HISA is "problematic *** 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's concern that a "covered person has no right to review before the [FTC]" cannot be reconciled with its 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.*

B. Plaintiffs Fail To State A Due Process Claim (Count IV)

Plaintiffs concede that their due process and nondelegation claims are coterminous. Br. 3-4; *see also* Plfs' MSJ 26 ("The legal analysis is the same[.]"). Accordingly, for the same reasons Plaintiffs fail to state a nondelegation claim, they fail to state a due process claim too.

To the extent Plaintiffs articulate some notion that HISA raises separate conflict-of-interest problems, they do not pull their claims "above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007); *see* Auth. MTD 28-29. Plaintiffs' argument that "the Authority, *itself*, creates a financial conflict of interest" by "set[ting] its own fees and charg[ing] industry participants," Br. 22, falls flat given Plaintiffs' own assertions that the "nonprofit" Authority has "no more corporate activities" apart from "enforcing HISA," Br. 23, 29, and that its purposes "are nearly identical to those set out in" the Act, Br. 9; *see* Certificate §§ 3-4 (App'x 26); Bylaws § 1.5 (App'x 34-35).

As for the individual Board members, Plaintiffs' authorities do not support an "objective" standard here that would require only a "potential for self-dealing or bias." Br. 21. One of the cases Plaintiffs cite for the "context" of their claim, *id.*, actually concerns whether judicial recusal was necessary to meet the due process guarantee of a "fair trial in a fair tribunal," *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). Even in that inapposite context, the general rule is that "[p]ersonal bias or prejudice alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause," beyond "extraordinary situation[s]" involving "extreme facts." *Id.* at 877, 887 (internal quotation marks omitted). Plaintiffs' second case is even further afield, as it does not involve due process at all, but interpretation of "the doctrine of state-action antitrust immunity" under the Sherman Act. *North Carolina State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 499 (2015); *see id.* at 520 (Alito, J., dissenting) (noting that private Boards that majority found to run afoul of Sherman Act "easily survived" challenges "under the doctrine

of substantive due process"). Even so, that antitrust doctrine makes clear that private involvement in a regulatory scheme is not problematic when subject to "active supervision" by a governmental body. *Id.* at 515.

More generally, Plaintiffs' conflict-of-interest arguments ignore that any Authority actions with legal effect on private parties will be subject to the FTC's independent review and approval. *Cf. 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). At bottom, Plaintiffs' due process claim boils down to a concern that HISA's express protections against self-dealing "are drafted ambiguously," Br. 21—only highlighting the ripeness problems that ensnare every aspect of this challenge.

C. Plaintiffs Abandon Their Claims Under The Public Nondelegation Doctrine And The Appointments Clause (Counts II & III)

Defendants moved to dismiss Plaintiffs' public nondelegation doctrine and Appointment Clause claims, Auth. MTD 24-28, yet Plaintiffs offer no response. When a plaintiff "fail[s] to defend [a] claim in *** response[] to the defendant's motion to dismiss[,] [that] failure *** constitute[s] abandonment." *Black v. North Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006); *see In re Dallas Roadster, Ltd.*, 846 F.3d 112, 126 (5th Cir. 2017). Accordingly, Counts II and III must be dismissed.[6]

[6] Plaintiffs cannot marshal these abandoned claims to support their standing and ripeness arguments. *Contra, e.g.*, Plfs' Br. 25-26, 29-30 & n.5 (claiming injury based on allegations that Board was "selected in violation of the U.S. Constitution's Appointments Clause" and that Congress provided "no guiding intelligible principle" to FTC).

CONCLUSION

For the foregoing reasons and those provided in the Authority Defendants' and FTC's motions to dismiss, this Court should dismiss the First Amended Complaint.

Respectfully submitted,

/s/ Pratik A. Shah

Pratik A. Shah
Admitted Pro Hac Vice
Lide E. Paterno
Admitted Pro Hac Vice
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street, NW
Washington, DC 20006
Tel: (202) 887-4000
Fax: (202) 887-4288
pshah@akingump.com

Aileen M. McGrath
Admitted Pro Hac Vice
AKIN GUMP STRAUSS HAUER & FELD LLP
580 California Street, Suite 1500
San Francisco, CA 94104-1036
Tel: (415) 765-9500
Fax: (415) 765-9501

Brennan H. Meier
Texas Bar No. 24077507
AKIN GUMP STRAUSS HAUER & FELD LLP
2300 N. Field Street
Dallas, TX 75201
Tel: (214) 969-2800
Fax: (213) 969-4343

John C. Roach
Admitted Pro Hac Vice
David T. Royse
Admitted Pro Hac Vice
RANSDELL ROACH & ROYSE, PLLC
176 Pasadena Drive, Building One
Lexington, KY 40503
Tel: 859-276-6262
Fax: 859-276-4500

Counsel for Defendants Jerry Black, Katrina Adams, Leonard Coleman, Nancy Cox, Joseph Dunford, Frank Keating, Kenneth Schanzer, and Horseracing Integrity and Safety Authority, Inc.

June 18, 2021

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 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.

/s/ Pratik A. Shah
Pratik A. Shah