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

NATIONAL HORSEMEN'S BENEVOLENT and PROTECTIVE ASSOCIATION et al., *Plaintiff*,	§	
v.	§	CIVIL ACTION NO. 5:21-cv-00071-H
JERRY BLACK et al., *Defendants.*	§	

THE STATE OF TEXAS AND THE TEXAS RACING COMMISSION'S MOTION TO INTERVENE AND MOTION TO JOIN PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT

Proposed Intervenor-Plaintiffs, the State of Texas and the Texas Racing Commission by and through the Office of the Attorney General of Texas, file this motion to intervene as a party-plaintiff pursuant to Rule 24 of the Federal Rules of Civil Procedure.

INTRODUCTION

On December 27, 2020, Congress enacted the Horseracing Safety and Integrity Act ("HISA"),[1] which was slipped through as part of the 2,000-page Consolidated Appropriations Act, 2021, more popularly known as the second COVID-19 stimulus bill. HISA unconstitutionally delegates legislative authority and regulatory power over the horseracing industry to a private, nonprofit corporation known as the Horseracing Integrity and Safety Authority (the "Authority"). The Authority is given the power to promulgate rules governing doping, medication control, and racetrack safety in horseracing; to investigate violations of those rules by issuing and enforcing subpoenas; to adjudicate violations of its rules; to bring civil actions in federal court in response to known or anticipated violations in order to enforce its regulations; and to discipline violators with

[1] Pub. L. No. 116-260, 134 Stat. 1182 (2020).

sanctions up to and including lifetime bans from horseracing, disgorgement of purses, and monetary fines and penalties. The Authority also possesses unlimited and unguided discretion to expand HISA's scope to include any breed of horse.

HISA grants the Authority broad regulatory power, yet the Authority is virtually unaccountable to any political actor. The Authority has the exclusive power to craft regulations relating to doping, medication control, and racetrack safety in horseracing. HISA relegates the Federal Trade Commission (the "Commission") to a ministerial role in which it is required to approve and issue certain of the Authority's regulations so long as they are consistent with HISA and "applicable rules approved by the Commission." Moreover, no federal official can remove any member of the Authority's Board of Directors. HISA thus delegates to a private body the full coercive power of the federal government while simultaneously making it completely unaccountable to the people.

After creating this vast new federal regulatory structure and delegating it to a private corporation, Congress disclaimed any responsibility for funding the Authority. Instead, it forced the funding responsibility onto the states, imposing on them the choice of either funding the Authority with state funds or, if a state refuses, collecting fees directly from racing industry participants in that state while punishing the state by banning it from collecting similar taxes or fees itself.

The National Horsemen's Benevolent and Protective Association, along with several of its state affiliates, filed this lawsuit against the Authority, the individual members of the Nominating Committee for the Authority, and the Federal Trade Commission ("FTC") and its commissioners in their official capacities. Plaintiffs ask this Court to declare HISA unconstitutional on the grounds that it violates (1) the nondelegation doctrines of Article I, Section 1 of the U.S. Constitution, (2) the Appointments Clause of Article II, Section 2, Clause 2 of the U.S. Constitution, and (3) the Due Process Clause of the Fifth Amendment.

The State of Texas and the Texas Racing Commission ("State Intervenors") move to intervene to protect, *inter alia*, their sovereign interests in regulating occupations and professional standards within their borders, including Texas's rulemaking authority contained in the Texas Racing Act[2] and its right to promulgate the rules of horseracing[3]. HISA unconstitutionally commandeers the legislative and executive branches of state government and puts Congress in control of state branches of government in violation of the Tenth Amendment. At the moment, these important interests are entirely unrepresented in this case. Mandatory intervention under Civil Rule 24(a)(2) is therefore appropriate. At the very least, the State Intervenors should be permitted to intervene under Civil Rule 24(b)(1)(B).

ARGUMENT IN SUPPORT OF INTERVENTION

I. The Court Should Permit State Intervenors to Intervene Under Civil Rule 24(a)(2).

Under the Federal Rules of Civil Procedure, a non-party must be allowed to intervene (1) when it has an interest relating to the subject of the action and (2) disposing of the action may practically "impair or impede" that interest, (3) unless the parties "adequately represent" that interest. Fed. R. Civ. P. 24(a)(2). The State Intervenors may intervene as of right in this matter because they satisfy all three requirements.

A. State Intervenors have important interests related to the subject of this action.

The Fifth Circuit has held that courts may not define the requisite interest for intervention purposes "too narrowly." *Ford v. City of Huntsville*, 242 F.3d 235, 240 (5th Cir. 2001). The State Intervenors have a "direct, substantial, legally protectable interest." *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 250 (5th Cir. 2009) (quotation omitted). And those interests are related to "the subject of

---

[2] TEX. OCC. CODE Chs. 2021-2035.
[3] 16 TEX. ADMIN. CODE Chs. 301-323.

the action." Fed. R. Civ. P. 24(a). An interest "is sufficient if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim." *Wal–Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 566 (5th Cir. 2016) (quotation omitted).

The State Intervenors have a direct, substantial, and legally protectable interest in rulemaking authority and regulating racing participants and pari-mutuel wagering within its borders, which goes to the very heart of the matters at issue in this suit. The Texas Racing Commission ("TRC") is state agency governed by the Texas Racing Act, which provides for strict regulation of horse racing and greyhound racing and the control of pari-mutuel wagering in connection with that racing. Tex. Occ. Code Ann. § 2021.002. The TRC licenses and regulates all aspects of horse racing and greyhound racing in Texas, regardless of whether that racing involves pari-mutuel wagering. Tex. Occ. Code Ann. § 2023.001(a). In adopting rules and in the supervision and conduct of racing, the TRC considers the effect of a proposed commission action on the state's agricultural, horse breeding, horse training, greyhound breeding, and greyhound training industry. Tex. Occ. Code Ann. § 2023.001(b). The regulations enacted by the TRC, including those related to anti-doping, racetrack safety, disciplinary action, and enforcement, are located at 16 Tex. Admin. Code §§ 301.1 to 323.203. The TRC is self-funded by the entities it regulates and is appropriated only General Revenue–dedicated funds. The agency's revenue primarily comes from fees assessed to racetracks, occupational licensee's fees, and simulcast racing taxes.

HISA requires Texas and the TRC to cooperate and share information with the Authority; forces them to remit taxes and fees to fund the Authority or lose the ability to collect taxes and fees for their own anti-doping, medication-control, and racetrack-safety programs; and preempts some of Texas's laws and regulations.

HISA forces Texas, through the TRC to assess, collect, and remit to the Authority fees that the Authority determines to be Texas's proportional share of the Authority's annual budget for the next calendar year. HISA § 1203(f)(2), 134 Stat. at 3256–57. The Board of Directors of the Authority, subject only to public comment, determines the annual budget of the Authority. There is no appeal or allowable challenges of what the Authority ultimately approves as its budget. If the State of Texas refuses to assess, collect, and remit fees to the Authority, HISA strips from Texas its right to "impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters for covered horseraces." *Id.* § 1203(f)(3), 134 Stat. at 3257. So, for example, if Texas were to decide that it desired that its anti-doping regulations be stricter than the Authority's regulations, HISA would bar Texas and the TRC from raising the funds necessary to enforce its own regulations unless it also agreed to collect the Authority's fees. That ban on state legislation or regulation that imposes taxes and fees applies only to states that refuse to fund the Authority—not to states that give money to the Authority. Furthermore, a portion of the amount of the statutorily designated taxes that the TRC collects are used for these purposes, but it may not be feasible to separately calculate or remove those amounts from the existing taxes.

HISA requires Texas "law enforcement authorities" to "cooperate and share information" with the Authority whenever a person's conduct may violate both a rule of the Authority and Texas law. HISA § 1211(b), 134 Stat. at 3275. HISA thus forces the State of Texas to spend time and resources to help the Authority carry out a federal regulatory program. If Congress wants to regulate, "it must appropriate the funds needed to administer the program," and it must enforce it. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018). Congress has no constitutional authority to command the law-enforcement agencies of the State of Texas to help the Authority administer a federal regulatory program.

Finally, even though Texas has successfully regulated horseracing for decades through the TRC, HISA preempts state laws and regulations on which Texans and the regulated industry have long relied to ensure the safety and integrity of horseracing. *See* HISA § 1205(b), 134 Stat. at 3259. HISA purports to impose this preemption on Texas via the regulations of a private corporation, which has a governing board that is neither appointed nor removable by a federal officer, and which can impose rules compliant with the Act and federal regulations without any meaningful oversight by politically accountable actors.

B. Disposition of this action will impair the State's interest.

The State Intervenors must also show "that disposing of the action may as a practical matter impair or impede" their interests. Fed. R. Civ. P. 24(a)(2). This does not mean that a judgment in this lawsuit would be binding on the State; rather, this element simply looks to whether the judgment "may" have a "practical" impact on the would-be intervenor's interest. *See Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 828-29 (5th Cir. 1967).

There is no question that Texas's interest will be impaired or impeded if it is not permitted to intervene because the current plaintiffs do not adequately represent the State Intervenors' legal and constitutionally protected interests in the State's rulemaking authority and ability to regulate racing participants and pari-mutuel wagering. *See John Doe No. 1 v. Glickman*, 256 F.3d 371, 380 (5th Cir. 2001).

C. The parties cannot show that they adequately represent the State's interests.

The next question is whether the existing parties adequately represent the State's interests. Arguably, the burden of persuasion on that question belongs to the parties. *See* 7C Wright & Miller, Federal Practice & Procedure § 1909 (3d ed.). But even if the State shoulders it, its burden is "not a substantial one." *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014). Then-Judge Blackmun summarized three scenarios when inadequate representation exists: (1) when the party in question may

be colluding with the opposing party; (2) when the party in question takes a position adverse to the would-be intervenor; or (3) when the party in question fails to diligently pursue the would-be intervenor's interests. *Stadin v. Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962). The State "need only show that the representation *may* be inadequate." *John Doe No. 1 v. Glickman*, 256 F.3d 371, 380 (5th Cir. 2001) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)) (emphasis added).

Here, there is no question that without the State Intervenors, the current plaintiffs are unable to adequately represent the State's interests. The existing plaintiffs' claims focus on private entities. Although the private entities' interests are related to the State's interests in rulemaking and regulating racing participants and pari-mutuel wagering, the plaintiffs do not adequately represent the State's sovereign interests in regulating occupations and professional standards within their borders nor do the existing plaintiffs assert that HISA unconstitutionally commandeers the legislative and executive branches of state government by putting Congress in control of state branches of government in violation of the Tenth Amendment.

D. The request to intervene is timely.

Finally, this motion to intervene is timely under Fed. R. Civ. P. 24(a). The Fifth Circuit has noted that Rule 24's timeliness inquiry "is contextual; absolute measures of timeliness should be ignored." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). Timeliness is not limited to chronological considerations, but is to be determined from all the circumstances, including the length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before petitioning for leave to intervene. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977).

Although this case has been pending since March 15, 2021, the State Intervenors only learned of this suit a little over a month ago and filed this motion without delay. In addition, the suit has not

progressed to the point that any party would be prejudiced. The State seeks intervention well "before discovery [has] progressed" and does not "seek to delay or reconsider phases of the litigation that ha[ve] already concluded." *Wal-Mart*, 834 F.3d at 565.

II. Alternatively, the Court Should Permit the State to Intervene Under Fed. R. Civ. P. 24(b)(1)(B).

If the Court does not grant the State intervention as of right— which it should, for the reasons addressed above—it should nonetheless grant permissive intervention because the State's position and this suit have a common question of law or fact. *See* Fed. R. Civ. P. 24(b)(1)(B) ("On timely motion, the court may permit anyone to intervene who . . . (B) has a claim or defense that shares with the main action a common question of law or fact.").

To obtain permissive intervention under Rule 24, the State must demonstrate that: (1) the motion to intervene is timely; (2) its claim or defense has a question of law or fact in common with the existing action; and (3) intervention will not delay or prejudice adjudication of the existing parties' rights. *Id.*; *see United States v. LULAC*, 793 F.2d 636, 644 (5th Cir. 1986) ("Although the court erred in granting intervention as of right, it might have granted permissive intervention under Rule 24(b) because the intervenors raise common questions of law and fact."). The State satisfies each of these factors.

First, as stated above, the State's motion is timely. *See supra* Part I.D. Second, because the State filed the motion before significant action has occurred in the case, granting the motion will not cause any delay or prejudice to the existing parties' rights to litigate the case. Third, the State shares common questions of law and fact with the claims asserted in the lawsuit.

In considering whether to grant permissive intervention, the Court may also consider "(1) whether an intervenor is adequately represented by other parties; and (2) whether intervention is likely

to contribute significantly to the development of the underlying factual issues." *Marketfare (St. Claude), L.L.C. v. United Fire & Cas. Co.*, Nos. 06–7232, 06–7641, 06–7639, 06–7643, 06–7644, 2011 WL 3349821, at *2 (E.D. La. Aug. 3, 2011) (citing *League of United Latin American Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 187 (5th Cir.1989)).

These factors provide additional support for granting permissive intervention in this case. As already discussed, the State has a significant interest in protecting the sovereignty of Texas's rulemaking authority and ability to regulate racing participants and pari-mutuel wagering. *See supra* Part I.A. These interests will not be adequately represented by the current plaintiffs. *See supra* Part I.C. In addition, the State's ability to address these interests will contribute significantly to the just and equitable resolution of the constitutional questions presented. Thus, even if the Court concludes that the State is not entitled to intervene as of right, it should grant the State's request for permissive intervention.

III. Motion to Join of Plaintiffs' Motion for Partial Summary Judgment.

In addition, Proposed Intervenor-Plaintiffs move this Court to join as a party to Plaintiffs' Motion for Summary Judgment [Dkt. 37] and Brief in Support thereof [Dkt. 38]. Texas understands that this case is set for a hearing on cross-motions for summary judgment and dismissal on February 16, 2022. Texas does not wish to delay resolution of the case; therefore, it asks to join the Motion for Summary Judgment filed by Plaintiffs as if it were its own.

CONCLUSION

The State of Texas' sovereign interest in rulemaking of racing participants and pari-mutuel wagering, as well as preserving its foundations is directly related to the Plaintiffs' claims in this case. If the Horseracing Integrity and Safety Act is allowed to stand, the federal government will be permitted, without Congressional authorization, to invade virtually any arena of racing and wagering,

threaten and preempt state regulations, and alter longstanding rules and principles that are hallmarks of the sport of racing and the State's right to regulate gambling within its borders. The State of Texas interests in these matters are not adequately represented by plaintiffs, who have alleged constitutional claims focused on their rights as private entities. For these reasons, intervenors ask the Court to grant its motion to intervene as party-plaintiffs as of right or, alternatively, to intervene permissively, and grant it all the same rights and responsibilities as a party to the lawsuit.

In addition, Proposed Intervenor-Plaintiffs ask this Court to grant its motion to join Plaintiffs' Motion for Partial Summary Judgment currently scheduled for oral arguments on February 16, 2022.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN COWLES
Deputy Attorney General for Civil Litigation

THOMAS A. ALBRIGHT
Chief for General Litigation Division

/s/ *Taylor Gifford*
TAYLOR GIFFORD
Texas Bar No. 24027262
Office of the Attorney General
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120 | FAX: (512) 320-0667
taylor.gifford@oag.texas.gov

Counsel for State of Texas and Texas Racing Commission

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been filed and served electronically through the Court's Electronic Case File system on this the 27th day of January, 2022, upon all counsel of record.

/s/ *Taylor Gifford*
TAYLOR GIFFORD
Assistant Attorney General

CERTIFICATE OF CONFERENCE

Before filing this Motion, counsel for the State of Texas and the Texas Racing Commission conferred via email with counsel for all parties. Counsel for Plaintiffs consent to Texas's intervention. Counsel for the Authority stated: "The Authority Defendants oppose the State's belated motion to intervene. In the event the Court nevertheless grants it, the State's oral argument time (if any) should come out of Plaintiffs' allotment of 30 minutes." Counsel for the Federal defendants stated: "Federal Defendants believe that this motion is untimely, and intend to respond in due course."

/s/ *Taylor Gifford*
TAYLOR GIFFORD
Assistant Attorney General