

**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,

and

THE STATE OF TEXAS and THE TEXAS RACING COMMISSION,

Intervenor-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' NOTICE  
OF SUPPLEMENTAL  
AUTHORITY  
REGARDING FTC  
ORDER APPROVING  
THE RACETRACK  
SAFETY RULE  
PROPOSED BY THE  
HORSERACING  
INTEGRITY AND  
SAFETY AUTHORITY**

Plaintiffs submit this Notice of Supplemental Authority to advise the Court that on March 3, 2022, Defendant Federal Trade Commission issued its Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity and Safety Authority, which is attached to this Notice as Exhibit A.<sup>1</sup>

As Plaintiffs feared, the Commission rubberstamped the Authority's proposal rule, approving it in whole with no modifications and with no recommendations for modifications. As the FTC stated explicitly, "[T]he Commission's statutory mandate to approve or disapprove a proposed Authority rule is limited to considering only whether the proposed rule 'is consistent with' the Act and applicable Commission rules." Exhibit A at 4 (quoting 15 U.S.C. § 3053(c)). When an agency reviews a proposed document only "for consistency with the Act's requirements," as did the FTC in this instance, the Fifth Circuit has ruled that such review is only "ministerial." *Luminant Generation Co., LLC v. United States EPA*, 675 F.3d 917, 921 (5th Cir. 2012).

The FTC received 39 public comments from industry stakeholders, Exhibit A at 3,<sup>2</sup> many of which it conceded were "useful" and "constructive," *id.* at 14, 47, 20; nonetheless, the FTC expressly ignored these valid concerns and refused to disapprove any portion of the proposed rules because it had been reduced to exercising a ministerial role. For instance, when commenters pointed out serious flaws in the definitions chosen by the Authority, the Commission did not engage with the comments because its only job, by its understanding, was to make sure the definitions did not explicitly conflict with the statute. *Id.* at 12. As the FTC explained, it can only

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<sup>1</sup> Plaintiffs filed a previous Notice on January 18, 2022, advising the Court of the proposed rule. *See* Dkt. 70.

<sup>2</sup> *See* <https://www.regulations.gov/docket/FTC-2021-0076/comments>.

cajole, sit, and wait: “The Commission would welcome a proposed rule modification that updates *Claiming Race* and any other definitions that experience reveals to be inadequate.” *Id.* at 15 (emphasis in original). The FTC admitted that only the Authority—not the Commission—can consider proposed rule modifications: “[M]any commenters made constructive suggestions for improvements that *the Authority* will consider in future proposed rule modifications.” *Id.* at 19-20 (emphasis added). The FTC’s hands remain tied by the Authority: “The Commission will welcome future proposed rule modifications that the Authority decides to submit in response to the useful comments received.” *Id.* at 14, 47.

Plaintiffs submit that the attached order demonstrates that the oversight provided by the Commission is strictly ministerial and cannot immunize the delegation of regulatory power to the private Authority. The Authority is not accountable to the Commission, whose only role is to check whether the Authority has explicitly violated the governing statute and the Commission’s procedural rule.

Respectfully Submitted,

Dated: March 8, 2022

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and

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