United States Court of Appeals for the Fifth Circuit

No. 22-10387

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 – Appellants,

and

THE STATE OF TEXAS AND THE TEXAS RACING COMMISSION,

Intervenors – Plaintiffs – Appellants,

versus

JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN, M.D.; NANCY COX; JOSEPH DUNFORD; FRANK KEATING; KENNETH SCHANZER; THE HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.; THE FEDERAL TRADE COMMISSION; LINA M. KHAN, IN HER OFFICIAL CAPACITY AS CHAIR OF THE FEDERAL TRADE COMMISSION; NOAH JOSHUA PHILLIPS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE FEDERAL TRADE COMMISSION; REBECCA KELLY SLAUGHTER, IN HER 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 – Appellees.

PLAINTIFFS-APPELLANTS' APPENDIX

On Appeal from the United States District Court
for the Northern District of Texas
Case No. 5:21-cv-00071-H
Honorable James Wesley Hendrix

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TABLE OF CONTENTS

APPEAL,CLOSED

U.S. District Court
Northern District of Texas (Lubbock)
CIVIL DOCKET FOR CASE #: 5:21-cv-00071-H

National Horsemen's Benevolent and Protective Association et al v. Black et al
Assigned to: Judge James Wesley Hendrix
Case in other court: USCA Fifth Circuit, 22-10387
USCA Fifth Circuit, 22-10387
Cause: 28:2201 Injunction

Date Filed: 03/15/2021
Date Terminated: 04/25/2022
Jury Demand: None
Nature of Suit: 890 Other Statutes: Other Statutory Actions
Jurisdiction: Federal Question

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Bar Status: Not Admitted

Date Filed	#	Docket Text
03/15/2021	1	COMPLAINT against All Defendants filed by Pennsylvania Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, Arizona Horsemen's Benevolent and Protective Association, National Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Oklahoma Horsemen's Benevolent and Protective Association, Washington Horsemen's Benevolent and Protective Association, Nebraska Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Oregon Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association. (Filing fee $402; Receipt number 0539-11695168) Clerk to issue summons(es). In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the Judges Copy Requirements and Judge Specific Requirements is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Bustos, Fernando) (Entered: 03/15/2021)
03/15/2021	2	Request for Clerk to issue Summons filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association. (Bustos, Fernando) (Entered: 03/15/2021)

03/15/2021	3	New Case Notes: A filing fee has been paid. Pursuant to Misc. Order 6, Plaintiff is provided the Notice of Right to Consent to Proceed Before A U.S. Magistrate Judge. Clerk to provide copy to plaintiff if not received electronically. (krr) (Entered: 03/15/2021)
03/15/2021	4	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association. (Bustos, Fernando) (Entered: 03/15/2021)
03/15/2021	5	Summonses Issued as to All Defendants'. (krr) (Entered: 03/15/2021)
03/15/2021	6	***FILING WITHDRAWN PER ORDER NO. 16 entered 03/31/2021*** MOTION for Injunction *and Memorandum of Law in Support* filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association with Brief/Memorandum in Support. (Bustos, Fernando) Modified text on 3/31/2021 (krr). (Entered: 03/15/2021)
03/15/2021	7	Appendix in Support filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association re 6 MOTION for Injunction *and Memorandum of Law in Support* (Bustos, Fernando) (Entered: 03/15/2021)
03/18/2021	8	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Brian K. Kelsey (Filing fee $100; Receipt number 0539-11706724) filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association (Bustos, Fernando) (Entered: 03/18/2021)

03/22/2021	9	ORDER granting 8 Application for Admission Pro Hac Vice of Brian Kirk Kelsey. The Clerk of Court shall deposit the admission fee to the account of the Non-Appropriated Fund of this Court. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge James Wesley Hendrix on 3/22/2021) (krr) (Entered: 03/22/2021)
03/26/2021	10	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Jeffrey D. Jennings (Filing fee $100; Receipt number 0539-11736249) filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association with Brief/Memorandum in Support. (Bustos, Fernando) (Entered: 03/26/2021)
03/26/2021	11	ORDER granting 10 Application for Admission Pro Hac Vice of Jeffrey D. Jennings. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge James Wesley Hendrix on 3/26/2021) (krr) (Entered: 03/26/2021)
03/29/2021	12	NOTICE of Attorney Appearance by Alexander V Sverdlov on behalf of Rohit Chopra, Federal Trade Commission, Noah Phillips, Kelly Slaughter, Christine Wilson. (Filer confirms contact info in ECF is current.) (Sverdlov, Alexander) (Entered: 03/29/2021)
03/29/2021	13	MOTION for scheduling order filed by Rohit Chopra, Federal Trade Commission, Noah Phillips, Kelly Slaughter, Christine Wilson with Brief/Memorandum in Support. (Sverdlov, Alexander) (Entered: 03/29/2021)
03/29/2021	14	NOTICE of Attorney Appearance by Brian Walters Stoltz-DOJ on behalf of Rohit Chopra, Federal Trade Commission, Noah Phillips, Kelly Slaughter, Christine Wilson. (Filer confirms contact info in ECF is current.) (Stoltz-DOJ, Brian) (Entered: 03/29/2021)
03/31/2021	15	NOTICE of Attorney Appearance by Brennan Holden Meier on behalf of Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer. (Filer confirms contact info in ECF is current.) (Meier, Brennan) (Entered: 03/31/2021)
03/31/2021	16	SCHEDULING ORDER: Before the Court is the parties' Joint Motion for Scheduling Order. Dkt. No. 13 . The Court grants the motion. Accordingly, the Court grants the parties' request that the plaintiffs' Motion for Preliminary Injunction, Dkt. No. 6 , be withdrawn and orders the Clerk of Court to terminate the motion. Additionally, the Court enters the following scheduling order to facilitate efficient disposition of this case. Finally, the Court grants the parties' request for oral argument on their dispositive motions and will set an oral argument after briefing on the dispositive motions is closed. Joinder of Parties: All motions requesting joinder of additional parties shall be filed no later than 05/07/2021. Amendment of Pleadings due by 04/02/2021. Dispositive Motions due 04/30/2021 with Responses due 05/28/2021. Replies in Support of Dispositive Motions due 06/18/2021. Oral argument on Dispositive Motions to be set at a later date. (Ordered by Judge James Wesley Hendrix on 3/31/2021) (krr) (Entered: 03/31/2021)
04/01/2021	17	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee

		$100; Receipt number 0539-11756953) filed by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer (Attachments: # 1 Certficate of Good Standing)Attorney Pratik A. Shah added to party Katrina Adams(pty:dft), Attorney Pratik A. Shah added to party Jerry Black(pty:dft), Attorney Pratik A. Shah added to party Leonard Coleman(pty:dft), Attorney Pratik A. Shah added to party Nancy Cox(pty:dft), Attorney Pratik A. Shah added to party Joseph Dunford(pty:dft), Attorney Pratik A. Shah added to party Horseracing Integrity and Safety Authority, Inc.(pty:dft), Attorney Pratik A. Shah added to party Frank Keating (pty:dft), Attorney Pratik A. Shah added to party Kenneth Schanzer(pty:dft) (Shah, Pratik) (Entered: 04/01/2021)
04/01/2021	18	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number 0539-11757063) filed by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer (Attachments: # 1 Certificate of Good Standing)Attorney Aileen M McGrath added to party Katrina Adams(pty:dft), Attorney Aileen M McGrath added to party Jerry Black(pty:dft), Attorney Aileen M McGrath added to party Leonard Coleman(pty:dft), Attorney Aileen M McGrath added to party Nancy Cox(pty:dft), Attorney Aileen M McGrath added to party Joseph Dunford(pty:dft), Attorney Aileen M McGrath added to party Horseracing Integrity and Safety Authority, Inc.(pty:dft), Attorney Aileen M McGrath added to party Frank Keating (pty:dft), Attorney Aileen M McGrath added to party Kenneth Schanzer(pty:dft) (McGrath, Aileen) (Entered: 04/01/2021)
04/01/2021	19	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number 0539-11757221) filed by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer (Attachments: # 1 Certificate of Good Standing)Attorney Lide E Paterno added to party Katrina Adams(pty:dft), Attorney Lide E Paterno added to party Jerry Black(pty:dft), Attorney Lide E Paterno added to party Leonard Coleman(pty:dft), Attorney Lide E Paterno added to party Nancy Cox(pty:dft), Attorney Lide E Paterno added to party Joseph Dunford(pty:dft), Attorney Lide E Paterno added to party Horseracing Integrity and Safety Authority, Inc.(pty:dft), Attorney Lide E Paterno added to party Frank Keating (pty:dft), Attorney Lide E Paterno added to party Kenneth Schanzer(pty:dft) (Paterno, Lide) (Entered: 04/01/2021)
04/01/2021	20	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number 0539-11757275) filed by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer (Attachments: # 1 Certificate of Good Standing)Attorney John C Roach added to party Katrina Adams(pty:dft), Attorney John C Roach added to party Jerry Black(pty:dft), Attorney John C Roach added to party Leonard Coleman(pty:dft), Attorney John C Roach added to party Nancy Cox(pty:dft), Attorney John C Roach added to party Joseph Dunford(pty:dft), Attorney John C Roach added to party Horseracing Integrity and Safety Authority, Inc.(pty:dft), Attorney John C Roach added to party Frank Keating (pty:dft), Attorney John C Roach added to party Kenneth Schanzer(pty:dft) (Roach, John) (Entered: 04/01/2021)
04/01/2021	21	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number 0539-11757309) filed by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer (Attachments: # 1 Certificate of Good Standing)Attorney David T Royse added to party Katrina Adams(pty:dft), Attorney David T Royse added to party Jerry Black(pty:dft), Attorney David T Royse added to party Leonard Coleman(pty:dft), Attorney David T Royse added to party Nancy

		Cox(pty:dft), Attorney David T Royse added to party Joseph Dunford(pty:dft), Attorney David T Royse added to party Horseracing Integrity and Safety Authority, Inc.(pty:dft), Attorney David T Royse added to party Frank Keating (pty:dft), Attorney David T Royse added to party Kenneth Schanzer(pty:dft) (Royse, David) (Entered: 04/01/2021)
04/02/2021	22	Joint MOTION to Amend/Correct 16 Scheduling Order,,,,, Modify Hearings/Deadlines,,,,, Terminate Motions,,,, filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association with Brief/Memorandum in Support. (Kelsey, Brian) (Entered: 04/02/2021)
04/02/2021	23	AMENDED COMPLAINT against All Defendants filed by Pennsylvania Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, Arizona Horsemen's Benevolent and Protective Association, National Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Oklahoma Horsemen's Benevolent and Protective Association, Washington Horsemen's Benevolent and Protective Association, Nebraska Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Oregon Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Tampa Bay Horsemen's Benevolent and Protective Association. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Attachments: # 1 Redline) (Kelsey, Brian) (Entered: 04/02/2021)
04/02/2021	24	ORDER granting 21 Application for Admission Pro Hac Vice of David T. Royse. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge James Wesley Hendrix on 4/2/2021) (krr) (Entered: 04/02/2021)
04/02/2021	25	ORDER granting 20 Application for Admission Pro Hac Vice of John C. Roach. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge James Wesley Hendrix on 4/2/2021) (krr) (Entered: 04/02/2021)
04/02/2021	26	ORDER granting 19 Application for Admission Pro Hac Vice of Lide E. Paterno. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge James Wesley Hendrix on 4/2/2021) (krr) (Entered: 04/02/2021)
04/02/2021	27	ORDER granting 18 Application for Admission Pro Hac Vice of Aileen M. McGrath. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f)

		and LCrR 49.2(g). (Ordered by Judge James Wesley Hendrix on 4/2/2021) (krr) (Entered: 04/02/2021)
04/02/2021	28	ORDER granting 17 Application for Admission Pro Hac Vice of Patrik A. Shah. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge James Wesley Hendrix on 4/2/2021) (krr) (Entered: 04/02/2021)
04/02/2021	29	ORDER GRANTING THE PARTIES' JOINT MOTION TO MODIFY SCHEDULING ORDER RE: 22 Motion. The plaintiffs' reply brief may not exceed 20 pages in length, and the FTC Defendants' and Authority Defendants' reply briefs may not exceed 15 pages in length. Additionally, the Court orders the defendants to file an answer or to otherwise respond to the plaintiffs' pleadings no later than April 30, 2021. If a party wants to join additional parties other than those named to the Horseracing Integrity and Safety Authority, Inc., prior this Court's ruling on dispositive motions, pursuant to the Court's Scheduling Order, that party must file a motion requesting joinder no later than May 7, 2021. The Court's Scheduling Order, Dkt. No. 16 , remains in effect. (Ordered by Judge James Wesley Hendrix on 4/2/2021) (krr) (Entered: 04/02/2021)
04/05/2021	30	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Reilly Stephens (Filing fee $100; Receipt number 0539-11763836) filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association (Bustos, Fernando) (Entered: 04/05/2021)
04/05/2021	31	NOTICE OF DEFICIENCY: Before the Court is Reilly Walsh Stephens's Application for Admission Pro Hac Vice. Dkt. No. 30 . Therefore, the Court orders that Stephens refile his application in proper form and with his bar number listed in the appropriate field by April 12, 2021. (Ordered by Judge James Wesley Hendrix on 4/5/2021) (krr) (Entered: 04/05/2021)
04/07/2021	32	Supplemental Document by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association as to 4 Cert. Of Interested Persons/Disclosure Statement,,, *Plaintiffs' First Supplemental Corporate Disclosure Statement*. (Bustos, Fernando) (Entered: 04/07/2021)
04/07/2021	33	ORDER granting 30 Application for Admission Pro Hac Vice of Reilly Walsh Stephens. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f)

		and LCrR 49.2(g). (Ordered by Judge James Wesley Hendrix on 4/7/2021) (krr) (Entered: 04/07/2021)
04/30/2021	34	MOTION to Dismiss filed by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer with Brief/Memorandum in Support. (Attachments: # 1 Appendix) (Shah, Pratik) (Entered: 04/30/2021)
04/30/2021	35	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer. (Shah, Pratik) (Entered: 04/30/2021)
04/30/2021	36	MOTION to Dismiss filed by Rohit Chopra, Federal Trade Commission, Noah Phillips, Kelly Slaughter, Christine Wilson with Brief/Memorandum in Support. (Sverdlov, Alexander) (Entered: 04/30/2021)
04/30/2021	37	MOTION for Summary Judgment *Partial* filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association (Bustos, Fernando) (Entered: 04/30/2021)
04/30/2021	38	Brief/Memorandum in Support filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association re 37 MOTION for Summary Judgment *Partial* (Bustos, Fernando) (Entered: 04/30/2021)
04/30/2021	39	Appendix in Support filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association re 38 Brief/Memorandum in Support of Motion,,, (Attachments: # 1 Exhibit(s)) (Bustos, Fernando) (Entered: 05/01/2021)
05/13/2021	40	MOTION for Leave to File Amicus Curiae Brief filed by The American Quarter Horse Association with Brief/Memorandum in Support.. Party The American Quarter Horse

		Association added.Attorney W Wade Arnold added to party The American Quarter Horse Association(pty:am) (Arnold, W) (Entered: 05/13/2021)
05/14/2021	41	MOTION for Leave to File Amicus Curiae Brief filed by North American Association of Racetrack Veterinarians Attorney Fernando M Bustos added to party North American Association of Racetrack Veterinarians(pty:am) (Bustos, Fernando) (Entered: 05/14/2021)
05/14/2021	42	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Paul E. Salamanca (Filing fee $100; Receipt number 0539-11894291) filed by Mitch McConnell, Paul Tonko, Andy Barr. Party U.S. Senator Mitch McConnell, et al. added.Attorney Eric Grant added to party Mitch McConnell(pty:am), Attorney Eric Grant added to party Paul Tonko(pty:am), Attorney Eric Grant added to party Andy Barr(pty:am) (Grant, Eric) (Entered: 05/14/2021)
05/14/2021	43	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Peter J. Sacopulos (Filing fee $100; Receipt number 0539-11894330) filed by North American Association of Racetrack Veterinarians (Bustos, Fernando) (Entered: 05/14/2021)
05/14/2021	44	Unopposed MOTION for Leave to File Brief Amici Curiae *in Support of Defendants' Motions to Dismiss* (), MOTION to proceed without local counsel re 34 MOTION to Dismiss , 36 MOTION to Dismiss filed by Andy Barr, Mitch McConnell, Paul Tonko with Brief/Memorandum in Support. (Attachments: # 1 Brief Amici Curiae, # 2 Proposed Order) (Grant, Eric) (Entered: 05/14/2021)
05/14/2021	45	MOTION Motion for Leave to Proceed Without Local Counsel re 41 MOTION for Leave to File Amicus Curiae Brief, 43 Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Peter J. Sacopulos (Filing fee $100; Receipt number 0539-11894330) filed by North American Association of Racetrack Veterinarians (Bustos, Fernando) (Entered: 05/14/2021)
05/17/2021	46	ORDER granting 43 Application for Admission Pro Hac Vice of Peter J. Sacopulos. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge James Wesley Hendrix on 5/17/2021) (krr) (Entered: 05/17/2021)
05/17/2021	47	ORDER granting 42 Application for Admission Pro Hac Vice of Paul E. Salamanca. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge James Wesley Hendrix on 5/17/2021) (krr) (Entered: 05/17/2021)
05/17/2021	48	ORDER GRANTING THE NORTH AMERICAN ASSOCIATION OF RACETRACK VETERINARIANS' MOTIONS FOR LEAVE TO FILE AMICUS BRIEF, 41 AND TO PROCEED WITHOUT LOCAL COUNSEL, 45 . (Unless the document has already been filed, clerk to enter the document as of the date of this order.) (Ordered by Judge James Wesley Hendrix on 5/17/2021) (krr) (Entered: 05/17/2021)
05/17/2021	49	THE NORTH AMERICAN ASSOCIATION OF RACETRACK VETERINARIANS AMICUS BRIEF IN SUPPORT OF PLAINTIFFS FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS MOTIONS TO DISMISS as to 48 ORDER GRANTING THE NORTH AMERICAN ASSOCIATION OF RACETRACK VETERINARIANS' MOTIONS FOR LEAVE TO FILE AMICUS

		BRIEF AND TO PROCEED WITHOUT LOCAL COUNSEL. (krr) (Entered: 05/17/2021)
05/17/2021	50	ORDER GRANTING THE AMERICAN QUARTER HORSE ASSOCIATION'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, Dkt. No. 40 . (Unless the document has already been filed, clerk to enter the document as of the date of this order.) (Ordered by Judge James Wesley Hendrix on 5/17/2021) (krr) (Entered: 05/17/2021)
05/17/2021	51	BRIEF FOR AMICUS CURIAE AMERICAN QUARTER HORSE ASSOCIATION IN SUPPORT OF PLAINTIFFS, filed by The American Quarter Horse Association RE: 50 ORDER GRANTING THE AMERICAN QUARTER HORSE ASSOCIATION'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF. (krr) (Entered: 05/17/2021)
05/17/2021	52	ORDER GRANTING SENATOR MITCH MCCONNELL AND REPRESENTATIVES PAUL TONKO AND ANDY BARR'S UNOPPOSED MOTION FOR LEAVE TO FILE AN AMICUS BRIEF AND TO PROCEED WITHOUT LOCAL COUNSEL, Dkt. No. 44 . (Unless the document has already been filed, clerk to enter the document as of the date of this order.) (Ordered by Judge James Wesley Hendrix on 5/17/2021) (krr) (Entered: 05/17/2021)
05/17/2021	53	BRIEF AMICI CURIAE OF SENATOR MITCH MCCONNELL AND REPRESENTATIVES PAUL TONKO AND ANDY BARR IN SUPPORT OF DEFENDANTS MOTIONS TO DISMISS, filed by Andy Barr, Mitch McConnell, and Paul Tonko, RE: 52 ORDER GRANTING SENATOR MITCH MCCONNELL AND REPRESENTATIVES PAUL TONKO AND ANDY BARR'S UNOPPOSED MOTION FOR LEAVE TO FILE AN AMICUS BRIEF AND TO PROCEED WITHOUT LOCAL COUNSEL. (krr) (Entered: 05/17/2021)
05/28/2021	54	RESPONSE filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association re: 34 MOTION to Dismiss , 36 MOTION to Dismiss (Attachments: # 1 Exhibit(s)) (Kelsey, Brian) (Entered: 05/28/2021)
05/28/2021	55	RESPONSE filed by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer re: 37 MOTION for Summary Judgment *Partial* (Shah, Pratik) (Entered: 05/28/2021)
05/28/2021	56	Brief/Memorandum in Support filed by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer re 55 Response/Objection *Opposition to Plaintiffs' Motion for Partial Summary Judgment* (Attachments: # 1 Appendix) (Shah, Pratik) (Entered: 05/28/2021)
05/28/2021	57	RESPONSE filed by Rohit Chopra, Federal Trade Commission, Noah Phillips, Kelly Slaughter, Christine Wilson re: 37 MOTION for Summary Judgment *Partial* (Sverdlov, Alexander) (Entered: 05/28/2021)

05/28/2021	58	Brief/Memorandum in Support filed by Rohit Chopra, Federal Trade Commission, Noah Phillips, Kelly Slaughter, Christine Wilson re 57 Response/Objection *Brief in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment* (Sverdlov, Alexander) (Entered: 05/28/2021)
06/18/2021	59	REPLY filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association re: 37 MOTION for Summary Judgment *Partial* (Kelsey, Brian) (Entered: 06/18/2021)
06/18/2021	60	REPLY filed by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer re: 34 MOTION to Dismiss (Shah, Pratik) (Entered: 06/18/2021)
06/18/2021	61	REPLY filed by Rohit Chopra, Federal Trade Commission, Noah Phillips, Kelly Slaughter, Christine Wilson re: 36 MOTION to Dismiss (Sverdlov, Alexander) (Entered: 06/18/2021)
07/23/2021	62	NOTICE of Change of Address for Attorney Brian Kirk Kelsey on behalf of Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association. (Filer will update contact info in ECF.) (Kelsey, Brian) (Entered: 07/23/2021)
08/30/2021	63	NOTICE of *SUPPLEMENTAL AUTHORITY* filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association (Kelsey, Brian) (Entered: 08/30/2021)
11/30/2021	64	NOTICE of *Supplemental Authority* re: 37 MOTION for Summary Judgment *Partial* filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mitch McConnell, Mountaineer Park Horsemen's Benevolent and Protective Association, National

		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, Washington Horsemen's Benevolent and Protective Association (Stephens, Reilly) (Entered: 11/30/2021)
01/11/2022	65	ORDER SETTING ORAL ARGUMENT: In their Joint Motion for Scheduling Order, which the Court granted Dkt. No. 16), the parties requested oral argument on the dispositive motions in this case. Dkt. No. 13 at 3. The Court will hear oral argument on Wednesday, February 16, 2022 at 9:30 a.m. in the United States District Court, Courtroom C-216, 1205 Texas Avenue, Lubbock, Texas 79401. Each side shall have 30 minutes for oral argument. Should any amici desire time,they may move for leave to argue. (Ordered by Judge James Wesley Hendrix on 1/11/2022) (krr) (Entered: 01/11/2022)
01/14/2022	66	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number 0539-12524547) filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association Attorney Daniel R Suhr added to party Arizona Horsemen's Benevolent and Protective Association(pty:pla), Attorney Daniel R Suhr added to party Arkansas Horsemen's Benevolent and Protective Association(pty:pla), Attorney Daniel R Suhr added to party Illinois Horsemen's Benevolent and Protective Association (pty:pla), Attorney Daniel R Suhr added to party Indiana Horsemen's Benevolent and Protective Association (pty:pla), Attorney Daniel R Suhr added to party Louisiana Horsemen's Benevolent and Protective Association (pty:pla), Attorney Daniel R Suhr added to party Mountaineer Park Horsemen's Benevolent and Protective Association (pty:pla), Attorney Daniel R Suhr added to party National Horsemen's Benevolent and Protective Association(pty:pla), Attorney Daniel R Suhr added to party Nebraska Horsemen's Benevolent and Protective Association (pty:pla), Attorney Daniel R Suhr added to party Oklahoma Horsemen's Benevolent and Protective Association (pty:pla), Attorney Daniel R Suhr added to party Oregon Horsemen's Benevolent and Protective Association (pty:pla), Attorney Daniel R Suhr added to party Pennsylvania Horsemen's Benevolent and Protective Association(pty:pla), Attorney Daniel R Suhr added to party Tampa Bay Horsemen's Benevolent and Protective Association(pty:pla), Attorney Daniel R Suhr added to party Washington Horsemen's Benevolent and Protective Association (pty:pla) (Suhr, Daniel) (Entered: 01/14/2022)
01/14/2022	67	MOTION for Leave to Participate In Oral Argument filed by North American Association of Racetrack Veterinarians (Sacopulos, Peter) Modified text on 1/18/2022 (lkw). (Entered: 01/14/2022)
01/14/2022	68	ORDER granting 66 Application for Admission Pro Hac Vice of Daniel R. Suhr. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge James Wesley Hendrix on 1/14/2022) (egp) (Entered: 01/14/2022)

01/14/2022	69	MOTION to Substitute Attorney, *remove attorney Brian Kelsey,* added attorney Daniel R Suhr. Motion filed by Pennsylvania Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, Arizona Horsemen's Benevolent and Protective Association, National Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Oklahoma Horsemen's Benevolent and Protective Association, Washington Horsemen's Benevolent and Protective Association, Nebraska Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Tampa Bay Horsemen's Benevolent and Protective Association, Oregon Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association (Suhr, Daniel) (Entered: 01/14/2022)
01/18/2022	70	NOTICE of *SUPPLEMENTAL AUTHORITY* re: 37 MOTION for Summary Judgment *Partial* filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association (Attachments: # 1 Exhibit(s)) (Stephens, Reilly) (Entered: 01/18/2022)
01/19/2022	71	ORDER granting 69 Motion to Substitute Attorney. Brian Kelsey is discharged as counsel of record for plaintiffs, and Daniel Sufu is substituted as counsel of record in this case. (Ordered by Judge James Wesley Hendrix on 1/19/2022) (krr) (Entered: 01/19/2022)
01/19/2022	72	AQHA's Motion for Leave to Participate in Oral Argument filed by The American Quarter Horse Association with Brief/Memorandum in Support. (Arnold, W) Modified text on 1/20/2022 (lkw). (Entered: 01/19/2022)
01/27/2022	73	MOTION to Intervene filed by State of Texas, Texas Racing Commission (Attachments: # 1 Proposed Order)Attorney Taylor Kathleen Gifford added to party State of Texas(pty:intvp), Attorney Taylor Kathleen Gifford added to party Texas Racing Commission(pty:intvp) (Gifford, Taylor) (Entered: 01/27/2022)
01/28/2022	74	RESPONSE filed by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer re: 70 Notice (Other),,,, (Shah, Pratik) (Entered: 01/28/2022)
01/28/2022	75	MOTION re 65 Order Setting Deadline/Hearing,, filed by Federal Trade Commission with Brief/Memorandum in Support. (Sverdlov, Alexander) (Entered: 01/28/2022)
01/31/2022	76	ORDER: Before the Court is the FTC Defendants' Motion for Remote Argument. Dkt. No. 75 . The motion does not rely on any attorney's particular health risks. Due to technical limitations, IT-staffing shortages, and the importance and complexity of this case, the motion is denied. The hearing will proceed in person as planned. If any attorney has specific health-related concerns, such as concerns based on membership in a high-risk category, then the attorney may move for remote argument on that basis, and the attorney may do so under seal if preferred. (Ordered by Judge James Wesley Hendrix on 1/31/2022) (krr) (Entered: 01/31/2022)
02/04/2022	77	ORDER: On January 27, 2022, the State of Texas and the Texas Racing Commission

		moved to intervene in this case. Dkt. No. 73 . Under the Courts local rules, the Federal defendants response is due no later than February 17the day after the hearing. Loc. Civ. R. 7.1(e). To aid the Court in preparing for the hearing, any response in opposition must be filed no later than February 10, 2022. (Ordered by Judge James Wesley Hendrix on 2/4/2022) (krr) (Entered: 02/04/2022)
02/04/2022	78	ORDER: Before the Court is the North American Association of Racetrack Veterinarians Motion for Leave to Participate in Oral Argument (Dkt. No. 67) and the American Quarter Horse Associations Motion for Leave to Participate in Oral Argument (Dkt. No. 72). The Court grants the motions. NAARV and AQHA shall each have ten minutes to present oral argument at the hearing on February 16, 2022. See Dkt. No. 65. Because NAARV and AQHA both appeared in support of the plaintiffs, the defendants shall have an additional 20 minutes for oral argument, resulting in 50 minutes total per side. (Ordered by Judge James Wesley Hendrix on 2/4/2022) (bmh) (Entered: 02/04/2022)
02/07/2022	79	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $100; Receipt number 0539-12580501) filed by Texas Racing Commission (Attachments: # 1 Proposed Order)Attorney Virginia Smith Fields added to party Texas Racing Commission(pty:intvp) (Fields, Virginia) (Entered: 02/07/2022)
02/09/2022	80	RESPONSE filed by Rohit Chopra, Federal Trade Commission, Noah Phillips, Kelly Slaughter, Christine Wilson re: 73 MOTION to Intervene (Sverdlov, Alexander) (Entered: 02/09/2022)
02/09/2022	81	RESPONSE filed by Katrina Adams, Jerry Black, Leonard Coleman, Nancy Cox, Joseph Dunford, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Kenneth Schanzer re: 73 MOTION to Intervene (Shah, Pratik) (Entered: 02/09/2022)
02/09/2022	82	RESPONSE filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association re: 73 MOTION to Intervene (Suhr, Daniel) (Entered: 02/09/2022)
02/10/2022	83	Proposed INTERVENOR COMPLAINT , *Exhibit A to Motion to Intervene* against Katrina Adams, Jerry Black, Rohit Chopra, Leonard Coleman, Nancy Cox, Joseph Dunford, Federal Trade Commission, Horseracing Integrity and Safety Authority, Inc., Frank Keating, Noah Phillips, Kenneth Schanzer, Kelly Slaughter, Christine Wilson filed by Texas Racing Commission, State of Texas. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Gifford, Taylor) (Entered: 02/10/2022)
02/11/2022	84	NOTICE ON MOTION TO INTERVENE: The Court recognizes that the proposed intervenors may not want to intervene subject to those conditions, especially if intervention in this matter might affect their ability to bring a separate claim or intervene in the Eastern District of Kentucky action. Thus, the Court orders the proposed intervenors to notify the Court no later than February 18, 2022, whether they wish to proceed with their motion to intervene. If they do not withdraw their motion, the Court

		will issue a more detailed order granting intervention under the conditions mentioned. (Ordered by Judge James Wesley Hendrix on 2/11/2022) (bdg) (Entered: 02/11/2022)
02/16/2022	85	ELECTRONIC Minute Entry for proceedings held before Judge James Wesley Hendrix: Motion Hearing (Oral Arguments) held on 2/16/2022 re: 34 MOTION to Dismiss , 36 MOTION to Dismiss , 37 MOTION for Summary Judgment *Partial*. Attorney Appearances: Plaintiff - Fernando Bustos; Defense - Pratik Shah; FTC/Alexander Sverdlov; Amicus - AQHA/Autum Leigh Flores and NAARV/Peter John Sacopulos (Court Reporter: Mechelle Daniel) (No exhibits) Time in Court - 2:33. (chmb) (Entered: 02/16/2022)
02/17/2022	86	MOTION re 84 Order Setting Deadline/Hearing,, filed by State of Texas, Texas Racing Commission (Gifford, Taylor) (Entered: 02/17/2022)
03/01/2022	87	Notice of Filing of Official Electronic Transcript of Motion Hearing (Oral Arguments) Proceedings held on 02/16/2022 before Judge James Wesley Hendrix. Court Reporter/Transcriber Mechelle Daniel, Telephone number (806) 744-7667. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office. If the transcript contains personal identifiers that must be redacted under MO 61, Fed.R.Civ.P. 5.2 or Fed.R.Crim.P. 49.1, or if the transcript contains the name of a minor child victim or a minor child witness that must be redacted under 18 U.S.C. § 3509, file a Redaction Request - Transcript within 21 days. If no action is taken, the entire transcript will be made available through PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed. (119 pages) Redaction Request due 3/22/2022. Redacted Transcript Deadline set for 4/1/2022. Release of Transcript Restriction set for 5/31/2022. (kmd) (Main Document 87 replaced on 4/4/2022) (chmb). (Entered: 03/01/2022)
03/02/2022	88	NOTICE of Change of Address for Attorney Daniel R Suhr on behalf of Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association. (Filer will update contact info in ECF.) (Suhr, Daniel) (Entered: 03/02/2022)
03/08/2022	89	NOTICE of *of Supplemental Authority* re: 70 Notice (Other),,,, filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association (Attachments: # 1 Exhibit(s) A) (Stephens, Reilly) (Entered: 03/08/2022)
03/17/2022	90	RESPONSE filed by Rohit Chopra, Federal Trade Commission, Noah Phillips, Kelly Slaughter, Christine Wilson re: 89 Notice (Other),,, (Sverdlov, Alexander) (Entered:

		03/17/2022)
03/31/2022	91	MEMORANDUM OPINION AND ORDER: Before the Court is the State of Texas and the Texas Racing Commissions Motion to Intervene and Motion to Join Plaintiffs Partial Motion for Summary Judgment. Dkt. No. 73 . For the reasons stated below, the Court grants the motions, allowing the State of Texas and the Texas Racing Commission to join the plaintiffs summary judgment motion and to permissively intervene, subject to the conditions outlined in its prior notice (Dkt. No. 84). (Ordered by Judge James Wesley Hendrix on 3/31/2022) (krr) (Entered: 03/31/2022)
03/31/2022	92	MEMORANDUM OPINION AND ORDER: The plaintiffs in this case bring a facial challenge to the regulatory process created by the Horseracing Integrity and Safety Act. The plaintiffs concerns are legitimate, and their arguments have merit. But under current Supreme Court and Fifth Circuit precedent, HISA does not venture beyond constitutional limits. Therefore, the Court denies the plaintiffs motion for summary judgment (Dkt. No. 37), grants the defendants motions to dismiss the plaintiffs Article I private nondelegation and due process claims (Dkt. Nos. 34 ; 36), and dismisses the plaintiffs Appointments Clause and public nondelegation claims, which they have abandoned. (Ordered by Judge James Wesley Hendrix on 3/31/2022) (krr) (Entered: 03/31/2022)
04/04/2022	93	ORDER: Because the state plaintiffs' anti-commandeering claim remains (Dkt. No. 83 at 27-28) (Claim V), the Court orders that the state plaintiffs' and the defendants confer and file a joint status report by no later than April 18, 2022. (Ordered by Judge James Wesley Hendrix on 4/4/2022) (krr) (Entered: 04/04/2022)
04/05/2022	94	ORDER granting 79 Application for Admission Pro Hac Vice of Virginia S. Fields. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f). (Ordered by Judge James Wesley Hendrix on 4/5/2022) (krr) (Entered: 04/05/2022)
04/14/2022	95	NOTICE of Dismissal filed by State of Texas, Texas Racing Commission (Attachments: # 1 Proposed Order) (Gifford, Taylor) (Entered: 04/14/2022)
04/19/2022	96	ORDER: Before the Court is the Intervenor-Plaintiffs' Notice of Dismissal pursuant to Federal Rule of Civil Procedure 4l(a)(l)(A)(i), which dismisses the anti-commandeering claim in this case. Dkt. No. 95. Therefore, the Court dismisses the intervenor-plaintiffs' anti-commandeering claim without prejudice. (Ordered by Judge James Wesley Hendrix on 4/19/2022) (bmh) (Entered: 04/19/2022)
04/19/2022	97	***RECOGNIZED AS VOID BY ORDER AT 106 *** FINAL JUDGMENT : It is hereby ordered, adjudged, and decreed that the plaintiffs' motion for summary judgment is denied, the defendants' motions to dismiss for failure to state a claim are granted, and the plaintiffs' claims are dismissed with prejudice. In addition, for the reasons stated in the Court's order on April 19, 2022 (Dkt. No. 96), it is hereby ordered, adjudged, and decreed that the intervenor-plaintiffs' anti-commandeering claim is dismissed without prejudice. The Clerk of Court is directed to close the case. (Ordered by Judge James Wesley Hendrix on 4/19/2022) (bmh) Modified on 4/25/2022 (egp). (Entered: 04/19/2022)
04/19/2022	98	NOTICE OF APPEAL to the Fifth Circuit by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association. Filing fee $505, receipt number 0539-12762908. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Stephens, Reilly) (Entered: 04/19/2022)
04/20/2022	99	NOTICE OF APPEAL as to 92 Memorandum Opinion and Order,, to the Fifth Circuit by State of Texas, Texas Racing Commission. Filing fee $505, receipt number 0539-12764891. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Gifford, Taylor) (Entered: 04/20/2022)
04/20/2022	100	Transcript Order Form: re 99 Notice of Appeal,,,, transcript requested by State of Texas, Texas Racing Commission for Motion for Summary Judgment held 02/16/22 (Court Reporter: Mechelle Daniel.) Payment method: Private funds - Requester has obtained the estimate from the reporter and has paid or will pay the cost as directed. Reminder: If the transcript is ordered for an appeal, Appellant must also file a copy of the order form with the appeals court. (Gifford, Taylor) (Entered: 04/20/2022)
04/21/2022		USCA Case Number 22-10387 in USCA Fifth Circuit for 99 Notice of Appeal, filed by State of Texas, Texas Racing Commission; and 98 Notice of Appeal, filed by Illinois Horsemen's Benevolent and Protective Association, Washington Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Oregon Horsemen's Benevolent and Protective Association, National Horsemen's Benevolent and Protective Association, Nebraska Horsemen's Benevolent and Protective Association, Oklahoma Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Pennsylvania Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, Tampa Bay Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Arizona Horsemen's Benevolent and Protective Association. (krr) (Entered: 04/21/2022)
04/22/2022	101	Joint MOTION to Alter Judgment filed by State of Texas, Texas Racing Commission (Attachments: # 1 Proposed Amendment, # 2 Proposed Order) (Gifford, Taylor) (Entered: 04/22/2022)
04/22/2022	102	RESPONSE filed by Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, National 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, Washington Horsemen's Benevolent and Protective Association re: 101 Joint MOTION to Alter Judgment (Attachments: # 1 Exhibit(s), # 2 Exhibit(s), # 3 Exhibit(s)) (Suhr, Daniel) (Entered: 04/22/2022)
04/22/2022	103	ORDER TO RESPOND: Due to the time-sensitivity of this matter, the defendants are ordered to respond by April 25, 2022 at 9:00 a.m. CDT, explaining their position on the motion and indicating whether they consent to the intervenor-plaintiffs amending their complaint. In addition, the defendants should address whether, if the Courts judgment was a nullity under Williams, the Court can avail itself of Rule 54(b) in conjunction with Appellate Rule 4(a)(2) and FirsTier Mortgage Co. v. Investors Mortgage Insurance Co., 498 U.S. 269, 276 (1991). See Cousins v. Small, 325 F.3d 627, 63032 (5th Cir. 2003); Young v. Equifax Cr. Info. Servs., 294 F.3d 631, 634 n.2 (5th Cir. 2002). If so, the defendants must explain their preferred approach and whether the plaintiffs and intervenor-plaintiffs are opposed to it. (Ordered by Judge James Wesley Hendrix on 4/22/2022) (krr) (Entered: 04/22/2022)
04/24/2022	104	RESPONSE filed by Jerry Black, Horseracing Integrity and Safety Authority, Inc. re: 101 Joint MOTION to Alter Judgment (Shah, Pratik) (Entered: 04/24/2022)
04/25/2022	105	RESPONSE filed by Federal Trade Commission, Noah Phillips, Kelly Slaughter, Christine Wilson re: 101 Joint MOTION to Alter Judgment (Sverdlov, Alexander) (Entered: 04/25/2022)
04/25/2022	106	ORDER: Before the Court is the intervenor-plaintiffs' and plaintiffs' Joint Emergency Motion to Amend Judgment Pursuant to Fed. R. Civ. P. 59(e). Dkt. No. 101 . The intervenor-plaintiffs' attach their proposed first amended complaint (Dkt. No. 101 -1) to their motion and request that it be filed in lieu of their prior notice of dismissal (Dkt. No. 95). For the reasons stated below, the Court first denies the motion to amend its prior judgment because the prior judgment was a nullity. Second, the Court certifies that its prior order denying the plaintiffs' motion for summary judgment and granting the defendants' motions to dismiss (Dkt. No. 92) was final as to the claims it dismissed with prejudice, which theplaintiffs and intervenor-plaintiffs subsequently appealed. See Fed. R. Civ. P. 54(b). Lastly, the Court grants the intervenor-plaintiffs' request to amend their complaint to drop their anti-commandeering claim. Thus, the Clerk is directed to file the intervenor-plaintiffs' amended complaint (Dkt. No. 101 -1), dropping their anticommandeering claim, as a separate docket entry. (Ordered by Judge James Wesley Hendrix on 4/25/2022) (krr) (Entered: 04/25/2022)
04/25/2022	107	JUDGMENT: For the reasons stated in the Court's orders on March 31, 2022 (Dkt. No. 92) and April 25, 2022 (Dkt. No. 106), it is hereby ordered, adjudged, and decreed that the plaintiffs' motion for summary judgment is denied, the defendants' motions to dismiss for failure to state a claim are granted, and the plaintiffs' claims are dismissed with prejudice. Pursuant to Fed. R. Civ. P. 54(b), the Court expressly determines that there is no just reason for delay and directs the Clerk of Court to enter this as a final judgment. (Ordered by Judge James Wesley Hendrix on 4/25/2022) (krr) (Entered: 04/25/2022)
04/25/2022	108	THE STATE OF TEXAS AND THE TEXAS RACING COMMISSION'S FIRST AMENDED COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF against Jerry Black, Rohit Chopra, Federal Trade Commission, Horseracing Integrity and Safety Authority, Inc., Noah Phillips, Kelly Slaughter, Christine Wilson filed by Texas Racing Commission, State of Texas. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at

		www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (krr) (Entered: 04/25/2022)
04/25/2022	109	FINAL JUDGMENT: The Court entered a partial final judgment under Rule 54(b) as to all claims in this action except the intervenor-plaintiffs' anti-commandeering claim. See Dkt. Nos. 106 ; 107 . The Court also granted the intervenor-plaintiffs' leave to amend their complaint. See Dkt. No. 106 , at 6. The intervenor-plaintiffs filed their amended complaint and dropped theiranti-commandeering claim. See Dkt. Nos. 101 , at 2 (seeking to withdraw claim); 108 (intervenor-plaintiffs' amended complaint). Because they dropped their anti-commandeering claim, that claim is no longer part of this action. Thus, this final judgment recognizes that all claims in this action were finally disposed of in the Court's prior judgment entered on April 25, 2022 (Dkt. No. 107). The Clerk is directed to close the case. (Ordered by Judge James Wesley Hendrix on 4/25/2022) (krr) (Entered: 04/25/2022)
05/12/2022	110	AMENDED NOTICE OF APPEAL as to 99 Notice of Appeal,,,, to the Fifth Circuit by State of Texas, Texas Racing Commission. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Gifford, Taylor) (Entered: 05/12/2022)
05/18/2022		Record on Appeal for USCA5 22-10387 (related to 98 appeal): Record consisting of: 1 ECF electronic record on appeal (eROA) is certified,. **PLEASE NOTE THE FOLLOWING:** Licensed attorneys must have filed an appearance in the USCA5 case and be registered for electronic filing in the USCA5 to access the paginated eROA in the USCA5 ECF system. (Take these steps immediately if you have not already done so. Once you have filed the notice of appearance and/or USCA5 ECF registration, it may take up to 3 business days for the circuit to notify the district clerk that we may grant you access to the eROA in the USCA5 ECF system.) To access the paginated record, log in to the USCA5 ECF system, and under the Utilities menu, select Electronic Record on Appeal. Pro se litigants may request a copy of the record by contacting the appeals deputy in advance to arrange delivery. (krr) (Entered: 05/19/2022)
05/20/2022		USCA Case Number 22-10387 in USCA Fifth Circuit for 110 Notice of Appeal, filed by State of Texas, Texas Racing Commission. (krr) (Entered: 05/20/2022)

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06/20/2022 12:06:39			
PACER Login:	reillywstephens:4720733:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	5:21-cv-00071-H
Billable Pages:	30	**Cost:**	3.00

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; LINA M. KHAN, in her official capacity as Chair of the Federal Trade Commission; NOAH JOSHUA PHILLIPS, in his official capacity as Commissioner of the Federal Trade Commission; REBECCA KELLY SLAUGHTER, in her official capacity as Commissioner of the Federal Trade Commission; and CHRISTINE S. WILSON, in her official capacity as Commissioner of the Federal Trade Commission,[1]

Defendants.

No. 5:21-cv-00071-H

PLAINTIFFS' NOTICE OF APPEAL

[1] Plaintiffs updated Federal Trade Commissioners, per Federal Rule of Civil Procedure 25(d).

Notice is hereby given that Plaintiffs, 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, appeal to the United States Court of Appeals for the Fifth Circuit the Order dismissing Plaintiffs' claims with prejudice entered by this Court on March 31, 2022 [Docket 92]. Plaintiffs do not appeal the dismissal of Defendants Katrina Adams; Leonard Coleman, Jr.; Nancy Cox; Joseph Dunford; Frank Keating; and Kenneth Schanzer.

Respectfully Submitted,

Dated: April 19, 2022

/s/ Reilly Stephens
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and

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 TEXAS RACING COMMISSION'S AMENDED NOTICE OF APPEAL

Notice is hereby given that State Intervenors, the State of Texas and the Texas Racing Commission, appeal to the United States Court of Appeals for the Fifth Circuit from the Court's Order (Doc. 92), entered March 31, 2022; the Court's partial final judgment (Doc. 107), entered April 25, 2022; and the Court's final judgment (Doc. 109), entered April 25, 2022, as well as any orders that merge into that order and those judgments, *see* Fed. R. App. P. 3(c)(4).

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that that on May 12, 2022, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/ Taylor Gifford
TAYLOR GIFFORD
Assistant Attorney General

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, et al.,

Plaintiffs,

THE STATE OF TEXAS and THE TEXAS RACING COMMISSION,

Intervenor-Plaintiffs,

v.

JERRY BLACK, et al.,

Defendants.

No. 5:21-CV-071-H

FINAL JUDGMENT

The Court entered a partial final judgment under Rule 54(b) as to all claims in this action except the intervenor-plaintiffs' anti-commandeering claim. *See* Dkt. Nos. 106; 107. The Court also granted the intervenor-plaintiffs' leave to amend their complaint. *See* Dkt. No. 106 at 6. The intervenor-plaintiffs filed their amended complaint and dropped their anti-commandeering claim. *See* Dkt. Nos. 101 at 2 (seeking to withdraw claim); 108 (intervenor-plaintiffs' amended complaint). Because they dropped their anti-commandeering claim, that claim is no longer part of this action. Thus, this final judgment recognizes that all claims in this action were finally disposed of in the Court's prior judgment entered on April 25, 2022 (Dkt. No. 107). The Clerk is directed to close the case.

So ordered on April 25, 2022.

JAMES WESLEY HENDRIX
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, et al.,

Plaintiffs,

v.

JERRY BLACK, et al.,

Defendants.

No. 5:21-CV-071-H

MEMORANDUM OPINION AND ORDER

After a rash of doping scandals and racetrack fatalities, Congress began considering how it could standardize thoroughbred-horseracing regulation. Proposals in 2013, 2015, and 2017 stalled. But after a particularly deadly 2019 season, the Horseracing Integrity and Safety Act of 2020 (HISA) became law. HISA creates a novel regulatory scheme that pairs the expertise of a private, self-regulatory nonprofit entity with the oversight of the Federal Trade Commission. Although modeled on the longstanding and long-upheld self-regulatory schemes found in the securities industry and elsewhere, the parties agree that HISA breaks new ground. And while the private plaintiffs favor nationwide regulation, they allege that HISA's unconventional structure facially violates the private-nondelegation doctrine under Article I and the Due Process Clause. Their concerns are legitimate. But precedent requires only that the private entity function subordinately to the FTC, guided by Congressional standards. And it does: Only the FTC can give proposed rules the force of law and, even then, the FTC can only do so when both it and the private entity adhere to Congress's instructions. Given the current state of the law and the private entity's subordination to the FTC, the plaintiffs' challenge must fail.

Thus, for the reasons stated below, the Court denies the plaintiffs' motion for summary judgment (Dkt. No. 37). The Court grants the defendants' motions to dismiss the plaintiffs' Article I private nondelegation and due process claims (Dkt. Nos. 34; 36). The Court also dismisses the plaintiffs' Appointments Clause and public nondelegation claims, which the plaintiffs abandoned.

1. Factual and Procedural Background

A. Factual Background[1]

On September 8, 2020, the Horseracing Integrity and Safety Authority, Inc. (the Authority) incorporated as a nonprofit to "establish safety and performance standards" and "develop and implement a horseracing anti-doping and medication control program and a racetrack safety program." Dkt. 34-1 at 28. A few weeks later, the Authority issued its corporate bylaws, defining its terms in accordance with the "contemplated Horseracing Integrity and Safety Act of 2020 or a substantially similar act." *Id.* at 53. And on December 27, 2020, HISA was signed into law, nationalizing thoroughbred horseracing regulation and "recogniz[ing]" the Authority for purposes of developing and implementing the same programs listed in its certificate of incorporation and bylaws. *See* Horseracing Integrity and Safety Act of 2020 § 1202, 15 U.S.C. § 3052. Although the private plaintiffs support nationalizing regulation, they take issue with the Authority's powers under HISA. Transcript of Oral Argument at 117–18 (hereinafter "Tr.").

Had the Authority been created by Congress, it may have been subject to certain Article II requirements. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477,

[1] The parties were given the opportunity to offer any further evidence not attached to their briefing on the plaintiffs' summary-judgment motion. Both parties declined to offer anything further and agreed to the viability and admissibility of the attached declarations and appendices. Tr. at 6–7.

483–85 (2010) (recognizing that, unlike private self-regulatory organizations, entities that are "Government-created [and] Government-appointed" must comply with Article II). But because Congress "recognized" it and left the appointment of its board to a private group selected by industry constituents—the Nominating Committee—the Authority avoids some of the strictures of governmental entities, just as other private, self-regulatory organizations that operate nationwide do. *See* 15 U.S.C. § 78o-3 (recognizing private associations such as the Financial Industry Regulatory Authority (FINRA)).

HISA enables the Authority to propose draft rules covering anti-doping and medication control (Section 3055), racetrack safety (Section 3056), and disciplinary proceedings (Section 3057). The Authority lacks the power, however, to promulgate rules themselves. *See* § 3053(b). Only the FTC can give a rule the force of law. *Id.* To do so, the FTC must determine that the rule is consistent with the statute and applicable rules, and it must independently approve it following notice and public comment. § 3053(b)–(d). If the FTC disapproves a proposed rule, it must recommend modifications so that the Authority may "incorporate[] the modifications" prior to resubmission. § 3053(c)(3). Without a proposed rule, the FTC may, for good cause under the Administrative Procedure Act, "adopt an interim final rule" if it finds it "necessary to protect (1) the health and safety of covered horses; or (2) the integrity of covered horseraces and wagering on those horseraces." § 3053(e); 5 U.S.C. § 553(b)(B) (good cause provision).

HISA also empowers the Authority to investigate rule violations and to assess penalties when it determines that an enacted rule has been violated. 15 §§ 3054(i), 3057(d). But the Authority may only investigate rule violations according to "uniform procedures" reviewed and approved by the FTC. § 3054(c). Moreover, HISA lists the required elements

of the disciplinary process and mandates that all proceedings provide due process, including "impartial hearing officers or tribunals commensurate with the seriousness" of the alleged violation. § 3057(c)(3).

The FTC retains the ability to review sanctions imposed by the Authority. All civil sanctions are subject to de novo review by an Administrative Law Judge appointed by the FTC, and the FTC can review de novo any final decision of the ALJ. § 3058(b)–(c). Finally, any determination by an ALJ or the FTC is a "Final decision," triggering judicial review under the Administrative Procedure Act. *See* § 3058(b)(3)(B), (c)(2)(B); *see also* Administrative Procedure Act § 10, 5 U.S.C. § 704 (outlining judicial review of administrative agency decisions).

To fund its operations, the Authority must initially obtain loans. § 3052(f)(1). After this initial funding stage, it appears that the Authority will primarily fund its programs by collecting fees from covered persons or state racing commissions. § 3052(f)(1)–(4). Before the Authority can collect any fees, however, the FTC must approve the "formula or methodology" for determining fee assessments. § 3053(a)(11).

HISA also creates parameters for the composition of the Authority's Board and committees in an attempt to ensure fair governance and representation within the horseracing industry. A nominating committee of "seven independent members selected from business, sports, and academia" chose the Authority's board members and standing committee members.[2] § 3052(d). HISA attempts to insulate the Authority from conflicts of

[2] The Nominating Committee members are outlined in the Authority's bylaws: Leonard S. Coleman, Jr. (Co-Chair), Dr. Nancy M. Cox (Co-Chair), Katrina Adams, Dr. Jerry B. Black, Gen. Joseph F. Dunford, Jr. (Ret.), Francis Anthony Keating II, and Ken Schanzer. Dkt. No. 39-1 at 47–48.

interest with other industry members. For example, a majority of the Board and standing committee members must be "independent members selected from outside the equine industry." § 3052(b)–(c). And no board member or independent member of the committees may (1) have a "financial interest in, or provide[] goods or services to, covered horses"; (2) be "[a]n official or officer of an equine industry representative" or serve in a "governance or policymaking capacity for an equine industry representative"; or (3) be "[a]n employee of, or an individual who has a business or commercial relationship with" people who have financial interests in covered horses or equine industry officers. § 3052(e)(1)–(3). The immediate family members of individuals in the first two categories are also barred from board and independent-committee membership. § 3052(e)(4). And, to assure diverse industry representation, a minority of the board and standing committee members must be industry members representing the "various equine constituencies, and shall include not more than one industry member from any one equine constituency."[3] *See* § 3052(b)–(c).

There are no disputes of material fact, as the nature of the plaintiffs' facial challenge turns primarily on the language of the statute.[4] Dkt. No. 38 at 7.

B. Procedural History

The National Horsemen's Benevolent and Protective Association and twelve of its affiliate organizations sued the FTC, its commissioners, the Authority, and its Nominating Committee members, bringing a facial challenge to HISA's constitutionality. Dkt. No. 1.

[3] HISA defines "equine constituencies" as "owners, breeders, trainers, racetracks, veterinarians, State racing commissions, and jockeys who are engaged in the care, training, or racing of covered horses." § 3051(7).

[4] Because there are no disputes of material fact, the Court would grant the defendants' motions (Dkt. Nos. 34; 36) on the merits even if it converted them to motions for summary judgment under Federal Rule of Civil Procedure 12(d).

The Horsemen then amended their complaint, which is the operative pleading. *See* Dkt. No. 23. They brought claims under the private-nondelegation doctrine, public-nondelegation doctrine, Appointments Clause, and the Due Process Clause, seeking to permanently enjoin the defendants from implementing HISA and to enjoin the Nominating Committee members from appointing the Authority's board of directors.[5] *Id.* at 27–29. They also seek declaratory relief, nominal damages for violations of their constitutional rights, compensatory damages for any fees the Authority charges them, and attorneys' fees and costs. *Id.* at 26–29.

The FTC and the Authority defendants separately moved to dismiss the amended complaint. Dkt. Nos. 34; 36. The same day, the Horsemen moved for summary judgment on their private-nondelegation and due-process claims only. Dkt. No. 37; *see* Dkt. No. 23. The parties responded and replied in due course, and the Court heard oral argument.[6] *See* Dkt. Nos. 67; 85. The state of Texas and the Texas Racing Commission intervened after briefing was completed and joined the plaintiffs' motion. *See* Dkt. Nos. 73; 91. Thus, the dispositive motions are ripe for review.

Limited by the parties' motions and assertions at oral argument, the Court examines the two claims in which the plaintiffs persist: Article I private nondelegation and Due Process. The plaintiffs abandoned their Appointments Clause claim by not opposing the defendants' motions to dismiss that claim, by failing to pursue it in their motion for

[5] The Nominating Committee appointed the Authority's Board just after litigation commenced. *See* Dkt. No. 54 at 28 (recognizing the "appointments were announced on May 5, 2021").

[6] The North American Association of Racetrack Veterinarians (NAARV) and the American Quarter Horse Association (AQHA) filed amicus briefs in support of the Horsemen. Dkt. Nos. 49; 51. Senator Mitch McConnell and Representatives Paul Tonko and Andy Barr filed an amicus brief in support of the defendants. Dkt. No. 53.

summary judgment, and by conceding at oral argument that they were no longer asserting it. Tr. at 10; *see Black v. North Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006); *see also In re Dall. Roadster, Ltd.*, 846 F.3d 112, 126 (5th Cir. 2017) (holding that plaintiff abandoned a claim by not opposing the motion to dismiss it). They initially pled their Appointments Clause claim in the alternative, alleging a violation only if the "court were to conclude that the grant of power to the Authority was sufficient to render it a public entity." Dkt. No. 23 at 25. But all parties briefed the dispositive motions assuming, as HISA indicates, that the Authority is a "private, independent, self-regulatory, nonprofit corporation." § 3052(a). The Court therefore—respecting the contours of the claims before it and the adversarial process—assumes without deciding that the Authority is a private entity.[7]

The plaintiffs also abandoned their "public nondelegation claim" that HISA violates Article I, Section I of the Constitution because it delegates legislative authority to a public entity without an intelligible principle. Dkt. No. 23 at 23. At the hearing, the plaintiffs affirmed that they abandoned their public-nondelegation claim. *See* Tr. at 10.

[7] Although the Authority appears to be private under Supreme Court precedent, the Court pauses to note its unique genesis. The last time the Supreme Court encountered a similar private-nondelegation challenge, it held that the private entity—Amtrak—was part of the government for constitutional purposes. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 51–55 (2015) (*Amtrak II*). Like Amtrak, the Authority's private label is "not dispositive" of its status. *Id.* at 51. And despite the defendants' assurances that the Authority is like other self-regulatory organizations, *e.g.*, Dkt. No. 34 at 24, it also bears an uncomfortable resemblance to the Public Company Accounting Oversight Board (PCAOB)—recognized as both governmental and unconstitutional by the Supreme Court in 2010. *See Free Enter. Fund*, 561 U.S. at 484–85. Unlike other "private" self-regulatory organizations in the securities industry, the PCAOB was a "Government-created, Government-appointed entity, with expansive power to govern an entire industry." *Id.* at 485. By contrast, the government here did not create the Authority nor appoint its directors. But the Authority formed just over three months prior to HISA's passage (Dkt. No. 39-1 at 95), its bylaws mirror large portions of HISA (*Id.* at 40–59), and HISA supplies many key terms in its bylaws (*Id.* at 57–58).

2. Jurisdiction[8]

Before addressing the merits, the Court must first confirm that it has jurisdiction to resolve the case. Without a live case or controversy, the Court cannot assess the merits of any claim.

A complaint must be dismissed under Rule 12(b)(1) if the Court lacks subject matter jurisdiction. *See Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "A case is properly dismissed for lack of subject matter jurisdiction when the Court lacks the statutory or constitutional power to adjudicate the case." *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005) (citation omitted). The jurisdiction of federal courts is limited to "cases" and "controversies." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992) (citing U.S. Const. art. III, § 2). And plaintiffs "bears the burden of proof that jurisdiction does in fact exist." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). When addressing a 12(b)(1) motion, the Court can base its decision upon "the complaint alone" or "the complaint supplemented by undisputed facts plus the [C]ourt's resolution of disputed facts." *Montez v. Dept. of Navy,* 392 F.3d 147, 149 (5th Cir. 2004).

A. Standing

The Constitution speaks directly to the limits of the federal judiciary's authority. Article III, Section 2, makes clear that federal jurisdiction is limited to "cases" and "controversies." *See Lujan*, 504 U.S. at 559. *Lujan* explained the importance of this limitation: "[T]he Constitution's central mechanism of separation of powers depends largely

[8] At the hearing, the Horsemen conceded that the Court does not have personal jurisdiction over individual nominating committee members Leonard Coleman, Dr. Nancy Cox, Katrina Adams, Gen. Joseph Dunford, Frank Keating, and Ken Schanzer. Tr. at 10. Therefore, they are dismissed from this case. *See* Fed. R. Civ. P. 12(b)(2).

upon the common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Id.* at 559–60; *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) (noting that "separation-of-powers principles underl[ie] th[e] [case-and-controversy] limitation").

Thus, to invoke the judicial power and the jurisdiction of the federal courts, "a plaintiff must satisfy the . . . 'irreducible constitutional minimum' for standing," which is composed of three elements. *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 689 (5th Cir. 2021) (quoting *Lujan*, 504 U.S. at 560). A 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." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (internal quotations omitted). To be "fairly traceable to the challenged action of the defendant," the injury must "not [be] the result of the independent action of some third party not before the court." *Id.* (internal quotations omitted). The redressability element will not be satisfied if it is "merely 'speculative[]' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561. And because "standing is not dispensed in gross," plaintiffs "must demonstrate standing for each claim [they] seek[] to press and for each form of relief that is sought." *Town of Chester v. Laroe Est., Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted).

Though injuries must be concrete and particularized, "an allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)

(quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). But a plaintiff who challenges a "statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

The Horsemen allege many abstract constitutional harms but present only two possible concrete injuries—financial injury arising from the payment of fees and an increased regulatory burden. Dkt. No. 54 at 33–34. First, the Horsemen fail to show a concrete injury arising from the payment of fees. They allege that they will suffer either a direct injury by paying the Authority's fees themselves or, in the case of a state commission remitting fees to the Authority, indirect injury resulting from "state racing commission fees that inevitably must increase if the state commissions pay Authority fees." *Id.* at 34. Whether the Authority will collect fees from the Horsemen depends on the states' decisions to remit fees. *See* § 3052(f)(2)–(3). And "[w]here a causal relation between injury and challenged action depends upon the decision of an independent third party," standing is "ordinarily substantially more difficult to establish." *California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (quoting *Lujan*, 504 U.S. at 562). Specifically, "the plaintiff must show at the least 'that third parties will likely react in predictable ways.'" *Id.* at 2117 (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019)). At this stage, the Horsemen have not shown how the state commissions will react to HISA, so the alleged direct injury—the Authority charging the Horsemen fees—is not certainly impending.

Likewise, the Horsemen fail to show an indirect financial injury arising from state racing commissions passing on increased fees to the Horsemen. If the state racing commissions choose to remit fees to the Authority, they will continue to collect fees from

the Horsemen but then pass the fees along to the Authority. *See* § 3052(f)(2)(D). So irrespective of the state commissions' choices, the Horsemen will be subject to fees under HISA whether they are payable to the state commissions or to the Authority. But the Horsemen offer no evidence that HISA will cause existing state fees to increase. And because, under HISA, state racing commissions no longer dictate medication control and racetrack safety regulation, they would have no need to finance those regulatory responsibilities. Accordingly, state racing commission fees may decrease. Adding Authority fees to a decreased rate may not raise the Horsemen's total financial burden beyond what they currently pay. As of now, there is no evidence detailing the amount of fees the Authority will charge.

In sum, it remains unclear whether the Horsemen will be required to pay fees to the Authority. Even if they are not, it is uncertain whether state racing commissions will increase the fees the Horsemen owe. Thus, any financial injury is "speculative" at this stage. *Clapper*, 568 U.S. at 401.

The Horsemen, however, primarily challenge the rulemaking mechanism in HISA, and they have shown a concrete injury arising from certainly impending regulation. *See* Dkt. No. 54 at 33. Requiring regulations to take effect when they allege that any regulation would violate Article I and Due Process "would make little sense." *Cf. State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 54 (D.C. Cir. 2015) ("[I]t would make little sense to force a regulated entity to violate a law (and thereby trigger an enforcement action against it) simply so that the regulated entity can challenge the constitutionality of the regulating agency.") (citing *Free Enter. Fund*, 561 U.S. at 490). The statute requires the regulations to take effect on July 1, 2022, and no one disputes that the Horsemen will be the "objects" of

regulations adopted under HISA. §§ 3051(14), 3055(a); *see Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015) ("If a plaintiff is an object of a regulation 'there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'") (quoting *Lujan*, 504 U.S. at 561–62). The Horsemen "participate in the type of events"—thoroughbred horse training and racing—"that the [programs] seek[] to regulate." *Contender Farms*, 779 F.3d at 266. In fact, HISA directly targets the Horsemen's members as owners of thoroughbred horses that will participate in covered horseraces. *See* § 3051(4) ("The term 'covered horse' means any Thoroughbred horse . . . that participates in covered horseraces or at a training facility."); § 3051(5) ("[C]overed horseraces are those involving covered horses that [have] a substantial relation to interstate commerce.").[9] As a result, to remain involved in the thoroughbred horseracing industry, the Horsemen must register with the Authority and comply with its rules. § 3054(d).

In any event, the language of HISA makes clear that the Authority and the FTC will exercise regulatory control over the Horsemen starting on July 1, 2022—the program effective date. §§ 3051(14), 3054(a); *see Buckley v. Valeo*, 424 U.S. 1, 114 (1976). HISA states that the FTC "shall" approve rules proposed by the Authority if it finds that they are

[9] The National Horsemen's Benevolent and Protective Association (NHBPA) represents thoroughbred racehorse owners and trainers throughout the United States and Canada. Dkt. No. 23 at 2–3. The NHBPA proposes medication and safety rules to a trade association of state regulators. The NHBPA has 28 affiliate organizations—12 of which joined the lawsuit here. Dkt. No. 39-1 at 1. The affiliate associations negotiate contracts with racetrack owners that must comply with each state's medication and safety regulations. And these state regulations would be replaced by rules promulgated under HISA. § 3054(a)(2)(A) (the FTC, Authority, and the anti-doping and medication control and enforcement agency shall "exercise independent and exclusive national authority over . . . the safety, welfare, and integrity" of covered entities); *see* § 3054(b) (noting the preemption of state regulations).

"consistent" with the statute itself and with applicable rules. § 3053(c). And the Authority "shall" propose rules to develop the programs on the topics outlined in the statute while taking into consideration the guidance outlined in the statute. §§ 3055(a)–(d), 3056(a)–(c). The rules will preempt existing state law and explicitly cover thoroughbred horses and their owners—*i.e.*, members of the Horsemen. §§ 3052(a), 3054(b). As the Supreme Court has long recognized, "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 287 (1936)).

The only universe in which members of the Horsemen will not be subject to the FTC–Authority regulatory regime—governing the medication of their horses and racetrack safety at the venues where their horses race—is one in which the Authority proposes no rules consistent with the Act, and the FTC adopts no final interim rules in response. That unlikely series of events contravenes the plain language of the statute and is inconsistent with the presumption that the FTC "will act properly and according to law." *FCC v. Schreiber*, 381 U.S. 279, 296 (1965). Accordingly, the "risk" is "substantial" that the Horsemen will be subject to FTC–Authority regulatory control. *Susan B. Anthony List*, 573 U.S. at 158 (quoting *Clapper*, 568 U.S. at 414 n.5).

The presence of impending regulation does not, however, end the analysis. The Horsemen must show an "imminent," concrete injury to challenge the statutory scheme under which they will be regulated. *Lujan*, 504 U.S. at 560. Attempting to avoid this requirement, the Horsemen rely on two cases concerning the President's power to remove

executive officers for the proposition that separation-of-powers violations can create "here-and-now" injuries. Dkt. No. 54 at 37–38 (citing *Free Enter. Fund*, 561 U.S. at 477; *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020)). Indeed, they can. But neither of the Horsemen's examples involved allegations of future injuries, nor do they dispense with the concrete injury requirement of standing. In both cases, the regulating entities took some concrete action against plaintiffs that enabled them to challenge the constitutionality of the entity's structure. *See Free Enter. Fund*, 561 U.S. at 487 (the challenged entity "inspected [plaintiff], released a [critical] report . . . and began a formal investigation"); *Seila Law*, 140 S. Ct. at 2196 (explicitly holding that the petitioner established a "concrete injury" because it was compelled to comply with a "civil investigative demand").

And while the Supreme Court in *Seila Law* made clear that its precedents "have long permitted private parties . . . to challenge [an] official's authority to wield [executive] power," the party must still be "aggrieved" by that "official's exercise of executive power." 140 S. Ct. at 2196; *see also Bond v. United States*, 564 U.S. 211, 223 (2011) ("If the constitutional structure of our Government that protects individual liberty is compromised, individuals who *suffer otherwise justiciable injury may object*." (emphasis added)).[10] The same is true with the other separation-of-powers cases the Horsemen cite. Dkt. No. 54 at 38; *see e.g.*, *Freytag v. Comm'r*, 501 U.S. 868, 872, 892 (1991) (rejecting plaintiffs' Appointment Clause

[10] The same goes for the Horsemen's argument that "Appointments Clause cases are 'structural' and therefore" do not require a showing of injury. Dkt. No. 54 at 38 n.5. (quoting *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000)). But the question in *Landry* was whether a "party claiming constitutional error in the vesting of authority must show a direct causal link between the error and the *authority's adverse decision*." *Landry*, 204 F.3d at 1131 (emphasis added). The D.C. Circuit held that no causal link was required. It did not hold, however, that a plaintiff could bring an appointments clause challenge against an official before receiving a "decision" from the official. Indeed, the plaintiff in *Landry* challenged the constitutionality of an ALJ's appointment only after the ALJ decided against him in the administrative proceeding.

challenge to a special trial judge who had decided against them); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239–40 (1995) (upholding a district court's decision against plaintiffs because the statute the plaintiffs invoked violated the separation of powers); *see also Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding standing when plaintiff would be injured "by not receiving a scheduled increase in benefits"). So far, the defendants in this case have done nothing to "aggrieve" the Horsemen because the Horsemen are not yet subject to any Authority rules. And the proposition that "[a]n *increased* regulatory burden typically satisfies the injury in fact requirement" does not necessarily apply to HISA because the Horsemen allege few facts about their current regulatory burdens. *Cf. Contender Farms*, 779 F.3d at 266 (emphasis added) (highlighting that the "harsher, mandatory penalties" and "additional measures" conferred standing under the new regulation).

Although this case law does not permit the Horsemen to avoid the certainly impending injury requirement, the undisputed facts satisfy it. HISA requires that certain regulations be passed, showing that a concrete injury is "certainly impending," which will "aggrieve" the Horsemen. *Susan B. Anthony List*, 573 U.S. at 158 (quoting *Clapper*, 568 U.S. at 414 n.5); *Seila Law*, 140 S. Ct. at 2196. The Horsemen specifically allege, for example, that they will be injured by the mandatory requirement that their horses may not race under the influence of any "therapeutic medication." Dkt. Nos. 23 at 27; 54 at 33 (citing 15 U.S.C. § 3055(b)(1) & (d)). Section 3055(b)(1) specifies that "[c]overed horses should compete only when they are free from the influence of medications . . . that affect their performance." Further crystallizing this requirement, the Authority's rules "shall prohibit the administration of any prohibited or otherwise permitted substance to a covered horse within 48 hours of its next racing start." § 3055(d). Because the statute requires the

Authority to submit rules including these prohibitions and mandates that the FTC "shall approve" proposed rules "consistent" with HISA, a substantial risk exists that the Horsemen will be subject to these requirements. § 3053(c). And, in their view, the requirements harm their horses that "need therapeutic drugs to race safely." Dkt. Nos. 54 at 35; 23 at 27.[11]

To be sure, the 48-hour prohibition in Section 3055(d) provides for limited exceptions in Subsections (e) and (f), but neither defeats the Horsemen's certainly impending injury. First, a possible exemption under Subsection (e) cannot take effect until at least three years after the initial regulations are implemented. *See* § 3055(e)(3)(A). And second, an exemption under Subsection (f) is only available for one substance—furosemide. § 3055(f)(1). Even then, an exemption covers only a limited subset of horses. No exceptions are available for "two-year-old covered horses" or any covered horse that competes "in stakes races." § 3055(f)(2).[12]

The Horsemen's certainly impending regulatory injury is also "fairly traceable" to the challenged conduct of the defendants. *Lujan*, 504 U.S. at 560. Here, the Horsemen challenge HISA's allegedly unconstitutional rulemaking scheme—subjecting them to a

[11] Per the Horsemen's supplemental filing (Dkt. No. 89), the Court also notes that the FTC has already approved of the Authority's proposed racetrack-safety rule. *See* HISA Racetrack Safety, 87 Fed. Reg. 435-59 (Jan. 5, 2022); FTC Approves Horseracing Racetrack Safety Rule, Federal Trade Commission, https://www.ftc.gov/news-events/press-releases/2022/03/ftc-approves-horseracing-racetrack-safety-rule (March. 4, 2022). These rules, which include inspections of the Horsemen's horses, will take effect July 1, 2022. Dkt. No. 89-1 at 21; § 3051(14).

[12] HISA also outlines the minimum contents of the baseline rules by incorporating currently available lists of prohibited substances, laboratory standards, testing standards, and violation rules. *See* § 3055(g)(1), (2). Of course, the Authority is empowered to modify these rules, subject to certain limitations in section 3055(g)(3), but possible modifications cannot overcome the substantial risk that the Horsemen will be subject to a new regulatory burden imposed from the baseline rules. *See also* Tr. at 55 (the FTC recognizing that the baseline rules are "certainly impending" and "likely to impact plaintiffs"). The Horsemen fail to allege, however, whether these baseline rules will *increase* their existing regulatory burden. *Cf. Contender Farms*, 779 F.3d at 266.

private entity's regulatory control in violation of Article I and the Due Process Clause. Dkt. No. 38 at 14–15. And, outside of interim final rules, all rules flow through the Authority-proposal-FTC-approval scheme. *See* § 3053; Dkt. No. 56 at 16 n.3 (recognizing that no rulemaking provision is self-executing). Therefore, the Horsemen's increased regulatory burden is directly traceable to the scheme that they allege allows a purportedly self-interested private party to regulate without sufficient governmental oversight. *See* § 3053(c). Irrespective of HISA's specificity, the Authority must "develop[]" and "implement[]" the rules. § 3052(a). Traceability is satisfied.

The defendants' attempts to undermine the traceability and redressability of the Horsemen's injury fall short. The FTC argues that the Horsemen "assert non-delegation and due process claims based on their view that HISA delegates *too much* power and discretion to a private entity," and severing the substance-prohibition provisions "would do nothing to *reduce*" the Authority's discretion generally. Dkt. No. 61 at 9–10 (citing Dkt. No. 23 at 19–27). In the FTC's view, "this incompatibility creates a remedy problem." *Id.* at 9. Fundamentally, however, the Horsemen challenge HISA's primary rulemaking *mechanism*, through which their certainly impending injury will arise. *See* Dkt. No. 54 (challenging "being directly regulated by an unconstitutionally constituted body").

That they bring a structural challenge distinguishes *California v. Texas*, the case on which the FTC relies. Dkt. No. 61 at 10. In *California v. Texas*, the state plaintiffs only challenged the constitutionality of the minimum-essential-coverage provision of the Affordable Care Act, but they alleged injury arising from other provisions.[13] *California*, 141

[13] The Supreme Court rejected the state plaintiffs' other alleged injuries as well. *California*, 141 S. Ct. at 2116–19.

S. Ct. at 2120. Therefore, the Court held the alleged injuries were not "fairly traceable" to the provision they claimed was unlawful. *Id.* The Court reasoned that "show[ing] that the minimum essential coverage requirement is unconstitutional would not show that enforcement of any of these other provisions violates the Constitution." *Id.* at 2119. They "operate[d] independently" of each other. *Id.* at 2119–20.

Unlike the plaintiffs in *California v. Texas*, the Horsemen facially challenge the constitutionality of an entire statute. Moreover, the substance prohibition does not "operate independently" of the Authority's statutory mandate to develop and implement the regulations—it operates within it. As described above, the Authority is principally tasked with proposing rules to "establish" the "anti-doping and medication control program." § 3055(a). The degree to which HISA delegates power and discretion to the Authority affects the merits of the delegation challenge more than its redressability if the Horsemen's facial attack succeeds. *Cf. Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 520 (5th Cir. 2014) (highlighting the danger of conflating the standing inquiry with the merits of a claim). Were the Court to find that the rulemaking mechanism of sections 3055(b)(1), (d), and (g) violated the private-nondelegation doctrine or Due Process Clause, it would necessarily show that rulemaking according to less specific provisions would likewise be unconstitutional.

In sum, a favorable Court decision would redress the Horsemen's certainly impending injury. Were the Court to find that HISA unconstitutionally delegates legislative power to a self-interested private entity, the Horsemen's injury would "likely" be redressed. *Spokeo*, 578 U.S. at 338. They would no longer be subject to certainly impending regulatory control under the HISA and would be able to continue administering the race-day

medications to their horses that the Authority's rules would inevitably prohibit. The Horsemen thus have standing to pursue their private-nondelegation and due-process claims.

B. Ripeness

Like standing, "ripeness is a constitutional prerequisite to the exercise of jurisdiction." *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). "Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) (internal quotation marks and citation omitted). A claim is not ripe for review if it is contingent [on] future events that may not occur as anticipated, or indeed may not occur at all." *Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

"The ripeness doctrine's 'basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967)). In evaluating whether a case is ripe for adjudication, courts must balance "(1) the fitness of the issues for judicial resolution, and (2) the potential hardship to the parties caused by declining court consideration." *Lopez*, 617 F.3d at 342 (citation omitted). Regarding fitness for adjudication, "[a] case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987) (citing *Thomas*, 473 U.S. at 581). In other words, "[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." *DM Arbor Ct.,*

Ltd. v. City of Houston, 988 F.3d 215, 218 (5th Cir. 2021) (citing *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010)). And regarding hardship, the Fifth Circuit has held that the kinds of hardships considered in a ripeness analysis include: "the harmful creation of legal rights or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being 'force[d] . . . to modify [one's] behavior in order to avoid future adverse consequences.'" *Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007) (quoting *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998)).

Here, the Horsemen challenge the constitutionality of HISA's regulatory structure, which presents a legal question fit for judicial resolution. Their private-nondelegation claim hinges on the language of the statute. The two primary Supreme Court cases dealing with the private-nondelegation doctrine assessed the plaintiffs' claims by looking to the language of the statute to see if Congress unconstitutionally delegated power. *See Carter Coal Co.*, 298 U.S. at 311 (holding that the statute itself "conferred" regulatory power to "private persons"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) ("Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid."). The inquiry is one of structural subordination and the agency's statutory surveillance and authority. *See Adkins*, 310 U.S. at 399. Tasked with a similar private-nondelegation question arising from a statute imbuing Amtrak with regulatory power, the D.C. Circuit found that the pre-enforcement challenge was ripe. *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 672 n.6 (D.C. Cir. 2013) (*Amtrak I*), *vacated on other grounds by Amtrak II*, 575 U.S. at 56. The D.C. Circuit concluded that the statute's constitutionality was a "purely legal question . . . appropriate for immediate judicial resolution." *Id.* at 672 n.6.

The Horsemen's separate due-process argument—that HISA allows an economically self-interested actor to regulate its competitors (Dkt. 38 at 7)—also presents a purely legal question. Whether the Authority possesses regulatory power mirrors the private-nondelegation analysis, and, in this context, self-interest also presents a legal question based on the statute's language. *See Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 32 (D.C. Cir. 2016) (*Amtrak III*) (finding self-interest based on the statutory language governing its incentives); *see also N. Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 510 (2015) (assessing self-interest in terms of a "*structural* risk of market participants' confusing their own interests with the State's policy goals") (emphasis added). Therefore, the Court "would be in no better position to adjudicate the issues in the future than it is now." *DM Arbor*, 988 F.3d at 218 (citing *Pearson*, 624 F.3d at 684).

With respect to hardship, "the harmful creation of legal rights or obligations" is certainly impending as discussed above. *Texas*, 497 F.3d at 499. Declining to consider these hardships at this stage would likely preclude judicial review before the plaintiffs will be subject to new federal regulatory burdens—burdens that will become effective in three months. Therefore, "[f]ailure to resolve this case now could be harmful to" the plaintiffs. *Pearson*, 624 F.3d at 685 (finding that the plaintiff satisfied the hardship requirement because he "could suffer harm if his claims are not adjudicated as soon as practicable").

Because the language of the statute is fixed, resolving the Horsemen's facial challenge now does not "entangle" the Court in an "abstract disagreement[]'" about administrative policy. *Greenstein*, 691 F.3d at 715 (quoting *Abbott Labs.*, 387 U.S. at 148). Rather, it requires the Court to resolve a dispute over Congress's choice to create a hybrid rulemaking scheme and the words it used to do so. *See Carter Coal*, 298 U.S. at 287 (finding

that the suit was "not prematurely brought" because "mandatory" provisions in the statute required that regulations be "formulated and promulgated").

3. Dismissal and Summary Judgment Standards

Beyond meeting basic jurisdictional thresholds, a plaintiff's complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Therefore, a complaint must allege sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content [that] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Defendants can challenge the sufficiency of a complaint through a motion to dismiss under Rule 12(b)(6). In evaluating whether a complaint states a claim for relief, the Court must accept all well-pleaded facts as true, but it need not accept a plaintiff's legal conclusions. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The Court "must limit itself to the contents of the pleadings, including attachments thereto." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). But "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). And the Court may take judicial notice of "matters of public record." *Norris v. Hearst Tr.*, 500 F.3d 454, 461 n.9 (5th Cir. 2007).

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(a). Movants must cite to particular parts of the record to show the absence of a genuine dispute or explain why the cited materials do not create a genuine dispute. Fed. R. Civ. P. 56(c)(1). The Court must consider materials cited by the parties but may also consider other materials in the record. Fed. R. Civ. P. 56(c)(3). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The substantive law identifies the material facts. *Id.* at 248.

4. Under current precedent, HISA is not an unconstitutional private delegation in violation of Article I or the Due Process Clause.

Limited by the parties' motions, the Court examines the two claims in which the Horsemen persist. The Horsemen facially challenge HISA, arguing that it violates the Article I private-nondelegation doctrine. *See* Dkt No. 38 at 7. They also argue that they will be regulated by a self-interested industry competitor in violation of the Due Process Clause. *Id.* The Horsemen are correct that HISA creates a novel structure that nationalizes regulation of the horseracing industry. But they cannot escape the reality that HISA satisfies the current, low thresholds created by Supreme Court and Fifth Circuit precedent. Although the Horsemen make compelling arguments that HISA goes too far, only appellate courts may expand or constrict their precedent. This Court cannot. And under current frameworks, HISA stays within constitutional boundaries.

A. HISA stays within current constitutional boundaries because it provides standards that confine the FTC's and Authority's discretion and places the Authority subordinate to the FTC.

The Constitution vests "[a]ll legislative Powers herein granted" in the United States Congress—not in another branch of government nor in a private entity. U.S. Const. art 1,

§ 1. "Accompanying that assignment of power to Congress is a bar on its further delegation." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality).

Eighty years ago, the Supreme Court—in *Carter v. Carter Coal Company*—invalidated the part of the Bituminous Coal Conservation Act of 1935 that delegated regulatory power to private parties. 298 U.S. at 310–11. The Act allowed two-thirds of coal producers to set the wage-and-hour rates for the rest of the producers and miners in the industry. *Id.* In other words, it gave the majority of coal producers "the power to regulate the affairs of an unwilling minority." *Id.* at 311. This was "legislative delegation in its most obnoxious form" because Congress delegated power "to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* Though debated by some, the Supreme Court likely held that this scheme violated due process, not Article I. *See id.* (finding that the delegation was "so clearly arbitrary, and so clearly a denial of . . . due process."); *see Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 707–09 (5th Cir. 2017) (characterizing *Carter Coal* as a due process case); *Synar v. United States*, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986) (recognizing that *Carter Coal* appeared to rest on due process grounds).[14] *Carter Coal* forms the heart of the Horsemen's private-nondelegation claim. *See* Dkt. No. 38 at 17 ("This Court should rely on *Carter Coal* to enjoin HISA for delegating regulatory authority of an industry to a private entity.").

A due process view of private nondelegation seems to comport with modern public-nondelegation jurisprudence. Supreme Court precedent provides that if an act of Congress lays down an intelligible principle, then an agency does not wield any "legislative power"

[14] *See* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J.L. & Pub. Pol'y 931, 979 (2014) ("On balance, *Carter Coal* is properly considered a due process case and not a non-delegation case.").

when enacting binding rules according to that principle. *See City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (explaining that agencies do not exercise "legislative power" when making rules); *INS v. Chadha,* 462 U.S. 919, 953 n.16 (1983) (explaining that rulemaking "may resemble 'lawmaking,'" but it is not). As Justice Scalia and many others have explained, agency rulemaking and adjudicating may take "'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive power.'" *City of Arlington*, 569 U.S. at 304 n.4.[15] So, if Congress lays down an intelligible principle in a statute and also properly gives a private party power to help an agency administer that statute, no Article I delegation problem could arise. Legislative power remains with Congress. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–14 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965)).[16]

[15] Still, as articulated by Chief Justice Roberts, "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting).

[16] Good reason exists, however, to not apply the forgiving intelligible-principle test indiscriminately between public and private entities alike. The Constitution commits no executive power to private entities. They have no vested powers of their own "that resemble lawmaking." *See Amtrak II*, 575 U.S. at 61 (Alito, J., concurring) ("[T]he formal reason why the Court does not enforce the [intelligible-principle inquiry] with more vigilance is that the other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking."). Indeed, the "whole theory of *lawful* congressional 'delegation' is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action." *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting). But neither party suggests what a stricter standard would look like, nor has the Supreme Court articulated one.

An intelligible principle, however, "cannot rescue a statute empowering private parties to wield regulatory authority." *Amtrak I*, 721 F.3d at 671. *Carter Coal* was clear: "regulating" is "necessarily a governmental function." 298 U.S. at 310–11. Private parties may play a role in the regulatory process only if they "function subordinately" to an agency. *Adkins*, 310 U.S. at 399.

Following the Supreme Court's reprimand in *Carter Coal*, Congress passed the Bituminous Coal Act of 1937. The 1937 Act eliminated the unconstitutional provisions of the 1935 version and "made other substantive and structural changes." *Adkins*, 310 U.S. at 387. The changes included removing the private parties' regulatory power over their competitors. *Id.* Instead, the statute allowed the private parties to "propose minimum prices" and other related standards to a government agency that could "approve[], disapprove[], or modif[y]" those rules. *Id.* at 388. They "operate[d] as an aid" to the agency. *Id.* The Supreme Court blessed this scheme as "unquestionably valid." *Id.* at 399. Specifically, the Court held that Congress does not impermissibly delegate "its legislative authority" to a private entity, when the entity "function[s] subordinately" to a governmental agency. *Id.* When the agency retains the ability to "determine the prices" and exercises "authority and surveillance over" the private entity, "law-making is not entrusted to the industry." *Id.*

Lawmaking is also not entrusted to the industry when Congress conditions an agency's regulatory power on private party approval. In *Currin v. Wallace*, for example, the Supreme Court upheld a scheme where a regulation could not take effect in a particular market without the approval of two-thirds of the regulated industry members in that market. 306 U.S. 1, 6, 15 (1939). There, the government possessed lawmaking power. *Id.* at 15

("[T]he required referendum does not involve any delegation of legislative authority."). The Court found that "it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application" on industry approval. *Id.* at 16; *see also United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 577–78 (1939) (upholding a similar scheme). Other circuit courts have upheld similar schemes where the effect of government regulations was contingent upon approval by a portion of the regulated industry members.[17]

Courts have consistently relied on *Currin* and *Adkins* in assessing private-nondelegation challenges. Just last year—in the subdelegation[18] context—the Fifth Circuit relied on *Adkins* for the proposition that subdelegations from agencies to private entities are lawful "so long as the 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) (quoting *Adkins*, 310 U.S. at 399).

The Fifth Circuit has also addressed the private nondelegation doctrine more generally and even identified the constitutional infirmities of *Carter Coal* and the other cases where the Supreme Court held statutes unconstitutional under the doctrine. *Boerschig*, 872 F.3d at 707–09. In *Boerschig*, the Fifth Circuit distinguished the "so-called 'private

[17] *See, e.g.*, *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 759 (9th Cir. 1992) (upholding a scheme that required 75% of orange growers to approve a regulation in order for it to take effect); *see also Ky. Div., Horsemen's Benevolent and Protective Ass'n v. Turfway Park Racing Ass'n*, 20 F.3d 1406, 1416 (6th Cir. 1994) (holding that the Horsemen did not have the power to "make the law and force it upon others" when it only had the power to waive a restriction imposed by Congress); *see also Cook v. Ochsner Found. Hosp.*, 559 F.2d 968, 975 (5th Cir. 1977) (finding that the "approval of the Federal Hospital Council is merely a condition precedent to the operative effect of the Secretary's regulations").

[18] Subdelegation occurs when an agency delegates a task to a private entity without Congressional authorization. *See Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143–44 (D.C. Cir. 1984). Here, Congress explicitly involved the Authority in HISA's regulatory scheme.

nondelegation' doctrine,"—arising from the Due Process Clause—from the nondelegation doctrine rooted in "separation-of-powers" concerns, which arises from Article I. *Id.* at 707; *but see Amtrak II*, 575 U.S. at 87–88 (Thomas, J., concurring) (suggesting that the "so-called 'private nondelegation doctrine' flows logically from the three Vesting Clauses"). "Like the doctrine that prevents Congress from delegating too much power to agencies, this doctrine preventing governments from delegating too much power to private persons and entities is of old vintage, not having been used by the Supreme Court to strike down a statute since the early decades of the last century." *Boerschig*, 872 F.3d at 707. In the Fifth Circuit's view, the problem with the statute in *Carter Coal*, and other statutes violating the private nondelegation doctrine,[19] was that private parties were "uncontrolled by any standard," and their determinations were "unreviewable." *See id.* at 708–09 (quoting *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 118–19 (1928) and citing *Carter Coal*, 298 U.S. at 310–11). In other words, a statute does not violate the private nondelegation doctrine—or "suffer from" the "twin ills" of *Carter Coal*—when (1) the statute "imposes a standard to guide" the private party and (2) provides "review of that determination that prevents the [private party] from having the final say." *Id.* at 708. Applied to a delegation of federal

[19] The Supreme Court held unconstitutional two other statutes for delegating power to private entities because the private parties were "uncontrolled by any standard," and there was "no provision for review." *See Roberge*, 278 U.S. at 118–19; *Eubank v. City of Richmond*, 226 U.S. 137, 140–41 (1912). *Eubank* and *Roberge* both predate *Carter Coal* and dealt with city ordinances. In *Eubank*, the Supreme Court struck down an ordinance that allowed two-thirds of property owners on any given block to prevent other property owners on the block from building in front of a block-long "setback line," even if the other owners were building on their own property. *Eubank*, 266 U.S. at 140–42, 144. In *Roberge*, the Supreme Court struck down an ordinance requiring a property owner to obtain consent from two-thirds of surrounding property owners in order to build a home for the poor. *Roberge*, 278 U.S. at 118–19, 122. As with *Carter Coal*, the problem with both laws was that the private parties had unrestrained and unreviewable power to restrict the property rights of others. *Id.* at 122 (citing *Eubank*, 226 U.S. at 143).

regulatory authority, this articulation appears to set out a test requiring both an intelligible principle and subordination.

But *Boerschig* does not provide a perfect fit for federal delegations. Though it discussed *Carter Coal*, the case itself involved a delegation of state eminent domain power to private companies. *Id.* at 706. The company could only take another's land if "necessary for 'public use'" (the standard), and the "review" to which it referred was judicial review, not agency rulemaking review. *Id.* at 708. Accordingly, it omitted any discussion of *Adkins*—the Supreme Court's last word on private party involvement in federal regulation and, as recognized by the defendants, the most analogous case. *See Adkins*, 310 U.S. at 399; Tr. at 92. Still, *Boerschig*'s articulation of the "twin ills" of the private nondelegation doctrine provides a starting framework. 872 F.3d at 708. And its holding does, of course, bind this Court.

Synthesizing the above case law, HISA must clear two primary hurdles to avoid a private-nondelegation violation. First, HISA must contain an intelligible principle guiding the Authority and the FTC, ensuring that Congress has not given away its legislative power under Article I. And second—related to government oversight and review—the Authority must function subordinately to the FTC, subject to its authority and surveillance, in accordance with *Adkins, Rettig*, and other case law assessing the limits of Congressional delegations in the regulatory context. Thus, the Court begins its analysis with an intelligible-principle inquiry and then turns to the question of subordination. The Court concludes its analysis by addressing the plaintiffs' best arguments against the statute.

i. HISA confines the FTC's and Authority's discretion.

For nearly a century the Supreme Court has "held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Gundy,* 139 S. Ct. at 2123 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928))). Indeed, its "jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372.

Those "standards . . . are not demanding." *Gundy*, 139 S. Ct. at 2129. In fact, the Supreme Court "has found only two delegations to be unconstitutional. Ever. And none in more than eighty years." *Big Time Vapes*, 963 F.3d at 446; *see A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935). Those delegations were unconstitutional because "'Congress had failed to articulate *any* policy or standard' to confine discretion." *Gundy*, 139 S. Ct. at 2129 (quoting *Mistretta*, 488 U.S. at 373 n.7). On the other hand, the Supreme Court has "blessed delegations that authorize regulation in the 'public interest' or to 'protect the public health'" or to set "fair and equitable" prices. *Big Time Vapes*, 963 F.3d at 442 n.18 (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943); and *Yakus v. United States*, 321 U.S. 414, 426–27 (1944)). The Fifth Circuit has also "uniformly upheld Congress's delegations." *Id.* at 442 n.17 (citing, for example, *United States v. Jones*, 132 F.3d 232, 239 (5th Cir. 1998) (upholding a delegation to DOJ to "define

non-statutory aggravating factors" to determine "death-eligible" offenders under the Federal Death Penalty Act)).

The Supreme Court and Fifth Circuit have both embraced a "non-blinkered brand of interpretation" when assessing whether Congress has given away its legislative powers. *Id.* at 443 (quoting *Gundy*, 139 S. Ct. at 2126). The Court is "meant also to consider 'the purpose of the [statute], its factual background, and the statutory context'" when "evaluating whether Congress laid down a sufficiently intelligible principle." *Id.* (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)). In other words, Congress must "'(1) clearly delineate its general policy, (2) the public agency which is to apply it, and (3) the boundaries of the delegated authority.'" *Id.* at 443–44 (quoting *Mistretta*, 488 U.S. at 372–73) (cleaned up).

First, HISA's general policy is clear. It expressly defines the FTC's and Authority's purposes and jurisdictional boundaries. *See* § 3054. Congress sought to develop an "independent and exclusive national" scheme to protect "the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces" through the "horseracing anti-doping and medication control program and the racetrack safety program." § 3054(a); *see also* Dkt. No. 36 at 26 (quoting H.R. Rep. No. 116-554, at 17 (2020)).[20] This policy communicates Congress's desire to protect the safety and integrity of horseracing through nationalizing and streamlining regulation under two specific programs, which are outlined in greater detail in sections 3055 and 3056. HISA, however, does not affect existing federal

[20] Indeed, the Act's title includes "Horseracing Integrity and Safety." *See INS v. Nat'l Ctr. for Immigrants' Rts., Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 221 (2012) ("The title and headings are permissible indicators of meaning.").

and state regulation on any "matters unrelated to antidoping, medication control and racetrack and racing safety of covered horses and covered races." § 3054(k)(3).

Second, the "public agency" to apply the policy highlights HISA's hybrid nature. Congress both "recognized" the Authority as a "private, independent, self-regulatory, nonprofit corporation" for "purposes of developing and implementing" HISA's two programs and tasked the FTC with "oversight" so that only the FTC possessed the power to give draft rules the force of law. §§ 3052(a), 3053.

The third factor—the "boundaries" of the delegated authority—falls within the outer-limits of precedent under the Fifth Circuit's "non-blinkered" approach. *See Big Time Vapes*, 963 F.3d at 443. Under HISA, the FTC shall approve proposed rules if they are "consistent with (A) this [statute] and (B) applicable rules approved by the [FTC]." § 3053(c)(2). HISA limits the scope of rulemaking to medication control and racetrack safety.[21] *See* § 3052. All other thoroughbred horseracing laws related to breeding, licensing, broadcasting, and the like remain "unaffected." § 3054(k)(3). Next, it outlines several "considerations" the Authority must take into account in developing the horseracing and medication control program, the "activities" of the program, and its baseline rules. § 3055(b), (c), and (g). For the racetrack safety program, HISA requires the Authority to "consider[]" existing safety standards, including those of three sources HISA lists; to incorporate twelve elements into the program; and to carry out specific "activities" under the program. § 3056 (a)–(c).

The Horsemen assert that this framework provides no boundaries to the FTC's authority and "no standards upon which to base its decisions" because the statute's

[21] To simplify and avoid redundancy, the Court refers to "anti-doping and medication control" as "medication control" when not directly quoting the statute.

"considerations" are given to the Authority. Dkt. No. 54 at 14. But the FTC can only approve proposed rules if they are "consistent with" the statute—and the statute contains those "considerations." §§ 3053(c)(2); 3055(b). In other words, the FTC may approve proposed rules only if they are "consistent with" the many provisions delineating the principles and elements the Authority must incorporate when developing proposed standards. Though not a paradigm of clarity, this suggests that the "elements" and "considerations" apply equally to the FTC's review.[22]

As in *Big Time Vapes*, Congress restricted the agency's—and the Authority's—discretion by making some of the "key regulatory decisions itself." *Big Time Vapes*, 963 F.3d at 445. HISA specifically creates the baseline list of permitted and prohibited substances by incorporating the lists "in effect for the International Federation of Horseracing Authorities." § 3055(g)(2)[23]; *see Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 441–42 (D.C. Cir. 2018) (recognizing that "federal law encourages" incorporating "technical standards" by reference). And it specifically prohibits the administration of substances to covered horses within 48 hours of a race. § 3055(d). The Authority only has the power to propose a modification to one substance included in this

[22] The Horsemen also seem to suggest that using the word "considerations"—rather than "directives" or "principles" in the rulemaking guidance—is fatal. Dkt. No. 54 at 15. Precedent proves this distinction immaterial. The Controlled Substances Act, the Horsemen's model of specific statutory guidance, directs the Attorney General to "consider . . . factors" in determining whether a substance is an "imminent hazard to the public safety." 21 U.S.C. § 811(h); *see* § 811(c); *Touby v. United States*, 500 U.S. 160, 165 (1991) (recognizing that "one cannot plausibly argue that §[811(h)]'s 'imminent hazard to the public safety' standard is not an intelligible principle"). In parallel fashion, HISA directs the Authority and the FTC to "consider . . . standards" and "take into consideration" enumerated factors and "elements" to ensure the "safety" and "integrity" of horseracing. 15 U.S.C. §§ 3055(b), 3056(a)(2).

[23] The Horsemen argue that "HISA . . . does not give direction as to what medications should be placed on the list." Dkt. No. 54 at 15. A plain reading of Section 3055(g)(2)(A)(i) refutes their assertion.

prohibition—furosemide—and may only do so if its board unanimously adopts four specific findings that the statute explicitly outlines: (1) the modification must be "warranted"; (2) the modification must be in the "best interests of horse racing"; (3) furosemide must have "no performance enhancing effect on individual horses"; and (4) "public confidence in the integrity and safety of racing [must] not be adversely affected." § 3055(e)(3)(B). And even if the Authority recommends such a change, that proposal must still run the gauntlet of FTC approval following notice and comment. *See* § 3053(b)(2) (providing that "a proposed modification to a rule . . . shall not take effect unless the proposed rule or modification has been approved by the Commission").

The Authority also has the power to propose modifications to the baseline rules. But before it can, it must consider, among other things, the following imperatives:

> (1) Covered horses should compete only when they are free from the influence of medications, other foreign substances, and methods that affect their performance.
>
> (2) Covered horses that are injured or unsound should not train or participate in covered races, and the use of medications, other foreign substances, and treatment methods that mask or deaden pain in order to allow injured or unsound horses to train or race should be prohibited.
>
> (3) The amount of therapeutic medication that a covered horse receives should be the minimum necessary to address the diagnosed health concerns identified during the examination and diagnostic process.

§ 3055(b).

For the racetrack-safety program, the Act's boundaries are more limited. HISA directs the Authority and the FTC to consider "existing safety standards," including those from "the National Thoroughbred Racing Association Safety and Integrity Alliance Code of Standards, the International Federation of Horseracing Authority's International Agreement

on Breeding, Racing, and Wagering, and the British Horseracing Authority's Equine Health and Welfare program." § 3056(b). The "elements" of the program describe what it must contain. They also specify that the training and racing safety standards must "tak[e] into account regional differences and the character of differing racing facilities" and be "consistent with the humane treatment of covered horses." § 3056(b)(1) & (2).

These considerations, topics, and elements confine the bounds of Congress's delegated authority to provide a sufficient intelligible principle. HISA cabins Congress's delegation more than the many statutes the Supreme Court has upheld despite "very broad delegations." *Gundy*, 139 S. Ct. at 2129. The standards it provides the Authority in proposing rules and the FTC in approving them as they seek to ensure the "safety, welfare, and integrity" of thoroughbred horseracing do not trespass the limits set by precedent.[24] *See Big Time Vapes*, 963 F.3d at 442 n.18 (collecting cases).

An intelligible principle is necessary, but not sufficient, to save the Act, however. The FTC must still exercise "authority and surveillance" over the Authority, which must function as a "subordinate[]" private entity. *Adkins*, 310 U.S. at 399; *Boerschig*, 872 F.3d at 709 (holding that private entities cannot wield "unreviewable" power). As explained next, HISA clears that hurdle as well.

[24] As the Fifth Circuit has recognized before, the Supreme Court "might well decide—perhaps soon—to reexamine or revive the [public] nondelegation doctrine. But 'we are not supposed to . . . read tea leaves to predict where it might end up.'" *Big Time Vapes*, 963 F.3d at 447 (quoting *United States v. Mecham*, 950 F.3d 257, 265 (5th Cir. 2020)). And until that happens, given the specificity of the Act, its limited reach, the fact that it regulates a relatively small component of the national economy, and that many of the issues HISA addresses are already subject to state regulation, "it would be freakish to single out the [programs] at issue here for special treatment." *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring).

ii. The Authority functions subordinately to the FTC because the FTC retains sole power to enact binding rules after independently reviewing the Authority's proposals.

HISA suffers from neither of the "twin ills" the Fifth Circuit has identified as markers of private-nondelegation violations. *Boerschig*, 872 F.3d at 708. Unlike the private parties in *Carter Coal*, the Authority lacks unrestrained, unreviewable power to regulate the rest of the thoroughbred horseracing industry. *Id.* at 708–09 (discussing *Carter Coal*, 298 U.S. at 310–11). Rather, the Authority can propose rules to the FTC, which then submits them to the public for comment, independently reviews them, and afterward either approves or disapproves them with proposal for modification. *See* §§ 3052–53. In other words, the Authority has no independent power to enact binding rules and "function[s] subordinately" to the FTC. *Adkins*, 310 U.S. at 399. Without the FTC's independent review and approval, the Authority is left "to establish safety and performance standards for horseracing" in accordance with its bylaws (Dkt. No. 39-1 at 40)—but nothing it drafts will carry any legal effect for private parties. Lawmaking, then, is "not entrusted to the industry." *Adkins*, 310 U.S. at 399. The ability to "adopt generally applicable rules of conduct" remains with the FTC, according to the legislative policy Congress established in HISA. *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (explaining that the framers understood "legislative power . . . to mean the power to adopt generally applicable rules of conduct governing future actions by private persons"). Only the FTC can turn a draft rule into a "rule of prospective force." *Loving v. United States*, 517 U.S. 748, 758 (1996).

In this respect, HISA mimics other self-regulatory organizations (SROs) that have consistently withstood private nondelegation challenges. *See, e.g.*, *R. H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952) (citing *Adkins*, 310 U.S. 381). SROs are private

organizations that govern members of an industry under an agency's oversight.[25] *See, e.g.*, 15 U.S.C. § 78*o*-3 (providing that "association[s] of brokers and dealers" may apply for registration with the SEC if they meet certain statutory terms and conditions). Like the Authority, they possess "Congressionally-mandated power." *Austin Mun. Sec., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 680 (5th Cir. 1985). But "to prevent the misuse" of that power, Congress grants agencies "broad supervisory responsibilities" over these organizations. *Id.* Specifically, the Maloney Act gave birth to the SEC–FINRA model, which inspired the FTC–Authority relationship. *See* Dkt. No. 53 at 15 (asserting that "HISA is modeled on the Maloney Act," which established the SEC–NASD (FINRA's predecessor) relationship).[26]

Circuit courts have uniformly rejected private nondelegation challenges to the Maloney Act, relying on the SEC's "power, according to reasonably fixed statutory standards, to approve or disapprove of [NASD] Rules." *Sorrell v. SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982) (quoting *R. H. Johnson & Co.*, 198 F.2d at 695); *see also Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977). Courts have likewise rejected challenges to NASD's ability to impose sanctions because the SEC has the power to "review [] any disciplinary action." *Sorrell*, 679 F.2d at 1326 (quoting *R. H. Johnson & Co.*, 198 F.2d at 695). Thus, every court to consider a nondelegation challenge to the Maloney Act has

[25] While agencies normally recognize SROs if they meet certain statutory terms and conditions, here, Congress "recognized" the Authority as a "self-regulatory" organization, setting statutory conditions for its structure and providing guidance for the development of its rules. Congress, not the FTC, decided that an organization like the Authority was fit for a self-regulatory role under agency oversight.

[26] "FINRA is the successor organization to the National Association of Securities Dealers [NASD]." *See Scottsdale Cap. Advisors Corp. v. FINRA*, 844 F.3d 414, 417 n.1 (4th Cir. 2016).

concluded that there is "no merit in the contention that the Act unconstitutionally delegates power to" a private entity. *Id.*

Though the Fifth Circuit has not addressed a private nondelegation challenge to the Maloney Act, just last year it approvingly cited *R. H. Johnson & Co.*—the original case upholding the Maloney Act on nondelegation grounds. *See Rettig*, 987 F.3d at 532 n.12 (citing *R. H. Johnson & Co.*, 198 F.2d at 695). There, the Fifth Circuit rejected a private-legislative-nondelegation challenge to a Department of Health and Human Services (HHS) rule that granted power to a private entity. *Id.* at 531–32. The rule at issue required a private board to certify that the rates that states had to pay insurers in their Medicaid contracts were "actuarially sound." *Id.* at 526. But the board did so according to its own "practice standards," leading the district court to conclude that the rule unlawfully delegated legislative power to the private board "to set rules on actuarial soundness." *Id.* at 530–31. The Fifth Circuit first found that HHS did not subdelegate legislative authority to private entities because it only "reasonably conditioned" HHS's approval of state Medicaid contracts on the actuaries' standards and certification. *Id.* at 531. Next, assuming arguendo that "HHS subdelegated authority to private entities," the Fifth Circuit held that "such subdelegations were not unlawful." *Id.* at 532. The private board "function[ed] subordinately to" HHS because HHS maintained "final reviewing authority" over its activities. *Id.* (citing *Adkins*, 310 U.S. at 399). That is, HHS "independently perform[ed] its reviewing, analytical and judgmental functions." *Id.* (citing *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974)). Because HHS "reviewed and accepted" the board's standards, the rule did not "divest HHS of its final reviewing authority." *Id.* at 532–33 (citing *Louisiana Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 552 (5th Cir. 2014)).

HISA passes muster under *Rettig*'s rubric as well. Structurally, the FTC possesses final reviewing authority over all of the Authority's proposed rules and standards. § 3053(b). HISA even endows the FTC with greater oversight than HHS possessed. Not only can the FTC approve the Authority's proposed rules, it can reject proposed rules and recommend modification after disapproval. § 3053(c)(3). HHS retained no such power without repealing wholesale the rule granting the board power in the first instance. *Rettig*, 987 F.3d at 532 n.13; *see Texas v. Rettig*, 993 F.3d 408, 413 (5th Cir. 2021) (Ho, J.) (dissenting from denial of rehearing en banc) (explaining that HHS's "only recourse is to amend or repeal the rule delegating power to the Board in the first place"). In addition, all proposed rules are subject to notice and comment, which enables more scrutinizing agency review. § 3053(c)(1).

To be sure, the subdelegated power in *Rettig* concerned only "a small part of the [contract] approval process" and that process was "closely 'superintended by HHS in every respect.'" *Rettig*, 987 F.3d at 533 (citing *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 708 n.5 (D.C. Cir. 1977)). In HISA, by contrast, Congress instructs the Authority to draft myriad medication control and racetrack safety rules. *See* §§ 3052, 3053. But the private nondelegation analysis concerns the *scope* of agency review (*i.e.*, ultimate control over regulation) more than the *object* of its review (*i.e.*, the number of proposed rules). *See Adkins*, 310 U.S. at 399. Here, the object—development and implementation of medication and safety programs—appears sweeping. But agency review is equally so. No Authority rule can go into effect without notice and comment and independent FTC review and approval. § 3053(b)–(c).

Another Fifth Circuit subdelegation case, *City of Dallas v. FCC*, similarly fails to help the Horsemen. 165 F.3d 341 (5th Cir. 1999). There, the FCC promulgated a blanket rule banning cable operators from providing video programming coming from other service providers (OVS operators). *Id.* at 357. But under another FCC rule, OVS operators (private entities) could "selectively" lift this general ban for cable operators without any FCC oversight. *Id.* at 358. The Court held the FCC rule—permitting OVS operators to discriminate amongst cable operators—contradicted the plain language of the statute and impermissibly delegated regulatory authority to a private entity. *Id.* at 357–58. Critically, however, the FCC could not review the private entities' regulatory decisions. *See In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Sys.*, 11 F.C.C. Rcd. 20227, 20253 ¶ 52 (1996) ("We believe that it is not appropriate for the Commission to deny an open video system operator the *independent business discretion* to decide that a cable operator's presence on its system may be beneficial." (emphasis added)). So while the Horsemen correctly assert that the FCC could not modify the private entities' decisions, the FCC also could not approve or disapprove their decisions. Dkt. No. 38 at 27. Here, the FTC can. *See* § 3053(c).

But the subdelegation inquiry likely differs from Congress's choice to involve a private entity in the regulatory process. In the subdelegation context, courts must ensure that an agency does not abdicate its *statutory duties* when reviewing particular private actions. *Rettig*, 987 F.3d at 532; *Lynn*, 502 F.2d at 59 (noting that the statute does "not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others"; rather, "the agency must independently perform its reviewing, analytical and judgmental functions"); *see also Sierra Club v. Sigler*, 695 F.2d

957, 962 & n.3 (5th Cir. 1983). Here, by contrast, whether the FTC abdicates its statutory duties is irrelevant to the central question this facial challenge presents: whether the Authority's and FTC's assigned "statutory duties" were lawful in the first instance. That is why the subdelegation inquiry fits better with an as-applied challenge to a specific agency action—for example, failing to independently analyze and review a proposed rule—than with a facial challenge where the plaintiff must show that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In any event, the Congressional authorization here likely puts HISA on firmer constitutional footing than subdelegations further removed from Congressional will. "[I]t is one thing to bless a Congressional decision to involve private parties in the rulemaking process. It is quite another to allow an agency—already acting pursuant to delegated power—to re-delegate that power out to a private entity." *Rettig*, 993 F.3d at 415 (Ho, J.) (dissenting from denial of rehearing en banc) (citing *Gundy*, 139 S. Ct. at 2123).

Still, the Horsemen argue that the statute itself renders the FTC a rubber stamp because the FTC has no pre-existing expertise in horseracing and only has 60 days to review proposed rules. Dkt. Nos. 38 at 23. Historically, valid private-public partnerships have involved agencies that possess independent expertise over the industry they are tasked with regulating. For example, the National Bituminous Coal Commission had expertise in the coal industry, and the SEC has expertise in securities regulation. *See Adkins*, 310 U.S. at 387–88; *Scottsdale Cap. Advisors Corp. v. FINRA*, 844 F.3d 414, 417–18 (4th Cir. 2016). This abnormality, however, is not fatal. While the Horsemen's concern is understandable—the parties agree that the FTC lacks pre-existing expertise in thoroughbred horseracing—neither contention presents an adequate legal basis on a facial challenge to hold that FTC review

will automatically prove meaningless. Rather, the Court must presume that the FTC "will act properly and according to law." *See FCC v. Schreiber*, 381 U.S. 279, 296 (1965); *see also United States v. Raines*, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases."). And, at the hearing, the Horsemen stated that they were not concerned with the FTC wielding regulatory control over them. Tr. at 117 (clarifying that they had no preference between being regulated by the Department of Agriculture or the FTC). The Horsemen's concern lies with the Authority's power. *Id.* at 117–18.

Moreover, some of HISA's goals fit neatly into the overall mission of the FTC—stopping unfair, deceptive, or fraudulent practices and promoting competition. Dkt. No 38 at 12. Congress passed HISA, in part, to stop cheating through the use of unauthorized substances and to otherwise increase the fairness of competition in horseracing and wagering. *See, e.g.*, § 3059 ("Unfair or deceptive acts or practices"). By providing uniform rules and centralized enforcement, HISA promotes fair competition on a level playing field.

iii. HISA's unique features do not transform the Authority into an insubordinate entity, free from sufficient FTC oversight.

The Horsemen make several other compelling arguments, highlighting the unusual nature of the FTC–Authority relationship, but none establish a private nondelegation violation under current law.

a. The FTC's limited power to draft rules itself does not create a private nondelegation violation.

Though an uncommon feature in public-private partnerships, the FTC's limited ability to draft rules does not necessarily convert the Authority into an insubordinate entity in the rulemaking scheme. Without Authority proposals, the FTC may adopt interim final

rules "if the Commission finds that such a rule is necessary to protect—(1) the health and safety of covered horses; or (2) the integrity of covered horseraces and wagering on those horseraces." § 3053(e). But, as recognized in Section 3053(e), an agency may promulgate interim final rules only if it has "good cause" to find that notice and comment would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). Courts uniformly read "good cause" narrowly. *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011) (quoting *United States v. Garner*, 767 F.2d 104, 120 (5th Cir. 1985)). So its "use 'should be limited to emergency situations.'" *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) (quoting *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981)). As a result, the FTC's ability to issue interim final rules is not much of an answer to the Horsemen's concern.

But Congress's decision to restrict the FTC's stand-alone rulemaking power parallels the private veto allowed in *Currin*. 306 U.S. at 16. The Supreme Court has long allowed private parties to reject agency rules until their substance reflects the private parties' preferences. *Id.*; *see Rock Royal*, 307 U.S. at 577–78; *see also Brackeen v. Haaland*, 994 F.3d 249, 352 n.63 (5th Cir. 2021) (recognizing that "the Supreme Court has historically upheld even delegations of authority to private entities" that "incorporate[] their decision-making into federal law") (citing *Currin* & *Rock Royal*). Because part of the industry in *Currin* could veto government regulation, private parties ultimately determined whether any rule took effect and, therefore, what the substance of that rule would be. In other words, the industry could hold the agency hostage. Likewise, the Authority could theoretically do the same by refusing to propose a draft rule in an area the FTC wanted to regulate, but *Currin* and its progeny suggest that neither hypothetical would yield a constitutional harm.

Relying on the Amtrak litigation, the Horsemen argue that giving private parties both the power to draft rules and the power to veto the government's preferences violates the private nondelegation doctrine. Dkt. No. 38 at 21–26. Indeed, Congress can enter precarious territory when attempting to combine roles that private parties may play in the rulemaking process. HISA, however, does not transgress these limits.

In *Amtrak I*, the D.C. Circuit struck down Section 207 of the Passenger Rail Investment and Improvement Act (PRIIA) because it unlawfully delegated "regulatory power to a private entity." 721 F.3d at 668; PRIIA, § 207, 49 U.S.C. § 24101.[27] There, Congress authorized Amtrak—designated a private entity at the time—and the Federal Railroad Administration (FRA) to "jointly develop . . . metrics and standards" that would affect Amtrak's railway competitors. PRIAA § 207(a). Under this scheme, Amtrak enjoyed "equal footing" with the agency. *Amtrak I*, 721 F.3d at 673. Regulations required joint approval for passage. And if the two entities disagreed as to the standards, either could petition the Surface Transportation Board to appoint an arbitrator to settle the disagreement. PRIAA § 207(d). Put another way, "[u]ltimate control over the regulatory standards did not rest with a neutral governmental agency; it could be exercised by Amtrak with an assist from the arbitrator." *Ass'n of Am. Railroads v. United States Dep't of Transportation*, 896 F.3d 539, 546 (D.C. Cir. 2018) (*Amtrak IV*).

Referring to the valid arrangements in *Adkins* and *Currin*, the D.C. Circuit suggested that a private party's involvement may become unconstitutional when granted two separately permissible roles: (1) drafting and proposing regulations (*Adkins*) and

[27] The Supreme Court vacated the D.C. Circuit's opinion by holding that Amtrak was a governmental entity, so it did not evaluate PRIIA under the private nondelegation doctrine. *Amtrak II*, 575 U.S. at 43.

(2) effectively vetoing regulations developed by an agency (*Currin*). *Amtrak I*, 721 F.3d at 671. Even if the statute "merely synthesize[d] elements approved by *Currin* and *Adkins*, that would be no proof of constitutionality." *Id.* at 673. "[N]ovelty," the court warned, "may, in certain circumstances, signal unconstitutionality." *Id.* (citing *Free Enter. Fund*, 561 U.S. at 505–06). The court rejected the government's argument that the Constitution only required "the government's 'active oversight, participation, and assent in its private partner's rulemaking decisions.'" *Id.* That proposition—one the court found "nowhere in the case law—vitiate[d] the principle that private parties must be limited to an advisory or subordinate role in the regulatory process." *Id.* And because an arbitrator settled disagreements between Amtrak and the FRA, "it would have been entirely possible for metrics and standards to go into effect that had not been assented to by a single representative of the government." *Id.* at 674.

While not disturbing the D.C. Circuit's private nondelegation analysis, the Supreme Court vacated *Amtrak I*, holding that Amtrak was a governmental—not private—entity. *Amtrak II*, 575 U.S. at 55. Nonetheless, on remand, the D.C. Circuit held that Section 207 of PRIIA violated the Due Process Clause because it gave Amtrak, a self-interested entity with a statutorily required profit-seeking motive, regulatory power over its competitors. *Amtrak III*, 821 F.3d at 27–34. For Due Process purposes, whether Amtrak was deemed a governmental or private entity mattered not. *Id.* at 31 ("Wherever Amtrak may fall along the spectrum between public accountability and private self-interest, the ability—if it exists—to co-opt the state's coercive power to impose a disadvantageous regulatory regime on its market competitors would be problematic.") (citing Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv.

J.L. & Pub. Pol'y 931 (2004)). Its ability to pursue self-interest over its competitors was the real problem. *Id.* at 34. Thus, the D.C. Circuit almost exclusively relied on *Carter Coal* to hold Section 207 unconstitutional. *Id.* at 35–36. And, especially relevant here, the D.C. Circuit held that *Adkins* and *Currin* were inapplicable because the "FRA's authority to hold the line against overreaching by Amtrak is undermined by the power of the arbitrator." *Id.* at 34 n.4. The FRA was "powerless to overrule Amtrak" because, "[a]s joint developers, they occupy positions of equal authority." *Id.* at 35. Thus, the FRA could not keep "Amtrak's naked self-interest in check." *Id.*

The ultimate remedy? Severing the arbitration provision. *Amtrak IV*, 896 F.3d at 545. "For it empowered Amtrak to impose on its competitors rules formulated with its own self-interest in mind, *without the controlling intermediation of a neutral federal agency*." *Id.* (emphasis added). The problem was that "Amtrak, through unilateral resort to the arbitrator, had the power 'to make law' by formulating regulatory metrics and standards without the agreement or control of the Administration." *Id.* at 548 (quoting *Amtrak III*, 821 F.3d at 23). Consistent with the Fifth Circuit's analyses in *Boerschig* and *Rettig*, the D.C. Circuit found that the power to make law without government review or approval violated the Due Process Clause under *Carter Coal*. *See id.* at 541.

Because the arbitration provision allowed Amtrak's standards to take legal effect over the government's objection, the D.C. Circuit could distinguish the cases upholding the SEC–NASD model. *Amtrak I*, 721 F.3d at 671 n.5 ("In none of these cases did a private party stand on equal footing with a government agency.") (citing, inter alia, *Sorrell*, 679 F.2d at 1325–26). Here, by contrast, the Authority can never enact rules without FTC review and approval. § 3053(b). And once the arbitration provision was severed, Amtrak's dual

powers to draft standards and veto the FRA's preferences presented no legal problem. Amtrak no longer had "power 'to make law' . . . without the agreement or control" of the agency. *Amtrak IV*, 896 F.3d at 548 (quoting *Amtrak III*, 821 F.3d at 23). Unlike the FRA, the FTC is not "powerless to overrule" the Authority. *Amtrak III,* 821 F.3d at 35. Indeed, the FTC always has "the final say." *Boerschig*, 872 F.3d at 708.

The Horsemen's reliance on the dissenting judges' nondelegation analysis in *Brackeen v. Haaland* likewise falls short. Dkt. No. 38 at 23. In *Brackeen*, the plaintiffs challenged the Indian Child Welfare Act (ICWA) on nondelegation grounds because it allowed tribes "to establish an order of adoptive and foster preferences that is different from the order set forth" by Congress elsewhere in the statute. *Brackeen*, 994 F.3d at 269 (citing 25 U.S.C. § 1915(c)). Under this authority, the Bureau of Indian Affairs promulgated a rule stating that a tribe's "preferences apply over those initially specified in ICWA." *Id.* at 346 (citing 25 C.F.R. § 23.130). The en banc majority upheld this rule and the statutory provision enabling it, finding that it did not violate the nondelegation doctrine because it "validly integrates tribal sovereigns' decision-making into federal law, regardless of whether it is characterized as a prospective incorporation of tribal law or an express delegation by Congress." *Id.* at 352. The court's decision relied on the tribes' sovereign character, making the majority's reasoning largely irrelevant here.

But the Horsemen urge the Court to apply the nondelegation reasoning of the dissenting judges, which treated the tribes as private entities in part of its analysis. Dkt. No. 38 at 23–24. First, the dissenting judges would have found a nondelegation violation because the statute did not "delegate to tribes authority merely to regulate under Congress's general guidelines." *Brackeen*, 994 F.3d at 420 (Duncan, J., dissenting). Rather, it

"empowere[d] tribes to change the substantive preferences Congress enacted" and "bind courts, agencies, and private persons to follow them." *Id.* at 421. Second, viewing the statute as delegating only regulatory—not legislative—authority, they would still have held it unconstitutional "because it delegates that authority outside the federal government." *Id.* at 422. The Horsemen translate this to mean "when an entity is private, it cannot be given the sole authority to *draft* regulations." Dkt. No. 38 at 23–24 (emphasis added).

But the Horsemen's translation has never been the test, as the SEC–FINRA model demonstrates. Drafting for agency review was not the problem—drafts do not bind. The problem in *Brackeen* (for the dissenters, at least) was that the statute empowered tribes to draft, enact, and bind others to their preferences. Here, by contrast, the Authority cannot change Congress's preferences. In fact, it cannot change anything: the FTC retains the exclusive power to give draft rules the force of law and, in doing so, ensures that the Authority's proposals are consistent with—not contrary to—Congress's will.[28]

b. HISA adequately guides the FTC in its review of proposed rules.

The Horsemen also attack the "limited guidance" HISA gives the FTC in its review of proposed rules because the FTC must approve proposed rules that are "consistent with" the Act and with "applicable rules." Dkt. No. 54 at 14; § 3053(c)(2). Though the Horsemen accuse HISA of providing the FTC no standards on which to base its decisions (Dkt. No. 54 at 14), HISA provides criteria governing both the Authority and FTC. *See supra* Section 3.B.i. At a minimum, "consistent with" the Act means that the FTC must independently ensure that proposed rules are consistent with "the safety, welfare, and integrity of covered

[28] The Fifth Circuit also identified "no binding precedent to support a rule that regulatory power cannot be delegated outside the federal government." *Brackeen*, 994 F.3d at 352.

horses, covered persons, and covered horseraces." § 3054(a)(2)(A). More specifically, consistency review ensures that rulemaking comports with the elements, considerations, baseline rules, and express prohibitions the Act contains.

The Horsemen's seemingly largest concern comes from a rule that Congress explicitly mandated: the 48-hour substance prohibition in Section 3055(d). Here, the Authority must propose a rule mimicking Congress's express intent. *Cf. Pittston Co. v. United States*, 368 F.3d 385, 396 (4th Cir. 2004) (finding that private entities serving "functions specifically defined and mandated by Congress" do not run afoul any private nondelegation concerns). And if the Authority attempted to deviate from a Congressional mandate, the FTC would summarily disapprove the proposed rule as inconsistent with the Act.

Similarly, Congress itself provided lists of the baseline rules for the medication control program. § 3055(g). Consistency review in this context likewise confines the Authority and the FTC to Congress's express will, with limited exceptions. Though the Authority may propose modified rules to the baseline program, the FTC must approve proposed modification only if it determines they are consistent with the principles the Act lists, including: (1) "horses should compete only when they are free from" substances "that affect their performance"; (2) substances that "mask or deaden pain in order to allow injured or unsound horses to train or race should be prohibited"; and (3) any "therapeutic medication" given to a covered horse "should be the minimum necessary to address the diagnosed health concerns." *See* § 3055(b). As detailed above in the legislative-standards section, the Authority's proposed rules must comport with certain principles on the front end, which the FTC must independently verify on the back end. *See supra* Section 3.B.i.

Finally, the notice and comment period also buttresses FTC review by allowing all industry stakeholders to highlight potential inconsistencies with HISA.

Despite HISA's unique characteristics, the Horsemen's argument is also undermined by the fact that HISA's consistency review tracks the SEC's review of FINRA rules. Under the Maloney Act, the SEC "shall approve a proposed rule change of a self-regulatory organization" if "consistent with" the requirements of the Maloney Act and applicable rules. 15 U.S.C. § 78s(b)(2)(C)(i). Yet the Court recognizes that, because the FTC can only disapprove rules that are inconsistent with the statute, HISA largely gives the Authority the power to "fill up the details" of the Act in places with less specific directives. *Gundy*, 139 S. Ct. at 2136 (quoting *Wayman v. Southard*, 23 U.S. 1, 20 (1825)). Filling up the details has long been recognized as the very business of regulating. *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (recognizing that the "power to fill up the details" of legislation *is* the power to make "administrative rules and regulations"). Furthermore, review for consistency resembles an adjudicative, rather than regulatory, function akin to courts reviewing agency action for whether it is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). And because Congress withheld the FTC's ability to modify proposed rules, the Authority wields greater power than FINRA and the private entities in *Adkins*. Though distinguishing HISA from the schemes on which it was modeled, these features do not take HISA outside established constitutional limits for the reasons stated above.

c. The FTC's inability to formally modify proposed rules does not render HISA unconstitutional under current law.

Because the FTC has the power to approve, disapprove, and recommend modifications to the Authority's proposed standards, its inability to formally modify the Authority's rules is not fatal. Though the agency in *Adkins* retained the ability to modify the

private parties' proposed prices and standards, the Horsemen acknowledge that the Supreme Court "did not rely on this fact in its reasoning." Dkt. No. 38 at 29. In fact, they clarify that the phrase "approve, disapprove, or modify" has been "taken out of context" by later courts. *Id.* Moreover, the agency in *Currin* could not modify its regulation without industry approval. *See* 306 U.S. at 16. Nor could the FRA modify any standards without Amtrak's agreement, even after the arbitration provision had been severed. *See Amtrak IV*, 896 F.3d at 545.

Though arising in the subdelegation context, the Fifth Circuit's view also supports the conclusion that *Adkins* did not turn on the commission's ability to modify proposed rules. In *Rettig*, HHS retained no ability to modify the private board's standards and certifications. 987 F.3d at 532. Rather, aside from the drastic remedy of repealing the board's involvement entirely, HHS could only "review[] and accept[]" the board's standards. *Id.* at 533. That HHS lacked modification power formed one of the dissent's primary critiques. *See* 993 F.3d at 415 (Ho, J.) (dissenting from denial of rehearing en banc) ("[W]hile the instant scheme arguably allows HHS to 'approve' private standards and actuarial certifications, it emphatically does not leave HHS free to 'disapprove or modify' them.") (quoting *Amtrak I*, 721 F.3d at 671). This Court, of course, is bound by majority opinions.

Consistent with the analyses of *Adkins* and *Rettig*, the decisions upholding the Maloney Act against delegation challenges do not rest their conclusions on the SEC's ability to "modify" NASD rules. *See, e.g.*, *Todd & Co.*, 557 F.2d at 1012. Rather, courts have limited their rulemaking analyses to whether the agency could "approve or disapprove" the private entity's rules even though the SEC retains authority to amend their rules. *Id.*; *see*

Aslin v. FINRA, 704 F.3d 475, 476 (7th Cir. 2013) (citing 15 U.S.C. § 78s(c)) (recognizing that the SEC may "abrogate, add to, and delete from all FINRA rules as it deems necessary"). Here, the FTC retains the power to approve or disapprove all rules and, "in the case of disapproval," it "shall make recommendations to the Authority to modify the proposed rule." § 3053(c)(3)(A). The defendants argue that there is "no functional difference" between this scheme and true modification power because any rejected proposed rules may be resubmitted if they "'incorporate[] the modifications recommended' by the FTC." Dkt. No. 60 at 13 (quoting § 3053(c)(3)(B)). If the Authority fails to "incorporate" the FTC's recommended modification, the FTC could continue to reject the proposed rule. Though not the equivalent of drafting the rule itself, the power to approve, disapprove, or recommend modification subject to continued rejection ensures that the Authority still "functions subordinately" to the FTC such that the FTC "determines" the binding rules. *See Adkins*, 310 U.S. at 399.

Again, the Horsemen's grievance is understandable. Unlike, the SEC–FINRA relationship, the FTC needs the Authority to function as a typical regulator. *See In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008) ("Absent the unique self-regulatory framework of the securities industry, [FINRA's] responsibilities would be handled by the SEC."). Only an act of Congress could permanently amend any Authority rule or divest it of its powers. The FTC may never command the Authority to change its rules or abolish its role in the administrative process. But Congress has restricted an agency's power before to an arguably greater degree. The agency in *Currin* could never order the industry to accept its regulatory preferences. 306 U.S. at 16. Congress limited its regulatory authority to the consent of private parties. *Id.*

Though the Fifth Circuit has not yet confronted a scheme like HISA, its precedents on the private nondelegation doctrine indicate that Congress has not given away its legislative power under Article I nor violated due process because the Authority does not possess unrestrained and unreviewable power to regulate. *See Rettig*, 987 F.3d at 532; *Boerschig*, 872 F.3d at 708–09. Rather, legislative standards guide the Authority and the FTC, and the FTC controls the promulgation of binding rules. Thus, HISA's rulemaking mechanism does not violate the private nondelegation doctrine.

B. The Authority's enforcement powers comport with due process.

Outside of the Authority's rule-drafting power, the Horsemen argue that several of the Authority's non-legislative regulatory functions violate the private nondelegation doctrine. Dkt. No. 38 at 21–32. For example, the Horsemen challenge the Authority's power to investigate and punish rule violations.[29] These functions, however, comport with due process as articulated in *Boerschig*.[30]

The Authority does not have the "unrestrained ability to decide whether another citizen's property rights can be restricted." *Boerschig*, 872 F.3d at 708. The Authority may only investigate rule violations according to "uniform procedures" reviewed and approved

[29] The Horsemen also point to the Authority's ability to commence civil actions as an example of the "lack of historical precedent" for the scheme and "the breadth" of its enforcement powers. Dkt. No. 38 at 19 (citing *Buckley v. Valeo*, 424 U.S. 1, 140 (1976)). In the hearing, however, the Horsemen conceded that this ability did not constitute a separate claim but went instead to the Court's irreparable-harm analysis. Tr. at 23. Because the Horsemen do not establish success on the merits of their claims, however, the Court need not engage in an irreparable-harm analysis as it relates to permanent injunctive relief.

[30] Additionally, the Authority Nominating Committee's power to select its board and committee members does not implicate the nondelegation doctrine nor due process, because they are not governmental powers in the first place. *See, e.g.*, *Pittston Co. v. United States*, 368 F.3d 385, 396 (4th Cir. 2004) (noting that a private entity's "internal governance . . . in no way impinges upon others" and "clearly do[es] not violate the nondelegation doctrine").

by the FTC, and they cannot impose any penalty or sanctions without providing due process and an impartial tribunal. §§ 3054(c), 3057(c)(3). Thus, even prior to FTC review, due process is baked into the system. Moreover, any Authority decision with final, legal effect is subject to de novo review by an ALJ, whose decision may then be reviewed de novo by the FTC. *See* § 3058(b), (c). This de novo review includes the ability to "reverse, modify, [or] set aside" any sanction of the Authority. *Id.* And any determination by an ALJ or the FTC is a "Final Decision" under the APA, enabling judicial review. § 3058(b)(3)(B); *see* § 3058(c)(2)(B); *see also* Administrative Procedure Act § 10, 5 U.S.C. § 704 (outlining judicial review of administrative agency decisions).

Case law supports this conclusion. The Maloney Act authorizes private entities to perform certain investigative and disciplinary functions, subject to the SEC's oversight. *See* 15 U.S.C. § 78*o*-3(h)(3). This aspect of the Maloney Act has been upheld against constitutional challenges on many occasions. *See Sorrell*, 679 F.2d at 1325–26; *Todd & Co.*, 557 F.2d at 1014; *R. H. Johnson & Co.*, 198 F.2d at 695. And these decisions focus on the SEC's ability to review any disciplinary action de novo, which the FTC retains. *See Sorrell*, 679 F.2d at 1326 & n.2 (citing *R. H. Johnson & Co.*, 198 F.2d at 695). In addition to HISA's layers of review, the Authority points out that the FTC's review is even more substantial than the SEC's review of FINRA decisions. *Compare, e.g.*, 15 U.S.C. § 3058(c)(3)(C) (providing for "consideration of additional evidence"), *with* 15 U.S.C. § 78s(e)(1) (providing that the SEC hearing "may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction").

By contrast, in *Carter Coal*, *Eubank*, and *Roberge*—the cases invalidating private delegations—"the actions of the private party [were] unreviewable." *Boerschig*, 872 F.3d at 709. Any deprivation caused by their actions was "final." *Boerschig*, 872 F.3d at 708 (quoting *Roberge*, 278 U.S. at 121–22). To the extent these enforcement powers implicate Article I or the Due Process Clause, they do not violate the private nondelegation doctrine.

C. The Authority is not a self-interested industry competitor.

Relying on *Amtrak III*, the Horsemen also move for summary judgment under the theory that they will be regulated by an economically self-interested competitor in violation of due process. Dkt. 38 at 7. The test they put forth asks whether "a self-interested entity" possesses "regulatory authority over its competitors." *Amtrak III*, 821 F.3d at 32–34. They assert, however, that the "legal analysis is the same whether the economic self-interest constitutes a violation of the Due Process Clause or the private nondelegation doctrine." Dkt. No. 38 at 32 (citing *Amtrak I*, 721 F.3d at 671 n.3). The Authority agrees. Dkt. No. 56 at 36. And, as discussed, the Fifth Circuit treats the private-nondelegation doctrine as a due process issue, suggesting that the claims are coterminous. *See Boerschig*, 872 F.3d at 707–09 (discussing *Carter Coal*). Having already found that HISA falls within the permissible boundaries of private-nondelegation precedent, this claim fares no better for the same reasons.

Assuming that the inquiries are different, however, the Court finds that the Authority is not a self-interested industry competitor creating a due process violation under the Horsemen's alternate theory. HISA explicitly protects against self-interest while preserving industry representation in the Authority. Five of the Authority's nine board members must be "independent members selected from outside the equine industry," meaning that

directors in the controlling coalition cannot be members or representatives of any organization of "owners, breeders, trainers, racetracks, veterinarians, State racing commissions, and jockeys." §§ 3051(8), 3052(b). While four directors must be selected from the industry, "not more than one industry member [may be selected] from any one equine constituency," such as owners or trainers. § 3052(b)(1)(B)(ii). Moreover, the conflicts-of-interest section precludes any person "who has a financial interest in, or provides goods or services to, covered horses," as well as that person's family members, from serving as a member of the "Board or as an independent member of a nominating or standing committee." § 3052(e)(1)–(4). Commercial relationships to those with financial interests in covered horses are likewise barred. § 3052(e)(3). In other words, the Board, while maintaining some industry representation, explicitly prevents any member from competing with any Horsemen or possessing financial interests in the industry.

The Horsemen's CEO alleges in his affidavit that the Horsemen "compete in the horseracing industry with those who selected the Nominating Committee for the Authority and advocated for passage of HISA. Dkt. No. 39-1 at 3. The Authority disputes this "unfounded conclusion." Dkt. No. 56 at 12. And the Horsemen later admit that it is "impossible to know who selected the nominating committee members." Dkt. No. 59 at 21. In any event, the dispute is not material. While the selection of the Nominating Committee is less than clear, it does not repeal the conflict-of-interest provisions found in the statute, nor render their protections meaningless. HISA prevents the type of "structural risk" that may present due process problems. *See N. Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 510 (2015). All seven members of the Nominating Committee must be "independent," equally subject to the conflict-of-interest provisions, which bar them from

financial, commercial, and familial relations with the industry. § 3052(e). The Horsemen's insinuation that the Jockey Club and others will puppeteer the independent members of the Nominating Committee and Board is both insufficiently supported at this point and requires an assumption of bad faith inappropriate for a facial challenge. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

The Horsemen also argue that the standing committees—which provide advice to the Board—are infected with self-interest, but their argument fails for similar reasons. Four of the seven members of both committees must be independent and subject to the conflict-of-interest provisions. §§ 3052(c)(1)–(2). Only one of the remaining three members may own a covered horse, while the other two industry members must represent other "equine constituencies." *Id.* Both standing committees, however, are subject to the Board's oversight, which, in turn, is subject to FTC oversight. *See Amtrak IV*, 896 F.3d at 545 (finding that it "raise[s] no constitutional eyebrow as long as the government agency [can] 'hold the line' against the entity's 'overreaching' to advance its own self-interests") (quoting *Amtrak III*, 821 F.3d at 34 n.4). Therefore, no single Authority member wields "coercive power" over others. *Amtrak III*, 821 F.3d at 31; *see also* § 3052(g) ("For all items where Board approval is required, the Authority shall have present a majority of *independent* members.") (emphasis added).

In addition, the Horsemen also argue that the Authority itself is self-interested because they will charge fees. Dkt. No. 54 at 30. Such is the nature of any "self-regulatory" organization, which, unlike Amtrak, has no profit-seeking motive as a nonprofit

corporation. *See* § 3052(a) (stating the Authority is a "private, independent, self-regulatory, nonprofit corporation"); *see also* 15 U.S.C. § 78*o*-3(b)(5) (providing that self-regulatory organizations, like FINRA, require "reasonable dues, fees and other charges"). In fact, Amtrak is "statutorily obligated to 'be operated and managed as a for-profit corporation.'" *Amtrak III*, 821 F.3d at 32 (quoting 49 U.S.C. § 24301(a)(2)). Like FINRA, the Authority is not. And its "formula or methodology" for determining fees is subject to FTC review and approval like all other proposed rules. § 3053(a)(11). HISA also requires that any fees the Authority collects from covered persons must be done so "equitably" among "covered persons." § 3052(f)(3)(B). Additionally, for the Horsemen to succeed on this theory, they must show that the Authority, as an entity, is one of their competitors. This they have not done.

To the extent the Horsemen are concerned about self-interest in the disciplinary process, HISA again mitigates any concerns despite stricter due process demands for "adjudicatory" functions than for "rulemaking" functions. *Amtrak III*, 821 F.3d at 27 n.3 (distinguishing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) (recognizing "rigid requirements" of impartiality for adjudicators); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (finding a due process violation when a mayor sat as judge over a criminal trial where he would receive the fines he imposed); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (similar); *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973) (finding that an Optometry Board "composed solely of optometrists in private practice for their own account" was "so biased by prejudgment and pecuniary interest that it could not constitutionally conduct [license revocation] hearings" for other optometrists)). Here, the statute requires that "impartial hearing officers or tribunals" conduct all rule violation adjudications according to

procedures—approved by the FTC—that afford adequate due process before any sanction may be imposed. § 3057(c)(1)–(3). Contrary to the Horsemen's characterization (Dkt. No. 54 at 32), these protections prevent the Authority from having "the unrestrained ability to decide whether another citizen's property rights can be restricted." *Boerschig*, 872 F.3d at 708. And, as detailed above, all disciplinary proceedings are subject to two layers of de novo FTC review. *See* § 3058(b)–(c).

Given the statutory protections, the Authority's nonprofit, self-regulatory nature, and its subordinate role to the FTC in the regulatory process, the Horsemen's alternative due-process theory fails.

5. Conclusion

The Court recognizes that HISA's regulatory model pushes the boundaries of public-private collaboration. The Court also acknowledges the dramatic change that HISA imposes nationwide on the thoroughbred horseracing industry. But that change resulted from a decision of the people through Congress. And despite its novelty, the law as constructed stays within current constitutional limitations as defined by the Supreme Court and the Fifth Circuit. Perhaps the Supreme Court or the Fifth Circuit will cabin their private-nondelegation precedent in light of HISA's reach. But this district court will not "read tea leaves to predict where [the doctrines] might end up.'" *Big Time Vapes*, 963 F.3d at 447 (quoting *Mecham*, 950 F.3d at 265). Indeed, "[d]eclaring unconstitutional an Act of Congress, duly adopted by the Legislative Branch and signed into law by the Executive, is one of the gravest powers courts exercise." *Amtrak IV*, 896 F.3d at 544. And under present articulations of the private-nondelegation doctrine, the plaintiffs' challenge must fail.

The plaintiffs abandoned their Appointments Clause claim (Claim II) and public nondelegation claim (Claim III), so they are dismissed. The Court denies the plaintiffs' motion for summary judgment (Dkt. No. 37) and grants the defendants' motions to dismiss (Dkt. Nos. 34; 36) the plaintiffs' Article I private-nondelegation claim and due-process claim. Because the plaintiffs' claims assert facial challenges based on the statute's language, amendment would be futile. The statute's language is fixed. Accordingly, the plaintiffs' claims are dismissed with prejudice.

So ordered on March 31, 2022.

JAMES WESLEY HENDRIX
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, et al.,

PLAINTIFFS,

VS. CAUSE NO. 5:21-CV-071-H

JERRY BLACK, et al.,

DEFENDANTS.

ORAL ARGUMENTS
BEFORE THE HONORABLE JAMES WESLEY HENDRIX,
UNITED STATES DISTRICT JUDGE

FEBRUARY 16, 2022
LUBBOCK, TEXAS

FEDERAL OFFICIAL COURT REPORTER: MECHELLE DANIEL, 1205 TEXAS AVENUE, LUBBOCK, TEXAS 79401, (806) 744-7667.

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P R O C E E D I N G S

THE COURT: Good morning, everyone. Welcome to the U.S. District Court for the Northern District of Texas. The Court calls for hearing Case Number 5:21-CV-071, National Horsemen's Benevolent and Protective Association, et al., vs. Jerry Black, et al.

Who is here on behalf of Plaintiffs NHBPA?

MR. BUSTOS: Fernando Bustos for Plaintiffs, Your Honor. Good morning.

THE COURT: Thank you, Mr. Bustos.

And for the FTC defendants?

MR. SVERDLOV: Good morning, Your Honor. Alexander Sverdlov for the FTC defendants.

THE COURT: Thank you, Mr. Sverdlov.

And for the Horseracing Integrity and Safety Authority and its committee members?

MR. SHAH: Good morning, Your Honor. Pratik Shah for the Authority defendants.

THE COURT: Thank you, Mr. Shah. It's good to see you.

We also have two amici here. Who is here on behalf of the American Quarter Horse Association?

MS. FLORES: Good morning, Your Honor. Autum Flores on behalf of AQHA.

THE COURT: Thank you, Ms. Flores.

And for NAARV?

MR. SACOPULOS: Good morning, Your Honor. Peter Sacopulos here on behalf of NAARV.

THE COURT: Thank you, Mr. Sacopulos. Good morning.

Okay. I know we have a few members of the press here as well. I've informed my court security officers that you are welcome to have a laptop or an electronic reader or an iPad if it's easier for you to take notes. I understand that. But no audio recording, no video recording, no sound. Understood? Not sure where members of the press-- I see one person nod, okay, two people nod. Okay. Great. We want to accommodate you to the best we can, but there are a few rules of the road.

Okay. Thank you all for being here. I appreciate your diligence in this case. I appreciate the briefing. The briefing from both sides, from all sides has been excellent. It's been very helpful to the Court, so thank you for that. I know some of you traveled a great distance to be here. Thank you for doing that.

We had one party ask for a remote argument. I wish we had technology at our fingerprints readily available and easily just by push of a button. We don't. Our IT guy is out for paternity leave, so there's a blessing behind it. So we literally would require folks to come from Dallas to make sure

that ran smoothly. I had video hearings for months starting in, I guess, March of 2020, and I learned enough to know that I need strong IT support, because there's a lot of moving parts. This is an important case. The arguments from both sides are going to be particularly important. There's a lot at stake here, and I didn't want technology to get in the way of someone's clear argument, which I've seen happen multiple times. So thank you for coming all this way.

All right. Let me see if I can clear a few procedural and evidentiary points before we get started. First, the parties originally requested oral argument and not an evidentiary hearing, and they have not since notified me otherwise. So I just want to make sure, the parties today intend to call no witnesses and intend to offer no evidence; is that right?

MR. BUSTOS: Yes. On behalf of Plaintiffs, that's correct, Your Honor.

THE COURT: All right. And from defense?

MR. SVERDLOV: That is correct, Your Honor. That's our position as well.

THE COURT: All right. Thank you.

Regarding our procedural posture, I have both defendants filing motions to dismiss all claims. I have Plaintiffs filing motions--a motion for summary judgment on two of its four claims: private nondelegation and due process. So

it's a little bit of a unique posture where I'm--you know, I plan to apply different, kind of, rules or standards of review to the dismissal motions than the summary judgment motions. I want to kind of tell you my plan and make sure I'm not missing anything, to see if anybody has any objection.

I intend to look only at the pleadings for the claims that Defendants have moved to dismiss, two of which the plaintiffs do not pursue in their motion for summary judgment, Claims 2 and 3. But for the two claims on summary judgment, I do intend to look at the attached appendices and the exhibits from both parties.

Any objection to that from the plaintiffs?

MR. BUSTOS: None from Plaintiffs.

THE COURT: From the defense?

MR. SVERDLOV: No objections, Your Honor.

THE COURT: All right. And am I right that there's been no objection to either side's attached exhibits or declarations or appendices? You don't dispute anything from the defense, do you?

MR. BUSTOS: That is correct. No disputes.

THE COURT: Does the defense dispute the viability or admissibility of the evidence from the plaintiffs?

MR. SVERDLOV: The FTC defendants do not, Your Honor.

THE COURT: And--

MR. SHAH: No, Your Honor, no objection from the Authority defendants.

THE COURT: Okay. Thank you, Mr. Shah.

All right. Time limits. Each side is going to have a total of 50 minutes. I have given two of the amici 10 minutes each, so the plaintiffs have 50 total, including 20 minutes total for the amici. Would the plaintiffs like to save any time for rebuttal?

MR. BUSTOS: Yes. Five minutes, please, Your Honor, if I could.

THE COURT: Five minutes? You got it.

MR. BUSTOS: Thank you.

THE COURT: Okay. So the Horsemen will have 25 minutes in opening argument. I'll then hear from NAARV and American Quarter Horse Association. The defense will then have 50 minutes, which you can divide however you'd like. And then in rebuttal, the plaintiffs are reserving five minutes.

Is the defense going to split argument?

MR. SVERDLOV: Yes, we are, Your Honor, though I anticipate that both of us will address the entirety of our motions and try to not overlap too much. But I think we might have slightly different emphasis that we would like to--

THE COURT: Okay. Are you dividing it equally among the two of you?

MR. SVERDLOV: That is our intention, Your Honor.

THE COURT: Okay. And would you like any kind of warnings when your time is about to expire?

MR. SVERDLOV: I would appreciate a five-minute warning for myself, Your Honor.

THE COURT: Okay. I'll give you both five-minute warnings. You'll each have 25 minutes.

Look, finally, on time limits, I've got a lot to do the rest of the week. I have nothing else set today. And if we're being productive and you have more to say or if I have inevitably asked a lot of questions and taken some of your time, I'm going to give both sides time back. There's not going to be a harsh red-light rule here, as long as we're being efficient and productive. But I do want some general time limits to give you a sense.

Okay. Argument from the plaintiffs. Who will be handling the argument?

MR. BUSTOS: I will, Your Honor.

THE COURT: All right. Okay. Mr. Bustos, before we dive in, let me ask a few isolated questions to see if I can clarify a few things. And if I can't, no problem. The first question is just about the scope of the remaining claims. And so it might be helpful to me, before you dive into the argument, for me to know that.

The defendants, again, moved to dismiss your appointments clause claim, Claim 3. There was no substantive

response to that motion to dismiss on that claim, and your summary judgment motion raises only the private nondelegation and due process. Are you still asserting your appointments clause claim?

MR. BUSTOS: No, Your Honor.

THE COURT: Okay. All right. So that claim is gone. What about your public nondelegation claim? Are you still asserting that claim?

MR. BUSTOS: No.

THE COURT: All right. And it's your position that the Authority is a private entity?

MR. BUSTOS: Yes. Based upon the facts as we understand them and representations made by the defendants, yes, private.

THE COURT: Okay. And one final question, and then I promise I'll just get out of both of y'alls way. Personal jurisdiction. You do not dispute, in the response to the motion to dismiss, that the Court lacks personal jurisdiction over any authority-nominating committee member except Jerry Black. Do the plaintiffs concede that I don't have personal jurisdiction over the remaining individual defendants?

MR. BUSTOS: That is correct.

THE COURT: Okay. All right. Thank you very much for that clarification. That's helpful for me. There's obviously a lot here, so to the extent I can focus it, it's

helpful.

All right. Go ahead, Mr. Bustos.

MR. BUSTOS: Thank you, Your Honor. May it please the Court.

So I'll be arguing, then, the standing, nondelegation--the private nondelegation, and the due process claims. Mr. Peter Sacopulos, on behalf of NAARV, will be arguing the Lasix ban and the due process issues unique to his industry. And Ms. Flores will argue application of the *Free Enterprise Fund* case.

THE COURT: Okay.

MR. BUSTOS: For over 125 years, the states have successfully regulated horseracing in this country. But the Horseracing Safety and Integrity Act, or HISA, has nationalized this regulation for the first time. HISA is unconstitutional, because Congress has delegated its lawmaking powers to a group of private, unelected citizens and has given them power to regulate this industry. Never before has either the Fifth Circuit or the Supreme Court upheld a delegation of authority to a private group that prohibits the government from modifying that private group's proposed rules. Because of this fatal flaw, HISA is unconstitutional.

Plaintiffs meet all four requirements for a permanent injunction: irreparable harm, no adequate remedy of law, the balance of hardships favors the plaintiffs, and the

public interest will be served by an injunction from this Court. And as this Court recently noted in its Head Start injunction case, irreparable harm to the movant is one of the most significant factors for the Court to take into account.

Regarding irreparable harm, there would be a substantial threat of irreparable harm if an injunction does not issue here. Again, going back to the Court's Head Start injunction opinion, to show irreparable harm, if threatened injury is not--if threatened action is not enjoined, the plaintiffs need only make a showing that they are likely to suffer irreparable harm in the absence of preliminary relief. As the Court also noted in that case, issues of standing and irreparable harm many times overlap, and so I'll discuss how those issues overlap right now and discuss them together.

This Court has jurisdiction over this case because the plaintiffs have standing to pursue their claims. This is because the Horseracing Integrity and Safety Authority, or the Authority, has already begun the process of promulgating regulations that the industry must follow.

THE COURT: Can you give me a case where a court has found standing where the agency has not actually issued the rule or the regulation?

MR. BUSTOS: Well, Judge Cummings, in his opinion in 2016 when he issued a nationwide permanent injunction against the Obama Administration's Persuader Rule under the

Department of Labor, he said that a court does not have to wait until the plaintiff gets injury in order to enjoin that type of action.

THE COURT: Okay.

MR. BUSTOS: So as the Court noted in, again, its Head Start case, an increased regulatory burden typically satisfies the injury-in-fact requirement for standing. Because HISA contains a watershed of increased regulatory burdens, this satisfies the injury-in-fact requirement to prove standing.

The very first increased regulatory burden is the ban on furosemide, or Lasix, a medicine that helps prevent bleeding in the lungs with racehorses. HISA itself contains a self-executing ban on therapeutic medicines for racehorses. And the Authority's assertion that the ban is not self-executing is belied by the actual text of the statute that says, in part, that the Authority, quote, shall establish a horseracing anti-doping and medication control program, close quote. And this program, quote, shall prohibit the administration of any prohibited or otherwise permitted substances to covered horses within 48 hours of its next racing start.

THE COURT: Let me follow up on that. Given that HISA itself, you mentioned--HISA itself bans certain things, bars certain things--

MR. BUSTOS: Right.

THE COURT: Given that, how is the injury that results from that fairly traceable to the delegation of authority to the Authority and not the statute itself? I mean, you're raising a nondelegation claim here, but the statute itself does some things. Does that undermine your fairly traceable argument?

MR. BUSTOS: No, because the Authority is in charge of enforcing that and determining, well, is there a violation of the regulation or not. Is there a violation of the statute or not. And so it's still an unconstitutional enforcement regime, and so our arguments still proceed because of that fact.

THE COURT: Okay.

MR. BUSTOS: It's not just because of the statute itself. It's how the statute sets up this unconstitutional enforcement agency where private actors are replacing government.

Earlier in the briefing, the defendants claim lack of justiciability because the Authority and the FTC hadn't yet proposed regulation. But we have now seen that those events have happened. On December 6th, 2021, the Authority submitted its proposed regulation for the Racetrack Safety Program. The next month, January 5th, 2022, the FTC published its HISA racetrack safety proposed rule in the Federal Register. And on December 7th, 2021, the Authority announced its proposed

implementation of the Anti-Doping and Medication Control Program.

So between the automatic ban on Lasix and these other regulations that are going to roll out and take effect very soon, Plaintiffs have proven the increased regulatory burden which satisfies the injury-in-fact requirement for standing, and they have shown they are likely to suffer irreparable harm in the absence of preliminary relief to enjoin that action.

THE COURT: Okay. So you agree that you haven't suffered an actual injury yet, but the boulder is rolling down the hill; we know it's coming and it's inevitable; and under those circumstances, you don't have to wait for an actual injury when it's inevitable, and, therefore, you have standing?

MR. BUSTOS: That's correct. As the Fifth Circuit held in *Contender Farms*, the mere potential of a horse being inspected under a new regime confers standing.

THE COURT: Okay.

MR. BUSTOS: Turning now to the next factor for injunctive relief, no adequate remedy of law, the Fifth Circuit has held that in the injunction context, quote, oftentimes the concepts of irreparable injury and no adequate remedy at law are indistinguishable.

In this case, nothing but an injunction can adequately stop this unconstitutional statute. That is because

HISA violates the nondelegation doctrine of the Constitution and the due process clause of the Fifth Amendment.

Regarding the private nondelegation doctrine, Article I, Section 1 of the Constitution delegates all of government's legislative powers exclusively to Congress. Because of this exclusive delegation of legislative authority, as Chief Judge Marshall stated in *Wayman vs. Southard*, quote, Congress may not delegate powers that are strictly and exclusively legislative, close quote.

In the *Carter Coal* case, large coal producers representing more than two-thirds of production and minority of the miners, were given the legislative authority to set wage and hour regulations for small producers. The Supreme Court found this, quote, to be legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business, close quote.

THE COURT: And Congress fixed that problem--

MR. BUSTOS: Yes.

THE COURT: --in the statute, and then we get *Adkins*.

MR. BUSTOS: Right.

THE COURT: How do you distinguish *Adkins*?

MR. BUSTOS: Because in *Adkins*, the government had

the power to modify what the private people were doing. The power to modify is the power to legislate, and that is the sine qua non here. So that is how *Adkins* is distinguishable. And so if we-- The FTC does not have the power to modify what the Authority is doing here, and so the FTC is just acting as an all-or-nothing rubber stamp, and that's impermissible under the Constitution.

Carter Coal's precedent is controlling. Even though that statute got amended, that proposition has not been reversed by the Supreme Court. HISA empowers a private entity hand-picked by a tiny minority within the horseracing industry to regulate the fees, medications, and racetrack services of its competitors. HISA is even more antidemocratic that the statute enjoining *Carter Coal*, because HISA gives a minority of the industry the authority to regulate the majority of the industry. This Court should therefore rely on *Carter Coal* to enjoin HISA because Congress unconstitutionally delegated its legislative authority to a private entity.

THE COURT: What do you do with *Rettig*?

MR. BUSTOS: I'm sorry?

THE COURT: What do you do with *Rettig?*

MR. BUSTOS: *Rettig*? You know, *Rettig*--it's distinguishable.

THE COURT: Yeah, and let me just put a finer point on it.

MR. BUSTOS: Okay.

THE COURT: *Rettig* makes clear that agencies--and correct me if I'm wrong, but *Rettig* makes clear that agencies may subdelegate to private entities as long as those private entities function subordinately to the agency and the agency has authority and surveillance over its activities.

Why doesn't the Authority here function subordinately to the FTC? The statute says the FTC can approve or disapprove or request modifications. Why is that not a subordinate function?

MR. BUSTOS: Well, because here, it's the tail wagging the dog. The FTC does not have the power to promulgate rules. Only the--

THE COURT: Well, that's not exactly right. They can promulgate interim final rules under emergency circumstances. So they can promulgate rules, albeit in more limited circumstances than normal. But I just want to be clear. Right? I mean, they have the power to issue IFRs.

MR. BUSTOS: They do. But as this Court mentioned in its Head Start vaccine case, typically the government's burden to show good cause to issue those types of emergency rules is a very heavy one and only met on, quote, rare occasions.

THE COURT: Yeah, I hear you. I mean, look, it would be under an emergency good cause.

MR. BUSTOS: Right.

THE COURT: But I just don't want to overstate anything. I just want to be-- They have some power, but more limited than normal. But your point was, this is the tail wagging the dog. Go ahead.

MR. BUSTOS: Well, because the FTC normally does not have the power to create those rules, to draft a first draft of the rules. They're not acting as a regulator. They're just acting as a rubber stamp. If they had the power to modify those rules, as the Supreme Court and other courts have found is permissible in other cases, that would be one thing. In *Rettig*, the Court found that there was a lot of back and forth between the agency involvement and the actuaries, so that real regulation was happening.

THE COURT: They did? My reading of *Rettig* was, the agency there subdelegated to a private authority the ability to set--and I'm probably going to get the verbiage wrong, but an actuarial rate, you know, a plug into the longer equation that they needed from this group of experts. The agency there, as I read *Rettig* and the dissent from--not taking it en banc from Judge Ho, is that the agency, in fact, could not disapprove the recommendation from that private entity. They had to approve it and certify it, period. There was less back and forth and less authority, from what it looks to me, than what we have here. The only thing the agency could do in

Rettig was just blow up the whole rule, just repeal the entire rule and say, nevermind, we're not going to approve and certify, and our only recourse is just to throw the whole rule out.

If an agency can subdelegate to a private entity without explicit authorization from Congress and only have the ability to either approve or blow the rule up, if that is not unconstitutional, according to the Fifth Circuit--and reasonable minds obviously differed there. But if that's what the Fifth Circuit is telling me, how in the world could it not be constitutional for an agency to work with a private entity at the explicit delegation of--or the explicit instruction of Congress, unlike *Rettig*, and that agency has the ability to approve or disapprove? *Rettig* seems like a hurdle for you. If I'm misreading it, please let me know. But that's my concern.

MR. BUSTOS: Let me give you some more findings that the panel found in *Rettig*.

THE COURT: Okay.

MR. BUSTOS: The Court found that there was, quote, sufficient reliance--or sufficient surveillance--

THE COURT: Okay.

MR. BUSTOS: --sufficient surveillance of the agency over this private actuary group.

There's no surveillance-type of relationship at all with HISA and the Authority. So that's a distinguishing

feature there.

THE COURT: Why isn't the FTC's ability to say no, go away, is--why is that not surveillance? Because you think it's a rubber stamp? You think they won't do that?

MR. BUSTOS: Let me give you a couple of reasons why.

THE COURT: All right.

MR. BUSTOS: First, the Authority, this private entity, will have the power to assess civil penalties, not the agency. The Authority will. Including a lifetime ban on racing. That doesn't sound like close surveillance. It also has subpoena and investigatory power. Under that provision of the statute--

THE COURT: But don't all those things also go to the FTC? I mean, I'm asking--we're talking about surveillance. Obviously the Authority has immense power. I mean, that's clear, and I don't think that's disputed.

MR. BUSTOS: Right.

THE COURT: But even fines and regulations, it all goes to the FTC.

MR. BUSTOS: But not the subpoena investigatory power.

THE COURT: Okay.

MR. BUSTOS: Under the terms of the statute, they can exercise that without FTC oversight. That is just

practically unheard of for the--

THE COURT: Now, those aren't legislative powers, are they? I understand, again, the Authority has power, but is the ability or the power of the Authority to issue a subpoena legislative? And if it's not, I don't think that's what we're talking about, based on the argument you're making today. We're talking about legislative delegation.

MR. BUSTOS: Right. And they've got the--they also have the power to tax. So Congress has the power to tax. That's a legislative power. And here, with HISA, effectively, the Authority has the power to tax. So the arrangement of HISA is even worse than those allowed by other cases. Rather than allowing indirect extraction of profit from another, HISA allows the direct extraction of fees by one private entity from another. In essence, a private entity is given the power of taxation.

So the Authority has also been delegated power to file civil lawsuits to enforce its rules, even though lawsuits to enforce laws of the United States on behalf of the government are only to be filed by officers of the United States, as the Supreme Court held in *Buckley vs. Valeo*.

THE COURT: Now, again, I mean, I think that's a--I think that's a strong argument, but I'm not sure it's one about Article I legislative power. How is that legislative?

MR. BUSTOS: It's not. It's enforcement power.

And it still shows the harm that's going to happen there, and, you know--so that's harmful and violates Article I.

THE COURT: How does it violate Article I?

MR. BUSTOS: It violates Article I--

THE COURT: It might violate something else. Don't get me wrong.

MR. BUSTOS: Right.

THE COURT: *Buckley vs.*--I mean, I'm going to ask them about *Buckley*. But I'm just not sure that it's tied to the two claims that are before me on summary judgment. Maybe--you know, maybe Texas raised claims if they decide to stay in. We'll see. But, you know, filing a lawsuit doesn't appear to me to be legislative.

MR. BUSTOS: Well, it goes more towards the irreparable harm analysis--

THE COURT: Okay. Okay.

MR. BUSTOS: What type of harm is going to flow to the plaintiffs because of this activity.

THE COURT: All right. I understand.

MR. BUSTOS: So HISA violates the private nondelegation doctrine because only the Authority, and not the FTC, can draft normal regulations under the statute. And the Authority, therefore, has the power to set the regulatory agenda.

As the Fifth Circuit held in *Sierra Club vs.*

Sigler, when a private entity drafts a document for government regulation, the situation is, quote, particularly troubling, close quote, because an agency cannot delegate its public duties to private entities.

The Fifth Circuit also noted in the *Sierra Club vs. Lynn* case that, quote, a responsible federal agency may not abdicate its statutory duties by reflexively rubber stamping a statement prepared by others.

The same problem with rubber stamping occurs here with HISA. HISA supposedly gives putative oversight to the FTC. But it's an agency with no experience, admittedly, in regulating horseracing. In addition, HISA only gives the FTC 60 days to either approve or reject rules, and so HISA is therefore an unconstitutional delegation of lawmaking power to private actors.

When the law gives a private entity unfettered discretion to make its decision with no ability for the government to modify, the Fifth Circuit has found a violation of the nondelegation doctrine. I cite the Court to the *City of Dallas vs. FCC* case. There, the FCC issued a rule giving private video service operators the power to decide to carry a given cable operator's video programming. By issuing that rule, the FCC gave blanket approval to decisions of private operators. And they are permitted to choose whether they wanted to give cable operators access rights. The fatal flaw

of this regime, like this one, was that the FCC failed to retain the ability to modify these, quote, selective, close quote, decisions.

THE COURT: Those decisions in the *City of Dallas* were completely unreviewable, were they not? So it's not exactly the case that you have. I understand you're citing it in support. But the agency there couldn't disapprove what those private entities did at all. Correct?

MR. BUSTOS: Right.

THE COURT: So it's a more extreme example.

MR. BUSTOS: It is. It's the same general proposition. If the agency doesn't exercise meaningful oversight to be able to modify what the private actors are going to be doing, then there's no real regulation going on here. It's a farce, and it's also unconstitutional.

THE COURT: So-- Okay. Go ahead.

MR. BUSTOS: So under HISA, FTC may only approve or disapprove rules that the Authority has already drafted. Because the Authority can write the rules, it can effectively stop or veto the FTC by acting by never presenting the commission with a rule on a particular subject. When a statute like HISA gives a private entity both the ability to write the rules and an effective veto over government regulations, that statute violates the private nondelegation doctrine.

The power to modify is the hallmark of legislating.

Thus, when the Supreme Court struck down the line item veto in *Clinton vs. City of New York*, it held that the power to modify the legislation via a line item veto was an impermissible use of Article I power. In other words, if all Government is doing is vetoing, like a president, or the FTC here, then they're not legislating. And if they aren't, who is, under HISA? It's private, unelected citizens, and that violates the nondelegation doctrine.

THE COURT: This regime was based on SEC FINRA, was it not?

MR. BUSTOS: Well, not really, because with SEC--

THE COURT: Well, according to Senator McConnell, it was, in his amicus brief. But--and again, you might disagree with that.

MR. BUSTOS: I do.

THE COURT: SEC FINRA has repeatedly been upheld as constitutional. I don't think the Fifth Circuit has addressed that. You can correct me if I'm wrong. But what's different about this?

MR. BUSTOS: Yes. There's two big differences in all the SEC FINRA cases. One is that the SEC has lots of experience regulating this industry. They have written the rules forever, and they regulated it for decades. And, two, and more importantly, the SEC has the power to modify regulations. Again, that is the sine qua non. The power to

modify is the power to legislate. And that's why all those cases are distinguishable.

THE COURT: Okay. Let me give you a scenario. Let's say Congress writes a law that says, we're going to ban--Congress is going to ban all fill-in-the-blank--all Hummers from interstate highways. We don't like them; they emit too much bad stuff; we don't like them.

Obviously, no delegation issue there. Congress itself is doing it. Right?

MR. BUSTOS: Right. They made a law.

THE COURT: Let's say-- Okay. So let's say Congress says, EPA, you must develop a rule that bans all Hummers from interstate highways.

Any delegation problem there?

MR. BUSTOS: No, because there's an intelligible principle.

THE COURT: We have an intelligible principle. Right?

MR. BUSTOS: Right.

THE COURT: So what if we take it one step further and Congress says, Ford Motor Company or, you know, the private authority against all Hummers on interstate highways, this private body, you are to create a rule that bans all Hummers from interstate highways. Do we have a constitutional violation?

MR. BUSTOS: You know--

THE COURT: We have an intelligible principle. It's a very precise rule.

MR. BUSTOS: The intelligible principle standard does not apply to private nondelegation cases as a matter of law.

THE COURT: Well, but if there were no intelligible principle, we would never get to the rest of it. It would fall through. So, I mean, I think--based on my second hypothetical, I think we have an agreement anyway that there is--so I'm trying to set up a hypothetical where it's clear as day.

MR. BUSTOS: Right.

THE COURT: We know the goal we're trying to hit. It's a very precise goal, and--but, I mean, does adding the private body--does it change your answer? Would that be unconstitutional?

MR. BUSTOS: If there's a clear direct demand from Congress saying this is the way the law is going to be, I would say there's not.

THE COURT: Okay. Explain how this system is different than-- Well, explain how that hypothetical that I just gave you is different than, at the very least, for example, the baseline anti-doping and medication control rules. Congress explicitly describes those in Section 3055(g)(2)(A), and it requires the Authority to propose to the FTC rules that

capture something Congress has already said. So, at the very least, is that piece not violative of the Constitution?

MR. BUSTOS: Except that the way to describe how to make that rulemaking process is pretty tautological. It just says, well, go ahead and issue rules that are consistent with the statute and-- It's not a very intelligible principle in my mind. It's not a lot of specificity. It's not specific like your Hummer example, that's for sure.

THE COURT: It's not that clear obviously.

MR. BUSTOS: Right.

THE COURT: There are portions of the statute that speak in great detail, in greater detail than a good number of other statutes empowering agencies where it's just in the public's interest to do X, Y, or Z. I mean, it can promulgate rules in--I mean, there's broader delegations that have come before courts that have been upheld.

And here, in some portions, we have some specificity, and what I'm struggling with is, under those circumstances, even if we add this extra layer of a private body to the agency, if Congress tells them exactly what to do, you know, what can I do about that?

MR. BUSTOS: You know, it's just hard when you start having private citizens running amuck and acting like government.

THE COURT: Well, but if they did something outside

of the scope, if Ford Motor Company said, "We're going to ban all Chevrolet vehicles," and that went up to the agency, the agency says, that's ultra vires. You're acting outside the scope of what Congress allowed you to do. You're not empowered to do that.

And if the agency-- So, I mean, there are guardrails, I guess, to prohibit truly running amuck, are there not?

MR. BUSTOS: Well, here, the Authority gets to write their own rules, and so they get to decide, at the first instance, whether they are acting permissibly within their delegated power. So that's unprecedented.

THE COURT: Yes. Okay.

MR. BUSTOS: Because you don't have, again, the government agency with officials who are responsible to an electorate exercising meaningful oversight.

In another applicable agency subdelegation case, the DC district court found a violation of the private nondelegation doctrine when an agency failed to maintain the ability to modify a private entity's decision. In *National Park and Conservation Association vs. Stanton*, the National Park Service delegated management of a river to a local private council and retained no control over the council decisions.

THE COURT: Okay.

MR. BUSTOS: The management plan could only be

modified by mutual written agreement, only if the private parties agreed to go along with the feds. Therefore, like the FTC with HISA, the National Park Service was unable to modify the regulation on its own. And for that reason, among others, the Court enjoined the National Park Service plan.

The defendants, again, rely heavily upon *Sunshine Coal vs. Adkins*. And again, I'll go back to this point. The power to modify is the power to legislate, and that's why this statute is unconstitutionally infirm.

THE COURT: So I understand the argument. I don't-- Tell me, where do you see that principle, the power to modify being the linchpin of these cases in something like *Rettig*? Is that there--

MR. BUSTOS: Well--

THE COURT: --in the majority opinion?

MR. BUSTOS: And I have to just go--

THE COURT: Because there's not a power to modify in that case, but yet, that was affirmed by the Fifth Circuit.

MR. BUSTOS: Well, I'll just go back to the words of the Fifth Circuit in their findings. They said that--the Court found that there was, quote, sufficient surveillance. I don't know that there's any real surveillance relationship here at all--

THE COURT: Okay. So maybe it's either there must be the power to modify, and if there's not, at the very least,

there must be sufficient surveillance.

MR. BUSTOS: And--

THE COURT: I'm trying to square a lot of cases that can sometimes be difficult to square. But the majority in *Rettig*, without the power to modify, says, this is fine. Now, almost half the Fifth Circuit disagreed with that, but, you know, the majority rules.

MR. BUSTOS: Right. And the Court also found that there was a close superintending relationship between HHS and these actuaries. And that is just not envisioned here in this regime where it's just an all-or-nothing rubber stamp, and there's no back and forth between the actuaries and the agencies.

Plus, relying on actuarial rates is nothing like the substantive lawmaking that will be happening here with HISA when the Authority is going to be regulating an entire industry. That is magnitudes greater in terms of the private entity's power to set the agenda as opposed to some actuaries making some actuarial rates. So I find it's distinguishable for that reason as well. It's a different swimming pool altogether.

THE COURT: Okay. I have definitely taken a lot of your time. Your 25 minutes is up, but I'd be glad to give you five extra minutes to the extent there were other things you wanted to get to.

MR. BUSTOS: Thank you, Judge. Just very briefly.

HISA violates the due process clause as well. When Congress gives economically self-interested actors the power to regulate their competitors, it violates the Fifth Amendment's due process clause. And the legal analysis is the same where the economic self-interest is a violation of the due process clause or the private nondelegation doctrine. As the DC Circuit note in its *Amtrak 2* case in 2016, quote, neither court nor scholar has suggested a change in the label would effect a change in the inquiry.

I would also go ahead and cite the Court to, again, Judge Cummings' injunction that he had, a nationwide injunction in 2016 against the Department of Labor rule to support the Element Number 3 for injunction that the threatened injury outweighed any harm that would result if the injunction were granted. He said that if the threatened injury is a loss of a constitutional right, then that injury is substantial as a matter of law. And on the other side of the coin, there is no harm in delaying implementation when the law is invalid.

And then an injunction would serve the public interest here, Your Honor. As the Fifth Circuit held in *Jackson Women's Health Organization vs. Currier*, quote, it is always in the public interest to prevent the violation of a party's constitutional rights.

THE COURT: Let me take you back to *Amtrak* and your

due process argument. The Authority is not an industry competitor, is it? The Authority itself. I mean, Amtrak is a competitor, private entity competing in the marketplace. The Authority is not a competitor. I understand the board rules require a minority of the board members be from the industry, but the Authority itself is not a competitor in the market, is it?

MR. BUSTOS: That's correct. But there is a distinguishing point there where you have private industry members, though, who are on the Authority and they are making rules and they had a private benefit that can inure to them. That's different from the *Amtrak* line of cases.

THE COURT: Okay. So the idea is, all right, it's not a competitor, but a minority of board members will have influence, although not majority influence, but they will have multiple seats at the table in promulgating rules, or recommending rules, I guess I should say.

MR. BUSTOS: That's right. And human nature dictates that those nonindustry members are going to give deference and listen carefully to people who are in the industry.

THE COURT: And give me a concrete example of what could happen. I mean, let's just say you're absolutely right. Those people--self-interest takes over, the devils on our shoulders take over. Give me the worst-case scenario for you.

MR. BUSTOS: Well, you know, members from the Jockey Club who are on the Authority, you know, they operate in a very expensive echelon and they want to go ahead and put out all the NASCAR tracks, so to speak. It's kind of like Formula 1 racing now getting to regulate NASCAR. And they can regulate NASCAR out of existence and say, we're going to introduce some fees and some penalties and regulatory regime, inspection regime that's going to price the NASCAR people out of the market, because we don't like the NASCAR people. They're deplorables. They're undesirable.

And so that's an example of--it's a worst-case scenario, but that's a potential example here.

THE COURT: Okay. Imposing fees that are cost-prohibitive to certain members of the current market within the horseracing industry.

MR. BUSTOS: They could price them out of the market, yes.

THE COURT: Okay.

MR. BUSTOS: For these reasons, Your Honor, we request that the Court grant our motion for summary judgment, deny the motion to dismiss, and enter an injunction.

THE COURT: Okay. Thank you, Mr. Bustos.

MR. BUSTOS: Thank you.

THE COURT: Okay. I'd be glad to hear from either the American Quarter Horse Association or NAARV. I don't know

if-- If one of you were planning to go first because it made more sense, it's fine with me.

All right. And it was Ms. Flores, correct, from the American Quarter Horse Association?

MS. FLORES: That's correct, Your Honor.

THE COURT: All right. Whenever you're ready.

MS. FLORES: Good morning, Your Honor.

THE COURT: Good morning.

MS. FLORES: So first of all, I would like to thank you for giving American Quarter Horse Association the opportunity to address you today.

I want to note that AQHA has a special and unique interest in this case. The definition of covered horses doesn't explicitly include, right now, the breed of American quarter horse. However, the statute of HISA gives state racing commissions the ability to include American quarter horses in the scope of that language.

And so one of the stated benefits of HISA is that it creates uniformity nationwide for the regulation of horseracing. That benefit doesn't apply to quarter horses, because we can still have that patchwork effect state by state, depending on whether or not HISA is applied to quarter horses in each state.

So AQHA's interest is unique, but it's also very closely aligned with the thoroughbred, because, while we fully

support the underlying motivation of HISA and the welfare of racing horses, AQHA also fully supports constitutional rights of its members, and--

THE COURT: And explain to me again how it would happen, how this patchwork would happen. HISA gives the state horseracing commissions the ability to expand the scope of definition of a covered horse. So the Texas Horseracing Commission, if it wanted to, could say, well, we've got all these fees being imposed on us; let's spread these out a little bit; let's divide by a larger number; we're going to include quarter horses; you're included. That happens in Idaho; that happens in Kentucky; that happens in New Mexico, whatever. But it's the state racing commissions that make that decision?

MS. FLORES: Yes, sir, that's my understanding.

THE COURT: Okay.

MS. FLORES: And so we've already got a patchwork state by state, and HISA doesn't fix that for the American quarter horse breed. I'm not saying it makes it worse; it just doesn't fix it. So that benefit is not there for AQHA.

THE COURT: And you said you support the underlying policies and the goals of HISA, but obviously you're going to assert your constitutional rights. That's fine. I've heard from some of the plaintiffs--and if you're unaware of the answer to this question, that's fine; I'll ask Mr. Bustos on rebuttal--that some groups on this side want national

uniformity and one governing body, but they don't want it to be regulated by the FTC or supervised by the FTC. They want the Department of Agriculture.

Is that AQHA's position, or do you--I mean, I don't mean to put you on the spot, so if the answer is, "I can't answer that right now," that's fine. But I found that interesting that there's no dispute about--well, for some, someone--a private entity in Washington, D.C., supervised by an agency taking control of what would otherwise be fifty states making fifty decisions. Is that AQHA's position?

MS. FLORES: I can't answer the question as to whether or not it would be the FTC or Department of Agriculture that's regulating and overseeing whatever entity ends up promulgating these rules. I think I can answer that AQHA would prefer to have whatever entity that turns out to be one that is not governed by self-interested--economically self-interested competitors in the industry and one that has the protections of the Constitution, so the appointments and removals and executive branch powers and all of that. But as to which department is overseeing it, I don't know the answer to that for AQHA's preference.

THE COURT: Okay. So you don't necessarily object to the idea of one body governing the industry nationwide, as long--but the devil is in the details. As long as that body doesn't have self-interested competitors and obviously complies

with the Constitution?

MS. FLORES: I agree, I think the devil is in the details. And it's part of those details-- You had asked a moment ago of Mr. Bustos about FINRA and what makes FINRA different, and I'd like to use the short time that I have with you today to address that question, because I think it's a very important question. And it goes back to *Rettig*, as well, which you also asked about.

FINRA is very different from the Authority. The Authority, as much as I know that Plaintiffs and Defendants on both sides have come to this conclusion that it is a private entity-- And I won't argue with that. I know that Plaintiffs are not pursuing the appointments clause, though I note it is in the motion to intervene. I have questions about that myself. I don't know if it's necessarily a private entity. But it is so different from FINRA that even if it is a private entity, it is very distinguishable.

And so Mr. Bustos had said that the SEC has a different type of oversight over FINRA. The SEC has more experience. Those are very valid reasons to distinguish FINRA. But another valid reason to distinguish it is because it's a true private entity. It is a membership organization. It has hundreds of thousands of members. The members of FINRA go online or in paper; they fill out a membership application; they voluntarily agree to pay membership fees and assessments;

they agree to be governed by FINRA and by the SEC and agree to comply with those rules.

HISA does no such thing when it established the Authority. And we'll get on the establishment issue in a minute. But the Authority is not a membership organization. There are no members. There are no membership fees. The only funds for the Authority come from the language of HISA. FINRA's funds come from its bylaws. So it is not a private membership, voluntary organization. The Authority is a congressionally-established organization that imposes regulations on members of the public that haven't asked to be regulated. So it's very, very different than FINRA.

The establishment of the Authority, I agree, is a little bit different from anything that we have seen before. The language of HISA says that it is a nonprofit, independent agency. That's the same as the Public Company Accounting Oversight Board that's the subject of the *Free Enterprise* cases. Those are a little bit different. That board is a little bit different because the language of the enacting--the Sarbanes-Oxley Act did say it was establishing the PCAOB. Here, HISA doesn't say it's establishing. It says it's recognizing.

But I want to point you back to an earlier version of HISA that did establish it. And so it's not a coincidence that the Authority was established between those two versions

of HISA. It's also not a coincidence that the company--that the entity was formed on September 8th and put on the Senate and House floors on September 9th.

THE COURT: Yeah, I don't think there could be any good-faith argument that this was some preexisting nonprofit dedicated to the safety of horses and racetracks that they're going to leverage this preexisting--I mean, the timing just doesn't--I don't think that--I don't think I'm going to hear that argument. Maybe I will. But point taken there.

MS. FLORES: Okay. And I bring it up because you may not hear it in our oral arguments, but it was mentioned at least a dozen times in the briefing from Defendants that it is preexisting and completely independent, and I would argue that it is not, actually--

THE COURT: Yeah, I mean, it is preexisting by a hair.

MS. FLORES: By a hair.

THE COURT: And the Court has read the briefs. But I don't think there's going to be an argument that it's somehow some long-established private entity that's going to be leveraged.

MS. FLORES: Right. And so I would say FINRA is very different. The Public Accounting Oversight Board--Public Company Accounting Oversight Board, very similar. Because of that establishment issue--I know there's a slight distinction

in the language of the statute, changing it from "established" to "recognized." But that one word shouldn't make all the difference in what this actually is.

But the PCAOB was found to be constitutional in part because its board was nominated by a government department. This board is not. And maybe that's what they use to say it's a private entity and that it's self-regulating and does its own thing. But to me, that doesn't redeem the Authority.

THE COURT: Isn't that a--I mean, isn't that an appointments clause problem?

MS. FLORES: It is.

THE COURT: I mean, that's--if this were public and--a public entity without appointments from the President, then we have a problem. But the plaintiffs aren't making that argument.

MS. FLORES: Right.

THE COURT: So I don't--I'm sure that's--I don't think that's before me. I don't think I can address that, at least yet.

MS. FLORES: And I'm using it as an analogy, because I think it's important for understanding the distinction between FINRA and the similarities because the PCAOB--why the PCAOB is constitution--is not--was not constitutional, according to the Supreme Court, because of the

removal issue, but why FINRA is constitutional.

And the Authority fits somewhere in between. It is a new creation. And I will point you to part of our brief, which is the language from Justice Kavanaugh in his dissent, which says: The lack of precedent for the PCAOB counsels great restraint by the judiciary before approving this additional incursion on the President's Article II powers. And further notes: Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.

But I also want to point you to Justice Kavanaugh's additional language where he--he predicted what happened here. He said: Upholding the PCAOB here would green-light Congress to create a host of similar entities. He goes on to say: Congress would have license to create a series of independent bipartisan boards appointed by independent agencies--which is what happened here; this board is appointed by a supposed independent nonprofit agency--and removable only for cause by such independent agencies.

THE COURT: Is that also language from a dissent?

MS. FLORES: Yes.

THE COURT: I mean, you know, I--help me. Find something in a majority with that. I mean, you know, I'm a district court. I know you know that. As much as I'd like to have a magic wand to make the world the way I'd like it to be,

I'm subject to precedent. So I understand that language. I understand those points. Those points are in dissents.

MS. FLORES: And that's true, but he is talking about--again, he's predicting where this goes. It's a slippery slope.

THE COURT: Okay.

MS. FLORES: And the Supreme Court, in its majority review of this case, did find that the removal powers--that for-cause provision and the dual layer of removal powers was unconstitutional. And so although it is in a dissenting opinion, it's the language that I'm drawing you to, because he goes into so much elaboration about why this is a slippery slope and why this will lead to further unconstitutional entities. The Supreme Court did look at that language and did find that these removal issues were unconstitutional.

THE COURT: Now, maybe I misheard you, but the Authority's board here is not appointed by the FTC.

MS. FLORES: That's--well, yeah, that's correct, which is the problem. That's what I'm saying. That doesn't redeem it. That doesn't make it a private entity and that's its redeeming feature. That is the feature that is severely problematic. Because of the structure of the Authority, the fact that the Authority appoints its own board members, there are no members--unlike FINRA, where there are hundreds of thousands of members who go to membership meetings and have

weigh-in and buy-in on who the board members are, the Authority has nine board members, four of whom are industry members, that appoint themselves and that regulate an entire industry, who haven't signed up for this, unlike FINRA, and that get that authority and they get that power from Congress. This is a very different type of entity and a very dangerous type of entity.

THE COURT: Okay. I understand. I definitely interrupted you multiple times. Your ten minutes is up, but you can have an extra minute if there was something else you wanted to say.

MS. FLORES: I just wanted to note very quickly that the--the composition of the board of directors and the standing committees in particular. I know there are conflict-of-interest provisions built into HISA. Those are not effective, especially because they don't apply to the standing committees. There is no conflict-of-interest provision, to my understanding, that affects the standing committees, which are the ones who originally promulgate the rules that are then reviewed and approved by the board. So AQHA also has a very serious concern about the impact of economically self-interested members of these committees and the board being able to regulate an entire industry that haven't signed up for that.

THE COURT: Okay. Thank you, Ms. Flores.

MS. FLORES: Thank you.

THE COURT: Mr. Sacopulos?

MR. SACOPULOS: Yes, sir.

I too want to thank the Court for the opportunity to address today. As I stated, I'm here on behalf of the North American Association of Racetrack Veterinarians. It is a specialized organization that nationally represents veterinarians who specialize in the treatment of racehorses.

The organization was started in 2015. It has representatives or members in every racing jurisdiction and treats and cares for horses at over 75 different tracks across the United States.

The veterinarians are very concerned about their due process rights relative to HISA, and they are because they are specifically included in this legislation as a covered person. Section 15 U.S.C. 3051 identifies a veterinarian who cares for a covered horse as somebody who falls under the jurisdiction of this federal legislation. So they are quite concerned about this.

They are also quite concerned because these veterinarians, unlike a veterinarian that may care for your dog or your cat, are required to have two licenses. They have the general veterinarian license that is provided by the state veterinarian licensing agency, and that gives them the right to practice general veterinarian medicine, spay the dog or neuter

the cat. And then they also have to have a special license, one that allows them to go on the back side of the track and treat racehorses.

This is important from a due process standpoint, Your Honor, because our U.S. Supreme Court, in *Barry vs. Barchi,* has found that a license--an occupational license is something that is afforded the right of due process review. So that if you're going to try to take or limit one's occupational license, it must be done with them having due process rights.

THE COURT: Doesn't the statute build in review and process?

MR. SACOPULOS: It does, Your Honor, and I think that perhaps it is at that level where the disciplinary process in the statute is addressed, that it becomes very clear that the due process rights of the members of our organization have serious concern and are not being afforded the due process they do under the current existing system.

The way that it currently works in most jurisdictions--and there are multiple different jurisdictions that have racing. And specifically in the matter before the Court today, we're talking about thoroughbred racing. So there are variations in these different systems from state to state, but in a general rule, the way it currently works is, it's a combination of an administrative process and a judicial process.

It begins with the stewards who are the referees or the people who are at the track making the call. Begins with the stewards hearing if there's a violation. In the case of a veterinarian, if there's an allegation that something has gone wrong, the stewards meet and make a decision whether or not they want to pursue an action against them.

At that point, the veterinarian or the licensed person has an opportunity to be heard on review if they timely request that. And that typically is done by way of a state-appointed administrative law judge. The administrative law judge would then hold a hearing, a merits hearing, at which point there would be testimony offered, evidence presented. And at the conclusion of that merit hearing, the administrative law judge would issue findings of fact, conclusions of law, and make a recommendation as to a penalty.

The veterinarian, if still dissatisfied or feels that the case--the agency has not made its case, has an opportunity to be heard by the state commission, and they can--

THE COURT: The state commission?

MR. SACOPULOS: Yes, the state racing commission.

THE COURT: Okay.

MR. SACOPULOS: So it would be the Texas Horseracing Commission, or the state regulators, if you will. And they--and in most jurisdictions, the state regulators, or the state racing commission, has the opportunity to accept the

recommendations of the administrative law judge or not accept the recommendations. They can modify the recommendations, or they can also remand it back to the administrative law judge for a further proceeding.

At that point, the administrative process in most states is complete with the racing commission's final decision. And all of that is governed largely by the Administrative Procedure Act. At that point, if the licensee is dissatisfied, he or she has the opportunity to file a petition for judicial review and move to a state trial court to have the matter reviewed by a trial court.

This is far different than what we see under HISA. And I will tell you that the--one of the main differences is, there is no guarantee for review by the overseeing agency. There is no guarantee that the FTC will review this.

So if I can, by way of contrast--

THE COURT: Isn't that just assuming the FTC will be derelict in its duties?

MR. SACOPULOS: Well, the FTC is not required to accept--it's called a request for review under HISA. They can either accept the review or they can not accept the review.

But the point here is, is that once this veterinarian who has had a hearing before an administrative law judge-- And I want to point out that the administrative law judge, under HISA, would be an FTC-appointed administrative law

judge.

And just as a side note, I think it's important for Your Honor to understand, if the FTC were to appoint this administrative law judge, they're going to appoint that law judge and they're going to pay that law judge. They're going to reappoint that law judge. The licensee, the covered person here, this veterinarian, has no input on what ALJ they get.

They also have--although the Administrative Procedures Act allows for ADR or for some other form of resolution, there is nothing provided for there. So this person is on this track to have a hearing before this administrative law judge after the initial hearing by the Medication and Anti-Doping Control Agency. Then they have this before the administrative law judge. And if the FTC decides it is not going to hear the request for review, that's final. And now, unlike the veterinarian before the state court who goes to the trial court which is 10 miles down the road, they are going not to a state court; they are going to the Federal Court of Appeals.

And so you have created a financial barrier for many people, I mean, whether they be-- Covered persons are obviously not just veterinarians. They are trainers who maybe have two horses. They are hot walkers. They are--they could be--all of these people that care for the horse are covered under this Act.

And to go directly from an administrative law judge's recommendations and findings to the U.S. Court of Appeals is quite a step, and it's a step financially. And unfortunately, that step includes a gate which is a financial barrier for many people, including many of these veterinarians, to try to get to.

And so it is our position that in terms of the due process argument, they are not--there should be a right, a guaranteed right of review by the FTC, but--

THE COURT: Well, there's a guaranteed right of review by an ALJ.

MR. SACOPULOS: Yes, sir.

THE COURT: And your argument is, okay, so we have a guaranteed right of the ALJ. You don't like that the ALJ is hired by the FTC, paid by the FTC. Your veterinarians don't have any say into who they go before. I mean, welcome to the administrative state, you know, I mean, but, you know, if I--again, if I had a magic wand--I don't. But I think your argument is that the barriers to entry are so--or the cost of review is so great that that's--that becomes a due process violation? What's the best authority you have to support that proposition?

MR. SACOPULOS: Well, I think the due process argument is, is that this Anti-Doping and Medication Control Agency is going to have the initial hearing, and right now, the

way that this is structured is, they could--they could be hearing it again at the ALJ level. I mean, you could have the same review. And we don't really know yet whether this is going to be a merits hearing or whether it's not.

And one of the things we do know is, is that from a procedural due process standpoint, Your Honor, that requires that the person who is alleged to have done something wrong--in this case, the veterinarian--be notified of what they have done wrong and have the opportunity to be heard in a meaningful way at a meaningful time. If they're being heard again by the same group--and they have no input on any of this--and now all of a sudden they're forced to go to the Court of Appeals.

And, I mean, there's one thing for the financial barrier. There's another situation where, if you're here, if the veterinarian is down the road and provides the care, they're now going to go to New Orleans. But an even greater example is, the veterinarian who is in Puerto Rico who takes care of a horse, he or she is--

THE COURT: Well, they go to New Orleans in 20 percent of the cases; 80 percent, you're going to file your brief, you're going to get an answer.

MR. SACOPULOS: Okay. But they--but there's certainly the possibility that they--

THE COURT: Sure.

MR. SACOPULOS: --if they-- And so you would have

the situation there where the veterinarian, the member who's providing the care in Puerto Rico, is going to Boston.

THE COURT: Okay. I understand your argument. You have one minute left. Is there anything else you wanted to say?

MR. SACOPULOS: No. I think the other point that I would like to talk about very briefly, Your Honor, is the Lasix issue.

THE COURT: Okay.

MR. SACOPULOS: Because HISA eliminates Lasix and eliminates any medications 48 hours out, this does two things. One, it puts the welfare of the horse in jeopardy, but it also places the racetrack veterinarian in a very precarious spot of being in violation of their own oath to take care of the health and welfare of these animals without being able to use these medications that they are currently using, and have been approved in every--have been approved in every racing state and have been used for over 40 years. And the scientific evidence clearly shows this is for the benefit of the animal. This is being removed.

Thank you for your time, sir.

THE COURT: Okay. All right. Thank you for your argument. Thank you for being here.

All right. Mr. Sverdlov, are you starting?

MR. SVERDLOV: Yes, I am. Thank you, Your Honor.

Good morning, Your Honor.

THE COURT: Good morning.

MR. SVERDLOV: And may it please the Court.

This case illustrates why facial challenges to statutory regimes are disfavored. To even reach the merits of Plaintiffs' claims, this Court would have to speculate about what kinds of rules the FTC might ultimately promulgate and how those rules might injure Plaintiffs.

THE COURT: Don't we know some of those rules to a certainty?

MR. SVERDLOV: We know the--yes, Your Honor, we know the baseline for what the statute directs those rules to contain, and that--

THE COURT: There's a Medication Control Program baseline, as laid out in 3055(g), and Congress has just made those mandatory, as far as I could see. I mean, the Authority and the agency can't ignore those. Correct?

MR. SVERDLOV: That is correct, Your Honor. And I think that points exactly to the nature of the--the reason that an injury-in-fact requirement exists. It exists in part so that this Court can know what portion of the statute is at issue and how that connects to the nature of Plaintiffs' claims.

THE COURT: So are you agreeing with me that at least as far as those portions that are very specific go, we

have a certainly impending injury?

MR. SVERDLOV: In the sense that rule--I wouldn't say that it's certainly impending, because--

THE COURT: Congress has said--Congress has said, at the very least, you have to do this. Authority, get it done. And, FTC, you have to approve it as long as it's consistent with our statute.

MR. SVERDLOV: That is correct, Your Honor. So--

THE COURT: And we have concrete steps that have been taken. We know this is coming. So help me under-- Why isn't that certainly impending injury?

MR. SVERDLOV: Your Honor, I would say that it is certainly impending, with the caveat that we don't know when it's going to happen, because even though the statute prescribes these minimum requirements, they still have to be put into proposed rules and approved, and there are steps involved in that process that have not yet taken place. The medication control rule and anti-doping rule has not been proposed yet. I understand that maybe there are some delays in that, and--such that the statutory timeline for the enactment of that rule may not be met.

But I would say that, yes, in--because the statute sets a baseline rule, it is true that those rules are likely to impact Plaintiffs. However, what we don't know, because Plaintiffs haven't pled it and they can't plead it at this

stage, is what exactly--whether the rules are going to contain anything beyond that baseline, whether those baseline rules are going to impose additional burdens beyond what they are subject to at the current state level. And again, the way that this interfaces with the nature of their challenge raises doubts whether that kind of injury, an injury from the medication control rule that implements a statutory requirement, would, in fact, give them standing to raise the nondelegation argument that they have raised in this case.

So as the Supreme Court's decision in *California v. Texas* shows, the Court has to analyze whether the injury is, in fact, traceable to the statutory defect that the plaintiffs are alleging. And here--

THE COURT: Well, the baseline rules still have to be proposed by the Authority. That's the traceability. We know these rules are coming. We don't know when. There might be some delays. Obviously there are going to be some steps. But the Authority has to propose them. The agency has to adopt them, as long as they are consistent; and then we're there. That's traceable to the Authority. They say the Authority is in violation of Article I, Section 1, of the Constitution. If it is, isn't that injury traceable to the Authority and the delegation of that authority, assuming it's an unconstitutional one?

MR. SVERDLOV: So I don't necessarily think so,

Your Honor. If the rule literally tracks the language of the statute, I don't see where there's any room for an exercise of legislative authority really on the part of either the Authority or the FTC. If all that happens is that a rule adopts the statutory language and there's no discretion along the way that anybody has exercised, I am not sure--

THE COURT: Well, where else would a plaintiff go? I mean, I understand, you know, in my Hummer example, it would be unusual, obviously, for Congress to say, do X very precise thing, when they could just pass a law that says that. But if they say, "We're not going to do it, we want you to do it," there's no law until the private entity, with the help of an agency, actually promulgates that law.

And so until it is promulgated and they follow the direction of Congress, there's no harm. It's only after that private entity, with the help of an agency--I mean, it's unusual, but isn't that, in part, what we have here?

MR. SVERDLOV: Well, Your Honor, I think there's no question in the Court's hypothetical, or at least I think there would be little question, that somebody would have standing to raise the challenge. I think the question is, really, what kind of challenge would be being raised.

THE COURT: Okay.

MR. SVERDLOV: Right? And so what I'm trying to highlight is just, there is a division between the injury that

is being claimed from a statutory provision and the delegation challenge which is predicated on the notion that a private entity and the FTC is exercising, quote-unquote, delegated authority.

THE COURT: Okay.

MR. SVERDLOV: And that's the--that's essentially the disconnect that I think Plaintiffs' briefs highlight.

I will note that in other structural constitutional challenges, Plaintiffs did have concrete injury. So whether we're talking about *Free Enterprise Fund*, *PCAOB*, or *Seila Law*, in all of those instances, the challenged entity actually took some kind of action against Plaintiffs, some kind of enforcement action. And if that were the case, I think it is likely that a plaintiff would have--Plaintiffs in this case, or in a subsequent case, could have standing to challenge--to raise the kind of challenges that they have raised.

THE COURT: I mean, the Sixth Circuit, anyway, has explained that: Plaintiffs have standing to challenge a statutory scheme that has not yet gone into effect when the only developments that could prevent plaintiffs' injuries from occurring are not probable and, indeed, themselves highly speculative.

That's *Thomas More Law Center*, which was reversed on other grounds by *Sebelius*.

Is that not what we have here?

MR. SVERDLOV: I think there is--I think there is a lot of intervening steps that would have to happen, and the very aspect of those--kind of the very uncertain parameters of those intervening steps would provide much greater clarity to the Court about the scope of a dispute.

So this really goes in part to our ripeness point as much as to our standing point, but--

THE COURT: And that's a good segue, because I wanted to ask you about ripeness next. I mean, whether the FTC's lack of ability to modify rules, as argued by the plaintiffs here--whether that violates the private nondelegation doctrine, isn't that just a question of law?

MR. SVERDLOV: So I think to the--

THE COURT: It's--

MR. SVERDLOV: It can be a question of law if the Court kind of accepts the statutory construction and the current posture. Our view is that, even under maximalist principles that Plaintiffs have put forth, we still prevail on the law. But I think--

THE COURT: And if it's a question of law based on the language of the statute, don't I have ripeness? I mean, if it's purely a question of law, I've got to look at the language of the statute, I've got to look at what the Authority is told to do, and I've got to answer whether that regime that allows approval, disapproval, arguably no modification--whether that

violates the private nondelegation doctrine.

MR. SVERDLOV: So, Your Honor--

THE COURT: What else do I need?

MR. SVERDLOV: I would raise two points, Your Honor, on that. The first is that the actual nature of the relationship between FTC and the Authority might give lie to Plaintiffs' allegations that the FTC is merely a rubber stamp and that it doesn't, in fact, have authority to, in practical terms, modify the--

THE COURT: How?

MR. SVERDLOV: Because if the course of rulemaking reveals that there is a tremendous amount of back and forth between the Authority and the FTC, and the FTC is taking its obligations to review rules seriously, as, in fact, its procedural rule suggests it will, I think a lot of the kinds of allegations that Plaintiffs have put forth would just be implausible. So--

THE COURT: Well, I think their argument is that the ability to either approve or disapprove--so in your world that you're explaining now, if FTC, despite its lack of expertise in horseracing, is heavily involved and they just keep disapproving rules, or proposed rules, disapprove, disapprove, disapprove, and they request modifications, recommend modifications, they can do that under the statute. I think their argument is, even that's not enough. The agency

has to have the ability to modify, not the Authority. The pen is out of the agency's hand and it's in the Authority's hand. I think that's their argument.

So even in the world you're describing, my guess is that Mr. Bustos is going to stand up and say, we still have a complaint and it's ripe because, see *Carter Coal*, see *Adkins*, we win.

MR. SVERDLOV: Your Honor, I think the only thing I would--I don't want to get bogged down on this point, and I think the only thing I would say is that the ripeness inquiry looks to whether further factual development would aid the Court in resolution of the dispute. And I think it is certainly the case that a--the ability to examine a particular rule or a particular enforcement action and the relationship between the FTC and the Authority, as it plays out, would certainly aid the Court's review of the statutory scheme, especially in light of the fact that, as we pointed out, some of the statutory terms are somewhat ambiguous and have yet to be given concrete scope by the FTC. So, for example, how FTC will interpret its--the direction to approve rules consistent with the Act is something that we will see once FTC actually does that.

But putting that aside--

THE COURT: Say that piece again. We-- Say that piece again. What part of the statute is ambiguous?

MR. SVERDLOV: The statute requires the FTC to approve rules that it finds consistent with the Act. But a finding that something is consistent with the Act can be made on a variety of parameters and can consider a great deal of either factual information or interpretation of other provisions of the Act. It is for the FTC to kind of give scope to what it views as its construction of the Act and what is consistent with it. And I think our point on the ripeness inquiry is that fleshing out those issues would certainly help the Court evaluate these claims.

THE COURT: Okay.

MR. SVERDLOV: That said, I am more than happy to sort of address Plaintiffs' claims head-on, because I think they fail as a matter of law even under kind of a maximalist provision. And if the Court were to reach the merits of the case in the current posture, we firmly believe that we still win.

THE COURT: All right. Yeah, I understand your standing argument. I understand your ripeness argument. Thank you for that pivot. Thank you for not letting us get bogged down there.

Before we get to some of the merits, let me ask you a few more threshold-type questions. You also agree that the Authority is private; is that right?

MR. SVERDLOV: Yes, we do, Your Honor. Yes.

THE COURT: Can I assume that for the sake of my order, or must I reach that?

MR. SVERDLOV: I think the Court could make that either as a factual finding on the basis of the allegations of the complaint or as a legal finding based on the characteristics of the Authority. So if the Court were to look to the standards and the parameters of what makes something a public entity, I think there's actually very little doubt that the Authority is a private--

THE COURT: Well, it was created in contemplation of HISA to wield governmental powers, and the FTC must approve changes to its bylaws. All of those factors support the idea that it's public, does it not?

MR. SVERDLOV: I don't think so, Your Honor, because the inquiry is kind of--the factors have to be analyzed in the totality--

THE COURT: Okay.

MR. SVERDLOV: --and the fact that the FTC doesn't exercise control over the board members or kind of the internal operations of the Authority all weigh heavily against the Authority being a private entity. I think if the Court compares this structure to, for example, the *Amtrak* case or, again, *PCAOB*, the distinctions are quite notable.

I, again, think the fact that it hasn't been placed in dispute by the parties means, especially on a motion for--on

a motion to dismiss, the Court wouldn't--the Court could resolve that either as a factual or as a legal matter.

THE COURT: Okay. All right. And what about on public delegation? They are not--you know, they are not persisting in their public delegation argument. That claim is gone. Do you agree with--I mentioned this to Mr. Bustos--that if there were no intelligible principle, that, necessarily, the subdelegation or the creation of a private entity to work with an agency would also have to fail? And, therefore, do I need to address whether I have an intelligible principle here?

MR. SVERDLOV: So, Your Honor, if I may just take one step back and answer this question in a kind of--

THE COURT: Yes, you may.

MR. SVERDLOV: --slightly more roundabout way--

THE COURT: Go ahead.

MR. SVERDLOV: --and I hope to make clear kind of why I'm doing this.

Our view is that private delegation is a misnomer. The nondelegation doctrine looks to whether Congress has improperly alienated some core aspect of its legislative power. There's nothing in the text of Article I or in the Supreme Court's cases analyzing nondelegation that looks to the target of the delegation for purposes of changing the nondelegation inquiry.

Now, if the target of the-- So the, kind of,

first-line question is, has legislative power been delegated. That's subject to the intelligible principle test. Now, if the receiving entity of legislative power is a private entity, then we would point the Court to the Fifth Circuit's decision in *Boerschig*, which lays out--which explains correctly, we believe, that private nondelegation is subject to a due process inquiry.

And looking to the Supreme Court's precedent in *Eubank* and *Roberge*, it lays out the factors for considering whether the delegation of authority--delegation of power to a private entity satisfies the due process clause. Now, those two factors are that there must be standards to guide the private entity's discretion and, two, that the scheme must provide for judicial review.

THE COURT: And before we get to those factors, you mentioned *Boerschig*. I mean, that involved a state law allowing a company to condemn land. Doesn't that make it materially different than what we have here? I mean, the condemnation power versus basically a law enforcement power. The latter is punitive, and the former is not.

MR. SVERDLOV: I think they can both be looked at as forms of--

THE COURT: Because *Boerschig* didn't concern legislative power.

MR. SVERDLOV: That's right.

THE COURT: And that's what you're talking about. I mean, you're telling me, let me help you understand the delegation of legislative power, when that's in bounds and out of bounds. But *Boerschig* wasn't about legislative power.

MR. SVERDLOV: That's correct, Your Honor. But what I would say to that is that there is, in fact--C*arter Coal* itself uses the language of due process.

THE COURT: Okay.

MR. SVERDLOV: And commentators have pointed out to that fact. The DC Circuit in the *Amtrak* case drops a footnote saying, well, some commentators have suggested that delegation of legislative power to private entities is actually more aptly named due process. There's language in *Carter Coal* that supports that; we don't think the analysis is different, and they--the DC Circuit kind of goes through the analysis that it goes through.

THE COURT: And the plaintiffs, you know, take that and run with it and say it doesn't really matter whether you call this private nondelegation, Article I, whether it's due process; the analysis is the same. Do you agree that the analysis is the same regardless?

MR. SVERDLOV: So I think nondelegation--I think this is kind of an analytical point, and--but there is a practical effect. I think nondelegation is a lower bar than the due process inquiry. Nondelegation looks to whether

Congress has improperly given away a core aspect of its Article I powers, and the Supreme Court has repeatedly said that the test for that is intelligible principle.

Now, as the Fifth Circuit, in *Boerschig,* articulates a kind of due process overlay, there is--there is--for a private entity exercising some aspect of government power, there must be standards to guide a private entity's discretion, must provide for judicial review.

We think it's possible that that first prong, must be standards to guide a private entity's discretion, is a higher bar than intelligible principle. I mean, intelligible principle is a very low bar, as we know. I think in this case, the Court doesn't get there because there's no delegation of legislative power.

THE COURT: All right.

MR. SVERDLOV: So if there's no delegation of legislative power, the Court doesn't need to consider whether there's intelligible principle or whether the, kind of, due process overlay applies, because it just fails kind of on the premise step.

THE COURT: Isn't whether there's a delegation of authority and whether there's an intelligible principle in that delegation--I mean, those--it's two sides of the same coin, isn't it?

MR. SVERDLOV: I don't think so, Your Honor.

THE COURT: Then you've lost me. Then you've lost me. So I don't understand that.

MR. SVERDLOV: So the Supreme Court's cases say--

THE COURT: If Congress says, "Hey, there's a lot of hate out there; I'm going to create this agency; make things better and make rules that are binding on people, go," no intelligible principle there.

MR. SVERDLOV: Yes.

THE COURT: Also, I mean, a delegation of legislative power.

MR. SVERDLOV: And there is a delegation of legislative power, yes.

THE COURT: Why wouldn't--are you arguing there's no-- Well, go ahead. Go ahead.

MR. SVERDLOV: Maybe I've been kind of insufficiently clear. I think there's circumstances where, as here, if there's no delegation of legislative power, there's no need to analyze whether there's an intelligible principle.

THE COURT: Okay. Just assume with me then that there is a delegation of legislative power. For the intelligible principle test, at least part of it has to set boundaries of the delegated authority. Correct?

MR. SVERDLOV: Yes.

THE COURT: Tell me about the boundaries that HISA placed on the development of racetrack safety. There are many

details regarding the anti-doping and medication control piece. The racetrack safety seems a bit broader. So where are the boundaries of delegated authority for that piece?

MR. SVERDLOV: So I think there's several areas that I would point the Court to. As a--kind of an overarching principle, I think if we look to the delegations that the Supreme Court has sustained, such as in *Gundy*, the--a command to develop racetrack safety within a--parameters of a statutory scheme that is, both on its face and from the legislative history, intended to protect the safety and welfare of horses and integrity of horseracing, would more than satisfy--

THE COURT: That would be enough? So if the statute just said, "Racetracks are dangerous; we're going to empower this private entity who works with an agency to make racetracks safer, go," that alone would be enough, in your view, to set boundaries of authority? And you cite--

MR. SVERDLOV: It would, Your Honor. I just want to--I just want to--I just want to distinguish between--I don't want to fight the hypothetical, but in the hypothetical, the delegation--I think it matters who the delegation is going to. So if the legislative power is being wielded by the FTC to develop--to approve rules, then we're squarely in the public nondelegation space. It absolutely satisfies.

I think if legislative power were actually delegated to a private entity and there were not the kind of

robust oversight that FTC provides, perhaps something more would be required. I think this gets to, kind of, our due process overlay point. But on an intelligible principle standard, the kind of framework that the Court has articulated would satisfy the Supreme Court's precedent.

THE COURT: Okay. And *Gundy* is the best case that you cited to me?

MR. SVERDLOV: I think *Gundy* is the most recent case. I think certainly the cases that *Gundy* discusses--the Supreme Court's precedent that *Gundy* discusses make clear just how broad a delegation can stretch.

THE COURT: Okay. Thank you for your patience with all of these questions. I just wanted to--I'm trying to figure out what I need to decide and what I don't need to decide.

Let's talk about private, legislative, and nondelegation.

MR. SVERDLOV: Yes. So in our view, Your Honor, as I think I've hopefully alluded to at this point, we don't think that the Authority wields any legislative power. As the Supreme Court's decision in *Loving* and the dissents in the more recent nondelegation cases make clear, the legislative power is the power to promulgate rules of prospective force. And--

THE COURT: The only rule the FTC can promulgate is an interim final rule under emergency good-cause narrow exceptions. That's the only rules they can write. Correct?

MR. SVERDLOV: In--yes, Your Honor. Under the statute--

THE COURT: Can you tell me an example of another agency-entity relationship--we would call it a two-step in Texas--like this one where the private entity has the pen, promulgates the rule, and the agency can approve or disapprove. Give me another example like that. Is there one?

MR. SVERDLOV: I would like to--I think I misspoke in my last answer insofar as-- The FTC promulgates all the rules. It doesn't just promulgate the IFR rules. It--

THE COURT: It promulgates them through approval. It doesn't draft them.

MR. SVERDLOV: It doesn't draft them, but here, I think we are putting--and Plaintiffs are putting form over substance, because the idea that--first of all, the idea that modification is some kind of linchpin for a legislative power I don't think finds any support in the case law that they have identified. It is certainly not the--it is not--it's certainly not the dispositive element.

THE COURT: So I tend to agree with you. I have a hard time finding that being the linchpin of any case. But to go back to my question, can you give me an example of an agency-entity relationship like this one that exists?

MR. SVERDLOV: Your Honor, I think that--

THE COURT: Or are we in, you know, just-- Just

because it's new doesn't necessarily mean it's unconstitutional. I just want to know whether you think this truly is neither fish nor fowl; this is new.

MR. SVERDLOV: I think it's different in the sense that it is true that in the SEC FINRA relationship, SEC--that the statutory authority provides for, quote-unquote, editing and modifications. So we don't disagree with that. This is--

THE COURT: Okay.

MR. SVERDLOV: --this is--based on FINRA, it has some differences.

THE COURT: So it's not like SEC FINRA. Similar, but not exactly like it. Is it like anything else that you know of?

MR. SVERDLOV: No, Your Honor. I think this is an extension. The closest analog is SEC FINRA. It is an extension of that relationship. I don't think it's a--it's a far extension, and I certainly don't think that it's an extension that is material for any purposes of a legal analysis. But it is different. I mean, that's why we're here.

THE COURT: Okay. All right. That's helpful. Thank you.

In your motion to dismiss, you assert that Congress gave the FTC broad discretion--your language--to determine which rules to enact based on the FTC's interpretation of HISA. Tell me where you see that in the statute.

MR. SVERDLOV: We see that, Your Honor, in the statement in HISA that FTC shall approve rules that it finds consistent with the statute. So I think--

THE COURT: Maybe this is just an eye-of-the-beholder thing, but a congressional mandate that the FTC must approve rules that are consistent with doesn't seem like broad discretion to me. It seems like we've set the rules; we've told you who's going to send you the drafts. As long as there's--as long as they're consistent, fall in line. Approve them. You must do that, in fact.

Why is--how is that broad discretion? Do we have a different idea of what "consistent with" means? Where is the--I don't know. Where-- That's my concern.

MR. SVERDLOV: Your Honor, I think--and I certainly don't mean to kind of overstate the statutory scheme or hyperbolize, but I think--

THE COURT: Oh, no. I don't think you are. I'm just trying to help--I just want help understanding your view of it.

MR. SVERDLOV: I think "consistent with the statute" can encompass a range of different things. For example, maybe the FTC decides that it needs to look to statutory history, legislative history to determine whether something is consistent with the overall purpose of the Act. Maybe it's going to restrict itself to the four corners of the

statute. Maybe it's going to take a broad view of the statutory intent in analyzing whether a baseline program is consistent with what Congress has enacted. Maybe it's just going to say, here's the text, and, like that tracks the text, good enough for us. We don't know that. Right? Because FTC hasn't done that yet. Whether the FTC takes a broad or a narrow view, I think, affords it--it affords it significantly more discretion than--

THE COURT: How could it receive a proposed rule from the Authority that says, we also want--Substances, you know, A through F are already there; we want to add 17 more substances to the banned list. They're all substances that are given to a horse, sometimes according to the Authority, and we want to add them. They're very important. And just assume, for the sake of this hypothetical, that some in the industry disagree with that, that they shouldn't be banned; they're for the horses' health, whatever.

How could the FTC reject that? They are additional substances that relate, in the Authority's view, to anti-doping and medication control, horse safety. That's consistent with the statute. How could they say--how could they send that back without violating a congressional mandate?

MR. SVERDLOV: Well, one way, Your Honor, is if the evidence that the Authority submits as part of its proposal doesn't support the Authority's assertion. So, for example, if

the Court looks to the procedural rule that the FTC has promulgated, it requires the Authority to submit a great deal of factual information along with its proposals and, in fact, justify, explain why it is that that's consistent with the Act. So that's Way Number 1.

I think Way Number 2 is, it is possible that the process of notice-and-comment rulemaking will bring to light additional evidence that the FTC would look to and consider and decide that actually it doesn't--you know, it seems on the line; it doesn't actually seem consistent with kind of the narrow purpose that Congress has exhibited, or maybe it's inconsistent with the notion of horse safety, racetrack integrity, as kind of derived from legislative history.

THE COURT: Okay.

MR. SVERDLOV: I think these are all things that FTC would have to flesh out. I'm not--you know, I don't want to prejudge how the FTC may analyze these things. But I will just point to the procedural rule as, I think, elucidating the degree to which there is--there is, at the very least, a factual inquiry that is expected on the part of FTC.

THE COURT: So when the proposed rule comes up, the Authority needs to provide some factual support for it?

MR. SVERDLOV: Uh-huh.

THE COURT: Is that in the statute? That's an honest question.

MR. SVERDLOV: That is not in the statute, Your Honor. And, in fact, that is one of the ways in which the FTC has looked to the Act and to its implementing its authorization under the Act to promulgate procedural rules.

THE COURT: Okay.

MR. SVERDLOV: And it has explained in the procedural rule the authority that the FTC finds in the statute to make these kinds of requirements.

THE COURT: All right. And it might also put it up for notice and comment. They get comment from the public that says, what are they talking about; that's good for horses. And the FTC says, what are you talking about; we reject that.

That's another possible avenue?

MR. SVERDLOV: Absolutely, yes, Your Honor.

THE COURT: Okay. Okay. Go ahead.

MR. SVERDLOV: I think this discussion really kind of underscores the other point that I was going to make, which is that the FTC's review is robust here, and this idea--aside from being unsupported by the case law, this idea that there is no possibility of modification for the Authority's proposals under the Act is something that seems dubious, at best, even if it were legally significant, which I think, as the Court noted in discussing *Rettig* earlier today, doesn't actually seem to be a requirement for a delegation inquiry.

I will only note, I think we agree with the

characterization of *Rettig* that the Court had made in questions to my colleagues on the other side. The one thing I would note is that *Rettig*, of course, looks at agency subdelegation, which is a question of statutory interpretation. And the standards for statutory interpretation, even as the dissent in the en banc denial noted, the standard for statutory subdelegation is--necessarily has to be higher than the standard for constitutional nondelegation.

THE COURT: So *Rettig* is distinguishable? It doesn't--

MR. SVERDLOV: I think in *Rettig's* support, I think *Rettig* belies the idea that modification is somehow appropriate or required, even for agency subdelegation, which is a higher standard that someone would have to meet than the constitutional bar of nondelegation of--

THE COURT: Okay. Let me ask you about a case that--it hasn't been--it hasn't been cited in the briefing. And I've stood at podiums where this happened, so I'm not going to hold you to knowledge of it. Are you familiar with *Luminant Generation vs. EPA*? It's a Fifth Circuit case from 2012.

And let me just give you a little background. There, the Fifth Circuit explained, albeit in a different context, that an agency is reduced to a ministerial role when its power is limited to reviewing another entity's standards,

quote, for consistency with an Act's requirements.

Stop me when this sounds familiar. My concern is--And then the Fifth Circuit went on to say: With regard to implementation, the Act confines the EPA to the ministerial function of reviewing SIPs for consistency with the Act's requirements.

Would this case support the idea and show that it's the FTC, not the Authority, that's in the ministerial role here, because it does not have the pen to draft the rules in the first place, or no? And again, I don't mean to put you on the spot. You know, I tried to give you a little bit of background about the case. But there is a Fifth Circuit case, right--whether y'all bring it in or not, I have to deal with precedent. And in this case, when there's just a review of another entity's rules for consistency, that was labeled ministerial only.

MR. SVERDLOV: So, Your Honor, if I may--I have three responses--

THE COURT: Go ahead, please.

MR. SVERDLOV: --to that, and I will preface all of them by saying that, unfortunately, I am not familiar with that case--

THE COURT: No problem.

MR. SVERDLOV: --and I can certainly look it up and--

THE COURT: No problem.

MR. SVERDLOV: But the three--kind of the three points that I would say is that, one, I think the discussion that I have--the colloquy that I have had with the Court about the scope of FTC's review and the kinds of factors that FTC has put forth in its procedural rule and seems to be contemplating requiring--well, in fact, has required--is contemplating reviewing, suggests that its function is not going to be ministerial.

My second point is that, while I'm not familiar with the precise legal claims in that case, for reasons that I alluded to, the constitutional standard of nondelegation is a lower one than a statutory standard of agency subdelegation. And potentially even sort of a more limited role on the part of FTC than what FTC has here would pass muster.

And the third point kind of related to the second that I would offer is that I think the ultimate inquiry for whether some entity has been delegated legislative power is whether it exercises the ability to promulgate rules of prospective force. And I think attendant to that is the notion that there has to be some degree of discretion that's involved.

So, for example, if Congress passed a law that simply said, "Authority will draft the rules, FTC shall approve them," you know, no standards by the Court for guiding the agency's discretion, all the FTC does is truly function as a

rubber stamp, I think that would be a better argument that the private entity is exercising legislative power.

And then the Court would move on to what we think is the proper analysis once we're in delegation-of-legislative-power land. The Court looks to, is there an intelligible principle for purposes of the nondelegation doctrine. If the recipient--if the statute passes that and the recipient is a private entity, then there's also the due process overlay.

I think there's no question, really, that there's an intelligible principle here. There's no question that the statute provides standards to guide discretion. And the--

THE COURT: It says--more than your hypothetical, it says, you shall approve them as long as they are consistent with the statute.

MR. SVERDLOV: Well, right now, I'm talking about the standards that would be given to the private entity. So in my hypothetical--I realize it's a little strange for me to be proffering hypotheticals, but in my hypothetical, the agency is merely a pass-through. Right? Like we take out the role of the agency. We think the--if the statute were simply directed to the private authority, it clearly contains an intelligible principle.

The next question under *Boerschig* is, does it satisfy the two-factor due process test. We think it does.

There's certainly the availability of judicial review on the back end. And not just judicial review. There's multiple layers of FTC review as well.

So we think even if the Court--even if the private entity were delegated legislative power--which, as I think our briefing makes clear, we think it has not been--the statute would still pass muster, but it would just pass muster under that second analysis.

THE COURT: If the FTC initially promulgated a proposed rule but, a year later, decided, we were wrong, what can it do about it?

MR. SVERDLOV: If--just to make sure I understand the hypothetical, if the FTC approved a rule that was proposed by the Authority, and--

THE COURT: The Authority says, make X a rule; FTC puts it up--approves it, puts it up, and it passes. A year later, they realize, that was a mistake. All they're--you know, all these people are doing are trying to price out certain members of the market, and that's unfair and we shouldn't do that. What can they do about it?

MR. SVERDLOV: So two answers, Your Honor, to-- One--the first thing that the FTC could do, depending on the circumstances, is promulgate an IFR. And I will note here that while--

THE COURT: So there would need to be an emergency?

MR. SVERDLOV: Well, so the APA--it is absolutely true that we think--under the APA, we think of an IFR as something that has to be promulgated for good cause where there are--there are enumerated exceptions.

I will note that HISA provides two categories of circumstances in which the FTC can--it defines when FTC can promulgate interim final rules, and that's when those rules are necessary to protect the health and safety of covered horses or the integrity of covered horses--of--I'm sorry, the integrity of covered horseraces and wagering.

I don't want to prejudge this issue, because it might come up, and the FTC hasn't yet interpreted it. But I think the interface between the APA's good-cause requirement and HISA's--Congress's explicit direction--explicit provision of those two circumstances where the FTC can promulgate rules is something that perhaps the FTC would be in the best position to interpret.

THE COURT: Okay.

MR. SVERDLOV: It may be that the FTC finds that when those conditions are met, that it's Congress's judgment that the APA's good-cause requirement has been met as well. So--

THE COURT: Okay. I've interrupted you throughout, and I've taken a lot of time. We're definitely over time, but I want you to be able to tell me everything you wanted to tell

me. Why don't you, I mean, move on from that point. What else?

MR. SVERDLOV: If I may just finish my answer to the Court's question. The second thing I wanted to say is that even if the FTC came to conclude that a rule that it had promulgated were inadvisable or bad policy, or even not its preferred first choice, I think the Supreme Court's decision in *Currin* and all the cases interpreting *Currin* or applying *Currin* make clear that an agency not getting its first choice in the kinds of rules that get promulgated is not fatal. It does not amount to a delegation of legislative power to a private entity that proposed the rules.

THE COURT: Yeah, but *Currin*--I mean, *Currin* and that line of cases--I mean, help me understand it if I'm incorrect, but it seems to be a materially different scenario, where an agency says, we have the pen, we're going to write it, and then we're going to set it up and offer it to some private entity, private industry, and they can veto it or approve it, they can agree or disagree, but the agency has the pen.

Isn't that *Currin*?

MR. SVERDLOV: That is *Currin*, Your Honor. I think that--

THE COURT: That's not what we have here. So how does *Currin* help you on this point?

MR. SVERDLOV: So I think what *Currin* stands for

and what *Currin*'s progeny stands for is the idea that Congress can set all kinds of limits on an agency's rulemaking without transforming--without sort of empowering the other entities who function as part of that condition into, themselves, legislative bodies. Right?

And I think the main point of *Currin* is that--Plaintiffs here say that, you know, FTC should get kind of a choice about what its preferred rule or its preferred policy should be and should get to enact that, and absent that, it's other entities wielding legislative power.

I think *Currin* gives lie to that notion, because the *Currin* regime contemplates that, like, the agency may not get its first choice, it might not get its second choice. There are plenty of constraints that Congress can impose without taking away the fact that the agency itself is still the one exercising the lawmaking power.

Your Honor, I recognize that I have been up here for a long time. I certainly want to allot enough time for my colleague. I don't really have very much to say on the due process clause. I think our papers address it with sufficient detail. I will just note that I think the statute provides all sorts of safety mechanisms to guard against what Plaintiffs are worried about. And to the extent that actual concerns arise, then it would be something that would be best explored in a concrete context, an as-applied challenge as opposed to a

facial one.

THE COURT: Okay. Thank you for that. Let me ask one more question about *Currin*. Does *Currin* make clear--and I understand your argument about it, but does it make clear that writing the rules is the legislative power?

MR. SVERDLOV: I don't think it does, Your Honor.

THE COURT: Okay. All right. Okay. Thank you. Mr. Sverdlov, I have kept you up there for much longer than you were expecting. I've lived that as well where I was expecting a 20-minute argument. That doesn't happen in the Fifth, but I argued in the Seventh as well, and it will happen in the Seventh, and I-- Thank you for your patience with me and for answering my questions.

MR. SVERDLOV: I appreciate the Court's indulgence. Thank you.

THE COURT: All right. Mr. Shah. I would tell you you have 25 minutes, but know thyself. Go ahead.

MR. SHAH: Thank you, Your Honor. May it please the Court.

We second the arguments for dismissal on the threshold standing and ripeness grounds for the reasons explained in our brief and by Mr. Sverdlov today. I'm happy to answer any further questions you have on those.

THE COURT: Okay. All right.

MR. SHAH: But unless the Court prefers otherwise,

I'm happy to focus my time on the merits of the plaintiffs' private nondelegation doctrine, to at least start there--

THE COURT: Sure. Go ahead.

MR. SHAH: --and leave you to interrupt me as you see fit.

The core of legislative authority is the power to enact binding rules that have the force of law. Under HISA, it's FTC, and FTC alone, that wields that power. Given Plaintiffs' decision to bring a facial challenge--we're here on a facial challenge--the Court must presume that FTC will faithfully perform its statutory mandated role, that statutory mandated role under Section 1204 of the Act and under the APA, rather than simply serve, as Mr. Bustos said, as a rubber stamp for proposed standards. It would be extremely odd, on a facial challenge, for the Court to presume that the FTC is a rubber stamp.

And that's really the linchpin of their nondelegation claim. They have to argue that FTC is merely a rubber stamp, because if FTC actually exercises the real sort of review as contemplated under the APA and under the specific provisions of HISA itself, then it is exercising any lawmaking power here, and their claim necessarily fails. By performing--

THE COURT: I think the question there goes to the scope of review given to it and breathed into it by Congress.

MR. SHAH: Sure.

THE COURT: And the language of the statute doesn't give it unfettered discretion. It says, you must approve as long as it's consistent with the statute. And the statute is fairly specific. The statute says we're going to do an Anti-Doping and Medication Control Program; we're going to have a Racetrack Safety Program; and here's a lot of detail about--well, maybe less about racetrack than doping. Doesn't that confine FTC's scope of review? And I guess your argument--I think yes, but I guess your argument is, but not so much that it's somehow unconstitutional?

MR. SHAH: Correct. Your Honor, Congress has to put limits on the agency. In fact, the Constitution requires it under the public nondelegation doctrine. It has to put guardrails. It can't give it unfettered discretion. That would be a constitutional violation. Congress can put all sorts of limits on the FTC, but--

THE COURT: Yeah, but guardrails on the scope of authority is one thing. I mean, they can't say, hey, FTC, do whatever the heck you want to do. Of course not. But here, my question goes to who really has the legislative--

MR. SHAH: Sure. So, Your Honor, let me address that squarely. First of all--

THE COURT: Because Mr. Sverdlov-- Let me just say one more thing and I'd love to hear that.

MR. SHAH: Yes, Your Honor.

THE COURT: Mr. Sverdlov, even in his hypothetical, I think recognized there is an area where we would get out of bounds, and that area would be if Congress said, private entity, you make the rules; agency, stamp it. Say yes, and you can only say yes.

MR. SHAH: Right.

THE COURT: Out of bounds.

MR. SHAH: Right.

THE COURT: Why isn't--

MR. SHAH: So the question is, are they a rubber stamp like in that hypothetical. And let me give you the answer why the Court shouldn't find that under this statute.

THE COURT: Okay.

MR. SHAH: The statutory language--it has to approve it, but if it's consistent with the Act. Now, there are a few places in the Act, like the twelve--the Medication Control Program, subsection (g), right, which says you have to do this with therapeutic substance.

But the statutory factors under the Medication Control Program, for the bulk of the Anti-Doping and Medication Program, which are under 3555(b), it's a seven-factor--it lays out seven broad factors. These are not very specific, you have to do this or that. These are seven broad factors that the Authority has to take into account when shaping up these--with these rules and then, presumably, that the FTC will look to

when deciding they're--whether they're consistent with the Act or not.

Similarly, with the Racetrack Safety Program, there are twelve statutory factors, and this is subsection 3056(b). It lays out twelve statutory factors that it has to consider that the--one, on the front end, the Authority has to consider when shaping its rule, and then on the back end, when the FTC has to determine is it consistent with the Act, it has to look at these twelve factors.

And just to make it very concrete, to take it out of the hypothetical realm to the concrete realm, we already have the proposed standards for the Racetrack Safety Program. That's been published in the Federal Register. And, in fact, we have comments, lots of comments that people in the industry that would be affected have submitted. The comment period is already closed, so you can go look those up. Plaintiffs themselves have submitted comments. Some of those comments say, hey, look, this proposed authority standard is inconsistent with the Act.

For example, to make it even more concrete, the educational program. There's a provision that requires that there be an educational program about these standards. They say, oh, that conflicts with the statute because you're leaving too much to the states to do; you should nationalize that.

Well, it's the FTC under the APA. And again,

remember, this is not just the FTC operating under HISA, which gives it plenty of discretion itself, but it's also operating under the APA. It has to conform to its APA obligations, so it has to take that objection that Plaintiffs have made that this particular provision is inconsistent with HISA, and then it has to make a determination, right, under the APA. It's going to even have to give some explanation. And if they don't, then they can bring an APA challenge that they haven't done it.

But to suggest that they are going to be a rubber stamp on a facial challenge, that they're going to disregard their obligations both to determine whether they meet these twelve factors under the Racetrack Safety Program, the seven factors under the Anti-Doping Medication Program, to suggest they're not going to do that and flout their APA and HISA obligations, it doesn't make sense to do that on a facial challenge. Of course, on a facial challenge, you have to assume that the agency is going to act in good faith.

And I think that's critical, and, in fact, I think that's where their claim fails, because if the linchpin, again, is--you heard him say it today--

THE COURT: Before we get to the linchpin, you gave a concrete example, which I appreciate.

MR. SHAH: Yes.

THE COURT: Clearly I need help here. Why hasn't the FTC accepted or rejected those proposed rules? I think the

60-day review period has expired.

MR. SHAH: It has not expired, Your Honor.

THE COURT: It has not?

MR. SHAH: No.

THE COURT: When did it begin?

MR. SHAH: They were--it was proposed in the Federal Register, the Racetrack Safety Program on January 5th, so the 60-day will end, I guess, beginning of March.

THE COURT: Okay.

MR. SHAH: So it will be--so we're coming up on it in a few weeks, I guess.

THE COURT: Okay.

MR. SHAH: So that, I think, is the core problem with Plaintiffs' argument.

THE COURT: Well, but the plaintiffs' argument focuses on the ability to modify. I mean, that's really the focus of their argument.

MR. SHAH: So let--

THE COURT: So you're saying they can do all these things. Nothing you've said so far has anything to do with modification.

MR. SHAH: Sure. So let me address--

THE COURT: So why is that not--

MR. SHAH: Let me address modification head-on. So I have three responses on why modification-- And, of course,

they're focusing on modification because that is the only distinction between this case and *Adkins*. It's the only--

THE COURT: I think we have a concession from Mr. Sverdlov that this is an unprecedented entity-agency--

MR. SHAH: Sure.

THE COURT: --relationship--

MR. SHAH: Well, let--

THE COURT: --and an unprecedented statute. Maybe you disagree with that. But it is new, and it is different. And, you know, the arguments that are being raised are not specious.

MR. SHAH: Sure. So it's only different in one respect from both SEC FINRA-- And it's not only SEC FINRA. That's not the only analog. *Adkins* itself-- This is the rare case, Your Honor, where the most analogous facts are not from a lower-court opinion, the district court or court of appeals. It's from the Supreme Court opinion itself. Right? The Supreme Court, in *Adkins*, faced a regime. FINRA SEC is modeled on *Adkins*, and this statute, as Senator McConnell and the sponsors told you, is modeled on SEC FINRA.

The only distinction between the regime in *Adkins* and the regime--SEC FINRA and this regime--they're not identical, but they're materially identical except for the fact that in *Adkins* and the SEC FINRA statute, it says, private industry, you write the rules. Same as here. Agency, you

determine whether to approve, disapprove, or modify. That's the language in the Coal Act in *Adkins* and in the SEC FINRA statute. Here, it's approve, disapprove, or withhold your approval with suggestions for modifications.

So that's the--that--I just want to be clear, that is the only distinction between those--

THE COURT: Let me add a-- Yeah, I understand the point you're making. Let me add a couple more, and tell me if I'm wrong, or-- One, both the agency involved in *Adkins* and the SEC have substantive expertise, which the FTC does not here.

MR. SHAH: Yes, that's--

THE COURT: So that's another difference. I know you're going to say it's immaterial, but that's a difference, is it not?

MR. SHAH: It is a difference if you talk about preexisting expertise, yes. SEC had preexisting expertise. The *Coal* agency had presumably some--I can't say I'm an expert on whatever that agency was in *Adkins*--presumably some preexisting expertise. But you're right, I'm going to tell you why that is not legally dispositive, because--

THE COURT: And the agency in *Adkins*-- Let me say one more thing. The agency in *Adkins* had unilateral power, did it not, to rewrite the rules?

MR. SHAH: Your Honor, it had the power to approve,

disapprove, or modify. So if you're talking about unilateral power, it could not, on its own, draft a proposed standard relating to pricing of coal. The statute--if you look up that 1937 statute, it makes it clear it can only ask the private industry board to trigger that.

THE COURT: Can't it take a red pen, once it shows up, and says, well, we like this, but we don't like that, and we're going to rewrite this--

MR. SHAH: So--

THE COURT: --and then notice and comment?

MR. SHAH: It depends, I guess, on how you consider modify. Assume it could, because it says approve, disapprove, or modify. So it could change a term. I don't think it could--I don't think it could write a new rule, right, because, again, that statute says it has to ask the private industry board-- And just to be clear, that case--this is, in some ways, on stronger footing than *Adkins,* because in *Adkins*, it wasn't a private authority. Right? It was private industry groups. The dominant players in the industry were the ones who were making the proposed rules that would govern the rest of the industry. It was direct competitors, not actually private authority. But--

THE COURT: But the agency could change the price.

MR. SHAH: The agency could change the price, absolutely. Let me give you--

THE COURT: Isn't that-- That's the question. That's the power. They could go, no, we want this price instead.

MR. SHAH: Right. But that was not the only type of regulation at issue in *Adkins*.

THE COURT: Okay.

MR. SHAH: The agency could propose prices. But if you look at that statute--and the Supreme Court mentions this in passing, but the actual statute itself, the provision of the statute says it can also propose standards and rules incidental to pricing issues. So they also had power to propose other standing and rules.

But you are right. They have the power to approve, disapprove, or modify. And let me give you three reasons why that is not a legally dispositive difference.

THE COURT: Okay.

MR. SHAH: Okay. The first is, again, the core lawmaking power is the power to enact rules with binding force of law. It is only the FTC, like the agency in *Adkins* or like the SEC, that can do that here. That is true with or without the modification power. The point of the nondelegation doctrine is to limit the legislative authority that a private agency has. It doesn't have anything to do with the limits that you're putting on the actual agency. Right? Congress can put all sorts of limits. Tomorrow, it can take away all

rulemaking power it wants from any agency in the country. It can say you can only do this or you can do that. That power, Congress has.

The question here is, nondelegation doctrine. So by hampering the FTC's ability to write its own rule, if you will, but do the red pen that you're talking about in the modification power, I am not quibbling with you that it is limiting FTC's authority, but it is not augmenting the lawmaking power of the Authority.

And that takes me to my second point, which is, it is true that, here, the statute says that the agency can approve, disapprove, and, if it disapproves, provide recommended modifications. But for all practical purposes, it can withhold any approval of the HISA rule unless those modifications are adopted. So it is wielding a pretty big club when you say propose modifications. It can recommend modifications. I think, for all practical purposes, it has the modification power, because then without--if the Authority never adopts that proposed modification, it's not going to adopt the rule.

The third distinction or reason why I don't think that modification power can bear the weight that Plaintiffs want it to bear is because the FTC, as already been discussed here, at least has residual interim final rulemaking power. So to make this concrete, if there is a situation where the

Authority proposes a standard and the FTC decides we're not going to approve this; we think this important modification should be made because it's critical to the health and safety of horses, right, and the Authority says no, right, if it's critical to the health and safety and meets the good-cause requirement, then it can actually do it.

So all three of those reasons, I think, show why, in this context, it's not material. Let me give you a precedential reason on top of why I think those analytical reasons--

THE COURT: Before we get to the precedent, let me go back to your first point. The first point confuses me.

MR. SHAH: Okay.

THE COURT: The first point you made--and correct me if I'm wrong--was that Congress's limiting an agency's power does not augment the private authority's power.

MR. SHAH: With respect to modification, that's right.

THE COURT: How can that be? If they say, Agency, all you can do--to take Mr. Sverdlov's example--if all you can do is approve whatever the heck they do, if the limit--it has to reach a point where the limit is so great, when set up with the regime, where it's really, hey, the people in the next room, they're making the rules and you are to approve them. That limit necessarily augments the power of the people with

the pen, doesn't it not?

MR. SHAH: Sure. And--

THE COURT: And it's just a matter of scope and line drawing?

MR. SHAH: Right. I mean, we were talking about the modification power. If you have the extreme example where Congress says, if it's written in English, you have to approve this rule, then I would have a much weaker case.

THE COURT: The inability to modify that is the problem. Could be one of the problems. If it says if it's written in English you have to approve it, but, you know, if you disagree with it, you can modify it, problem solved.

MR. SHAH: Sure, Your Honor. But, here, we don't have a situation where they're saying if it's written in English, you have to approve it and you can't do anything else. You can either approve--and here's the critical part--you can disapprove. So the ultimate lawmaking power. The Authority has zero independent lawmaking power, because it's only the FTC that decides whether to approve or disapprove within the guardrails or guidance provided by Congress. That is true with or without a modification power.

So as long as-- You are right. There is a point at which, if Congress was so limiting on the agency that it had to function as a rubber stamp, it just had to approve whatever was in front of it, then you probably get to the point where

there's a serious nondelegation problem. But as long as it gives Congress the ultimate--the agency the ultimate authority to exercise the lawmaking power, as this one unquestionably does, because it can approve or disapprove, then you're there.

THE COURT: As long as the agency has the ultimate lawmaking power?

MR. SHAH: As long as--yes, pursuant to the delegation. Right? This is a delegation of lawmaking power from Congress to the FTC, as long as there's an intelligible principle. We don't have a public nondelegation claim that they have raised. If they did, it would fail, because there's obviously plenty of intelligible principles in the statute. I gave you the twelve factors for the Racetrack Safety Program and the eight for the Medication Control Program. Then, yes, then that's the question here. And by limiting their modification, Congress has limited the agency but hasn't created a nondelegation problem.

THE COURT: All right. So the agency has to hold the ultimate lawmaking power. If Black's Law Dictionary defines legislative power as the power to make laws and alter the law-- The agency doesn't have the ability to alter, does it? And again, I know that's a definition from Black's, not the statutory language here, but--

MR. SHAH: Right. It does not have the power to alter. But I would give two responses to that. One is, in

this regime, this is, again, another way in which this law is on stronger footing than *Adkins*. The law in *Adkins* is that there's interim final rulemaking authority.

So if this were really a situation where the agency felt it needed a rule, it could, in fact, promulgate its rule. And, of course, again, we're here on a facial challenge. Their choice to bring a facial challenge. And so you have to read the statute as a whole and you--and then you have it.

The second point I would make is--the other legal point I would make is, Congress, tomorrow, could tell the EPA, you can promulgate rules under the Clean Air Act, but once you've promulgated them, you can't alter that rule. It can say that. There is no legal doctrine that prohibits Congress from doing that to EPA.

That is not a nondelegation problem. Maybe you could come up with some other problem. But, of course, Congress can freeze rules in place. It holds the strings. And the fact that Congress is limiting the agency and not giving it the full bucket of legislative power doesn't mean it has given the full bucket of legislative power to the private entity.

THE COURT: Okay. I understand your argument. All right. Thank you. And you were about to pivot to precedent, which I'm glad to hear. Go ahead.

MR. SHAH: Okay. So we've talked about *Adkins*. As I mentioned, this is, I think, the rare case that--obviously

there's not a whole lot of private nondelegation cases that--The two from the Supreme Court are *Carter Coal* and *Adkins*, and as you noted, that was an evolution. Right? You had *Carter Coal*. Congress amended the statute. You get *Adkins*, and there, again, what the Supreme Court concluded in its holding was, quote, since lawmaking is not entrusted to the industry, this statutory scheme is unquestionably valid.

And so, again, you have the Supreme Court focused on is there a direct delegation of lawmaking authority to the industry. It said no, because that agency, again, had the plenary power to approve or disapprove--not plenary, consistent with the Act, approve or disapprove. And by the way, the SEC FINRA uses that exact same formulation, consistent with the Act. That's the discretion that SEC has.

And HISA, again, as the--as Senator McConnell, in their amicus brief--is--is modeled on FINRA SEC. Every court of appeals that has considered a private nondelegation challenge to HISA-- It's been 80 years on the books. Every court of appeals to have considered nondelegation challenges cited *Adkins* and rejected that challenge. And the Fifth Circuit, in *Rettig*--and this is at page 532 in Note 12--cites one of those cases. Its cites a SEC FINRA case--

THE COURT: Is it *Johnson* or--

MR. SHAH: Exactly. The *Johnson* case.

THE COURT: I happen to have it right here.

MR. SHAH: Right. Yeah, exactly. So--

THE COURT: Second Circuit 1952. Okay.

MR. SHAH: Right. Exactly. So while the Fifth Circuit hasn't had one of those SEC FINRA challenges, you have just this year, right, this past year, the Fifth Circuit citing it favorably in its *Rettig* decision.

And then that brings us to *Rettig* itself. *Rettig* is--and I think we've read them all--is, I think, the most expansive articulation of the private nondelegation doctrine. Again, there are not a whole lot of these cases, the two Supreme Court cases and a couple court of appeals cases more recently.

But I think *Rettig* is the most--has elaborated it more than any other circuit, and I think it's also safe to say it is the most permissive of those. Of all the circuit elaborations out there, I think it provides a test that we very easily satisfy. And it, again, adopts the *Adkins* framework, but it goes further. Right? It goes further. Its upholding--in *Rettig*, it upheld an agency subdelegation. It wasn't Congress that did it. Right? It was the agency that subdelegated. And when the agency subdelegated that authority to the private actuarial board and to the private actuary who certifies it, they could not undo it. Right?

Here, the FTC can simply say, no, we're not going to take your role, end of story. In *Rettig* itself, once HHS

made that decision to recognize the independent actuary's determination, it was stuck with that. It couldn't go any further in the certification process, if the actuary said no, unless it withdrew the entire subdelegation itself. Judge Ho focused on that point in particular in his dissent for denial.

So this case is on far stronger ground. If you think modification for-- Again, we don't think modification at all is the linchpin for all the reasons I've said. But if you thought it was, well, that can't be the case under *Rettig*. This case--

THE COURT: Because HHS has no ability to modify there--

MR. SHAH: Exactly.

THE COURT: --and the Fifth Circuit gave it two thumbs up.

MR. SHAH: Right.

THE COURT: Does it matter--is it material that, in *Rettig*-- Look, I hear you. It's an incredibly strong case in favor of agency power, right or wrong. Almost half the Fifth Circuit strongly disagreed with that, but that's--you know, this side won.

That case does involve a very discrete role from a private entity, a precondition of a contract basically, and we can't fill in the blank. We have everything else. We, the agency, we've done everything else, but we need this plug to

push into the equation, and so, hey, you experts over there with your sharp pencils, you figure that out and give us that.

That's all that subdelegation was. Does that make a difference here? Because that's not what we have here.

MR. SHAH: Sure, Your Honor. And that's why I think, factually, *Adkins*--this is, again, the weird situation where the Supreme Court has the most analogous facts. I think factually, *Adkins* is probably more on point if you're just talking about the facts. But again, *Rettig* was not just about the facts, but it also elaborated the legal principles that, I think, are more expansive, more permissive for nondelegation.

The other thing I would say is, you're absolutely right. It was just one discrete portion. But to suggest it was-- It wasn't a minor portion. It was the whole certification of the capitation rate, right, which is the whole point, right, the amount that they're going to--

THE COURT: Hundreds of millions of dollars rested on--

MR. SHAH: Right. It's the linchpin of that rulemaking. So--

THE COURT: Another potential distinction. HHS did, however, have the ability to just blow that rule up, and the--I don't think the FTC has that here. The FTC can't say, you know what, we don't want to use the Authority anymore; nevermind; we've now--we've spent a few years here; we know

horseracing now and we've got this; no, thank you. They don't have that authority.

MR. SHAH: Exactly. But that cuts in our favor, Your Honor.

THE COURT: Tell me why.

MR. SHAH: As Judge Ho pointed out in his dissenting opinion, if this were Congress in the HHS situation, he might not be dissenting. Right? Because Congress has a whole lot more leeway to set its delegations, because it is the one vested with Article I legislative authority.

That's what happened in this case. It's Congress that set up this scheme, modeled on *Adkins*, modeled on SEC FINRA. And so even under Judge Ho's dissent, even if that were the law--which it's not; its a dissent from a denial of rehearing. Even if that were the law, we would win, because he said that if Congress did it, okay.

THE COURT: Okay. All right. I understand that.

MR. SHAH: The last thing I'll point out--I'll talk about--and I'm happy to answer any questions about anything else, but just in terms of affirmative, is, the other side brought up the executive--what I would call the executive power piece of the nondelegation. Right? They're challenging primarily the legislative piece, but they brought up the sanctions that the Authority has. Well, that can't be an Article I nondelegation problem. If there's any constitutional

basis for that, it has to come from the due process doctrine.

THE COURT: Yeah, I share that concern. What I hear Mr. Bustos saying was that those portions of his argument just went to the irreparable harm injury of the permanent injunction that he's seeking. I'll let him correct me if I'm wrong on that. But--

MR. SHAH: Oh, okay.

THE COURT: Yeah, that was the qualification that I heard, because I asked that question, and I think what I heard was, those pieces don't go to our legislative nondelegation argument. They go to our irreparable harm argument. But again, Mr. Bustos can correct me if I'm wrong. But your argument remains the same regardless? Those pieces are about executive power, not legislative power?

MR. SHAH: Those are executive power, and there's ample--under that--you know, if you want to apply a due process, *Carter Coal* or whatever, there is limitations on the front end where the agency has to approve the standard by which they're going to be doing all of this enforcement, and on the back end, where there's two layers of de novo FTC review of any sanctions that might result from those enforcement, as well as Article III federal court review just consistent with final agency action review under the APA.

So even if they--if they're not challenging it, great, but if they are, then it fails for that--

THE COURT: Let me--I do have a question related to this. It's about the ability to impose fees. The Authority has the power to set its own fees. Correct?

MR. SHAH: Only subject to approval by the agency. So again--

THE COURT: And fines as well. Fees and fines. Subject to agency approval, it can do that.

MR. SHAH: Right. They can't do anything, Your Honor-- They could decide they want whatever fees they want. It's not going to happen until the FTC enacts that rule into law. It's the FTC that is imposing fees, not the Authority. The FTC--

THE COURT: But the Authority has the--the Authority has the ability to set--to define the fees, to define the fines, subject to the FTC approval. And here's, really, the question. I want to contrast what we have here with *Pittston*.

MR. SHAH: With--I'm sorry?

THE COURT: *Pittston*.

MR. SHAH: Oh, the *Pittston* case?

THE COURT: So *Pittston*, the statute gave detailed guidance as to what the premiums must be. So the Fourth Circuit found that the private entity only had the ministerial task of doing calculations and collecting funds.

Doesn't the lack of that guidance and oversight

here make *Pittston* distinguishable?

MR. SHAH: So two responses on that. First is, the statute doesn't just say, Authority, come up with fees. It provides bases for how they are supposed to calculate those fees based upon racing starts in states, and they're supposed to do some calculation that fairly equitably distributes it between the states based on--I'm not going to have the details right, but the number of racing starts in a state, and other factors.

THE COURT: I recall that--

MR. SHAH: So there is absolutely guidance. They can't just come up--and if they did deviate from that guidance or otherwise inconsistent with the Act, the FTC will say no and they get zero fees. So that's point number one.

Point number two is, I can't remember *Pittston* myself, but I don't think, after--my recollection is, that was true, but the agency didn't come in and approve it after the fact. I might be wrong about that, but--

THE COURT: Okay. I'll check.

MR. SHAH: But again, here, I think the critical point is, nothing goes unless the FTC enacts it into law, and that's the sine qua non of legislative power.

THE COURT: Okay. Is the sanctioning power a delegation of executive authority? I know that argument is not being made here, but they have the power to sanction.

MR. SHAH: Yes.

THE COURT: Isn't that a delegation of executive authority? If not, why not?

MR. SHAH: No, I think, Your Honor--I think that would be. But again, it's within the sort of limits that the Supreme Court has talked about in the legislative side, right, because any sanction that they issue on the front end before they issue--before the Authority can issue a single sanction, they have to get approval from the FTC on the menu of sanctions for the types of violations at issue. And that rule is actually now published in the Federal Register. It's the enforcement rule. Right? And so they have to lay out their sanctions. That has to undergo notice and comment rulemaking. The FTC enacts it. Okay. So let's--

THE COURT: That's not legislative power--

MR. SHAH: No. But in order for them to exercise that sanctions power, they first have to get approval from the FTC. So let's assume it's now--they have gotten that approval. Right? And now they go ahead and issue that sanction, which we're calling an exercise of executive power here. They go ahead and issue sanction; you violated a rule, here's your fine. Right?

That goes under direct review to an ALJ in the FTC, and it's de novo review. It's not like normal agency review. This is de novo agency review of everything that the Authority

has done. And then, on top of that--which would obviously be enough in and of itself. On top of that, the FTC reserves the right to have full commission review upon a petition to look at it. And then if that were not enough, you get federal court review under the APA, because you have final agency action after the FTC has done it. So even if you want to look at the sanctions power as an exercise of executive authority, it has all of those safeguards, which are more than enough to take it out of any constitutional problem.

THE COURT: If I decide either I should or I must look at these types of enforcement powers-- *Buckley vs. Valeo* came up during the opening argument. And if the enforcement powers are before me, why doesn't the Authority's power to commence civil actions violate the appointments clause in *Buckley vs. Valeo*?

MR. SHAH: The appointments clause, Your Honor? I don't see how it violates the appointments clause here. We're not--

THE COURT: Primary--*Buckley* explained: Primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights may be discharged only by persons who are officers of the United States.

MR. SHAH: Well, Your Honor, that is a generally true statement. But I can point you to all sorts of examples

in the U.S. Code where Congress has empowered private actors to enforce federal laws. Think of qui tam statutes. There are all sorts of situations--

THE COURT: Can you think of a better example than qui tam that is closer to what we have here? I don't view this as a qui tam situation. Qui tam is incentivising private parties to help the government avoid fraud and to--

MR. SHAH: Right. But it's an example of Congress delegating to a private body the authority to file a cause of action. You can think of private causes of action to enforce labor violations. Of course, you have to have an injury in fact to do that. And I don't want to get too down the road into theory whether the Authority would have an injury in fact. But I think Congress has recognized a cause of action for them to enforce, just-- And here, we're no different than the SEC FINRA context, which allows similar enforcement powers to FINRA.

But I think my primary submission here is, besides the fact that I don't think it's properly presented in this case, but if you want to--if you're only talking about that piece of it, that they can file an action, again, we have no idea how that's going to play out, if that's ever going to happen, and how that's going to play out in practice on a facial challenge. If you can conceive of a way in which that's constitutional, you uphold it on a facial challenge. And so I

guess that's where I would end on that one.

THE COURT: Okay. I think my final question is really just about remedy. If I decide one piece goes too far, the statute doesn't have any clause that says, take that out and keep the rest. Do you have a view on what the appropriate remedy would be?

MR. SHAH: Sure, Your Honor. It would depend on what provision you're talking about. Of course, the Supreme Court has now made clear twice in the last two terms that it takes the severability doctrine very seriously, and there's a strong presumption, even in the absence--

THE COURT: Of a clause?

MR. SHAH: --of a severability clause. Yeah, I mean, they have just said that twice in the last term, that even in the absence of a severability clause, courts should be very wary of exercising--striking down congressional legislative enactment without a clear notion that the Act could not be functional without that provision.

THE COURT: I see. What are those cases? Help me remember.

MR. SHAH: *Facebook* case and--oh, I--

THE COURT: It's okay. I'll find the other one.

MR. SHAH: Yeah, I'm drawing a blank.

THE COURT: Okay.

MR. SHAH: Okay. Thank you, Your Honor.

THE COURT: All right. Thank you for your argument.

Mr. Bustos?

MR. BUSTOS: May it please the Court.

THE COURT: You have reserved five minutes for rebuttal, but obviously they went way over time, so I want you to be able to tell me what you'd like to tell me in rebuttal. Go ahead.

MR. BUSTOS: Thank you, Your Honor. May it please the Court.

Regarding *Rettig*, in that case, HHS was tasked with approving managed care organization contracts. The Court in that case called utilizing private accountants and their actuarial standards a, quote, small part, close quote, of the approval process, but in the statute of *Rettig*, conditioned government action on private entity approval. But HISA turns that on its head. HISA conditions private entity action on government approval. So here, the Authority is given the entire power to do the first draft of regulatory rules. That is entirely different from adopting some actuarial standards in *Rettig*. So it's distinguishable for that reason.

In terms of *Adkins*, lawmaking is entrusted to the industry under HISA, and that's why it is invalid under *Carter Coal*. They can say, oh, no, no, really, it's the FTC promulgating the rule. That's a formality. As a practicality,

it is the Authority that's doing the first draft. As you said, they have the pen in hand, they're drafting the rules, and because they have that power, that power to legislate, lawmaking should not be entrusted to private industry, under *Carter Coal*.

There are six cases that we have cited in our reply brief, our motion for summary judgment that quote that *Adkins* standard that the power to modify means something. One of them is the Supreme Court's opinion in *Amtrak*. Footnote 1 of our MSJ reply brief has those six cases in there.

THE COURT: Okay.

MR. BUSTOS: Going to *Pittston*, here's a quote from *Pittston*: Quote, any delegation of regulatory authority to private persons whose interests may be and often are adverse to the interests of others in the same business is disfavored.

And that's a 2004 case. This isn't ancient law we're talking about here. And Judge Costa in the *Boerschig* case, not that long ago, quoted some language that said that this nondelegation doctrine is alive and well. It's not a moribund doctrine. It's a real thing.

When it comes to the Court's reference to the *Luminant Generation vs. EPA* case, there, the Fifth Circuit-- I took a very brief look at it. The Fifth Circuit--

THE COURT: I let y'all have computers in here. I was hoping somebody would look it up and help me out.

Go ahead.

MR. BUSTOS: Well, there, the Fifth Circuit talked about how, under the Environmental Protection Act, the EPA's role is ministerial. I've never seen the FTC ever act in a ministerial role in any of the work it does. All right? There's a wholesale difference here.

So this--HISA would put the FTC into a ministerial role, which would be completely unlike anything the FTC has done before. They're trust-busters. They do antitrust litigation, for Pete's sake. They are not just a rubber stamp for whatever the Authority wants to do, and they can't be reduced to a cajoler-in-chief position.

So, for example, I want to spin out a scenario here where it could get really bad. Unless the Authority agreed to rescind a prior-- I'll go back to your hypothetical. What if there's a rule that got promulgated and the FTC says, wow, that was bad; we've got to rescind that. And they talk to the Authority and the Authority was, like, I don't see a problem here. Then nothing can happen. Nothing can happen.

THE COURT: What about an IFR? What about an interim final rule?

MR. BUSTOS: I have a big problem with government saying, well, it's okay because we can legislate an emergency.

THE COURT: Well, I mean, you might have a problem with it, but it is a release valve. My question is, I mean,

you know, everybody can have a problem with it, but why is that not at least a solution to this impasse that you just described?

MR. BUSTOS: It doesn't cure the entire regime. I mean, as the Court said, again, in its vaccine case, it's very difficult to show good cause. It's a very heavy burden to be able to exercise that type of emergency rulemaking power. It should only be used in rare occasions. And so are we going to go ahead and cure an entire defective constitutional scheme through emergency rulemaking powers? That's not good, and it is not constitutional either.

When it comes to the EPA--speaking of the EPA, I cited the Court to a couple of EPA-type cases with *Sierra Club vs. Sigler, Sierra Club vs. Lynn.* And here, the Fifth Circuit has said twice, it's particularly troubling when a private group is drafting a document for regulations, because the agency should not delegate its public duties to private entities. It can't abdicate its statutory duties.

And then *Currin*. So *Currin* is distinguishable. *Currin* is a problem for them, because in *Currin*, the private tobacco growers were not given the ability to draft the regulations. That's the big difference here. Here, the Authority has the power to make the first draft of those regulations. In *Currin,* there was also a referendum of all the private growers that was required under the statute.

So *Currin* is distinguishable. It's a problem for them, because in *Currin*, the government had that power. Here, the Authority has that power. It is just unconstitutional for Congress to outsource its lawmaking authority to private citizens. For that reason, the Court should issue an injunction in this case.

THE COURT: Was I right in my question to the American Quarter Horse Association that your client is fine and maybe even supports a uniform body, a singular body that regulates the entire industry? Is that right?

MR. BUSTOS: As long as it's constitutionally ordained.

THE COURT: Assuming it's constitutional, is that your client's preference, that, hey, we recognize the need, and, in fact, we want there to be one body to govern all fifty states, but we want it to be constitutional and we prefer it to be in the Department of Agriculture's purview and not the FTC?

MR. BUSTOS: Really more constitutional than anything.

THE COURT: Okay.

MR. BUSTOS: Whether it's in Agriculture or FTC--I'll give the Court one little tidbit here. Covered races--so under HISA, some horseraces for thoroughbreds aren't even covered if they don't have the simulcast of that race

transmitted to some other place. So that's a really weird thing. That doesn't show due concern for horses' safety. It's bizarre. I learned that last night.

THE COURT: So if it's not simulcast, so if someone in a remote location can't bet on it, they are not covered?

MR. BUSTOS: Yeah. That's crazy. And so the important thing is, yeah, our--we'd like to see a national rule, so to speak. It's great for Congress to do that. But Congress should not be outsourcing that rulemaking power to private entities, and it should have a government agency actually doing its job, with the power to modify what private industry would recommend. It's just taken the entire private industry regulatory relationship that we've had for the entire history of the republic and turned it on its head. That--

THE COURT: So it's really that there are a minority member of the board of the Authority that are industry members and potentially have different and competitive interests in mind. That is your main concern? If Congress had said--even the FTC. If Congress said, FTC, figure this out and make rules, here's our guidance, there's intelligible principle, full stop; you have no objection?

MR. BUSTOS: Yeah, if there were no private actors going in there writing the rules for the FTC, if that was not happening, there would not be a problem.

THE COURT: Okay. All right. I understand.

MR. BUSTOS: Thank you, Your Honor.

THE COURT: Thank you very much.

Ladies and gentlemen, thank you for your patience with my many, many questions. Thanks again for your briefing. The Court is obviously going to take this under advisement. I know time is of the essence. We will get an order out as soon as we possibly can.

Safe trip home. Safe trip home. Court is adjourned.

(END OF HEARING)

I, Mechelle Daniel, Federal Official Court Reporter in and for the United States District Court for the Northern District of Texas, do hereby certify pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

/s/ Mechelle Daniel **DATE** FEBRUARY 28, 2022

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