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, WASHINGTON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, TAMPA BAY HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,

Plaintiffs – Appellants,

and

STATE OF TEXAS; TEXAS RACING COMMISSION,

Intervenor Plaintiffs – Appellants,

versus

JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN; MD NANCY COX; JOSEPH DUNFORD; FRANK KEATING; KENNETH SCHANZER; HORSERACING INTEGRITY AND SAFETY AUTHORITY, INCORPORATED; FEDERAL TRADE COMMISSION; COMMISSIONER KELLY SLAUGHTER; COMMISSIONER ROHIT CHOPRA; COMMISSIONER NOAH PHILLIPS; COMMISSIONER CHRISTINE WILSON,

Defendants – Appellees.

On Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:21-cv-00071-H

PLAINTIFFS-APPELLANTS' REPLY BRIEF

Daniel Robert Suhr
Reilly Stephens
Jeffrey D. Jennings
Liberty Justice Center
440 North Wells Street, Suite 200
Chicago, Illinois 60654
Telephone (312) 637-2280
dsuhr@libertyjusticecenter.org
rstephens@libertyjusticecenter.org
jjennings@libertyjusticecenter.org

Fernando M. Bustos
Bustos Law Firm, P.C.
1001 Main Street, Suite 501
Lubbock, Texas 79408
Telephone (806) 780-3976
fbustos@bustoslawfirm.com

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

The core of democratic government is accountability. Yet in the Horseracing Integrity and Safety Act ("HISA"), Congress unlawfully gave governmental power to a private Horseracing Integrity and Safety Authority (the "Authority") that is not accountable to anyone. Defendants claim HISA is no different from the Maloney Act or the Bituminous Coal Act of 1937, but the District Court recognized "the parties agree that HISA breaks new ground." ROA.1466. If this Court lets stand what the District Court called "HISA's unconventional structure," which "pushes the boundaries of public-private collaboration," then no industry will be safe from its invidious design. *Id.*; ROA.1524.

ARGUMENT

I. This Court has jurisdiction, and the Horsemen's notice of appeal was filed timely because the District Court's corrected order perfected it.

The Authority's jurisdictional argument has no support either in the text and history of the federal rules or in this Court's case law. The plain meaning of both the civil and appellate rules allows a party to perfect a prior-filed notice of appeal after a district court rules on a

Federal Rule of Civil Procedure 59(e) motion and after a later-filed judgment. The Authority's argument attempts to *reintroduce* a procedural trap that was deliberately and explicitly removed from the federal rules *nearly thirty years ago*. This Court should decline the invitation to recreate booby traps that were long-ago disarmed.

The current version of Federal Rule of Appellate Procedure 4(a)(4) includes the current text in subparagraph (B)(i): "If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of [a Rule 59(e) motion]—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." That is precisely what happened here: the District Court entered a judgment on April 19, 2022, ROA.1533; Plaintiffs (the "Horsemen") filed a notice of appeal on April 19, 2022, ROA.1534; the District Court issued an order disposing of the Rule 59(e) motion on April 25, 2022, ROA.1686-91; and the notice of appeal became effective. *See* ROA.1719.[1]

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[1] The Rule 59(e) motion arose because Texas filed a Rule 41 motion to dismiss its anti-commandeering claim. After the court granted that motion, *to which the Authority had consented*, the Authority's counsel emailed that the Rule 41 motion could only dismiss entire actions, and Texas should've amended its complaint. *See* ROA.1574-88. Endeavoring

Likewise, Rule 4(a)(2) provides, "A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." The clear intent of both iterations in Rule 4(a) is that otherwise timely-filed notices of appeal aren't invalid simply because the court later issues an amended judgment.

The Authority's core argument to the contrary is that "'any notice of appeal is a nullity if it is filed before the district court rules on' a Rule 59 motion." Authority Br. 23 (citing *Lawson v. Stephens,* 900 F.3d 715, 719 n.12 (5th Cir. 2018) (quoting *Richardson v. Oldham*, 12 F.3d 1373, 1377 (5th Cir. 1994))). But *Lawson* is not a case about the failure to file a fresh notice of appeal. There, the Rule 59(e) motion had been resolved by a magistrate judge and not an Article III district court judge, so the jurisdictional question was whether the Rule 59(e) motion was *still pending* in the district court. 900 F.3d at 719. That is not the case here.

The Authority's key citation is *Richardson*, but it relied on the *prior*

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to comply with this Court's holdings, Texas filed the Rule 59(e) motion with the Horsemen's concurrence. The District Court felt Rule 59(e) was the wrong method to perfect the judgment and instead certified the earlier judgment as appealable under Rule 54(b).

version of Rule 4(a), which it quoted in a footnote: "'A notice of appeal filed before the disposition of any of the above motions [including Rule 59 motions] shall have no effect.'" 12 F.3d at 1377 n.7. That prior version *did* create a trap for the unwary, which is why it was rewritten in 1993:

> The 1979 amendment of this paragraph created a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending. The 1979 amendment requires a party to file a new notice of appeal after the motion's disposition. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. *Griggs v. Provident Consumer Discount Co*., 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule.

Notes of Advisory Committee on 1993 amendments. The "trap for an unsuspecting litigant" is the exact trap the Authority is trying to spring here. The committee explained the new version of Rule 4(a)(4) would eliminate this problem:

> The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

Id. The Authority cannot reintroduce a problem that was deliberately removed from the federal rules.

Likewise, this Court's cases support the Horsemen. *Cousin v. Small*, 325 F.3d 627, 631 (5th Cir. 2003), is directly on point. There "Defendants contend[ed] that Cousin's notice of appeal [was] defective because it was filed before the court entered the rule 54(b) judgment." *Id.* This Court rejected that argument, finding, "'Because the district court's order would have been appealable if followed by Rule 54(b) certification and order, rule 4(a)(2) permits this court to exercise its jurisdiction,' where a final judgment was actually entered subsequent to the filing of the notice of appeal." *Id.* (quoting *Barrett v. Atl. Richfield Co.*, 95 F.3d 375 (5th Cir. 1996)). On this point, the Federal Trade Commission ("FTC") agrees with the Horsemen. *See* FTC Br. 1, n.1 ("[I]n general, Appellate Rule 4(a)(2) and this Court's decision in *Cousin* suggest that plaintiffs' notice of appeal was timely filed.").

The District Court also agrees with this position: "By declining to amend its prior 'Final Judgment,' and instead certifying that its previously appealed order was appealable under Rule 54(b), the Court aims to remove any doubt as to the Fifth Circuit's jurisdiction over the pending appeal." ROA.1689 (quoting *Cousins* and *Barrett*).

The other cases the Authority cites also don't support its argument. *Banister v. Davis*, 140 S. Ct. 1698 (2020), held that Rule 59(e) motions do not count as "second or successive" habeas petitions, because "the ruling on the Rule 59(e) motion merges with the prior determination, so that the reviewing court takes up only one judgment." *Id.* at 1703. That's consistent with this case, where the post-Rule 59(e) judgment became the operative judgment and perfected the earlier-filed notice of appeal.

This Court's decision in *United States v. Cooper*, 135 F.3d 960, 962 (5th Cir. 1998), agrees: "[I]n civil cases, appeal is proper where notice is filed after the district court rules from the bench but before the disposition is entered as a final judgment." Once again, the final judgment works to perfect the earlier-filed notice of appeal.

Based on the text, history, and case law of Rule 4(a), this Court should reject the Authority's jurisdictional argument.

II. HISA violates the nondelegation doctrine because *any* delegation to a private entity is a violation, because the Authority—not the FTC—determines the rules, and because the FTC does not maintain sufficient authority and surveillance over the Authority.

A. *Any* delegation of regulatory authority to a private entity violates the nondelegation doctrine.

The standard for determining whether a statute delegates legislative power to a *private* entity, unlike a public entity, does not involve whether the private entity or any governmental agency with supposed oversight of it was given an "intelligible principle" on which to act. *Contra* Authority Br. 27; FTC Br. 15. The phrase "intelligible principle" does not appear once in the most important private nondelegation cases: *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Texas v. Rettig*, 987 F.3d 518 (5th Cir. 2021); and *Texas v. Rettig*, 993 F.3d 408 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). The phrase appears only once in *Amtrak I* to distinguish between the standards for a violation of the private nondelegation doctrine and the public one. *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) ("*Amtrak I*") (vacated and remanded on other grounds by *Dep't of Transp. v. Ass'n of Am. R.R.,* 575 U.S. 43 (2015) ("*Amtrak II*")). The D.C.

Circuit Court explained, "All that is required then to legitimate a delegation to a *government agency* is for Congress to prescribe an intelligible principle governing the statute's enforcement." *Id.* (emphasis added). But for a private entity, *no* delegation is allowed: "Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority." *Id.* at 671. Similarly, the Fourth Circuit clarified, "*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." *Pittston Co. v. U.S.*, 368 F.3d 385, 394 (4th Cir. 2004) (quoting *Carter Coal*, 298 U.S. at 311) (emphasis added). In this case, the District Court confused the two standards, and Defendants-Appellants are wrong to try to defend this position, which has no basis in law.[2]

[2] Defendants misunderstand the Horsemen's reliance on *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022). Authority Br. 29; FTC Br. 13. *Jarkesy* was a public nondelegation doctrine case, so its use of the "intelligible principle" standard does not apply to this case. Horsemen Br. 32. But *Jarkesy* provides the most recent analysis of the nondelegation doctrine by this Court and counsels that, regardless of whether the Court exercised the doctrine often in the past, it should do so when presented with a novel situation that transgresses the standards delineated by the Supreme Court. 34 F.4th at 462.

The correct analysis for determining whether a statute unconstitutionally delegates regulatory authority to a private entity asks whether the government 1) "determines" the regulations and 2) has "authority and surveillance over the activities" of the private entity. *Adkins*, 310 U.S. at 399; *accord* Authority Br. 35; FTC Br. 25.

B. Under HISA, the Authority "determines" the regulations because the FTC cannot draft them on the front end, modify them on the back end, or disapprove them if it disagrees with the policy.

No court has ever approved of a "novel regulatory scheme" like HISA that prohibits the government from drafting regulations, modifying them, *and* disapproving them based on policy. Dist. Ct. Op. ROA.1466. The combination of these three powers ensures it is the Authority—and not the FTC—that "determines" the regulations.

1. The FTC cannot draft regulations.

Under non-emergency circumstances, the FTC cannot draft regulations under HISA; only the Authority can. 15 U.S.C. § 3053(a). Therefore, to enact regulations governing the everyday conduct of the horseracing industry, the FTC must sit and wait for the Authority to propose them. This is strong, if not conclusive, evidence that the Authority—and not the FTC—"determines" the regulations.

The FTC's inability to draft regulations makes HISA worse than the statute enjoined in *Amtrak I*. There, the allegedly private "Amtrak enjoy[ed] authority equal to the [Federal Railway Administration, or] FRA." 721 F.3d at 671. They were equal because both could draft regulations, and both could veto the other's regulations. In this case, the entities are not equal. While both can veto—the FTC by disapproving and the Authority by never proposing a regulation in the first place—the Authority holds superior legislative power to the FTC because only it can draft regulations through the normal process. Therefore, under the reasoning of *Amtrak I*, HISA should be enjoined.

The FTC states the conclusion of several iterations of Amtrak litigation was that the arbitration provision was severed. FTC Br. 35. That's beside the point. The Horsemen readily admit that *Amtrak I* was overturned on the ground that Amtrak wasn't a private entity. *Amtrak II*, 575 U.S. at 55. The Horsemen cite *Amtrak I* as persuasive authority from another circuit court that examined the private nondelegation doctrine in depth and enjoined a statute that gave even less power to the private entity than does HISA.

Similarly, the FTC miscomprehends *Currin v. Wallace*, 306 U.S. 1 (1939). *See* FTC Br. 27. The FTC cites that decision for the proposition that Congress can "plac[e] a restriction upon its own regulation" by requiring approval from a private entity. *Id.* (quoting 306 U.S. at 15). That's exactly what *Currin* and similar cases stand for, but importantly, the restriction occurred *after* the government had drafted the regulation.[3] But the government cannot draft the regulation under HISA. The problem with the FTC's reasoning is that it describes the drafting of regulations as a mere "restriction" on the FTC's "own regulation," but a regulation is not the FTC's "own regulation" if the FTC cannot draft the regulation in the first place. The Authority's legislative first-draft power under HISA is tremendously greater than that of the private entities who were able to give their approval after-the-fact to governmental regulations in *Currin* and its progeny. As the

[3] *See Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406, 1416 (6th Cir. 1994); *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 759 (9th Cir. 1992*); United States v. Frame,* 885 F.2d 1119, 1127-28 (3d Cir. 1989); *see also United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 577–78 (1939); *Cook v. Ochsner Found. Hosp.*, 559 F.2d 968, 975 (5th Cir. 1977).

D.C. Circuit Court explained in *Amtrak I*: “The industries in *Currin* did not craft the regulations . . . .” 721 F.3d at 671.

The only drafting authority held by the FTC is the ability to issue interim final rules, 15 U.S.C. § 3053(e), but the Administrative Procedures Act (“APA”) limits this ability to emergency situations and requires the agency to show “good cause” to find that notice-and-comment would be impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b)(B). As the FTC admits, “good cause” cannot be read “broadly,” lest it create an “““escape clause” from the [notice-and-comment] requirements Congress prescribed’ under the APA.” FTC Br. 30 (quoting *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011)). Therefore, “Typically, the government’s burden to show that good cause exists is a heavy one. Indeed, the exception is to be narrowly construed and only reluctantly countenanced.” *Texas v. Becerra*, 577 F.Supp. 3d 527, at *36 (N.D. Tex. 2021) (cleaned up).

In addition to good cause, HISA requires the FTC to find the interim final rule is “necessary to protect” either “the health and safety of covered horses” or “the integrity of covered horseraces and wagering on those horseraces.” 15 U.S.C. § 3053(e). The FTC implies this additional finding alone could satisfy and overwrite the "good cause" requirement, FTC Br. 30, but it cannot. HISA explicitly references and incorporates the "conditions specified in section 553(b)(B) of title 5" (the APA) including the "good cause" limitation. 15 U.S.C. § 3053(e). Therefore, the FTC must satisfy both requirements. Further, the FTC claims the Horsemen are wrong that interim final rules are limited to "emergencies," FTC Br. 30, but that's exactly what the case law says: The "good cause" exception "should be limited to emergency situations." *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001).

A hypothetical example illustrates how extreme it is for HISA to prohibit the FTC from drafting regulations under normal circumstances. If the FTC wanted to ban racing on dirt tracks and allow it only on turf tracks, it could not do so. Such a decision would certainly fall within the parameters of HISA's direction to enact a racetrack safety program. *See* 15 U.S.C. § 3056. But the FTC would be forced to sit on its hands and recommend the policy to the Authority, which could ignore the recommendation with no consequences. The only option available would be to issue an interim final rule, but it would be near impossible for the FTC to show "good cause" that notice-and-comment would be impracticable, unnecessary, or contrary to the public interest. Dirt track racing has existed in America for 200 years, so the Commission could not claim urgency in the need to protect the health and safety of horses, and it would certainly want to field public comments before embarking on such an important change. Thus, the FTC would be stuck.

It simply cannot enact the policy that it thinks best for the industry. It cannot "determine" the regulations, as *Adkins* requires.

2. The FTC cannot modify regulations.

The only statutes ever upheld under the private nondelegation doctrine that prohibited the government from writing the initial draft of regulations were the statutes upheld in *Adkins* and in the Securities Exchange Commission ("SEC") cases, and in both instances, the government maintained the ability to draft regulations, or "determine" them, through its ability to modify proposed regulations.

It's undisputed that under HISA the FTC cannot modify regulations. 15 U.S.C. § 3053(c); *see also* Authority Br. 48. Defendants claim HISA is "modeled" on the Maloney Act and the relationship between the SEC and the private Financial Industry Regulatory Authority ("FINRA") and its predecessor, the National Association of Securities Dealers ("NASD"). Authority Br. 7; FTC Br. 36. The District Court acknowledged this assertion, ROA.1502, but it properly found to the contrary: "[B]ecause Congress withheld the FTC's ability to modify proposed rules, the Authority wields greater power than FINRA . . . ." ROA.1515.

Defendants initially attempt to discount this important difference by pointing out that the SEC's ability to modify occurs in a separate part of the process from the approval or disapproval part. Authority Br. 47; FTC Br. 22. But that only highlights how powerful the ability to modify is. The SEC can, *sua sponte*, draft regulations through its ability to "add to" the rules. 15 U.S.C. § 78s(c). That puts the Maloney Act on par with the statutes upheld in *Currin* and its progeny. Further, the SEC may—at any time—"abrogate" or "delete from" rules that are already on the books. *Id*. The powers to "add to" and "delete from" regulations are key to the SEC's ability to "determine" what the regulations are.

Defendants wrongly claim the ability to modify regulations is not central to the holdings of the SEC cases or *Adkins*. Authority Br. 20, 46;

FTC Br. 32. It's true that no court has ever enjoined a statute solely based on its failure to allow the government to modify regulations, but that's because no statute has ever *gone so far* as to prohibit the government from modifying a private entity regulation. Had Congress ever taken such a drastic step before, the case law shows why this would have been problematic.

The Seventh Circuit cited the SEC's ability to modify rules as one of only two reasons it gave for stating that the SEC wields significant oversight of FINRA: "FINRA . . . is subject to significant SEC oversight. The SEC must approve all of FINRA's rules, 15 U.S.C. § 78s(b)(1), and the SEC may abrogate, add to, and delete from all FINRA rules as it deems necessary. 15 U.S.C. § 78s(c)." *Aslin v. Fin. Indus. Regulatory Auth., Inc.*, 704 F.3d 475, 476 (7th Cir. 2013). Similarly, the D.C. Circuit Court identified modification as the second most important aspect of SEC oversight–right behind approval of the rules: "The delegation involves close oversight; the SEC approves all rule changes by an SRO such as NASD, no matter how minor. 15 U.S.C. § 78s(b). If the SEC deems it necessary, it may also amend an SRO's rules itself. *Id.* § 78s(c)." *Lowe v. Nat'l Ass'n of Sec. Dealers, Inc.*, 548 F.3d 110, 112 (D.C.

Cir. 2008). An Eleventh Circuit judge concurred: the SEC has "direct supervision of all of NASD's regulatory activities" because it "must approve all NASD rules before they are implemented, 15 U.S.C § 78s(b), and may 'abrogate, add to, and delete from . . . the rules . . . as [it] deems necessary or appropriate,' 15 U.S.C. § 78s(c)." *Weissman v. NASD, Inc.*, 468 F.3d 1306, 1316 (11th Cir. 2006) (Tjoflat, J., dissenting) (panel opinion reversed en banc by *Weissman v. NASD*, 500 F.3d 1293 (11th Cir. 2007)).

Similarly, the Second Circuit noted the two bodies were "intimately intertwined" in part because "the SEC retains discretion to amend the rules" of FINRA. *Standard Inv. Chartered, Inc. v. NASD*, 637 F.3d 112, 116 (2d Cir. 2011).

Defendants complain the three opinions from other circuits upholding the Maloney Act don't mention the SEC's ability to modify FINRA rules. Authority Br. 20; FTC Br. 33. But Defendants fail to mention that two of the three cases were decided before the SEC was given the power to modify. *R.H. Johnson & Company v. SEC*, 198 F.2d 690 (2d Cir. 1952), the only case ever mentioned by this Court (and only in a footnote), was decided in 1952, prior to the 1975 amendment to the

Exchange Act, which gave the SEC the power to "abrogate" NASD rules for the first time. *See In re Stock Exchs. Options Trading Antitrust Litig.*, No. 1283, 2001 WL 128325, at *5-6 (S.D.N.Y. Feb. 15, 2001). So modification could not have been the basis for the court's ruling. Similarly, the Third Circuit did "not intimate any view on the constitutionality of the 1975 amendment." *Todd & Co. v. Sec. & Exch. Com.*, 557 F.2d 1008, 1012 n.6 (3d Cir. 1977). The Ninth Circuit stands alone in having done so. *See Sorrell v. SEC*, 679 F.2d 1323, 1326 (9th Cir. 1982).

In addition, courts in various circuits in various decades have analyzed private nondelegation cases based on whether the government retained the ability to "approve[ ], disapprove[ ], *or modif*[*y*]" regulations. *Adkins*, 310 U.S. at 388 (emphasis added); *see also Agendia, Inc. v. Becerra*, 4 F.4th 896, 903 (9th Cir. 2021); *Texas v. Rettig*, 993 F.3d 408, 415 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc); *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 896 F.3d 539, 546 (D.C. Cir. 2018) ("*Amtrak IV*"); *Amtrak I*, 721 F.3d at 671; *Pittston*, 368 F.3d at 394; *Planned Parenthood SE, Inc. v. Strange*, 9 F. Supp. 3d 1272, 1278 (M.D. Ala. 2014); *Krielow v. La. Dep't of Agric. &*

Forestry, 125 So. 3d 384, 389 (La. 2013).

The D.C. Circuit in *Amtrak I* explained that the ability to modify was key to the Supreme Court's decision in *Adkins*:

> *Adkins* . . . affirmed a modest principle: Congress may formalize the role of private parties in proposing regulations so long as that role is merely "as an aid" to a government agency that retains the discretion to "approve[], disapprove[], or modif[y]" them.

310 U.S. at 388.[4] Even the 2015 Congressional Research Service memorandum that warned Congress of HISA's impending nondelegation problem pointed out the agency in *Adkins* "could modify the rules as it saw fit." ROA.812.

In *Adkins*, the agency's power to modify minimum coal prices was, in effect, the power to rewrite the coal prices. In its hearing, the District Court explained it best: "The agency in *Adkins* had unilateral power, did it not, to rewrite the rules?" ROA.1812. The Court continued, "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 . . . ?" ROA.1813. Thus, the red pen, or the ability to draft by modification, is the *sine qua non* of legislative power.

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[4] In *Adkins*, the government also could "direct" private actors to propose regulations. Bituminous Coal Act, 50 Stat. 72, 79 (1937).

Defendants argue there's no "functional difference" between the wielding of a red pen and the FTC's ability to disapprove and recommend modifications. Authority Br. 48; *see also* FTC Br. 21-22. But HISA functions quite differently from any other statute because, by merely disapproving and recommending, the FTC does not have the power to write the regulation the way it wants. It cannot "determine" the regulation, as *Adkins* requires, 310 U.S. at 399; instead, the government must beg the Authority for what it wants. In a standoff between the government and the private entity, the government cannot have its way. If the Authority disagrees with the recommended modification, it retains the power not to submit any rule at all. This is a marked departure from the statutes in *Adkins* and in the SEC cases, and it reverses the relational positions of the parties. *Adkins* requires the private entity to "function subordinately" to the government, but HISA's failure to give the FTC a red pen ensures that the government "function[s] subordinately" to the private entity. *Id.*[5]

[5] Also, the government maintained the ability to modify in *Rettig*, *contra* Authority Br. 47, because the agency could rescind its rule at any time. 987 F.3d at 533.

3. The FTC cannot disapprove regulations based on policy.

The FTC's ability to disapprove and recommend modifications is further weakened by the fact that the FTC cannot disapprove a regulation if it disagrees with the Authority's chosen policy. Instead, the statute forces the FTC to approve every Authority rule that is "consistent with" HISA (and its own procedural rule). 15 U.S.C. § 3053(c)(2). This mere consistency review undermines what Defendants unfairly characterize as the FTC "independently perform[ing] its reviewing, analytical and judgmental functions." Authority Br. 39 (quoting *Rettig*, 987 F.3d at 532 (quoting *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974))). *See also* FTC Br. 11 (referencing "the FTC's 'independent' and 'critical[]' review" (quoting *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 447-48 (D.C. Cir. 2017))). Here, HISA fails to allow the independent review required by *Rettig* and *Susquehanna* and, instead, compels the "rubber stamping" this Court described in *Lynn*. 502 F.2d at 59.

The crux of this disagreement between the parties turns on whether one views HISA as specific or general in its terms. Defendants assert that HISA has "detailed requirements regarding many of the rules mandated by the Act." FTC Br. 37-38; *see also* Authority Br. 50.

But the Act itself gives the Authority broad powers to "establish a racetrack safety program" and "a horseracing anti-doping and medication control program" and gives the Authority a wide range of policy options to pick among in establishing these two programs. 15 U.S.C. §§ 3056(a)(1), 3055(a)(1). For example, while the medication control program portion of the statute sets a floor of prohibited substances, FTC Br. 38, it has no ceiling. 15 U.S.C. § 3055(g). And many of its requirements are not requirements at all but only aspirations that the Authority "shall take into consideration." *Id.* at § 3055(b).

Regarding the racetrack safety program, even the District Court, in its hearing, belied Defendants' characterization of specificity:

> 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?

ROA.1787-88.

Because there are few boundaries in the Act for what policies the Authority may choose to implement in establishing a racetrack safety program, the FTC must approve them, regardless of whether it agrees with them. As this Court has stated, when an agency reviews a proposed document only "for consistency with the Act's requirements," such review is only "ministerial" and is not an exercise of lawmaking power. *Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012). This situation is different from that of the SEC, which can "abrogate, add to, and delete from" regulations "as the Commission deems necessary or appropriate to insure the *fair administration* of" FINRA. 15 U.S.C. § 78s(c) (emphasis added); *cf*. Authority Br. 50. The SEC maintains broad discretion to amend rules under a flexible "fair administration" standard, but the FTC reviews Authority rules only for consistency.

Also, HISA's consistency review restricts the government far more than the statute in *Adkins*. The Authority notes that in both cases the regulations must be consistent with the statute, Authority Br. 50, but only in HISA is that the end of the inquiry. In *Adkins*, the government otherwise maintained the discretion to "approve, disapprove, or modify" regulations. Bituminous Coal Act, 50 Stat. 72, 79 (1937). Additionally, the government was reviewing regulations incidental to only one policy:

the minimum price of coal—and even that policy could be rewritten by the government. In contrast, HISA has granted the Authority broad policymaking power over an entire industry; therefore, the scope of the potential delegation is vastly different.

A real-world example illustrates just how broad the Authority's power is. HISA says nothing about horseshoes. Yet the Authority's regulations on racetrack safety prohibit horseshoes from having a toe grab, which is akin to a football cleat. ROA.1120. Racetrack veterinarians commented that toe grabs should be allowed on hind legs for horses racing on dirt tracks to provide traction at the start of a race, per the practice followed throughout the U.S. ROA.1440. But the FTC found the horseshoe rule to be consistent with a vaguely worded directive for "the humane treatment of covered horses," and specifically admitted that it could not enter into the merits of this debate or disapprove a regulation based on "policy":

> Commenters did not address the Horseshoe rule's consistency with the Act. Rather, the comments challenge certain details in the Authority's choice of permitted horseshoes, but these are essentially *policy disagreements*. Section 3056(b)(2) of the Act allows "racing safety standards . . . consistent with the humane treatment of covered horses," which "may include . . . permitted and prohibited practices or methods." The Commission notes that Rule 2276 is especially consistent with § 3056(b)(2) of the Act.

ROA.1441 (emphasis added).[6] By prohibiting the government from deciding policy, HISA deprives it of the power to "determine" regulations, which the Supreme Court requires under *Adkins*. Determining policy is the essence of legislative power. *See Amtrak II*, 575 U.S. at 90 (Thomas, J., concurring in the judgment) ("to the extent that [a] decision involves an exercise of policy discretion, it requires an exercise of legislative power"). By the FTC's own admission, it's the Authority which decides policy and, thus, exercises legislative power.

[6] Defendants complain that the horseshoe-toe grab rule and other examples of the Authority's overreach amount to as-applied challenges to HISA. FTC Br. 40; Authority Br. 52. That's not so. The Horsemen are not challenging specific portions of regulations or arguing that they're arbitrary and capricious; that challenge lies elsewhere. *See Louisiana v. HISA*, No. 22-30458 (5th Cir.). The Horsemen's examples serve only to illustrate their points. The disagreement over the horseshoe rule shows the FTC's lack of policy-making power. The Authority's ability to blow past the statutory deadline for the medication control regulation with impunity shows the FTC's lack of sufficient authority and surveillance. Horsemen Br. 27, 36. The FTC's own admission that it lacks sufficient time to evaluate rules shows both its lack of policy-making power and its insufficient oversight. Horsemen Rule 28(j) letter re: *Louisiana v. HISA* at 2. The FTC's own admission that the Authority is "best positioned" to answer certain questions about HISA also shows its insufficient oversight. *See* FTC Letter to Representative Mullin, Aug. 8, 2022, *available at* https://traoracing.com/PDF/20220808-LettertoRepMullin-re-HISA.pdf.

C. The FTC does not exercise sufficient authority and surveillance over the Authority.

The Authority admits that the FTC's power is limited and states that it's "axiomatic" that Congress may limit a governmental agency's affirmative power to promulgate lawmaking regulations. Authority Br. 45. But that limitation is vis-à-vis *Congress*—not an unelected private entity. *Adkins* requires that the FTC exercise "authority and surveillance over the activities" of the Authority. 310 U.S. at 399. But this it does not have.

The FTC, for example, states that it must approve all Authority fees levied on horsemen and state racing commissions. FTC Br. 45. But it fails to mention that the FTC can only disapprove a fee if it's inconsistent with the Act. And the only limitation on initial fees in the Act is that they "shall be allocated toward funding of the Authority and its activities." 15 U.S.C. § 3052(f)(4). Therefore, in practice, the FTC cannot disapprove fees at all, and it has zero power over the expenditure of those revenues. Five judges of this Court recently said, "An administrative agency with extensive executive, legislative, and adjudicative authority and complete budgetary independence has no place in our constitutional system." *Consumer Fin. Prot. Bureau v. All*

Am. Check Cashing, Inc., 33 F.4th 218, 231 (5th Cir. 2022) (Jones, J., concurring). This statement is all the more true as applied to a private entity.

Again, the FTC's authority and surveillance are strikingly less than those of the SEC, which has "extensive oversight, supervision, and control" over FINRA. *Austin Mun. Secur., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 680 (5th Cir. 1985); *see also* Horsemen Br. 57-58. The SEC may amend FINRA rules whenever it deems "appropriate to insure the fair administration of" FINRA. 15 U.S.C. § 78s(c). Further, the SEC has decades of expertise and required trained professionals to oversee the fair administration of FINRA. In contrast, the FTC has no "independent expertise in the horseracing industry." ROA.426. The FTC says no court has ever used that fact as the basis for enjoining a statute on delegation grounds, FTC Br. 44, but again, it fails to recognize that no statute has ever made such a capacious delegation with such limited oversight.[7]

[7] The FTC also states that the Horsemen waived this argument because they agreed to be regulated by the FTC. FTC Br. 45. They did not. At the hearing, counsel for the Horsemen pointed out the *primary* problem with HISA is the powers given to the private entity, which is "[r]eally more constitutional than anything" else. ROA.1836. The Horsemen

Finally, the FTC's lack of "authority and surveillance" over the activities of the Authority is evident in its inability to force the Authority to affirmatively comply with HISA. The FTC proudly states that it "direct[ed] the Authority to submit to the Commission a supplemental proposed rule" regarding property seizure, FTC Br. 40-41, but it fails to mention that such directive occurred in an order *approving* the Authority's enforcement rule. HISA leaves the FTC powerless to enforce this directive—or to penalize any other inaction by the Authority.

For example, the Authority missed its statutory deadline of July 1, 2022, for implementing the medication control program, but the FTC had no authority to force it to comply or to discipline it. *Compare* 15 U.S.C. § 3051(14) *with* ROA.1124. The FTC is a toothless tiger, and the Authority knows it.

A more appalling example occurred recently when the Authority changed its mind regarding its ban on horseshoe toe grabs. *See supra* part II.B.3. After receiving public blowback from its enacted rule, the

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advocated for the creation of an office within the U.S. Department of Agriculture National Veterinary Services Lab to establish and oversee uniform laboratory protocols. ROA.768.

Authority unilaterally announced that it would not enforce the rule: "Rule 2276 shall not be enforced for horses racing on dirt surfaces that are shod on the hindlimbs with traction devices . . . ."[8] Not only does the Authority have the power to make the rules, but also it has the power not to enforce its own rules. This is on par with all-powerful prosecutorial discretion. It completely undermines the FTC's role in approving a rule for the Authority to turn around a month later and act like it never happened. By ignoring regulations that supposedly have been promulgated by the FTC, the Authority reveals that it believes the FTC "function[s] subordinately" to the Authority and not the other way around. *Adkins*, 310 U.S. at 399. That the FTC has no disciplinary power over such brazen Authority actions shows it was not given "authority and surveillance over the activities" of the Authority. *Id*. at 399.

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[8] Authority, *Rule 2276 Announcement*, July 29, 2022, *available at* https://static1.squarespace.com/static/604f6ab712afe14e11227976/t/62e3edcb13ecc920a9cffad4/1659104715305/Horseshoe+Rule+Update+7.29.22+.pdf (last visited Aug. 14, 2022).

III. HISA violates the Due Process Clause because it gives economically self-interested actors the power to regulate their competitors.

The Authority and its statutorily-recognized standing committees include persons who are economically interested in the horseracing industry. Defendants claim that board members may not have a financial interest in covered horses, Authority Br. 57; FTC Br. 46, but they fail to point out that the conflict-of-interest provision does not apply to industry members on the Authority's standing committees, including the chairman of the racetrack safety standing committee. 15 U.S.C. § 3052(e), (c)(2)(C).[9] In practice, these standing committees on racetrack safety and medication control provide the initial guidance for developing the Authority's regulations, so they play a critical role in the exercise of its legislative powers. *Id.* at § 3052(c)(1)(A), (c)(2)(A); ROA.398.[10] It's undisputed that they may contain persons who compete directly with the Horsemen in the horseracing industry. *Id.* at § 3052(e) & (c)(2)(C).

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[9] The conflict-of-interest provision also does not apply to industry insiders on the nominating committee. 15 U.S.C. § 3052(e).

[10] Imagine if Congress had an ethics law that applied only to floor votes and not to committee work; the two are part-and-parcel of the legislative process.

In addition, it's undisputed that four Authority board members are industry members selected from—among other things—owners, breeders, and racetracks. Many members of these constituencies compete directly with the Horsemen.

In short, Defendants treat the Authority as if it were the NASD or its successor FINRA, democratic organizations made up of virtually all the members of the industry and that have been in existence for decades. Authority Br. 5. But unlike the private entities in the SEC cases, *Adkins*, *Carter Coal*, *Currin*, and its progeny, the Authority is not made up of a broad majority of participants in an industry. It's a shadowy "business league" of insiders. Authority Br. 5. It's bad enough for democracy when a large, established private organization receives special treatment from Congress, but it's even worse when a small group of industry insiders convinces Congress, in essence, to create a tiny, private organization by statute and then imbue its actions with the force of federal law. ROA.580-85. This is "legislative delegation in its most obnoxious form," and it violates the Due Process Clause of the Fifth Amendment. *Carter Coal*, 298 U.S. at 311.

CONCLUSION

This Court should reverse the opinion of the District Court.

Respectfully submitted,

August 17, 2022

s/ Daniel Robert Suhr
Daniel Robert Suhr*
Reilly Stephens
Jeffrey D. Jennings
Liberty Justice Center
440 North Wells Street, Suite 200
Chicago, Illinois 60654
Telephone (312) 637-2280
dsuhr@libertyjusticecenter.org
rstephens@libertyjusticecenter.org
jjennings@libertyjusticecenter.org

Fernando M. Bustos
Bustos Law Firm, P.C.
1001 Main Street, Suite 501
Lubbock, Texas 79408
Telephone (806) 780-3976
fbustos@bustoslawfirm.com

* *Counsel of Record*

Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that on August 17, 2022, I caused a copy of the foregoing document to be served on all registered counsel of record via the Court's ECF filing system.

s/ Daniel Robert Suhr
Attorney of record for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

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s/ Daniel Robert Suhr
Attorney of record for Plaintiffs-Appellants

August 17, 2022