

**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,
LOUISIANA HORSEMEN'S BENEVOLENT AND
PROTECT ASSOCIATION,
MOUNTAINEER PARK HORSEMEN'S BENEVOLENT
AND PROTECTIVE ASSOCIATION,
NEBRASKA HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION,
OKLAHOMA HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION,
OREGON HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION,
PENNSYLVANIA HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION, AND
WASHINGTON HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION,

Plaintiffs,

v.

JERRY BLACK; KATRINA ADAMS; LEN COLEMAN;
NANCY COX; JOSEPH DUNFORD; FRANK KEATING;
KEN SCHANZER; the HORSERACING INTEGRITY AND
SAFETY AUTHORITY, INC.; the FEDERAL TRADE
COMMISSION; REBECCA KELLY SLAUGHTER, in her
official capacity as Acting Chair of the Federal Trade
Commission; ROHIT CHOPRA, in his official capacity as
Commissioner of the Federal Trade Commission; NOAH
JOSHUA PHILLIPS, in his official capacity as Commissioner
of the Federal Trade Commission; and CHRISTINE S.
WILSON, in her official capacity as Commissioner of the
Federal Trade Commission,

Defendants.

No. 5:21-CV-00071-H

**THE NORTH AMERICAN
ASSOCIATION OF
RACETRACK
VETERINARIANS' MOTION
FOR LEAVE TO FILE
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**

TO THE HONORABLE JAMES WESLEY HENDRIX, UNITED STATES DISTRICT JUDGE
PRESIDING:

Pursuant to Local Rule 7.2(b), Amicus Curiae—The North American Association of Racetrack Veterinarians (“hereinafter “NAARV”)—respectfully moves this Court for leave to file an amicus curiae brief in support of Plaintiffs’ First Amended Complaint for Declaratory and Injunctive Relief (Doc. 23) and Plaintiffs’ Motion for Partial Summary Judgment (Doc. 37) and in opposition to Defendants’ Motions to Dismiss (Docs. 34 & 36).

On March 15, 2021, Plaintiffs filed their Complaint challenging the recently enacted federal Horseracing, Integrity, and Safety Act (“HISA”). (Doc.1) Under the terms of the Court’s Scheduling Order, the parties are to file dispositive motions by April 30, 2021, with briefs limited to 30 pages in length, response briefs to be filed by May 28, 2021, with Defendants’ briefs limited to 30 pages in length, and Plaintiffs’ brief limited to 40 pages in length, and reply briefs to be filed by June 18, 2021, with defense briefs limited to 15 pages each, and Plaintiffs’ brief limited to 20 pages. (Docs. 16 & 29)

Amicus, NAARV, is a professional association of licensed veterinarians specializing in the treatment, health, and welfare of the racehorse. It is a Kentucky based 501 (c) (6) non-profit organization established in 2015 dedicated to advancing the health and welfare of the racehorse through evidence-based medicine and the continuing education of the professionals and public involved with the sport. It is the only trade organization that is comprised solely of the veterinarians charged with the health and welfare of the equine racing athlete. NAARV represents racetrack veterinary practitioners in all horseracing jurisdictions that are licensed by both state veterinarian licensing agencies as well as state racing commissions and regulators.

NAARV has an interest in this case because its members are “covered persons” pursuant to 15 U.S.C.A. § 3051(6) which defines “covered persons” as “...all trainers, owners, breeders,

jockeys, racetracks, veterinarians, persons (legal and natural) licensed by a State racing commission and the agents, assigns, and employees of such persons and other horse support personnel who are engaged in the care, training or racing of covered horses.”

All racetrack veterinarians are licensed by the State and the Horse Racing Commission of the State. Accordingly, all racetrack veterinarians, are directly affected by the defects of the HISA legislation. NAARV is further affected in that its mission of ensuring the health and well-being of the racehorse through the protection and improvement of the veterinary care of the equine athlete is undermined by the burdens of the HISA legislation upon the licenses of its members and their goal of ensuring the welfare of the equine athlete.

An Amicus brief is, therefore, desirable for the Court to hear from this organization and its concerns about the safety and well-being of racehorses in America, and the unconstitutional nature of HISA as it pertains to due process for racetrack veterinarians.

This Court has traditionally allowed interested parties to file Amicus briefs in significant cases that are pending before it, such as the instant case. *See, e.g.,* Order, *Nat’l Fed’n of Indep. Bus. v. Perez*, No. 5:16-CV-66-C (N.D. Tex. May , 2016), ECF No. 38 (granting the motion for leave to file an amicus brief from both the Chamber of Commerce and the Washington Legal Foundation); Order, *Taylor v. Williams*, No. 5:14-CV-149-C (N.D. Tex. Mar. 29, 2016), ECF No. 64 (granting the Attorney General’s amicus curiae advisory); Order, *Fonovisa, Inc. v. Alvarez*, No. 1:06-CV-011-C (N.D. Tex. June 15, 2006), ECF No. 26 (considering the amicus curiae brief of Electronic Frontier Foundation in support of the defendant’s motion to dismiss); Order, *Welch v. U.S. Air Force*, No. 5:00-cv-392 (N.D. Tex. Sept. 23, 2002), ECF No. 74 (allowing the state of Texas to file an amicus brief).

In preparing the proposed amicus brief that accompanies this Motion as Exhibit A, the Amicus have reviewed the filings of the parties and have endeavored to address issues raised by the pleadings without making redundant arguments as well as to offer a unique perspective on the issues raised by this case.

This motion should be granted and Amicus Curiae, The North American Association of Racetrack Veterinarians, should be permitted to file the amicus curiae brief that is attached as Exhibit A.

DATED: May 14, 2021

Respectfully Submitted,

/s/ Peter J. Sacopulos

Peter J. Sacopulos

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ATTORNEYS FOR AMICUS CURIAE

Motion for admission pro hac vice pending.

CERTIFICATE OF CONFERENCE

Counsel for Plaintiffs agree with the relief sought in NAARV’s brief, and Counsel for Defendants, on May 3, 2021, via email, stated they did not oppose the Motion for Leave, so long as such Motion was filed by May 14, 2021, and the brief was no longer than 15 pages. This Motion and brief comply with both of those requests, therefore this is an unopposed motion.

/s/ Peter J. Sacopulos
Peter J. Sacopulos

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court, the electronic filing system sent a “Notice of Electronic Filing” to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Peter J. Sacopulos
Peter J. Sacopulos

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
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Pleading	Party	Date	Docket No.
Motion to Dismiss and Brief In Support	Defendants Jerry Black, Katrina Adams, Leonard Coleman, Nancy Cox, Joseph Dunford, Frank Keating, Kenneth Schanzer, and Horseracing Integrity and Safety Authority, Inc.	4/30/2021	34

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus, NAARV, is a professional association of licensed veterinarians specializing in the treatment, health, and welfare of the racehorse. It is a Kentucky based 501 (c) (6) non-profit organization established in 2015 dedicated to advancing the health and welfare of the racehorse through evidence-based medicine and the continuing education of the professionals and public involved with the sport. It is the only trade organization that is comprised solely of the veterinarians charged with the health and welfare of the equine racing athlete. NAARV represents racetrack veterinary practitioners in all horseracing jurisdictions that are licensed by both state veterinarian licensing agencies as well as state racing commissions and regulators.

Pursuant to Local Civil Rule 7.2(b), NAARV has an interest in this case because its members are “covered persons” pursuant to 15 U.S.C.A. § 3051(6) which defines “covered persons” as “...all trainers, owners, breeders, jockeys, racetracks, veterinarians, persons (legal and natural) licensed by a State racing commission and the agents, assigns, and employees of such persons and other horse support personnel who are engaged in the care, training or racing of covered horses.”

All racetrack veterinarians are licensed by the State and the Horse Racing Commission of the State. Accordingly, all racetrack veterinarians, are directly affected by the defects of the HISA legislation. NAARV is further affected in that its mission of ensuring the health and well-being of the racehorse through the protection and improvement of the veterinary care of the equine athlete is undermined by the burdens of the HISA legislation upon the licenses of its members and their goal of ensuring the welfare of the equine athlete.

II. INTRODUCTION: SUMMARY OF ARGUMENT

On December 27, 2020, as part of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020), Congress passed the Horseracing Integrity and Safety Act of 2020. *Id.* div. FF, tit. XII § 1201, 134 Stat. at 3252.¹ The National HBPA and its affiliates (hereinafter collectively referred to as “HBPA”) have moved this court for a ruling declaring HISA unconstitutional and enjoining the HISA Board of Directors and Standing Committees, appointed this past week, from regulating medication and track safety matters in thoroughbred racing.

The North American Association of Racetrack Veterinarians (hereinafter “NAARV”)² has an interest in, and were it a party like Plaintiffs, has standing to make its view known to the Court contesting the constitutional infirmities of the HISA. It does so because NAARV, like Plaintiffs, meets the test of standing as set out in the case law. The Fifth Circuit’s approach to standing and ripeness is straightforward. It is:

To meet the constitutional standing requirements, (1) the plaintiff must have suffered an ‘injury in fact’ . . . that is (a) concrete . . . (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of . . ., and (3) it must be likely, not merely speculative, that the injury will be a redressed by favorable decision.”

Texas v. United States, 497 F.3d 491, 497 (5th Cir. 2007) (standing exists because Texas compelled to participate in an invalid administrative process).

Regarding the related doctrine of ripeness, NAARV, like Plaintiffs also meets the criteria in that this legislation will imminently affect their ability to care for and therapeutically medicate

¹ All references to Title XII, Division FF of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020), shall be styled “HISA.”

² NAARV certifies that no part of this Brief was authored by counsel for any party, and no person or entity other than NAARV made any monetary contributions to the preparation or submission of this Brief.

the equine athlete. The Fifth Circuit explained “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.” *Monk v. Huston*, 340 F.3d 279, 283 (5th Cir. 2003).

The due process rights of NAARV are violated by HISA. This is, in part, because 15 U.S.C.A § 3058 entitled “Review of Final Decision of the Authority” violates both the substantive and procedural due process rights of NAARV members as “covered persons” under the Act.

To be a racetrack veterinarian, members of NAARV must secure two licenses. First, they must secure a license issued by the state, typically the state veterinarian licensing board that entitles members to practice general veterinarian medicine. A second license is also required to work on the “backside” of a racetrack where many thoroughbred horses are stabled. The second license is issued by state regulators authorized to govern horse racing such as state racing commissions or authorities.

Racetrack veterinarians, with the enactment of HISA, are subject to two paralleling systems of review. The first system governs any allegation of wrongdoing involving medication and/or track safety violations which will be adjudicated before the Authority and the Federal Trade Commission. All allegations other than medication and track safety violations will remain subject to adjudication pursuant to state law and before state regulators.

This is significant because allegations against or initial findings of wrongdoing by a member of NAARV, pursuant to HISA, result in a report to the Federal Trade Commission and, therefore, a federal violation. A federal violation would inevitably result in the loss of not only the NAARV member’s track license, but also the loss of the member’s professional license to practice veterinarian medicine. Therefore, members of NAARV are not able to “take the deal” on

a minimum violation but are forced to defend their position to maintain their license and their livelihood. Prior to the implementation of HISA, NAARV members were able to negotiate a state violation without necessarily risking their general veterinary license. They are forced to do so in a system, created under 15 U.S.C.A § 3058, that deprives them of both substantive and procedural due process.

15 U.S.C.A § 3058 violates NAARV members' substantive and procedural due process rights. It does so by establishing a closed system of self-review that provides no guarantee to review by the Federal Trade Commission (hereinafter "FTC") and a cost prohibitive appeal process directly to a United States Court of Appeals. NAARV members, as covered persons under the Act, are therefore denied both substantive and due process rights by 15 U.S.C.A § 3058 because its application subjects the covered person to a different adjudication system with consequences far more severe than exists under the state-based system.

III. ARGUMENT

A. STANDING

NAARV has standing to and an interest in supporting Plaintiff's claims contesting the constitutional infirmities of the HISA. It does so because NAARV meets the test of standing as set out in the case law. The Fifth Circuit's approach is straightforward.

“[t]he gist of the question . . . is whether the party seeking relief has alleged a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions. . . To meet the constitutional standing requirements, (1) the plaintiff must have suffered an ‘injury in fact’ . . . that is (a) concrete . . . (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of . . . , and (3) it must be likely, not merely speculative, that the injury will be a redressed by favorable decision.”

Texas v. United States, 497 F.3d 491, 497 (5th Cir. 2007) (standing exists because Texas compelled to participate in an invalid administrative process).

“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. But one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.”

#

Where 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 disputed provisions will come into effect.”

Roman Catholic Diocese v. Sebelius, 927 F. Supp.2d 406, 418, 421 (N.D. Texas 2013) (emphasis added).

Focusing on the related doctrine of ripeness the Fifth Circuit explained: “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.” *Monk v. Huston*, 340 F.3d 279, 283 (5th Cir. 2003). Yet even where an issue presents purely legal questions, “the plaintiff must show some hardship in order to establish ripeness.” *Texas v. United States*, supra, 497 F.3d at 499.

Regarding “hardship,”: “The Supreme Court has found hardship to inhere in legal harms, such as 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.” *Choice Incorporated of Texas v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012).

The negative effects of the legislation upon the equine and horseracing industries are substantial and represent a total remaking of the industry. The legislation further places demands upon racetrack veterinarians both as to compliance and as to the maintenance of their professional licenses.

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

(hereinafter “HISA Defendants), argue that no rules have even been proposed and, therefore, the HBPA’s challenge(s) is/are not ripe. Mtn to Dismiss and Brief In Support (“HISA MTD”) p.10, Doc. No. 34. That argument is contradicted by 15 U.S.C.A. § 3055 (g)(1) entitled “Baseline anti-doping and medication control rules” which states “(1) In general.—Subject to paragraph (3), the baseline anti-doping and medication control rules described in paragraph (2) shall—(A) constitute the initial rules of the horseracing anti-doping and medication control program....” and 15 U.S.C.A. § 3055 (g) (2) goes on to require that the baseline anti-doping and medication control rules be taken from lists currently recommended and distributed by several different organizations including the Association of Racing Commissioners International (“ARCI”).

More important and imminently harmful for NAARV members, is HISA’s ban on the race day administration of furosemide (commonly called Lasix). 15 U.S.C.A. § 3055 (d) provides that no medication shall be administered within 48 hours of a race. Lasix prevents and lessens a serious health hazard that afflicts 90% of racehorses – Exercise Induced Pulmonary Hemorrhaging or “bleeding in the lungs.” Lasix has been prescribed and administered to horses on race day for the last 40 years. It has proved safe, effective, and its race day use is authorized on race day by every state Racing Commission.

B. DUE PROCESS

The HISA legislation essentially nationalized the areas of medication and track safety of the Thoroughbred horseracing industry. HISA violates NAARV’s members’ right to due process, both as to substantive due process and as to procedural due process by removing a level playing field for the defense of allegations of violations pursuant to 15 U.S.C.A § 3058 of the act.

NAARV is a professional association of racetrack veterinarians. Its goal is advancing the health and welfare of the racehorse through evidence based veterinary medicine, expanding

scientific knowledge, and the continuing education of the professionals and public involved in the sport. See NAARV's mission/goal statement at <https://www.naarv.org/mission>. NAARV represents racetrack practitioners in all 35 states that have racetracks. Its members are licensed to practice at more than 75 racetracks.

Each member of NAARV is issued a license by the state veterinarian licensing agency as well as a state occupational license by that state racing commission and/or state authorities that govern thoroughbred racing. NAARV members' state-issued occupational license constitutes: "a property interest...sufficient to invoke due process protections..." *Barry v. Barchi*, 433 U.S. 55, 64 (1979). That license may not be taken away or suspended without providing both procedural and substantive due process. Procedural due process requires, among other things, the reasonable right to notice of the charges and an opportunity to be heard: "...at a meaningful time and in a meaningful manner...." *Armstrong v. Manzo*, 380 US 545, 552 (1965).

Substantive due process requires that there must be a rational relationship between a legitimate government purpose of a regulation (i.e. insuring the integrity of pari-mutuel racing) and the means chosen for that desired end (i.e. promulgation of regulations prohibiting the use of a substance that effects the performance of a racehorse). "Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation." See Chemerinsky, Erwin (1999) "Substantive Due Process," *Touro Law Review*. Vol. 15: No. 4, Article 15, p. 1501.³

15 U.S.C.A § 3055 (C)(4)(A)(B), 3057 (c), and 3058 set forth the disciplinary process for alleged medication and track safety violations. That process violates NAARV members' constitutionally guaranteed right of due process. This violation of racetrack veterinarians' due

³ Available at <https://digitalcommons.tourolaw.edu/lawreview/vol15/iss4/15>

process rights becomes apparent when comparing the due process rights they enjoy under the state regulatory system versus their rights to due process under HISA.

Specifically, most state disciplinary procedures, allow a racetrack veterinarian the right to be heard and present a defense through an administrative law process and, thereafter, a judicial process. In most jurisdictions, the administrative process is governed by the Administrative Procedures Act. That process begins with the licensee presenting a response to track officials, known in thoroughbred racing as Stewards. This is commonly referred to as a “Stewards’ Hearing.” If the racetrack veterinarian/licensee believes the Stewards’ recommended penalty is unfair, unjust, or otherwise unsupported, he or she has the right to appeal the decision. The appeal is conducted by a state commission or state regulatory authority-appointed Administrative Law Judge. The Administrative Law Judge conducts a hearing on the merits and, at the conclusion of this hearing, issues findings of fact, conclusions of law, and a recommended penalty or no penalty. *See* 5 USCS § 556, 557. The racetrack veterinarian/licensee has the right, in most jurisdictions, to timely appeal the Administrative Law Judge’s decision to the state commission or governing authority. In most jurisdictions, this constitutes the final stage of the administrative process. Having exhausted his or her administrative remedies, the licensee may then seek judicial review in state court. On the other hand, 15 U.S.C.A § 3055 (c) (4)(A)(B), 3057 (c), and 3058 present a significant departure from the state regulatory system.

In contrast, HISA’s disciplinary process originates with the Anti-Doping and Medication Control Enforcement Agency. 15 U.S.C.A. § 3055 (c)(4)(B)(C). Upon concluding a violation has occurred, this agency conducts an investigation, issues charges, and adjudicates the potential medication control rule violation. Any sanction issued by the Anti-Doping and Medication Control Enforcement Agency constitutes the final decision and/or civil sanction of the Authority. It is

unknown whether a hearing will be conducted at this stage and, if so, whether an Administrative Law Judge or the Anti-Doping and Medication Control Enforcement Agency itself will conduct any such hearing.

Next, the Anti-Doping and Medication Control Enforcement Agency and/or the Authority files a notice of sanction(s) with the FTC. Either party, the FTC or the covered person, may request a review of said sanction by the FTC. 15 U.S.C.A § 3058 (b) (1). If the request for review is timely filed, the matter is submitted to an Administrative Law Judge for a de novo review. 15 U.S.C.A. § 3058 (b) (1). 15 U.S.C.A § 3058 (b) is silent as to whether a hearing conducted at this stage is a merits hearing or not. The Administrative Law Judge may affirm, reverse, modify, set aside, or remand the notice of sanction for further proceedings. *See* 15 U.S.C.A § 3058 (b)(3)(A)(ii). The Administrative Law Judge's decision constitutes the final decision of the FCT unless an Application for Review is submitted pursuant to 15 U.S.C.A. § 3058 (c) and is accepted by the FTC.

The Administrative Law Judge, who is appointed by the FTC's Office of Administrative Law Judges and is employed by the FTC, conducts the hearing. The covered person, under HISA, has no right or input as to the selection of the Administrative Law Judge and, although the Administrative Procedures Act specifically provides for Alternative Dispute Resolution, HISA makes no mention of mediation or other forms of alternative dispute resolution being available to the covered person. *See* 5 U.S.C.S., Pt. I, Ch. 5, Subch. IV.

The final step of the administrative/agency process under HISA is a right to review directed to the Federal Trade Commission. It is at this point that the due process afforded to the racetrack veterinarian/covered person is both truncated and violated. It is so for two primary reasons.

The first reason being that the covered person has no right to review before the Federal Trade Commission. The Federal Trade Commission may accept the covered person's application for review or refuse the covered person's application for review. *See* 15 U.S.C.A § 3058 (c). Absent the FTC accepting the licensee's application for review, the FTC-appointed Administrative Law Judge's findings of fact, conclusions of law, and recommended penalty becomes the final order of the agency. *See* 15 U.S.C.A § 3058 (c)(2)(B). In the event that the FTC does agree to accept the application for review, a hearing is conducted by and before the FTC and that ruling is a final appealable decision.

The second difference between the state administrative/judicial system of resolution and that under the Act is even more problematic and significant to members of NAARV. It is so because an appeal of either the FTC's refusal of an application for review and/or the application for review being heard and decided by the FTC, requires an appeal to a court of law, but in the case of the Act, not to a state court. Instead, the covered person's right to judicial review, pursuant to Title 5, Chapter 7 of the United States Code, is directly to a United States Court of Appeals (See 5 USC §702 and 5 USC §706). On average, the cost of having a matter heard before the United States Court of Appeals is \$20,000 to \$50,000. *See* Donna Bader, *FAQ*, (2011).⁴ This constitutes a cost that the vast majority of covered persons, including NAARV members, cannot afford and as such, acts as a deterrent to the exercise of rights. In short, the Act presents a financial barrier to due process review. It creates a cost or premium for substantive due process rights that is unobtainable for most NAARV members and thus, results in a denial of their due process rights.

⁴ Available at

<http://www.anappealthereason.com/faq/#:~:text=An%20average%20appeal%20can%20cost,way%20to%20the%20Supreme%20Court> (last visited May 10, 2021).

Additionally, the truncating and violating of due process rights under HISA and, specifically, 15 U.S.C.A § 3058, places the racetrack veterinarians at a greater risk than other covered persons. This is because a violation under HISA is a federal violation and results in required reporting and loss and/or suspension of one's license to practice veterinary medicine. The same is not true of a state regulated and adjudicated claim. This places the racetrack veterinarian/covered person's state issued veterinarian license and general license to practice veterinary medicine at risk. In essence, it places their entire livelihood at risk.

For example, the racetrack practitioner who fails to properly or fully complete a field of information on a medical record or, inadvertently administers a therapeutic medication intramuscularly rather than intravenously is now placed in a significantly different and more precarious position under HISA. That racetrack veterinarian/covered person is faced with defending the allegation before an Administrative Law Judge that is selected by, appointed by, paid by, and retained by the opponent. The same racetrack veterinarian/covered person is denied any input on the selection or appointment of the Administrative Law Judge and is without the right or remedy of alternative dispute resolution. The NAARV member is not even guaranteed a right to be heard on the merits by the overseeing agency, the FTC. Instead, that track practitioner/covered person is forced to be heard, for the first time, in an independent forum, which is a United States Court of Appeals. For that right, he or she is also guaranteed tens of thousands of dollars of legal costs which would not be incurred in the state administrative judicial process.

The racetrack practitioner/covered person is placed in a similar position of one accused of rolling through a stop sign only to have his or her case determined by a local judge selected, appointed, paid for, and retained by the local prosecutor or state's attorney and, thereafter, being

afforded one path forward, that being a review to a United States Court of Appeals. Such a system is, on its face, a violation of the racetrack veterinarian's guaranteed right to due process.

State veterinarian licensing boards embrace and enforce reciprocity. Therefore, the racetrack veterinarian described above would likely be excluded from treating thoroughbred horses not only at the racetrack where the alleged violation occurred, and in the state where the alleged violation occurred, but at all thoroughbred racetracks in all racing jurisdictions.

Additionally, HISA, at 15 U.S.C.A § 3058, does not address burden of proof, rules, or regulations regarding the introduction of evidence or offering of testimony, or the exorbitant costs, which is in most cases is unobtainable, of proceeding with an appeal before the United States Court of Appeals.

C. BANNING LASIX HARMS THE EQUINE ATHLETE AND PLACES NAARV MEMBERS IN A POSITION OF VIOLATING THE VETERINARIAN'S OATH

As we noted above, Lasix administration on race day over the past forty (40) years has been lawful under our state regulatory system and has proved to be safe and effective. Without its continued use, horses will likely suffer serious injury and, in some cases, death.

As professional veterinarians, NAARV members take an oath to promote and protect the health and welfare of animals including, in the case of NAARV, the equine racing athlete. NAARV has, from the outset, opposed this legislation as it pertains to the issue of administration of therapeutic medications and, specifically, Lasix.

Lasix is a diuretic medication that is routinely administered to thoroughbred horses to help prevent Exercised Induced Pulmonary Hemorrhage (EIPH). EIPH is the presence of blood in the airways of the lung in association with exercise.

NAARV's position is set forth in a Press Release found on its website and that states:

- The bill's elimination of raceday furosemide, or Lasix. This administration is solely for the benefit of the health and welfare of the athlete. The safe, effective, highly regulated and transparent use of Lasix is supported by scientific and medical evidence.
- Equating human testing with horse testing. The horse racing industry tests over 250,000 samples per annum, as compared with USADA's oversight of 11,000 human athletes. Horse racing drug laboratories test for more substances at lower concentrations than in human sports, with a violation rate less than half that observed in human sports. Of the 0.6% of violations in horse racing, over 90% are trace levels of therapeutic medications, and not performance enhancing drugs. USADA has NO experience in equine testing or regulation, which includes the equine athletes at the Olympics.
- Inadequate veterinary medical representation. The governing body (the "Authority") would have only one veterinarian in its makeup, and such a veterinarian may be either a practitioner or regulator. Practitioners hold the expertise in equine veterinary practice with regard to racehorses. They are integral to the health and well-being of the equine athlete and cannot be marginalized.
- Standardized thresholds must be based on experimental and clinical evidence gathered and presented transparently with appropriate peer review. Failure in this area creates danger for horses, horsemen, and veterinarians alike.
- No recognition that medication rules are appropriately separate for different sports. This bill unfairly combines no less than 4 different sports and multiple breeds that are inherently distinct.

See NAARV, *Press Release* (2020).⁵

NAARV bases its position on years of study, scientific evidence, and experience regarding the treatment and welfare of the equine athlete.

NAARV submits that the implementation of HISA, including the ban on race day Lasix, will irreparably harm the racing industry and the livelihood of its veterinarian members. That is because NAARV members will be unable to honor their oath to care for the equine athlete that is engaged in the highly competitive and stressful sport of thoroughbred racing.

⁵ Available at <https://www.naarv.org/press-releases>. (last visited May 11, 2021)

IV. CONCLUSION

In conclusion, the truncating and violating of due process rights of racetrack veterinarians that comprise NAARV all of which further evidences the required but missing right to due process for NAARV members as covered persons under the Act.

When the stakes are highest, the right and need for due process rights are at the highest. In this case for members of NAARV, as covered persons under the Act, those rights are needed but absent. HISA violates and truncates NAARV members' rights to due process that are constitutionally guaranteed. HISA should be found to be unconstitutional and all efforts to implement HISA enjoined.

DATED: May 14, 2021

Respectfully Submitted,

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ATTORNEYS FOR AMICUS CURIAE

Motion for admission pro hac vice pending.

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court, the electronic filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Peter J. Sacopulos

Peter J. Sacopulos