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,

v.

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

Defendants.

No. 5:21-cv-00071-H

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

In accordance with this Court's Scheduling Order [Dkt. 16], and Order modifying it [Dkt. 29], Plaintiffs (the "Horsemen") file this joint response in opposition to the Motions to Dismiss filed by the Horseracing Integrity and Safety Authority, Inc. (the "Authority") along with Defendants Black, Adams, Coleman, Cox, Dunford, Keating, and Schanzer ("Authority MTD") [Dkt. 34] and by the Federal Trade Commission (the "FTC") along with Defendants Slaughter, Chopra, Phillips, and Wilson ("FTC MTD") [Dkt. 36]. They also reply to the relevant arguments made by the Brief of Amici Curiae from Senator McConnell and Representatives Tonko and Barr (the "Congressmen") ("Congressmen Br.") [Dkt. 53].

The Horsemen have stated a claim upon which relief may be granted because the Horseracing Safety and Integrity Act ("HISA") does not allow the FTC to draft or modify the rules drafted by the Authority. 15 U.S.C. § 3053(c) (HISA § 1204(c)). Also, this claim is justiciable because it is certain the Horsemen will be regulated by this unconstitutional act.

LEGAL STANDARD

A motion to dismiss for failure to state a claim should be denied if the facts, which are accepted as true, allow the Court to draw a reasonable inference that the defendants are liable. Dismissal under Federal Rule of Civil Procedure 12(b)(6) "is appropriate only if the complaint fails to plead 'enough facts to state a claim to relief that is plausible on its face.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim is plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Sanchez v. County of El Paso*, 486 Fed. Appx. 455, 456 (5th Cir. 2012), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "When considering a motion to dismiss, the court accepts as true the well-pled

factual allegations in the complaint, and construes them in the light most favorable to the plaintiff." *Taylor v. Books a Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002).

For a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), plaintiffs need only "allege a plausible set of facts establishing jurisdiction." *Physician Hosps. of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012). Likewise for 12(b)(2), "[t]he plaintiff bears the burden of establishing jurisdiction, but need only present *prima facie* evidence." *Patterson v. Aker Sols. Inc.*, 826 F.3d 231, 233 (5th Cir. 2016). In both cases, courts "must accept the plaintiff's uncontroverted allegations, and resolve in [his] favor all conflicts between the facts contained in the parties' affidavits and other documentation." *Id.* (alteration in original).

ARGUMENT

I. The Horsemen have stated claims upon which relief can be granted for both a private nondelegation doctrine violation and a Due Process clause violation.

A. The Fifth Circuit recognizes the private nondelegation doctrine.

As a threshold matter, Plaintiffs feel compelled to dispel the false notion advocated by the Defendants that the Fifth Circuit does not recognize the Article I, Section 1 private nondelegation doctrine because of its ruling in *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 707 (5th Cir. 2017). Authority MTD 14; FTC MTD 15-16; Congressmen Br. 10. Specifically, the Authority suggests that *Boerschig* held that the private nondelegation doctrine arises only from the Due Process clause and not from Article I, Section 1. Authority MTD 14.

But that is not the holding of *Boerschig*. Unlike the Horsemen who challenge a federal law here, the landowners in *Boerschig* argued that a *state* law violated the Fourteenth Amendment's Due Process Clause by delegating the eminent domain power to private utility companies. 872 F.3d at 703-04, 706. Thus, the landowners did not argue that the state condemnation law violated the Vesting clause of Article I, Section 1 of the U.S. Constitution. Nor could they have. Unlike the

Fourteenth Amendment, Article I does not apply to the states. Therefore, *Boerschig* does not foreclose a private nondelegation doctrine claim arising under Article I, Section 1 of the U.S. Constitution.

Additionally, the FTC falls short in its attempts to brush aside the Horsemen's private nondelegation cases as dealing only with the Due Process clause. FTC MTD 15. The Horsemen rely on *Amtrak*, where the Court held that delegating regulatory power to Amtrak, which the court thought was a private entity, violated the separation of powers found in Article I, Section 1. *See Ass'n of Am. R.R. v. Dep't of Transp.*, 721 F.3d 666, 671 n.3 (D.C. Cir. 2013) ("Amtrak"), *rev'd on other grounds by Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 55 (2015). The court found that the constitutional "difficulties" that arise when Congress delegates regulatory powers to the Executive Branch "are even more prevalent in the context of agency delegations to private individuals." *Amtrak*, 721 F.3d at 670 (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (D.C. Cir. 1984) (per curiam)). The court acknowledged that at least one scholar has suggested the private nondelegation doctrine is better housed in the Due Process clause, *id.* at 671 n.3, but the court then concluded that its "own precedent describes the problem as one of unconstitutional delegation." *Id.* Accordingly, it declined to reach the Due Process argument because it held that the powers delegated to Amtrak violated Article I, Section 1. *Id.* at 677.

In any event, even if this Court were to decide that the Horsemen lack a claim under Article I, Section 1 of the U.S. Constitution, the separation of powers principles they discuss in their opening brief still apply. *See* Horsemen Br. in Support of Motion for Partial Summary Judgment [Dkt. 38] ("Horsemen MSJ") at 9-26. As the circuit court in *Amtrak* observed, the private nondelegation doctrine analysis is the same whether it arises from Article I, Section 1 or the Due Process clause: "neither court nor scholar has suggested a change in the label would effect a change

in the inquiry." 721 F.3d at 671 n.3.

B. HISA represents an unprecedented delegation of legislative authority to a private entity.

HISA represents an unprecedented delegation of legislative authority to a private entity in four important ways. First, the governmental body given oversight of the private entity lacks expertise to regulate the subject area. The FTC admits in its motion that "the FTC lacks independent expertise in the horseracing industry." FTC MTD 4; *see also id*. at 21.[1] Therefore, as a practical matter, it cannot subject the Authority's proposed rules to the rigorous review needed to bless them with governmental imprimatur. As the Fifth Circuit has ruled, "[A] responsible federal agency [may not] abdicate its statutory duties by reflexively rubber stamping a statement prepared by others." *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974). In this case, the FTC will be forced to abdicate its statutory duties because it simply does not have the expertise to do otherwise.

To borrow a phrase from another body of law which the FTC does have expertise regulating—antitrust—in this case it is the FTC, itself, which will be subject to "regulatory capture." While, under normal circumstances, "determining when regulatory capture has occurred is no simple task," it becomes very simple when the agency, itself, admits that it has no expertise in the subject matter it is purporting to regulate. *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 527 (2015) (Alito, J., dissenting). In fact, the FTC goes on to state in its brief that it will "benefit substantially" from the input of self-interested industry experts. FTC MTD 12. It may be a benefit to the Authority and to the FTC, but there is no benefit to the public in having a private entity dictate regulatory policy to a commission with no expertise to evaluate the efficacy of its

[1] Thus, the FTC agrees with Undisputed Material Fact 22 in Plaintiffs' Motion for Partial Summary Judgment: "The FTC has no experience regulating horse racing." Horsemen MSJ at 7.

policies. This obvious structural flaw in HISA, which is unique to HISA, will lead to the inevitable "rubber stamping" that the Fifth Circuit prohibits in delegations of public duties to private entities. *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3. (5th Cir. 1983).[2]

The congressional decision to place this blindfold on the governmental body responsible for regulation is unique to HISA among delegations to a private entity. By comparison, Defendants point this Court to the example of the Financial Industry Regulatory Authority ("FINRA") as a private delegation upheld by several circuit courts. *See* Authority MTD 20-21; FTC MTD 5, n.3. But unlike HISA, FINRA is regulated by a body with expertise in the securities industry: the Securities and Exchange Commission (SEC). *See* 15 U.S.C. § 78d. In addition to their own expertise, the SEC Commissioners are instructed by the Maloney Act to hire economists, examiners, attorneys, officers, and other employees to add to their expertise. *Id*. Therefore, they are more competent to oversee FINRA than the FTC is to oversee the Authority.

Similarly, the Authority, the FTC, and the Congressmen point this Court to *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) as a case in which a private delegation of authority was upheld. Authority MTD 18; FTC MTD 12-13; Congressmen Br. 2-3. But in that case, too, the private entities making recommendations on the minimum price for coal—the district boards of code members—were regulated by a commission with expertise in the coal industry: the

[2] Plaintiff National Horsemen's Benevolent and Protective Association has been advocating for the establishment of an office to oversee and establish absolute uniform laboratory protocols within the United States Department of Agriculture National Veterinary Services Lab. *See* Statement of Eric Hamelback, 2019, available at https://nationalhbpa.com/what-the-national-hbpa-is-doing-to-protect-horses/ retrieved May 26, 2021). When Hamelback asked an industry stakeholder involved in HISA negotiations why HISA did not give oversight to this federal government agency with expertise in horse medication, he was told that HISA would lose support from the Humane Society of the U.S., the American Society for the Prevention of Cruelty to Animals, Animal Wellness Action Group, and People for the Ethical Treatment of Animals if the Department of Agriculture was involved.

National Bituminous Coal Commission. *Adkins*, 310 U.S. 381 at 388. Finally, even in the statute enjoined by the D.C. Circuit as a violation of the private nondelegation doctrine, Amtrak was regulated by a body with expertise in the railroad industry: the Federal Railway Administration (FRA). *Amtrak*, 721 F.3d at 671. Only in the case of HISA were the keys to the kingdom given to a private entity, while the guard put in charge had a blindfold.

The second reason HISA represents an unprecedented delegation of legislative authority to a private entity is that, even if it did have subject matter expertise, the FTC was given limited guidance on how to oversee the Authority. In the all-important rulemaking authority, HISA gives the FTC no standards upon which to base its decisions. Its guidance is completely circular: "The [FTC] shall approve a proposed rule . . . if [it] finds that the proposed rule . . . is consistent with—(A) this Act; and (B) applicable rules approved by the [FTC]." 15 U.S.C. § 3053(c)(2) (HISA § 1204(c)(2)). Thus, the FTC is to look to rules proposed by the private entity and approved by the FTC to determine whether to approve rules proposed by the private entity. Indeed, the FTC admits that its only statutory direction is to approve rules it finds "consistent with its prior rules and HISA." FTC MTD 4. This limited rubric for FTC oversight compounds the problem of delegating legislative power to the Authority.

Defendants attempt to analyze this case under the "intelligible principle" standard, but that is the wrong standard for private delegations. Authority MTD 24-26; FTC MTD 17-18; Congressmen Br. 9. Courts utilize the "intelligible principle" standard for delegations of legislative power to executive agencies—not to private entities like the Authority: "Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority." *Amtrak*, 721 F.3d at 671. The standard for private delegation is more stringent because delegation to a private entity is "legislative delegation in its most obnoxious form." *Carter v. Carter Coal*

Co., 298 U.S. 238, 311 (1936). HISA delegates authority to a private entity with the ability to regulate its competitors, and so even an "intelligible principle" cannot save it: "*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. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (quoting *Carter Coal*, 298 U.S. at 311) (emphasis added).

Also, Defendants mistakenly conflate the criteria HISA lays out for the Authority with the criteria given to the FTC for its oversight. *See* Authority MTD 26, FTC MTD 18. Specifically, Defendants point to a list of considerations given in Section 1206(b) of HISA. *Id*. Section 1206(b) provides a list of thoughts the Authority is supposed to "take into consideration" when implementing its medication control program. 15 U.S.C. § 3055(b). That is hardly a directive on how to draft regulatory rules—or even a directive on what to do with the items on the list after it considers them. Either way, these considerations are given *to the Authority* and not to the FTC. Instead, the FTC was given limited and circular guidance for its oversight. Therefore, as to the FTC, HISA would not pass the "intelligible principle" test, even if that were the correct standard to apply in this context.

As the rules previously passed by the Authority are not an independent rubric by which to judge the Authority's actions, the only real guidance for the FTC is to look to the Act itself. While the Act gives a list of topics on which the Authority may draft rules, 15 U.S.C. § 3053(a) (HISA § 1204(a)), it provides no direction about what principle it should follow in doing so or what principle the FTC should follow in deciding whether to approve the proposed rules. For example, HISA states that the Authority may draft a rule relating to "a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and methods," but it does not give direction as to what medications should be placed

on the list or why. 15 U.S.C. § 3053(a)(2) (HISA § 1204(a)(2)). By contrast, a different statute, the Controlled Substances Act, lists the initial substances prohibited by name and gives the Attorney General eight factors to consider when deciding whether to add or remove a drug from the list:

> (1) Its actual or relative potential for abuse.
> (2) Scientific evidence of its pharmacological effect, if known.
> (3) The state of current scientific knowledge regarding the drug or other substance.
> (4) Its history and current pattern of abuse.
> (5) The scope, duration, and significance of abuse.
> (6) What, if any, risk there is to the public health.
> (7) Its psychic or physiological dependence liability.
> (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

21 U.S.C. § 811(c). This sort of specific guidance may amount to an intelligible principle. *See Touby v. United States*, 500 U.S. 160, 165-66 (1991) (delegation of authority to the Attorney General to schedule controlled substances as necessary to avail an imminent public hazard had an "intelligible principle" and was not an unconstitutional delegation of legislative power). But this specificity is lacking from HISA, rendering the act an unprecedented delegation of authority.

Third, HISA is unlike most other delegations of power to a private entity because the private entity is not a longstanding, known, trustworthy entity but, instead, was created for the very purpose of enforcing HISA. The timeline reveals the Authority was created for the express purpose of enforcing the statute. The Authority was incorporated at 6:30 P.M. on September 8, 2021. *See* Authority Certificate of Incorporation, Authority MTD App'x 25 [Dkt. 34-1]; *see also* First Amended Complaint [Dkt. 23] ("FAC") ¶ 50. The very next day, HISA's precursor bill was amended and marked up by the House Committee on Energy and Commerce, and Senators McConnell, Gillibrand, McSally, and Feinstein announced the introduction on the Senate floor of a bill identical in form to the amended version announced in the House committee. Authority MTD

5. The clear inference is that these three acts were scripted to occur at the same time because the two bills reference for the first time a private entity named the Horseracing Integrity and Safety Authority, and the entity incorporated the day before is named the Horseracing Integrity and Safety Authority, Inc. The incorporated Authority's purposes are nearly identical to those set out in the bills. *See* Authority Bylaws 1-2 § 1.5, Authority MTD App'x 34-35. Finally, certain definitions in the Bylaws change their meaning to those adopted by HISA "upon enactment of the contemplated Horseracing Integrity and Safety Act of 2020 or a substantially similar act." *Id*. 18 § 7.7. Therefore, the Authority is newly created to enforce HISA.

In this respect, the Authority differs from most other private entities considered by courts for potential violations of the nondelegation doctrine. For example, the purportedly private entity Amtrak had existed and provided rail service for many years prior to the statute considered in *Amtrak*. *Amtrak*, 721 F.3d at 668 (Amtrak was created circa 1970, and the legislation was passed in 2008.). Also, the statute considered in *Currin v. Wallace* had required a referendum among all private growers of tobacco in a given market prior to regulation. *Currin v. Wallace*, 306 U.S. 1, 15 (1939). Similarly, the statute considered in *United States v. Frame* had required consent of a majority of private cattle producers. *United States v. Frame*, 885 F.2d 1119, 1124 (3d Cir. 1989). Also, the statute considered in *Sequoia Orange Co. v. Yeutter* had required consent from 75% of private growers. *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 754, 759 (9th Cir. 1992).

Creating a new private entity out of whole cloth and then imbuing it with governmental powers, as HISA does, would create a dangerous precedent. It is entirely unknown how this new entity will wield its immense power. It may do so well; it may do so poorly; or it may do so in an entirely corrupt manner. Unlike Congress, it is not accountable to the people through election. That is why the Constitution forbids Congress from giving away its legislative power to such an entity.

U.S. Const. Art. I, Sec. 1.

Fourth, HISA represents an unprecedented delegation of legislative authority to a private entity because the FTC cannot modify rules proposed by the Authority. This difference is explored further in the next subsection of the brief.

C. Under HISA, the FTC cannot write or modify the rules to regulate the industry it has been charged with regulating; therefore, the historical examples relied upon by Defendants are inapposite.

HISA is unique among statutes challenged on nondelegation grounds because the FTC cannot draft its own regulatory rules either at the initial stage of the rulemaking process or at the modification stage of the rulemaking process. It is devoid of the ability to write the rules to regulate the industry it has been charged with regulating. As the Horsemen showed in their Motion for Partial Summary Judgment, HISA is unique in this respect. Horsemen MSJ at 20-24. No court has ever gone so far as to uphold a statute that denies the government the ability to modify the rules proposed to it by a private entity.

1. The FTC cannot initiate the rulemaking process by drafting rules.

Under HISA, the FTC must sit passively and wait for the Authority to begin the rulemaking process. 15 U.S.C. § 3053(a) (HISA § 1204(a)). By contrast, in the statute enjoined in *Amtrak*, both the purportedly private entity, Amtrak, and the governmental agency, the FRA, were given the ability to draft rules. *Amtrak*, 721 F.3d at 671. The circuit court determined that, nonetheless, the statute violated the private nondelegation doctrine because the private entity was given an "effective veto" over the rules drafted by the government. *Id*. Under this reasoning, HISA represents an even more egregious violation of the private nondelegation doctrine because the government is not given the power to draft any rules itself; thus, there is nothing for the Authority to veto. *See* Horsemen MSJ at 14-20.

The FTC points out that HISA gives it the ability to draft interim final rules, but this

authority is for emergency rule-making only. *See* FTC MTD 12. For that reason, the FTC can exercise this power only when it is "necessary to protect-- (1) the health and safety of covered horses; or (2) the integrity of covered horseraces and wagering on those horseraces." 15 U.S.C. § 3053(e) (HISA § 1204(e)). No other topics can be covered. In addition, these rules must "take effect immediately" and are exempt from the notice and comment requirements of 5 U.S.C. § 553. *Id*. Thus, for the normal rulemaking process that is subject to notice and comment, the FTC has no independent authority to draft rules under HISA.

In the Horsemen's Motion for Summary Judgment, the Horsemen relied on Judge Duncan's opinion in the *en banc* decision *Brackeen v. Haaland*, No. 18-11479, 2021 WL 1263721 (5th Cir. Apr. 6, 2021) (*en banc*) (opinion of Duncan, J.). Horsemen MSJ at 17-18, which is highly persuasive. Although it is not controlling, it comes very recently from seven Fifth Circuit judges who reached the merits of the nondelegation claim in the case. The Congressmen attempt to distinguish Judge Duncan's opinion. Congressmen Br. 12-13. The Congressmen and the Horsemen agree that Judge Duncan and his colleagues would have enjoined the statute at issue because the purportedly private entity was "given the ***sole authority*** to draft regulations." Congressmen Br. 13 (emphasis in original). Likewise, under HISA, the Authority is left with the *sole authority* to draft regulations. The FTC cannot draft regulations either on its own initiative or by modifying Authority regulations. *See* 15 U.S.C. § 3053(a) (HISA § 1204(a)). Thus, Judge Duncan's reasoning should apply to this case, and the statute should be enjoined.

Furthermore, *Riverbend Farms, Inc. v. Madigan* does not help the FTC in its argument because, unlike the statute there that allowed a trade group to make recommendations to an agency while still preserving the agency's ability to draft rules on its own initiative, HISA gives the Authority a monopoly on drafting rules. *Compare* FTC MTD 13-14 (relying on *Riverbend Farms*,

Inc. v. Madigan, 958 F.2d 1479, 1483 (9th Cir. 1992)), *with* 15 U.S.C. § 3053(c) (HISA § 1204(c)). The FTC has no ability to draft rules on its own initiative; instead, HISA relegates the FTC to making only "recommendations" to the Authority. *Id*. This inverts the way the U.S. Constitution says the rulemaking process should work.

Perot v. FEC is also inapposite because in that case no private entity promulgated rules that governed anyone but itself. 97 F.3d 553, 556, 559–60 (D.C. Cir. 1996). There, the FEC created an exception to the general ban on corporate campaign expenditures, allowing private corporations to spend money hosting nonpartisan presidential debates as long as they used "objective criteria" to select participants. *Id*. at 556. The court held that the phrase "objective criteria" was not a delegation of rulemaking authority but was simply "leeway to decide what specific criteria to use." *Id*. at 559-60. The private nonprofit at issue was not promulgating regulations with the force of law; rather, it developed a selection criteria for its own private event. The FEC rule simply gave the corporation "discretion in interpreting what actions it must take to comply" with the rules set by the FEC. *Id*. at 560. In this case, the Authority exists explicitly to regulate the broader horseracing industry. If Authority members were holding their own private races, and Congress simply allowed them to set entrance criteria for those private races, that would be a different matter entirely.

2. The FTC cannot modify Authority rules.

Also, the FTC cannot draft rules by modifying the rules presented to it by the Authority. *See* 15 U.S.C. § 3053(c)(1) (HISA § 1204(c)(1)). For over 80 years, governments have urged courts to uphold statutes on private nondelegation grounds as long as the rules proposed by a private entity could be "approved, disapproved, or modified" by the government. *Adkins*, 310 U.S. at 388. In this case, they cannot be "modified"; therefore, even under this lenient standard, HISA fails to

meet the test.

Defendants attempt to gloss over this fatal flaw in HISA by inventing new terms for FTC power under the Act. The Authority argues that the FTC can "consider modifications." Authority MTD 19. The Congressmen argue that the FTC can "functionally modify" the rules presented to it. Congressmen Br. 2, 9, 10. These new terms amount to an attempt to rewrite the statute after the fact. But this Court cannot accept a rewriting of the statute. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) ("our constitutional structure does not permit this Court to rewrite the statute that Congress has enacted") (quotation marks and citation omitted). If, as Defendants argue, the ability to disapprove a rule and offer suggestions constitutes the ability to "modify" a statute, then there was no reason for the *Adkins* Court to mention modification at all. It could have relied only on the government's ability to approve or disapprove. But the Supreme Court included the word "modified" for a reason. It conveys an important power beyond that of "approved" or "disapproved." *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("were we to adopt respondent's construction of the [text], we would render the word [at issue] insignificant, if not wholly superfluous. It is our duty to give effect, if possible, to every clause and word") (quotations and citations omitted).

Supreme Court analysis of another clause in Article I is helpful to elucidate this point. In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court ruled that a statute giving the president a line-item veto was prohibited by Article I, Section 7. Among the reasons given for enjoining the Line Item Veto Act was that it represented the "functional equivalent of partial repeals of Acts of Congress." *Clinton*, 524 U.S. at 444. The Court enjoined this executive branch "exercise[ ] of legislative power." *Id*. In other words, when the president was given only the ability to approve or disapprove of a law, he was not exercising legislative power. But when he was also given the

power to modify the law, a violation occurred because the power to modify is greater than and different from the power merely to approve or disapprove. Likewise, the power to modify rules in the nondelegation context is also greater than and different from the power simply to approve or disapprove them, and it is this important power to modify that is lacking from the FTC authority in HISA. In the line-item veto context, without the power to modify, the president properly leaves legislative power in the hands of the legislature; however, in the nondelegation context, without the power to modify, the FTC improperly leaves legislative power in the hands of the private Authority. No court has ever upheld such a delegation without the ability to modify.

Defendants rely heavily on *Adkins* to support their position; however, HISA's failure to give the FTC the power to modify proposed rules distinguishes the ruling in that case. Congressmen Br. 11-12. A second reason to distinguish *Adkins* is supplied by the Congressmen themselves. For 80 years, several other courts have relied on *Adkins* to uphold statutes as long as they included the ability to approve, disapprove, or modify a private entity's proposed rules. But for the *Adkins* court, such a lenient test was not "central to its decision." Congressmen Br. 12. The issue in *Adkins* was whether district boards made up of private code members could recommend the minimum price for selling coal. The Court reasoned this situation did not create a private delegation of legislative authority because the National Bituminous Coal Commission maintained "authority and surveillance over the activities" of these district boards and because, ultimately, the Commission, "not the code authorities, determine[d] the prices." *Adkins,* 310 U.S. at 399. This factual situation is a far cry from HISA.

In HISA, the FTC does not maintain the expertise in the horseracing industry to provide proper "surveillance over the activities" of the Authority. Furthermore, the district board recommendations in *Adkins* were limited to setting a minimum price. By retaining the power to

approve, disapprove, or modify that price, the Coal Commission retained full authority to set its own price, independent of the private entity recommendations. Under HISA, however, the recommendations being made by the private entity are far more complex. They are writing the rules to govern an entire industry. HISA limits the FTC to only approving or disapproving of these rules. Because HISA does not give the FTC full authority to write its own rules, it cannot rely on the holding of *Adkins*. Under either the lenient standard that has been ascribed to *Adkins* over the years or under the real standard that the *Adkins* Court lays out in its reasoning, HISA fails to meet the test because it does not give the government adequate power over the private entity.

In further reliance on the lenient test from *Adkins*, Defendants also point to cases upholding the Maloney Act and the relationship between the private FINRA, which was preceded by the National Association of Securities Dealers ("NASD"), and the public SEC. *See* Authority MTD 20-21; FTC MTD 5, n.3; Congressmen Br. 2. As mentioned above, one important difference between this relationship is that the SEC has expertise regulating the industry, unlike the FTC in HISA. *See Sec. I.B., supra,* at 4-6. But the other major difference is that, unlike the SEC, the FTC is not given the ability to modify rules proposed by the private entity. *See* Horsemen MSJ at 18. Thus, HISA fails to meet even the lenient test from *Adkins* that was applied by courts analyzing the Maloney Act. Under the act, "the SEC may abrogate, add to, and delete from all FINRA rules as it deems necessary." *Aslin v. Fin. Indus. Regul. Auth., Inc.*, 704 F.3d 475, 476 (7th Cir. 2013) (citations omitted). Prior versions of the relevant code section, 15 U.S.C. § 78s(c), contained similar language: "the SEC retains discretion to amend the rules of [the NASD], *see* 15 U.S.C. § 78s(c)." *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 637 F.3d 112, 116 (2d Cir. 2011); *see also In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 112 (D.C. Cir. 2008) ("If the SEC deems it necessary, it may also amend [NASD] rules itself.") (citing

15 U.S.C. § 78s(c)). Thus, the following cases cited by Defendants for upholding the Maloney Act under the lenient *Adkins* test are inapposite: *Scottsdale Cap. Advisors Corp. v. FINRA*, 844 F.3d 414, 417 n.1 (4th Cir. 2016); *Austin Mun. Sec., Inc. v. NASD*, 757 F.2d 676, 680 (5th Cir. 1985); *Sorrell v. SEC*, 679 F.2d 1323, 1326 (9th Cir. 1982); *Todd & Co. v. SEC*, 557 F.2d 1008, 1010 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 694-695 (2d Cir. 1952). In fact, Defendants have failed to point to one case in which a court has upheld a statute in which a governmental body does not retain the ability to "approve[ ], disapprove[ ], or modif[y]" a private entity's rules. *Adkins*, 310 U.S. at 388.

Next, Defendants fail in their attempts to distinguish the reasoning of Fifth Circuit judges in the case of *Texas v. Rettig*, No. 18-10545, 2021 WL 1324382 (Mem) (5th Cir. Apr. 9, 2021), (Ho, J., dissenting from the denial of rehearing *en banc*). As with Judge Duncan's opinion in *Brackeen*, Judge Ho's reasoning in *Texas v. Rettig* is not controlling but is highly persuasive, as it comes very recently from the Fifth Circuit judges who reached the merits of the nondelegation claim in the case.

The Authority mistakenly states that "the Fifth Circuit rejected plaintiffs' nondelegation argument" in the underlying panel decision of *State v. Rettig*, 987 F.3d 518 (5th Cir. 2021). Authority MTD 17. This statement is false. The deciding panel found that the nondelegation doctrine was not applicable to the facts of the case because there is no subdelegation analysis when an agency only "reasonabl[y] condition[s]" its decision on that of a private entity. *State v. Rettig*, 987 F.3d at 531. In that case, the Department of Health and Human Services (HHS) had merely conditioned its Medicaid rates on being certified according to the actuarial standards used by private accountants. *Id*. at 524–25. Conditioning a rule on generally accepted accounting standards is nothing like giving private entities the power to draft rules, as HISA does. As the Horsemen

acknowledged in their Motion for Summary Judgment, Congress can condition agency action on private market acceptance under certain circumstances. Horsemen MSJ at 18-20. It simply cannot do the opposite and condition private rulemaking on agency acceptance, as HISA attempts to do. The government must retain the ability to draft rules either on its own initiative or by modifying the private-sector rules. Thus, the panel in *State v. Rettig* goes on to state that, even if a subdelegation had occurred, it would have been constitutional. *Id.* at 531. According to the panel, HHS retained the ability to approve, disapprove, or modify the actuarial rate by issuing its own rule. *Id*. at 532. Furthermore, "certification [of the rate was] a small part of the [overall] approval process" of approving state Medicaid contracts with managed care organizations. *Id*. at 533. The court reasoned that the small condition on private market acceptance would not have constituted a subdelegation because HHS "retain[ed] final reviewing authority" over the overall contract. *Id*. at 532.

By contrast, Judge Ho, in his denial from rehearing *en banc*, interpreted the facts differently from the panel; therefore, he did reach the delegation question the panel sidestepped. He found that HHS could only approve but not disapprove or modify the actuarial rates. *Texas v. Rettig*, No. 18-10545, 2021 WL 1324382 (Mem) (5th Cir. Apr. 9, 2021), slip. op. at *20. Thus, he and his four colleagues sought for the panel decision to be reheard *en banc*. *Id.* at *25. First, Defendants attempt to distinguish his reasoning by pointing out that *Rettig* is an agency subdelegation case and not a congressional delegation case. Authority MTD 17, n.4; Congressmen Br. 13. That is true, but it makes his reasoning no less persuasive, as an agency subdelegation is a type of private nondelegation, and it, too, relies on Article I, Section 1 for its support. Second, Defendants try to distinguish Judge Ho's reasoning by quoting his mention that HHS's "only recourse [was] to amend or repeal the rule." Congressmen Br. 13 (quoting *Texas v. Rettig* at 413 (Ho, J., dissenting

from rehearing *en banc*)); *see also* Authority MTD 19-20. This only further proves the Horsemen's position. For a delegation of legislative authority to survive, the governmental entity must retain the ability to approve, disapprove, *and* modify the private entity's rules.

Likewise, the Congressmen seek to distinguish *City of Dallas v. F.C.C.*, 165 F.3d 341 (5th Cir. 1999), but that case is controlling here. In *Dallas*, the Federal Communications Commission (FCC) gave private video service operators a choice of whether to give access rights to cable operators. *Id*. at 357–58. The Fifth Circuit held that the private entity choice violated the agency subdelegation doctrine because the FCC failed to retain the ability to modify these "selective[ ]" decisions. *Id*. at 358. The Congressmen seek to distinguish the case because the FCC had given "blanket approval to the decisions of private operators." Congressmen Br. 12. But whether the approval or disapproval was given on a blanket basis or an individual basis is irrelevant. The relevant fact for this case is that the commission was not given the ability to modify decisions made by private entities.

In addition, the Authority relies on *American Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 442 (D.C. Cir. 2018). Authority MTD 16-17. But in that case, a preexisting private organization was creating technical standards that were "entirely voluntary". 896 F.3d at 441. To the extent the standards in question were ever given the force of law, it was by "agencies or legislatures incorporate[ing] private standards into law,"—that is, the legislature looked at a pre-existing set of standards and decided they were a good set of rules to adopt. *Id.* at 442. That is a very different matter from empowering a new organization like the Authority to invent unknown rules out of whole cloth.

3. Some Authority decisions have no oversight whatsoever.

In addition to the aspects unique to HISA that prohibit the FTC from drafting rules or

modifying Authority rules, HISA has another unique aspect. Some legislative powers given to the Authority have no FTC oversight whatsoever. *See* Horsemen MSJ at 25-26. In particular, HISA gives the Authority federal subpoena and investigatory authority to pursue civil violations within its jurisdiction and does not give the FTC the power to approve, disapprove, or modify these decisions. 15 U.S.C. § 3054(h) (HISA § 1205(h)). Even though the Horsemen pled that this power violates the nondelegation doctrine, Defendants failed to answer the charge in their motions to dismiss. *See* FAC at 18, ¶75. Therefore, this Court must accept it as true.

4. Congress was aware of its nondelegation problem and failed to fix the problem.

Plaintiffs and Defendants agree that the illegal doping of horses is detrimental to horses and the public and constitutes harm that any properly drawn regulatory scheme should address. But Defendants' invocation of HISA's legislative history amounts to an attempt to argue the end justifies the means. *See* Authority MTD 4-5; FTC MTD 2-3; Congressmen Br. 1, 6-8. Ultimately, Defendants acknowledge that HISA received no Senate debate, passed the House on a voice vote, and was stuck into a much larger bill, where it received little scrutiny. *Id*. The Horsemen posit that this method of passage was chosen because Congress was aware it had a nondelegation problem. In 2015 the nonpartisan Congressional Research Service (CRS) issued a memorandum warning Congress of the potential nondelegation problem with an earlier version of HISA. *See* "Analysis of Potential Constitutional Challenges to Delegations Made to a Private Entity Under H.R. 3084," CRS Memorandum to Rep. Joe Pitts, Oct. 27, 2015 ("CRS Memorandum"), attached as Exhibit A. Later, Congress attempted to fix this problem by requiring the FTC to approve or disapprove of rules drafted by the Authority. But Congress failed to give the FTC the power to modify those rules. 15 U.S.C. § 3053(a) (HISA § 1204(a)). As the CRS Report points out, an all-important aspect to the statute upheld in *Adkins* is that the governmental entity "could modify the rules as it saw

fit." *Id*. at 11. Because Congress failed to heed the advice of its own research service and allow for modification, its statute fails to survive constitutional scrutiny.

D. HISA also violates the Due Process clause because it gives economically self-interested actors the power to regulate their competitors.

When the motions in this case were filed on April 30, 2021, the parties did not have the benefit of knowing who would be appointed to the Authority board. This is no longer the case: the appointments were announced on May 5, 2021.[3] The Industry Directors include the former head of the Maryland Jockey Club and owner of Pimlico Race Course, the former President of the Breeder's Cup, the former President of the prominent Kentucky race course and auction house Keeneland, and a veterinarian specializing in the treatment of equine injuries. The so-called "Independent" directors include Leonard Coleman, a former board member of Churchill Downs and Ellen McClain, a former president of the New York Racing Association. The elite of the racing world, who have spent their careers overseeing its most prestigious events, will now make the rules for the thousands of horsemen who eke out a living in the industry.

The Authority's own motion reinforces this basic fact. For instance, it cites to the statement of Rep. Pallone who argued that "the Humane Society, the Jockey Club, the Breeders' Cup, Animal Welfare Action, several racetracks, and many horsemen support this bill." Authority MTD 5. Yes, the sport's elite, such as the Jockey Club, the Breeders Cup, and the owners of racetracks, supported the Act because they sought to exercise power over the working horsemen whose interests Plaintiffs represent. However "many" horsemen Rep. Pallone believed supported the bill,

[3] Thoroughbred Daily News, "Board and Standing Committee of HISA Announced," May 5, 2021, available at https://www.thoroughbreddailynews.com/board-and-standing-committee-of-hisa-announced/ (retrieved May 25, 2021).

the number pales in comparison to the thousands whose interests are subverted by the Act in favor of the preferences of a select few.

Also, the Authority was created for the very purpose of enforcing HISA. *See, supra,* at 8-9. It has no longstanding history of fairness and impartiality. On the contrary, it was incorporated by a tiny group of individuals in the industry against the wishes of the vast majority of horsemen.

In their motions, the Authority and the FTC dismiss Plaintiffs' Due Process challenge to the regulation of this industry by a small subset of its members as "speculative." Authority MTD 28-29; FTC MTD 20. But the premise that private parties will exercise power in a manner that reflects their own interests is not speculative. "A private party . . . may be presumed to be acting primarily on his or its own behalf." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985). And despite the contention otherwise, Authority MTD 29, this conclusion does not depend on a finding of bad faith but "rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals." *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 510. In the context of the Due Process clause, the question is not whether plaintiffs have proved a factual instance of self-dealing or bias but rather whether the circumstances at issue objectively create a potential for self-dealing or bias. *See Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 881 (2009) ("The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias'").

Defendants' motions make much of the various provisions in the Act and the Authority bylaws that they say would eliminate conflicts of interest. Authority MTD 29; FTC MTD 20-21. But such rules are not so strong a bulwark as it might seem. They are drafted ambiguously. For instance, the requirement that five of the nine directors be "independent" defines independence as

being "outside the equine industry." It is not at all clear how far "outside" they need be. As pointed out above, at least two of the so-called "independent" directors have substantial ties to the industry—a former director of Churchill Downs and the former president of the New York Racing Association. Thus, the Authority members are already flouting what few rules exist to govern them.

Nor are the provisions barring active financial or business relationships dispositive. Even assuming, arguendo, that each board member has divested every share of ownership in the various industry entities which they previously operated (a possibility Plaintiffs are skeptical of, given the Directors' résumés), they retain substantial personal ties throughout the industry and have not forgotten the longstanding business and financial relationships they developed as significant figures in horse racing. These are not disinterested third parties who come to the field afresh, unburdened by prior commitments. The elimination of strict formalities tying them to the industry would not—indeed cannot—also mean that they will have no incentives to serve the constituencies from which they come.

Furthermore, the ambiguous conflict of interest provisions that Defendants rely on in their attempt to refute the Due Process claim do not apply at all to the industry members of the two standing committees that advise and guide the Authority in drafting its regulations. 15 U.S.C. § 3052(c) (HISA § 1203(c)). These actors will be explicitly self-interested.

Moreover, the Authority, *itself*, creates a financial conflict of interest. The Act gives the Authority the power to set its own fees and charge industry participants for the privilege of being regulated by the Authority. 15 U.S.C. § 3052(f)(3)(C)(ii) (HISA § 1203(f)(3)(C)(ii)). Thus, the financial incentives created by the operation of the Authority mean that self-interest cannot be properly eliminated from this arrangement.

Furthermore, the Authority's failure to collect fees thus far raises questions about who paid to incorporate the Authority and who is paying its legal fees now. The presumed answer is not the so-called "independent" Authority board members but those in the industry who stand to gain from HISA precisely *because* they stand to gain from it. Thus, self-interest permeates every aspect of the Authority, and because these self-interested actors will be regulating their competitors, HISA violates the Due Process clause.

The Authority claims that *Boerschig* forecloses Plaintiffs' Due Process claim, but that is not the case. Authority MTD 22-24.[4] The facts of *Boerschig* are fundamentally different from those of this case. Rather than a congressional delegation to a private nonprofit to issue binding regulations and enforcement actions, *Boerschig* involved the state of Texas permitting private pipeline companies to initiate eminent domain proceedings in court, rather than depending on the State to initiate proceedings. *Boerschig*, 872 F.3d at 704. The pipeline company had no statutory authority to take property but could only petition a court to do so. *Id*. The court controlled the entire process and determined whether the condemnation furthered a public purpose:

> That proceeding begins with a state district court appointing special commissioners who assess the value of the property. After the commissioners make that award, the condemnor can take control of the property. If objections to the commissioners' award are filed, a case is opened in state court. It is during that judicial phase when the landowner may challenge the utility's finding of a public necessity.

Id. (citations omitted). The Court in *Boerschig*, therefore, found that there was no Due Process violation because the landowner had been given the process that was due: a court-directed determination of the condemnation. The Authority mistakenly compares this explicit judicial oversight with the more general possibility that horsemen might file a complaint in federal district

[4] Above, Plaintiffs dispelled the notion that *Boerschig* forecloses Plaintiffs' private nondelegation doctrine claim. *See*, *supra*, at 2-3.

court to litigate the rules it imposes. Authority MTD 23-24. Under HISA, the process of imposing civil sanctions is controlled by the private entity, not controlled by a court, and the burden to file a petition for court review falls on the aggrieved party, not on the private entity. 15 U.S.C. § 3057(d) (HISA § 1208(d)); 5 U.S.C. § 702. Thus, unlike the situation in *Boerschig*, the Authority can impose civil sanctions for violating rules without any judicial oversight at all. *Id*. This is precisely the sort of situation *Boerschig* said *would* constitute a due process problem: "when private parties have the unrestrained ability to decide whether another citizen's property rights can be restricted, any resulting deprivation happens without 'process of law.'" 872 F.3d at 708.

II. Plaintiffs' Complaint is justiciable.

A. The Horsemen have standing.

Plaintiffs "can satisfy the constitutional elements of standing by present[ing] (1) an actual or imminent injury that is concrete and particularized, (2) fairly traceable to the defendant's conduct, and (3) redressable by a judgment in [their] favor." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015) (alteration in original) (quoting *Duarte ex rel. Duarte v. City of Lewisville, Tex.*, 759 F.3d 514, 517 (5th Cir. 2014)) (internal quotation marks omitted); *see Texans Against Governmental Waste & Unconstitutional Governmental Conduct v. U.S. Dep't of Treasury*, 619 F.Supp.2d 274, 276 (N.D. Tex. 2009).

Standing "'must be supported . . . with the manner and degree of evidence required at the successive stages of litigation.'" *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). "The required injury to challenge agency action is minimal," and "[a]t the pleading stage, allegations of injury are liberally construed." *Collins v. Mnuchin*, 938 F.3d 553, 586–87 (5th Cir. 2019), cert. granted, 141 S. Ct. 193 (2020); *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009) (citing *Lujan*, 504 U.S. at 561).

In their First Amended Complaint, Plaintiffs allege the following injuries:

- Being subject to the regulatory control and rulemaking authority of an unconstitutionally constituted body (FAC ¶¶ 51, 56, 60-62, 65, 66, 70–72, 75–123);
- Being subject to such a body that is a private entity but that has the power of a governmental body; (FAC ¶¶ 56, 65, 66, 70–72, 82–85, 90–102);
- Being subject to regulatory control by a body controlled by private individuals selected in a shadowy process: the governing board is selected by a group of private individuals, who were selected by another group of private individuals, who themselves were selected by the sole private individual who incorporated the Authority (FAC ¶¶ 51, 56, 60–62, 65, 111–17);
- Being subject to regulatory control by a body controlled by such private individuals who were selected in violation of the U.S. Constitution's Appointments Clause (FAC ¶¶ 51, 56, 60–62, 65, 111–17);
- Being subject to regulatory control by a body controlled by such private individuals who are economically interested in regulatory outcomes and are, therefore, competitors of Plaintiffs (FAC ¶¶ 118–123);
- Being subject to regulatory control by a body controlled by such private individuals who, though nominal members of the executive branch, are not removable by any member of the executive branch, including the President of the United States (FAC ¶¶ 51, 56, 60–62);
- Being subject to such a body that is nominally overseen by a governmental authority but in fact overseen only by private individuals (FAC ¶¶ 56–62, 65, 81–85, 88);
- Being subject to unconstitutional regulatory control, including rule-making powers that cover all facets of equine medication and horseracing safety (FAC ¶¶ 56, 66, 70–72);
- Being subject to regulations that forbid the use of therapeutic medication prescribed by veterinarians, administration of any "foreign substance," or any method that affects performance (FAC ¶ 122; 15 U.S.C. § 3055(b)(1) & (d) (HISA § 1206(b)(1) & (d));
- Being subject to an unconstitutionally constituted body with sweeping enforcement powers, including the power to fine, suspend, bring civil lawsuits against Plaintiffs, and establish its own civil penalties for violations of its rules (FAC ¶¶ 56, 77, 78);

- Being subject to an unconstitutionally constituted body of inquisition that has federal investigatory and subpoena powers that are not supervised in any way by any other governmental entity (FAC ¶¶ 75, 76);
- Payment of fees (whether indirectly through Plaintiffs' state racing commission fees that inevitably must increase if the state commissions pay Authority fees, or directly if state racing commissions decline to fund the Authority) to fund and operate a body that is unconstitutionally constituted (FAC ¶¶ 67–69);
- Being subject to an unconstitutionally constituted regulatory body that has legislative powers but no guiding intelligible principle (FAC ¶¶ 103–110).

1. Plaintiffs' members have suffered an actual or imminent injury that is concrete and particularized.

The Authority focuses its arguments regarding standing on the first element, "actual or imminent injury that is concrete and particularized." *See* Authority MTD at 8–10.

For an injury to be sufficiently particularized, it "must affect the plaintiff in a personal or individual way." *Texans Against Governmental Waste & Unconstitutional Governmental Conduct*, 619 F. Supp. 2d at 276 (citing *Lujan*, 504 U.S. at 561 n.1). "An increased regulatory burden typically satisfies the injury in fact requirement." *Contender Farms*, 779 F.3d at 266 (citing *Ass'n of Am. R.R.s v. Dep't of Transp.*, 38 F.3d 582 (D.C. Cir. 1994)).

The basic question that underlies all three elements of standing is whether the plaintiff is an object of the challenged regulation. *See Contender Farms*, 779 F.3d at 264 (citing *Lujan*, 504 U.S. at 561). "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.'" *Id.* (quoting *Lujan*, 504 U.S. at 561–62).

Defendants rest much of their standing argument on the fact that HISA's framework does not go into effect until July 1, 2022. *See* FTC MTD 6-7; 15 U.S.C. § 3051(14) (HISA § 1202(14)); 15 U.S.C. § 3054(a) (HISA § 1205(a)). However, "[a]n 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 Intern. USA*, 568 U.S. 398, 414 n.5 (2013)). As an example, the mere prospect of being inspected at some point in the future for a potential violation is an injury in fact. *See Contender Farms*, 779 F.3d at 266, 268; *see also* 15 U.S.C. § 3056(b)(5) (HISA § 1207(b)(5)) (HISA requiring that the Authority implement a program "that may include pre- and post-training and race inspections"). In the present case, there can be no doubt that, as of July 1, 2022, the Authority will exercise all the unconstitutional powers complained of by Plaintiff. *See* 15 U.S.C. § 3051(14) (HISA § 1202(14)); 15 U.S.C. § 3054(a) (HISA § 1205(a)); 15 U.S.C. § 3055(a)(1) (HISA § 1206(a)(1)); 15 U.S.C. § 3056(a) (HISA § 1207(a)).

HISA also expressly mandates that there be put in place a regulation "prohibiting the administration of any" therapeutic substance to a covered horse within 48 hours of its next racing start. 15 U.S.C. § 3055(d) (HISA § 1206(d)); *see also* 15 U.S.C. § 3055(b)(1) (HISA § 1206(b)(1)) (in developing regulations, the Authority shall take into consideration that "[c]overed horses should compete only when they are free from the influence of medications"). This rule would prohibit all therapeutic medicines from being administered to racehorses within 48 hours of their next race *even if they are otherwise permitted and have been prescribed by a veterinarian for the health and safety of the horse*. *See id;* FAC ¶ 122. As a result, some of the horses owned by Plaintiffs' members will be injured because they need therapeutic drugs to race safely. *See* FAC ¶ 122. The internal bleeding that can occur in some of these horses without the necessary drugs may even cause some of them to die. *Id*. Thus, the threatened injury in this case is "certainly impending" and is sufficient to give Plaintiffs standing. And, thus, the FTC's mischaracterization that "[a]t best, Plaintiffs[] complain[] [they] *might* be subject to some rules they dislike," is unavailing.

Compare FTC MTD at 7 *with* 15 U.S.C. § 3051(14) (HISA § 1202(14)); 15 U.S.C. § 3054(a) (HISA 1205(a)); 15 U.S.C. § 3055(a)(1) (HISA § 1206(a)(1)); 15 U.S.C. § 3056(a) (HISA § 1207(a)) *and* FAC.

The FTC relies repeatedly on *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013), for the proposition that the standing inquiry is especially rigorous when constitutional questions are concerned. *See* FTC MTD at 6-7. However, the FTC fails to disclose that the plaintiffs in *Clapper* did not belong to the class targeted by the statute; instead, their injury would accrue only if a U.S. intelligence agency targeted someone with whom plaintiffs had conversations, used the statute at issue to seek approval of this surveillance, and then actually received that approval from the FISA Court. *Id*. at 410. These facts constituted a "highly attenuated chain of possibilities." *Id*. In contrast, HISA directly targets Plaintiffs' members as owners of Thoroughbred horses (*compare* FAC ¶¶ 1, 4-29 *with* 15 U.S.C. § 3051(4)&(6) (HISA § 1202(4)&(6)) (covered horse means any Thoroughbred horse; covered person means owner of thoroughbred horse) *and* 15 U.S.C. § 3051(2)(a) (HISA § 1202(2)(a)) (the Authority will implement a safety and medication program for covered horses and covered persons)). Thus, *Clapper* has no bearing on Plaintiffs' Complaint.

The FTC further asserts that the Horsemen seek an advisory opinion. *See* FTC MTD 7-8. This characterization is incorrect; rather, Plaintiffs seek relief from the "here-and-now injury" of being directly regulated by an unconstitutionally constituted body that is itself expressly required by the statute to promulgate onerous regulations. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) (when removal provision violates the separation of powers, it inflicts a 'here-and-now' injury) (citing *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)).

Because Plaintiffs' members, as owners of "covered horses," will be an object of this HISA-mandated regulation (*compare* FAC ¶¶ 1, 4–29 *with* 15 U.S.C. § 3051(4) (covered horse

means any Thoroughbred horse)), there is "little question that [statute mandating promulgation of this regulation] has caused [them] injury, and that a judgment preventing . . . [the regulation] will redress it." *Contender Farms*, 779 F.3d at 264 (citing *Lujan*, 504 U.S. at 561). Thus, under the express holding of *Contender Farms*, the Horsemen meet all the requirements of standing.

2. Subjection to regulatory control of an agency that offends separation-of-powers provisions is, in itself, actual or imminent injury that is concrete and particularized.

The Authority argues that because it is a private organization, enjoining HISA will not change its quintessential corporate activities and will, therefore, not remedy any injury. Authority MTD 8. From a factual standpoint, this argument is disingenuous. Unlike the private entities delegated legislative authority in other cases, the Authority was created for the express purpose of enforcing HISA. *See*, *supra*, at 8-9. Therefore, if HISA is enjoined, there will be no more corporate activities, and without the funding authority granted by HISA, the Authority will likely dissolve.

When overlaid onto other private interest groups, the Authority's assertion shows nothing so much as want of a better argument. For example, if Congress were to breathe rule-making, fee-assessing, investigatory, and enforcement power into the National Rifle Association or the Sierra Club while insulating the privately appointed, private individuals who control these entities from removal or any genuine executive oversight, would the fact that Congress did nothing else to change these entities' quintessential corporate activities save the organic statute from being struck down? Of course, the answer is, "No." More to the point, would being placed directly under the regulatory control of such a para-governmental organization by itself constitute an injury, whether or not plaintiffs can point to a specific regulation that affects them in a personal or individual way? For the following reasons, the answer is, "Yes."

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Supreme Court held that a plaintiff was "entitled to declaratory relief sufficient to ensure that the reporting

requirements and auditing standards to which they are subject will be enforced *only by a constitutional agency accountable to the Executive*." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 485–86 (2010) (emphasis added). The Court further stated that a "separation-of-powers violation may create a 'here-and-now' injury that can be remedied by a court." *Id*. at 513 (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)). It is noteworthy that in quoting *Bowsher*, the Court modified the phrase "here-and-now subservience," to "'here-and-now' injury," thus equating subservience (in violation of separation-of-powers requirements) with injury. *Compare Free Enter. Fund.*, 561 U.S. at 513 *with Bowsher*, 478 U.S. at 727 n.5.

The Court further strengthened this standard in *Seila Law LLC v. Consumer Financial Protection Bureau*, when it stated that when a removal provision "violates the separation of powers it *inflicts* a 'here-and-now' injury on affected third parties that can be remedied by a court." *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) (citing *Bowsher*, 478 U.S. at 727 n.5) (The Court in *Seila Law LLC* changed the phrase "may create" to "inflicts."); *see also Landry v. F.D.I.C.*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) ("There is certainly no rule that 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.").[5]

In the instant case, the Horsemen are subject to rulemaking, fee-assessing, investigatory, and enforcement powers by a private corporation. FAC ¶¶ 56, 59, 65-80. The corporation's directors are private individuals appointed in a shadowy, multi-layered process by a series of other private individuals with no real accountability to any government official. *Id.* ¶¶ 57-63.

[5] The court further stated that under Supreme Court precedent, Appointments Clause cases are "structural" and, therefore, subject to automatic reversal without showing of injury. (citing *Neder v. United States*, 527 U.S. 1, 8 (1999); *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995)).

Consequently, there exists an incontrovertible separation-of-powers and vesting authority violation. Thus, under the standards articulated in *Free Enterprise Fund* and *Seila Law*, the Horsemen have suffered a "here-and-now injury." *See* FAC ¶ 111–17.

3. The Authority's argument that HISA's regulatory framework may be less burdensome than the current "patchwork system" is unavailing.

The Authority urges that, under HISA, Plaintiffs may not incur fees greater or face regulations more burdensome than they currently do. *See* Authority MTD 9–10. First, such an argument ignores the practicalities of fee assessments. Whether the fees come from state racing commissions (who will inevitably pass the financial burden downstream to Plaintiffs' members) or—in the event these commissions opt not to pay the Authority's fees—from Plaintiffs' members themselves, there can be no doubt the money needed to fund an additional layer of regulatory control will ultimately come from the pockets of Plaintiffs' members. *See* FAC ¶¶ 67–69.

In asserting that regulations may be no more burdensome under HISA than the rules currently in place, the Authority again ignores the prohibition of pre-race treatments, including treatments prescribed by veterinarians. 15 U.S.C. § 3055(d) (HISA § 1206(d)); *see* FAC ¶ 122. It also ignores the fact that HISA requires the Authority and the FTC to promulgate regulations forcing Plaintiffs' members to fully disclose to regulatory authorities the administration of medications and treatments to their horses, an invasive and onerous requirement. 15 U.S.C. § 3055(b)(7) (HISA § 1206(b)(7)).

In light of the burdensome regulations HISA explicitly compels the Authority to pass, requiring Plaintiffs to show that the system currently in place is less burdensome than the full possibility of changes that may or may not come about under HISA would require Plaintiffs to do the very thing current jurisprudence forbids. A plaintiff may not rest its case on "mere conjecture about possible governmental actions." *Clapper*, 568 U.S. at 420. However, under the Authority's

unworkable proposed standard, the Horsemen would be forced to establish all possible future outcomes of the state-based system and the regulatory regime they oppose. The Authority cites no law in support of this requirement.

Moreover, whether the fees charged are higher or lower or whether the rules are more or less strict is of no moment. The injury in this case is being subject to an unconstitutional scheme. Even if it were far more permissive than the present system, it would still violate the Constitution. *See Nat'l Solid Wastes Mgmt. Ass'n v. City of Dallas*, 903 F. Supp. 2d 446, 470 (N.D. Tex. 2012) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable [harm] is necessary.") (brackets in original).

B. Plaintiffs' claims are constitutionally and prudentially ripe.

"The ripeness and standing analyses are closely related, as ripeness inquires as to 'whether the harm asserted has matured sufficiently to warrant judicial intervention.'" *Contender Farms*, 779 F.3d at 267 (quoting *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 544–45 (5th Cir. 2008)).

There are two types of ripeness: constitutional and prudential. "Constitutional ripeness refers to Article III's case-or-controversy requirement, which mandates that an 'actual controversy' exist between the parties." *DM Arbor Court, Ltd. v. City of Houston*, 988 F.3d 215, 218 n.1 (5th Cir. 2021) (citing *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016)). "[A]n actual controversy exists where a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests." *Roman Catholic Diocese of Dallas v. Sebelius*, 927 F. Supp. 2d 406, 423 (N.D. Tex. 2013) (citing *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 896 (5th Cir. 2000) (internal citations and quotations omitted)).

For the reasons discussed in Section I, *supra*, a "substantial controversy of sufficient

immediacy and reality exists between the parties," making this case constitutionally ripe.

Even when constitutional ripeness is satisfied, however, a court may decide not to hear a case for prudential reasons, such as "[p]roblems of prematurity and abstractness." *DM Arbor Court*, 988 F.3d at 218 n.1 (quoting *Buckley v. Valeo*, 424 U.S. 1, 114 (1972)). "'[W]hen . . . a case is not prudentially ripe, it means that the case will be better decided later not that the case is not a real or concrete dispute affecting cognizable current concerns of the parties.'" *Roman Catholic Diocese of Dallas*, 927 F. Supp. 2d at 424 (quoting *Connecticut v. Duncan*, 612 F.3d 107, 113–14 (2d Cir. 2010)). Prudential ripeness concerns are not jurisdictional. *Socialist Lab. Party v. Gilligan*, 406 U.S. 583, 588 (1972); *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 88–89 (5th Cir. 2011).

"Two key considerations exist for courts evaluating the ripeness of an action: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Roman Catholic Diocese of Dallas*, 927 F. Supp. 2d at 424 (quoting *New Orleans Pub. Serv. Inc. v. Council of the City of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987)). "Both aspects of the inquiry involve the exercise of judgment, rather than the application of a black-letter rule." *Roman Catholic Diocese of Dallas*, 927 F. Supp. 2d at 424–25 (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 814 (2003) (Stevens, J., concurring)).

As to the first consideration, whether an issue is fit for review depends primarily on the extent to which it is a "purely legal" versus factual question. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977); *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812. Because it is unnecessary to wait for HISA's offending provisions to be applied to determine legality, the instant case presents a purely legal question: whether HISA, in its grant of authority and structural determinations, offends the private

nondelegation doctrine and the Due Process clause. *See Contender Farms*, 779 F.3d at 267 (citing *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. Envtl. Prot. Agency*, 752 F.3d 999, 1008 (D.C. Cir. 2014)). Thus, the first consideration is met.

As to the second consideration, denying prompt judicial review would impose hardship on the Horsemen. Without judicial review, they must choose among: (1) abandoning Thoroughbred horseracing; (2) subjecting themselves to the investigatory and enforcement jurisdiction of a private entity that is required by law to implement and enforce a regulation that will lead to the severe injury of their horses (FAC ¶ 122; 15 U.S.C. § 3055(d) (HISA § 1206(d))); or (3) incurring the investigative and enforcement burdens that will inevitably fall on them if they choose to give their horses the care they need in preparation for races. In fact, the mere prospect of investigation of violations and the corresponding risk of penalties erroneously imposed, even when a plaintiff intends to comply with the contested law, is enough to create ripeness. *See Contender Farms*, 779 F.3d at 267–68 (plaintiff had standing to challenge a regulation proscribing the soring of horses, even where plaintiff professed abstention from soring).

Nevertheless, the Authority complains that no regulation has been promulgated. *See* Authority MTD 10–11. However, Plaintiffs are not challenging a yet-to-be-passed regulation but a statute. The offending burdens in this case are easily weighed because the statute implements an unconstitutional regulatory structure and expressly mandates the implementation of certain regulations. Thus, stating that the Horsemen's future harm is not final or "even in the works" is incorrect. *Id.* at 11.

The Authority further complains that judicial review would prematurely cut off the FTC's interpretive process. *Id.* at 11–12. However, the offending points in the statute are clear, and the

FTC cannot give them an interpretation contrary to the unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

Finally, the Authority unsuccessfully seeks refuge in HISA's delayed implementation provision. The fact that the prescribed regulatory regime will not be put into effect until July 2022 is irrelevant. The statute itself will remain unchanged until then, and it is the statute itself that is offensive. Additionally, parties subject to regulatory control are not required to bear the full weight of that control before testing its constitutionality. Instead, such parties can meet their burden by showing that the "threatened injury is certainly impending or there is a substantial risk that harm will occur." *Contender Farms*, 779 F.3d at 267 (quoting *Susan B. Anthony List*, 573 U.S. at 158). Plaintiffs have satisfied that requirement.

Furthermore, because the Authority's argument is made on "'on grounds that are prudential, rather than constitutional,'" it "'is in some tension with [the Supreme Court's] recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.'" *Susan B. Anthony List*, 573 U.S. at 167 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–26 (2014) (internal quotation marks and citations omitted)). Thus, because Plaintiffs have conclusively demonstrated constitutional ripeness and Article III standing, and because they have shown hardship, the Authority's arguments against the ripeness of the instant action are unavailing.

The FTC urges that ambiguity in the organic statute leaves room for FTC interpretation that does not offend the Constitution. FTC MTD 8-9. However, the offending provisions in the statute giving legislative power to the Authority are unambiguous and, therefore, cannot be saved by agency interpretation (*see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (agencies cannot give statutes interpretation contrary to the unambiguously expressed

intent of Congress). For example, "The Board of the Authority shall be governed by bylaws." 15 U.S.C. § 3052(b)(3) (HISA § 1204(b)(3)). Though HISA requires that the FTC rubberstamp any change to these bylaws (15 U.S.C. § 3053(a)), the FTC can point to no provision showing that the original bylaws originated from any governmental authority. Instead, they were drafted by private individuals. Also, "The nominating committee shall select the initial members of the Board and the standing committees." 15 U.S.C. § 3052(d)(3)(A) (HISA § 1203(d)(3)(A)). "The initial nominating committee members shall be set forth in the governing corporate documents of the Authority." 15 U.S.C. § 3052(d)(1)(B) (HISA § 1203(d)(1)(B)). Again, there is no ambiguity in the text. The Authority is governed by private individuals selected by another group of private individuals, who were selected by the private individual(s) who incorporated the Authority. In addition, "The Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction." 15 U.S.C. § 3054(h) (HISA § 1205(h)). These are only some of the offending provisions, but they show the statute is unambiguous and cannot be changed by FTC interpretation. Because the unambiguous text of HISA presents a purely legal question and because Plaintiffs suffer unquestionable hardship under the statute, the claims presented in the First Amended Complaint are ripe.

C. This Court has personal jurisdiction over the Authority and Dr. Black.

The Authority argues that all but one of the Nominating Committee Defendants should be dismissed for lack of personal jurisdiction, aside from Defendant Black, who resides in Lubbock, Texas. Dkt. No. 34 at 12. While this may be true, the Authority did not move to dismiss itself for lack of personal jurisdiction, and could not, given its self-assumed role of regulating horseracing nationwide. Because the Authority did not raise this defense, it is waived. *See* FED. R. CIV. P. 12(h)(1); *see also Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703

(1982). Thus, this Court has personal jurisdiction over both the Authority and Dr. Black and, therefore, can enjoin the Authority from acting unconstitutionally regarding HISA.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motions to Dismiss. In addition, the Court should grant Plaintiffs' Motion for Summary Judgment, declare the Horseracing Integrity and Safety Act unconstitutional, and issue an injunction prohibiting Defendants from enforcing it.

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Respectfully Submitted,

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