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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OKLAHOMA; OKLAHOMA HORSE RACING COMMISSION; TULSA COUNTY PUBLIC FACILITIES AUTHORITY, dba Fair Meadows Racing and Sports Bar; STATE OF WEST VIRGINIA; WEST VIRGINIA RACING COMMISSION; HANOVER SHOE FARMS, INC.; OKLAHOMA QUARTER HORSE RACING ASSOCIATION; GLOBAL GAMING RP, LLC, dba Remington Park; WILL ROGERS DOWNS, LLC; UNITED STATES TROTTING ASSOCIATION; STATE OF LOUISIANA, *Plaintiffs-Appellants,* *v.* UNITED STATES OF AMERICA; HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.; LEONARD S. COLEMAN, JR.; NANCY M. COX; FEDERAL TRADE COMMISSION; ANDREW N. FERGUSON, in his official capacity as the Chair of the Federal Trade Commission;	No. 22-5487

MARK R. MEADOR, in his official capacity as Commissioner of the Federal Trade Commission; STEVE BESHEAR; ADOLPHO BIRCH, JR.; ELLEN MCCLAIN; CHARLES P. SCHEELER; JOSEPH DEFRANCIS; SUSAN STOVER; BILL THOMASON; D. G. VAN CLIEF,

Defendants-Appellees.

On Remand from the United States Supreme Court
United States District Court for the
Eastern District of Kentucky at Lexington.
No. 5:21-cv-00104—Joseph M. Hood, District Judge.

Argued: November 12, 2025
Decided and Filed: December 17, 2025

Before: SUTTON, Chief Judge; COLE and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Lochlan F. Shelfer, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., for Appellants. Courtney L. Dixon, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees. Pratik A. Shah, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., for Horseracing Authority Appellees. **ON SUPPLEMENTAL BRIEF:** Lochlan F. Shelfer, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., Zach West, OFFICE OF THE OKLAHOMA ATTORNEY GENERAL, Oklahoma City, Oklahoma, Michael R. Williams, OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL, Charleston, West Virginia, Joseph Bocock, BOCOCK LAW PLLC, Oklahoma City, Oklahoma, Todd Hembree, CHEROKEE NATION BUSINESSES, Catoosa, Oklahoma, Elizabeth B. Murrill, LOUISIANA DEPARTMENT OF JUSTICE, Baton Rouge, Louisiana, Michael Burrage, WHITTEN BURRAGE, Oklahoma City, Oklahoma, Jared C. Easterling, GREEN LAW FIRM PC, Ada, Oklahoma, for Appellants. Courtney L. Dixon, Caroline W. Tan, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees. Pratik A. Shah, Lide E. Paterno, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., John C. Roach, RANSDELL ROACH & ROYSE, Lexington, Kentucky, for Horseracing Authority Appellees. **ON SUPPLEMENTAL AMICUS BRIEF:** Sarah Sloan Reeves, Adam Clay Reeves, STOLL KEENON OGDEN PLLC, Lexington, Kentucky, Paul E. Salamanca, Lexington, Kentucky, Aaron M. Streett, BAKER BOTTS L.L.P., Houston, Texas, for Amici Curiae.

OPINION

SUTTON, Chief Judge. Sometimes government works. And sometimes it works best after a dialogue between and within the various branches.

In 2020, Congress enacted the Horseracing Integrity and Safety Act to establish a nationwide framework for regulating thoroughbred horseracing. That led to several non-delegation and anti-commandeering challenges to the validity of the Act throughout the country. The lead challenge—the facial non-delegation challenge—focused on the reality that the Act replaced several state regulatory authorities with a private corporation, the Horseracing Authority, which became the Act's primary rulemaker and which was not subordinate to the relevant public agency, the Federal Trade Commission, in critical ways. The first circuit to assess the validity of the law, the Fifth Circuit, declared the Act facially unconstitutional because it gave "a private entity the last word" on federal law. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* (*Black I*), 53 F.4th 869, 872 (5th Cir. 2022); *see id.* at 888–89.

In response to the Fifth Circuit's decision and after oral argument in a similar case in our circuit, Congress amended the Act to give the Federal Trade Commission discretion to "abrogate, add to, and modify" any rules that bind the industry. Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 4459, 5231–32 (2022). While the Constitution does not require constructive exchanges between Congress and the federal courts, it does not discourage them either, and good government sometimes benefits from them. *Mistretta v. United States*, 488 U.S. 361, 408 (1989). A productive dialogue occurred in this instance, and, from our perspective, it ameliorated the concerns underlying the non-delegation challenge. In *Oklahoma v. United States*, we upheld the Act against a facial non-delegation challenge and an anti-commandeering challenge. 62 F.4th 221, 225 (6th Cir. 2023). The Eighth Circuit took the same view. *Walmsley v. FTC*, 117 F.4th 1032, 1038–40 (8th Cir. 2024). The Fifth Circuit agreed with both courts with respect to the rulemaking power created by the Act. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* (*Black II*), 107 F.4th 415, 420 (5th Cir. 2024). But it facially invalidated the law on the ground that the Act afforded the Horseracing Authority the power to enforce federal law "without the FTC's say-so." *Id.* at 421. The losing parties all filed petitions for writs of certiorari in the Supreme Court.

The Supreme Court held the various petitions while it considered a separate non-delegation challenge to another federal law that used a private entity in implementing the law. In *FCC v. Consumers' Research*, the Court considered an as-applied challenge to the Federal Communications Commission's Universal Service Fund, premised on the reality that the FCC relied on a private administrator's policy recommendations in administering the program. 606 U.S. 656 (2025). The Court ruled that the program did not impermissibly delegate government authority to a private entity because the FCC retained final "decision-making authority." *Id.* at 693. After its decision, the Court "GVR'd" the three certiorari petitions raising non-delegation challenges to the Horseracing Integrity and Safety Act. That is to say, the Court granted each petition, vacated the lower court judgments, and remanded the cases for reconsideration in light of *Consumers' Research*.

That brings us to our second look at the Act. In view of the guidance provided by the Supreme Court in *Consumers' Research* and other recent decisions, we reject this facial challenge because the Act, as amended, gives the FTC, not the Horseracing Authority, the final say over the Act's key rulemaking and enforcement provisions.

I.

Most Americans know horseracing through occasional high-visibility races, say the Kentucky Derby on the first Saturday of May, or high-visibility books, say *Seabiscuit*. But as the partly initiated and the fully initiated alike can appreciate, the sport comes with risk. Racing a dozen or more jockeys atop sizeable horses around a mile or more track, all with prize money and gambling positions at stake, creates plenty of danger. Over the last seventy years or so, fatal accidents of jockeys in horseraces exceeded those of drivers in NASCAR races. Peta L. Hitchens, Ashley E. Hill, & Susan M. Stover, *Jockey Falls, Injuries, and Fatalities Associated with Thoroughbred and Quarter Horse Racing in California 2007–2011*, at 3, Orthopedic J. of Sports Med. (2013) (129 jockeys killed between 1940 and 2012); *NASCAR Deaths*, Ciancio Ciancio & Brown (Aug. 19. 2024), https://tinyurl.com/3s73htny (92 NASCAR drivers killed in accidents between 1948 and 2024). Faring worse, at least 850 racehorses died in 2024 alone due to racing injuries. Michael A. Fletcher, *How One Organization Plans to*

Improve Horse Racing Safety, ESPN (May 2, 2025), https://tinyurl.com/yzbha26u.

Whether it's the risk of pushing horses past their limits or the risks associated with unsafe tracks and doping, or other health and safety issues facing horses and jockeys, no one doubts the imperative for oversight. The initial question, as is so often the case, is whether the regulation should come from local governments or the national government.

The answer for a long time was local. Before 2020, thirty-eight state regulatory regimes supplied an array of horseracing protocols and safety requirements. Kjirsten Lee, *Transgressing Trainers and Enhanced Equines*, 11 J. Animal & Nat. Res. L. 23, 26 (2015).

In 2020, Congress tried a national answer. It did so in conventional and unconventional ways. Conventionally, it enacted a national law, the Horseracing Integrity and Safety Act, to centralize the regulation of thoroughbred racing. 15 U.S.C. §§ 3051–60. Less conventionally, it chose to use a private nonprofit corporation—the Horseracing Integrity and Safety Authority—to help with regulating and enforcing the Act under the supervision of the Federal Trade Commission. The decision to turn to a private entity to regulate sporting events was not wholly unprecedented. It echoed Congress's earlier choice to charter and empower the United States Olympic Committee to regulate American Olympic participation. *See* An Act to Incorporate the United States Olympic Association, Pub. L. No. 81-805, 64 Stat. 899 (1950); Amateur Sports Act of 1978, Pub. L. No. 95-606, 92 Stat. 3045.

The Act charges the Horseracing Authority with "developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program." 15 U.S.C. § 3052(a). The Authority's jurisdiction also includes the "safety, welfare, and integrity" of covered thoroughbreds, jockeys, and horseraces. *Id.* § 3054(a)(2)(A). The Authority may expand the Act's coverage to other breeds upon request by a state racing commission or a breed governing organization. *Id.* § 3054(l). "As a condition of participating in covered races and in the care, ownership, treatment, and training of covered horses," individuals are required to register with the Horseracing Authority and to sign an agreement to comply with the Authority's rules, standards, and procedures and to cooperate with any investigation by the Authority. *Id.* § 3054(d).

The Act says that the Horseracing Authority's governing board of directors should have nine members, five "selected from outside the equine industry" and four from within the industry. *Id.* § 3052(b)(1)(A)–(B). A separate "nominating committee" comprised of "seven independent members selected from business, sports, and academia" selects the initial members of the governing board and thereafter recommends "individuals to fill any vacancy on the Board." *Id.* § 3052(d)(1)(A)–(C). The FTC and the Authority may establish bylaws governing "the procedures for filling vacancies on the Board" and for establishing "term limits for members" of the board. *Id.* § 3052(b)(3)(C)–(D); *see id.* § 3053(a).

The Horseracing Authority funds its operations through fees on the horseracing industry. Each year, it calculates its budget and apportions amounts owed by each State. *Id.* § 3052(f)(1)(C). The States have two options. They may collect the fees themselves from covered entities and remit the fees to the Authority. *Id.* § 3052(f)(2)(D). Or they may allow the Authority to collect the fees directly from the relevant entities. *Id.* § 3052(f)(3)(D).

The Act empowers the Horseracing Authority to promulgate rules on a variety of subjects: prohibited medications, laboratory protocols and accreditation, racetrack standards and protocols, injury analysis, enforcement, and fee assessments. *Id.* § 3053(a). The Authority also develops procedures for its investigatory and subpoena powers. *Id.* § 3054(c). Once issued, the rules preempt state law. *Id.* § 3054(b).

The Horseracing Authority has initial authority to implement the rules, monitor compliance, and investigate potential rule infractions. *Id.* § 3054(c), (h), (i). The Act directs "the Authority and Federal or State law enforcement authorities" to "cooperate and share information" whenever a covered person may have violated federal or state law in addition to one of the Authority's rules. *Id.* § 3060(b). After investigating an infraction, the Authority customarily enforces the rules through internal adjudications subject to "due process" and two layers of review: by an ALJ and the FTC. *Id.* §§ 3057(c)(3), 3058. The Authority also may initiate an enforcement action in federal court, *id.* § 3054(j), though it has yet to exercise this power since Congress passed the Act in 2020.

The Act also permits the Authority to enlist private and governmental organizations to assist in its enforcement efforts. The Act directs the Authority, for example, to enter into an agreement with a separate private entity to serve as an "independent anti-doping and medication control enforcement organization" and to implement anti-doping rules "on behalf of the Authority." *Id.* § 3054(e)(1)(E)(i). The Authority may enter into similar agreements with state horseracing commissions for assistance in enforcing racetrack safety rules. *Id.* § 3054(e)(2)(A)(i).

Under the Horseracing Act, as originally enacted, the Federal Trade Commission had a confined rulemaking role. When the Authority proposed rules, the FTC published them for public comment. After the comment period, the Act directed the FTC to approve any proposed rules if they were "consistent" with the Act and with other "applicable rules approved by the Commission." *Id.* § 3053(b)–(c) (2020). The FTC also could issue an "interim" rule if it had "good cause" to do so and if the rule was "necessary to protect" the welfare of horses or the integrity of the sport. *Id.* § 3053(e) (2020); 5 U.S.C. § 553(b)(B).

This version of the Act prompted several legal challenges. In a case filed in federal court in Texas, several claimants argued that the Act violated the Constitution by delegating unmonitored lawmaking power to a private entity. The Fifth Circuit agreed, reasoning that the FTC's confined oversight did not suffice because the FTC could not modify the rules or otherwise question the Horseracing Authority's policy choices. *Black I*, 53 F.4th at 872–73, 886–87.

Our court faced a similar challenge. Oklahoma, West Virginia, Louisiana, their racing commissions, and other entities (collectively, Oklahoma) claimed that the Act unlawfully delegated federal power to a private entity and unlawfully commandeered the States to do the federal government's bidding. The district court rejected Oklahoma's claims as a matter of law.

After the Fifth Circuit issued its decision and after we heard oral argument in our case, Congress enacted, and the President signed into law, an amendment to the Act that expanded the FTC's oversight role. The amendment eliminated the FTC's interim-rule authority and instead empowered the FTC to create rules that "abrogate, add to, and modify the rules of the Authority." 15 U.S.C. § 3053(e).

Oklahoma maintained that the Act remained unconstitutional. We disagreed, reasoning that the FTC's newly expansive rulemaking power made the Horseracing Authority subordinate to the FTC. *Oklahoma*, 62 F.4th at 229–30. Neither the Act's rulemaking structure nor its enforcement provisions, we held, violated the non-delegation doctrine. *Id.* at 231. Nor did the Act unlawfully commandeer the States, we added. *Id.* at 233.

Oklahoma filed a petition for a writ of certiorari, which the Supreme Court denied on June 24, 2024. *Oklahoma v. United States*, 144 S. Ct. 2679 (2024). On July 5, 2024, the Fifth Circuit revisited its earlier ruling with respect to a similar challenge to the amended Act. It held that the Authority's new rulemaking power "cured the nondelegation defect" in the Act's rulemaking structure that it identified in its previous decision. *Black II*, 107 F.4th at 421, 424. At the same time, however, it ruled that the Act's enforcement provisions violated the private non-delegation doctrine. *Id.* at 429–30. The decision prompted Oklahoma to move for rehearing of its denied petition for certiorari on July 18, 2024. Petition for Rehearing, *Oklahoma v. United States*, No. 23-402 (U.S. July 18, 2024).

On September 20, 2024, the Eighth Circuit entered the picture. It held that neither the Act's rulemaking structure nor its enforcement provisions facially violated the non-delegation doctrine. *Walmsley*, 117 F.4th at 1038–39.

On October 7, 2024, the Supreme Court requested that the FTC and the Horseracing Authority respond to Oklahoma's motion for rehearing. Request for Response, *Oklahoma v. United States*, No. 23-402 (U.S. Oct. 7, 2024). The responses were filed on November 6, 2024. Responses to Petition for Rehearing, *Oklahoma v. United States*, No. 23-402 (U.S. Nov. 6, 2024). In view of the division in the circuits, the FTC and the Horseracing Authority agreed that the Court should grant review in one of the three cases. FTC's Response to Petition for Rehearing at 4, *Oklahoma v. United States*, No. 23-402 (U.S. Nov. 6, 2024); Horseracing Authority's Response to Petition for Rehearing at 11, *Oklahoma v. United States*, No. 23-402 (U.S. Nov. 6, 2024). As the Court considered these petitions for certiorari, it stayed the mandate in the Fifth Circuit case. Stay of Mandate, *Horseracing Integrity & Safety Auth. v. Nat'l Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Oct. 28, 2024).

Adding another layer of complication, the Court granted certiorari in a distinct private non-delegation challenge, *Consumers' Research*, on November 22, 2024. In June 2025, the Supreme Court decided *Consumers' Research*. In the context of that as-applied challenge, it held that an agency may delegate enforcement authority to a private entity so long as it "function[s] subordinately to" the agency and remains "subject to [the agency's] 'authority and surveillance.'"

606 U.S. at 692 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)).

On June 30, 2025, the Court granted Oklahoma's motion for rehearing, granted certiorari in all three horseracing non-delegation cases, and vacated and remanded all three cases for further consideration in light of *Consumers' Research*. *Oklahoma v. United States*, 145 S. Ct. 2836 (2025); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Horseracing Integrity & Safety Auth., Inc.*, 145 S. Ct. 2836 (2025); *Walmsley v. FTC*, 145 S. Ct. 2870 (2025). That brings us to this second assessment of the Act.

II.

Mootness. First things first: Does the 2022 amendment to the Act transform this live controversy into a moot one? When Congress amends a statute, pending claims challenging the law sometimes become moot. *See City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc). Not invariably, however. If the revised statute continues to place a material burden on the plaintiff that arises from the same theory of unconstitutionality set forth in the complaint, the case remains live. *Kenjoh Outdoor, LLC v. Marchbanks*, 23 F.4th 686, 692–93 (6th Cir. 2022). A similar conclusion applies if the amendment does not affect other features of the challenge. *Id.* Both exceptions apply here.

The amendment to § 3053(e) of the Horseracing Act, clarifying that any rulemaking authority of the Horseracing Authority remains subordinate to the FTC, does not moot Oklahoma's non-delegation claim. While significant to the outcome of today's case, the amendment changes little else about the Act's basic structure. The revised Act "operates in the same fundamental ways," with the Authority proposing and enforcing rules under the FTC's oversight, the key difference being that the FTC has more oversight than it did before. *Id.* at 693. The revised Act likewise presents fundamentally the "same controversy," with Oklahoma continuing to argue that the Act gives unsubordinated power to a private entity. *Id.*; *see Cam I, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 460 F.3d 717, 720 (6th Cir. 2006). Nor does the Act moot Oklahoma's anti-commandeering claim. In reality, the amendment does not change that dispute in any meaningful way. No party to the case disagrees with these conclusions, and they all urge us to address the validity of the amended Act.

Remand. One other preliminary question remains. If a legislature changes a law while a non-moot challenge to it remains on appeal, appellate courts may remand the case to the district court to permit it to consider the challenge in the first instance. The option is discretionary, not mandatory. In this instance, we see little benefit from a remand because Oklahoma brings facial challenges that raise only legal issues and because the parties and panel have already devoted considerable time and resources to the dispute. Fortifying this conclusion is the reality that the challengers have asked us to proceed to the merits.

III.

A.

Non-delegation principles. Through the United States Constitution, the People separated the powers of the National Government into three branches. They vested the legislative power in Congress, the executive power in the President, and the judicial power in the federal courts. U.S. Const. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1. The People also constrained each branch's use of its power through counterweights in the other branches. To preserve this balance, the Constitution bars further delegations of power between the branches. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Any delegation from Congress to an agency within the Executive Branch at a minimum must contain "an intelligible principle" to guide the agency's implementation of the statute. *Id.* (quotation omitted).

What about delegations to private entities? Surely, if the Vesting Clauses bar the three branches from exchanging powers among themselves, those Clauses bar unchecked reassignments of power to a non-federal entity. Just as it is a central tenet of liberty that the government may not permit a private person to take property from another private person, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388–89 (1798) (opinion of Chase, J.), or allow private individuals to regulate other private individuals, *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122 (1928), it follows that the government may not empower a private entity to exercise unchecked legislative or executive power. Those who govern the People must be accountable to the People. Transferring unchecked federal power to a private entity that is not elected, nominated, removable, or impeachable undercuts representative government at every turn.

Precedent confirms that unchecked delegations to private entities violate core separation-of-power guarantees. Consider *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). A federal statute gave the President discretion to create far-reaching codes of fair competition based on proposals from private entities. *Id.* at 538, 542. Rejecting the government's view that this private participation cured any surplus delegation to the President, the Court explained that transforming private groups into legislatures would make things worse and was "utterly inconsistent" with the constitutional design. *Id.* at 537. The President's complete discretion over the proposals, at any rate, meant that he made the law—the private entities counted only as advisors—and accordingly the Court refused to enforce the law on traditional non-delegation grounds. *Id.* at 538, 542; *id.* at 552–53 (Cardozo, J., concurring).

A year later, the Court applied a similar standard to a similar arrangement under the Bituminous Coal Act, though this one permitted private coal companies to have the final say over regulation of the industry. *Carter v. Carter Coal Co.* reasoned that, by empowering coal producers to set wages and to control the businesses of others, the Act amounted to a "delegation in its most obnoxious form" because such regulation "is necessarily a governmental function." 298 U.S. 238, 310–11 (1936). Appreciating the problem, Congress amended the Act the next year to give the Coal Commission, a federal agency, power to set prices. *See Adkins*, 310 U.S. at 388. After Congress subordinated the private coal producers to a public body (the Coal Commission) that could modify or reject their proposals, the Court determined that the statute did not impermissibly delegate "legislative authority to the industry." *Id.* at 399.

Nearly 90 years later, the Supreme Court applied these non-delegation principles with respect to private parties in *Consumers' Research*. To ensure universal access to communications technologies, Congress developed a mechanism to collect fees from telecommunications companies to subsidize communications services in low-income and rural areas. 606 U.S. at 662–64. Congress empowered the Federal Communications Commission to administer the program and instructed the Commission to rely on a private corporation to help manage the program's operations. *Id.* Relying on *Adkins*, the Court held that this arrangement did not violate the non-delegation doctrine. *Id.* at 695. The Court explained that an agency may "rely on advice and assistance from private actors" if the agency "retains decision-making power." *Id.* at 692. Because the private corporation must "follow[] the FCC's rules" and can only "make[] recommendations," the FCC remains "in control." *Id.* at 694–95.

Taken together, these cases draw a line between impermissible delegations of unchecked lawmaking power to private entities and permissible participation by private entities in developing government standards and rules. *Adkins* and *Consumers' Research* show that a private entity may aid a public agency so long as the agency retains ultimate authority over the implementation of the federal law. *See Adkins*, 310 U.S. at 388; *Consumers' Rsch.*, 606 U.S. at 692. If the private entity creates the law or retains full discretion over any regulations promulgated under it, however, an unconstitutional exercise of federal power emerges. *See Carter Coal*, 298 U.S. at 311; *Schechter*, 295 U.S. at 537.

Decisions from the courts of appeals hold this line. Private entities may serve as advisors that propose regulations. *See Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974); *Cospito v. Heckler*, 742 F.2d 72, 87–89

(3d Cir. 1984); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012–13 (3d Cir. 1977). And they may undertake ministerial functions, such as fee collection. *See Pittston Co. v. United States*, 368 F.3d 385, 395–97 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128–29 (3d Cir. 1989). But a private entity may not be the principal decisionmaker in the use of federal power, *Pittston Co.*, 368 F.3d at 395–97, may not create federal law, *Texas v. Rettig*, 987 F.3d 518, 533 (5th Cir. 2021), may not wield equal power with a federal agency, *Ass'n of Am. R.R. v. Dep't of Transp.* (*Amtrak I*), 721 F.3d 666, 671–73 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015), or regulate unilaterally, *Black I*, 54 F.4th at 872. These principles, for what it is worth, are American through and through. The state constitutions place similar limits on private exercises of public authority. *See, e.g.*, *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 457 (Tex. 1997).

An illuminating example of how these principles work in practice comes from federal securities law. The Securities and Exchange Commission regulates the securities industry with the assistance of private, self-regulatory organizations called SROs. The SROs propose rules for the industry and initially enforce the rules through internal adjudication. The SEC oversees the rulemaking and the enforcement. As to the rules, the SEC approves proposed rules if they are consistent with the Maloney Act, and may "abrogate, add to, and delete from" an SRO's rules "as the Commission deems necessary or appropriate." 15 U.S.C. § 78s(b)(2)(C), (c). As to enforcement, the SEC applies fresh review to the SRO's decisions and actions. *Id.* § 78s(e); *see Sartain v. SEC*, 601 F.2d 1366, 1369–71 & n.2 (9th Cir. 1979). In case after case, the federal courts have upheld this arrangement, reasoning that the SEC's control over the rules and their enforcement makes the SROs permissible aids and advisors. *See R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952); *Todd & Co.*, 557 F.2d at 1012–13; *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 699 (3d Cir. 1979); *Sorrell v. SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982); *see also Amtrak I*, 721 F.3d at 671 n.5 (describing the SROs' role as "purely advisory or ministerial").

These precedents all suggest that, at a minimum, a private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge. Whether subordination always suffices to withstand a challenge raises complex separation-of-powers questions. Simplifying matters for today, if not for a future day, the parties accept this framing of the appeal. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020); Appellants' Br. 22, 55; FTC's Br. 10; Horseracing Authority's Br. 17. As the case comes to us, then, the determinative question is whether the Horseracing Authority remains inferior to the FTC with respect to rulemaking and enforcement.

B.

The Horseracing Authority is subordinate to the agency. The Authority yields to FTC supervision and lacks the final say over rulemaking and enforcement of the law, all tried and true hallmarks of an inferior body. But even if there were doubt about the application of these points to hypothetical rulemaking or enforcement settings, that would not help Oklahoma. In filing this lawsuit, Oklahoma brought a facial challenge to the law. "[T]hat decision comes at a cost." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). In considering a facial challenge, we must focus our inquiry on the circumstances in which the Act is "most likely to be constitutional" rather than imagining "hypothetical scenarios where [the Act] might raise constitutional concerns." *United States v. Rahimi*, 602 U.S. 680, 701 (2024). To succeed, a facial claimant must establish that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

That burden does not diminish when a challenge implicates constitutional structure. The *Salerno* standard applies regardless of whether a facial challenge turns on an individual right or a structural guarantee. *See, e.g.*, *Sabri v. United States*, 541 U.S. 600, 604–05, 608 (2004) (rejecting facial challenge to Congress's spending authority to pass an anti-bribery statute applicable to local officials). What matters is whether the theory of invalidity pierces all implementations of the challenged law. In the context of individual rights, as an example, a law that allocates a public benefit based solely on the race of the beneficiary will not have any constitutional applications, whether a potential beneficiary is denied a benefit based on race or receives a benefit based on race. In the context of structure, as another example, improperly designated officers under the Appointments Clause may never exercise power, no matter whether they propose to act modestly or aggressively. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 14–16, 23–26 (2021). To succeed in this case, Oklahoma thus must demonstrate that the FTC lacks supervisory power over all of the Authority's rulemaking or enforcement powers. Oklahoma does not clear this "very high bar," *Moody*, 603 U.S. at 723, in view of numerous applications of the Act's rulemaking and enforcement provisions in which the

Horseracing Authority remains subordinate to the FTC.

1.

Rulemaking. The Horseracing Act gives the FTC supervision over the rules that govern the horseracing industry. The Act permits the Horseracing Authority to draft proposed rules on racetrack safety and anti-doping matters. But they are just that: proposals. No such proposal becomes a binding rule until the FTC approves it, and the Act permits the agency only to approve proposed rules if they are "consistent" with the Act. 15 U.S.C. § 3053(c)(2). In addition, the Act gives the FTC authority, as it "finds necessary or appropriate," to "abrogate, add to, and modify the rules." *Id.* § 3053(e). The FTC's power to review proposed rules, to abrogate existing rules, and to add new rules makes clear who is in charge and who has the final say.

Other features of § 3053(e) show that Congress gave the FTC a comprehensive oversight role. The provision adds that the FTC may act as it "finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of [this Act] and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of [this Act]." *Id.* The final catchall suggests that § 3053(e) spans the Horseracing Authority's jurisdiction. The parties are one in agreeing that this section allows the FTC to modify rules as it wishes. Appellants' First Suppl. Br. 1; FTC's Suppl. Br. 1; Horseracing Authority's Suppl. Br. 10.

With § 3053(e)'s broad grant of power to the FTC to write and rewrite the rules comes policymaking discretion. *See Cospito*, 742 F.2d at 88–89. When the FTC decides to act, whether by abrogating one of the Horseracing Authority's rules or by introducing its own, the FTC makes a policy choice and necessarily scrutinizes the Authority's proposed policy choices. That is no less true when the FTC decides *not* to act. In either setting, the FTC may "unilaterally change regulations," *Amtrak I*, 721 F.3d at 671, and "is free to prescribe" the rules, showing that it "retains ultimate authority," *Cospito*, 742 F.2d at 88. The FTC has recognized as much, explaining that its new "rulemaking power" allows it to "exercise its own policy choices." *Order Ratifying Previous Commission Orders* 3, Fed. Trade Comm'n (Jan. 3, 2023), https://tinyurl.com/dkenwspt.

In full, § 3053(e) gives the FTC ultimate discretion over the content of the rules that govern the horseracing industry and the Horseracing Authority's implementation of those rules. It follows that ultimate "law-making is not entrusted to the [Authority]," *Adkins*, 310 U.S. at 399, as the Authority "must carry out all its tasks consistent with the [FTC's] rules," *Consumers' Rsch.*, 606 U.S. at 693 (quotation omitted). That makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the "subordinate" one. *Id.* at 692; *see Adkins*, 310 U.S. at 388.

Accountability considerations lead to the same destination. With its authority to have "the final word on the substance of the rules," the FTC bears ultimate responsibility for them. *Black I*, 53 F.4th at 887; *see Adkins*, 310 U.S. at 399; *cf. Lynn*, 502 F.2d at 59. The People may rightly blame or praise the FTC for how adroitly (or, let's hope not, ineptly) it "ensure[s] the fair administration of the Authority" and advances "the purposes of [the Act]." 15 U.S.C. § 3053(e).

Oklahoma makes several contrary arguments. It points out that the Act permits the FTC only to review proposed rules by the Authority for "consisten[cy]" with the Act. 15 U.S.C. § 3053(c). But that's searching for clouds on a cloudless day. A sure sign that Congress has not delegated too much authority to an agency or a private entity is a directive that *all* regulations promulgated under the Act must be consistent with it. Even so, Oklahoma adds, doesn't the word "consistency" at some level of generality permit the Horseracing Authority to obtain approval for proposed rules that contain embedded policy choices with which the FTC might disagree? We doubt any such risk exists. But even if it did, the FTC's authority to modify *any* rules for any reasonable reason at all, including policy disagreements, ensures that the FTC retains ultimate authority over implementation of the Horseracing Act.

The FTC's review authority in this respect parallels similar authority delegated to the SEC under the Maloney Act. It provides that the SEC "may abrogate, add to, and delete from . . . the rules of [the private entity] as the Commission deems necessary or appropriate." 15 U.S.C. § 78s(b)(2)(C), (c). The same is true under the Coal Act. It provides that the Coal Commission may "approve, disapprove, or modify" proposals. *See* Bituminous Coal Act of 1937, Pub. L. No. 75-48, § 4, 50 Stat. 72, 78. All of this explains why the Supreme Court upheld the Coal Act in *Adkins* and why every court of appeals to address the validity of this kind of delegation under the Maloney Act has upheld it.

Harking back to the "consistency" provision, Oklahoma worries that a proposed rule by the Horseracing Authority could govern a dispute until the FTC undoes a rule it dislikes through the sometimes slow, ever deliberate, notice-and-comment process. We doubt, to repeat, the premise of the argument—that the FTC's consistency review will permit problematic rules to get through. But let us grant the premise for now to explain an independent reason this argument does not carry the day.

Even though the FTC's modification authority under § 3053(e) customarily would run through ordinary rulemaking, that current reality need not be a future reality. For one, the threat of modification is not likely to miss the attention of the Authority. For another, the FTC has power to initiate new rules, not just to modify rules it does not like. To the extent this timing gap creates a problem, the FTC is free to resolve it ahead of time. It might adopt a rule, for example, that all newly enacted rules do not take effect for a certain period of time, thereby giving the FTC time to review rules and prepare preemptive modifications. Or it might decide to hold off on publishing a rule proposed by the Authority until the FTC has promulgated its own modified version of the rule. *See* 15 U.S.C. § 3053(c)(1) (requiring the FTC to approve or disapprove proposed Authority rules "[n]ot later than 60 days" after the FTC publishes the proposal, but placing no time limit on when the FTC publishes such proposals).

This argument overlooks another reality. When the FTC reviews the Horseracing Authority's proposed rules, it asks not just whether they are "consistent" with the Act; it also asks whether they are "consistent" with other "applicable rules approved by the Commission." *Id.* § 3053(c)(2). Any risk of a policymaking gap between initial consistency review and initial full review—and, to repeat, we doubt any such risk exists—will diminish over time as the FTC chooses to exercise (or not to exercise) its ample authority to initiate new rules or modify old ones. Over time, the FTC's threshold consistency review will account for its own full-throated rulemaking power. None of these arguments, let us not forget, interferes with the FTC's power to "abrogate, add to, and delete from" the rules whatever it wishes and however often it wishes.

Oklahoma persists that the FTC's duty under the Administrative Procedure Act to explain any changes to the rules limits its hand. But that means only that it may not arbitrarily alter the rules. The APA does not limit the FTC's authority to disagree with the Horseracing Authority over a policy choice delegated to the agency by Congress. The FTC "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It is enough that "there are good reasons" for the new policy "and that the agency believes it to be better." *Id.* (emphasis omitted).

No matter, Oklahoma adds: The Horseracing Authority's ability to expand its jurisdiction to breeds other than thoroughbreds escapes the FTC's review. Not so. The FTC's § 3053(e) power is sufficiently broad to allow it to revoke any decision from the Authority on this or any other topic, or to place procedural and substantive conditions on such decisions.

In the last analysis, "in the relationship between the two"—the FTC and the Horseracing Authority—

the FTC "dominates" when it comes to rulemaking. *Consumers' Rsch.*, 606 U.S. at 693. The Act's grant of power to the FTC to set whatever rulemaking policy it wishes will lead to plenty of constitutional exercises of that power and perhaps only constitutional exercises of that power. The existence of ample permissible exercises of power by itself suffices to uphold the Act's rulemaking provisions against this facial challenge.

2.

Enforcement. A similar conclusion applies to Oklahoma's attack on the enforcement provisions of the Act. This challenge is harder to answer in some ways and easier in others. It is the more difficult of the challenges to rebut because the Horseracing Authority appears to have more authority over some enforcement features of the Act than it does with respect to rulemaking. But it is easier because challenges to enforcement provisions quintessentially lend themselves to as-applied challenges, not to overriding facial challenges. *See Sabri*, 541 U.S. at 604–05. Oklahoma's "pre-enforcement" facial challenge to the Act's enforcement provisions seeks "to leave nothing standing." *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc). Oklahoma asks us to declare the Act's enforcement provisions unconstitutional not only as to the parties before us, but also "on behalf of *all*" who fall under the Act and with respect to any potential enforcement of the Act. *Id.* (emphasis in original). "That is not how constitutional litigation typically proceeds." *Id.* Because enforcement challenges often turn on "an understanding of complex factual issues," *id.* (quotation omitted), plaintiffs generally, and wisely, choose to challenge enforcement provisions as applied to them, *cf. Morrison v. Olson*, 487 U.S. 654, 668

(1988) (as-applied challenge to independent counsel's power to issue subpoenas), and seek relief only as to the parties in the case, *cf. Trump v. CASA, Inc.*, 606 U.S. 831, 850–52 (2025).

By pursuing a facial challenge, Oklahoma took a different path. That choice comes at a cost. If the enforcement provisions of the Act "'could conceivably be' implemented in a constitutional manner," that will prove "fatal" to Oklahoma's facial challenge. *Warshak*, 532 F.3d at 530 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 456–57 (2008)). Several such enforcement actions would be permissible.

Begin with the Horseracing Authority's main enforcement tool and the only one used to date: an internal enforcement action. In that setting, the Authority may investigate a violation of the rules and propose a sanction. But it may not impose a sanction without oversight. Any aggrieved entity may obtain review from an Administrative Law Judge over any sanction proposed by the Horseracing Authority. 15 U.S.C. § 3058(b). After that, the FTC has full authority to review the Authority's enforcement actions with fresh eyes. *Id.* § 3058(c)(1)–(2). Through this independent review, the FTC may reverse any sanction by the Authority. *Id.* § 3058(c)(3)(A)(1).

As with rulemaking, so with adjudication when it comes to finality. The Authority's adjudication decisions do not become final until the FTC has the opportunity to review them. *See Consumers' Rsch.*, 606 U.S. at 693 (private entity subordinate to FCC because "anyone aggrieved by an action of the [private entity] may seek *de novo* review by the Commission"); *Cospito*, 742 F.2d at 88; *Todd & Co.*, 557 F.2d at 1012–14. No sanction thus goes into final effect without the

FTC's "say-so." *Consumers' Rsch.*, 606 U.S. at 695. In this way, the Horseracing Authority is "subject to [the FTC's] pervasive surveillance and authority," making the Authority "an aid" to the FTC, not its choreographer. *Adkins*, 310 U.S. at 388. If the Authority tries to implement a sanction before the FTC finally reviews it, the FTC or the ALJ may stay the sanction. 15 U.S.C. § 3058(d).

These two layers of review, and the existence of this stay authority, by themselves insulate the Act from a successful facial challenge. In-house adjudications serve as the Horseracing Authority's primary tool, and the sole tool during the first several years of enforcing the Act, for sanctioning rulebreakers. Surely there will be plenty of sanctions that do not involve any meaningful investigation or any use of subpoenas—say, an instance of excessive horse cropping by a jockey fully captured on film. In that setting, all that will matter is the extent and amount of the sanction. Full review of such a proposed sanction by the FTC before it goes into effect does not violate public or private non-delegation principles.

Keep in mind, too, that the FTC's § 3053(e) rulemaking power provides it with an additional means to supervise the Authority's enforcement practices. Take an example to illustrate the point. Imagine the FTC initially adopted a laissez-faire mindset toward thoroughbred horseracing, and the Horseracing Authority ran heedlessly with that authority. Section 3053(e) gives the FTC tools to bring an overzealous Horseracing Authority to heel. The FTC could begin with rules constraining the Authority's investigations and increasing the procedural rights of suspected rulebreakers. The FTC could abrogate rules that lead to petty violations. The FTC could promulgate rules that change the elements of a rule violation by, say, increasing the burden of proof, imposing a state-of-mind requirement, or shortening any limitations periods. The FTC could require that the Authority seek its authority before investigating an incident. The FTC could require that the Authority provide a suspect with a full adversary proceeding and with free counsel. The FTC could modify rules to decrease the penalties for rule violations. And the FTC could require that the Authority meet a burden of production before bringing a lawsuit.

The FTC need not stop at procedural rules governing "*how* the Authority enforces [the Act]." *Black II*, 107 F.4th at 433 (emphasis in original). Section 3053(e) also empowers the FTC to determine *who* the Authority investigates in the first place. The FTC could promulgate rules requiring, for instance, that the Authority drop a misguided investigation into a particular jockey or, conversely, that the Authority pursue an enforcement action against a recalcitrant rule breaker.

Still further, the FTC could require the Horseracing Authority to seek its permission before pursuing *any* enforcement action. Recent developments offer a proof of concept. The Authority itself recently proposed a rule that would require the FTC's approval before the Authority may issue a subpoena or bring a civil enforcement action. 90 Fed. Reg. 43,431, 43,443–45 (Sep. 9, 2025). That is hardly evidence of a private entity "running riot." *Schechter*, 295 U.S. at 553 (Cardozo, J., concurring). The FTC is free to beef up that rule and micromanage every particularized decision the Authority makes in an investigation. Or the FTC could decide to take a more hands-off approach. No matter which way it goes, the FTC's capacity to control the Authority's enforcement activities ensures that the FTC, not the Horseracing Authority, is the agency of ultimate resort that decides how the federal government enforces the Act. Serial layers of review of any proposed sanctions, together with the FTC's rulemaking powers over enforcement actions, give it "pervasive" oversight and control of the Authority's enforcement activities, just as in the rulemaking context. *Adkins*, 310 U.S. at 388.

This conclusion by the way does not depend on how the FTC employs its power—by action or inaction. Whether the FTC becomes a demanding taskmaster or a lenient one, the FTC *could* subordinate every aspect of the Authority's enforcement "to ensure the fair administration of the Authority . . . or otherwise in furtherance of the purposes of [the Act]." 15 U.S.C. § 3053(e) (as amended). That potential suffices to defeat a facial challenge, where Oklahoma must show that no feature of the enforcement provisions of the Act should be left standing.

Oklahoma persists that this interpretation of § 3053(e) contradicts other provisions of the Act. It points to the Act's prefatory language, which says that the FTC and the Authority shall implement the Act "each within the scope of their powers and responsibilities under this chapter." 15 U.S.C. § 3054(a). Oklahoma maintains that our reading of the FTC's rulemaking powers makes a hash of this division of labor. But this argument, too, sees shadows instead of silver linings. Under the Act, one of the FTC's key responsibilities is to "abrogate, add to, and modify the rules of the Authority . . . as the

[FTC] finds necessary or appropriate" to further "the purposes of" the Act. *Id.* § 3053(e). Section 3053(e) permits the FTC to employ its sweeping rulemaking powers to govern all aspects of the Authority's operations. An agency does not exceed the scope of its power by faithfully exercising it.

Section 3059 doesn't help Oklahoma either. That provision targets certain "unfair or deceptive" practices in selling horses. *Id.* § 3059. While the Horseracing Authority may, subject to the FTC's supervision, initiate enforcement of other provisions of the Act, it may only "recommend that the [FTC] commence an enforcement action" to enforce § 3059. *Id.* § 3054(c)(1)(B). That makes sense. Unfair trade practices fit comfortably within the FTC's bailiwick. Unlike other aspects of the Act involving the minutiae of horseracing, this is an area where Congress determined that the FTC did not need help. Far from suggesting that Congress intended to limit the FTC's supervisory power, this provision speaks to the inherent limits of the Authority's expertise as "an aid" to the FTC. *Adkins*, 310 U.S. at 388.

These arguments suffer from another defect. Statutes should not be read "extravagantly, the better to create a constitutional problem." *Consumers' Rsch.*, 606 U.S. at 690. They "should be read, if possible, to comport with the Constitution, not to contradict it." *Id.* at 691. That is particularly so where an inter-branch dialogue led to amendments designed to conform the Act to the Constitution's requirements. The Act never grants the Authority exclusive enforcement power. The statute uses the word "exclusive" only once, declaring that the FTC *and* the Authority together "exercise independent and exclusive national authority" to regulate horseracing.

15 U.S.C. § 3054(a)(2). By urging us to read the Act to vest exclusive enforcement power in the Horseracing Authority, Oklahoma proposes an interpretation that maximizes constitutional risks rather than minimizing them. Where fairly possible, however, we should harmonize statutes with the Constitution, not create chasms between them.

Oklahoma points out that an agency may not "cure an unlawful delegation . . . by adopting in its discretion a limiting construction of the statute." *Whitman*, 531 U.S. at 472. That is true in a traditional non-delegation case. An agency may not fix a statute that lacks an "intelligible principle" by supplying intelligible principles itself or by otherwise denying itself the power Congress unduly gave it. But that's not what's going on today. In this private non-delegation dispute, the issue is whether Congress gave final enforcement and rulemaking authority to the relevant agency, the FTC. If it did and if the FTC exercises that authority to subordinate the Horseracing Authority to its policy preferences, that is not an end run around the non-delegation doctrine. It is proof that no improper delegation to a private entity occurred in the first place. The broad rulemaking authority that Congress delegated to the FTC demonstrates that Congress empowered the agency to supervise the Horseracing Authority and act on its "advice and assistance" as it wishes. *Consumers' Rsch.*, 606 U.S. at 692.

Oklahoma's reliance on *Alpine Securities Corp. v. FINRA* likewise comes up short and in the end proves our point. 121 F.4th 1314 (D.C. Cir. 2024). In that as-applied challenge to an enforcement action, the D.C. Circuit held that the private non-delegation doctrine barred an SRO under the Maloney Act from summarily expelling a company from the securities industry without prior SEC review. *Id.* at 1326, 1331; *see id.* at 1343 (Walker, J., concurring in the judgment in part and dissenting in part). The decision illustrates the difference between facial and as-applied challenges and the wisdom of using as-applied challenges to restrict unduly zealous enforcement actions. If the Horseracing Authority ever forces a company to "shut down," making "any later review" by the agency no more than an "academic exercise," *id.* at 1326, 1331 (majority opinion), as happened in *Alpine Securities*, an as-applied challenge to that enforcement action would be waiting in the wings. And the federal courts in this circuit will be open to hear it. But today, the parties presented us with a facial challenge, in which we must "consider the circumstances in which" the Act is "most likely to be constitutional" instead of imagining hypothetical worst-case scenarios in which the Act might cross constitutional lines. *Rahimi*, 602 U.S. at 701.

Oklahoma falls back on the proposition that, at the very least, the Horseracing Authority's power to bring civil enforcement actions on its own initiative in federal court under § 3054(j) must violate the private non-delegation doctrine. The power to enforce the law through civil lawsuits, Oklahoma contends, may not reside outside the executive branch.

"Difficult and fundamental questions," we appreciate, arise when private entities enforce federal law. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring). In one direction, it appears to cut against the grain to permit private entities to make such discretionary decisions, whether to bring an enforcement action or whether to engage in narrow or broad investigations of alleged violations of the law. In the other direction, "[p]rivate citizens [have been] actively involved in government work," including investigations and prosecutions, throughout our country's history. *Filarsky v. Delia*, 566 U.S. 377, 385 (2012). "Private detectives and privately employed patrol personnel" have served "as special policemen," *id.* at 387 (quotation omitted), and at times in our history "private lawyers were regularly engaged to conduct criminal prosecutions," *id.* at 385.

The question, then, is not whether a private entity performs what looks like an enforcement function. It is whether the private entity is subject to the agency's supervision. *See Consumers' Rsch.*, 606 U.S. at 695. An agency is free to enlist a private entity to serve "as an aid" even in carrying out executive functions. *See Adkins*, 310 U.S. at 388. The test is whether the private entity remains "subject to [the agency's] pervasive surveillance and authority" when it matters. *Id.*

It is premature and inappropriate to finally resolve the validity of § 3054(j) in today's case. In the first place, Oklahoma chose to bring a facial challenge to the "Act's delegation of law-enforcement power to the Authority" in general, not to any one enforcement provision. Appellants' Second Suppl. Br. 58–59; *see* R.53 ¶ 11 (amended complaint). Having litigated the case as a broad facial challenge to the enforcement provisions, Oklahoma may not now leverage one provision to invalidate all of them. Nor did Oklahoma, by the way, argue below or in its written submissions on appeal that, if this one provision is invalid and if it is unseverable, then all of the Act's enforcement provisions must fall.

In the second place, serious standing, ripeness, and mootness questions would arise if Oklahoma brought a single-shot challenge to § 3054(j). Keep in mind that the Authority has *never* filed a civil enforcement action under § 3054(j) since Congress passed the law. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014). And keep in mind that the Authority has proposed a rule for the FTC to approve that would require the FTC, under the Act's delegated powers, to approve any such action before it is filed. That rule might moot this very concern. Oklahoma cannot smuggle a truly hypothetical, likely unripe, perhaps soon-to-be moot, pre-enforcement challenge to a single provision under the cover of a broad facial challenge.

In the third place, a challenge to this enforcement provision brings into play two salient and unbriefed issues, one set of which overlaps with the other enforcement provisions and the other of which does not. As for the overlapping question, it remains unclear whether any investigations and enforcement actions conducted by the Authority count as governmental action. Put another way, do the Fourth Amendment (*e.g.*, no unreasonable searches and seizures) and Fifth Amendment (*e.g.*, no compelled testimony, no due process violations) limit the Authority's power to investigate alleged violations and enforce its rules? We are not prepared to hazard a guess and see no need to do so in the context of a facial challenge in which no party examined the issue.

As for the non-overlapping question, the Act appears to require regulated entities to waive challenges to the Authority's general enforcement authority, 15 U.S.C. § 3054(d), though not its power to initiate an action under § 3054(j). Here is what the

Act says in relevant part: "As a condition of participating in covered races and in the care, ownership, treatment, and training of covered horses, a covered person shall register with the Authority[.] [That registration] shall include an agreement by the covered person to be subject to and comply with the rules, standards, and procedures developed and approved under [§ 3054(c)]." *Id.* § 3054(d)(1)–(2). SROs under the Maloney Act impose a similar requirement. *Id.* § 78o(b)(8); *see, e.g.*, FINRA Bylaws, art. IV, § 1(a) (FINRA members must "agree[] to comply with" FINRA's rules and enforcement decisions). Because the parties did not brief this issue, it remains unclear how broadly this waiver applies and whether, if it applies broadly, the waiver amounts to an unconstitutional condition. *See Rust v. Sullivan*, 500 U.S. 173, 197–98 (1991). Sorting out all of these issues ought to wait until the Authority invokes these enforcement provisions against a regulated entity in a way that implicates these potential concerns—still a figment in the public's imagination—at which time the meaning and enforceability of the relevant provisions can be discerned. Else, we would be forced to address the "gritty who/what/when details of enforcement" before they "have been worked out" in an actual or threatened enforcement action. *Saginaw County v. STAT Emergency Med. Servs., Inc.*, 946 F.3d 951, 958 (6th Cir. 2020).

As this case illustrates, litigation by hypothetical is a one-way street when it comes to facial challenges to a statute. A reviewing court may reject a challenge based on potential applications of the statute that avoid constitutional shoals. But it may not invalidate a statute based on hypothetical applications that have yet to occur. Like the D.C. Circuit when it comes to the Maloney Act, *see Alpine Sec.*, 121 F.4th at 1322–24, we will wait for an as-applied challenge to the Act before handling some of the enforcement issues raised by Oklahoma. Having resolved this challenge in the facial context in which it comes to us, we will save resolution of other enforcement questions, if such questions there be, for a day when the Authority's actions and the FTC's oversight appear in concrete detail, presumably in the context of an actual enforcement action.

IV.

Oklahoma separately claims that two provisions of the Horseracing Act, § 3060(b) and § 3052(f), violate the anti-commandeering guarantee of the Tenth Amendment. Oklahoma lacks standing to challenge the first provision, and the second one does not count as a cognizable form of commandeering.

A.

Oklahoma initially sets it sights on § 3060(b), which requires state authorities to "cooperate and share information" with the Horseracing Authority or federal agencies. Right or wrong about whether this requirement amounts to commandeering, Oklahoma and the other State plaintiffs lack standing to challenge it.

Standing arises from the Constitution's mandate that federal courts decide only "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. A plaintiff must establish standing for each claim it presses and each statutory provision it challenges. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). To do that, it must point to an injury that is traceable to the defendant's conduct and that a judicial decision can redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). In a pre-enforcement challenge like this one, a plaintiff must also allege a "credible threat" of future enforcement. *Driehaus*, 573 U.S. at 167.

Oklahoma has not carried this burden. Even if Oklahoma is correct that § 3060(b) unlawfully orders the States to cooperate, the provision does not contain a penalty or enforcement mechanism. And Oklahoma does not point to any actual or threatened enforcement actions. An unenforceable statutory duty does not give rise to Article III standing, *California v. Texas*, 593 U.S. 659, 669–70 (2021), and "mere conjecture" about possible enforcement is not any better, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013).

Oklahoma asserts in response that wrongdoing will "frequently" implicate both federal and state law and thus trigger the duty to cooperate. R.86 at 10. But the question is not how often the opportunity for cooperation may arise; it is whether the defendants can or will mandate cooperation when that time comes. Even so, Oklahoma notes, the Horseracing Authority may penalize States that refuse to cooperate. But the Authority's sanction power extends only to covered persons, a term that does not include States. 15 U.S.C. §§ 3051(6), 3054(d), 3057(a)(1); *see Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). The same is true of the Authority's ability to initiate civil lawsuits. 15 U.S.C. § 3054(j).

Absent a credible allegation that the Horseracing Authority or the FTC can or will enforce § 3060(b), Oklahoma lacks standing to challenge it. *California*, 593 U.S. at 671–72.

B.

Oklahoma separately claims that § 3052(f) puts the States to an unconstitutionally coercive choice. While § 3052(f)'s threat of preemption gives Oklahoma standing, *Kentucky v. Biden*, 23 F.4th 585, 598–601 (6th Cir. 2022), the provision does not commandeer the States.

As separate sovereigns, Congress may not require the States to implement federal programs. *Printz v. United States*, 521 U.S. 898, 925 (1997). Nor may the federal government issue "orders directly to the States" to carry out this or that federal program. *Murphy v. NCAA*, 584 U.S. 453, 470 (2018). At the same time, Congress may "encourage a State to regulate" or "hold out incentives" in hopes of "influencing a State's policy choices." *New York v. United States*, 505 U.S. 144, 166 (1992).

One option in this last respect is that Congress may encourage the States through conditional preemption. *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981). Instead of preempting state law altogether, Congress may offer States a regulatory role contingent on following federal standards. *New York*, 505 U.S. at 167–68. The choice brings consequences. If a State participates, it often has discretion in how it implements the program. *See Hodel*, 452 U.S. at 289. If a State decides not to participate, the State's activities are preempted. By offering States such a non-coercive choice—regulate or be preempted—Congress has not violated any constitutional imperatives. *Murphy*, 584 U.S. at 476; *New York*, 505 U.S. at 167; *Hodel*, 452 U.S. at 288–91; *FERC v. Mississippi*, 456 U.S. 742, 769 (1982).

That's how § 3052(f) operates. It presents States with a choice, not a command. States may elect to collect fees from the industry and remit the money to the Horseracing Authority or States may refuse. That's their call. If a State participates, it gains discretion over how the fees are collected. 15 U.S.C. § 3052(f)(2)(D). If a State refuses, the Authority collects the fees itself, and the State "shall not impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters." *Id.* § 3052(f)(2)(D), (3)(D).

This scheme fits comfortably within the conditional preemption framework. Section 3052(f) "simply establish[es] requirements for continued state activity in an otherwise pre-emptible field." *FERC*, 456 U.S. at 769; *see Printz*, 521 U.S. at 925–26. And because Congress may regulate horseracing under its commerce power, there is nothing unconstitutional about Congress "offer[ing] States the choice of regulating that activity according to federal standards or having state law pre-empted." *New York*, 505 U.S. at 173–74.

Section 3052(f) also lacks the hallmark of commandeering: a "direct" order to the States. *Murphy*, 584 U.S. at 471. Section 3052(f)'s statement that a State "shall not impose or collect" certain fees may sound like a command, true enough. 15 U.S.C. § 3052(f)(3)(D). But preemption often carries that tone, as similar language in other statutes confirms. *See, e.g.*, 42 U.S.C. § 7543(a) (1988) ("No State . . . shall adopt or attempt to enforce any standard relating to the control of emissions . . . ."); 49 U.S.C. § 40116(b) ("A State . . . may not levy or collect a tax [or] fee . . . on an individual traveling in air commerce."). Because Congress often speaks in this manner, "it is a mistake to be confused" by preemption provisions that "appear to operate directly on the States." *Murphy*, 584 U.S. at 478. Congress in this instance offers the States a choice, as Oklahoma all but concedes. Reply Br. 2, 25, 26, 27 (referring to § 3052(f) as a "threat of preemption"). A choice is not a command. *See Printz*, 521 U.S. at 925–26.

All of this is not to say "that the choice put to the States—that of either abandoning regulation" or assisting the Authority—is an easy one or a good one as a matter of policy. *FERC*, 456 U.S. at 766. Fraught though this decision may be, Congress has not commandeered the States by putting them to the choice.

Oklahoma's principal counterargument is that a choice between collecting fees and losing fee-collecting authority is illegitimate, coercive, or punitive. We don't think so.

Oklahoma begins by arguing that § 3052(f)'s choice—collect fees for the Horseracing Authority or stop collecting entirely—commandeers the States because Congress may not force the States to adopt either alternative. *See New York*, 505 U.S. at 175–76. Congress may not force a State to collect fees, true. *See Printz*, 521 U.S. at 933. But Congress may use its commerce power to preempt the field of horseracing, preventing States from imposing fees. *See FERC*, 456 U.S. at 764; *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). Threatening to do so, it follows, is a "conditional exercise of [a] congressional power." *New York*, 505 U.S. at 176.

Oklahoma's response that a "threat of preemption," Reply Br. 25, is coercive runs aground on contrary precedent. The Court has rejected the argument "that the threat of federal usurpation of their regulatory roles coerces the States." *Hodel*, 452 U.S. at 289.

Even so, Oklahoma continues, threatening a State's taxing authority is especially coercive. We fail to see how. The validity of conditional preemption does not fluctuate with the power that is threatened. *See id.* at 290–91. This would not be the first time a State's taxing power was preempted. *See Aloha Airlines, Inc. v. Dir. of Tax'n*, 464 U.S. 7, 14 n.10 (1983); *Exxon Corp. v. Hunt*, 475 U.S. 355, 360–63 (1986).

Oklahoma presses the point that Congress's financial incentives may become so overwhelming that a State effectively cannot refuse. *See South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987). Grafting this principle on conditional preemption raises legal and factual problems. Legally, it is bereft of support; no case evaluates conditional preemption by looking to a State's monetary incentives. Factually, Oklahoma falters because it does not quantify its expected loss. *See NFIB v. Sebelius*, 567 U.S. 519, 580–82 (2012) (opinion of Roberts, C.J.) (comparing an incentive to a State's budget). Without knowing how much money is at stake, how are we to say the sum is too high?

Oklahoma adds that the threat is punitive because it serves no purpose other than to obtain compliance. Conditional preemption, however, amounts to a "permissible method of encouraging a State to conform to federal policy." *New York*, 505 U.S. at 168; *see FERC*, 456 U.S. at 766. And a State that sees itself as a sovereign sometimes must act like one. Another reason is not difficult to find anyway. The fee provisions ensure that a single entity—

whether a State or the Authority—imposes fees on the horseracing industry for all anti-doping and racetrack safety matters. Eliminating "double taxation" and fostering uniformity are adequate grounds to preempt parallel collection regimes. *Aloha Airlines*, 464 U.S. at 9–10; *see Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 97–99 (2017); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (plurality opinion).

Oklahoma next argues that Congress failed to "appropriate the funds needed to administer the program" by forcing States to pay for collecting fees even if they refuse to act as the Authority's fee collector. *Murphy*, 584 U.S. at 474. Not so. Private parties pay for the Authority's operations. 15 U.S.C. § 3052(f)(2)(D), (3)(B). And if a State does not collect fees under the Act, the Authority incurs the cost of doing so. Even if States suffer a pocketbook loss from preemption, that does not force them to pay for the program. *See Hodel*, 452 U.S. at 288.

Oklahoma also worries that the scheme blurs accountability. Conditional preemption, however, leaves a State and its citizens with "the ultimate decision as to whether or not the State will comply." *New York*, 505 U.S. at 168. The ability to choose ensures that state and federal entities are accountable for their roles. *See id.*

We affirm.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 23-402

OKLAHOMA, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

Filed: June 30, 2025

ORDER

The petition for rehearing is granted. The order entered June 24, 2024, denying the petition for a writ of certiorari is vacated. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *FCC* v. *Consumers' Research*, 606 U.S. —— (2025).

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 23-402

OKLAHOMA, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

Filed: June 24, 2024

ORDER

Petition DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OKLAHOMA; OKLAHOMA HORSE RACING COMMISSION; TULSA COUNTY PUBLIC FACILITIES AUTHORITY, dba Fair Meadows Racing and Sports Bar; STATE OF WEST VIRGINIA; WEST VIRGINIA RACING COMMISSION; HANOVER SHOE FARMS, INC.; OKLAHOMA QUARTER HORSE RACING ASSOCIATION; GLOBAL GAMING RP, LLC, dba Remington Park; WILL ROGERS DOWNS, LLC; UNITED STATES TROTTING ASSOCIATION; STATE OF LOUISIANA,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.; LEONARD S. COLEMAN, JR.; NANCY M. COX; FEDERAL TRADE COMMISSION; REBECCA KELLY SLAUGHTER, in her official

No. 22-5487

capacity as Acting Chair of the Federal Trade Commission; NOAH JOSHUA PHILLIPS, in his official capacity as Commissioner of the Federal Trade Commission; ALVARO BEDOYA, in his official capacity as Commissioner of the Federal Trade Commission; CHRISTINE S. WILSON, in her official capacity as Commissioner of the Federal Trade Commission; STEVE BESHEAR; ADOLPHO A. BIRCH, JR.; ELLEN MCCLAIN; CHARLES P. SCHEELER; JOSEPH DEFRANCIS; SUSAN STOVER; BILL THOMASON; D.G. VAN CLIEF; LINA KHAN,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Kentucky at Lexington.
No. 5:21-cv-00104—Joseph M. Hood, District Judge.

Argued: December 7, 2022
Decided and Filed: March 3, 2023

Before: SUTTON, Chief Judge; COLE and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Matthew D. McGill, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., for Appellants. Courtney L. Dixon, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees. Pratik A. Shah, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., for Horseracing Authority Appellees. **ON BRIEF:** Matthew D. McGill, Lochlan F. Shelfer, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., Zach West, Bryan Cleveland, OFFICE OF THE OKLAHOMA ATTORNEY GENERAL, Oklahoma City, Oklahoma, Lindsay S. See, OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL, Charleston, West Virginia, Joseph Bocock, BOCOCK LAW PLLC, Oklahoma City, Oklahoma, Todd Hembree, CHEROKEE NATION BUSINESS, Catoosa, Oklahoma, Elizabeth B. Murrill, LOUISIANA DEPARTMENT OF JUSTICE, Baton Rouge, Louisiana, Michael Burrage, WHITTEN BURRAGE, Oklahoma City, Oklahoma, Jared C. Easterling, GREEN LAW FIRM PC, Ada, Oklahoma, for Appellants. Courtney L. Dixon, Joseph F. Busa, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees. Pratik A. Shah, Lide E. Paterno, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., John C. Roach, RANSDELL ROACH & ROYSE, Lexington, Kentucky, for Horseracing Authority Appellees. Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, Paul E. Salamanca, Lexington, Kentucky, April A. Wimberg, DENTONS BINGHAM GREENEBAUM LLP, Louisville, Kentucky, Gregory G. Garre, Blake E.

Stafford, LATHAM & WATKINS LLP, Washington, D.C., for Amici Curiae.

SUTTON, C.J., delivered the opinion of the court in which GRIFFIN and COLE, JJ., joined. COLE, J. (pp. 20–31), delivered a separate concurring opinion.

OPINION

SUTTON, Chief Judge. Sometimes government works. In 2020, when Congress enacted the Horseracing Safety and Integrity Act to create a national framework to regulate thoroughbred horseracing, it generated several non-delegation and anti-commandeering challenges to the validity of the Act. The lead challenge—the non-delegation challenge—turned on the reality that the Act replaced several state regulatory authorities with a private corporation, the Horseracing Authority, which became the Act's primary rule-maker and which was not subordinate to the relevant public agency, the Federal Trade Commission, in critical ways. The Fifth Circuit declared the Act unconstitutional because it gave "a private entity the last word" on federal law. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872, 888–89 (5th Cir. 2022).

In response, Congress amended the Act to give the Federal Trade Commission discretion to "abrogate, add to, and modify" any rules that bind the industry. Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022). The Constitution anticipates, though it does not require, constructive exchanges between Congress and the federal courts. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (explaining that "interdependence" and "reciprocity" should characterize the relationship between the branches as much as "separateness" and "autonomy"). A productive dialogue occurred in this instance, and it ameliorated the concerns underlying the non-delegation challenge. As amended, the Horseracing Act gives the FTC the final say over implementation of the Act relative to the Horseracing Authority, allowing us to uphold the Act as constitutional in the face of this non-delegation challenge as well as the anti-commandeering challenge.

I.

Unlike other sports, no one authority traditionally has regulated horseracing. Instead, 38 state regulatory schemes have supplied an array of protocols and safety requirements. Kjirsten Lee, *Transgressing Trainers and Enhanced Equines*, 11 J. Animal & Nat. Res. L. 23, 26 (2015). Most Americans know horseracing through occasional high-visibility races, say the Kentucky Derby on the first Saturday of May, or high-visibility books, say *Seabiscuit*. But as the partly and fully initiated alike can appreciate, the sport comes with risk. Racing a dozen or more jockeys atop large horses around a mile or more track, all with prize money and gambling positions at stake, creates plenty of danger. Over the last seventy years or so, fatal accidents for jockeys during horseraces have exceeded that of drivers in NASCAR races. Peta L. Hitchens *et al.*, *Jockey Falls, Injuries, and Fatalities Associated with Thoroughbred and Quarter*

Horse Racing in California 2007–2011, at 3, Orthopedic J. Sports Med. (2013) (129 jockeys killed between 1940 and 2012); *How Many NASCAR Drivers Have Died Racing?*, Motor Racing Sports, https://tinyurl.com/2d3xnazy (last visited Feb. 6, 2023) (82 NASCAR drivers killed between 1950 and 2021). Faring no better, almost 500 thoroughbreds died in 2018 alone due to racing injuries. *Why Horse Racing Is So Dangerous*, Nat'l Geographic (Jan. 21, 2020), https://tinyurl.com/ycyf5rhv.

Whether it's the risk of pushing horses past their limits or the risks associated with unsafe tracks and doping, or other health and safety issues facing horses and jockeys, no one doubts the imperative for oversight. The question, as is so often the case, is whether the regulation should be national or local.

In 2020, Congress answered national but did so in conventional and unconventional ways. Conventionally, it enacted the Horseracing Integrity and Safety Act to nationalize regulatory authority over thoroughbred racing. 15 U.S.C. §§ 3051–60. Less conventionally, it chose to use a private nonprofit corporation—the Horseracing Integrity and Safety Authority—to do some of the regulating.

The Act charges the Horseracing Authority with "developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program." *Id.* § 3052(a). The Authority's jurisdiction also includes the "safety, welfare, and integrity" of covered thoroughbreds, jockeys, and horseraces. *Id.* § 3054(a)(2)(A). The Authority may expand the Act's coverage to other breeds upon request by a state racing commission or a breed governing organization. *Id.* § 3054(*l*).

The Horseracing Authority funds its operations through fees on the horseracing industry. Each year, it calculates its budget and apportions amounts owed by each State. *Id.* § 3052(f)(1)(C). The States have two options. They may collect the fees themselves from covered entities and remit the fees to the Authority. *Id.* § 3052(f)(2)(D). Or they may allow the Authority to collect the fees directly. *Id.* § 3052(f)(3)(A)–(C).

The Act empowers the Horseracing Authority to promulgate rules on a variety of subjects: prohibited medications, laboratory protocols and accreditation, racetrack standards and protocols, injury analysis, enforcement, and fee assessments. *Id.* § 3053(a). The Authority also develops procedures for its investigatory and subpoena powers. *Id.* § 3054(c). Once issued, the rules preempt state law. *Id.* § 3054(b).

The Horseracing Authority implements the rules, monitors compliance, and investigates potential rule infractions. *Id.* § 3054(c), (h), (i). The Act directs "the Authority and Federal or State law enforcement authorities" to "cooperate and share information" whenever a covered person may have violated federal or state law in addition to one of the Authority's rules. *Id.* § 3060(b). After investigating, the Authority may enforce the rules through internal adjudications or civil lawsuits. *Id.* §§ 3054(j), 3057(c).

Under the Horseracing Act as originally passed, the Federal Trade Commission played a limited role. The FTC published the Authority's proposed rules for public comment. *Id.* § 3053(b)(1). After the comment period, the FTC had to approve the rules if they were "consistent" with the Act and with other "applicable rules approved by the Commission." *Id.* § 3053(b)–(c). The FTC also could issue an "interim" rule if it had "good cause" to do so and if the rule was "necessary to protect" the welfare of horses or the integrity of the sport. *Id.* § 3053(e) (2020); *see* 5 U.S.C. § 553(b)(B).

This framework prompted legal challenges. In a case filed in federal court in Texas, several claimants argued that the Act violated the Constitution by delegating unmonitored lawmaking power to a private entity. The Fifth Circuit agreed, reasoning that the FTC's oversight was insufficient because the FTC could not modify the rules or otherwise question the Horseracing Authority's policy choices. *Black*, 53 F.4th at 872–73, 886–87. Our court faced a similar challenge. Oklahoma, West Virginia, Louisiana, their racing commissions, and other entities (collectively, Oklahoma) claimed that the Act unlawfully delegated federal power to a private entity and unlawfully commandeered the States. The district court dismissed Oklahoma's claims.

After the Fifth Circuit issued its decision and after we heard oral argument in our case, Congress enacted, and the President signed into law, an amendment to the Act that increased the FTC's oversight role. The amendment eliminated the FTC's interim-rule authority and instead gave sweeping power to the FTC to create rules that "abrogate, add to, and modify the rules of the Authority." 15 U.S.C. § 3503(e) (as amended). Oklahoma maintains that the Act remains unconstitutional.

II.

Mootness. First things first: Does the amendment to the Act transform this live controversy into a moot one? When Congress amends a statute, it is true, pending claims challenging the law sometimes become moot. *See City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam). Not invariably, however. If the revised statute continues to place a non-trivial burden on the plaintiff that arises from the same theory of unconstitutionality set forth in the complaint, the case remains live. *Kenjoh Outdoor, LLC v. Marchbanks*, 23 F.4th 686, 692–93 (6th Cir. 2022). A similar conclusion applies if the amendment does not affect other features of the challenge. Both exceptions apply here.

The amendment to § 3053(e) of the Horseracing Act does not moot Oklahoma's nondelegation claim. While significant to the outcome of the case, this singular amendment changes little about the Act's basic structure. The revised Act "operates in the same fundamental ways," with the Authority proposing and enforcing rules and with the FTC overseeing all of them, the key difference being that the FTC has far more oversight authority than it had before. *Id.* at 693. The revised Act likewise presents fundamentally the "same controversy," with Oklahoma continuing to argue that the Act gives too much unsubordinated power to a private entity. *Id.*; *see Cam I, Inc. v.*

Louisville/Jefferson Cnty. Metro Gov't, 460 F.3d 717, 720 (6th Cir. 2006). Nor does the Act moot Oklahoma's anti-commandeering claim. In reality, the amendment does not change that dispute in any material way.

Remand. One other preliminary point remains. If the legislature changes a law while a live challenge to it remains on appeal, appellate courts may remand the case for the district court to take the first look at the revised law. *Hadix v. Johnson*, 144 F.3d 925, 934 (6th Cir. 1998), *abrogated on other grounds*, 530 U.S. 327 (2000). The option is discretionary, not mandatory. In this instance, we see "little to be gained" from a remand because Oklahoma brings facial challenges that raise only legal issues and because the parties and panel have already devoted considerable time and resources to the dispute. *Id.* at 935; *see Phelps-Roper v. Troutman*, 712 F.3d 412, 417 (8th Cir. 2013) (per curiam). Fortifying this conclusion is the reality that the challengers have asked us to proceed to the merits.

III.

A.

Non-delegation. Through the United States Constitution, the People separated the powers of the National Government into three branches. They vested the legislative power in Congress, the executive in the President, and the judicial in the federal courts. U.S. Const. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1. The People also constrained each branch's use of its power through counterweights in the other branches. To preserve this balance, the Constitution bars further delegations of power between the branches. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

What about delegations to private entities? Surely, if the Vesting Clauses bar the three branches from exchanging powers among themselves, those Clauses bar unchecked reassignments of power to a non-federal entity. Just as it is a central tenet of liberty that the government may not permit a private person to take property from another private person, *Calder v. Bull*, 3 U.S. (Dall.) 386, 388–89 (1798) (Chase, J.), or allow private individuals to regulate other private individuals, *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122 (1928), it follows that the government may not empower a private entity to exercise unchecked legislative or executive power. Those who govern the People must be accountable to the People. Completely transferring unchecked federal power to a private entity that is not elected, nominated, removable, or impeachable undercuts representative government at every turn.

Precedent confirms that unchecked delegations to private entities at a minimum violate core separation-of-power guarantees. Consider *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). A federal statute gave the President discretion to create codes of fair competition based on proposals from private entities. *Id.* at 542. Rejecting the government's view that private participation cured any surplus delegation to the President, the Court explained that transforming private groups into legislatures was "utterly inconsistent" with the constitutional design. *Id.* at 537.

The Court applied the same standard to the Bituminous Coal Act. In *Carter v. Carter Coal Co.*, the Court concluded that, by empowering coal producers to set wages and to control the businesses of others, the Act amounted to a "delegation in its most obnoxious form" because such regulation "is necessarily a governmental function." 298 U.S. 238, 310–11 (1936). Appreciating the problem, Congress amended the Act the next year to give the Coal Commission, a government entity, the power to set prices. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). After Congress subordinated the private coal producers to a public body (the Coal Commission) that could modify or reject their proposals, the Court determined that the statute did not impermissibly delegate "legislative authority to the industry." *Id.* at 399.

Taken together, these cases draw a line between impermissible delegation of unchecked lawmaking power to private entities and permissible participation by private entities in developing government standards and rules. *Adkins* shows that a private entity may aid a public federal entity that retains authority over the implementation of federal law. *Id.* at 388. But if a private entity creates the law or retains full discretion over any regulations, *Carter Coal* and *Schechter* tell us the answer: that it is an unconstitutional exercise of federal power. *See Carter Coal*, 298 U.S. at 311; *Schechter*, 295 U.S. at 537.

Decisions from the courts of appeals hold this line. Private entities may serve as advisors that propose regulations. *See Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974); *Cospito v. Heckler*, 742 F.2d 72, 87–89 (3d Cir. 1984); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012–13 (3d Cir. 1977). And they may undertake ministerial functions, such as fee collection. *See Pittston Co. v. United States*, 368 F.3d 385, 395–97 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128–29 (3d Cir. 1989), *abrogated on other grounds*, 521 U.S. 457 (1997). But a private entity may not be the principal decisionmaker in the use of federal power, *Pittston Co.*, 368 F.3d at 395–97, may not create federal law, *Texas v. Rettig*, 987 F.3d 518, 533 (5th Cir. 2021), may not wield equal power with a federal agency, *Ass'n of Am. R.R. v. U.S. Dep't of Transp.* (*Amtrak I*), 721 F.3d 666, 671–73 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015), or regulate unilaterally, *Black*, 54 F.4th at 872.

An illuminating example comes from securities law. The Securities and Exchange Commission regulates the securities industry with the assistance of private, self-regulatory organizations called SROs. The SROs propose rules for the industry, and they initially enforce the rules through internal adjudication. The SEC oversees both the rulemaking and the enforcement. As to the rules, the SEC approves proposed rules if they are consistent with the Maloney Act, and may "abrogate, add to, and delete from" an SRO's rules "as the Commission deems necessary or appropriate." 15 U.S.C. § 78s(b)(2)(C), (c). As to enforcement, the SEC applies fresh review to the SRO's decisions and actions. *Id.* § 78s(e); *see Sartain v. SEC*, 601 F.2d 1366, 1369–71

(9th Cir. 1979). In case after case, the courts have upheld this arrangement, reasoning that the SEC's ultimate control over the rules and their enforcement makes the SROs permissible aides and advisors. *See R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952); *Todd & Co.*, 557 F.2d at 1012–13; *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Sorrell v. SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982); *see also Amtrak I*, 721 F.3d at 671 n.5 (describing the SROs' role as "purely advisory or ministerial").

These sources all suggest that, at a minimum, a private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge. Whether subordination always suffices to withstand a challenge raises complex separation of powers questions. Simplifying matters for today, if not for a future day, the parties accept this framing of the appeal. As the case comes to us, then, the determinative question is whether the Horseracing Authority is inferior to the FTC.

B.

The Horseracing Authority is subordinate to the agency. The Authority wields materially different power from the FTC, yields to FTC supervision, and lacks the final say over the content and enforcement of the law—all tried and true hallmarks of an inferior body.

Rulemaking. As amended, the Horseracing Act gives the FTC supervision over the rules that govern the horseracing industry. At the outset, the

Horseracing Authority drafts rules on racetrack safety and anti-doping matters, and the FTC must approve those proposals if they are consistent with the Act. 15 U.S.C. § 3053(c)(2). But, critically, as the FTC "deems necessary or appropriate," it "may abrogate, add to, and modify the rules." *Id.* § 3053(e) (as amended). The FTC's power to abrogate and change the Authority's rules creates "a clear hierarchy." *Black*, 53 F.4th at 888–89.

Section 3053(e)'s amended text grants the FTC a comprehensive oversight role. The Act provides that the FTC may act as it "finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act." 15 U.S.C. § 3053(e) (as amended). The final catchall indicates that § 3053(e) spans the Horseracing Authority's jurisdiction. The parties are one in agreeing that this section allows the FTC to modify rules "if it wishes." Appellants' Suppl. Br. 1.

A comparison with § 3053(e)'s pre-amendment language reenforces the point. Before the amendment, § 3053(e) allowed the FTC to adopt interim rules only if "necessary," and only if good cause existed to bypass the Administrative Procedure Act's notice and comment procedures. 15 U.S.C. § 3053(e) (2020). The Fifth Circuit concluded that the ability to "make temporary rules on a break-glass-in-case-of-an-emergency basis" did not give the FTC sufficient control. *Black*, 53 F.4th at 883. The FTC could overrule the Authority only in rare, extreme cases, making it the inferior, not the superior, rule-maker. The amended section, by contrast, requires no emergency, no good cause, no necessity. The FTC now may create new rules or modify existing rules as it deems "appropriate to" advance "the purposes of [the] Act." 15 U.S.C. § 3053(e) (as amended). That amounts to true oversight authority.

With § 3053(e)'s broad power to write and rewrite the rules comes policymaking discretion. *See Cospito*, 742 F.2d at 88–89. When the FTC decides to act—whether by abrogating one of the Horseracing Authority's rules or introducing its own—the FTC makes a policy choice and necessarily scrutinizes the Authority's policies. That is no less true when the FTC decides *not* to act. In either setting, the FTC may "unilaterally change regulations," *Amtrak I*, 721 F.3d at 671, and "is free to prescribe" the rules, showing that it "retains ultimate authority," *Cospito*, 742 F.2d at 88. In a recent rule, the FTC recognized as much, explaining that its new "rulemaking power" allows it to "exercise its own policy choices." *Order Ratifying Previous Commission Orders* 3, Fed. Trade Comm'n (Jan. 3, 2023), https://tinyurl.com/dkenwspt.

In full, § 3053(e)'s amended text gives the FTC ultimate discretion over the content of the rules that govern the horseracing industry and the Horseracing Authority's implementation of those rules. By the same token, ultimate "law-making is not entrusted to the [Authority]." *Adkins*, 310 U.S. at 399; *see Frame*, 885 F.2d at 1129. That makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one. *See Adkins*, 310 U.S. at 388.

Accountability considerations lead to the same destination. Before the amendment, the Fifth Circuit determined that the FTC could not question the Horseracing Authority's policy choices or modify its rules. *Black*, 53 F.4th at 886–87. It followed that the Authority, a private entity beyond public control, alone was responsible for the exercise of government power in this area. Not so anymore. With its new ability to have "the final word on the substance of the rules," the FTC bears ultimate responsibility. *Id.* at 887; *cf. Lynn*, 502 F.2d at 59. The People may rightly blame or praise the FTC for how adroitly (or, let's hope not, ineptly) it "ensure[s] the fair administration of the Authority" and advances "the purposes of [the] Act." 15 U.S.C. § 3053(e) (as amended).

Enforcement. A similar conclusion applies to enforcement of the Act. The Horseracing Authority's enforcement duties are extensive, granted. The Authority implements the Act, investigates potential rule violations, and enforces the rules through internal adjudications and external civil lawsuits. Even so, the FTC's rulemaking and rule revision power gives it "pervasive" oversight and control of the Authority's enforcement activities, just as it does in the rulemaking context. *Adkins*, 310 U.S. at 388.

Take an example to illustrate the point. Imagine that the Horseracing Authority began enforcing its rule without giving thought to the procedural rights of jockeys, trainers, and other industry participants. Section 3053(e) gives the FTC the tools to step in. To ensure a fair enforcement process, the FTC could issue rules protecting covered persons from overbroad subpoenas or onerous searches. The FTC could require that the Authority provide a suspect with a full adversary proceeding and with free counsel. And the FTC could require that the Authority meet a burden of production before bringing a lawsuit or preclear the decision with the FTC. In these ways as well as others, the FTC may control the Authority's enforcement activities and ensure that the FTC, not the Authority, ultimately decides how the Act is enforced.

Topping this oversight off, the FTC has full authority to review the Horseracing Authority's enforcement actions. 15 U.S.C. § 3058(c)(1)–(2). After an independent review, the FTC may reverse the Authority's decision. *Id.* § 3058(c)(3). As with rulemaking, so with adjudication: The Authority's adjudication decisions are not final until the FTC has the opportunity to review them. *See Cospito*, 742 F.2d at 88; *Todd & Co.*, 557 F.2d at 1012–14. All told, the Horseracing Authority is "subject to [the FTC's] pervasive surveillance and authority," revealing that the Authority "operate[s] as an aid to the [FTC]," nothing more. *Adkins*, 310 U.S. at 388.

Whether the FTC becomes a demanding taskmaster or a lenient one, the FTC *could* subordinate every aspect of the Authority's enforcement "to ensure the fair administration of the Authority . . . or otherwise in furtherance of the purposes of [the] Act." 15 U.S.C. § 3053(e) (as amended). That potential suffices to defeat a facial challenge, where Oklahoma must show that the Act is unconstitutional in all its applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

C.

In seeking to head off this conclusion, Oklahoma points out that the amendment does not change one feature of the Act—that the FTC has power only to review proposed rules by the Authority for "consistency" with the Act, a standard of review that, it says, does not pick up policy disagreements. 15 U.S.C. § 3053(c). Maybe so. But even if that is the case, the FTC's later authority to modify any rules for any reason at all, including policy disagreements, ensures that the FTC retains ultimately authority over the implementation of the Horseracing Act. The FTC's review authority in this respect parallels similar authority exercised by the SEC under the Maloney Act. *Compare* 15 U.S.C. § 78s(c) (providing that the SEC "may abrogate, add to, and delete from . . . the rules of [the private entity] as the Commission deems necessary or appropriate"), *with* 15 U.S.C. § 3053(e) (as amended) (providing that the FTC "may abrogate, add to, and modify the rules of the Authority . . . as the Commission finds necessary or appropriate"). The same is true in the Coal Act. *See* Bituminous Coal Act of 1937, Pub. L. No. 75-48, § 4, 50 Stat. 72, 78 (providing that the Coal Commission could "approve, disapprove, or modify" proposals).

Before the amendment, Oklahoma observed that the SEC's modification power gives the SEC "largely unbounded authority to craft [the private entity's] regulations as it sees fit." Reply Br. 7. The same is now true under the Horseracing Act. The lack of a modification power, moreover, was the "key distinction" the Fifth Circuit identified between the Maloney and Horseracing Acts. *Black*, 53 F.4th at

887. The amendment to § 3053(e) eliminates that distinction. Even if other less-material distinctions between the two laws remain, the FTC's new discretion to adopt and modify rules correctly places the private Horseracing Authority in a subordinate position to the public FTC. All of this explains why every court of appeals to address the validity of such delegations under the Maloney Act and the Coal Act, as noted, has upheld them.

Oklahoma worries that the Horseracing Authority's rules could govern a dispute until the FTC undoes rules it dislikes. It's true that the FTC's modification authority under § 3053(e), as it currently exists, customarily would run through ordinary rulemaking. But that current reality need not be a future reality. For one, the threat of modification is not likely to miss the attention of the Authority. For another, the FTC has power to initiate new rules, not just to modify rules it does not like. To the extent this timing gap creates a problem, the FTC is free to resolve it ahead of time. It might, for example, adopt a rule that all newly enacted rules do not take effect for 180 days, thereby giving the FTC time to review rules and prepare preemptive modifications.

This argument overlooks another reality. When the FTC reviews the Horseracing Authority's proposed rules, it asks not just whether they are "consistent" with the Act; it also asks whether they are "consistent" with other "applicable rules approved by the Commission." *Id.* § 3053(c)(2). Any risk of a policymaking gap between initial consistency review and initial full review will diminish over time as the FTC chooses to exercise—or not to exercise—its complete authority to initiate new rules or modify old ones. Over time, the FTC's threshold consistency review will account for its own full-throated rulemaking power.

Oklahoma notes that the FTC's duty under the Administrative Procedure Act to explain any changes to the rules limits its hand. But that just means it may not arbitrarily alter the rules. The APA does not limit the FTC's authority to disagree with the Horseracing Authority over a policy choice delegated to the agency by Congress. The FTC "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It is enough that "there are good reasons" for the new policy "and that the agency believes it to be better." *Id.*

No matter, Oklahoma adds: The Horseracing Authority's ability to expand its jurisdiction to breeds other than thoroughbreds escapes the FTC's review. Not so. The FTC's § 3053(e) power allows it to revoke the Authority's decision or place procedural and substantive conditions on any such decision.

Oklahoma points to the Horseracing Authority's ability to enforce the Act through civil lawsuits, asserting that the ability cannot reside outside the executive branch. "Difficult and fundamental questions," we agree, arise when private entities enforce federal law. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring). But this is not an as-applied challenge to an individual enforcement action; it is a facial challenge to the Act. The FTC's ultimate authority over all rules promulgated under the Act, which would include any rules related to enforcement, offers a potent answer to this concern in the context of a facial challenge. The Authority's enforcement through internal adjudication and external lawsuits is subordinate to the FTC. The other reality is that the parties simply have not engaged with this feature of the Act, including briefing with respect to founding-era or contemporary analogs showing the role private entities may, and may not, play in law enforcement. That omission is understandable. From the start, Oklahoma litigated this claim as one turning on "governmental oversight" of and "accountability" for the Horseracing Authority's activities, not as a categorical Article II inquiry or as a question of historical meaning. R.53 150; R.98 at 23–24. We thus will decide the case as it comes to us, and save resolution of such questions, if such questions there be, for a day when the Authority's actions and the FTC's oversight appear in concrete detail, presumably in the context of an actual enforcement action.

IV.

Oklahoma separately claims that two provisions of the Horseracing Act, § 3060(b) and § 3052(f), violate the anti-commandeering guarantee of the Tenth Amendment. Oklahoma lacks standing to challenge the first provision, and the second one does not count as a cognizable form of commandeering.

A.

Oklahoma initially sets its sights on § 3060(b), which requires state authorities to "cooperate and share information" with the Horseracing Authority or federal agencies. Right or wrong about whether this requirement amounts to commandeering, Oklahoma and the other State plaintiffs lack standing to challenge it.

Standing arises from the Constitution's mandate that federal courts decide only "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. A plaintiff must establish standing for each claim he presses and each statutory provision he challenges. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207–08 (2021). To do that, he must point to an injury that is traceable to the defendant's conduct and that a judicial decision can redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). In a pre-enforcement challenge like this one, a plaintiff must also allege a "credible threat" of future enforcement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).

Oklahoma has not carried this burden. Even if Oklahoma is correct that § 3060(b) unlawfully orders the States to cooperate, the provision does not contain a penalty or enforcement mechanism. And Oklahoma does not point to any actual or threatened enforcement actions. An unenforceable statutory duty does not give rise to Article III standing, *California v. Texas*, 141 S. Ct. 2104, 2113–14 (2021), and "mere conjecture" about possible enforcement is not any better, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013).

Oklahoma asserts in response that wrongdoing will "frequently" implicate both federal and state law, and thus trigger the duty to cooperate. R.86 at 10. But the question is not how often the opportunity for cooperation may arise; it is whether the defendants can or will mandate cooperation when that time comes. Even so, Oklahoma notes, the Horseracing Authority may penalize States that refuse to cooperate. But the Authority's sanction power extends only to covered persons, a term that does not include States. 15 U.S.C. §§ 3051(5), 3054(d), 3057(a)(1); *see Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). The same is true of the Authority's ability to initiate civil lawsuits. 15 U.S.C. § 3054(j).

Absent a credible allegation that the Horseracing Authority or the FTC can or will enforce § 3060(b), Oklahoma lacks standing to challenge it. *California*, 141 S. Ct. at 2115.

B.

Oklahoma separately claims that § 3052(f) puts the States to an unconstitutionally coercive choice. While § 3052(f)'s threat of preemption gives Oklahoma standing, *Kentucky v. Biden*, 23 F.4th 585, 597–601 (6th Cir. 2022), the provision does not commandeer the States.

Congress may not require the States, separate sovereigns all, to implement federal programs. *Printz v. United States*, 521 U.S. 898, 925 (1997). Nor may the federal government issue "orders directly to the

States" to carry out this or that federal program. *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). At the same time, Congress may "encourage a State to regulate" or "hold out incentives" in hopes of "influencing a State's policy choices." *New York v. United States*, 505 U.S. 144, 166 (1992).

One option in this last respect is that Congress may encourage the States through conditional preemption. *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981). Instead of preempting state law altogether, Congress may offer States a regulatory role contingent on following federal standards. *New York*, 505 U.S. at 167–68. The choice brings consequences. If a State participates, it often has discretion in how it implements the program. *See Hodel*, 452 U.S. at 289. If a State decides not to participate, the State's activities are preempted. By offering States such a non-coercive choice—regulate or be preempted—Congress has not violated any constitutional imperatives. *Murphy*, 138 S. Ct. at 1479; *New York*, 505 U.S. at 167; *Hodel*, 452 U.S. at 288–91; *FERC v. Mississippi*, 456 U.S. 742, 769 (1982).

That's how § 3052(f) operates. It presents States with a choice, not a command. States may elect to collect fees from the industry and remit the money to the Horseracing Authority or States may refuse. That's their call. If a State participates, it gains discretion over how the fees are collected. 15 U.S.C. § 3052(f)(2)(D). If a State refuses, the Authority collects the fees itself, and the State "shall not impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters." *Id.* § 3052(f)(3)(D).

This scheme fits comfortably within the conditional preemption framework. Section 3052(f) "simply establish[es] requirements for continued state activity in an otherwise pre-emptible field." *FERC*, 456 U.S. at 769; *see Printz*, 521 U.S. at 925–26. And because Congress may regulate horseracing under its commerce power, there is nothing unconstitutional about Congress "offer[ing] States the choice of regulating that activity according to federal standards or having state law pre-empted." *New York*, 505 U.S. at 173–74.

Section 3052(f) also lacks the hallmark of commandeering: a "direct" order to the States. *Murphy*, 138 S. Ct. at 1476. Section 3052(f)'s statement that a State "shall not impose or collect" certain fees may sound like a command, true enough. *Id.* § 3052(f)(3)(D). But preemption often carries that tone, as similar language in other statutes confirms. *See, e.g.*, 42 U.S.C. § 7543(a) (1988) ("No State . . . shall adopt or attempt to enforce any standard relating to control of emissions . . . ."); 49 U.S.C. § 40116(b) ("[A] State . . . may not levy or collect a tax [or] fee . . . on an individual traveling in air commerce . . . ."). Because Congress often speaks in this manner, "it is a mistake to be confused" by preemption provisions that "appear to operate directly on the States." *Murphy*, 138 S. Ct. at 1480. Congress in this instance offers the States a choice, as Oklahoma all but concedes. Reply Br. 2, 25, 26, 27 (referring to § 3052(f) as a "threat of preemption"). A choice is not a command. *See Printz*, 521 U.S. at 925–26.

All of this is not to say "that the choice put to the States—that of either abandoning regulation" or assisting the Authority—is an easy one or a good one as a matter of policy. *FERC*, 456 U.S. at 766. Fraught though it may be, Congress has not commandeered the States by putting them to this choice.

Oklahoma's principal counterargument is that a choice between collecting fees and losing fee collecting authority is illegitimate, coercive, or punitive. We don't think so.

Oklahoma begins by arguing that § 3052(f)'s choice—collect fees for the Horseracing Authority or stop collecting entirely—commandeers the States because Congress may not force the States to adopt either alternative. *See New York*, 505 U.S. at 175–76. Congress may not force a State to collect fees, true. *Printz*, 521 U.S. at 933. But Congress may use its commerce power to preempt the field of horseracing, preventing States from imposing fees. *See FERC*, 456 U.S. at 764; *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). Threatening to do so, it follows, is a "conditional exercise of [a] congressional power." *New York*, 505 U.S. at 176.

Oklahoma's response that a "threat of preemption," Reply Br. 25, is coercive runs aground on contrary precedent. The Court has rejected the argument "that the threat of federal usurpation of their regulatory roles coerces the States." *Hodel*, 452 U.S. at 289; *New York*, 505 U.S. at 176.

Even so, Oklahoma continues, threatening a State's taxing authority is especially coercive. We fail to see how. The validity of conditional preemption does not fluctuate with the power that is threatened. *See Hodel*, 452 U.S. at 290–91. This would not be the first time a State's taxing power was preempted. *See Aloha Airlines, Inc. v. Dir. of Tax'n*, 464 U.S. 7, 14 n.10 (1983); *Exxon Corp. v. Hunt*, 475 U.S. 355, 360–63 (1986).

Oklahoma presses the point that Congress's financial incentives may become so overwhelming that a State effectively cannot refuse. *See South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987). Grafting this principle on conditional preemption raises legal and factual problems. Legally, it is bereft of support; no case evaluates conditional preemption by looking to a State's monetary incentives. Factually, Oklahoma falters because it does not quantify its expected loss. *See NFIB v. Sebelius*, 567 U.S. 519, 580–82 (2012) (opinion of Roberts, C.J.) (comparing an incentive to a State's budget). Without knowing how much money is at stake, how are we to say the sum is too high?

Oklahoma adds that the threat is punitive because it serves no purpose other than to obtain compliance. Conditional preemption, however, amounts to a "permissible method of encouraging a State to conform to federal policy." *New York*, 505 U.S. at 168; *see FERC*, 456 U.S. at 766. And a State that sees itself as a sovereign sometimes must act like one. Another reason is not difficult to find anyway. The fee provisions ensure that a single entity—whether a State or the Authority—imposes fees on the horseracing industry for all anti-doping and racetrack safety matters. Eliminating "double taxation" and fostering uniformity are adequate grounds to preempt parallel collection regimes. *Aloha Airlines*, 464 U.S. at 9–10; *see Coventry Health Care of Mo., Inc. v. Nevis*, 581 U.S. 87, 97–99 (2017); *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (plurality).

Oklahoma next argues that Congress failed to "appropriate the funds needed to administer the program" by forcing States to pay for collecting fees even if they refuse to act as the Authority's fee collector. *Murphy*, 138 S. Ct. at 1477. Not so. Private parties pay for the Authority's operations. 15 U.S.C. § 3052(f)(2)(D), (3)(B). And if a State does not collect fees under the Act, the Authority incurs the cost of doing so. Even if States suffer a pocket-book loss from preemption, that does not force them to pay for the program. *See Hodel*, 452 U.S. at 288.

Oklahoma also worries that the scheme blurs accountability. Conditional preemption, however, leaves a State and its citizens with "the ultimate decision as to whether or not the State will comply." *New York*, 505 U.S. at 168. The ability to choose ensures that state and federal entities are accountable for their roles. *See id.*

We affirm.

CONCURRENCE

COLE, Circuit Judge, concurring. While I agree with the majority's conclusions that the Act is facially constitutional, and its analysis in full in Part IV, I write separately because I depart slightly from its framing of the issue and its analysis of the private nondelegation doctrine.

I. ISSUE ON APPEAL

As a threshold matter, I note what is before us on appeal. In 2020, with wide bipartisan support, Congress passed, and then-President Trump signed into law, the Horseracing Integrity and Safety Act ("HISA" or "the Act"). Pub. L. No. 116-260, §§ 1201–12, 134 Stat. 1182, 3252–75 (2020) (codified at 15 U.S.C. §§ 3051–60). Petitioners challenged the Act's constitutionality and appealed the district court's dismissal of the case for failure to state a claim. A few weeks after this panel heard oral argument in the appeal, Congress amended the Act. *See* Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 126 Stat. 4459, 5231–32 (2022) (codified as amended at 15 U.S.C. § 3053(e)). Congress amended section 3053(e), which now provides that:

> The Commission, by rule, in accordance with section 553 of title 5, United States Code, may abrogate, add to, and modify the rules of the Authority promulgated in accordance with this Act as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to

> requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act.

15 U.S.C. § 3053(e). Under the current form of the statute, the Federal Trade Commission ("FTC") can, in certain circumstances delineated in the Act, and through proper rule-making procedures as required by the Administrative Procedure Act, "abrogate, add to, and modify" existing rules promulgated by the Horseracing Integrity and Safety Authority ("Authority"). *Id.*

Today, our review is cabined to the statute as amended, withholding judgment on the previous version or other circuits' handling of the original statute. To the extent that the cogent majority opinion goes further—opining in dicta that the original statute was unconstitutional—I note that not only does such analysis not carry the force of law, but also that I disagree, as I believe the original statute was constitutional because the private Authority has always been subordinate to the FTC.

II. PRIVATE NONDELEGATION DOCTRINE

The nondelegation doctrines broadly refer to judicially imposed limits on Congress's ability to constitutionally delegate authority to others. Specifically, Congress cannot delegate its legislative authority to an executive agency unless the statute contains an "intelligible principle" guiding the agency. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion); *see also Mistretta v. United States*, 488 U.S. 361, 372 (1989). This is the public nondelegation doctrine. The private nondelegation doctrine refers to constitutional concerns that arise where a private entity—rather than a government entity—wields significant power to execute a statutory scheme. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Only the latter of these, private nondelegation, is at issue here.

I agree with the majority that the Act is constitutional under the private nondelegation doctrine, and also that the main test for this issue is whether the private entity is subordinate to the federal agency. But I write separately because I diverge from the majority's analysis in two ways: (1) the source of the private nondelegation doctrine, and (2) the precise framing of the private nondelegation question.

A. Source of Private Nondelegation Doctrine

The private nondelegation doctrine is rooted in both due process and separation of powers concerns. Indeed, the earliest invocations of the private nondelegation doctrine arose in the context of local regulations. *See Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121–22 (1928); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530 (1917); *Eubank v. City of Richmond*, 226 U.S. 137, 143–44 (1912). In these cases, localities granted private homeowners the power to create zoning laws for their neighborhood, and the Supreme Court found these ordinances violated property owners' federal due process rights. *Eubank*, 226 U.S. at 143–44. "The Court was concerned that private property owners, with their own interests at stake, had been given total, standardless control over an important aspect of their neighbors' property." *Rice v. Vill. of Johnstown*, 30 F.4th 584, 589 (6th Cir. 2022) (citing *Eubank*, 226 U.S. at 143).

The separation of powers concerns, meanwhile, stem from the Vesting Clauses, inasmuch as the Constitution vests each of the three branches of government with specific powers and responsibilities. Article I of the Constitution grants Congress legislative power, Article II grants the President executive power, and Article III grants the federal courts judicial power. "Accompanying that assignment of power to Congress is a bar on its further delegation." *Gundy*, 139 S. Ct. at 2123; *see Mistretta*, 488 U.S. at 371 ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."). Therefore, when a statute confers "the power to regulate the affairs of an unwilling minority" onto a private entity, that "is legislative delegation in its most obnoxious form[.]" *Carter Coal*, 298 U.S. at 311. But when the private entity "operate[s] as an aid to the [agency]" and is "subject to [the agency's] pervasive surveillance and authority, . . . law-making is not entrusted to the [private entity]" and so such a "statutory scheme is unquestionably valid." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 399 (1940).

Notably, in its federal private nondelegation cases, the Supreme Court has blurred the lines between the two rationales, opting not to definitively root the private nondelegation doctrine in one or the other, and often referring to both. For instance, in *Carter v. Carter Coal*, the first case applying the private nondelegation doctrine to a federal statute, the Court ruled that a portion of the Bituminous Coal Conservation Act of 1935 was unconstitutional under the private nondelegation doctrine. 298 U.S. at 311. In invalidating the statute, the Court found the delegation at issue "so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." *Id.* at 311–12 (first citing *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); then citing *Eubank*, 226 U.S. at 143; and then citing *Roberge*, 278 U.S. at 121–22).

In so holding, the Court cited two of the zoning cases premised on the due process concerns of the private nondelegation doctrine, and also *Schecter Poultry*, addressing the separation of powers argument. By doing so, the Court maintained the public versus private division as opposed to a rationale-based division and endorsed both of the rationales underpinning the private nondelegation doctrine. *See Carter Coal*, 298 U.S. at 311.

The Fifth Circuit, when it ruled recently on the original version of the Act, recognized this ambiguity. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 881 n.23 (5th Cir. 2022). "Courts and commentators," it wrote, "differ over the locus of the constitutional violation." *Id.* (citing several articles and cases). *Compare U.S. Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 46 (2014) ("This argument [regarding private nondelegation] rests on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers."), *with id.* at 87–88 ("[O]ur so-called 'private nondelegation doctrine' flows logically from the three Vesting Clauses.") (Thomas, J., concurring). But the Fifth Circuit concluded it "need not weigh in" to resolve the question at hand. *Black*, 53 F.4th at 881 n.23. "Whatever the constitutional derivation, all parties and the district court agree that the outcome turns on whether the private entity is subordinate to the agency." *Id.*; *see also Ass'n of Am. R.R.s v. U.S. Dep't of Transp.* (*Amtrak I*), 721 F.3d 666, 671 n.3 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015) ("While the distinction [between the due process clause and Vesting Clauses] evokes scholarly interest, . . . our own precedent describes the problem as one of unconstitutional delegation."). When presented with the same ambiguity, the D.C. Circuit also did not decide the issue because the doctrine turns on unconstitutional delegation, regardless of its textual roots, and "neither court nor scholar has suggested a change in the label would effect a change in the inquiry." *Amtrak I*, 721 F.3d at 671 n.3.

Moreover, if we root the private nondelegation doctrine solely in separation of powers concerns, we circumvent our own court's private nondelegation doctrine cases—many of which focus on local regulations, not federal ones, and are grounded in due process rights, as opposed to separation of powers principles. *See Rice*, 30 F.4th at 589–91; *Kiser v. Kamdar*, 831 F.3d 784, 791–92 (6th Cir. 2016); *Stevens v. City of Columbus*, No. 21-3755, 2022 WL 2966396, at *9 (6th Cir. July 27, 2022).

Whatever the exact underpinning of the private nondelegation doctrine, what is clear is that the statute is constitutional if the Authority remains subordinate to the FTC. *See Adkins*, 310 U.S. at 388, 399 (holding a statute constitutional where the private entity is "an aid" to the agency and is "subject" to the agency's "pervasive surveillance and authority"); *Carter Coal*, 298 U.S. at 310–11 (invalidating a statute where private entities were granted the power to establish the maximum hours of labor without any governmental oversight or approval).

That is the beginning and end of the inquiry as to whether a statute is constitutional under the private nondelegation doctrine. The Supreme Court has never suggested that this is the minimum finding, or that subordination on its own may not suffice to withstand a challenge to a statute on private nondelegation grounds. And so the parties could not have framed the appeal in a different way, because the only private nondelegation test is that of subordination.

Now that the framing and source of the nondelegation doctrine is clear, I apply the existing precedent to HISA, finding that HISA as a whole is facially constitutional because the Authority is subordinate to the FTC in several ways.

B. HISA's Constitutionality

1. Rulemaking Authority

Oklahoma raises several concerns with the Act and its different components. I agree in full with the majority's discussion of section 3053(e)'s amended text, and its conclusion that the amended text indicates that the Authority remains subordinate to the FTC. I diverge in that I find the rest of the Act to be nearly identical to the previously upheld Maloney Act and Coal Act. I also find that the amended text supports the Authority's subordination but does not alone ensure the Act's constitutionality.

To begin, the Authority does not have independent rulemaking power—only the FTC can promulgate regulations with the force of law:

> A proposed rule or proposed modification to a rule cannot take effect unless approved by the Commission. The Commission is authorized to grant such approval if the proposed rule or modification of a rule is consistent with the requirements in this legislation and any applicable rules approved by the Commission. The Commission is granted the authority to prescribe rules and interim final rules to carry out their responsibilities under this section using the rulemaking process under the Administrative Procedure Act.

H.R. Rep. No. 116-554, at 25 (2020).

Like the private entities in the Maloney Act, known as self-regulatory organizations ("SROs"), and the private entity in *Adkins*, the Authority may only "propose[]" rules to the Commission. 15 U.S.C. § 3053(a). The Authority's rule *cannot* go into effect "unless the proposed rule . . . has been approved by the Commission." *Id.* § 3053(b)(2); *accord Adkins*, 310 U.S. at 388 (upholding statute where boards "propose[d]" prices that only took effect once the agency "fix[ed]" them); 15 U.S.C. § 78s(b)(1) (writing that private entities in the securities arena may "propose[]" rules but, generally, "[n]o proposed rule change shall take effect unless approved by the [SEC]"). Here, a rule only goes into effect once the FTC has approved it, and to approve it, the FTC must first ensure that the rule "is consistent with" HISA and other "applicable rules approved by the [FTC]." 15 U.S.C. § 3053(c)(2).

This consistency review is no mere rubber stamp. The FTC, under the express terms of the Act, must review the Authority's proposed rules to ensure they are consistent with "the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces[.]" *Id.* § 3054(a)(2)(A). There are certain categories of rules for which Congress explicitly laid out clear boundaries for both the Authority and the FTC, and such rules provide "clearly defined policy" for the Authority and FTC to effectuate. (*See* D. Ct. Opinion, R. 105, PageID 1496.) But even for the ones with fewer constraints, all promulgated rules must abide by Congress's explicit imperative to create rules for "the safety, welfare, and integrity" of covered entities. *Id.* § 3054(a)(2)(A). "[T]o the extent HISA affords rulemaking discretion to advance Congress's broader objectives, such as the requirement that safety standards be 'consistent with the humane treatment of covered horses,' the FTC (not the Authority) ultimately exercises that statutorily conferred discretion—all of which is bound up with 'the policy implications of rules proposed.'" (Authority Br. 41 (citations omitted).)

HISA is remarkably similar to the constitutional Maloney Act, and was so even when assessed irrespective of the amendment. The Maloney Act provides the following parameters regarding the SEC's approval of an SRO's rules. The SEC "shall approve"—meaning it *must* approve—a rule "if it finds that such proposed rule change *is consistent with* the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization." 15 U.S.C. § 78s(b)(2)(C)(i) (emphasis added). Likewise, HISA provides that the FTC "shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification *is consistent with*—(A) this chapter; and (B) applicable rules approved by the Commission." *Id.* § 3053(c)(2) (emphasis added).

Both the Maloney Act and HISA therefore provide for analogous consistency review: the reviewing agency must approve rules that are consistent with both the statute and previously issued rules. The Supreme Court held that the SEC "has broad authority to oversee and to regulate the rules adopted by the SROs" because rules are not enacted "unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act, 15 U.S.C. § 78s(b)[.]" *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 233–34 (1987). If that is true for 15 U.S.C. § 78s(b), then that must also be true of 15 U.S.C. § 3053(c)(2).

And neither agency's review of the respective private entity ends there. Each act also provides additional requirements for the consistency review of proposed rules in specific instances. In the Maloney Act, specifically relating to rules proposed by one specific subset of SROs, the SEC's consistency review includes that the rules be "designed[,] . . . in general, to protect investors and the public interest[,]" as well as not be "designed to permit unfair discrimination . . . among participants[.]" *Id.* § 78q-1(b)(3)(F); *see also Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 446 (D.C. Cir. 2017). In the context of another subset of SROs, the SEC must ensure that the proposed rules meet various textual standards, including that they "are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons," and additional standards. 15 U.S.C. § 78f(b)(5).

In HISA, the Authority proposes rules or modifications to rules "relating to" eleven buckets of issues that it then "submits" to the FTC. *Id.* § 3053(a). Some of these include "a list of permitted and prohibited medications"; "standards for racing surface quality maintenance"; and "a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons[.]" *Id.* But in addition to these categories, the Authority may also propose "rule[s], standard[s], or procedure[s] . . . to carry out the horseracing anti-doping and medication control program or the racetrack safety program." *Id.* § 3053(d)(1). For these programs, HISA contains additional requirements and considerations that the FTC includes as part of its consistency review. *See, e.g.*, *id.* § 3055(b) (listing seven categories of horse-welfare considerations); *id.* § 3055(g)(3)(b).

Both HISA and the Maloney Act therefore provide for similarly broad consistency review, with additional requirements for specific subsets of rules, such that consistency review on its own can ensure that a private authority remains subordinate to a federal agency.

HISA also matches the aforementioned Coal Act's constitutional agency review of private entities' proposed rules. The statute, which the Supreme Court upheld as "unquestionably valid," *Adkins*, 310

U.S. at 399, granted the Coal Commission the power to "approve, disapprove, or modify" the private coal boards' "proposed minimum prices *to conform to the requirements* of this subsection," Bituminous Coal Act of 1937, § 4, pt. II(a), 50 Stat. 72, 78 (emphasis added). Whether providing that the rule must be consistent with a statute, which both the Maloney Act and HISA require, or that the rule must conform to the requirements of a statute, as the Bituminous Coal Act requires, all three statutes properly and constitutionally subordinate the private entity to the federal agency.

And all three statutes provide the agency with independent rulemaking power. The Maloney Act provides that the SEC "may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as 'amend') the rules of a[n SRO] . . . as the [SEC] deems necessary or appropriate to insure the fair administration of the [SRO], to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter[.]" 15 U.S.C. § 78s(c). Such review is textually cabined to "Amendment by Commission of rules of self-regulatory organizations," so it applies only to previously enacted rules, not the SRO's proposed rules or its proposed changes to previously promulgated rules. *Id.*

Further still, the Maloney Act provides a separate set of requirements for the SEC to approve an SRO's new rule or rule change. *See id.* § 78s(b). Under this subsection, the SEC may either "approve or disapprove the propos[al,]" or it may "institute proceedings under subparagraph (B) to determine whether the propos[al] should be disapproved." *Id.* § 78s(b)(2)(A)(i). Subparagraph B requires that the SEC "shall provide" the SRO with "notice of the grounds for disapproval under consideration" and the chance for a hearing on the rule. *Id.* § 78s(b)(2)(B)(i). The other portion of subparagraph B makes clear that within the mandated time frame, the SEC must "issue an order approving or disapproving the" proposed rule. *Id.* § 78s(b)(2)(B)(ii)(I). Notably missing from these procedures? The SEC's ability to itself modify an SRO's proposed rule.

The Coal Act also provided the Coal Commission limited modification power. Much like the review described in the Maloney Act, the Coal Commission's power to modify rules was not all-encompassing: it could only be done to conform the proposal to the requirements of the statute. § 4, 50 Stat. at 78. The importance of this power is that the Coal Commission could ensure that proposed rules that did not align with, or were inconsistent with, the statute's purpose did not become promulgated rules with the power of law.

Both before and after the amendment, the FTC has had, and continues to have, independent rulemaking power. Prior to the amendment, section 3053(e) provided that the FTC could issue an interim final rule, which carries the power of law, under the standards articulated in the Administrative Procedures Act, 5 U.S.C. § 553(b)(B)—if "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) (2020). 5

U.S.C. § 553(b)(B), known as the APA's good-cause provision, allows agencies to issue rules where regular notice-and-comment procedures are "impracticable, unnecessary, or contrary to the public interest." This section provided the FTC with broad rulemaking power without the need for notice-and-comment rulemaking that could be used beyond the emergency context, such as when notice and comment was "unnecessary"—for example, if there had already been sufficient notice-and-comment procedures regarding various alternative options presented in a proposed rule. *See* 16 C.F.R. § 1.142(a)(3) (requiring the Authority to include a discussion of "any reasonable alternatives" to the proposed rule and explain why the specific proposal was chosen); *Mobil Oil Corp. v. United States EPA*, 35 F.3d 579, 584 (D.C. Cir. 1994) ("If the original record is still fresh, a new round of notice and comment might be unnecessary."); *Priests for Life v. United States Dep't of Health & Human Servs.*, 772 F.3d 229, 276 (D.C. Cir. 2014) (similar), *vacated on other grounds by Zubik v. Burwell*, 578 U.S. 403 (2016).

Now, with the amendment, the FTC can utilize proper procedures under the APA, including either regular notice-and-comment procedures or the good-cause provision, to "abrogate, add to, and modify the rules of the Authority" whenever the FTC "finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to the requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act." 15 U.S.C. § 3053(3). Just as the Maloney Act and the Coal Act allow the agency to amend the private entity's proposed rules in certain circumstances, so does HISA. Ultimately, none of Oklahoma's arguments regarding the unlawfulness of HISA's rulemaking structure carry substantial weight.

One final note about the private nondelegation doctrine and the cases that have formulated the subordination test. I have noted the numerous ways in which HISA—both with and without the amendment—is nearly identical to the unquestionably constitutional Maloney Act. But even if there are slight differences between the two statutes, no case has ever said that the Maloney Act in its current form is a floor for private nondelegation purposes. In other words, it is not true that a statute must be identical to the Maloney Act, or provide more oversight than the SEC, to be a constitutional delegation. The private entity simply must be subordinate to the agency. The Authority is subordinate to the FTC, and so HISA remains facially constitutional.

2. Enforcement Authority

Oklahoma also challenges HISA's enforcement structure. The Supreme Court has not ruled on this precise issue, but other circuit courts have relied upon Supreme Court precedent to do so in a way that supports the enforcement structure's constitutionality. Courts' review of the Maloney Act is once again instructive. All circuits that have ruled on the issue have held that the Maloney Act's enforcement scheme is constitutional where, as here, a private entity (the National Association of Securities Dealers ("NASD")) brought enforcement actions against covered entities. *See, e.g.*, *Sorrell v. SEC*, 679

F.2d 1323 (9th Cir. 1982); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690 (2d Cir. 1952), *cert. denied*, 344 U.S. 855 (1952).

The Second Circuit held that because of "the [SEC's] review of any disciplinary action" taken by the NASD, there is "no merit in the contention that the Act unconstitutionally delegates power to the association." *R.H. Johnson & Co.*, 198 F.2d at 695. The Ninth Circuit, citing to Second and Third Circuit decisions upholding the constitutionality of NASD's enforcement powers, noted that "[petitioner's] claim of unconstitutional delegation appears to rest on his mistaken idea that the SEC does not engage in an independent review of NASD decisions. As we stated in *Sartain v. SEC*, 601 F.2d 1366, 1371 n.2 (9th Cir. 1979), SEC review is de novo." *Sorrell*, 679 F.2d at 1326 n.2. The unanimous principle from the circuit decisions—which the Supreme Court has not disturbed despite repeated opportunities to do so—is that so long as the agency retains de novo review of a private entity's enforcement proceedings, there is no unconstitutional delegation of legislative or executive power, even if the agency does not review the private entity's initial decision to bring an enforcement action. The consistency of this principle reinforces the constitutionality of HISA's enforcement scheme.

In fact, the enforcement scheme in HISA is even more constitutionally sound than that found in the Maloney Act. The Maloney Act was amended in 1975, and, in relation to the enforcement scheme, the amendment may have constrained the SEC's power to review the disciplinary proceedings the NASD pursued. *See Bergen*, 605 F.2d at 697. Nonetheless, this did not change the court's analysis:

> We need not now decide whether this statutory change effects a significant alteration in the SEC's power to review NASD disciplinary proceedings. It suffices to say that to the extent the amendment restricts the SEC's ability to receive additional evidence not presented below, this does not alter our conclusion in Todd [*Todd & Co., Inc. v. SEC*, 557 F.2d 1008 (3d Cir. 1977)] that there is no unconstitutional delegation of legislative authority.

Bergen, 605 F.2d at 697. HISA, unlike the Maloney Act, unambiguously empowers the FTC to obtain additional evidence not in the record below and to review the proceeding de novo. *See* 15 U.S.C. § 3058(c)(3)(C). The enforcement scheme in HISA, including two levels of de novo review and allowing the FTC to review evidence not in the record, ensures that HISA is soundly in the company of previously upheld enforcement mechanisms, and is thus not an unconstitutional delegation of power to a private authority.

* * *

Although the majority and I take different paths in our analysis, I fully agree that HISA is constitutional under Supreme Court precedent as well as the majority of federal court caselaw.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

STATE OF OKLAHOMA, *et al.*, *Plaintiffs*, v. UNITED STATES OF AMERICA, *et al.*, *Defendants.*	Civil Case No. 5:21-cv-104-JMH **MEMORANDUM OPINION AND ORDER** June 3, 2022

* * *

This matter comes before the Court on Defendants Steve Beshear, Adolpho Birch, Leonard S. Coleman, Jr., Ellen McClain, Charles Scheeler, Joseph DeFrancis, Susan Stover, Bill Thomason, D.G. Van Clief, and the Horseracing Integrity and Safety Authority, Inc.'s (collectively, the "Authority Defendants") Motion to Dismiss [DE 68] Plaintiffs' First Amended Complaint [DE 53], pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for alleged lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. In addition to Authority Defendants' Motion [DE 68], Defendants the United States of America, the Federal Trade Commission (FTC), Lina Khan, in her official capacity as Chair of the FTC, Rebecca Kelly Slaughter, in her official capacity as Commissioner of the FTC, Rohit Chopra, in his official capacity as Commissioner of the FTC, Noah Joshua Phillips, in his official capacity as Commissioner of the FTC, and

Christine S. Wilson, in her official capacity as Commissioner of the FTC (collectively, the "Federal Defendants") move the Court to dismiss Plaintiffs' First Amended Complaint [DE 53], pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). [DE 70]. In opposing Authority and Federal Defendants' Motions to Dismiss [DE 68; DE 70], Plaintiffs State of Oklahoma, Oklahoma Horse Racing Commission ("OHRC"), State of West Virginia, West Virginia Racing Commission ("WVRC"), State of Louisiana, Hanover Shoe Farms, Inc. ("Hanover"), United States Trotting Association ("USTA"), Oklahoma Quarter Horse Racing Association ("OQHRA"), Tulsa County Public Facilities Authority d/b/a Fair Meadows Racing and Sports Bar ("Fair Meadows"), Global Gaming RP, LLC d/b/a Remington Park ("Remington Park"), and Will Rogers Downs LLC (collectively, "Plaintiffs") move for summary judgment, pursuant to Federal Rule of Civil Procedure 56. [DE 87]. For the following reasons, the Authority Defendants' Motion to Dismiss [DE 68] and the Federal Defendants' Motion to Dismiss [DE 70] will be denied in part, insofar as they seek dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction, and granted in part, insofar as they seek dismissal under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and Plaintiffs' Motion for Summary Judgment [DE 87] will be denied.

I. DISCUSSION

This case arises from Congress' passage of the Horseracing Integrity and Safety Act ("HISA") and what Plaintiffs allege is an unconstitutional delegation of legislative power to a private organization, the Horseracing Integrity and Safety

Authority, Inc. (the "Authority"). HISA grants the Federal Trade Commission ("FTC") authority to promulgate rules to address concerns with medication, alleged doping, and track safety in horseracing to bring more consistency to horseracing regulations than what state-based horseracing laws provide. Plaintiffs' primary issue with the legislation is that the FTC's rules will be based on proposed standards offered by the Authority, which Plaintiffs' claim the FTC is required to adopt, making the FTC subordinate to the Authority.

A. JURISDICTION

Before considering the Parties' arguments concerning requests for dismissal for failure to state a claim and summary judgment, the Court must first determine whether Plaintiffs' claims must be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction, as it is a threshold matter. "The jurisdiction of federal courts is limited to 'cases' and 'controversies.'" *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, No. 5:21-CV-071-H, 2022 WL 982464, at *4 (N.D. Tex. Mar. 31, 2022) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992) (citing U.S. Const. art. III, § 2))). "Where subject matter jurisdiction is challenged pursuant to Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). Moreover, Plaintiffs must "meet their burden of showing their claim is ripe for review" to overcome concerns "both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 342 (6th Cir. 2009) (internal quotation marks omitted). The Court must "presume that [it] lack[s] jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted).

1. STANDING

To establish standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (quotations omitted). "To be 'fairly traceable to the challenged action of the defendant,' the injury must 'not [be] the result of the independent action of some third party not before the court.'" *Nat'l Horsemen's*, 2022 WL 982464, at *4 (quoting *Lujan*, 504 U.S. at 560). Redressability will not be shown if it is "merely 'speculative[ ]' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. Since the "determination of standing is both plaintiff- and provision-specific," plaintiffs must demonstrate they have standing for each claim they seek to press. *Fednav, Ltd. v. Chester*, 547 F.3d 607, 614 (6th Cir. 2008); *see Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("[S]tanding is not dispensed in gross[.]").

"[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 Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). "But a plaintiff who challenges a 'statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Nat'l Horsemen's*, 2022 WL 982464, at *5 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

Here, Plaintiffs challenge the rulemaking mechanism in HISA, which they allege is an unconstitutional delegation of power that permits the Authority, a private entity, to regulate without sufficient government oversight. HISA requires that the regulations take effect on July 1, 2022, and Plaintiffs will be objects of the regulations adopted under HISA. *Nat'l Horsemen's*, 2022 WL 982464, at *5 (citing §§ 3051(14), 3055(a)). "HISA states that the FTC 'shall' approve rules proposed by the Authority if it finds that they are 'consistent' with the statute itself and with applicable rules." *Id.* at 6 (quoting § 3053(c)). Moreover, "the Authority 'shall' propose rules to develop the programs on the topics outlined in the statute while taking into consideration the guidance outlined in the statute." *Id.* (citing §§ 3055(a)–(d), 3056(a)–(c)). "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 the disputed provisions will come into effect." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 287 (1936)). So, presuming the FTC "'act[s] properly and according to law,'" as the Court must, *Nat'l Horsemen's*, 2022 WL 982464, at *6 (quoting *FCC v. Schreiber*, 381 U.S. 279, 296 (1965)), there is a substantial risk that Plaintiffs will be subjected to the regulations. *Susan B. Anthony List,* 573 U.S. at 158 (quoting *Clapper*, 568 U.S. at 414 n.5).

In addition to there being a substantial risk that Plaintiffs will be subjected to the regulations, Plaintiffs must show that a threatened, concrete injury is "imminent" to challenge the regulatory scheme found in HISA. *Lujan*, 504 U.S. at 560. While Plaintiffs cannot show that they have been aggrieved by the regulatory scheme found in HISA, the Court agrees with the finding in *Nat'l Horsemen's* that "HISA requires that certain regulations be passed, showing that a concrete injury is 'certainly impending,' which will 'aggrieve'" Plaintiffs because they will be subjected to the allegedly unconstitutional rulemaking scheme and the Authority's alleged regulatory control. 2022 WL 982464, at *7 (quoting *Susan B. Anthony List*, 573 U.S. at 158 (quoting *Clapper*, 568 U.S. at 414 n.5)); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020)).

Plaintiffs' alleged certainly impending regulatory injury is also "fairly traceable" to the challenged rulemaking scheme. *Lujan*, 504 U.S. at 560. Plaintiffs challenge HISA's rulemaking scheme, which they allege subjects them to be unconstitutionally subjected to the Authority's regulatory control, "[a]nd, outside of interim final rules, all rules flow through the Authority-proposal-FTC-approval scheme." *Nat'l Horsemen's*, 2022 WL 982464, at *7 (citing § 3053). Therefore, the alleged regulatory injury is directly traceable to the allegedly unconstitutional regulatory scheme found in HISA.

Lastly, the Court finds that a decision in Plaintiffs' favor would likely redress their alleged certainly impending injury. Specifically, were the Court to find that HISA unconstitutionally delegates legislative power to the Authority, a private entity, Plaintiffs would not be subjected to regulatory control under HISA. Accordingly, the Court finds Plaintiffs have standing to pursue their claims.

2. RIPENESS

"Ripeness requires that the 'injury in fact be certainly impending'" and "separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review." *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997) (citations omitted). Questions of ripeness require the Court to consider the following factors: (1) the likelihood that the alleged injury will come to pass; (2) the fitness of the issues for judicial decision at the pre-enforcement stage, meaning whether the record is adequately developed to produce a fair adjudication of the merits of the parties' claims; and (3) the hardship to the parties of withholding court consideration during the pre-enforcement stage. *Id.* at 284 (citing *United Steelworkers, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194-95 (6th Cir. 1988)).

In the present case, the first factor weighs in Plaintiffs' favor because without judicial intervention, the alleged injury is certain to occur, as discussed previously herein. Specifically, Plaintiffs will be subjected to an allegedly unconstitutional rulemaking scheme that allows a private party to oversee them without sufficient governmental oversight.

A ripeness analysis requires the Court to analyze whether the claims were "amenable to judicial consideration *at the time the complaint was filed*," *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996) (emphasis added). However, Plaintiffs argue that the "challenge to HISA's constitutionality does not depend on the content of the regulations that are ultimately promulgated, but on the constitutionality of the organic statute itself." [DE 99, at 4 (citing [DE 87, at 32])]. Specifically, Plaintiffs claim, "[T]he regulatory structure established by HISA is unconstitutional and that the Authority and the FTC can accordingly take no action whatsoever pursuant to it. Those arguments are suitable for judicial resolution now." [DE 87, at 32]. For the following reasons, the Court agrees.

In two similar cases involving allegedly unconstitutional delegations of power, the Supreme Court of the United States "assessed the plaintiffs' claims by looking to the language of the statute to see if Congress unconstitutionally delegated power." *Nat'l Horsemen's*, 2022 WL 982464, at *9 (citing *Carter Coal Co.*, 298 U.S. at 311 (finding the statute at issue "conferred" regulatory power to "private persons"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) ("Since law-making is not entrusted to the industry, the statutory scheme is unquestionably valid.")). "The inquiry is one of structural subordination and the agency's statutory surveillance and authority." *Id.* (citing *Adkins*, 310 U.S. at 399). Likewise, in *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.,* the D.C. Circuit found a pre-enforcement challenge to a statute was ripe because its constitutionality was a "purely legal question . . . appropriate for immediate judicial resolution." 721 F.3d 666, 672 n.6 (D.C. Cir. 2013), vacated on other grounds. Moreover, due process arguments involving allegedly self-interested actors regulating their competitors have been found to present purely legal questions. *See Nat'l Horsemen's*, 2022 WL 982464, at *9 (citing *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 32 (D.C. Cir. 2016) (finding self-interest based on the statutory language governing its incentives); *see also N. Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 510 (2015)). Therefore, the Court need not wait until HISA is in effect and applied to make an informed decision about the issues present in this matter because the constitutional challenges are to the statute itself and present purely legal questions regarding delegation and potential conflicts of interests concerning self-interested private entities regulating their competitors.

The remaining factor in the Court's ripeness analysis requires the Court to consider whether withholding a decision would cause Plaintiffs undue hardship. As discussed above, once HISA goes into effect on July 1, 2022, Plaintiffs will be subjected to regulations that stem from an allegedly unconstitutional rulemaking scheme wherein the Authority, a private entity comprised of potentially self-interested individuals, funnels proposed rules to the FTC that the FTC allegedly has no choice but to accept. The Court's failure to address this matter before July 1, 2022, could result in harm to Plaintiffs. Therefore, this matter is ripe for review, and both the Authority Defendants' Motion to Dismiss [DE 68] and the Federal Defendants' Motion to Dismiss [DE 70] will be denied in part, insofar as they seek dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction.

B. DISMISSAL UNDER 12(b)(6) AND SUMMARY JUDGMENT

1. STANDARDS OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides that a complaint may be attacked for failure "to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A motion to dismiss is properly granted if it is beyond doubt that no set of facts would entitle the petitioner to relief on his claims." *Computer Leasco, Inc. v. NTP, Inc.*, 194 F. App'x 328, 333 (6th Cir. 2006). When considering a Rule 12(b)(6) motion to dismiss, the court will presume that all the factual allegations in the complaint are true and draw all reasonable inferences in favor of the nonmoving party. *Total Benefits Planning Agency v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008) (citing *Great Lakes Steel v. Deggendorf*, 716 F.2d 1101, 1105 (6th Cir. 1983)). "The court need not, however, accept unwarranted factual inferences." *Id.* (citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987)).

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute exists on a material fact, and thus summary judgment is improper, if the evidence shows 'that a reasonable jury could return a verdict for the nonmoving party.'" *Olinger v. Corporation of the President of the Church*, 521 F. Supp. 2d 577, 582 (E.D. Ky. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Stated another way, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S.

at 252. "The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Pennington,* 553 F.3d at 450 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

The moving party has the initial burden of demonstrating the basis for its motion and identifying those parts of the record that establish the absence of a genuine issue of material fact. *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002). The movant may satisfy its burden by showing "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant has satisfied this burden, the non-moving party must go beyond the pleadings and come forward with specific facts demonstrating the existence of a genuine issue for trial. Fed. R. Civ. P. 56; *Hall Holding*, 285 F.3d at 424 (citing *Celotex*, 477 U.S. at 324). Moreover, "the nonmoving party must do more than show there is some metaphysical doubt as to the material fact. It must present significant probative evidence in support of its opposition to the motion for summary judgment." *Hall Holding*, 285 F.3d at 424 (internal citations omitted).

The Court "must construe the evidence and draw all reasonable inferences in favor of the nonmoving party." *Pennington v. State Farm Mut. Automobile Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). However, the Court is under no duty to "search the entire record to establish that it is bereft of a genuine issue of material fact." *In re Morris*, 260 F.3d 654, 655 (6th Cir. 2001). Rather, "the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *Id.*

2. DELEGATION OF POWER

"The Constitution vests '[a]ll legislative Powers herein granted' in the United States Congress—not in another branch of government nor in a private entity." *Nat'l Horsemen's*, 2022 WL 982464, at *11 (quoting U.S. Const. art 1, § 1). "Accompanying that assignment of power to Congress is a bar on its further delegation." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality).

"Supreme Court precedent provides that if an act of Congress lays down an intelligible principle, then an agency does not wield any 'legislative power' when enacting binding rules according to that principle." *Nat'l Horsemen's*, 2022 WL 982464, at *11 (citing *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983)). Agency rulemaking and adjudicating may take "'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive power.'" *City of Arlington*, 569 U.S. at 304 n.4. Therefore, "if Congress lays down an intelligible principle in a statute and also properly gives a private party power to help an agency administer that statute, no Article I delegation problem could arise," as the legislative power remains with Congress. *Nat'l Horsemen's*, 2022 WL 982464, at *11 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–14 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965))).

"An intelligible principle, however, 'cannot rescue a statute empowering private parties to wield regulatory authority.'" *Id.* at 12 (quoting *Amtrak I*, 721 F.3d at 671). Regulation is "necessarily a governmental function." *Carter Coal Co.*, 298 U.S. at 310–11. "Private parties may play a role in the regulatory process only if they 'function subordinately' to an agency." *Nat'l Horsemen's*, 2022 WL 982464, at *12 (*Adkins*, 310 U.S. at 399). Accordingly, "HISA must contain an intelligible principle guiding the Authority and the FTC, ensuring that Congress has not given away its legislative power under Article I," and "the Authority must function subordinately to the FTC, subject to its authority and surveillance . . . ." *Id.* at 13.

a. INTELLIGIBLE PRINCIPLE

"[The Supreme] Court has held that a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." *Gundy*, 139 S. Ct. at 2129 (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). "[T]he Court has stated that a delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority.'" *Id.* (quoting *American Power & Light v. SEC*, 329 U.S. 90, 105 (1946). Generally, Congress is not second-guessed "'regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Id.* (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 474–475 (2001)). In fact, the Supreme Court has only found two delegations to be unconstitutional, *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), because "'Congress had failed to articulate *any* policy or standard' to confine discretion." *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 373 n. 7 (1989)). However, "the Supreme Court has 'blessed delegations that authorize regulation in the 'public interest' or to 'protect the public health" or to set 'fair and equitable' prices." *Nat'l Horsemen's*, 2022 WL 982464, at *14 (quoting *Big Time Vapes, Inc. v. Food & Drug Admin.*, 963 F.3d 436, 442 n.18 (5th Cir. 2020) (citing *Whitman*, 531 U.S. at 472; *Nat'l Broad Co. v. United States*, 319 U.S. 190, 225-26 (1943); *Yakus v. United States*, 321 U.S. 414, 426-27 (1944))).

Here, HISA's policy "expressly defines the FTC's and Authority's purposes and jurisdictional boundaries." *Id.* (citing § 3054). "Congress sought to develop an 'independent and exclusive national' scheme to protect 'the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces' through the 'horseracing anti-doping and medication control program and the racetrack safety program.'" *Id.* (quoting § 3054(a)). "This policy communicates Congress' desire to protect the safety and integrity of horseracing through nationalizing and streamlining regulation under two specific programs, which are outlined in greater detail in sections 3055 and 3056." *Id.* "HISA, however, does not affect existing federal and state regulation on any 'matters unrelated to antidoping, medication control and racetrack and racing safety of covered horses and covered races.'" *Id.* (quoting § 3054(k)(3)). Additionally, "Congress both 'recognized' the Authority as a 'private, independent, self-regulatory, nonprofit corporation' for 'purposes of developing and implementing' HISA's two programs and tasked the FTC with 'oversight' so that only the FTC possessed the power to give draft rules the force of law." *Id.* at 15 (quoting §§ 3052(a), 3053).

In addition to a clearly defined policy, HISA sets clear boundaries for what is delegated to the Authority. "Under HISA, the FTC shall approve proposed rules if they are 'consistent with (A) this [statute] and (B) applicable rules approved by the [FTC].'" *Id.* (quoting § 3053(c)(2)). "HISA limits the scope of rulemaking to medication control and racetrack safety." *Id.* (citing § 3052). "All other thoroughbred horseracing laws related to breeding, licensing, broadcasting, and the like remain 'unaffected.'" *Id.* (quoting § 3054(k)(3)). HISA then "outlines several 'considerations' the Authority must take into account in developing the horseracing and medication control program, the 'activities' of the program, and its baseline rules." *Id.* (quoting § 3055(b), (c), and (g)). "For the racetrack safety program, HISA requires the Authority to 'consider[ ]' existing safety standards, including those of three sources HISA lists; to incorporate twelve elements into the program; and to carry out specific 'activities' under the program." *Id.* (quoting § 3056 (a)–(c)). While these considerations are given to the Authority, they "apply equally to the FTC's review," because the FTC ultimately chooses whether to approve the Authority's proposed rules "if they are 'consistent with' the statute—and the statute contains those 'considerations.'" *Id.* (citing §§ 3053(c)(2); 3055(b)).

For the foregoing reasons, the Court agrees with the *Nat'l Horsemen's* Court that "[t]hese considerations, topics, and elements confine the bounds of Congress's delegated authority to provide a sufficient intelligible principle," and "HISA cabins Congress's delegation more than the many statutes the Supreme Court has upheld despite 'very broad delegations.'" 2022 WL 982464, at *16 (quoting *Gundy*, 139 S. Ct. at 2129). Next, the Court must determine whether HISA allows the FTC to maintain sufficient "'authority and surveillance'" over the Authority to ensure that it functions as a subordinate private entity. *See Id.* (quoting *Adkins*, 310 U.S. at 399).

b. SUBORDINATION

In *Carter Coal Co.*, the Supreme Court struck down the part of the Bituminous Coal Conservation Act of 1935 that allowed two-thirds of coal producers to set the maximum labor hours and minimum wages for the other coal producers and miners in the industry and found this was a "legislative delegation in its most obnoxious form" because it delegated power "to private persons whose interests may be and often are adverse to the interests of others in the same business." 298 U.S. at 310-11.

Following the Supreme Court's decision in *Carter Coal Co.*, Congress passed the Bituminous Coal Act of 1937, which removed the provisions of the 1935 statute that the Supreme Court found unconstitutional and "'made other substantive and structural changes,'" including "removing the private parties' regulatory power over their competitors." *Nat'l Horsemen's*, 2022 WL 982464, at *12 (quoting *Adkins*, 310 U.S. at 387). "Instead, the statute allowed the private parties to 'propose minimum prices' and other related standards to a government agency that could 'approve[], disapprove[], or modif[y]' those rules." *Id.* (quoting *Adkins*, 310 U.S. at 388). The Supreme Court found the revised scheme to be "unquestionably valid." *Adkins*, 310 U.S. at 388. "Specifically, the Court held that Congress does not impermissibly delegate 'its legislative authority' to a private entity, when the entity 'function[s] subordinately" to a governmental agency." *Nat'l Horsemen's*, 2022 WL 982464, at *12 (quoting *Adkins*, 310 U.S. at 388). "When the agency retains the ability to 'determine the prices' and exercises 'authority and surveillance over' the private entity, 'law-making is not entrusted to the industry.'" *Id.*

"Lawmaking is also not entrusted to the industry when Congress conditions an agency's regulatory power on private party approval." *Id.* In *Currin v. Wallace*, "the Supreme Court upheld a scheme where a regulation could not take effect in a particular market without the approval of two-thirds of the regulated industry members in that market." *Id.* (citing *Currin v. Wallace*, 306 U.S. 1, 6, 15 (1939)). In *Currin*, the Supreme Court found, "[I]t is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application." 306 U.S. at 16. Likewise, in *Kentucky Div., Horsemen's Benev. & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, the Court of Appeals for the Sixth Circuit, relying on *Currin*, found, "[T]he horsemen's veto provision does not allow a private party to 'make the law and force it upon a minority'; rather, the veto is merely a condition established by Congress upon the application of Congress' general prohibition of interstate off-track betting." 20 F.3d 1406, 1416 (6th. Cir. 1994). The Sixth Circuit held that the horsemen's veto was a waiver power rather than a delegation of legislative power. *Id.*

In the present case, Plaintiffs argue HISA violates the private nondelegation doctrine by placing the FTC in a merely ministerial role where the FTC is forced to act as a rubber stamp for the Authority's proposed rules because HISA specifies that the FTC "*shall* approve" the Authority's proposed rules if they are "consistent with" HISA and the Authority's prior approved rules. 15 U.S.C. § 3053(c)(2) (emphasis added). However, as the FTC correctly asserts, "[T]he standard the FTC employed is the same standard under which the Securities and Exchange Commission [("SEC")] decides whether to approve rules proposed by a self-regulating private entity." [DE 102, at 3 (citing 15 U.S.C. § 78s(b)(2)(C)(i))]. The FTC further correctly states, "[E]very court of appeals to consider a non-delegation challenge to this framework has rejected it." [DE 102, at 3 (citing *Sorrell v. SEC*, 679 F.2d 1323 (9th Cir. 1982) (quoting *R.H. Johnson & Co. v. SEC,* 198 F.2d 690 (2d Cir. 1952)); Senator McConnell Amicus Br., ECF No. 53 at 1, 10-11, Case No. 21-cv-71 (E.D. Tex., Apr. 30, 2021) (explaining that "'HISA is modeled on the Maloney Act,' which governs the SEC's relationship with FINRA")). Likewise, the *Nat'l Horsemen's* Court found, "HISA's consistency review tracks the SEC's review of FINRA rules," and "[u]nder the Maloney Act, the SEC 'shall approve a proposed rule change of a self-regulatory organization' if 'consistent with' the requirements of the Maloney Act and applicable rules." 2022 WL 982464, at *22 (quoting 15 U.S.C. § 78s(b)(2)(C)(i)).

Nevertheless, Plaintiffs takes issue with the fact that the FTC can only disapprove rules that are inconsistent with HISA while the Authority has the power to "fill up the details" of HISA. [DE 104, at 2]. "Filling up the details has long been recognized as the very business of regulating." *Nat'l Horsemen's*, 2022 WL 982464, at *22 (citing *United States v. Grimaud*, 220 U.S. 506, 517 (1911)). Meanwhile, the FTC's ability to "review for consistency resembles an adjudicative, rather than regulatory, function akin to courts reviewing agency action for whether it is 'in excess of statutory jurisdiction, authority, or limitations.'" *Id.* (quoting 5 U.S.C. § 706(2)(C)). Since "Congress withheld the FTC's ability to modify proposed rules, the Authority wields greater power than FINRA and the private entities in *Adkins*." *Id.* However, while HISA is distinct from the Maloney Act and schemes on which it is modeled, HISA's unique "features do not take HISA outside established constitutional limits." *Id.*

The FTC argues, "Plaintiffs identify no authority for the proposition that discretion to define the precise contours and policy of regulation is the defining feature of rulemaking," [DE 102, at 3], and the *Nat'l Horsemen's* Court agrees, finding, "the FTC has the power to approve, disapprove, and recommend modifications to the Authority's proposed standards, its inability to formally modify the Authority's rules is not fatal," 2022 WL 982464, at *23. As the *Nat'l Horsemen's* Court notes, "[T]he agency in *Currin* could not modify its regulation without industry approval. *See* 306 U.S. at 16. Nor could the FRA modify any standards without Amtrak's agreement, even after the arbitration provision had been severed. *See Amtrak IV*, 896 F.3d at 545." *Id.*

Plaintiffs contend the decision on this issue in *Nat'l Horsemen's* should not be relied upon by this Court because *Nat'l Horsemen's* was "constrained by precedent—in particular, *Texas v. Rettig*, 987 F.3d 518 (5th Cir. 2021)," which upheld a similar scheme that "'does not leave [the federal agency] free to disapprove or modify' the private entity's regulations."

[DE 104, at 3 (citing *Nat'l Horsemen's*, 2022 WL 982464, at *23 (quoting *Texas v. Rettig*, 993 F.3d 408, 415 (5th Cir. 2021)))]. However, the *Nat'l Horsemen's* Court did not rely solely on *Rettig* to decide this issue. It also relied on the Supreme Court's decision in *Adkins*, which the Fifth Circuit and this Court agree "did not turn on the commission's ability to modify proposed rules," 2022 WL 982464, at *23, the Seventh Circuit's decision in *Aslin v. FINRA*, 704 F.3d 475, 476 (7th Cir. 2013), and the Third Circuit's decision in *Todd & Co., Inc. v. S.E.C.*, 557 F.2d 1008, 1012 (3d Cir. 1977), which found, "Because the Commission the Commission . . . has the power, according to reasonably fixed statutory standards, to approve or disapprove the Association's rules . . . the court found no merit in the unconstitutional delegation argument. Considering *Adkins, Aslin*, and *Todd & Co.* alongside the Fifth Circuit precedent in *Rettig*, the *Nat'l Horsemen's* Court, considering binding and persuasive authority, correctly found, "[c]ourts have limited their rulemaking analyses to whether the agency could 'approve or disapprove' the private entity's rules," 2022 WL 982464, at *23, and the undersigned agrees.

Furthermore, even though the ability to modify is not a necessary consideration to the rulemaking analysis, "the FTC retains the power to approve or disapprove all rules and, 'in the case of disapproval,' it 'shall make recommendations to the Authority to modify the proposed rule.'" *Id.* (quoting § 3053(c)(3)(A)). If the FTC disapproves a rule and makes recommendations to modify the proposed rule, the Authority may resubmit the proposed rule "if they 'incorporate the modifications recommended' by the FTC." *Id.* (quoting § 3053(c)(3)(B)). In the event the Authority fails to incorporate the FTC's recommended modifications, the FTC has the power to disapprove the proposed rule until the Authority makes the recommended modification, meaning the FTC retains the ability to control what becomes a binding rule and can contribute to the language of the proposed rule through recommendations that must be made for the Authority to resubmit. "Though not the equivalent of drafting the rule itself, the power to approve, disapprove, or recommend modification subject to continued rejection ensures that the Authority still 'functions subordinately' to the FTC such that the FTC 'determines' the binding rules." *Id.* (quoting *Adkins*, 310 U.S. at 399). Therefore, HISA's rulemaking scheme does not violate the private nondelegation doctrine.

c. THE AUTHORITY'S ENFORCEMENT POWERS

In addition to Plaintiffs' arguments against HISA's rulemaking scheme, Plaintiffs argue the Authority's enforcement powers violate the private nondelegation doctrine. [DE 87, at 45-47]. Specifically, Plaintiffs argue it is unconstitutional for the Authority to have the power to commence civil actions against regulated parties who violate HISA, 15 U.S.C. § 3054(j)(1), investigate potential violations and impose sanctions, 15 U.S.C. § 3054(c)(1)(A), and investigate, charge, and adjudicate potential anti-doping and medication control violations, 15 U.S.C. § 3055(c)(4(B). [DE 87, at 45-47]. However, as held in *Nat'l Horsemen's*:

> The Authority may only investigate rule violations according to "uniform procedures" reviewed and approved by the FTC, and they cannot impose any penalty or sanctions without providing due process and an impartial

> tribunal. §§ 3054(c), 3057(c)(3). Thus, even prior to FTC review, due process is baked into the system. Moreover, any Authority decision with final, legal effect is subject to de novo review by an ALJ, whose decision may then be reviewed de novo by the FTC. *See* § 3058(b), (c). This de novo review includes the ability to "reverse, modify, [or] set aside" any sanction of the Authority. *Id.* And any determination by an ALJ or the FTC is a "Final Decision" under the APA, enabling judicial review. § 3058(b)(3)(B); *see* § 3058(c)(2)(B); *see also* Administrative Procedure Act § 10, 5 U.S.C. § 704 (outlining judicial review of administrative agency decisions).

2022 WL 982464, at *24.

Moreover, such a delegation of power is not unheard of and has been upheld in similar instances. For example, "[t]he Maloney Act authorizes private entities to perform certain investigative and disciplinary functions, subject to the SEC's oversight." *Id.* (citing 15 U.S.C. § 78*o*-3(h)(3)), and "[t]his aspect of the Maloney Act has been upheld against constitutional challenges on many occasions," *Id.* (citing *Sorrell*, 679 F.2d at 1325–26; *Todd & Co.*, 557 F.2d at 1014; *R. H. Johnson & Co.*, 198 F.2d at 695). In these decisions, the courts focused "on the SEC's ability to review any disciplinary action de novo, which the FTC retains." *Id.* (citing *Sorrell*, 679 F.2d at 1326 & n.2 (citing *R. H. Johnson & Co.*, 198 F.2d at 695)). Like Plaintiffs' arguments regarding HISA's rulemaking scheme, Plaintiffs' enforcement power arguments also fail to show that HISA violates the private nondelegation doctrine.

3. THE AUTHORITY'S ALLEGED SELF-INTEREST

Plaintiffs also move for summary judgment because they argue HISA allows them to be regulated by self-interested competitors in violation of due process. [DE 87, at 53-54]. They correctly assert, "Due process forbids an 'economically self-interested actor' from 'regulat[ing] its competitors.'" *Id.* at 53 (quoting *Ass'n of Am. R.Rs. V. U.S. Dep't of Transp.* ("*Amtrak III*"), 821 F.3d 19, 23 (D.C. Cir. 2016). Plaintiffs are also correct that "the *Carter Coal* Court held the Coal Conservation Act unconstitutional not only because it was an improper delegation of legislative authority to a private entity, but also because the act gave the majority of the industry 'the power to regulate the affairs of an unwilling minority.'" *Id.* at 53-54 (quoting 298 U.S. at 311). HISA states that the Authority is a "private, independent, self-regulatory, nonprofit corporation." § 3052(a). Plaintiffs argue self-interest is evidence because "[f]our of the nine members on the Authority's Board of Directors must be 'industry members selected from among the various equine constituencies.'" *Id.* at 54 (quoting 15 U.S.C. § 3052(b)(1)(B)).

As the *Nat'l Horsemen's* Court noted, and the parties in that case agreed, an inquiry regarding whether self-interest constitutes a due process violation is no different than an inquiry regarding the private nondelegation doctrine. 2022 WL 982464, at *25 (citing *Amtrak I*, 721 F.3d at 671 n.3). Accordingly, Plaintiffs' self-interest argument fails for the same reasons as its private nondelegation doctrine arguments discussed previously herein. Specifically, even assuming the Authority is, in whole or in part, comprised of self-interested competitors, the Authority is subordinate to the FTC in the regulatory process. Therefore, the Authority is not regulating its competitors in violation of due process.

4. THE ANTICOMMANDEERING DOCTRINE

Plaintiffs argue HISA unconstitutionally commandeers the States by requiring them to fund the Authority's operations and conscripting them into helping the Authority carry out its operations. [DE 87, at 33-39]. "The anticommandeering doctrine . . . is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States" and is confirmed by the Tenth Amendment. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-76 (2018). As this Court has recognized, "[T]he Supreme Court has clearly stated that Congress may not pass legislation which requires a state to regulate or enforce a federal statute." *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 9 F. Supp. 2d 766, 771-72 (E.D. Ky. 1998); *see also New York v. United States,* 112 S. Ct. 2408, 2429 (1992) ("[T]he Constitution simply does not give Congress the authority to require the States to regulate."); *Printz v. United States*, 521 U.S. 898, 935 (1997) ("Congress cannot . . . conscript[ ] the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

Here, the first provision Plaintiffs claim violates the anticommandeering doctrine is § 1203(f)(2), which provides that "states may 'elect[ ] to remit fees' on behalf of their members 'according to a schedule established in a rule developed by the Authority and approved by the' FTC." [DE 70, at 34 (quoting § 1203(f)(2))]. Plaintiffs claim this provision "require[s] States . . . to remit State monies." [DE 87, at 34]. However, that is not the case. The States' remission of fees is clearly a choice they may elect to do so because § 1203(f)(3) provides that "[c]overed persons . . . shall be required to remit such fees to the Authority . . . [i]f a State racing commission does not elect" to collect the fees on their behalf. The provision neither requires the States to collect fees from covered persons nor does it involve state funds. Instead, it is merely a requirement on private entities, *i.e.*, the covered persons, to remit fees to the Authority. Any participation by the States regarding the collection of those fees is voluntary and would only involve money owed to the federal government, as opposed to State funds.

Under HISA, the consequence of a State not opting to collect the remitted fees from its members is that the State may not collect funds for related regulation of their own because HISA provides "'exclusive national authority' over covered activities and state[s] that Authority rules 'shall preempt any provision of State law or regulation with respect to matters within the jurisdiction of the Authority under this Act.'" [DE 68, at 36 (quoting § 1205(a), (b)). Despite Plaintiffs claims to the contrary this is nothing more than a typical preemption scheme as outlined in *Murphy*, wherein the Supreme Court explained that preemption works as follows: "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." 138 S.

Ct. at 1480. As the Authority Defendants correctly assert, "HISA's funding provision 'operates just like any other federal law with preemptive effect' by 'confer[ing]on private entities (*i.e.*, covered [persons]) a federal right to engage in certain conduct subject only to certain (federal) constraints." [DE 68, at 36 (citing *Murphy*, 138 S. Ct. at 1480).

Next, Plaintiffs argue that HISA mandates the States cooperate with the Authority because § 1211(b) states that "[t]o avoid duplication of functions, facilities, and personnel, and to attain closer coordination and greater effectiveness and economy in administration of Federal and State law, where conduct by any person subject to" HISA's medication control or racetrack safety program "may involve both a" HISA rule "violation and violation of Federal or State law, the Authority and Federal or State law enforcement authorities shall cooperate and share information." Plaintiffs argue that the inclusion of the phrase "the Authority and Federal or State law enforcement authorities shall cooperate and share information," is best understood to require the States to cooperate with the Authority. However, as Defendants contend, the better reading is that § 1211(b) is simply a requirement for the Authority to cooperate with the States not the other way around, as Plaintiffs insist.

While Plaintiffs assert that the plain meaning of § 1211(b) confirms cooperation is mandated for both the Authority and the States, Plaintiffs' interpretation requires that the provision be read in a vacuum instead of considering it in the context of the statute in its entirety. The Federal Defendants are correct that the provisions meaning is clear since "HISA's primary objective is to create a framework for regulatory action; to that end, its provisions define the duties and obligations of the Authority, its relationship with the FTC, and the obligations of persons that would be subject to the rules under HISA." [DE 70, at 37 (citing HISA §§ 1203-1209)]; *see also* Saks v. Franklin Covey Co., 316 F.3d 337, 345 (2d Cir. 2003) ("The text's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute."). Therefore, the Court finds that HISA does not violate the anticommandeering doctrine.

5. THE AUTHORITY AS A PUBLIC ENTITY

Plaintiffs make several alternative arguments in case the Court finds the Authority to be a public entity, including that its structure violates the Appointments Clause, its officers are not properly removable under Article II and the separation of powers, and it violates the public nondelegation doctrine. *See* [DE 87, at 54-61]. However, as repeatedly stated herein, in HISA, *see* § 3052(a), and in Plaintiffs' Amended Complaint [DE 53, at 5, 17, 41, 42, 43, 44, 45, 51], the Authority is a private entity. Therefore, the Court need not consider Plaintiffs' alternative arguments regarding the Authority as a public entity.

II. CONCLUSION

The Court, having considered the matters fully, and being otherwise sufficiently advised,

IT IS ORDERED as follows:

(1) The Authority Defendants' Motion to Dismiss [DE 68] and the Federal Defendants' Motion to Dismiss [DE 70] are **DENIED IN PART**, insofar as they seek dismissal under Rule 12(b)(1) for lack of

subject matter jurisdiction, and **GRANTED IN PART**, insofar as they seek dismissal under Rule 12(b)(6) for failure to state a claim upon which relief can be granted;

(2) Plaintiffs' Motion for Summary Judgment [DE 87] is **DENIED**;

(3) This matter is **DISMISSED WITH PREJUDICE**; and

(4) This is a final and appealable order.

This 3rd day of June, 2022.

Signed By:

Joseph M. Hood

Senior U.S. District Judge

APPENDIX F

No. 22-5487

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OKLAHOMA; OKLAHOMA HORSE RACING COMMISSION; TULSA COUNTY PUBLIC FACILITIES AUTHORITY, DBA FAIR MEADOWS RACING AND SPORTS BAR; STATE OF WEST VIRGINIA; WEST VIRGINIA RACING COMMISSION; HANOVER SHOE FARMS, INC.; OKLAHOMA QUARTER HORSE RACING ASSOCIATION; GLOBAL GAMING RP, LLC, DBA REMINGTON PARK; WILL ROGERS DOWNS, LLC; UNITED STATES TROTTING ASSOCIATION; STATE OF LOUISIANA, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, ET AL., Defendants-Appellees.	)	ORDER

BEFORE: SUTTON, Chief Judge; COLE and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

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*Judge Bush recused himself from participation in this ruling.

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. II, § 1.

The executive Power shall be vested in a President of the United States of America.

U.S. Const. art. II, § 2.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. III, § 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

15 U.S.C. § 3051. Definitions

In this chapter the following definitions apply:

(1) Authority

The term "Authority" means the Horseracing Integrity and Safety Authority designated by section 3052(a) of this title.

(2) Breeder

The term "breeder" means a person who is in the business of breeding covered horses.

(3) Commission

The term "Commission" means the Federal Trade Commission.

(4) Covered horse

The term "covered horse" means any Thoroughbred horse, or any other horse made subject to this chapter by election of the applicable State racing commission or the breed governing organization for such horse under section 3054(k) of this title, during the period—

(A) beginning on the date of the horse's first timed and reported workout at a racetrack that participates in covered horseraces or at a training facility; and

(B) ending on the date on which the Authority receives written notice that the horse has been retired.

(5) Covered horserace

The term "covered horserace" means any horserace involving covered horses that has a substantial relation to interstate commerce, including any Thoroughbred horserace that is the subject of interstate off-track or advance deposit wagers.

(6) Covered persons

The term "covered persons" means 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.

(7) Equine constituencies

The term "equine constituencies" means, collectively, owners, breeders, trainers, racetracks, veterinarians, State racing commissions, and jockeys who are engaged in the care, training, or racing of covered horses.

(8) Equine industry representative

The term "equine industry representative" means an organization regularly and significantly engaged in the equine industry, including organizations that represent the interests of, and whose membership consists of, owners, breeders, trainers, racetracks, veterinarians, State racing commissions, and jockeys.

(9) Horseracing anti-doping and medication control program

The term "horseracing anti-doping and medication control program" means the antidoping and medication program established under section 3055(a) of this title.

(10) Immediate family member

The term "immediate family member" shall include a spouse, domestic partner, mother, father, aunt, uncle, sibling, or child.

(11) Interstate off-track wager

The term "interstate off-track wager" has the meaning given such term in section 3002 of this title.

(12) Jockey

The term "jockey" means a rider or driver of a covered horse in covered horseraces.

(13) Owner

The term "owner" means a person who holds an ownership interest in one or more covered horses.

(14) Program effective date

The term "program effective date" means July 1, 2022.

(15) Racetrack

The term "racetrack" means an organization licensed by a State racing commission to conduct covered horseraces.

(16) Racetrack safety program

The term "racetrack safety program" means the program established under section 3056(a) of this title.

(17) Stakes race

The term "stakes race" means any race so designated by the racetrack at which such race is run, including, without limitation, the races comprising the Breeders' Cup World Championships and the races designated as graded stakes by the American Graded Stakes Committee of the Thoroughbred Owners and Breeders Association.

(18) State racing commission

The term "State racing commission" means an entity designated by State law or regulation that has jurisdiction over the conduct of horseracing within the applicable State.

(19) Trainer

The term "trainer" means an individual engaged in the training of covered horses.

(20) Training facility

The term "training facility" means a location that is not a racetrack licensed by a State racing commission that operates primarily to house covered horses and conduct official timed workouts.

(21) Veterinarian

The term "veterinarian" means a licensed veterinarian who provides veterinary services to covered horses.

(22) Workout

The term "workout" means a timed running of a horse over a predetermined distance not associated with a race or its first qualifying race, if such race is made subject to this chapter by election under section 3054(k) of this title of the horse's breed governing organization or the applicable State racing commission.

15 U.S.C. § 3052. Recognition of the Horseracing Integrity and Safety Authority

(a) In general

The private, independent, self-regulatory, non-profit corporation, to be known as the "Horseracing Integrity and Safety Authority", is recognized for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces.

(b) Board of directors

(1) Membership

The Authority shall be governed by a board of directors (in this section referred to as the "Board") comprised of nine members as follows:

(A) Independent members

Five members of the Board shall be independent members selected from outside the equine industry.

(B) Industry members

(i) In general

Four members of the Board shall be industry members selected from among the various equine constituencies.

(ii) Representation of equine constituencies

The industry members shall be representative of the various equine constituencies, and shall include not more than one industry member from any one equine constituency.

(2) Chair

The chair of the Board shall be an independent member described in paragraph (1)(A).

(3) Bylaws

The Board of the Authority shall be governed by bylaws for the operation of the Authority with respect to—

(A) the administrative structure and employees of the Authority;

(B) the establishment of standing committees;

(C) the procedures for filling vacancies on the Board and the standing committees;

(D) term limits for members and termination of membership; and

(E) any other matter the Board considers necessary.

(c) Standing committees

(1) Anti-doping and medication control standing committee

(A) In general

The Authority shall establish an antidoping and medication control standing committee, which shall provide advice and guidance to the Board on the development and maintenance of the horseracing antidoping and medication control program.

(B) Membership

The anti-doping and medication control standing committee shall be comprised of seven members as follows:

(i) Independent members

A majority of the members shall be independent members selected from outside the equine industry.

(ii) Industry members

A minority of the members shall be industry members selected to represent the various equine constituencies, and shall include not more than one industry member from any one equine constituency.

(iii) Qualification

A majority of individuals selected to serve on the anti-doping and medication control standing committee shall have significant, recent experience in anti-doping and medication control rules.

(C) Chair

The chair of the anti-doping and medication control standing committee shall be an independent member of the Board described in subsection (b)(1)(A).

(2) Racetrack safety standing committee

(A) In general

The Authority shall establish a racetrack safety standing committee, which shall provide advice and guidance to the Board on the development and maintenance of the racetrack safety program.

(B) Membership

The racetrack safety standing committee shall be comprised of seven members as follows:

(i) Independent members

A majority of the members shall be independent members selected from outside the equine industry.

(ii) Industry members

A minority of the members shall be industry members selected to represent the various equine constituencies.

(C) Chair

The chair of the racetrack safety standing committee shall be an industry member of the Board described in subsection (b)(1)(B).

(d) Nominating committee

(1) Membership

(A) In general

The nominating committee of the Authority shall be comprised of seven independent members selected from business, sports, and academia.

(B) Initial membership

The initial nominating committee members shall be set forth in the governing corporate documents of the Authority.

(C) Vacancies

After the initial committee members are appointed in accordance with subparagraph (B), vacancies shall be filled by the Board pursuant to rules established by the Authority.

(2) Chair

The chair of the nominating committee shall be selected by the nominating committee from among the members of the nominating committee.

(3) Selection of members of the Board and standing committees

(A) Initial members

The nominating committee shall select the initial members of the Board and the standing committees described in subsection (c).

(B) Subsequent members

The nominating committee shall recommend individuals to fill any vacancy on the Board or on such standing committees.

(e) Conflicts of interest

To avoid conflicts of interest, the following individuals may not be selected as a member of the Board or as an independent member of a nominating or standing committee under this section:

(1) An individual who has a financial interest in, or provides goods or services to, covered horses.

(2) An official or officer—

(A) of an equine industry representative; or

(B) who serves in a governance or policy-making capacity for an equine industry representative.

(3) An employee of, or an individual who has a business or commercial relationship with, an individual described in paragraph (1) or (2).

(4) An immediate family member of an individual described in paragraph (1) or (2).

(f) Funding

(1) Initial funding

(A) In general

Initial funding to establish the Authority and underwrite its operations before the program effective date shall be provided by loans obtained by the Authority.

(B) Borrowing

The Authority may borrow funds toward the funding of its operations.

(C) Annual calculation of amounts required

(i) In general

Not later than the date that is 90 days before the program effective date, and not later than November 1 each year thereafter, the Authority shall determine and provide to each State racing commission the estimated amount required from the State—

(I) to fund the State's proportionate share of the horseracing antidoping and medication control program and the racetrack safety program for the next calendar year; and

(II) to liquidate the State's proportionate share of any loan or funding shortfall in the current calendar year and any previous calendar year.

(ii) Basis of calculation

The amounts calculated under clause (i) shall—

(I) be based on—

(aa) the annual budget of the Authority for the following calendar year, as approved by the Board; and

(bb) the projected amount of covered racing starts for the year in each State; and (II) take into account other sources of Authority revenue.

(iii) Requirements regarding budgets of Authority

(I) Initial budget

The initial budget of the Authority shall require the approval of 2/3 of the Board.

(II) Subsequent budgets

Any subsequent budget that exceeds the budget of the preceding calendar year by more than 5 percent shall require the approval of 2/3 of the Board.

(iv) Rate increases

(I) In general

A proposed increase in the amount required under this subparagraph shall be reported to the Commission.

(II) Notice and comment

The Commission shall publish in the Federal Register such a proposed increase and provide an opportunity for public comment.

(2) Assessment and collection of fees by States

(A) Notice of election

Any State racing commission that elects to remit fees pursuant to this subsection shall notify the Authority of such election not later than 60 days before the program effective date.

(B) Requirement to remit fees

After a State racing commission makes a notification under subparagraph (A), the election shall remain in effect and the State racing commission shall be required to remit fees pursuant to this subsection according to a schedule established in rule developed by the Authority and approved by the Commission.

(C) Withdrawal of election

A State racing commission may cease reemitting fees under this subsection not earlier than one year after notifying the Authority of the intent of the State racing commission to do so.

(D) Determination of methods

Each State racing commission shall determine, subject to the applicable laws, regulations, and contracts of the State, the method by which the requisite amount of fees, such as foal registration fees, sales contributions, starter fees, and track fees, and other fees on covered persons, shall be allocated, assessed, and collected.

(3) Assessment and collection of fees by the Authority

(A) Calculation

If a State racing commission does not elect to remit fees pursuant to paragraph (2) or withdraws its election under such paragraph, the Authority shall, not less frequently than monthly, calculate the applicable fee per racing start multiplied by the number of racing starts in the State during the preceding month.

(B) Allocation

The Authority shall allocate equitably the amount calculated under subparagraph (A) collected among covered persons involved with covered horseraces pursuant to such rules as the Authority may promulgate.

(C) Assessment and collection

(i) In general

The Authority shall assess a fee equal to the allocation made under subparagraph (B) and shall collect such fee according to such rules as the Authority may promulgate.

(ii) Remittance of fees

Covered persons described in subparagraph (B) shall be required to remit such fees to the Authority.

(D) Limitation

A State racing commission that does not elect to remit fees pursuant to paragraph (2) or that withdraws its election under such paragraph shall not impose or collect from any person a fee or tax relating to antidoping and medication control or racetrack safety matters for covered horseraces.

(4) Fees and fines

Fees and fines imposed by the Authority shall be allocated toward funding of the Authority and its activities.

(5) Rule of construction

Nothing in this chapter shall be construed to require—

(A) the appropriation of any amount to the Authority; or

(B) the Federal Government to guarantee the debts of the Authority.

(g) Quorum

For all items where Board approval is required, the Authority shall have present a majority of independent members.

15 U.S.C. § 3053. Federal Trade Commission oversight

(a) In general

The Authority shall submit to the Commission, in accordance with such rules as the Commission may prescribe under section 553 of Title 5, any proposed rule, or proposed modification to a rule, of the Authority relating to—

(1) the bylaws of the Authority;

(2) a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and methods;

(3) laboratory standards for accreditation and protocols;

(4) standards for racing surface quality maintenance;

(5) racetrack safety standards and protocols;

(6) a program for injury and fatality data analysis;

(7) a program of research and education on safety, performance, and anti-doping and medication control;

(8) a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons;

(9) a schedule of civil sanctions for violations;

(10) a process or procedures for disciplinary hearings; and

(11) a formula or methodology for determining assessments described in section 3052(f) of this title.

(b) Publication and comment

(1) In general

The Commission shall—

(A) publish in the Federal Register each proposed rule or modification submitted under subsection (a); and

(B) provide an opportunity for public comment.

(2) Approval required

A proposed rule, or a proposed modification to a rule, of the Authority shall not take effect unless the proposed rule or modification has been approved by the Commission.

(c) Decision on proposed rule or modification to a rule

(1) In general

Not later than 60 days after the date on which a proposed rule or modification is published in the Federal Register, the Commission shall approve or disapprove the proposed rule or modification.

(2) Conditions

The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—

(A) this chapter; and

(B) applicable rules approved by the Commission.

(3) Revision of proposed rule or modification

(A) In general

In the case of disapproval of a proposed rule or modification under this subsection, not later than 30 days after the issuance of the disapproval, the Commission shall make recommendations to the Authority to modify the proposed rule or modification.

(B) Resubmission

The Authority may resubmit for approval by the Commission a proposed rule or modification that incorporates the modifications recommended under subparagraph (A).

(d) Proposed standards and procedures

(1) In general

The Authority shall submit to the Commission any proposed rule, standard, or procedure developed by the Authority to carry out the horseracing anti-doping and medication control program or the racetrack safety program.

(2) Notice and comment

The Commission shall publish in the Federal Register any such proposed rule, standard, or procedure and provide an opportunity for public comment.

(e) Amendment by Commission of rules of Authority

The Commission, by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Authority promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.

15 U.S.C. § 3054. Jurisdiction of the Commission and the Horseracing Integrity and Safety Authority

(a) In general

Beginning on the program effective date, the Commission, the Authority, and the anti-doping and medication control enforcement agency, each within the scope of their powers and responsibilities under this chapter, as limited by subsection (j), shall—

(1) implement and enforce the horseracing anti-doping and medication control program and the racetrack safety program;

(2) exercise independent and exclusive national authority over—

(A) the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces; and

(B) all horseracing safety, performance, and anti-doping and medication control matters for covered horses, covered persons, and covered horseraces; and

(3) have safety, performance, and antidoping and medication control authority over covered persons similar to such authority of the State racing commissions before the program effective date.

(b) Preemption

The rules of the Authority promulgated in accordance with this chapter shall preempt any provision of State law or regulation with respect to matters within the jurisdiction of the Authority under this chapter, as limited by subsection (j). Nothing contained in this chapter shall be construed to limit the authority of the Commission under any other provision of law.

(c) Duties

(1) In general

The Authority—

(A) shall develop uniform procedures and rules authorizing—

(i) access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses;

(ii) issuance and enforcement of subpoenas and subpoenas duces tecum; and

(iii) other investigatory powers of the nature and scope exercised by State racing commissions before the program effective date; and

(B) with respect to an unfair or deceptive act or practice described in section 3059 of this title, may recommend that the Commission commence an enforcement action.

(2) Approval of Commission

The procedures and rules developed under paragraph (1)(A) shall be subject to approval by the Commission in accordance with section 3053 of this title.

(d) Registration of covered persons with Authority

(1) In general

As a condition of participating in covered races and in the care, ownership, treatment, and training of covered horses, a covered person shall register with the Authority in accordance with rules promulgated by the Authority and approved by the Commission in accordance with section 3053 of this title.

(2) Agreement with respect to Authority rules, standards, and procedures

Registration under this subsection shall include an agreement by the covered person to be subject to and comply with the rules, standards, and procedures developed and approved under subsection (c).

(3) Cooperation

A covered person registered under this subsection shall, at all times—

(A) cooperate with the Commission, the Authority, the anti-doping and medication control enforcement agency, and any respective designee, during any civil investigation; and

(B) respond truthfully and completely to the best of the knowledge of the covered person if questioned by the Commission, the Authority, the anti-doping and medication control enforcement agency, or any respective designee.

(4) Failure to comply

Any failure of a covered person to comply with this subsection shall be a violation of section 3057(a)(2)(G) of this title.

(e) Enforcement of programs

(1) Anti-doping and medication control enforcement agency

(A) Agreement with USADA

The Authority shall seek to enter into an agreement with the United States Anti-Doping Agency under which the Agency acts as the anti-doping and medication control enforcement agency under this chapter for services consistent with the horseracing anti-doping and medication control program.

(B) Agreement with other entity

If the Authority and the United States Anti-Doping Agency are unable to enter into the agreement described in subparagraph (A), the Authority shall enter into an agreement with an entity that is nationally recognized as being a medication regulation agency equal in qualification to the United States Anti-Doping Agency to act as the anti-doping and medication control enforcement agency under this chapter for services consistent with the horseracing anti-doping and medication control program.

(C) Negotiations

Any negotiations under this paragraph shall be conducted in good faith and designed to achieve efficient, effective best practices for anti-doping and medication control and enforcement on commercially reasonable terms.

(D) Elements of agreement

Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, and budgets of the United States Anti-Doping Agency while acting as the antidoping and medication control enforcement agency under this chapter, as well as a provision for the revision of the agreement to increase in the scope of work as provided for in subsection (k), and any other matter the Authority considers appropriate.

(E) Duties and powers of enforcement agency

The anti-doping and medication control enforcement agency under an agreement under this paragraph shall—

(i) serve as the independent anti-doping and medication control enforcement organization for covered horses, covered persons, and covered horseraces, implementing the anti-doping and medication control program on behalf of the Authority;

(ii) ensure that covered horses and covered persons are deterred from using or administering medications, substances, and methods in violation of the rules established in accordance with this chapter;

(iii) implement anti-doping education, research, testing, compliance and adjudication programs designed to prevent covered persons and covered horses from using or administering medications, substances, and methods in violation of the rules established in accordance with this chapter;

(iv) exercise the powers specified in section 3055(c)(4) of this title in accordance with that section; and

(v) implement and undertake any other responsibilities specified in the agreement.

(F) Term and extension

(i) Term of initial agreement

The initial agreement entered into by the Authority under this paragraph shall be in effect for the 5-year period beginning on the program effective date.

(ii) Extension

At the end of the 5-year period described in clause (i), the Authority may—

(I) extend the term of the initial agreement under this paragraph for such additional term as is provided by the rules of the Authority and consistent with this chapter; or

(II) enter into an agreement meeting the requirements of this paragraph with an entity described by subparagraph (B) for such term as is provided by such rules and consistent with this chapter.

(2) Agreements for enforcement by State racing commissions

(A) State racing commissions

(i) Racetrack safety program

The Authority may enter into agreements with State racing commissions for services consistent with the enforcement of the racetrack safety program.

(ii) Anti-doping and medication control program

The anti-doping and medication control enforcement agency may enter into agreements with State racing commissions for services consistent with the enforcement of the anti-doping and medication control program.

(B) Elements of agreements

Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, budgets, and any other matter the Authority considers appropriate.

(3) Enforcement of standards

The Authority may coordinate with State racing commissions and other State regulatory agencies to monitor and enforce racetrack compliance with the standards developed under paragraphs (1) and (2) of section 3056(c) of this title.

(f) Procedures with respect to rules of Authority

(1) Anti-doping and medication control

(A) In general

Recommendations for rules regarding antidoping and medication control shall be developed in accordance with section 3055 of this title.

(B) Consultation

The anti-doping and medication control enforcement agency shall consult with the anti-doping and medication control standing committee and the Board of the Authority on all anti-doping and medication control rules of the Authority.

(2) Racetrack safety

Recommendations for rules regarding racetrack safety shall be developed by the racetrack safety standing committee of the Authority.

(g) Issuance of guidance

(1) The Authority may issue guidance that—

(A) sets forth—

(i) an interpretation of an existing rule, standard, or procedure of the Authority; or

(ii) a policy or practice with respect to the administration or enforcement of such an existing rule, standard, or procedure; and

(B) relates solely to—

(i) the administration of the Authority;

(ii) any other matter, as specified by the Commission, by rule, consistent with the public interest and the purposes of this subsection.

(2) Submittal to Commission

The Authority shall submit to the Commission any guidance issued under paragraph (1).

(3) Immediate effect

Guidance issued under paragraph (1) shall take effect on the date on which the guidance is submitted to the Commission under paragraph (2).

(h) Subpoena and investigatory authority

The Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.

(i) Civil penalties

The Authority shall develop a list of civil penalties with respect to the enforcement of rules for covered persons and covered horseraces under its jurisdiction.

(j) Civil actions

(1) In general

In addition to civil sanctions imposed under section 3057 of this title, the Authority may commence a civil action against a covered person or racetrack that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, to enforce any civil sanctions imposed under that section, and for all other relief to which the Authority may be entitled.

(2) Injunctions and restraining orders

With respect to a civil action commenced under paragraph (1), upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(k) Limitations on authority

(1) Prospective application

The jurisdiction and authority of the Authority and the Commission with respect to the horseracing anti-doping and medication control program and the racetrack safety program shall be prospective only.

(2) Previous matters

(A) In general

The Authority and the Commission may not investigate, prosecute, adjudicate, or penalize conduct in violation of the horseracing anti-doping and medication control program and the racetrack safety program that occurs before the program effective date.

(B) State racing commission

With respect to conduct described in subparagraph (A), the applicable State racing commission shall retain authority until the final resolution of the matter.

(3) Other laws unaffected

This chapter shall not be construed to modify, impair or restrict the operation of the general laws or regulations, as may be amended from time to time, of the United States, the States and their political subdivisions relating to criminal conduct, cruelty to animals, matters unrelated to antidoping, medication control and racetrack and racing safety of covered horses and covered races, and the use of medication in human participants in covered races.

(*l*) Election for other breed coverage under chapter

(1) In general

A State racing commission or a breed governing organization for a breed of horses other than Thoroughbred horses may elect to have such breed be covered by this chapter by the filing of a designated election form and subsequent approval by the Authority. A State racing commission may elect to have a breed covered by this chapter for the applicable State only.

(2) Election conditional on funding mechanism

A commission or organization may not make an election under paragraph (1) unless the commission or organization has in place a mechanism to provide sufficient funds to cover the costs of the administration of this chapter with respect to the horses that will be covered by this chapter as a result of the election.

(3) Apportionment

The Authority shall apportion costs described in paragraph (2) in connection with an election under paragraph (1) fairly among all impacted segments of the horseracing industry, subject to approval by the Commission in accordance with section 3053 of this title. Such apportionment may not provide for the allocation of costs or funds among breeds of horses.

15 U.S.C. § 3055. Horseracing anti-doping and medication control program

(a) Program required

(1) In general

Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Authority shall establish a horseracing anti-doping and medication control program applicable to all covered horses, covered persons, and covered horseraces in accordance with the registration of covered persons under section 3054(d) of this title.

(2) Consideration of other breeds

In developing the horseracing anti-doping and medication control program with respect to a breed of horse that is made subject to this chapter by election of a State racing commission or the breed governing organization for such horse under section 3054(k) of this title, the Authority shall consider the unique characteristics of such breed.

(b) Considerations in development of program

In developing the horseracing anti-doping and medication control program, the Authority shall take into consideration the following:

(1) Covered horses should compete only when they are free from the influence of medications, other foreign substances, and methods that affect their performance.

(2) Covered horses that are injured or unsound should not train or participate in covered races, and the use of medications, other foreign substances, and treatment methods that mask or deaden pain in order to allow injured or unsound horses to train or race should be prohibited.

(3) Rules, standards, procedures, and protocols regulating medication and treatment methods for covered horses and covered races should be uniform and uniformly administered nationally.

(4) To the extent consistent with this chapter, consideration should be given to international anti-doping and medication control standards of the International Federation of Horseracing Authorities and the Principles of Veterinary Medical Ethics of the American Veterinary Medical Association.

(5) The administration of medications and treatment methods to covered horses should be based upon an examination and diagnosis that identifies an issue requiring treatment for which the medication or method represents an appropriate component of treatment.

(6) The amount of therapeutic medication that a covered horse receives should be the minimum

necessary to address the diagnosed health concerns identified during the examination and diagnostic process.

(7) The welfare of covered horses, the integrity of the sport, and the confidence of the betting public require full disclosure to regulatory authorities regarding the administration of medications and treatments to covered horses.

(c) Activities

The following activities shall be carried out under the horseracing anti-doping and medication control program:

(1) Standards for anti-doping and medication control

Not later than 120 days before the program effective date, the Authority shall issue, by rule—

(A) uniform standards for—

(i) the administration of medication to covered horses by covered persons; and

(ii) laboratory testing accreditation and protocols; and

(B) a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and methods.

(2) Review process for administration of medication

The development of a review process for the administration of any medication to a covered horse during the 48-hour period preceding the next racing start of the covered horse.

(3) Agreement requirements

The development of requirements with respect to agreements under section 3054(e) of this title.

(4) Anti-doping and medication control enforcement agency

(A) Control rules, protocols, etc.

Except as provided in paragraph (5), the anti-doping and medication control program enforcement agency under section 3054(e) of this title shall, in consultation with the anti-doping and medication control standing committee of the Authority and consistent with international best practices, develop and recommend anti-doping and medication control rules, protocols, policies, and guidelines for approval by the Authority.

(B) Results management

The anti-doping and medication control enforcement agency shall conduct and oversee anti-doping and medication control results management, including independent investigation, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations. Any final decision or civil sanction of the anti-doping and medication control enforcement agency under this subparagraph shall be the final decision or civil sanction of the Authority, subject to review in accordance with section 3058 of this title.

(C) Testing

The anti-doping enforcement agency shall perform and manage test distribution planning (including intelligence-based testing), the sample collection process, and in-competition and out-of-competition testing (including no-advance-notice testing).

(D) Testing laboratories

The anti-doping and medication control enforcement agency shall accredit testing laboratories based upon the standards established under this chapter, and shall monitor, test, and audit accredited laboratories to ensure continuing compliance with accreditation standards.

(5) Anti-doping and medication control standing committee

The anti-doping and medication control standing committee shall, in consultation with the anti-doping and medication control enforcement agency, develop lists of permitted and prohibited medications, methods, and substances for recommendation to, and approval by, the Authority. Any such list may prohibit the administration of any substance or method to a horse at any time after such horse becomes a covered horse if the Authority determines such substance or method has a long-term degrading effect on the soundness of a horse.

(d) Prohibition

Except as provided in subsections (e) and (f), the horseracing anti-doping and medication control program shall prohibit the administration of any prohibited or otherwise permitted substance to a covered horse within 48 hours of its next racing start, effective as of the program effective date.

(e) Advisory committee study and report

(1) In general

Not later than the program effective date, the Authority shall convene an advisory committee comprised of horseracing anti-doping and medication control industry experts, including a member designated by the antidoping and medication control enforcement agency, to conduct a study on the use of furosemide on horses during the 48-hour period before the start of a race, including the effect of furosemide on equine health and the integrity of competition and any other matter the Authority considers appropriate.

(2) Report

Not later than three years after the program effective date, the Authority shall direct the advisory committee convened under paragraph (1) to submit to the Authority a written report on the study conducted under that paragraph that includes recommended changes, if any, to the prohibition in subsection (d).

(3) Modification of prohibition

(A) In general

After receipt of the report required by paragraph (2), the Authority may, by unanimous vote of the Board of the Authority, modify the prohibition in subsection (d) and, notwithstanding subsection (f), any such modification shall apply to all States beginning on the date that is three years after the program effective date.

(B) Condition

In order for a unanimous vote described in subparagraph (A) to effect a modification of the prohibition in subsection (d), the vote must include unanimous adoption of each of the following findings:

(i) That the modification is warranted.

(ii) That the modification is in the best interests of horse racing.

(iii) That furosemide has no performance enhancing effect on individual horses.

(iv) That public confidence in the integrity and safety of racing would not be adversely affected by the modification.

(f) Exemption

(1) In general

Except as provided in paragraph (2), only during the three-year period beginning on the program effective date, a State racing commission may submit to the Authority, at such time and in such manner as the Authority may require, a request for an exemption from the prohibition in subsection (d) with respect to the use of furosemide on covered horses during such period.

(2) Exceptions

An exemption under paragraph (1) may not be requested for—

(A) two-year-old covered horses; or

(B) covered horses competing in stakes races.

(3) Contents of request

A request under paragraph (1) shall specify the applicable State racing commission's requested limitations on the use of furosemide that would apply to the State under the horseracing anti-doping and medication control program during such period. Such limitations shall be no less restrictive on the use and administration of furosemide than the restrictions set forth in State's laws and regulations in effect as of September 1, 2020.

(4) Grant of exemption

Subject to subsection (e)(3), the Authority shall grant an exemption requested under paragraph (1) for the remainder of such period and shall allow the use of furosemide on covered horses in the applicable State, in accordance with the requested limitations.

(g) Baseline anti-doping and medication control rules

(1) In general

Subject to paragraph (3), the baseline antidoping and medication control rules described in paragraph (2) shall—

(A) constitute the initial rules of the horseracing anti-doping and medication control program; and

(B) except as exempted pursuant to subsections (e) and (f), remain in effect at all times after the program effective date.

(2) Baseline anti-doping medication control rules described

(A) In general

The baseline anti-doping and medication control rules described in this paragraph are the following:

(i) The lists of permitted and prohibited substances (including drugs, medications, and naturally occurring substances and synthetically occurring substances) in effect for the International Federation of Horseracing Authorities, including the International Federation of Horseracing Authorities International Screening Limits for urine, dated May 2019, and the International Federation of Horseracing Authorities International Screening Limits for plasma, dated May 2019.

(ii) The World Anti-Doping Agency International Standard for Laboratories (version 10.0), dated November 12, 2019.

(iii) The Association of Racing Commissioners International out-of-competition testing standards, Model Rules of Racing (version 9.2).

(iv) The Association of Racing Commissioners International penalty and multiple medication violation rules, Model Rules of Racing (version 6.2).

(B) Conflict of rules

In the case of a conflict among the rules described in subparagraph (A), the most stringent rule shall apply.

(3) Modifications to baseline rules

(A) Development by anti-doping and medication control standing committee

The anti-doping and medication control standing committee, in consultation with the anti-doping and medication control enforcement agency, may develop and submit to the Authority for approval by the Authority proposed modifications to the baseline anti-doping and medication control rules.

(B) Authority approval

If the Authority approves a proposed modification under this paragraph, the proposed modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

(C) Anti-doping and medication control enforcement agency veto authority

The Authority shall not approve any proposed modification that renders an antidoping and medication control rule less stringent than the baseline anti-doping and medication control rules described in paragraph (2) (including by increasing permitted medication thresholds, adding permitted medications, removing prohibited medications, or weakening enforcement mechanisms) without the approval of the antidoping and medication control enforcement agency.

15 U.S.C. § 3056. Racetrack safety program

(a) Establishment and considerations

(1) In general

Not later than the program effective date, and after notice and an opportunity for public comments in accordance with section 3053 of this title, the Authority shall establish a racetrack safety program applicable to all covered horses, covered persons, and covered horseraces in accordance with the registration of covered persons under section 3054(d) of this title.

(2) Considerations in development of safety program

In the development of the horseracing safety program for covered horses, covered persons, and covered horseraces, the Authority and the Commission shall take into consideration existing safety standards including the National Thoroughbred Racing Association Safety and Integrity Alliance Code of Standards, the International Federation of Horseracing Authority's International Agreement on Breeding, Racing, and Wagering, and the British Horseracing Authority's Equine Health and Welfare program.

(b) Elements of horseracing safety program

The horseracing safety program shall include the following:

(1) A set of training and racing safety standards and protocols taking into account regional differences and the character of differing racing facilities.

(2) A uniform set of training and racing safety standards and protocols consistent with the humane treatment of covered horses, which may include lists of permitted and prohibited practices or methods (such as crop use).

(3) A racing surface quality maintenance system that—

(A) takes into account regional differences and the character of differing racing facilities; and

(B) may include requirements for track surface design and consistency and established standard operating procedures related to track surface, monitoring, and maintenance (such as standardized seasonal assessment, daily tracking, and measurement).

(4) A uniform set of track safety standards and protocols, that may include rules governing oversight and movement of covered horses and human and equine injury reporting and preventions.

(5) Programs for injury and fatality data analysis, that may include pre- and post-training and race inspections, use of a veterinarian's list, and concussion protocols.

(6) The undertaking of investigations at racetrack and non-racetrack facilities related to safety violations.

(7) Procedures for investigating, charging, and adjudicating violations and for the enforcement of civil sanctions for violations.

(8) A schedule of civil sanctions for violations.

(9) Disciplinary hearings, which may include binding arbitration, civil sanctions, and research.

(10) Management of violation results.

(11) Programs relating to safety and performance research and education.

(12) An evaluation and accreditation program that ensures that racetracks in the United States meet the standards described in the elements of the Horseracing Safety Program.

(c) Activities

The following activities shall be carried out under the racetrack safety program:

(1) Standards for racetrack safety

The development, by the racetrack safety standing committee of the Authority in section 3052(c)(2) of this title of uniform standards for racetrack and horseracing safety.

(2) Standards for safety and performance accreditation

(A) In general

Not later than 120 days before the program effective date, the Authority, in consultation with the racetrack safety standing committee, shall issue, by rule in accordance with section 3053 of this title—

(i) safety and performance standards of accreditation for racetracks; and

(ii) the process by which a racetrack may achieve and maintain accreditation by the Authority.

(B) Modifications

(i) In general

The Authority may modify rules establishing the standards issued under subparagraph (A), as the Authority considers appropriate.

(ii) Notice and comment

The Commission shall publish in the Federal Register any proposed rule of the Authority, and provide an opportunity for public comment with respect to, any modification under clause (i) in accordance with section 3053 of this title.

(C) Extension of provisional or interim accreditation

The Authority may, by rule in accordance with section 3053 of this title, extend provisional or interim accreditation to a racetrack accredited by the National Thoroughbred Racing Association Safety and Integrity Alliance on a date before the program effective date.

(3) Nationwide safety and performance database

(A) In general

Not later than one year after the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Authority, in consultation with the Commission, shall develop and maintain a nationwide database of racehorse safety, performance, health, and injury information for the purpose of conducting an epidemiological study.

(B) Collection of information

In accordance with the registration of covered persons under section 3054(d) of this title, the Authority may require covered persons to collect and submit to the database described in subparagraph (A) such information as the Authority may require to further the goal of increased racehorse welfare.

15 U.S.C. § 3057. Rule violations and civil sanctions

(a) Description of rule violations

(1) In general

The Authority shall issue, by rule in accordance with section 3053 of this title, a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons.

(2) Elements

The description of rule violations established under paragraph (1) may include the following:

(A) With respect to a covered horse, strict liability for covered trainers for—

(i) the presence of a prohibited substance or method in a sample or the use of a prohibited substance or method;

(ii) the presence of a permitted substance in a sample in excess of the amount allowed by the horseracing anti-doping and medication control program; and (iii) the use of a permitted method in violation of the applicable limitations established under the horseracing antidoping and medication control program.

(B) Attempted use of a prohibited substance or method on a covered horse.

(C) Possession of any prohibited substance or method.

(D) Attempted possession of any prohibited substance or method.

(E) Administration or attempted administration of any prohibited substance or method on a covered horse.

(F) Refusal or failure, without compelling justification, to submit a covered horse for sample collection.

(G) Failure to cooperate with the Authority or an agent of the Authority during any investigation.

(H) Failure to respond truthfully, to the best of a covered person's knowledge, to a question of the Authority or an agent of the Authority with respect to any matter under the jurisdiction of the Authority.

(I) Tampering or attempted tampering with the application of the safety, performance, or anti-doping and medication control rules or process adopted by the Authority, including—

(i) the intentional interference, or an attempt to interfere, with an official or agent of the Authority;

(ii) the procurement or the provision of fraudulent information to the Authority or agent; and

(iii) the intimidation of, or an attempt to intimidate, a potential witness.

(J) Trafficking or attempted trafficking in any prohibited substance or method.

(K) Assisting, encouraging, aiding, abetting, conspiring, covering up, or any other type of intentional complicity involving a safety, performance, or anti-doping and medication control rule violation or the violation of a period of suspension or eligibility.

(L) Threatening or seeking to intimidate a person with the intent of discouraging the person from the good faith reporting to the Authority, an agent of the Authority or the Commission, or the anti-doping and medication control enforcement agency under section 3054(e) of this title, of information that relates to—

(i) an alleged safety, performance, or anti-doping and medication control rule violation; or

(ii) alleged noncompliance with a safety, performance, or anti-doping and medication control rule.

(b) Testing laboratories

(1) Accreditation and standards

Not later than 120 days before the program effective date, the Authority shall, in consultation with the anti-doping and medication control enforcement agency, establish, by rule in accordance with section 3053 of this title—

(A) standards of accreditation for laboratories involved in testing samples from covered horses;

(B) the process for achieving and maintaining accreditation; and

(C) the standards and protocols for testing such samples.

(2) Administration

The accreditation of laboratories and the conduct of audits of accredited laboratories to ensure compliance with Authority rules shall be administered by the anti-doping and medication control enforcement agency. The antidoping and medication control enforcement agency shall have the authority to require specific test samples to be directed to and tested by laboratories having special expertise in the required tests.

(3) Extension of provisional or interim accreditation

The Authority may, by rule in accordance with section 3053 of this title, extend provisional or interim accreditation to a laboratory accredited by the Racing Medication and Testing Consortium, Inc., on a date before the program effective date.

(4) Selection of laboratories

(A) In general

Except as provided in paragraph (2), a State racing commission may select a laboratory accredited in accordance with the standards established under paragraph (1) to test samples taken in the applicable State.

(B) Selection by the authority

If a State racing commission does not select an accredited laboratory under subparagraph (A), the Authority shall select such a laboratory to test samples taken in the State concerned.

(c) Results management and disciplinary process

(1) In general

Not later than 120 days before the program effective date, the Authority shall establish in accordance with section 3053 of this title—

(A) rules for safety, performance, and antidoping and medication control results management; and

(B) the disciplinary process for safety, performance, and anti-doping and medication control rule violations.

(2) Elements

The rules and process established under paragraph (1) shall include the following:

(A) Provisions for notification of safety, performance, and anti-doping and medication control rule violations.

(B) Hearing procedures.

(C) Standards for burden of proof.

(D) Presumptions.

(E) Evidentiary rules.

(F) Appeals.

(G) Guidelines for confidentiality and public reporting of decisions.

(3) Due process

The rules established under paragraph (1) shall provide for adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness of the alleged safety, performance, or anti-doping and medication control rule violation and the possible civil sanctions for such violation.

(d) Civil sanctions

(1) In general

The Authority shall establish uniform rules, in accordance with section 3053 of this title, imposing civil sanctions against covered persons or covered horses for safety, performance, and anti-doping and medication control rule violations.

(2) Requirements

The rules established under paragraph (1) shall—

(A) take into account the unique aspects of horseracing;

(B) be designed to ensure fair and transparent horseraces; and

(C) deter safety, performance, and anti-doping and medication control rule violations.

(3) Severity

The civil sanctions under paragraph (1) may include—

(A) lifetime bans from horseracing, disgorgement of purses, monetary fines and penalties, and changes to the order of finish in covered races; and

(B) with respect to anti-doping and medication control rule violators, an opportunity to reduce the applicable civil sanctions that is comparable to the opportunity provided by the Protocol for Olympic Movement Testing of the United States Anti-Doping Agency.

(e) Modifications

The Authority may propose a modification to any rule established under this section as the Authority considers appropriate, and the proposed modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

15 U.S.C. § 3058. Review of final decisions of the Authority

(a) Notice of civil sanctions

If the Authority imposes a final civil sanction for a violation committed by a covered person pursuant to the rules or standards of the Authority, the Authority shall promptly submit to the Commission notice of the civil sanction in such form as the Commission may require.

(b) Review by administrative law judge

(1) In general

With respect to a final civil sanction imposed by the Authority, on application by the Commission or a person aggrieved by the civil sanction filed not later than 30 days after the date on which notice under subsection (a) is submitted, the civil sanction shall be subject to de novo review by an administrative law judge.

(2) Nature of review

(A) In general

In matters reviewed under this subsection, the administrative law judge shall determine whether—

(i) a person has engaged in such acts or practices, or has omitted such acts or practices, as the Authority has found the person to have engaged in or omitted;

(ii) such acts, practices, or omissions are in violation of this chapter or the anti-doping and medication control or racetrack safety rules approved by the Commission; or

(iii) the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(B) Conduct of hearing

An administrative law judge shall conduct a hearing under this subsection in such a manner as the Commission may specify by rule, which shall conform to section 556 of title 5.

(3) Decision by administrative law judge

(A) In general

With respect to a matter reviewed under this subsection, an administrative law judge—

(i) shall render a decision not later than 60 days after the conclusion of the hearing;

(ii) may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the final civil sanction of the Authority; and

(iii) may make any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record.

(B) Final decision

A decision under this paragraph shall constitute the decision of the Commission without further proceedings unless a notice or an application for review is timely filed under subsection (c).

(c) Review by Commission

(1) Notice of review by Commission

The Commission may, on its own motion, review any decision of an administrative law judge issued under subsection (b)(3) by providing written notice to the Authority and any interested party not later than 30 days after the date on which the administrative law judge issues the decision.

(2) Application for review

(A) In general

The Authority or a person aggrieved by a decision issued under subsection (b)(3) may petition the Commission for review of such decision by filing an application for review not later than 30 days after the date on which the administrative law judge issues the decision.

(B) Effect of denial of application for review

If an application for review under subparagraph (A) is denied, the decision of the administrative law judge shall constitute the decision of the Commission without further proceedings.

(C) Discretion of Commission

(i) In general

A decision with respect to whether to grant an application for review under subparagraph (A) is subject to the discretion of the Commission.

(ii) Matters to be considered

In determining whether to grant such an application for review, the Commission shall consider whether the application makes a reasonable showing that—

(I) a prejudicial error was committed in the conduct of the proceeding; or

(II) the decision involved—

(aa) an erroneous application of the anti-doping and medication control or racetrack safety rules approved by the Commission; or

(bb) an exercise of discretion or a decision of law or policy that warrants review by the Commission.

(3) Nature of review

(A) In general

In matters reviewed under this subsection, the Commission may—

(i) affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge; and

(ii) make any finding or conclusion that, in the judgement of the Commission, is proper and based on the record.

(B) De novo review

The Commission shall review de novo the factual findings and conclusions of law made by the administrative law judge.

(C) Consideration of additional evidence

(i) Motion by Commission

The Commission may, on its own motion, allow the consideration of additional evidence.

(ii) Motion by a party

(I) In general

A party may file a motion to consider additional evidence at any time before the issuance of a decision by the Commission, which shall show, with particularity, that—

(aa) such additional evidence is material; and (bb) there were reasonable grounds for failure to submit the evidence previously.

(II) Procedure

The Commission may—

(aa) accept or hear additional evidence; or

(bb) remand the proceeding to the administrative law judge for the consideration of additional evidence.

(d) Stay of proceedings

Review by an administrative law judge or the Commission under this section shall not operate as a stay of a final civil sanction of the Authority unless the administrative law judge or Commission orders such a stay.

15 U.S.C. § 3059. Unfair or deceptive acts or practices

The sale of a covered horse, or of any other horse in anticipation of its future participation in a covered race, shall be considered an unfair or deceptive act or practice in or affecting commerce under section 45(a) of this title if the seller—

(1) knows or has reason to know the horse has been administered—

(A) a bisphosphonate prior to the horse's fourth birthday; or

(B) any other substance or method the Authority determines has a long-term degrading effect on the soundness of the covered horse; and

(2) fails to disclose to the buyer the administration of the bisphosphonate or other substance or method described in paragraph (1)(B).

15 U.S.C. § 3060. State delegation; cooperation

(a) State delegation

(1) In general

The Authority may enter into an agreement with a State racing commission to implement, within the jurisdiction of the State racing commission, a component of the racetrack safety program or, with the concurrence of the anti-doping and medication control enforcement agency under section 3054(e) of this title, a component of the horseracing antidoping and medication control program, if the Authority determines that the State racing commission has the ability to implement such component in accordance with the rules, standards, and requirements established by the Authority.

(2) Implementation by State racing commission

A State racing commission or other appropriate regulatory body of a State may not implement such a component in a manner less restrictive than the rule, standard, or requirement established by the Authority.

(b) Cooperation

To avoid duplication of functions, facilities, and personnel, and to attain closer coordination and greater effectiveness and economy in administration of Federal and State law, where conduct by any person subject to the horseracing medication control program or the racetrack safety program may involve both a medication control or racetrack safety rule violation and violation of Federal or State law, the Authority and Federal or State law enforcement authorities shall cooperate and share information.