No. A-_____

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA, ET AL.,

Applicants,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

APPENDIX TO APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Gentner F. Drummond
Oklahoma Attorney General
Zach West
OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
313 NE 21st St.
Oklahoma City, OK 73105
Phone: 405.522.4392
Email: zach.west@oag.ok.gov

Counsel for Applicants State of Oklahoma, Oklahoma Horse Racing Commission, and Fair Meadows

Lochlan F. Shelfer
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1700 M St. N.W.
Washington, D.C. 20036
Phone: 202.887.3641
Email: lshelfer@gibsondunn.com

Counsel for Applicants Hanover Shoe Farms, Inc. and United States Trotting Association

John B. McCuskey
West Virginia Attorney General
Michael R. Williams
OFFICE OF THE WEST VIRGINIA
ATTORNEY GENERAL
1900 Kanawha Blvd. East
Building 1, Room E-26
Charleston, WV 25305
Phone: 304.558.2021
Email: michael.r.williams@wvago.gov

Counsel for Applicants State of West Virginia and the West Virginia Racing Commission

Joseph Bocock
BOCOCK LAW PLLC
119 N. Robinson Ave., Suite 630
Oklahoma City, OK 73102
Phone: 405.605.0218
Email: joe@bococklaw.com

Counsel for Applicant Oklahoma Quarter Horse Racing Association

Todd Hembree
CHEROKEE NATION BUSINESSES
777 W. Cherokee St.
Catoosa, OK 74015
Phone: 918.384.7474
Email: todd.hembree@cn-bus.com

Counsel for Applicant Will Rogers Downs LLC

Elizabeth B. Murrill
Louisiana Attorney General
J. Benjamin Aguiñaga
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70804
Phone: 225.326.6766
Email: AguinagaJ@ag.louisiana.gov

Counsel for Applicant State of Louisiana

Michael Burrage
WHITTEN BURRAGE
512 North Broadway Avenue, Ste. 300
Oklahoma City, OK 73102
Phone: 405.516.7800
Email: mburrage@whittenburragelaw.com

Jared C. Easterling
GLOBAL GAMING SOLUTIONS, LLC
1921 Cradduck Road
Ada, OK 74820
Phone: 580.399.0268
Email: jared.easterling@ggsol.net

Counsel for Applicant Global Gaming RP, LLC, d/b/a Remington Park

TABLE OF CONTENTS

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0346p.06

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; 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.

No. 22-5487

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 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 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.

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

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

***

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

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

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs,	)	Civil Case No.
	)	5:21-cv-104-JMH
v.	)	
	)	**JUDGMENT**
UNITED STATES OF AMERICA,	)	
et al.,	)	
	)	
Defendants.	)	

***

In accordance with the Court's Order entered this date, and pursuant to Rule 58 of the Federal Rules of Civil Procedure,

IT IS ORDERED and **ADJUDGED** as follows:

(1) This matter is **DISMISSED WITH PREJUDICE;**

(2) All remaining claims for relief or pending motions are **DENIED AS MOOT;**

(3) This action is **STRICKEN** from the Court's active docket; and

(4) This is a **FINAL** and **APPEALABLE JUDGMENT**, and there is no just cause for delay.

This 3rd day of June, 2022.

Signed By:
Joseph M. Hood
Senior U.S. District Judge