

No. 26-____

IN THE
Supreme Court of the United States

GULF COAST RACING L.L.C., ET AL.,
Cross-Petitioners,

v.

HORSERACING INTEGRITY AND SAFETY AUTHORITY, ET AL.,
Cross-Respondents.

and

GULF COAST RACING L.L.C., ET AL.,
Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Cross-Respondents.

**On Petitions for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**CROSS-PETITION FOR
A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Whether Congress, when empowering the Horseracing Integrity and Safety Authority with exclusive nationwide rulemaking, investigative, prosecutorial, and adjudicatory authority under federal law, had to comply with the Appointments Clause despite the Authority having incorporated as a “private” nonprofit corporation under Delaware law mere weeks before the law’s enactment.

2. If the Directors of the Horseracing Integrity and Safety Authority do not require appointments under the Appointments Clause, whether the Horseracing Integrity and Safety Act nevertheless violates the private-nondelegation doctrine by vesting the Authority with nationwide regulatory and enforcement authority.

PARTIES TO THE PROCEEDINGS

1. Cross-Petitioners (Plaintiffs-Appellants below, referred to throughout as “Petitioners”) are Gulf Coast Racing L.L.C.; LRP Group, Limited; Valle de Los Tesoros, Limited; Global Gaming LSP, L.L.C.; and Texas Horsemen’s Partnership, L.L.P.

2. The State of Texas and the Texas Racing Commission were Intervenor-Plaintiffs in the case consolidated with Petitioners’ case below. They are seeking review of the court of appeals’ private-nondelegation rulings in a separate cross-petition for writ of certiorari.

3. National Horsemen’s Benevolent and Protective Association (“NHBPA”), Arizona Horsemen’s Benevolent and Protective Association, Arkansas Horsemen’s Benevolent and Protective Association, Indiana Horsemen’s Benevolent and Protective Association, Illinois Horsemen’s Benevolent and Protective Association, Louisiana Horsemen’s Benevolent and Protective Association, Mountaineer Park Horsemen’s Benevolent and Protective Association, Nebraska Horsemen’s Benevolent and Protective Association, Oklahoma Horsemen’s Benevolent and Protective Association, Oregon Horsemen’s Benevolent and Protective Association, Pennsylvania Horsemen’s Benevolent and Protective Association, Washington Horsemen’s Benevolent and Protective Association, and Tampa Bay Horsemen’s Benevolent and Protective Association were Plaintiffs-Appellants below in a case consolidated with the Petitioners’ case. They have filed their own cross-petition for writ of certiorari.

4. Cross-Respondents (Defendants-Appellees below, referred to throughout as “Respondents”) are the Horseracing Integrity and Safety Authority, Inc., Charles Scheeler, Steve Beshear, Adolpho Birch, Leonard Coleman, Joseph De Francis, Susan Stover, Bill Thomason, D.G. Van Clief, Nancy Cox, Katrina Adams, Jerry Black, Joseph Dunford, Frank Keating, Kenneth Schanzer, Ellen McClain, and Lisa Lazarus. The Authority and its officials have filed a petition for writ of certiorari in No. 26-199.

5. Cross-Respondents (Defendants-Appellees below) also include the Federal Trade Commission, Chair Andrew N. Ferguson, and Commissioner Mark R. Meador. Under Rule 35.3, those officials are automatically substituted for the former officials named in the judgment below: Chair Lina Khan and Commissioners Rebecca Slaughter, Alvaro Bedoya, Noah Phillips, and Christine Wilson. The Commission and its officials have filed a petition for writ of certiorari in No. 26-201.

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6, Cross-Petitioners Gulf Coast Racing L.L.C., LRP Group, Limited, Valle de Los Tesoros, Limited, Global Gaming LSP, L.L.C., and Texas Horsemen's Partnership, L.L.P. (collectively, the "Gulf Coast Racing Plaintiffs") disclose the following:

1. Gulf Coast Racing L.L.C. has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

2. LRP Group, Limited has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

3. Valle de Los Tesoros, Limited has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

4. Global Gaming LSP, L.L.C. is 51% owned by Racing Partners of Texas, L.L.C., and 49% owned by Global Gaming Solutions, L.L.C. No publicly held company has a 10% or greater ownership interest in it.

5. Texas Horsemen's Partnership, L.L.P. has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

RELATED PROCEEDINGS

This cross-petition seeks review of the same June 11, 2026 judgment of the United States Court of Appeals for the Fifth Circuit that is the subject of the petitions in Nos. 26-199 and 26-201.

Gulf Coast Racing, LLC v. Horseracing Integrity & Safety Authority, Inc., No. 5:23-cv-00077-H, U.S. District Court for the Northern District of Texas. Case transferred and consolidated April 11, 2023.

National Horsemen's Benevolent & Protective Ass'n v. Black, Nos. 5:21-cv-00071-H, 5:23-cv-00077-H, U.S. District Court for the Northern District of Texas. Judgment entered May 4, 2023.

National Horsemen's Benevolent & Protective Ass'n v. Black, No. 22-10387, U.S. Court of Appeals for the Fifth Circuit. Judgment entered November 18, 2022.

National Horsemen's Benevolent & Protective Ass'n v. Black, No. 23-10520, U.S. Court of Appeals for the Fifth Circuit. Judgment entered July 5, 2024; vacated June 30, 2025.

Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n, No. 24A287, U.S. Supreme Court. Stay entered October 28, 2024.

Federal Trade Commission v. National Horsemen's Benevolent & Protective Ass'n, No. 24-429, U.S. Supreme Court. Petition granted, judgment vacated, and case remanded June 30, 2025.

Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n, No. 24-433, U.S. Supreme Court. Petition granted, judgment vacated, and case remanded June 30, 2025.

Texas v. Black, No. 24-465, U.S. Supreme Court. Petition granted, judgment vacated, and case remanded June 30, 2025.

National Horsemen's Benevolent & Protective Ass'n v. Horseracing Integrity & Safety Authority, Inc., No. 24-472, U.S. Supreme Court. Petition granted, judgment vacated, and case remanded June 30, 2025.

Gulf Coast Racing, L.L.C. v. Horseracing Integrity & Safety Authority, Inc., No. 24-489, U.S. Supreme Court. Petition granted, judgment vacated, and case remanded June 30, 2025. 145 S. Ct. 2837 (2025).

National Horsemen's Benevolent & Protective Ass'n v. Black, No. 23-10520, U.S. Court of Appeals for the Fifth Circuit. Judgment entered June 11, 2026; mandate stayed July 14, 2026, pending petitions for writ of certiorari.

Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n, No. 26-199, U.S. Supreme Court. Petition filed August 10, 2026, docketed August 17, 2026, pending.

Federal Trade Commission v. National Horsemen's Benevolent & Protective Ass'n, No. 26-201, U.S. Supreme Court. Petition filed August 14, 2026, docketed August 17, 2026, pending.

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INTRODUCTION

Congress assigned nationwide federal regulatory power to a nine-member Board at the head of a new regulatory agency, even though no constitutional actor appoints its Directors and no federal official can remove them. The Horseracing Integrity and Safety Act (“HISA”) calls the resulting regulator, the Horseracing Integrity and Safety Authority (the “Authority”), a “private” corporation. 15 U.S.C. § 3052(a). But HISA gives that corporation “independent and exclusive national authority” over covered horseracing, *id.* § 3054(a)(2); preempts state law with its legislative rules, *id.* § 3054(b); and empowers it to investigate, prosecute, adjudicate, and sanction violations of federal law, *id.* §§ 3054(c), (h), (j), 3055(c), 3056(b), 3057. This case asks whether Congress may place federal officers beyond Article II simply by using a Delaware corporate shell.¹

That question is now squarely presented. In *FCC v. Consumers’ Research*, 606 U.S. 656 (2025), the Court upheld the Universal Service Fund against public- and private-nondelegation challenges. But Justice Gorsuch, joined by Justices Thomas and Alito, identified the question the parties there had not presented: whether the private administrator’s leaders “qualify as officers of the United States and, if so, whether their role complies with the Appointments Clause.” *Id.* at 720 n.6 (Gorsuch, J., dissenting). This Court then vacated the

¹ Petitioners’ prior petition for writ of certiorari was No. 24-489 (U.S. Oct. 28, 2024). The separate Sixth Circuit litigation did not present an Appointments Clause claim on appeal, and the vacated Eighth Circuit opinion in a preliminary posture no longer supplies a decision on that question. See *Oklahoma v. United States*, 163 F.4th 294 (6th Cir. 2025); *Walmsley v. FTC*, 117 F.4th 1032 (8th Cir. 2024), *vacated and remanded*, 145 S. Ct. 2870 (2025).

judgment in this very case and directed reconsideration in light of *Consumers' Research*. Petitioners are the only parties who preserved the Appointments Clause issue that *Consumers' Research* left open. This Court should grant certiorari so that it can, finally, resolve that question.

On remand, the Fifth Circuit incorrectly rejected the Appointments Clause challenge. It treated *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995)—a case about Amtrak, a government-created corporation that at the time exercised no governmental power—as an exclusive checklist for deciding whether a corporation is governmental. Because the Authority incorporated under state law shortly before HISA's enactment, pursued at the time of its creation and as a private association what the panel called non-governmental objectives, and has no federally appointed Directors, the panel held that the Authority is private. App. 41a-49a. That analysis converts an anti-evasion decision into a roadmap for evasion—and circularly uses the unconstitutional method of selecting the Directors as a reason the Appointments Clause does not apply to them.

The correct analysis has two steps. A person must hold a continuing position established by law and exercise significant authority pursuant to federal law. See *Lucia v. SEC*, 585 U.S. 237, 245-249 (2018). The Authority satisfies the first step because *ongoing statutory duties* establish an office by law, whatever the position's label. The Authority's Directors satisfy the second because they wield powers this Court has repeatedly described as significant authority that must be exercised by officers. *Lebron* addresses a different question: whether government-created corporations that do not exercise significant authority are nevertheless the government for certain purposes

such as the First Amendment. The Court should also grant certiorari to clarify the respective domains of these doctrines. As the Fifth Circuit stated, the Gulf Coast Racing Plaintiffs’ suggestion to harmonize them is one “only the Supreme Court could act upon.” App. 48a n.29.

For their part, the Authority and the FTC argue that the Authority is no different than the Financial Industry Regulatory Authority (FINRA), which has been described as a private self-regulatory organization. Not so. HISA does not recognize a preexisting member association that privately regulates willing members. It recognizes a single corporation as the exclusive national regulator; makes registration a condition of participating in covered racing; authorizes coercive searches, charges, and sanctions; preempts state law; and provides no mechanism for industry members to vote for the Authority’s Directors. In other words, the Authority is not a self-regulatory organization at all, but rather acts like any other administrative agency. Whether FINRA is constitutional need not be decided here.²

The Court should also grant certiorari because this cross-petition raises the question whether Congress can create still novel mechanisms to “evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.” *Lebron*, 513 U.S. at 397. In the Act, Congress selected and “recognized” one corporation by name—a corporation

² FINRA’s constitutionality remains the subject of ongoing merits litigation. *Alpine Securities Corp. v. FINRA*, 121 F.4th 1314 (D.C. Cir. 2024), resolved only a request for preliminary relief and did not decide the ultimate Appointments Clause question; this Court denied certiorari at that interlocutory stage. 145 S. Ct. 2751 (2025).

that did not exist until mere weeks before the statute was enacted—to perform a federal regulatory mission prescribed entirely by HISA. 15 U.S.C. § 3052(a). The Authority has no preexisting membership rules, private business, or independent regulatory jurisdiction. Every office, committee, program, and duty relevant here exists because federal law requires it. Its rules displace state law and bind nonconsenting persons nationwide. And Respondents defend HISA by insisting that the FTC now exercises pervasive control over the Authority’s rules, budget, subpoenas, litigation, and adjudications. Under *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 55 (2015), that “practical reality of federal control and supervision” prevails over a statutory disclaimer of governmental status.

The powers are equally unmistakable. The Authority writes generally applicable rules backed by federal law; compels registration and access to property and records; directs investigations and testing; issues charges and subpoenas; conducts adversarial adjudications; imposes suspensions, disqualifications, and monetary sanctions; and may sue in federal court. 15 U.S.C. §§ 3053-3058. *Buckley v. Valeo* held that rulemaking, adjudication, investigation, and civil enforcement are “significant governmental dut[ies]” that Congress may vest only in officers. 424 U.S. 1, 126, 137-141 (1976) (per curiam). And *Trump v. Slaughter*, 146 S. Ct. 2283, 2304-2305 (2026), confirms that making binding rules, investigating violations, adjudicating charges, and pursuing civil actions are executive functions.

FTC supervision does not make those powers private. Supervision distinguishes principal officers from inferior officers. *Edmond v. United States*, 520

U.S. 651, 662-663 (1997). SEC administrative law judges remained officers although the Commission reviewed their decisions. *Lucia*, 585 U.S. at 249. The Preventive Services Task Force members remained officers although the Secretary could review their recommendations and remove them. *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 759-765 (2025). And the PCAOB members remained officers although the SEC approved their rules and reviewed sanctions. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 485-486, 504-510 (2010).

The FTC's December 2025 enforcement-rule modification reinforces the point. The rule now requires the Authority to obtain Commission approval before issuing a subpoena or commencing a civil action. FTC, *Order Approving the Enforcement Rule Modification Proposed by the Horseracing Integrity and Safety Authority* 5-6 (Dec. 19, 2025) (effective Jan. 18, 2026). Preapproval may bear on whether the Directors are inferior officers. It cannot erase their continuing offices or the significant discretion they exercise in deciding what to investigate, whom to charge, what sanction to seek, and how initially to adjudicate violations. Nor can a rule cure the statutory fact that the Directors are selected by a private nominating committee and removable only by their fellow Directors. Nor can it erase the tremendous discretion they exercise over the promulgation of legislative rules, which the FTC must rubber-stamp if those rules are merely consistent with the Act's broad standards.

HISA therefore presents a constitutional trilemma. If the FTC's control is as comprehensive as Respondents maintain, that control *confirms* the Authority's governmental character and, at most, makes its Directors inferior officers—who still must be

appointed by the President, a court of law, or a department head. If the FTC's control is insufficient, the private-nondelegation challenge succeeds. And if the Directors are principal officers because no federal official directs and removes them, presidential nomination and Senate confirmation are required. Under every path, the self-perpetuating Board is constitutionally defective.

The court of appeals' answer is no answer: it held that the private-nondelegation doctrine "corrals" any evasion of Article II. App. 48a. But a doctrine governing how a private adviser may assist an agency cannot authorize unappointed persons to exercise powers the Constitution reserves to officers. Nor does after-the-fact judicial review supply the political accountability Article II requires. The Appointments Clause "is more than a matter of 'etiquette or protocol'; it is "among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659 (citation omitted). The Court should thus also grant certiorari because this is the only petition that will allow it to consider the relationship between the Appointments Clause and private nondelegation.

Review is imperative now. After this Court's GVR, the Fifth Circuit reissued its holding and said, as noted above, that Petitioners' Appointments Clause argument is one "only the Supreme Court could act upon." App. 48a n.29. The Fifth and Sixth Circuits remain divided over the constitutionality of HISA's enforcement scheme. Compare App. 15a-40a, with *Oklahoma*, 163 F.4th 294. The Eighth Circuit's earlier opinion in a preliminary posture was vacated and supplies no current holding. 145 S. Ct. 2870 (2025). The conflict leaves a nationwide regulator and every covered participant in uncertainty.

All parties seek this Court’s review, but they propose different questions and remedies. The Authority and the FTC seek review of the Fifth Circuit’s enforcement holding; the NHBPA parties and Texas seek broader relief on private-nondelegation grounds; and Petitioners seek review of the antecedent Appointments Clause question that determines whether the Authority may exercise its sweeping powers through the present Board. Granting the related petitions together would allow the Court to resolve the controversy in full.

This case is also an excellent vehicle. Petitioners pleaded and preserved the Appointments Clause challenge, tried it to judgment, presented it to the Fifth Circuit twice, and obtained an express ruling. Both lower courts reached the merits. The district court also recognized that “covered persons like the Gulf Coast plaintiffs will be regulated and subject to assessments” under HISA. App. 107a. Respondents never sought dismissal of the Appointments Clause claim for lack of standing, and no factual development is needed to decide the structural question.

And, critically, an Appointments Clause challenge *necessarily is a facial challenge*. The Court need not identify an instance in which HISA might be constitutional in its operation; if the Authority’s Directors are officers, they cannot exercise *any* of the coercive powers or statutory duties given to them. *See Freytag v. Commissioner*, 501 U.S. 868, 882 (1991) (holding that “[s]pecial trial judges are not inferior officers for purposes of some of their duties . . . but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution. If a

special trial judge is an inferior officer for purposes of [certain] subsections . . . , he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed.”); *accord Buckley*, 424 U.S. at 137 (holding that improperly appointed FEC could only exercise its nongovernmental “investigative and informative” function).

The stakes extend beyond horseracing. The decision below tells Congress that it may avoid Article II by having a favored corporation file state papers before a federal statute takes effect, omitting presidential appointment, and calling the corporation private. Nothing would confine that maneuver to racetrack safety. The same design could be used for securities, health care, transportation, energy, or any other national regulatory program.

The Constitution does not permit that result. It “deals with substance, not shadows.” *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867). The cross-petition should be granted.

OPINIONS BELOW

The opinion of the court of appeals is reported at 178 F.4th 224 (5th Cir. 2026) and reproduced at App. 1a-50a. The opinion of the district court is reported at 672 F. Supp. 3d 220 (N.D. Tex. 2023) and reproduced at App. 51a-112a.

JURISDICTION

The court of appeals entered judgment on June 11, 2026. App. 1a-50a. On July 14, 2026, it stayed the mandate pending the filing and disposition of petitions for writ of certiorari. App. 115a-116a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article II, Section 2, Clause 2 of the U.S. Constitution provides, in relevant part, that the President:

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

Article I, Section 1 provides:

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

Article II, Section 1, Clause 1 provides, in relevant part:

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

The Horseracing Integrity and Safety Act, 15 U.S.C. §§ 3051-3060, is reproduced at App. 117a-167a.

STATEMENT OF THE CASE

1. In September 2020, a purportedly nonprofit corporation calling itself the Horseracing Integrity and Safety Authority was organized under Delaware law in anticipation of HISA's enactment. ROA.4223.

Weeks later, Congress enacted HISA as part of a 5,600-page omnibus COVID bill. In HISA, Congress “recognized” a “private, independent, self-regulatory, nonprofit corporation, to be known as the ‘Horseracing Integrity and Safety Authority,’” for the exclusive purpose of developing and implementing the federal programs HISA specifies. 15 U.S.C. § 3052(a). The corporation had no preexisting regulatory program or membership jurisdiction. HISA supplied its mission, powers, governance requirements, and regulated population.

HISA requires a nine-member Board: five members from outside the equine industry and four industry members. *Id.* § 3052(b). A nominating committee selected by the Authority chooses the Directors. *Id.* § 3052(d). The bylaws named that committee, ROA.4239-4240, and provide that Directors may be removed for cause only by the unanimous vote of the other Directors, ROA.4236. No President, court, department head, or FTC Commissioner appoints or removes any Director.

2. HISA gives the Authority, the FTC, and a contracted enforcement agency “independent and exclusive national authority” over the safety, welfare, and integrity of covered horses, persons, and races. 15 U.S.C. § 3054(a)(2). Authority rules preempt state law within that jurisdiction. *Id.* § 3054(b). Covered persons include trainers, owners, breeders, jockeys, racetracks, veterinarians, and others engaged in covered racing. *Id.* § 3051(6). Participation requires registration with the Authority and agreement to abide by its rules, standards, and procedures. *Id.* § 3054(d).

HISA commands the Authority to establish nationwide racetrack-safety and anti-doping programs, *id.* §§ 3055(a), 3056(a); issue substantive rules defining

violations, *id.* § 3057(a); create procedures for investigations and disciplinary hearings, *id.* §§ 3054(c), 3057(c); and prescribe sanctions, *id.* § 3057(d). Acting under those provisions, the Authority has promulgated rules governing registration and access to property, racetrack safety, anti-doping, fee assessments, investigations, adjudications, and sanctions. *See, e.g.*, 87 Fed. Reg. 435 (Jan. 5, 2022); 87 Fed. Reg. 4023 (Jan. 26, 2022); 87 Fed. Reg. 29,862 (May 17, 2022); 88 Fed. Reg. 5070 (Jan. 26, 2023).

The Authority also has statutory subpoena and investigatory power. 15 U.S.C. § 3054(h). Its rules authorize access to offices, racetracks, records, and personal property; its agents investigate suspected violations, collect samples, and issue charges; its adjudicators take evidence and initially resolve contested cases; and the Authority imposes suspensions, disqualifications, monetary sanctions, and other penalties. *Id.* §§ 3054(c), 3055(c), 3056(b), 3057. HISA separately authorizes the Authority to commence civil actions for injunctions or to enforce sanctions. *Id.* § 3054(j).

3. Authority rules take effect only after FTC approval. 15 U.S.C. § 3053(c). The FTC is required to approve a proposed rule if it is consistent with HISA and existing approved rules. *Id.* Under the original statute, the FTC disclaimed authority to reconsider the Authority's policy judgments.

FTC review of sanctions is generally *de novo* before an administrative law judge and then the Commission. *Id.* § 3058(b)-(c). In December 2025, the FTC approved an Authority enforcement-rule modification requiring Commission approval before the Authority issues a subpoena under § 3054(h) or commences a civil action under § 3054(j). FTC, *Order Approving the*

Enforcement Rule Modification Proposed by the Horseracing Integrity and Safety Authority (Dec. 19, 2025). The modification took effect January 18, 2026. It does not transfer to the FTC the Authority’s decisions to open investigations, collect evidence, file charges, prosecute cases, or initially adjudicate violations and impose sanctions.

4. The NHBPA parties filed suit in the Northern District of Texas in March 2021, and Texas and its Racing Commission intervened. ROA.66, 1479. In November 2022, the Fifth Circuit held HISA’s original rulemaking structure unconstitutional under the private-nondelegation doctrine because the Authority’s policy choices were not subordinate to the FTC. *National Horsemen’s Benevolent & Protective Ass’n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022).

Congress responded in December 2022 by adding, in another omnibus bill, the FTC’s power in § 3053(e) to abrogate, add to, and modify Authority rules. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. O, tit. VII, § 701, 136 Stat. 4459, 5231-5232 (2022). The FTC continues to maintain that, under the statute as modified, it cannot review the policy judgments of the Authority and must approve its rules if consistent with the statute.³ In March 2023,

³ See, e.g., FTC, *Order Approving the Racetrack Safety Rule Modification Proposed by the Horseracing Integrity and Safety Authority* 3 (June 7, 2024) (“[T]he Commission finds that the Racetrack Safety proposed rule modification is consistent with the Act and the Commission’s procedural rule and therefore approves the proposed rule modification.”); FTC, *Order Approving the Anti-Doping and Medication Control Rule Modification Proposed by the Horseracing Integrity and Safety Authority* 3 (Nov. 22, 2023) (“The Commission therefore finds that the proposed modification to the ADMC Rule to include iron dextran

however, the Sixth Circuit held that the amendment cured the rulemaking defect and rejected a separate challenge to HISA's enforcement structure. *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), *vacated and remanded*, 145 S. Ct. 2836 (2025).

5. Petitioners had filed a separate action in July 2022. ROA.4846. Unlike the other plaintiffs, they alleged that the Authority's Directors are unconstitutionally appointed officers. ROA.4873-4881. They also preserved a private-nondelegation challenge in the alternative. ROA.4888-4891. The case was transferred, consolidated with the NHBPA action, and tried to the district court in April 2023. ROA.5894-5899.

The district court entered judgment for Respondents on May 4, 2023. App. 51a-112a. It reasoned that the Fifth Circuit's first decision had treated the Authority as private, and alternatively applied *Lebron* because the Authority was not created by federal law and its Directors were not federally appointed. App. 72a-86a. The court nevertheless described Petitioners as covered persons who would be regulated and assessed under HISA. App. 107a.

6. On July 5, 2024, the Fifth Circuit affirmed in part and reversed in part. *National Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024). All sides sought certiorari. Petitioners' petition presented the Appointments Clause question. No. 24-489 (U.S. Oct. 28, 2024). After deciding *Consumers' Research*, this Court granted the related petitions, vacated the judgment, and remanded for reconsideration. App. 113a.

as a banned substance is consistent with the Act and with the Commission's procedural rules.").

In *Consumers' Research*, the Court held that the FCC had supplied the controlling policy, required the private administrator to submit projections for Commission approval before they had legal effect, and could review the administrator's interpretations. 606 U.S. at 692-695. The Court emphasized that the company performed accounting and advisory work rather than exercising independent policy discretion. *Id.* Justice Gorsuch's dissent identified—but the parties had not presented—the separate question whether the company's leaders were officers. *Id.* at 720 n.6 (Gorsuch, J., dissenting).

7. On June 11, 2026, the Fifth Circuit reissued its judgment with a new discussion of *Consumers' Research*. App. 1a-50a. It again held that § 3053(e) makes Authority rulemaking sufficiently subordinate to the FTC. App. 10a-15a. But it held HISA's enforcement provisions facially unconstitutional because the Authority investigates, issues subpoenas, conducts searches, levies fines, and sues without adequate FTC control. App. 15a-40a. That holding conflicts with the Sixth Circuit's post-GVR decision upholding the same enforcement scheme. *Oklahoma*, 163 F.4th at 310-316.

The Fifth Circuit again rejected Petitioners' Appointments Clause claim. The panel correctly acknowledged that HISA's "private" label does not settle whether the Authority is part of the federal government. App. 43a-44a. But it treated *Lebron* as the governing and exclusive test, then found the Authority private because it incorporated under Delaware law, was supposedly not created to further governmental objectives, and lacks federally appointed Directors. App. 44a-49a.

The panel declined to apply *Buckley* and *Lucia* because those cases involved people "already part of

the government.” App. 47a-48a (emphasis omitted). It recognized Petitioners’ argument that the nature and duration of the statutory duties are what establish a federal office, but concluded that only this Court could adopt that analysis over the panel’s reading of *Lebron*. App. 47a-48a & n.29. The panel did not address the circularity of using the absence of a constitutional appointment to establish private status.

8. On July 14, 2026, the Fifth Circuit stayed its mandate pending the filing and disposition of petitions for writ of certiorari. App. 115a-116a. Petitioners now seek review of the judgment rejecting their Appointments Clause claim.

REASONS FOR GRANTING THE CROSS-PETITION

1. The question presented is important, recurring, and unresolved. The Authority exercises powers that this Court classifies as executive and significant, through continuing offices created and defined by federal law. Yet its Directors are selected and removable only through private mechanisms. If the decision below stands, Congress may avoid the Appointments Clause whenever a favored corporation files state incorporation papers before Congress passes a law imbuing it with federal power.

2. The decision conflicts with *Lebron*’s anti-evasion principle, *Association of American Railroads*’ practical-control analysis, *Buckley* and *Lucia*’s significant-authority test, and *Edmond*, *Braidwood*, and *Free Enterprise Fund*’s treatment of supervision. It also cannot be reconciled with *Slaughter*, decided after the judgment below, which confirms that the Authority’s core functions are exercises of executive power. The Court should grant this cross-petition because it is the

only one that will allow it to harmonize these related strands of doctrine that have confused the lower courts in this and other cases: those involving the Appointments Clause, private nondelegation, and government-created corporations.

3. This is the only case that preserved and decided the Appointments Clause issue. All parties seek review of the same judgment; the Fifth and Sixth Circuits are divided over HISA's constitutionality; the mandate is stayed; and the court below expressly stated that only this Court could adopt Petitioners' position. Review is warranted now.

ARGUMENT

I. THE AUTHORITY'S DIRECTORS ARE OFFICERS OF THE UNITED STATES.

Officer status requires a continuing federal office with significant authority under federal law. *Lucia*, 585 U.S. at 245-249. Both requirements are satisfied here. The Court should grant certiorari to confirm that the Appointments Clause is the appropriate frame of analysis, and because the Appointments Clause resolves the circuit split that has emerged regarding the private-nondelegation doctrine.

A. *Consumers' Research* confirms that the Appointments Clause question remains open.

This Court's decision in *Consumers' Research* upheld a delegation to the Universal Service Administrative Company (USAC). Congress and the FCC supplied the controlling policy; the private administrator performed projections and accounting; its recommendations had no legal effect until FCC approval; and the FCC could review its interpretations. 606 U.S. at 692-695. The

Court therefore treated the administrator as an aid to the agency, not as the source of binding law or coercive enforcement.

Justice Gorsuch, joined by Justices Thomas and Alito, separately identified the question whether the administrator's leaders were officers and complied with the Appointments Clause. *Id.* at 720 n.6 (Gorsuch, J., dissenting). The Court did not decide that question because neither the parties nor the court of appeals had addressed it. *Id.* Here the question was pleaded, tried, preserved, twice briefed to the Fifth Circuit, and expressly decided—and the Authority exercises far greater powers than does USAC.

Justice Jackson's concurrence supplies an additional reason for review. She questioned whether private nondelegation is a viable independent doctrine and cited scholarship explaining that other constitutional provisions—including the Appointments Clause—perform much of the relevant work. *Id.* at 710-711 (Jackson, J., concurring) (citing Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 Notre Dame L. Rev. 203 (2023)).

Recent scholarship addressing HISA validates the Gulf Coast Racing Plaintiffs' conclusion: the Appointments Clause is the appropriate framework. See Loryn McFall, Comment, *Executive Roundup: Saddling Private Article II Enforcement Under the Horseracing Integrity and Safety Act of 2020*, 57 Tex. Tech L. Rev. 591, 612-618 (2025) (arguing that HISA violates the Appointments Clause); Volokh, *supra*, at 203, 211, 248-251 (agreeing that the Appointments Clause is the correct frame for analyzing HISA); see also Dina Mishra, *An Executive-Power Non-Delegation*

Doctrine for the Private Administration of Federal Law, 68 Vand. L. Rev. 1509, 1544-1546 (2015) (suggesting the Appointments Clause is the appropriate framework for other private delegations).

HISA and the Authority, moreover, are far removed from the advisory arrangement upheld in *Consumers' Research*. The Authority does not merely calculate a contribution factor or offer advice before an agency acts. It originates nationwide rules; compels regulated persons to register and submit to its procedures; initiates investigations and charges; prosecutes cases; and issues initial adjudications and sanctions. The FTC's ability to review some outputs cannot recharacterize the actors who exercise those powers as private accountants.

The post-GVR conflict confirms that *Consumers' Research* did not settle HISA's constitutionality. The Sixth Circuit found the Authority sufficiently subordinate in enforcement; the Fifth Circuit found the opposite. *Compare Oklahoma*, 163 F.4th at 310-316, *with* App. 15a-40a. Petitioners' preserved Appointments Clause claim supplies a textually grounded way to address the underlying accountability problem across the Authority's functions.

B. HISA establishes continuing federal offices.

HISA provides that the Authority "shall be governed by a board of directors," fixes the Board at nine seats, allocates five seats to independent members and four to industry members, prescribes representational qualifications, creates the nominating committee, and specifies the Board's federal duties. 15 U.S.C. § 3052(b), (d). Those are not episodic assignments to private volunteers. They are "continuing and

permanent” offices that endure through successive occupants. *Lucia*, 585 U.S. at 245 (quoting *United States v. Germaine*, 99 U.S. 508, 511-512 (1879)).

The Authority’s charter cannot displace those statutory offices. An “office” is defined by the “duties, salary, and means of appointment” attached to it, not by the label chosen for its holder. *Freytag*, 501 U.S. at 881 (citation omitted). Congress’s statute itself supplies the duties and qualifications, and it makes the Board indispensable to the federal program. The fact that the Authority’s own documents implement Congress’s design no more privatizes the office than an agency’s personnel rules would.

Nor does the Authority’s incorporation under Delaware law weeks before the statute’s enactment change the analysis. A government “office” is defined by its statutory duties. See Noah Webster, *An American Dictionary of the English Language* 236 (New York, S. Converse 1828) (defining “officer” as “[a] person commissioned or authorized to perform any public duty”); Giles Jacob, *A New Law-Dictionary* [653] (10th ed., London: W. Strahan & W. Woodfall 1782) (“[E]very man is a public officer who hath any duty concerning the public.”). The *office* is therefore established *by the statute*. If tomorrow Congress passed a law transferring the EPA’s duties to the faculty of the Yale School of the Environment, those faculty members would *now* be officers requiring proper appointments to the extent they executed those statutory duties.

The Authority recognizes this reality. HISA provides that the corporation “*to be known as*” the Authority “is recognized” to implement the federal programs. 15 U.S.C. § 3052(a) (emphasis added). The Authority itself has stated that HISA “created the Authority as the

independent governing structure charged with proposing and enforcing health-and-safety standards.” ROA.4711.

C. The Directors exercise significant federal authority.

The Directors exercise “significant authority pursuant to the laws of the United States.” *Buckley*, 424 U.S. at 126. They formulate and approve rules with nationwide legal consequences—rules that the FTC *must* approve if “consistent with” the statute’s broad standards. Their rules displace state laws that have governed horseracing for over a century. And the Directors prescribe violations and penalties—and their final decisions go into effect *before* any FTC ALJ has had a chance to review them. *See* 88 Fed. Reg. 5070, 5109 (Jan. 26, 2023) (Authority Rule 3264); 15 U.S.C. § 3058. *Buckley* held that “rulemaking and enforcement power” may be exercised only by officers. 424 U.S. at 118, 140-141. *Slaughter* confirms that making rules carrying the force of law is an executive act even when subject to statutory standards and judicial review. 146 S. Ct. at 2304-05.

The same is true of enforcement and adjudication. The Authority decides whether to investigate; directs testing and evidence collection; issues charges; prosecutes cases; administers hearings; and imposes civil sanctions. Those duties alone exceed the powers that made SEC administrative law judges officers in *Lucia* and special trial judges officers in *Freytag*. *See Lucia*, 585 U.S. at 247-249; *Freytag*, 501 U.S. at 881-882. They also parallel the PCAOB’s “significant executive power” to inspect, investigate, and sanction regulated firms. *Free Enterprise Fund*, 561 U.S. at 485, 514.

FTC oversight cannot negate officer status. In *Edmond*, review and supervision made military judges inferior officers. 520 U.S. at 662-666. In *Braidwood*, review and removal made Task Force members inferior officers. 606 U.S. at 759-765. In *Free Enterprise Fund*, SEC oversight made PCAOB members inferior officers whose appointment by the SEC was permissible only because the Commission was a department head and could remove them at will after severance. 561 U.S. at 510-513. None became a private nonofficer because a superior could review the work.

The Directors were not appointed by the President with Senate consent or, if inferior, by the President, a court of law, or the head of a department. U.S. Const. art. II, § 2, cl. 2. They also are insulated from presidential removal because only their fellow Directors may remove them, and then only for cause and unanimously. ROA.4236. *Slaughter* confirms that officials exercising executive power must remain accountable to the President, directly or through removable superiors. 146 S. Ct. at 2310-2311. HISA's Board satisfies neither appointment nor removal requirements.

D. The Authority is a federal instrumentality for Article II purposes.

The Authority argues that the difference between this case and *Lucia*, *Free Enterprise Fund*, *Buckley*, and other Appointments Clause cases is that in those cases the entity was part of the federal government, whereas here the entity incorporated itself a few weeks before Congress enacted HISA and so is “private.” This is a question on which the Executive Branch has split. *Compare* Office of Legal Counsel, *The Test for Determining “Officer” Status Under the Appointments Clause* 1-2 (Jan. 16, 2025) (“2025 OLC

Opinion”) (“[T]o be an officer, an individual must occupy a continuing position that is part of the federal government for constitutional purposes.”) (cleaned up), *with* Office of Legal Counsel, *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 122 (2007) (“2007 OLC Opinion”) (“[A]n individual who will occupy a position to which has been delegated by legal authority a portion of the sovereign powers of the federal government, and which is ‘continuing,’ must be appointed pursuant to the Appointments clause.”).

This Court should grant certiorari not only because this case allows it to resolve the key question left open by *Consumers’ Research*, but also because it will allow this Court to settle a question that has divided executive branch lawyers for decades.

The correct answer is that one need not be part of the federal government *initially* in order to trigger the Appointments Clause. After all, the Yale School of the Environment, in the hypothetical scenario noted above, was not created by Congress. But its *federal office* was created by Congress’s statute. So too here. The Authority may have briefly preexisted Congress’s statute by a few days, but its *office*—the sum of its statutory duties—was created by Congress. That *office* is therefore necessarily “part of the government.” See 2007 OLC Opinion at 121 (rejecting “the error of some of our prior opinions in concluding that the Appointments Clause does not apply to persons who are not employees of the federal government, even if they are delegated permanent federal authority to enforce federal law”).

Assuming for sake of argument, however, that there is a third step to the *Lucia* and *Buckley* analysis requiring the individual to be “part of the

government,” this Court should hold that Congress’s “private” label is not dispositive. It has held as much before. *Lebron* held that Amtrak was governmental for certain constitutional purposes despite an express statutory disclaimer because “it is not for Congress to make the final determination” of constitutional status. 513 U.S. at 392. *Association of American Railroads* likewise held that “the practical reality of federal control and supervision prevails over Congress’ disclaimer.” 575 U.S. at 55. Those decisions state an anti-evasion principle, not a drafting formula that Congress may abuse to evade the separation of powers by changing the order of incorporation and enactment.

First, HISA functionally establishes the Authority by special law. Congress did not authorize any qualifying organization to apply for recognition. It identified one “corporation, to be known as the ‘Horseracing Integrity and Safety Authority,’” and endowed that entity alone with federal jurisdiction. 15 U.S.C. § 3052(a). The shell incorporated weeks earlier had no members to regulate, no nationwide jurisdiction, and no relevant business apart from anticipating HISA. The Authority itself told the district court that HISA “created the Authority as the independent governing structure charged with proposing and enforcing health-and-safety standards.” ROA.4711.

Second, the Authority exists to accomplish governmental objectives. HISA declares a national regulatory program, makes the Authority’s jurisdiction exclusive, preempts state law, compels registration, and authorizes binding rules and sanctions. 15 U.S.C. §§ 3052(a), 3054(a)-(d), 3057. Preventing doping and regulating racetrack safety may be desirable private goals in the abstract. But establishing compulsory federal rules and enforcing them against

nonconsenting persons is a governmental objective and a sovereign function. *Collins v. Yellen*, 594 U.S. 220, 252-253 (2021).

Third, federal control is pervasive under Respondents' own account. Authority rules require FTC approval; the FTC may rewrite them; the FTC reviews sanctions de novo; the Authority's budget is submitted to the FTC; and current rules require FTC approval for subpoenas and civil actions. 15 U.S.C. §§ 3052(f)(1)(C), 3053, 3054(h), (j), 3058. Respondents cannot invoke that control to defeat a private-nondelegation challenge while denying that the same "practical reality" bears on federal-instrumentality status. *Ass'n of Am. R.R.s*, 575 U.S. at 55.

The Fifth Circuit's decisive contrary factor—that "the government has no role in appointing the Authority's Board," App. 46a—reasons in a circle. The absence of a constitutional appointment is the alleged violation. If an invalid selection method itself establishes private status, Congress can always avoid the Appointments Clause by specifying a private selector. *Lebron* rejected precisely that kind of empty formalism: government may not evade constitutional obligations "by simply resorting to the corporate form." 513 U.S. at 397.

The timing of incorporation changes nothing. Congress may not do indirectly through recognition of a purpose-built shell what it could not do directly by chartering the identical regulator after enactment. The constitutional inquiry asks what the entity is and does under federal law *now*. HISA transformed the empty corporation into the exclusive federal regulator and established continuing Board positions to exercise its powers.

Nor can the private-nondelegation doctrine supply a safe harbor. That doctrine may permit private persons to provide information, calculations, or proposals to an agency that retains the operative decision. *See Consumers' Research*, 606 U.S. at 692-695. It does not permit private persons to occupy continuing federal offices, initiate coercive proceedings, or exercise significant discretion while remaining outside Article II. The Appointments Clause answers who may wield those powers; supervision then answers what kind of officer that person is.

II. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS, WHICH BEG FOR HARMONIZATION.

The Fifth Circuit acknowledged the force of Petitioners' anti-evasion concern but thought *Lebron* foreclosed any other result. App. 44a-49a. That reading conflicts with the reasoning of *Lebron* itself, with later government-instrumentality cases, and with the Court's officer-status decisions. Although the Fifth Circuit viewed this Court's precedents involving government-created corporations, private nondelegation, and the Appointments Clause as mutually exclusive and contradictory, these doctrines all serve different purposes. This Court should grant this case to explain how they work in harmony.

A. *Lebron* is an anti-evasion principle, not a safe harbor.

Lebron asked whether Amtrak was governmental for First Amendment purposes even though Congress called it private. 513 U.S. at 383. The Court held that when the government creates a corporation by special law to further governmental objectives and retains

permanent authority to appoint a majority of directors, the corporation “is part of the Government for purposes of the First Amendment.” *Id.* at 399. That conclusion stated sufficient circumstances for the entity before the Court: Even though Amtrak exercised no governmental power, it was nevertheless “an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution.” *Id.* at 394. The Court did not hold that those facts exhaust every path to governmental status for every constitutional provision. Certainly, the Court in no way held that the test it was articulating *replaced* the significant-authority test for officers of the United States.

The opinion’s broader rule points the other way: constitutional status turns on substance, and government cannot avoid constitutional obligations through corporate form or statutory labels. *Id.* at 392, 397. The Authority fits that principle more directly than Amtrak did in *Lebron*. Amtrak supplied passenger service; at the time, it did not exercise any governmental power. That is why a test was needed to determine if it was nevertheless the “government” for certain purposes. The Authority makes and enforces federal law against nonconsenting persons.⁴ It is the government *for all purposes*.

The Fifth Circuit nevertheless transformed *Lebron*’s sufficient facts into three necessary conditions. It then resolved each through a formalism devoid of substance: incorporation papers defeated federal

⁴ The regulatory authority considered in *Association of American Railroads* arose from the Passenger Rail Investment and Improvement Act of 2008, enacted years after *Lebron*. See 575 U.S. at 45-47. Amtrak’s later regulatory power was immaterial to *Lebron*’s 1995 holding.

creation; the “private” subject matter defeated governmental objectives; and the unconstitutional selection process defeated federal control. App. 45a-46a. A legislature following that recipe may build an agency in everything but name and avoid Article II.

This Court’s later cases reject such empty formalism. *Association of American Railroads* treated Amtrak as governmental when it jointly prescribed binding metrics and standards, emphasizing its federal objectives, statutory structure, presidentially appointed directors, and practical federal control. 575 U.S. at 51-55. The analysis was substantive and context specific. It did not announce an incorporation-timing rule.

Free Enterprise Fund is even closer. Congress labeled the PCAOB a private nonprofit; its rules required SEC approval; the SEC could review sanctions; and the SEC could not direct the Board’s choice to begin a particular investigation. 561 U.S. at 484-486, 504. Yet the Board was part of the Government, its members were inferior officers, and their appointment and removal were governed by Article II. *Id.* at 485-486, 510, 513-514. HISA’s comparable oversight cannot yield the opposite classification.

No decision of this Court holds that persons occupying continuing positions and wielding exclusive sovereign authority under federal law remain constitutionally private merely because neither Congress nor the President appointed them. After all, the whole question is whether they *must* be constitutionally appointed. *Buckley* swept broadly: “any appointee exercising significant authority pursuant to the laws of the United States” is an officer. 424 U.S. at 126. *Lucia* applied *that* rule by examining office and duties.

585 U.S. at 245-249. Neither decision made a governmental-but-non-Article-II appointment a prerequisite to officer status.

Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC, 590 U.S. 448 (2020), is consistent. There, the Court first asked whether Board members were “Officers of the United States,” distinguishing federal officers from territorial officers based on the source and nature of their authority. *Id.* at 456-469. The case did not hold that Congress may assign federal executive power to persons outside government altogether simply by denominating them private.

The Fifth Circuit’s approach also creates an inexplicable asymmetry. A low-level federal adjudicator who takes testimony and issues an initial decision must be constitutionally appointed. *Lucia*, 585 U.S. at 247-249. But under the decision below, Congress may give an entire privately selected Board broader authority to write rules, investigate, charge, adjudicate, and punish—without any appointment at all. The Appointments Clause cannot demand accountability for the lesser power while ignoring the greater.

The Court should make clear that *Lebron* and *Lucia* address complementary questions. *Lebron* prevents formal labels from concealing a government instrumentality and declares that even corporations with no government power may be governmental for certain purposes. *Lucia* then identifies who is an “officer” requiring proper appointments on the basis of the government power that officer wields. Where, as here, a corporation’s only relevant existence is a federal regulatory program and its Board exercises sovereign power, both lines point to federal officer status.

B. Supervision distinguishes inferior from principal officers.

The decision below conflates subordination with private status. An inferior officer is one “whose work is directed and supervised at some level” by officers appointed by the President with Senate consent. *Edmond*, 520 U.S. at 663. The extent of supervision therefore classifies an officer; it does not eliminate the office. *Braidwood* recently applied that principle to a body whose recommendations became binding by federal law, relying on review and at-will removal to find inferior-officer status. 606 U.S. at 759-765.

The distinction is dispositive here. Respondents say the FTC is the primary regulator because it may approve and rewrite rules, review sanctions, supervise budgets, and preapprove subpoenas and lawsuits. If so, the Directors resemble the inferior officers in *Edmond*, *Braidwood*, and *Free Enterprise Fund*. But Congress did not vest their appointment in the FTC or any other constitutionally permitted actor, and the FTC cannot remove them. Supervision cannot cure a defective appointment.

The December 2025 rule modification does not change the answer. Requiring approval for two enforcement tools may increase supervision. It does not eliminate the Board’s discretion over rules, investigations, charges, prosecutions, initial adjudications, or sanctions. More fundamentally, an agency rule cannot transform an officer into a private person. If preapproval sufficed to erase officer status, the SEC administrative law judges in *Lucia* and PCAOB members in *Free Enterprise Fund* would not have been officers.

The removal defect confirms the structural problem. HISA and the bylaws leave the Directors answerable to one another, not to the President or a removable superior. Even accepting Respondents' theory that the FTC can control discrete outputs, no Commissioner may remove a Director for disregarding federal policy, neglecting duties, or abusing coercive powers. Article II does not permit executive authority to be exercised by officials accountable to no one. *Free Enterprise Fund*, 561 U.S. at 496-498.

Nevertheless, there is some undeniable tension in this Court's Appointments Clause jurisprudence and the private-nondelegation doctrine. Subordination in the former context is the test for inferior officer status; it is also the test for satisfying the private-nondelegation doctrine. This petition allows the Court to resolve and explain this tension because the Gulf Coast Racing Plaintiffs have consistently pleaded in the alternative. Because the Authority exercises significant authority, its Directors are officers requiring proper appointments. And if the Appointments Clause, for whatever reason, does not apply, then HISA may not vest in a private entity independent authority to make law, investigate, prosecute, adjudicate, and punish.

The theories are complementary because neither permits HISA's current structure. Adequate FTC direction may make the Directors inferior officers, but inferior officers still require constitutional appointments. Inadequate direction leaves an impermissible private delegation. The Court should reject the suggestion below that satisfying one doctrine automatically defeats the other. It should decide the Appointments Clause question before determining what—if any—private assistance remains permissible.

In Petitioners’ view, the private-nondelegation doctrine applies when individuals who do not satisfy the test for officer status—usually because their duties are episodic—nevertheless exercise occasional government power that must be adequately supervised. One classic example is the delegation of eminent-domain power to private corporations. *See PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 495 (2021) (“For as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties.”). Another is when market competitors convene to fix prices or markets. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (invalidating price-fixing delegation “to private persons whose interests may be and often are adverse to the interests of others in the same business”); *see also Chiglaides Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973) (addressing “a group of self-interested producers” denying competitor allowance to grow celery).⁵ But if the Appointments Clause applies,

⁵ The doctrine’s origins reinforce this distinction. The doctrine originated in early police-power cases that involved episodic authority granted to private neighbors. *See Eubank v. City of Richmond*, 226 U.S. 137, 143-144 (1912) (holding that a municipal government delegating to property owners the right to impose new and additional restrictions on street, if two-thirds agree, without any standards governing the decision, and no obvious relation to health or welfare, was not a reasonable exercise of the police power); *Cusack Co. v. City of Chicago*, 242 U.S. 526, 530 (1917) (allowing a majority of residents in neighborhood to waive a general prohibition on billboards upheld as reasonable exercise of the police power because the residents would be giving more rights to the business than would otherwise exist); *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121 (1928) (a general prohibition on houses for the poor and aged that could be waived only by two-thirds of nearby residents invalidated as

satisfying the private-nondelegation doctrine is not enough—that would merely show that the officer in question is an inferior rather than a principal officer.

This petition is the only one involving HISA that will allow this Court to harmonize the private-nondelegation doctrine with the Appointments Clause.

C. The Authority is not a self-regulatory organization.

Respondents invoke the Maloney Act and FINRA, which has been described as a private self-regulatory organization (SRO). But tradition matters when Congress formalizes a genuinely private association’s regulation of its members. *See Consumers’ Research*, 606 U.S. at 695. HISA did not formalize a longstanding system of private membership regulation. It installed a newly organized corporation as the exclusive national regulator of an industry historically governed by States. Even today, alternative SROs are permissible in the securities industry. 15 U.S.C. §§ 78o, 78s. Not so under HISA. The Authority has a statutory monopoly on the coercive use of government power within its jurisdiction. It is no different from any other administrative agency.

The Authority’s jurisdiction also does not rest on consensual membership. Federal law makes registration with the Authority a condition of participation in covered racing and binds “all” covered owners, trainers, veterinarians, racetracks, and other participants. 15 U.S.C. §§ 3051(6), 3054(d). Authority rules preempt state law, and its sanctions carry federal legal consequences. *Id.* §§ 3054(b), 3057. Unlike FINRA, the

unreasonable exercise of police power because such homes not a threat to health or safety).

Authority has no members, and industry participants do not elect its Board; its self-perpetuating governance process selects the Directors and their successors.

The Court need not decide FINRA's ultimate constitutional status. The D.C. Circuit's interlocutory decision in *Alpine Securities Corp. v. FINRA*, 121 F.4th 1314 (D.C. Cir. 2024), did not resolve the merits of the Appointments Clause challenge, and this Court denied review at that preliminary stage. 145 S. Ct. 2751 (2025). Judge Walker's separate opinion, however, identified a similar constitutional anomaly: significant executive authority cannot become immune from Article II merely because Congress assigns it to a nominally private regulator. 121 F.4th at 1338-1347 (Walker, J., concurring in the judgment in part and dissenting in part).

Whatever questions FINRA may present, they are no reason to deny review here. HISA's purpose-built regulator, exclusive jurisdiction, compulsory reach, state-law preemption, and comprehensive coercive powers make this the clearest possible case for applying the Appointments Clause.

III. THIS CASE IS THE RIGHT VEHICLE FOR AN EXCEPTIONALLY IMPORTANT QUESTION.

Three features make review especially appropriate: every side seeks certiorari from the same judgment; this is the only case and petition that preserved the Appointments Clause question; and an extant circuit split leaves a nationwide regulatory scheme in constitutional uncertainty.

A. Every side seeks this Court’s review.

The Authority and federal Respondents seek review of the Fifth Circuit’s enforcement ruling. The NHBPA parties and Texas seek review of rulings sustaining other portions of HISA. Petitioners seek review of the Appointments Clause ruling. Although the questions differ, no party defends the judgment as a satisfactory final resolution. Granting the related petitions together would allow the Court to resolve both HISA’s constitutional classification and the consequences for its rulemaking and enforcement structure.

B. This is the only case that preserved the Appointments Clause issue.

The Sixth Circuit noted that the challengers there litigated HISA as a private delegation and did not develop an Appointments Clause claim. *Oklahoma*, 163 F.4th at 314-315. The Eighth Circuit’s former opinion in a preliminary posture was vacated after *Consumers’ Research* and has not been replaced. 145 S. Ct. 2870 (2025). Only Petitioners pleaded the officer-status theory, developed a trial record, obtained a final judgment, preserved the issue on appeal, and secured an appellate ruling after this Court’s GVR.

There is no vehicle defect. The Appointments Clause question is purely legal. Both lower courts reached it. Petitioners include covered persons whom the district court said “will be regulated and subject to assessments,” App. 107a, and the Fifth Circuit resolved the merits. Because an unconstitutionally appointed Board presently makes rules and oversees enforcement, the structural injury is ongoing; Petitioners need not provoke a sanction before challenging it. See *Free Enterprise Fund*, 561 U.S. at 490-491. Indeed, they are presently injured because

they cannot simulcast their races without the threat of the agency's enforcement. ROA.4592-4595.

The posture is unusually clean. This Court has already identified the broader private-administration problem, vacated the prior judgment, and directed reconsideration. The Fifth Circuit then adhered to its Appointments Clause holding and said that only this Court could accept Petitioners' position. App. 48a n.29. Further percolation cannot move an inferior court past what it believes is an issue this Court must resolve.

C. The circuit split and national stakes warrant immediate resolution.

The Fifth Circuit has declared HISA's enforcement provisions facially unconstitutional; the Sixth Circuit has upheld them. *Compare* App. 15a-40a, *with Oklahoma*, 163 F.4th at 310-316. The disagreement concerns the same congressional statute and nationwide regulator. Regulated parties face different constitutional rules depending on forum, while the Authority operates under a stayed mandate and continuing uncertainty.

The Appointments Clause question is antecedent to that split. If the Directors are officers, the present Board cannot constitutionally exercise either the rulemaking powers the Fifth Circuit upheld or the enforcement powers it enjoined. Deciding only whether the Authority is sufficiently supervised as a private entity would leave unresolved who may wield its admitted government power. This petition permits a complete answer.

The issue also reaches far beyond HISA. Congress increasingly relies on corporations and other nominally private bodies to administer federal programs. The decision below offers a simple route around appointment

and removal: organize first under state law, select directors privately, and invoke agency oversight when challenged. Review is necessary to prevent such a novel arrangement for circumventing Article II.

CONCLUSION

Distilled to its essence, the constitutional infirmity in Congress's statute is evident. No one would doubt that a statute providing that "John Doe is hereby appointed to execute HISA" would violate the Appointments Clause. A statute providing "John Doe Inc. is hereby appointed to execute HISA" would be equally impermissible. And yet that is exactly what HISA does. If Congress cannot by statute specify which individual is to execute a statute, it cannot by statute specify which group of individuals is to execute a statute. Only the President and the officers whom he or she appoints are constitutionally permitted to execute the laws. The Court should grant review to resolve the circuit split and the question left open in *Consumers' Research* concerning the relationship between private nondelegation and the Appointments Clause.

The Court should consider this cross-petition together with the related petitions arising from the same judgment, and grant it.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10520

NATIONAL HORSEMEN’S BENEVOLENT AND PROTECTIVE
ASSOCIATION; ARIZONA HORSEMEN’S BENEVOLENT AND
PROTECTIVE ASSOCIATION; ARKANSAS HORSEMEN’S
BENEVOLENT AND PROTECTIVE ASSOCIATION; INDIANA
HORSEMEN’S BENEVOLENT AND PROTECTIVE
ASSOCIATION; ILLINOIS HORSEMEN’S BENEVOLENT AND
PROTECTIVE ASSOCIATION; LOUISIANA HORSEMEN’S
BENEVOLENT AND PROTECTIVE ASSOCIATION;
MOUNTAINEER PARK HORSEMEN’S BENEVOLENT AND
PROTECTIVE ASSOCIATION; NEBRASKA HORSEMEN’S
BENEVOLENT AND PROTECTIVE ASSOCIATION;
OKLAHOMA HORSEMEN’S BENEVOLENT AND
PROTECTIVE ASSOCIATION; OREGON HORSEMEN’S
BENEVOLENT AND PROTECTIVE ASSOCIATION;
PENNSYLVANIA HORSEMEN’S BENEVOLENT AND
PROTECTIVE ASSOCIATION; WASHINGTON HORSEMEN’S
BENEVOLENT AND PROTECTIVE ASSOCIATION; TAMPA
BAY HORSEMEN’S BENEVOLENT AND PROTECTIVE
ASSOCIATION; GULF COAST RACING, L.L.C.; LRP
GROUP, LIMITED; VALLE DE LOS TESOROS, LIMITED;
GLOBAL GAMING LSP, L.L.C.; TEXAS HORSEMEN’S
PARTNERSHIP, L.L.P.,

Plaintiffs—Appellants,

STATE OF TEXAS; TEXAS RACING COMMISSION,

Intervenor Plaintiffs—Appellants,

versus

2a

JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN;
MD NANCY COX; JOSEPH DUNFORD; FRANK KEATING;
KENNETH SCHANZER; HORSERACING INTEGRITY AND
SAFETY AUTHORITY, INCORPORATED; FEDERAL TRADE
COMMISSION; COMMISSIONER NOAH PHILLIPS;
COMMISSIONER CHRISTINE WILSON; LISA LAZARUS;
STEVE BESHEAR; ADOLPHO BIRCH; ELLEN MCCLAIN;
CHARLES SCHEELER; JOSEPH DEFRANCIS; SUSAN
STOVER; BILL THOMASON; LINA KHAN, *Chair*; REBECCA
SLAUGHTER, *Commissioner*; ALVARO BEDOYA,
Commissioner; D. G. VAN CLIEF,
Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC Nos. 5:21-CV-71, 5:23-CV-77

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Before KING, DUNCAN, and ENGELHARDT, *Circuit Judges.*

STUART KYLE DUNCAN, *Circuit Judge:*

Last year, the Supreme Court vacated our decision in *National Horsemen’s Benevolent & Protective Association v. Black (Horsemen’s II)*, 107 F.4th 415 (5th Cir. 2024), and remanded “for further consideration in light of *FCC v. Consumers’ Research*, 606 U.S. [656] (2025).” *Horseracing Integrity & Safety Auth., Inc. v. Nat’l Horsemen’s Benevolent & Protective Ass’n*, 145 S. Ct. 2837 (2025) (mem.). The parties have filed supplemental briefs helpfully addressing this question.

We conclude *Consumers’ Research* does not affect our prior decision, which we reissue below.¹ In a new section, *infra* Part III(B)(6), we explain why *Consumers’ Research* does not change our analysis of the private nondelegation question presented in this case.

INTRODUCTION

We again consider constitutional challenges to the Horseracing Integrity and Safety Act of 2020 (“HISA” or the “Act”). In HISA, Congress empowered a private corporation—the Horseracing Integrity and Safety Authority (“Authority”)—to create and enforce nationwide rules for thoroughbred horseracing. In our first foray into HISA, we held the Act facially unconstitutional under the private nondelegation doctrine because the Authority’s rulemaking was not subordinate to the Federal Trade Commission (“FTC”). *See Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black (Horsemen’s I)*, 53 F.4th 869 (5th Cir. 2022). At the time, we did not consider a separate nondelegation challenge to the Authority’s enforcement power. Congress responded to our decision by amending HISA, giving the FTC power to abrogate, add to, or modify the Authority’s rules.

On remand, the district court held the amendment cured HISA’s constitutional deficiencies because the FTC now has general rulemaking power over the Authority’s activities. It also rejected claims raised by a new plaintiff, Gulf Coast Racing LLC (“Gulf Coast”), that HISA violates the Constitution’s Appointments Clause because the Authority wields significant governmental authority. The plaintiffs all appealed,

¹ We add a handful of footnotes to clarify a few matters and also to discuss sister-circuit decisions issued after *Horsemen’s II*. *See infra* nn. 7, 12, 17, 19, 22, 23.

arguing HISA is still constitutionally deficient under the private nondelegation doctrine, the Due Process Clause, the Appointments Clause, and the Tenth Amendment.

Just as we concluded in our now-vacated *Horsemen's II* opinion, we agree with nearly all of the district court's well-crafted opinion. Specifically, we agree that the FTC's new rulemaking oversight means the agency is no longer bound by the Authority's policy choices. In other words, the amendment solved the nondelegation problem with the Authority's rulemaking power. We also agree that HISA does not violate the Due Process Clause by putting financially interested private individuals in charge of competitors. Further, we agree that, under current Supreme Court precedent, *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), the Authority does not qualify as a government entity subject to the Appointments Clause. Finally, we agree that plaintiff Gulf Coast lacks standing to bring its Tenth Amendment challenge.

After the Supreme Court's remand, we still disagree with the district court in one important respect, however: HISA's enforcement provisions violate the private nondelegation doctrine. The statute empowers the Authority to investigate, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the FTC's say-so. That is forbidden by the Constitution. We therefore DECLARE that HISA's enforcement provisions are facially unconstitutional on that ground. In doing so, we part ways with our esteemed colleagues on the Sixth Circuit. *See Oklahoma v. United States (Oklahoma I)*, 62 F.4th 221 (6th Cir. 2023); *Oklahoma v. United States (Oklahoma II)*, 163 F.4th 294 (6th Cir. 2025) (both rejecting

nondelegation challenge to HISA’s enforcement provisions).

Accordingly, the district court’s judgment is AFFIRMED in part and REVERSED in part.

I. BACKGROUND

A. HISA Framework

In 2020, HISA created a framework for enacting and enforcing nationwide rules governing doping, medication control, and racetrack safety in the thoroughbred horseracing industry. *See* 15 U.S.C. § 3054(a). *See generally Horsemens I*, 53 F.4th at 873–75. To “develop[] and implement[]” these rules, HISA empowers a “private, independent, self-regulatory, nonprofit corporation, to be known as the ‘Horseracing Integrity and Safety Authority,’” subject to the “oversight” of the FTC. §§ 3052(a), 3053.

Under HISA, the Authority writes all the rules—that is, rules fleshing out the substantive areas covered by HISA, as well as rules governing investigation, adjudication, and sanctions.² The Authority submits proposed rules to the FTC, which publishes them for public comment. § 3053(b)(1), (c)(1). Rules take effect only after FTC approval, which must occur within 60 days of publication. § 3053(c)(1). The FTC “shall approve” a proposed rule if it finds the rule “consistent” with the Act and with “applicable rules approved by the [FTC].” § 3053(c)(2). Originally, this

² *See* § 3057(a)(1), (c)(1) (power to establish substantive rules governing medication controls); § 3056(a)(1) (power to establish racetrack safety rules); §§ 3054(c), 3057(c) (power to “develop uniform procedures and rules” governing investigations and adjudications that afford due process); § 3057(d) (power to establish civil sanctions); § 3054(c), (h) (investigatory and subpoena powers).

“consistency review” did not allow the FTC to reject a proposed rule based on its disagreement with the Authority’s policy choices. *Horsemen’s I*, 53 F.4th at 884–87. In *Horsemen’s I*, we held that this arrangement violated the private nondelegation doctrine by making a private entity superior to a government agency. *Ibid.* In response, Congress amended HISA to give the FTC power to “abrogate, add to, and modify” the Authority’s rules. § 3053(e).

The Authority also has the power to enforce HISA. It does so by (1) exercising “subpoena and investigatory authority,” § 3054(h); (2) imposing civil sanctions, §§ 3054(i), 3057; and (3) filing civil actions seeking injunctions or enforcement of sanctions, § 3054(j). The actual work of enforcing HISA involves a further delegation to other entities, however. For instance, HISA directs the Authority to contract enforcement of doping and medication rules to a private non-profit, the U.S. Anti-Doping Agency (“USADA”), or other comparable entity. § 3054(e)(1)(A), (B). The Authority’s proposed partnership with USADA ultimately did not pan out. Instead, the Authority partnered with Drug Free Sport International, which operates as the Horseracing Integrity and Welfare Unit (“HIWU”).

HIWU then acts as “the independent . . . enforcement organization” for those rules, “implement[s]” HISA’s anti-doping programs, and exercises related powers “including independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations.” § 3054(e)(1)(E)(i), (iii), (iv); § 3055(c)(4)(B).³ HIWU’s decisions on such matters

³ Similarly, the Authority may contract out enforcement of the racetrack safety program to “State racing commissions” or “other

“shall be the final decision or civil sanction of the Authority,” subject to *de novo* review by an administrative law judge (“ALJ”) and the FTC. § 3055(c)(4)(B); § 3058.

B. Procedural History

Horsemen’s I concluded that HISA’s delegation of rulemaking power was facially unconstitutional. HISA delegated rulemaking power to a private organization (the Authority) whose policy choices could not be second-guessed by the agency (FTC). The Authority’s rulemaking powers were therefore not subordinate to the FTC, meaning HISA facially violated the private nondelegation doctrine. *Horsemen’s I*, 53 F.4th at 872. We did not consider the plaintiffs’ distinct nondelegation challenges to the Authority’s investigative and enforcement powers nor their due process claims. *Id.* at 890 n.37. Finally, as noted, Congress responded to *Horsemen’s I* by empowering the FTC to “abrogate, add to, and modify” the Authority’s rules. § 3053(e).

On remand, the National Horsemen’s Association (“Horsemen”) and Texas continued to press their private nondelegation claims, arguing Congress’s amendment did not actually subordinate Authority rulemaking to the FTC. They also continued to press their nondelegation challenge to the Authority’s enforcement powers (as well as their due process claims). In addition, a new plaintiff, Gulf Coast Racing LLC (“Gulf Coast”), raised separate challenges to HISA in a different division of the same district. *See Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black (Black II)*, 672 F. Supp. 3d 220, 224–25 (N.D. Tex. 2023). Gulf Coast claimed (1) HISA’s directors qualify

State regulatory agencies.” § 3054(e)(2), (3); *see also* § 3056 (discussing racetrack safety program).

as “officers of the United States” and are therefore subject to Article II’s appointment and removal requirements; and (2) HISA commandeers Texas in violation of the Tenth Amendment. Gulf Coast’s suit was consolidated with the remanded *Horsemen’s I* case. *Id.* at 230–31. Following a one-day bench trial, the district court rejected all the plaintiffs’ claims.

As to private nondelegation, the district court followed the Sixth Circuit’s decision in *Oklahoma I*, 62 F.4th 221. The district court reasoned that Congress’s amendment empowering the FTC to “abrogate, add to, and modify” proposed rules “cured the constitutional issues identified by [*Horsemen’s I*]” by making the Authority’s rulemaking power “subordinate” to the FTC. *Black II*, 672 F. Supp. 3d at 241, 243–44 (citing *Oklahoma I*, 62 F.4th at 230, 232). As to the separate challenge to the Authority’s enforcement powers, the district court largely relied on its previous order rejecting the claim because those powers “comport with due process.” *See id.* at 248 (quoting *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black (Black I)*, 596 F. Supp. 3d 691, 725 (N.D. Tex. 2022)). The court also relied on the fact that the FTC could review civil sanctions and control enforcement through rulemaking. *Id.* at 248–49 (citing *Black I*, 596 F. Supp. 3d at 725–26); *see also Oklahoma I*, 62 F.4th at 231. Finally, the court rejected the due process claims because the Horsemen failed to show the Authority’s directors have financial interests in regulating competitors. *Black II*, 672 F. Supp. 3d at 252.

As to Gulf Coast’s claims, the district court concluded that our *Horsemen’s I* decision required it to reject them. Specifically, the court reasoned that *Horsemen’s I* necessarily decided the Authority was a private entity, and so its directors were not subject to

the Appointments Clause. *Id.* at 234–37. Alternatively, the court reasoned that the Authority is private because “it is not government created, and its directors are not government appointed.” *Id.* at 234 (citing *Lebron*, 513 U.S. 374). Finally, the court rejected the Tenth Amendment anti-commandeering argument for lack of standing. *Id.* at 249–50.

Accordingly, the district court entered final judgment dismissing all claims. The Horsemen, Texas, and Gulf Coast timely appealed.

II. STANDARD OF REVIEW

We review the district court’s legal conclusions following a bench trial *de novo*. *Deloach Marine Servs., L.L.C. v. Marquette Transp. Co., L.L.C.*, 974 F.3d 601, 606 (5th Cir. 2020). To prevail on their facial challenge, the plaintiffs “must show that no set of circumstances exists under which [HISA] would be valid.” *Horsemen’s I*, 53 F.4th at 878 (cleaned up).

III. DISCUSSION

The various plaintiffs raise these issues on appeal:

(A) Did Congress’s amendment to HISA cure the private nondelegation problem with the Authority’s rulemaking powers?

(B) Do the Authority’s enforcement powers separately violate the private nondelegation doctrine?

(C) Does HISA violate due process by permitting self-interested industry participants to regulate their competitors?

(D) Are the Authority’s directors subject to the Appointments Clause?

(E) Does HISA violate the Tenth Amendment’s anti-commandeering rule by forcing States to administer a federal program?

We consider each issue in turn.

A. Private Nondelegation Challenge to Authority’s Rulemaking

We previously discussed the origins of the private nondelegation doctrine in *Horsemen’s I*. See *id.* at 880–81. In essence, the doctrine teaches that “a private entity may wield government power only if it ‘functions subordinately’ to an agency with ‘authority and surveillance’ over it.” *Id.* at 881 & n.21 (citing *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021)); *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128 (3d Cir. 1989).⁴ Or, as our sister circuit has explained: “Congress may formalize the role of private parties in proposing regulations so long as that role is merely as an aid to a government agency that retains the discretion to approve, disapprove, or modify them.” *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp. (Amtrak I)*, 721 F.3d 666, 671 (D.C. Cir. 2013) (cleaned up) (quoting *Adkins*, 310 U.S. at 388), *vacated and remanded on other grounds*, *Dep’t of Transp. v. Ass’n of Am. R.Rs. (Amtrak II)*, 575 U.S. 43 (2015).

In *Horsemen’s I*, we ruled the Authority’s rulemaking power was an unconstitutional private delegation. Our analysis focused on the fact that the Authority’s proposed rules were subject only to the FTC’s limited “consistency review,” which did not permit the agency

⁴ See also generally *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Curran v. Wallace*, 306 U.S. 1, 15–16 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

to second-guess the Authority’s policy choices. *See Horsemen’s I*, 53 F.4th at 882–87. In response, Congress amended HISA to provide that:

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

15 U.S.C. § 3053(e). This new provision was borrowed from the Maloney Act, which allocates authority between the Securities and Exchange Commission (“SEC”) and private, self-regulatory organizations (such as the Financial Industry Regulatory Authority (“FINRA”)). *See Oklahoma I*, 62 F.4th at 231–32. Although HISA was originally modeled on the Maloney Act, it lacked this provision until the recent amendment. *See* Consolidated Appropriations Act, Pub. L. No. 117-328, div. O, tit. VII, § 701, 136 Stat. 4459, 5231–32 (2023). As noted, the district court followed the Sixth Circuit in ruling that the amendment cured the nondelegation problem with the Authority’s rulemaking power. *See Black II*, 672 F. Supp. 3d at 241–45 (citing *Oklahoma I*, 62 F.4th at 230, 232).

We agree with the district court and the Sixth Circuit that the amendment cured the nondelegation defect identified in *Horsemen’s I*. That defect lay in the agency’s being at the mercy of the Authority’s policy choices. *See Horsemen’s I*, 53 F.4th at 872 (“[T]he FTC concedes it cannot review the Authority’s policy

choices.”). For instance, when the Authority issued rules on the kinds of horseshoes permitted during races, the FTC told objecting commenters it lacked the power to question the Authority’s views. *See id.* at 885 & n.29 (discussing FED. TRADE COMM’N, ORDER APPROVING THE ENFORCEMENT RULE PROPOSED BY THE HORSERACING INTEGRITY AND SAFETY AUTHORITY 26 (Mar. 25, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P222100HISAOrderRacetrackSafety.pdf [<https://perma.cc/G3VQ-JPJR>]). The amendment has corrected that imbalance. Now, the FTC may “abrogate, add to, and modify” the Authority’s rules. § 3053(e). So, unlike before, if the FTC now disagrees with the policies reflected in the Authority’s rules, it may change them. *See Oklahoma I*, 62 F.4th at 230 (noting recent rule explaining that FTC’s “new ‘rulemaking power’ allows it to ‘exercise its own policy choices’” (quoting FED. TRADE COMM’N, ORDER RATIFYING PREVIOUS COMMISSION ORDERS AS TO HORSERACING INTEGRITY AND SAFETY AUTHORITY’S RULES 3 (Jan. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/HISA%20Order%20re%20Ratification%20of%20Previous%20Orders%20-%20Final%20not%20signed.pdf [<https://perma.cc/44BK-37A9>])). As the Sixth Circuit correctly observed, “§ 3053(e)’s amended text gives the FTC ultimate discretion over the content of the rules,” which “makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one.” *Ibid.* (citing *Adkins*, 310 U.S. at 388).

Appellants’ arguments to the contrary do not persuade us.

First, the Horsemen argue the Authority remains superior because it continues to write the rules in the first place and the agency must approve them if they hurdle the low bar of consistency review. We disagree.

The problem was never that the private entity proposed the rules; the problem was that the agency lacked power to second-guess them once they were proposed. *See Horsemen's I*, 53 F.4th at 884 (“The FTC’s oversight is too limited to ensure the Authority functions subordinately to the agency.” (cleaned up) (quoting *Adkins*, 310 U.S. at 399)). Now the FTC has been given that power: it can “abrogate” or “modify” Authority rules it disagrees with. § 3053(e). And that new power gives consistency review new bite. Previously, consistency review “*exclude[d]* . . . the Authority’s policy choices in formulating rules.” *Horsemen's I*, 53 F.4th at 885. Now it implicitly includes review of those choices. The FTC must approve only those rules “consistent with . . . applicable rules approved by the [FTC],” and, thanks to the amendment, it is the FTC that has final word over what those rules are. § 3053(c)(2); *see also Oklahoma I*, 62 F.4th at 231 (explaining that “the FTC’s later authority to modify *any* rules for any reason at all, including policy disagreements, ensures that the FTC retains ultimate[] authority over the implementation of the Horseracing Act”).⁵

⁵ Texas contends § 3053(e) does not solve the nondelegation problem because it gives the FTC only limited rulemaking authority—*i.e.*, “to ensure the fair administration of the Authority.” Because the FTC lacks plenary rulemaking authority, Texas argues, the Authority still effectively calls the shots. We disagree. Section 3053(e) empowers the FTC to engage in rulemaking, not only for specified purposes, but also “otherwise in furtherance of the purposes of [HISA].” This language, borrowed from the Maloney Act, gives the agency “broad authority to oversee and to regulate the rules adopted by the [Authority] . . . , including the power to mandate the adoption of any rules it deems necessary[.]” *Shearson/Am. Express, Inc. v McMahon*, 482 U.S. 220, 233–34 (1987).

Next, the Horsemen argue the FTC's new review power creates a timing problem. Because the FTC may alter only rules "promulgated" by the Authority, § 3053(e), regulated entities may end up being subject to the Authority's rules until the FTC can intervene and fix them. We disagree. The FTC has 60 days to approve or disapprove a proposed rule. § 3053(c)(1). If the FTC is concerned about a proposed rule going into effect, then it can intervene and create safeguards to prevent that from happening. *See* § 3053(a) (requiring Authority to submit proposed rules to the FTC "in accordance with such rules as the [FTC] may prescribe"). For instance, the agency could adopt a rule postponing the effective date of a newly enacted rule. *See Oklahoma I*, 62 F.4th at 232 (suggesting this). Or the agency could engage in emergency rulemaking to delay the effective date of a rule. In any event, these are hypothetical problems that, if they arise, can be addressed in as-applied challenges. *See Hersh P. U.S. ex rel. Mukasey*, 553 F.3d 743, 762 (5th Cir. 2008) (holding that "as-applied challenges are preferred"). This is a facial challenge, however, and we cannot say that a potential timing gap in FTC's § 3053(e) review makes HISA unconstitutional in all its applications. *See United States P. Salerno*, 481 U.S. 739, 745 (1987) (holding that a facial challenger "must establish that no set of circumstances exists under which the Act would be valid").⁶

⁶ The Horsemen also argue that the Authority can circumvent the FTC by issuing unreviewable guidance documents, such as dear colleague letters. We disagree. The Authority admits such guidance would not have the force of law and, even if it did, the FTC has authority to review guidance documents, § 3054(g)(2), and to promulgate a rule overruling guidance it disagrees with.

Finally, the Horsemen point to the SEC's supervisory authority over private self-regulatory organizations like FINRA. They argue that, notwithstanding § 3053(e), the FTC still has less sway over the Authority than the SEC does over FINRA. We again disagree. We previously pointed out that the "key distinction" between the FTC and the SEC was the FTC's lack of general rulemaking power. *See Horsemen's I*, 53 F.4th at 887–88. "The SEC itself," we explained, "can make changes to FINRA rules, but the FTC can only recommend changes to the Authority's rules." *Id.* at 888 (citation omitted). But Congress has now amended HISA to give the FTC the same general rulemaking authority that the SEC has with respect to FINRA. *See Oklahoma I*, 62 F.4th at 225, 229 (reaching this conclusion).

In sum, we agree with the district court and the Sixth Circuit that, in light of Congress's amendment to HISA in § 3053(e), the Authority's rulemaking power is subordinate to the FTC's. Because the FTC has ultimate say on what the rules are, the Authority's power to propose horseracing rules does not violate the private nondelegation doctrine.

B. Private Nondelegation Challenge to Authority's Enforcement

Appellants next argue that, apart from its rulemaking powers, the Authority's enforcement powers violate the private nondelegation doctrine. Recall that the Authority enforces HISA by levying sanctions, which are ultimately subject to FTC review, and by bringing lawsuits. The Authority also has power to investigate potential violations, although the actual investigatory work is contracted to other private organizations, such as HIWU in the case of doping rules, or to state racing commissions in the case of

racetrack safety rules. *See supra* Part I(A). Our *Horsemen’s I* decision did not address this challenge to the Authority’s enforcement powers, *see* 53 F.4th at 890 n.37, and on remand the district court treated it as a due process claim and rejected it, *see Black II*, 672 F. Supp. 3d at 248–49. Appellants now bring the claim to us, arguing that the Authority’s enforcement power is not subordinate to FTC oversight.

1.

Before addressing the merits of this claim, we must address the Authority’s argument that it is premature. Arguing both in terms of standing and ripeness, the Authority contends that it has not yet tried to enforce HISA against the Horsemen and that any challenge to the Authority’s enforcement power can be raised if and when it does. We disagree for several reasons.

First, the Authority misunderstands the Horsemen’s claim. They do not challenge some particular enforcement action undertaken by the Authority—claiming, for instance, that the Authority issued an overbroad subpoena for medical records or lacked probable cause to search a racetrack.

Instead, the Horsemen argue that HISA, on its face, vests the Authority with enforcement power that is effectively unreviewable by the agency. When a regulated entity raises “a purely legal challenge” like this one, “it is unnecessary to wait for the Regulation to be applied in order to determine its legality.” *Contender Farms, L.L.P. v. U.S. Dep’t of Agric.*, 779 F.3d 258, 267 (5th Cir. 2015) (cleaned up); *see also Nat’l Env’t Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1008 (D.C. Cir. 2014) (“Petitioner’s challenge in this case presents a purely legal question It is unnecessary to wait for the [statute] to be applied in

order to determine its legality.”); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014) (“Nothing in this Court’s decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.”).

Second, the Horsemen have a cognizable injury for standing purposes. Pursuant to HISA, they have already had to agree “to be subject to and comply with the [Authority’s] rules, standards, and procedures”—including rules requiring they cooperate with investigations, consent to searches, and comply with subpoenas. *See* 15 U.S.C. § 3054(c)–(f). In other words, the Horsemen are themselves “objects of the Regulation,” and so “there is ordinarily little question” that they have standing to challenge it. *Contender Farms*, 779 F.3d at 264–65 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992)). And courts typically do not require a regulated party to “bet the farm” by violating a regulation before allowing it to test its validity. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010); *see also, e.g., Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991) (explaining that a separation-of-powers challenge to a board’s veto powers was “ripe even if the veto power ha[d] not been exercised to respondents’ detriment”).

Finally, the record shows several instances in which the Authority has enforced HISA against the Horsemen. For example, the Authority has threatened one of the Horsemen’s members with sanctions if it did not repair a racetrack railing. Additionally, the Authority has both threatened and actually barred member racetracks in Texas from broadcasting races out of state because they failed to register with the Authority. More generally, the Horsemen represent

some 30,000 members and, when the parties filed their briefs, the Authority’s website already listed hundreds of enforcement actions—and that number has now grown to over 3,000.⁷ So, at a minimum, the Horsemen have shown a credible threat that the Authority will bring enforcement actions against their members in the future. *See Driehaus*, 573 U.S. at 164.

In sum, the Horsemen have standing to challenge the Authority’s enforcement powers and that challenge is ripe. We proceed to the merits.

2.

The Horsemen’s (as well as Texas’s) basic contention is that HISA grants the Authority enforcement power that is effectively unreviewable by the FTC. That claim turns on the same standard as the challenge to the Authority’s rulemaking addressed in *Horsemen’s I*: the delegation is constitutional if, when enforcing HISA, the Authority “‘functions subordinately’ to an agency with ‘authority and surveillance’ over it.” 53 F.4th at 881 (quoting *Rettig*, 987 F.3d at 532). In other words, the Authority may constitutionally enforce HISA only if it acts “as an aid” to the FTC, which “retains the discretion to approve, disapprove, or modify” the private entity’s enforcement actions. *Ibid.* (cleaned up) (quoting *Amtrak I*, 721 F.3d at 671).⁸

⁷ See generally *Rulings*, HORSERACING INTEGRITY & SAFETY AUTH., <https://portal.hisapps.org/public-rulings> [<https://perma.cc/24TV-7NV3>] (last visited June 3, 2026) (listing 3,307 enforcement rulings)

⁸ As explained in *Horsemen’s I*, the D.C. Circuit’s *Amtrak I* decision was vacated only because the Supreme Court found Amtrak was a governmental, as opposed to private, entity. 53 F.4th at 881 n.22 (citing *Amtrak II*, 575 U.S. at 46, 50–55). The D.C. Circuit’s private nondelegation analysis, however, remains

While the constitutional standard is the same, the nature of the delegated authority is different this time around. *Horsemen's I* addressed delegation of legislative authority—the power to make rules. See *Myers v. United States*, 272 U.S. 52, 186 (1926) (McREYNOLDS, J., dissenting) (“The essence of the legislative authority is to . . . prescribe rules for the regulation of the society[.]”). Logically, we focused on which actor—government agency or private entity?—had final say over the content of those rules. See *Horsemen's I*, 53 F.4th at 884–87 (analyzing FTC’s lack of authority over the Authority’s policy choices). Today, by contrast, we address delegation of executive authority. The power to launch an investigation, to search for evidence, to sanction, to sue—these are all quintessentially executive functions.⁹ And they have

sound and has been approved by our court. See *id.* at 881 (explaining that *Amtrak I* “expressed the [private nondelegation doctrine] more precisely” than prior formulations).

⁹ See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”); *Morrison v. Olson*, 487 U.S. 654, 696 (1988) (reasoning “the power to initiate an investigation” is executive power that must be subject to the Attorney General’s “unreviewable discretion”); *Buckley v. Valeo*, 424 U.S. 1, 138, 140 (1976) (per curiam) (concluding the “discretionary power to seek judicial relief” and “conduct[] civil litigation in the courts of the United States for vindicating public rights” are exercises of Article II executive power); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 225 (2020) (holding the CFPB director unconstitutionally exercised “executive power” to “set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties”); *id.* at 219 (holding the “power to seek daunting monetary penalties against private parties . . . [is] a quintessentially executive power”); *Free Enter. Fund*, 561 U.S. at 504 (holding the “power to start, stop, or alter individual Board investigations” is part of the executive power); *Collins v. Yellen*,

been considered so from our Nation’s founding.¹⁰ As much as legislative power, the private nondelegation doctrine forbids unaccountable delegations of executive power. *See, e.g., Amtrak II*, 575 U.S. at 62 (ALITO, J., concurring) (“Private entities are not vested with ‘legislative Powers.’ Art. I, § 1. Nor are they vested with the ‘executive Power,’ Art. II, § 1, cl. 1, which belongs to the President.”). Accordingly, we must determine

594 U.S. 220, 254 (2021) (holding the power “to issue subpoenas” is an “executive power”); *id.* at 289 (SOTOMAYOR, J., concurring in part and dissenting in part) (noting “the power to impose fines” is an “executive power”); *id.* at 287 (arguing the FTC had significant executive power because it had “wide powers of investigation” and “broad authority to issue complaints and cease-and-desist orders” (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 620–21 (1935))); *United States v. Grubbs*, 547 U.S. 90, 98 (2006) (describing a search as an “exercise of executive power”); *California v. Acevedo*, 500 U.S. 565, 586 (1991) (STEVENS, J., dissenting) (“The Fourth Amendment is a restraint on Executive power.”).

¹⁰ *See generally* Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1545 (2015) (discussing “[c]ertain types of tasks that seem quintessentially executive,” including “the tasks of law enforcement—that is, of forcing compliance with the law”); *id.* at 1546 (“Ratification-era history further supports the understanding that law enforcement consists of forcing compliance or imposing sanctions on law violators.” (citing THE FEDERALIST No. 21, at 134–35 (Alexander Hamilton) (Clinton Rossiter ed., 1961))); Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1764 (2023) (“Law execution was the executive power’s principal component.”); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 737 (“Executive officers investigate, apprehend, and prosecute potential lawbreakers. As the wielder of the executive power, the president is the chief of these law enforcement executives.”); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 146–47 (2020) (arguing that law enforcement and prosecution powers have been considered core executive functions since the Founding).

whether HISA delegates enforcement power to private entities and, if so, whether that power is subordinate to the FTC.

HISA divides enforcement authority among the FTC, the Authority, and HIWU, “each within the scope of their powers and responsibilities under this chapter.” § 3054(a). Recall that HIWU is the private non-profit to whom the Authority must delegate anti-doping and medication enforcement. *See* § 3054(e)(1)(B).¹¹ So, the answer to the question before us turns on what “powers and responsibilities” each of these three entities has under HISA. Although HISA somewhat confusingly disperses the relevant provisions throughout the Act, we can discern the following division of labor.

First, the Authority has responsibility for (1) investigating potential violations, including by issuing subpoenas (§ 3054(h)); (2) levying sanctions (§§ 3054(j)(1), 3057, 3058(a)); and (3) bringing suit against violators for injunctive relief or to enforce sanctions (§ 3054(j)(1)–(2)). Second, actual enforcement of doping and medication rules is done by HIWU, which “implement[s]” those rules “on behalf of the Authority.” § 3054(e)(1)(E)(i). In this regard, HIWU’s responsibilities include “independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations.” § 3055(c)(4)(B); *see also* § 3054(e)(1)(E)(iv). Third, the FTC may ask an ALJ to review any sanction *de novo*,

¹¹ The Authority also “may enter into agreements” with State racing commissions to enforce the racetrack safety program. *See* § 3054(e)(2)(A)(i), (3); § 3056(c). The Authority remains in charge, however, and dictates the “scope of work, performance metrics, reporting obligations, budgets, and any other matter [it] considers appropriate.” § 3054(e)(2)(B).

§ 3058(b)(1), and the FTC may itself review the ALJ's decision *de novo*, either on its own motion or upon petition by an aggrieved party, § 3058(c).

The Act's plain terms permit only one conclusion: HISA is enforced by a private entity, the Authority. The Authority decides whether to investigate a covered entity for violating HISA's rules. The Authority decides whether to subpoena the entity's records or search its premises. The Authority decides whether to sanction it. And the Authority decides whether to sue the entity for an injunction or to enforce a sanction it has imposed. To be sure, the Authority does not perform these functions itself. Rather, HISA requires the Authority to contract with another private entity, HIWU, which undertakes enforcement "on behalf of the Authority." § 3054(e)(1)(E)(i). The bottom line, though, is that a private entity, not the agency, is in charge of enforcing HISA.

Consider also what HISA does not say. It does not empower the FTC to decide whether to investigate a covered entity, whether to subpoena its records, whether to search its premises, whether to charge it with a violation, or whether to sanction or sue it. Nor does the Act empower the FTC to countermand any of the Authority's investigatory or charging decisions (or, more precisely, HIWU's decisions). Nor does it require the Authority or HIWU to seek the FTC's approval before investigating, searching, charging, sanctioning, or suing. All these actions are enforcement actions, and, by the plain terms of the Act, they can be done by the private entities without the FTC's involvement.

The inescapable conclusion is that the Authority does not "function subordinately" to the FTC when enforcing HISA. *Horsemen's I*, 53 F.4th at 881. That is not permitted under the private nondelegation doctrine.

A private entity that can investigate potential violations, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the say-so of the agency—does not operate under that agency’s “authority and surveillance.” *Ibid.* Put another way, with respect to enforcement, HISA’s plain terms show that the Authority does not merely act “as an aid” to the FTC because the FTC does not “retain[] the discretion to approve, disapprove, or modify” the Authority’s enforcement actions. *Ibid.* (cleaned up) (quoting *Amtrak I*, 721 F.3d at 671).

3.

One might counter, though, that the FTC at least partially supervises the Authority because it can review sanctions at the back end, after ALJ review. *See* §§ 3055(c)(4)(B), 3058(b)(3)–(c)(3). That is true, and it is the Authority’s best argument for why its enforcement power is subordinate to the FTC.

The argument nonetheless fails. Suppose the Authority sanctions a horse owner for a doping violation, but the sanction is later reversed by the FTC. Does that make the Authority’s enforcement power subordinate to the agency? No, it does not. Consider everything the Authority was permitted to do up to that point: launch an investigation into the owner, subpoena his records, search his facilities, charge him with a violation, adjudicate it, and fine him.¹² Each and every one of those actions is “enforcement” of HISA.

¹² Not only does HISA facially permit that, but it has already happened. For example, in one FTC appeal, it is uncontested that three private Authority investigators showed up at the appellant’s residence and served her with a notice of an alleged doping violation (there is no personal service requirement under the statute). The investigators then “subjected [the appellant] to

Each can occur under HISA without any supervision by the FTC. Moreover, penalties imposed by the Authority are not automatically stayed pending appeal. *See* 16 C.F.R. § 1.148(a) (2022). So, any penalty goes into effect as soon as the Authority makes its decision, unless the ALJ or FTC exercises its discretion to implement a stay pending appeal. *See* § 3058(d).

It is no answer to say that the FTC can come in at the tail-end of this adversarial process and review the sanction. As far as enforcement goes, the horse was already out of the barn. (You knew that was coming.)

a coercive interrogation in a small room” and searched “her barn and . . . her mother’s car” for banned substances. Statement of Contested Facts and Specification of Additional Evidence, *In re Lynch*, 2024 WL 1111724 (F.T.C.), at *2, Dkt. No. 9423. She was then fined \$55,000 and banned from racing for 48 months. *Id.* at *3. She later settled with the Authority, and the case was dismissed. Order of Withdrawal from Review by the Administrative Law Judge, *In re Lynch*, 2024 WL 4298917 (F.T.C.), Dkt. No. 9423. Authority investigators have also searched defendants’ property and extracted fines under HISA’s strict liability regime for possession of banned substances. For example, one veterinarian forgot to clean out his trailer and still had two buckets of a newly banned substance two weeks after the effective date. Private Authority investigators searched his trailer, found the buckets, fined him \$5,000, and banned him from practice for 14 months. The ALJ affirmed on appeal. All this despite the fact that the Authority and the ALJ conceded that the appellant purchased the substance long before it was banned, forgot it was in his trailer, and did not even attempt to use it on a horse. The appellant petitioned the FTC to review the decision. That petition was denied. Decision of the Commission on Application for Review Under 15 U.S.C. § 3058, *In re Perez*, 2024 WL 3824065 (F.T.C.), Dkt. No. 9420; *see also* Administrative Law Judge Decision on Application for Review, *In re Poole*, 2023 WL 8435860 (F.T.C.), Dkt. No. 9417 (affirming an \$18,000 fine and banning him from practice for 22 months for a similar inadvertent possession of a newly banned substance).

Besides, what if the sanctioned owner, instead of fighting the process, opts to settle for a lower fine? *See, e.g., In re Lynch*, 2024 WL 4298917 (F.T.C.), Dkt. No. 9423 (dismissing case due to settlement). In that case, according to the Authority’s logic, *no one* has enforced HISA. That is obviously not true. To the contrary, the settlement scenario—which will likely happen often—only underscores that it is the private entity that acts as HISA’s enforcer in any meaningful sense.

Consider a hypothetical. Suppose a city structures its speeding laws to let a group of private car enthusiasts monitor speeds with their own radar guns, pull speeders over, and ticket them. Fines are reviewed by the police department and, ultimately, the mayor. Who *enforces* the speeding laws? Anyone would say the private group. After all, consider how many cases we decide concerning whether the police have wrongly stopped someone or used excessive force during the stop. *See, e.g., Terrell v. Town of Woodworth*, No. 23-30510, 2024 WL 667690 (5th Cir. Feb. 19, 2024) (*per curiam*). All would agree that the police were “enforcing” the law when they stopped the person. The same goes for the private entity in the hypothetical.

The Authority’s argument, moreover, does not work even on its own terms. In addition to levying fines, HISA empowers the Authority to sue people and racetracks to enjoin past, present, or impending violations. *See* § 3054(j)(1) (providing “the Authority may commence a civil action against a covered person or racetrack that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter . . . to enjoin such acts or practices”); § 3054(j)(2) (allowing issuance of “a permanent or temporary injunction or restraining order . . . without bond”). HISA gives the FTC no role in this process,

either before or after the fact. So, even assuming the Authority is correct (and it is not) that the agency's after-the-fact supervision of sanctions makes the Authority subordinate, the Authority is demonstrably *not* subordinate when it comes to suing violators for injunctions. That is plainly an unsupervised delegation of executive power that the Constitution does not tolerate. *See Buckley*, 424 U.S. at 138 (“A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts [this] responsibility[.]”).

4.

The Authority next argues that the FTC could use its new rulemaking authority to rein in the Authority's enforcement actions or even require the Authority to preclear lawsuits with the agency. *See* § 3053(e) (empowering FTC to “abrogate, add to, and modify” the Authority's rules). This argument persuaded the Sixth Circuit that at least a *facial* challenge to the Authority's enforcement powers should fail. *See Oklahoma I*, 62 F.4th at 231 (through § 3053(e) rulemaking, “the FTC *could* subordinate every aspect of the Authority's enforcement,” which “suffices to defeat a facial challenge”). And we have already found that the FTC's rulemaking power has some purchase in turning back a facial challenge to the Authority's *rulemaking* power: as explained, the agency could ensure via rulemaking that no Authority rule could go into effect until the agency had time to review it. *See supra* Part III(A). With great respect to our colleagues on the Sixth Circuit, however, we are not convinced that this rulemaking argument can save the Authority's enforcement powers.

The Authority's rulemaking argument would let the agency rewrite the statute. In HISA, Congress set out

a definite enforcement scheme, dividing responsibilities among the FTC, the Authority, and HIWU. *See* § 3054(c)(1), (e). HISA is quite clear about this: it provides that those three entities “implement and enforce” the Act, “*each within the scope of their powers and responsibilities under this chapter.*” § 3054(a)(1) (emphasis added). A mere agency cannot alter that statutory division of labor. *See, e.g., Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020) (“We will not defer to ‘an agency interpretation that is inconsistent with the design and structure of the statute as a whole.’” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014))); 5 U.S.C. § 706(2)(C) (authorizing courts to set aside agency action “in excess of statutory jurisdiction, authority, or limitations”).¹³ As the Supreme Court recently

¹³ *See also Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473 (2001) (holding that agency rulemaking “has no bearing upon” whether a statutory delegation is constitutional); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6–7 (2000) (“Where a statute names the parties granted the right to invoke its provisions, such parties only may act.” (cleaned up)); *Bayou Lawn & Landscape Servs. v. Sec’y of Lab.*, 713 F.3d 1080, 1084–85 (11th Cir. 2013) (holding it “axiomatic that an agency’s power to promulgate legislative regulations is limited to the authority delegate[d] to it by Congress” and that courts cannot “locate . . . power in one agency where it had been specifically and expressly delegated by Congress to a different agency”); *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 863 F.3d 816, 823 (8th Cir. 2017) (finding express delegation to the Federal Railroad Administration precluded implied authority claimed by the private Board); *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam) (“We agree with the general proposition that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor[.]”); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 509 (2014) (relying on the statute’s “plain text and

reiterated, even “statutory permission to ‘modify’ does not authorize ‘basic and fundamental changes in the scheme’ designed by Congress.” *Biden v. Nebraska*, 600 U.S. 477, 494 (2023) (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994)). Yet that is just what the Authority says the FTC could do through rulemaking.

Take the Authority’s power to seek injunctions. HISA empowers the Authority to file suit to enjoin violations, while saying nothing about FTC involvement in the process. *See* § 3054(j)(1). Yet the Authority suggests the FTC could, by rule, require the Authority to preclear any such action with the agency. We disagree. That would let the agency amend the enforcement scheme delineated by statute.¹⁴ The same goes for investigatory and subpoena power: HISA unqualifiedly gives that power to the Authority, *see* § 3054(h), and then requires the Authority to delegate it to HIWU, *see* §§ 3054(e)(1)(E)(iv), 3055(c)(4)(B) (the Authority “shall” contract with HIWU to “conduct and oversee” anti-doping and medication enforcement “including independent investigations”). And the same goes for charging and adjudicating violations and levying sanctions. *See ibid.* (the Authority “shall” contract with HIWU to “conduct and oversee . . . charging and adjudication of potential medication

structure [to] establish a clear chronology of federal and State responsibilities” (quotation omitted)).

¹⁴ Nor could the Authority claim that the statute is merely silent about FTC pre-approval and that gap could be filled by rulemaking. Our circuit has repeatedly rejected this “nothing-equals-something argument” for conjuring agency authority out of thin air. *Gulf Fishermens*, 968 F.3d at 460–61 (citing *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015), *aff’d by an equally divided court*, 579 U.S. 547 (2016) (per curiam)).

control rule violations, and the enforcement of any civil sanctions for such violations”); § 3054(j) (recognizing the Authority’s power to impose “civil sanctions”). Congress enacted this reticulated scheme. The agency cannot amend it by promulgating a rule.

Furthermore, when Congress wanted to put the FTC in charge of enforcement, it knew how. Section 3059, for instance, is a separate part of HISA targeting certain “unfair or deceptive” practices in selling horses.¹⁵ With respect to *that* section, the Authority can only “recommend” that the FTC “commence an enforcement action.”¹⁶ § 3054(c)(1)(B). In other words, only here did Congress limit the Authority’s enforcement discretion to “recommending” agency enforcement. *Cf.* § 3054(j)(1) (providing “the Authority may commence a civil action” seeking an injunction). Yet the Authority contends that the agency could, by rulemaking, make *every* enforcement action subject to similar FTC approval. That would rewrite the enforcement scheme Congress enacted. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally

¹⁵ *See* § 3059 (deeming it an unfair or deceptive practice under 15 U.S.C. § 45(a) to fail to disclose to a buyer that a horse was administered “a bisphosphonate” before its fourth birthday or any other prohibited substance).

¹⁶ *See* § 3054(c)(1)(B) (providing the “Authority . . . with respect to an unfair or deceptive act or practice described in section 3059 of this title, may recommend that the Commission commence an enforcement action”).

and purposely in the disparate inclusion or exclusion.” (cleaned up)).¹⁷

Additionally, the Sixth Circuit believed the FTC could supervise the Authority through a slightly different kind of rulemaking—that is, by issuing rules governing *how* the Authority enforces HISA. See *Oklahoma I*, 62 F.4th at 231. For instance, the agency could issue rules against “overbroad subpoenas or onerous searches” or “provid[ing] a suspect with a full adversary proceeding and with free counsel.” *Ibid.* Unhappily, we again disagree with our sister circuit.

The Horsemen are not complaining about *how* the Authority exercises its enforcement power. They are complaining about *where* the enforcement power is lodged: on its face, HISA empowers private entities to enforce it and permits agency oversight only after the enforcement process is over and done with (and then only with respect to fines, not injunctions). If the Horsemen were objecting only to overbroad subpoenas, unwarranted searches, or lack of free counsel, perhaps those complaints could be addressed through rulemaking or as-applied challenges. But their complaint is different. They contend that HISA facially delegates unsupervised enforcement power to private actors. They are right. See *Salerno*, 481 U.S. at 745 (recogniz-

¹⁷ Following our original *Horsemen’s II* decision, a split panel of the Eighth Circuit disagreed with us on this point. See *Walmsley v. Fed. Trade Comm’n*, 117 F.4th 1032, 1039–40 (8th Cir. 2024). In partial dissent, Judge Gruender agreed with our view. See *id.* at 1041–44 (GxUENnEx, J., concurring in part and dissenting in part). The Supreme Court subsequently vacated the Eighth Circuit’s judgment and remanded for further consideration in light of *Consumers’ Research*. See 145 S. Ct. 2870 (2025) (mem.). The Eighth Circuit has not yet issued a decision on remand.

ing challengers shoulder a “heavy burden” to demonstrate facial invalidity when they “establish that no set of circumstances exists under which the Act would be valid”).¹⁸

In sum, HISA’s clear delineation of enforcement power between the FTC, the Authority, and HIWU cannot be altered through rulemaking.

5.

Finally, the Authority defends its enforcement role by analogizing it to the role of self-regulatory organizations (“SROs”)—specifically, FINRA—which assist the SEC in enforcing securities laws. The Authority seeks support in circuit cases concluding that FINRA’s enforcement role presents no private nondelegation problem. *See, e.g., Oklahoma I*, 62 F.4th at 229, 232 (gathering cases).¹⁹ For their part, the

¹⁸ Moreover, consider the revealing premise of this line of argument. Suppose the FTC issued a rule saying, “The Authority can search racetracks only if it has probable cause.” Well and good, but that rule still presupposes *the Authority* is the one doing the search. Merely because the Authority would have to obey the Fourth Amendment does not change the fact that a private entity is searching your racetrack without agency say-so. And it is no answer to say that the agency could issue a rule saying, “The Authority can search racetracks only if the FTC approves the search.” That rule, as explained, would amend the statute’s division of authority. *See* § 3054(h) (“The Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.”).

¹⁹ The Sixth Circuit relied on several cases upholding the constitutionality of FINRA to hold that “[i]n case after case, the courts have upheld [the Maloney Act’s] arrangement, reasoning that the SEC’s ultimate control over the rules and their enforcement makes the SROs permissible aides and advisors.” *Oklahoma I*, 62 F.4th at 229. We do not read those cases quite so broadly. They relied largely on the grounds that the SEC

Horsemen argue that, for enforcement purposes, the FTC–Authority relationship is meaningfully different from the SEC–FINRA relationship. As we have before noted, HISA was modeled on the Maloney Act, which created FINRA. *See Horsemen’s I*, 53 F.4th at 887; *supra* Part III(A). Moreover, we concluded in *Horsemen’s I* that HISA lacked a key feature of the Maloney Act empowering the SEC to “abrogate, add to, and delete” rules proposed by FINRA. *Horsemen’s I*, 53 F.4th at 887. As discussed, Congress added a similar provision to HISA, which remedied the nondelegation problem with the Authority’s rulemaking powers. *Supra* Part III(A).

We agree with the Horsemen that, for enforcement purposes, HISA gives the Authority an enforcement role meaningfully different from FINRA’s. Unlike the SEC–FINRA relationship, HISA does not give the FTC potent oversight power over the Authority’s enforcement such as the power to enforce HISA itself, deregister the Authority as the enforcing entity, or remove its directors.

To begin with, Congress empowered the SEC to enforce FINRA’s rules if needed. The SEC can “in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate” the Maloney Act. 15 U.S.C. § 78u(a)(1). The SEC can also,

ultimately approves any proposed rules and has its own generalized rulemaking power. *See, e.g., R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 696 (2d Cir. 1952) (considering only whether the SEC abused its discretion); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977) (considering only a nondelegation challenge to the SEC’s legislative rulemaking authority); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (same); *Sorrell v. SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982) (same). But none addressed a nondelegation challenge to executive power.

on its own accord, seek criminal sanctions, injunctive relief, or disgorgement. § 78u(c), (d), (d)(4). The FTC cannot. *See* § 3054(c)(1)(A)(iii) (granting the Authority investigatory power); § 3054(e) (granting the Authority and HIWU enforcement responsibility). The SEC has power to issue subpoenas, *see* §§ 77s(c), 78u(c), while HISA gives the Authority that power, § 3054(h), (c)(1)(A)(ii). The SEC can also revoke FINRA’s ability to enforce its rules, § 78s(g)(2), and step in and enforce any written rule itself, § 78o(b)(4). HISA gives the FTC none of these tools.

Moreover, HISA diverges radically from the Maloney Act in empowering the Authority to sue. The SEC alone has the power to bring civil suits, §§ 78u-1(a)(1), 78u(d)(1), while HISA gives that power exclusively to the Authority, § 3054(j)(1). Giving a private entity the sole power to sue in federal court to enforce a statute cuts to the core of executive power. *See Buckley*, 424 U.S. at 138 (“A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts [this] responsibility[.]”).²⁰

²⁰ One may reasonably ask whether HISA’s delegation of enforcement authority is supported by an analogous delegation in qui tam statutes. We think not. The Horsemen note our decision in *Riley v. St. Luke’s Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001) (en banc), where we held that the False Claims Act (“FCA”) does not violate Article I’s Take Care Clause. They argue that *Riley* does not support HISA’s delegation because qui tam relators are episodic and do not have a continuing relationship with the government. That is true, but we see a more fundamental distinction between the two statutes: under the FCA, the executive branch has substantial power over qui tam relators that the FTC does not have over the Authority. For example, the United States can intervene in any qui tam litigation, take control of the litigation, veto settlement

Finally, the SEC “retains formidable oversight power to supervise, investigate, and discipline [FINRA] for any possible wrongdoing or regulatory missteps.” *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 101 (2d Cir. 2007). The FTC does not. This “formidable” power is manifest in the SEC’s ability to derecognize FINRA’s regulatory role entirely, § 78s(a)(3), (h)(1); remove FINRA board members for cause, § 78s(h)(4); remove any individual FINRA member, § 78s(h)(2); and bar any person from associating with FINRA, § 78o-3(g)(2). HISA, on the other hand, “recognize[s] for purposes of developing and implementing” the Act only “[t]he private, independent, self-regulatory, nonprofit corporation, to be known as the ‘Horseracing Integrity and Safety Authority.’” § 3052(a). And only the Authority’s Board can remove members: directors by a two-thirds vote and committee members for any reason.²¹

6.

We now consider whether the Supreme Court’s recent *Consumers’ Research* decision impacts our private nondelegation analysis in this case.

Consumers’ Research addressed challenges to a federal law tasking the Federal Communications Commission (“FCC”) with providing affordable communications services throughout the United States. The law required telecom carriers to pay quarterly into a

agreements, and dismiss the suit “notwithstanding the objections of the [relator].” *Id.* at 753–54. HISA gives the FTC none of those powers.

²¹ In saying all this, we express no opinion on whether the SEC–FINRA relationship poses any constitutional issues under the private nondelegation doctrine (or any other doctrine). Such questions are not posed by this case.

Universal Service Fund (“USF”), which would be distributed to underserved populations. A “contribution factor,” devised by the FCC, would set each carrier’s USF share. *See Consumers’ Rsch.*, 606 U.S. at 664, 666–67, 668; 47 U.S.C. §§ 151, 254.

Much of *Consumers’ Research* addressed whether the law improperly delegated legislative power to the FCC (*i.e.*, a “public” nondelegation challenge). *See* 606 U.S. at 672–91. The Supreme Court held it did not. In brief, the Court explained that Congress had placed sufficiently “intelligible” guardrails around the FCC’s exercise of its assigned powers. *See id.* at 680–91; *see generally J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (asking whether Congress enacted “intelligible principle[s]” to guide an agency’s exercise of delegated authority).

The part of *Consumers’ Research* relevant here concerned a separate challenge to the FCC’s appointment of a private organization—the Universal Service Administrative Company (the “Administrator”)—to manage the USF. *Consumers’ Rsch.*, 606 U.S. at 669. Among other tasks, the Administrator produced the financial projections the FCC used to determine carriers’ quarterly USF contribution. *Id.* at 669–70. The Administrator’s role was challenged as the delegation of legislative power to a private organization. *Id.* at 692. The Court rejected this challenge. *Id.* at 692–95.

Drawing on its earlier precedents, the Court reaffirmed the basic idea that a federal agency can delegate power to a private organization only if it functions “subordinately” to the agency. *Ibid.* (first citing *Carter Coal*, 298 U.S. 238; and then citing *Adkins*, 310 U.S. 381). The Court summarized the doctrine this way: “As long as an agency . . . retains

decision-making power, it may enlist private parties to give it recommendations.” *Id.* at 692.

Applying that standard, the Court held the Administrator’s role was permissible. The Administrator was “broadly subordinate to the [FCC]” because (1) the FCC appointed the Administrator’s board and approved its budget; (2) the Administrator engaged in “no policy-making” but was “just doing arithmetic”; (3) the Administrator had to carry out all tasks consistent with FCC directives; and (4) the FCC could review the Administrator’s actions *de novo*. *Id.* at 693. Critically, the FCC always had “a chance to review—and, if needed, to revise” the Administrator’s projections before approving them. *Id.* at 694; *see also id.* at 695 (observing the Administrator’s projections could not “go into effect without [the FCC’s] say-so”). In sum, the FCC “alone” had decision-making authority, while the Administrator played only an “advisory role.” *Id.* at 693. Accordingly, the Court concluded the FCC’s “transfer of accounting functions to the Administrator” was proper because “[i]n every way that matters to the constitutional inquiry, the [FCC], not the Administrator, is in control.” *Id.* at 695.

For the following reasons, we conclude the private nondelegation analysis in *Consumers’ Research* does not change the outcome in this case.

a.

To begin with, *Consumers’ Research* articulated the same private nondelegation doctrine we applied before (and now reapply). An agency, the Court explained, may “rely on advice and assistance from private actors,” provided they remain “broadly subordinate” to the agency’s “authority and surveillance.” *Id.* at 692. That doctrinal formulation is identical to our own:

“[A] private entity may wield government power only if it functions subordinately to an agency with authority and surveillance over it.” *Horsemen’s II*, 107 F.4th at 423 (internal citations omitted). Indeed, the Court drew on the same precedents we did. *Compare Consumers’ Rsch.*, 606 U.S. at 692 (discussing *Schechter Poultry*, 295 U.S. 495; *Carter Coal*, 298 U.S. 238; *Adkins*, 310 U.S. 381), *with Horsemen’s II*, 107 F.4th at 423 n.4 (citing same cases); *see also Horsemen’s I*, 53 F.4th at 880–81 (same).

So, *Consumers’ Research* did not alter the doctrine, whose touchstone remains the same it has always been—namely, whether the private organization is “subordinate” to a superintending agency.

b.

Nor does the Court’s application of the doctrine to the USF Administrator change our conclusion in this case about the Authority’s enforcement powers. As we held before and now reaffirm, in exercising those powers, the Authority does not function subordinately to the FTC.

To see why, just compare the private actors in the two cases. In *Consumers’ Research*, the Administrator played merely an “advisory role,” leaving the FCC “alone” with “decision-making authority.” *Id.* at 693. The Administrator only recommended how to calculate the contribution factor—but its advice could not go into effect until the FCC reviewed it, revised it if necessary, and gave the final “say-so.” *Id.* at 693–95. This arrangement meant “the [FCC], not the Administrator, [wa]s in control.” *Id.* at 695.

The Authority wields power of an entirely different color. HISA gives the Authority (and its secondary private partner) power to investigate, subpoena, sue,

and sanction covered entities. *See Horsemen's II*, 107 F.4th at 429. The FTC is given no statutory authority to approve, review, or countermand any of the Authority's investigatory, prosecutory, or adjudicatory decisions. *Ibid.* All of that enforcement, according to HISA's "plain terms," "can be done by the private entities without the FTC's involvement." *Ibid.*; *see generally supra* Parts I(A), III(B)(2).

True, the FTC has some back-end review over the Authority's enforcement actions. *See supra* Part III(B)(3) (discussing §§ 3055(c)(4)(B), 3058(b)(3)–(c)(3)). So, one might ask: isn't that like the "*de novo* review" exercised over the Administrator by the FCC? *See Consumers' Rsch.*, 606 U.S. at 693. No, it is not. As the Supreme Court explained, nothing the USF Administrator does respecting the contribution factor has any "legal (or, indeed, practical) effect" until the agency "decides [it] should." *Id.* at 694. Contrast that with the Authority, which is empowered to launch numerous intrusive enforcement actions—investigations, subpoenas, searches, charges, adjudications—all without any agency oversight.²²

²² This is where we continue to differ with the Sixth Circuit. On remand, *see Oklahoma v. United States*, 145 S. Ct. 2836 (2025) (mem.), our sister circuit reaffirmed its holding that the Authority's enforcement powers are subordinate to the FTC. *See Oklahoma II*, 163 F.4th 294. Specifically, *Oklahoma II* relied on the agency's *de novo* review of Authority sanctions. *Id.* at 311. But we have already explained why that review comes far too late to constitute genuine oversight of the Authority's wide-ranging enforcement powers—such as investigations and subpoenas. *See supra* Part III(B)(3). In addition, we have previously explained why the FTC's § 3053(e) rulemaking authority cannot amend the statutory allocation of power between the agency and the Authority, *see supra* Part III(B)(4), another point on which we part ways with our Sixth Circuit colleagues. *Cf. Oklahoma II*, 163

All that is to say: *Consumers' Research* only reinforces our previous conclusion. By exercising a raft of unsupervised enforcement actions that go far beyond the USF Administrator's "recommendations," it is evident that "the [Authority], not the [FTC], is in control." *Id.* at 695.²³

* * *

In sum, we agree with the Horsemen that the FTC lacks adequate oversight and control over the Authority's enforcement power. HISA's explicit division of enforcement responsibility empowers the Authority with quintessential executive functions and gives the FTC scant oversight until enforcement has already occurred. Such back-end review by the FTC does not subordinate the Authority. And the FTC's general rulemaking power provides no answer because executive rulemaking cannot amend the plain division of enforcement power laid out in HISA's text. Such a radical delegation differs materially from the SEC-FINRA relationship because the FTC lacks any tools to ensure that the law is properly enforced. HISA's

F.4th at 312 (concluding FTC could constrain the Authority's investigatory powers by rule).

²³ Although the point is not strongly contested by the parties on remand, we note that *Consumers' Research* also does not change our previous holding concerning the Authority's rulemaking. *See supra* Part III(A). Texas points out that, unlike in *Consumers' Research*, the FTC neither appoints the Authority's Board nor approves its budget. True, but that feature is outweighed by the far more critical point that the HISA amendments give the agency final say-so over the content of any rule before it ever takes effect. *See supra* Part III(A); *see also Walmsley*, 117 F.4th at 1039; *Oklahoma II*, 163 F.4th at 308 (agreeing with us on this point).

enforcement provisions thus facially violate the private nondelegation doctrine.

C. Due Process Challenge

We turn next to the Horsemen's challenge based on the Fifth Amendment's Due Process Clause. They argue that HISA, both facially and as-applied, deprives them of due process by permitting economically self-interested actors to regulate their competitors. *See Carter Coal*, 298 U.S. at 311 (government violates due process by allowing regulation by "private persons whose interests may be and often are adverse to the interests of others in the same business"). Specifically, the Horsemen contend that *Carter Coal* does not require proof of economic self-interest, only that the private person "may be" adverse to those he regulates. They then argue that several members of the Board and standing committees violate the conflict of interest provisions due to their professions and prior financial interests. Finally, the Horsemen contend that the statute fails to properly protect against self-interested actors because it does not cover financial interests other than interests in a covered horse, as opposed to a racetrack or other facility.

The district court correctly rejected these claims. As to the Horsemen's facial challenge, the court concluded it was defeated by HISA's conflict-of-interest provisions. *See Black II*, 672 F. Supp. 3d at 252. Those provisions prohibit a range of individuals from serving as Board or independent committee members, including individuals with financial interests in, or who provide goods or services to, covered horses; officials, officers, or policy makers for an equine industry; and employees, contractors, or immediate family members of the prior individuals. § 3052(e)(1)–(4).

As to the as-applied challenge, the district court rejected it on the facts. Following a bench trial, the court found the Horsemen relied only on the committee members' biographical information but adduced no other evidence showing their adverse interests, financial or otherwise. *See Black II*, 672 F. Supp. 3d at 252 (“HISA affords sufficient protection through its conflicts-of-interest provisions, and the plaintiffs have not met their burden to show unconstitutional self-dealing by directors, committee members, or others associated with the Authority.”). At most, the court observed that the biographical information may show the members do not qualify as “independent members.” *Ibid.*; § 3052(b)(1)(A) (“[I]ndependent members [must be] selected from outside the equine industry.”). But, as the court pointed out, even assuming that to be true, it says nothing about the members' financial interests. *Black II*, 672 F. Supp. 3d at 252. On appeal, the Horsemen fail to show any error by the district court here.

D. Appointments Clause Challenge

A separate plaintiff, Gulf Coast, challenges the Authority's structure under the Appointments Clause of Article II.²⁴ Recall that Gulf Coast raised this distinct challenge in a suit later consolidated with the Horsemen's. *See id.* at 230. Gulf Coast argues that, for constitutional purposes, the Authority is governmen-

²⁴ The Appointments Clause reads “[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for” but provides “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. Const. art. II, § 2, cl. 2.

tal, not private, and so is subject to the Appointments Clause. This means the Authority’s directors, if they are principal officers, must be appointed by the President with Senate confirmation or, if they are inferior officers, by the President, courts, or department heads according to law. *See Free Enter. Fund*, 561 U.S. at 487–88; *Cochran v. SEC*, 20 F.4th 194, 198 (5th Cir. 2021) (en banc). The Authority’s directors are not appointed in any of these ways,²⁵ and so, if Gulf Coast is right, their appointment would violate Article II.

The Authority and the FTC first respond that we previously decided this question in *Horsemen’s I*. By applying the *private* nondelegation doctrine to the Authority, they argue we necessarily determined the Authority is not governmental for constitutional purposes. The district court took this view as well. *See Black II*, 672 F. Supp. 3d at 234. That is understandable. Challenges based on private nondelegation, on the one hand, and the Appointments Clause, on the other, appear mutually exclusive. For constitutional purposes, an entity is either governmental or not. *See, e.g., Lebron*, 513 U.S. at 378–79; *Amtrak II*, 575 U.S. at 50–51. That is why the Horsemen themselves call Gulf Coast’s claim “fundamentally incompatible” with their private nondelegation challenge. Texas seems to agree, noting that Gulf Coast’s Appointments Clause theory would apply only if “the Court disagree[s]” with its assumption that the Authority is private.

That said, however, we cannot agree that we decided this question in *Horsemen’s I*. The Appointments Clause question was never posed. Party presentation

²⁵ The directors are appointed by the Authority itself. *See* § 3052(d)(3) (Board members are selected by the Authority’s nominating committee).

is a fundamental constraint on appellate decision-making. *See United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) (“Courts . . . wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.” (cleaned up)). The fact is that in *Horsemen’s I*, all parties proceeded on the assumption that the Authority is private for constitutional purposes. *See Horsemen’s I*, 53 F.4th at 875 n.11 (“The Horsemen also claimed HISA was unconstitutional under the . . . Appointments Clause. The district court did not rule on those claims and so they are not before us.”). No one suggested that the Authority might qualify as a government entity or that its directors were subject to the Appointments Clause. So, because we did not settle the question previously, we can address it now. *See Companion Prop. & Cas. Ins. Co. v. Palermo*, 723 F.3d 557, 561 (5th Cir. 2013) (“Appellate powers are limited to reviewing issues raised in, *and decided by*, the district court.” (cleaned up)); *Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 281 (5th Cir. 2001) (“[T]he law of the case doctrine only applies to issues we actually decided[.]”).

The basic premise of Gulf Coast’s argument is that the Authority is part of the federal government for Appointments Clause purposes. *See Amtrak II*, 575 U.S. at 50–51. We of course recognize that HISA calls the Authority private, as does the Authority’s own charter. *See* § 3052(a) (“The private, independent, self-regulatory, nonprofit corporation, to be known as the ‘Horse racing Integrity and Safety Authority,’ is recognized for purposes of developing and implementing [HISA].”); HORSERACING INTEGRITY & SAFETY AUTH., INC., DEL. SEC’Y OF STATE, CERTIFICATE OF INCORPORATION 1 (2020) (“The Corporation is organized and shall be operated as a nonprofit business

league[.]”). But deeming an entity “private” does not settle whether it is legally part of the federal government. Otherwise, the government could evade constitutional restrictions by mere labeling. *See Lebron*, 513 U.S. at 397 (“It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.”). So, we must determine whether the Authority qualifies as part of the federal government for constitutional purposes.

The analysis guiding that inquiry comes from *Lebron*. In that case, the Supreme Court examined “the long history of corporations created and participated in by the United States for the achievement of governmental objectives.” *Id.* at 386.²⁶ The specific question before the Court was whether “Amtrak, though nominally a private corporation, must be regarded as a Government entity for First Amendment purposes.” *Id.* at 383. The answer was yes. That was so, the Court held, because “the Government create[d] [the Amtrak] corporation by special law, for the furtherance of governmental objectives, and retain[ed] for itself permanent authority to appoint a majority of the directors of that corporation.” *Id.* at 399. The Supreme Court and circuit courts have since used *Lebron*’s analysis to discern whether corporations are part of the government for constitutional purposes.²⁷

²⁶ *See also id.* at 386–91 (discussing corporations such as the first and second Banks of the United States, the Panama Railroad Company, the United States Grain Corporation, the Reconstruction Finance Corporation, the Federal Deposit Insurance Corporation, the Communications Satellite Corporation, the Corporation for Public Broadcasting, and the Legal Services Corporation).

²⁷ *See Nebraska*, 600 U.S. at 490–93 (applying *Lebron* to conclude that the Missouri Higher Education Loan Authority is “an instrumentality of Missouri”); *Free Enter. Fund*, 561 U.S. at

Applying *Lebron*, we conclude that the Authority is not a federal instrumentality for purposes of the Appointments Clause.

First, the Authority was not created by the federal government “by special law,” *ibid.*, but was incorporated under Delaware law shortly before HISA’s passage. Contrast this with Amtrak, which “Congress established” by enacting the Rail Passenger Service Act of 1970. *Id.* at 383–84; *see also Nat’l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454 (1985) (observing “Congress established the National Railroad Passenger Corporation, a private, for-profit corporation that has come to be known as Amtrak”).

Second, the Authority was not created to further “governmental objectives,” *Lebron*, 513 U.S. at 399, but instead as a private association to address doping, medication, and safety issues in the thoroughbred racing industry. Again, contrast this with Amtrak, which Congress created “to avert the threatened

486 (citing *Lebron* when referencing parties’ agreement that the Public Company Accounting Oversight Board (“PCAOB”) “is ‘part of the Government’ for constitutional purposes”); *Amtrak II*, 575 U.S. at 54–55 (explaining *Lebron* “provides necessary instruction” and “teaches that, for purposes of Amtrak’s status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress’[s] disclaimer of Amtrak’s governmental status”); *Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152, 158–59 (4th Cir. 2018) (applying *Lebron* to conclude that the Metropolitan Washington Airports Authority (“MWAA”) is not “a federal entity” because “MWAA was not created by the federal government” and “is not controlled by the federal government”); *Montilla v. Fed. Nat’l Mortg. Ass’n*, 999 F.3d 751, 759–61 (1st Cir. 2021) (applying *Lebron* to conclude that Fannie Mae and Freddie Mac are not government actors).

extinction of passenger trains in the United States” and for other goals Congress itself “establish[ed].” *Id.* at 383–84.

Third, the federal government does not “control[] the operation of the [Authority],” nor has it “retain[ed] for itself permanent authority to appoint a majority of the [Authority’s] directors.” *Id.* at 399. To the contrary, the government has no role in appointing the Authority’s Board. Once again, contrast this with Amtrak—where a majority of its directors was appointed by the President. *Id.* at 397–98; *see also Amtrak II*, 575 U.S. at 51 (observing that seven of nine Amtrak board members “are appointed by the President and confirmed by the Senate”); *cf. Free Enter. Fund*, 561 U.S. at 484, 484–85 (noting the PCAOB—despite being statutorily deemed “private”—is a “Government-created, Government-appointed entity,” whose five members are “appointed . . . by the [SEC]”).

Instead of engaging with *Lebron*, Gulf Coast argues that *Lebron*’s analysis is not “the *only* way” to tell whether a corporation is a government instrumentality. That takes too narrow a view of precedent, however. *Lebron* canvassed “the long history of corporations created and participated in by the United States” and set out a detailed analysis to determine whether a particular corporation—despite its designation as “private”—counts as a government instrument for constitutional purposes. *See* 513 U.S. at 386, 386–91. That is precisely the question we must answer with respect to the Authority. How can we, as an inferior court, simply bypass *Lebron*? We cannot.

Gulf Coast tries to offer us a way around *Lebron*, but it is a dead end. Gulf Coast argues that *Lebron* addressed only government-created corporations “that in no way exercised government power.” But *Lebron*

did not limit itself in that way—to the contrary, it relied on cases where Congress turned to private corporations to “accomplish purely governmental purposes.” *Id.* at 395 (quoting *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539 (1946)).²⁸ Furthermore, the corporation actually addressed in *Lebron*—Amtrak—itself exercised regulatory power, as the Supreme Court, the D.C. Circuit, and our court have all recognized. See *Amtrak II*, 575 U.S. at 50 (“Amtrak . . . cannot constitutionally be granted the regulatory power[.]” (citation and quotation omitted)); *Amtrak I*, 721 F.3d at 671 (“No case prefigures the unprecedented regulatory powers delegated to Amtrak.”); *Horsemen’s I*, 53 F.4th at 889 (discussing how Congress gave “regulatory power to the ‘economically self-interested Amtrak’” (citation omitted)).

Gulf Coast also argues that, to determine whether directors of a private entity are “Officers of the United States,” we should focus on their duration in office and the nature of the entity’s power. We disagree. The two principal cases Gulf Coast relies on for this argument addressed whether individuals *already part* of the government should be considered “Officers.” So, *Buckley* examined whether Federal Election Commission appointees wielded “significant authority pursuant to the laws of the United States.” 424 U.S. at 126. And *Lucia v. SEC* applied this same test to SEC ALJs. 585 U.S. 237, 244–45 (2018). Gulf Coast urges us to extend *Buckley* and *Lucia* well beyond their facts to analyze whether persons in a *private* entity are “Officers.” Even

²⁸ See also *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 n.4 (1940) (“The corporations, of course, perform ‘governmental’ functions.” (citation omitted)); *id.* at 522 (“The banking system which Congress thus established embodied a blend of governmental and private purposes.”).

if we were inclined to take that step, however, *Lebron* would remain an insuperable hurdle. As explained, *Lebron* addressed when a private entity qualifies as part of the government for constitutional purposes. That is precisely the question before us. Post-*Lebron*, no case has applied *Buckley* to private actors. Instead, the Supreme Court has repeatedly applied *Lebron* for three decades. *See supra* note 27. We are not at liberty to displace the Supreme Court’s governing framework.²⁹

Finally, Gulf Coast argues that if *Lebron* is the test, then the federal government can simply vest all executive power in a private corporation and avoid the Appointments Clause. This argument ignores the role of the private nondelegation doctrine. The government cannot delegate core governmental powers to unsupervised private parties. *Pittston*, 368 F.3d at 394. A private entity can only act “subordinately to an agency with authority and surveillance over it.” *Horsemen’s I*, 53 F.4th at 881 (quotations omitted). The private nondelegation doctrine thus corrals any attempts to evade *Lebron* by giving unaccountable governmental power to a pre-existing private entity.

In sum, *Lebron* is the governing test to determine whether an entity is private or public and, under that

²⁹ That principle also answers Gulf Coast’s reliance on a 2007 Office of Legal Counsel (“OLC”) opinion. The opinion argued that the Appointments Clause applies to someone with significant and continuing government authority, whether he is a private or a government employee. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 121–22 (2007). If the opinion was suggesting its analysis as an alternative to *Lebron* (a decision, it should be noted, the opinion cited, *see id.* at 121), that is a suggestion only the Supreme Court could act upon, not a circuit court bound by *Lebron*.

test, the Authority is a private entity not subject to Article II's Appointments Clause.

E. Anti-Commandeering Challenge

Finally, we turn to Gulf Coast's argument that HISA unconstitutionally commandeers state officials. The Constitution forbids Congress from "command[ing] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997); *see also New York v. United States*, 505 U.S. 144, 165, 188 (1992). Gulf Coast argues HISA violates that principle by coercing state racing commissions to remit fees to fund the Authority's operations. If state officials refuse, the Authority collects fees directly from covered persons—but, in that event, HISA prohibits the state from imposing taxes or fees to finance the state's own horseracing programs. *See* § 3052(f). This scheme, argues Gulf Coast, "puts a gun to the head of Texas" by coercing state officials to administer a federal program rather than a state program.

The problem with this claim, as the district court pointed out, is that Gulf Coast lacks standing to raise it. Specifically, Gulf Coast's alleged injury—that it prefers Texas's racetrack safety rules to HISA's—is "no injury at all." *Black II*, 672 F. Supp. 3d at 250. As the district court correctly reasoned, "[a] party cannot establish constitutional injury by suggesting that he may be subject to rules that he does not prefer." *Ibid.*; *see also, e.g., Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 91 F.4th 342, 350 (5th Cir. 2024) (holding that "merely being subject to . . . regulations, in the abstract, does not create an injury").

On appeal, Gulf Coast fails to explain how the district court erred. It merely argues that the coercive pressure the funding scheme allegedly places on Texas will lead it to implement HISA's rules rather than the current Texas regulations, which makes Gulf Coast subject to "a new set of unwanted (federal) regulations." Again, though, this does not explain why Gulf Coast experiences an injury sufficient to assert an anti-commandeering challenge to HISA.

IV. CONCLUSION

In sum, we affirm the district court's judgment that (1) Congress's recent amendment to HISA cured the private nondelegation flaw in the Authority's rulemaking power; (2) HISA does not violate due process; (3) the Authority's directors are not subject to the Appointments Clause under *Lebron*; and (4) Gulf Coast lacks standing to challenge HISA on anti-commandeering grounds.

We reverse the district court's judgment in one respect. Insofar as HISA is enforced by private entities that are not subordinate to the FTC, we DECLARE that HISA violates the private nondelegation doctrine.

Accordingly, the district court's judgment is AFFIRMED in part and REVERSED in part.

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APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

No. 5:21-CV-071-H

NATIONAL HORSEMEN’S BENEVOLENT AND
PROTECTIVE ASSOCIATION, *et al.*,

Plaintiffs,

THE STATE OF TEXAS and
THE TEXAS RACING COMMISSION,

Intervenor-Plaintiffs,

v.

JERRY BLACK, *et al.*,

Defendants

MEMORANDUM OPINION AND ORDER

In hopes of standardizing horseracing regulation, the Horseracing Integrity and Safety Act of 2020 (HISA) empowered a private entity to draft nationwide regulations subject to the Federal Trade Commission’s review and approval. In response, the plaintiffs claimed that HISA was unconstitutional because it did not give the FTC meaningful oversight—violating the private-nondelegation doctrine. Although this Court recognized that the plaintiffs’ concerns were legitimate, it construed binding precedent as permitting Congress’s approach in its March 2022 order. The Fifth Circuit disagreed, ex-

plaining that precedent could not justify HISA and that it was unconstitutional because the FTC lacked discretion to approve, disapprove, or modify the proposed regulations. Answering the Fifth Circuit’s call, Congress amended HISA to empower the FTC to “abrogate, add to, and modify” the entity’s regulations. Nevertheless, the plaintiffs continue to allege constitutional violations. But because Congress remedied the offending provisions and brought the law within the Fifth Circuit’s stated requirements, the plaintiffs’ claims fail.

Specifically, after remand, the original plaintiffs continue to claim that HISA violates the private-nondelegation doctrine under Article I and the Due Process Clause. Dkt. No. 116. Texas and the Texas Racing Commission, as intervenor-plaintiffs, raise the same arguments. Dkt. No. 155 at 22–25. Additionally, also after remand, another court transferred a related case to this Court. *Gulf Coast Racing LLC v. Horseracing Integrity & Safety Authority*, No. 2:22-CV-146-Z (N.D. Tex.), Dkt. No. 53. Those plaintiffs make the same private-nondelegation claim, but only as an alternative to their primary claim that HISA violates Article II’s Appointments Clause and Article I’s Vesting Clause. Dkt. No. 136. In their view, the private entity at issue—the Horseracing Integrity and Safety Authority—is, in reality, a public entity subject to the same requirements applicable to all public officers. No. 5:23-CV-077, Dkt. No. 36 at 33. They also allege, albeit briefly, that HISA violates the Tenth Amendment’s anti-commandeering principles by requiring Texas to do the federal government’s bidding. *Id.* at 57.

In light of Congress’s amendment to HISA and the undisputed evidence following a bench trial, each of these arguments falls short. First, the plaintiffs’ private-nondelegation argument reveals too much and is barred by precedent. Previously, the plaintiffs argued that “HISA violates the private nondelegation doctrine because the FTC cannot modify the Authority’s rules.” Dkt. No. 38 at 26. Now that Congress expressly authorizes the FTC to modify the Authority’s rules, the plaintiffs retreat and admit their true view: that there is nothing Congress could do to bring the HISA–Authority arrangement within constitutional bounds. Dkt. No. 182 at 31–33, 37–38. But this argument ignores the long history of the executive branch leveraging—with court approval—expertise from private industry so long as the industry remains subordinate to a supervisory federal agency. *E.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940) (allowing private parties to participate in price setting because the private entities “function[ed] subordinately to the Commission” and because the Commission retained “pervasive surveillance and authority” over the activities of the private parties); *see also Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 386–90 (1995) (detailing the “long history of corporations created and participated in by the United States for the achievement of governmental objectives” beginning in the 18th Century). The Court understands the plaintiffs’ concerns with these arrangements, especially given how long horseracing has been regulated at the local level. But because Congress brought HISA within the Constitution’s limits as defined by the Fifth Circuit, the Court concludes that HISA does not violate the private non-delegation doctrine.

Second, the plaintiffs' facial and as-applied Fifth Amendment Due Process argument fails for the same reasons this Court explained in its first order rejecting it. The Court finds that the Authority is not a self-interested industry competitor creating a constitutional violation. As a facial matter, HISA explicitly protects against self-interest through structural safeguards while preserving industry representation in the Authority. And the as-applied challenge fails because there is no evidence of actual, unconstitutional self-dealing that has harmed industry competitors.

Third, the plaintiffs' appointment and removal arguments fail for a simple reason—the challenged entity at issue (the Authority) is not a public, governmental actor subject to these constitutional limitations. The Fifth Circuit held as much in its panel opinion, so the plaintiffs' assertion otherwise at this point is both contrary to the law of the case and foreclosed by precedent. Moreover, even assuming that the Fifth Circuit left this issue open, precedent makes clear that the Authority is private because it was not created by the government, and it retains for itself permanent authority to appoint its directors.

Finally, the plaintiffs lack standing to raise their Tenth Amendment argument that HISA unconstitutionally commandeers the states. Although private plaintiffs are not automatically barred from bringing Tenth Amendment claims, they must still demonstrate injury that is traceable to the defendant's conduct and redress-able by the Court. But the private plaintiffs have no traceable, redressable injury to assert because HISA allows Texas to either elect to collect fees of covered persons or, if not, the Authority will. HISA allows states to “elect[]” to

assess and collect fees on covered persons. 15 U.S.C. § 3052(f)(2)(A). But if the state does not make such an election, then the Authority steps in to do so. § 3052(f)(3). In this way, covered persons like the Gulf Coast plaintiffs will be regulated and subject to assessments even if they were to succeed on the anti-commandeering claim. Although the private plaintiffs clearly prefer to be regulated by Texas instead of the Authority, the preference alone is insufficient to establish a redress-able injury.

For all these reasons, the Court rejects the plaintiffs' arguments and conclude that Congress cured the unconstitutional aspects of HISA's original approach. Given the parties' desire for an expeditious resolution, the Court's opinion is sufficient to permit appellate review but does not exhaust every possible vein of analysis.¹

1. Findings of Fact

Following remand from the Fifth Circuit, the plaintiffs filed multiple motions for a preliminary injunction. Dkt. Nos. 116; 124; 139. Given the plaintiffs' requests for expedited treatment and temporary emergency relief, the Court consolidated the hearing on the plaintiffs' motions for preliminary injunction with the trial on the merits. Dkt. No. 135; *See also* Fed. R. Civ. P. 65(a)(2). The Court finds the following facts.

¹ As explained *infra* in Parts 1.I through 1.L, the Court is operating on an expedited timeframe. After resolving multiple emergency motions, the Court consolidated these cases on April 11—roughly three weeks ago. Trial was held last week on April 26. Although the ADMC rule's effective date was delayed until May 22 (Dkt. No. 180), the plaintiffs request resolution “as soon as possible.” Dkt. No. 181 at 8.

A. Congress enacts HISA with broad bipartisan support.

American horseracing has existed for centuries, and throughout it “has been regulated by the States, local communities, and private organizations.” *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 53 F.4th 869, 873 (5th Cir. 2022). Although popular even in the colonial era, the growth of American horseracing in the 1850s was met with “a growing interest in the formation of a national governing board to regulate racing.” Joan S. Howland, *Let’s Not “Spit the Bit” in Defense of “The Law of the Horse”: The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS. L. REV. 473, 483 (2004). But it would take more than 170 years for the first national horseracing legislation to be signed into law. *Nat’l Horsemen’s*, 53 F.4th at 873.

After an increase in doping scandals and racetrack fatalities, Congress passed HISA with broad bipartisan support. Pub. L. No. 116-260, §§ 1201-12, 134 Stat. 1182, 3252-75 (2020) (codified at 15 U.S.C. §§ 3051–60). On December 27, 2020, HISA was signed into law. *Id.* For the first time in the long history of American horseracing, HISA established a framework for national regulation of certain aspects of the industry. 15 U.S.C. §§ 3051–60. Specifically, HISA aims to establish nationwide rules over racetrack safety and anti-doping and medication control (ADMC). *Nat’l Horsemen’s*, 53 F.4th at 873. HISA applies to all covered horses (thoroughbreds (§ 3051(4)), covered persons (all trainers, owners, breeders, jockeys, racetracks, and veterinarians, among others (§ 3051(6))), and covered horseraces (those horseraces with a substantial effect on interstate commerce (§ 3051(5))). In other words, “[t]he

Act's reach is broad," and HISA creates a truly nationwide, comprehensive regulatory scheme for racetrack safety and ADMC. *Nat'l Horsemen's*, 53 F.4th at 873.

B. A private entity, the Authority, is incorporated in aid of HISA.

The Authority was incorporated as a nonprofit on September 8, 2020. GPX 6 at 1; No. 5:23-CV-077, Dkt. No. 47 at 5. HISA "recognize[d]" the Authority, a "private, independent, self-regulatory, nonprofit corporation . . . for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces." 15 U.S.C. § 3052(a). HISA prescribes the makeup of the Authority's board of directors, including the number of total directors (nine), independent directors (five), and industry-member directors (four). § 3052(b)(1). The initial directors are chosen by a nominating committee, "comprised of seven independent members . . . set forth in the governing corporate documents of the Authority." § 3052(d). HISA also directs the Authority to establish racetrack-safety and ADMC standing committees. § 3052(c).

C. HISA creates a rulemaking procedure that attempts to allow the Authority to aid the FTC in regulating thoroughbred horseracing.

HISA creates a regulatory framework that allows the Authority to operate in aid of the FTC: The Authority first drafts proposed rules, which are then submitted for FTC approval. § 3053(a). Once a rule is received by the FTC, it goes through notice and com-

ment. § 3053(a)–(b). HISA also requires FTC approval before a proposed rule can take effect. § 3053(b)(2). The FTC is given sixty days to “approve or disapprove the proposed rule or modification,” and the FTC “shall approve” a proposed rule if it is consistent with the statute and applicable rules. § 3053(c).

D. With oversight by the FTC, the Authority is tasked with enforcement.

The Authority is empowered to enforce the rules it aids the FTC in creating by investigating violations, imposing civil sanctions, and suing to enforce sanctions or obtain injunctive relief. §§ 3058(a), 3057(d), 3054(h)–(j). The Authority’s investigatory powers are subject to “uniform procedures” reviewed and approved by the FTC. § 3054(c). All civil sanctions imposed by the Authority are subject to two layers of FTC oversight. First, all civil sanctions are subject to de novo review by an Administrative Law Judge appointed by the FTC. § 3058(b). And the FTC can review de novo the ALJ’s final decision. § 3058(c).

E. The Authority is funded by private parties.

At its initial stage, the Authority is funded by loans. *See* § 3052(f)(1). After that initial stage, the majority of the Authority’s funding will derive from fees collected from covered persons or state racing commissions. § 3052(f)(1)–(4). Any “proposed increase” in fees for covered persons must be reported to the FTC for review and submitted for notice and comment. § 3052(f)(1)(c)(iv).

F. Multiple parties challenge HISA's constitutionality.

This case involves many parties, consisting of the lead-case plaintiffs,² the member-case plaintiffs,³ the intervenor-plaintiffs,⁴ the FTC defendants,⁵ and the Authority defendants.⁶ Both plaintiff groups sued

² The plaintiffs in the lead case are National Horsemen's Benevolent and Protective Association, Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, Nebraska Horsemen's Benevolent and Protective Association, Oklahoma Horsemen's Benevolent and Protective Association, Oregon Horsemen's Benevolent and Protective Association, Pennsylvania Horsemen's Benevolent and Protective Association, Tampa Bay Horsemen's Benevolent and Protective Association, and Washington Horsemen's Benevolent and Protective Association (hereinafter the Horsemen plaintiffs). Dkt. No. 149 at 2–10.

³ The plaintiffs in the member case are Gulf Coast Racing LLC, LRP Group Ltd., Valle de Los Tesoros Ltd., Global Gaming LSP, LLC, and the Texas Horsemen's Partnership LLP (hereinafter the Gulf Coast plaintiffs). Dkt. No. 142 at 7–8.

⁴ The intervenor-plaintiffs are the State of Texas and the Texas Racing Commission. Dkt. No. 155.

⁵ The Authority defendants are Jerry Black, the Horseracing Integrity and Safety Authority, Lisa Lazarus, Steve Beshear, Adolpho Birch, Leonard Coleman, Ellen McClain, Charles Scheeler, Joseph DeFrancis, Susan Stover, Bill Thomason, D.G. Van Clief, Katrina Adams, Nancy Cox, Joseph Dunford, Frank Keating, and Kenneth Schanzner. Dkt. Nos. 142; 149.

⁶ The FTC defendants are the Federal Trade Commission, Lina Khan, in her official capacity as Chair of the Federal Trade Commission, Rebecca Kelly Slaughter, Alvaro Bedoya, Noah Phillips, and Christine Wilson, all in their official capacities as

FTC-related defendants and Authority-related defendants.

G. The Fifth Circuit holds HISA unconstitutional.

In March 2021, the National Horsemen’s Benevolent and Protective Association and twelve of its affiliates (the Horsemen plaintiffs) filed suit against the FTC, its commissioners, the Authority, and the Authority’s Nominating Committee members, challenging HISA’s constitutionality on several grounds. Dkt. No. 1 at 19–26. In due time, the FTC defendants and the Authority defendants separately filed motions to dismiss (Dkt. Nos. 34; 36), and the Horsemen filed a partial motion for summary judgment, seeking declaratory and injunctive relief on their private-nondelegation and due-process claims (Dkt. No. 37). After considering the briefing of the parties and various *amici*, and after oral argument, the Court concluded, based on what it viewed as binding precedent, that HISA did not result in a constitutional violation. *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 596 F. Supp. 3d 691, 725 (N.D. Tex. 2022), *rev’d and remanded*, 53 F.4th 869 (5th Cir. 2022). Thus, the Court denied the partial motion for summary judgment (Dkt. No. 37) and noted that the plaintiffs had abandoned their remaining claims (*Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 728). The Court dismissed the plaintiffs’ complaint (Dkt. No. 23) with prejudice.

On appeal, the Fifth Circuit reversed in a thorough opinion, holding that the FTC-Authority regulatory

Commissioners of the Federal Trade Commission. Dkt. Nos. 142; 149.

scheme was unconstitutional because it gave the FTC too little control over a private entity with regulatory authority. *Nat’l Horsemen’s*, 53 F. 4th at 872. The court explained that “[a] cardinal constitutional principle is that federal power can be wielded only by the federal government.” *Id.* As a result, “a private entity may wield government power only if it ‘functions subordinately’ to an agency with ‘authority and surveillance’ over it.” *Id.* at 881. To explain the concept “more precisely,” the court noted that it is within constitutional bounds for Congress to “formalize the role of private parties in proposing regulations so long as that role is merely ‘as an aid’ to a government agency that retains the discretion to ‘approve[], disapprove[], or modif[y]’ them.” *Id.* (quoting *Ass’n of Am. R.R.s v. Dep’t of Transp. [Amtrak I]*, 721 F.3d 666, 671 (D.C. Cir. 2013)). But “[i]f the private entity does not function subordinately to the supervising agency, the delegation of power is unconstitutional.” *Id.*

Applying these principles, the court held that the Authority was not subordinate to the FTC. *Id.* at 872–73. “An agency does not have meaningful oversight if it does not write the rules, cannot change them, and cannot second-guess their substance.” *Id.* at 872. It was the Authority, not the FTC, that had “the last word over what rules govern our nation’s thoroughbred horseracing industry,” which rendered HISA unconstitutional. *Id.*

Three aspects of HISA and the FTC-Authority relationship led the panel to this conclusion. First, the court noted the Authority’s “sweeping rulemaking power” and observed that “HISA’s generous grant of authority to the Authority to craft entire industry ‘programs’ strongly suggests it is the Authority, not

the FTC,” that is in control. *Id.* at 882–83. Moreover, the court explained that the FTC’s ability to adopt interim final rules did not meaningfully alter the scope of the Authority’s power because such rule-making is narrow and reserved for emergencies. *Id.* at 883.

Second, the court relied on the FTC’s limited power to review proposed rules, which prevented the FTC from reviewing the Authority’s policy choices. *Id.* at 884. The FTC’s review of proposed rules for consistency with HISA was “too limited to ensure the Authority ‘functions subordinately’ to the agency.” *Id.* “[S]uch arms-length review hardly subjects the Authority’s rules to ‘independent’ oversight.” *Id.* at 885. Perhaps more importantly, the court explained that, whatever the FTC’s consistency review would entail, it excludes review of the Authority’s policy choices. *Id.* Similarly, the FTC could not force the Authority to modify those choices; it could only make recommendations to the Authority. *Id.* at 886. “The Act’s division of labor is clear: the Authority writes the rules; the agency may suggest certain changes, but the Authority can take them or leave them.” *Id.*

Finally, the Fifth Circuit noted that HISA’s FTC-Authority relationship was materially different from the Maloney Act’s SEC–FINRA model, which has consistently withstood non-delegation challenges. *Id.* at 887. Although FINRA, like the Authority, “is a private entity empowered to draft and propose regulations” to a federal agency, there was “a key distinction” between the two. *Id.* “Unlike HISA, the Maloney Act empowers the SEC to ‘abrogate, add to, and delete from’ FINRA rules ‘as the [SEC] deems necessary or appropriate[.]’ ” *Id.* (quoting 15 U.S.C. § 78s(c) and citing *Aslin v. Fin. Indus. Regulatory*

Auth., Inc., 704 F.3d 475, 476 (7th Cir. 2013) (observing that the SEC “may abrogate, add to, and delete from all FINRA rules as it deems necessary”). The SEC’s rulemaking power, the court explained, “meaningfully distinguishes the SEC-FINRA relationship from the FTC-Authority relationship.” *Id.* The court recognized that while “FINRA plays an important role in formulating securities industry rules, its role is ultimately ‘in aid of’ the SEC, which has the final word on the substance of the rules.” *Id.* The Authority, in contrast, has the final word on formulating and proposing rules because of “the limits built into the FTC’s oversight.” *Id.* Thus, the Fifth Circuit held that “the FTC’s power to *recommend* modifications is not equivalent to the power to *require* modifications.” *Id.* at 888.

These reasons—combined with the Fifth Circuit’s view that precedent did not require affirmance—led the Court to hold that the Authority was not subordinate to the FTC and, thus, the FTC-Authority structure violated the Constitution’s guarantee against private nondelegation. *Id.* at 890.

H. Congress amends HISA.

Roughly six weeks after the Fifth Circuit’s decision, Congress enacted, and the President signed into law, an amendment to HISA. As amended, § 3053(e) now provides the FTC with authority to “abrogate, add to, and modify the rules of the Authority promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.” 15 U.S.C. § 3053(e). The defendants sought

rehearing in the Fifth Circuit in light of the amendment, but the panel remanded the case to this Court for further proceedings. *Nat'l Horsemen's*, No. 22-10387, Dkt. Nos. 223–24 (5th Cir. Jan. 31, 2023) (denying rehearing and issuing mandate).

I. The plaintiffs allege several post-remand emergencies.

Following remand, the plaintiffs in *National Horsemen's* filed a Motion for a Preliminary Injunction (Dkt. No. 116), asking the Court to enjoin the Authority from implementing and enforcing HISA while the parties dispute whether Congress's recent modification to HISA makes the statute constitutional. *Id.* at 6. The plaintiffs proposed that the Court order an expedited briefing schedule on the motion so the Court could issue its order by March 27, 2023—the date an anti-doping rule was scheduled to (and eventually did) go into effect. Dkt. No. 117. After considering the parties' respective positions, the Court declined to order expedited briefing and instead set a regular briefing schedule. Dkt. No. 121.

On March 27, 2023—the very day that the anti-doping rule was approved and went into effect—the plaintiffs filed their Motion for an Emergency Preliminary Injunction Against the Medication Rule. Dkt. No. 124. The emergency motion focused specifically on the anti-doping rule, alleging that it violated the Administrative Procedure Act. *Id.* The Court ordered expedited briefing for the emergency motion only. Dkt. No. 127. In its order, the Court found that the anti-doping rule issued without the notice required under the APA and delayed the Rule's effective date until May 1, 2023. Dkt. No. 134.

Five days later, the plaintiffs in *Gulf Coast*—a case originally pending in the Amarillo Division—moved for a temporary restraining order and preliminary injunction, seeking to enjoin the defendants from enforcing HISA while the Court resolved the pending dispositive motions. No. 2:22-CV-146-Z, Dkt. No. 50. This case was transferred to the Lubbock Division of this Court because of the substantial overlap of the claims in *Gulf Coast* and *National Horsemen's*, the similarity of the parties, and the likelihood that the evidence involved and objective of the plaintiffs in both cases would be nearly identical. *Gulf Coast*, No. 5:23-CV-077-H, Dkt. No. 53 at 4. After the transfer, the Court denied the motion for temporary restraining order but reserved its ruling on the motion for preliminary injunction. *Gulf Coast*, No. 5:23-CV-077-H, Dkt. No. 59.

J. The plaintiffs bring numerous constitutional claims.

The Court found that *Gulf Coast* and *National Horsemen's* involved “a common question of law or fact” and consolidated the two cases pursuant to Federal Rule of Civil Procedure 42(a)(2). Dkt. No. 135 at 1.

i. Gulf Cost Racing

The Gulf Coast plaintiffs’ operative complaint makes the following constitutional claims: (1) the Authority’s leadership-appointment process violates Article II’s Appointments Clause, (2) the Authority leadership-removal process violates Article II’s Vesting Clause, (3) the Authority’s rulemaking constitutes “a naked delegation” of legislative power, (4) the rulemaking authority that is delegated to the Authority violates the nondelegation doctrine bec-

ause Congress has not supplied an intelligible principle, (5) the delegation of power to the Authority violates the private-nondelegation doctrine, (6) the Authority's power to seek civil penalties from covered persons violates the Seventh Amendment right to a jury trial, (7) the Authority's ability to adjudicate private rights violates Article III, (8) HISA's elect-or-preempt provision violates the Tenth Amendment's guarantee that the federal government cannot command States to enforce federal law, and (9) HISA Rule 8400, which requires covered persons to consent to inspection as a condition of registration, violates the Fourth Amendment. Dkt. No. 142.

At the April 18, 2023 pretrial conference, the parties discussed with the Court the possibility that the claims might be narrowed in advance of trial. Dkt. No. 163 at 16–17. During the conference, the Gulf Coast plaintiffs indicated they were abandoning an argument related to the breed-expansion authority, which they called a sub-claim of the private-nondelegation challenge. *Id.* at 13. The next day, the Gulf Coast plaintiffs filed an advisory that they would be willing to abandon “Claims 3-4 (public nondelegation), Claim 6 (Seventh Amendment), Claim 7 (Article III), and Claim 9 (Fourth Amendment),” provided the defendants would not hold that abandonment against them in another case or in an enforcement proceeding. Dkt. No. 161. The defendants filed a notice advising that they agreed to these conditions (Dkt. Nos. 164; 165), so the Gulf Coast plaintiffs have abandoned their third, fourth, sixth, seventh, and ninth claims.

Thus, the Gulf Coast plaintiffs' remaining claims are:

- An Article I, Section 2, Clause 2 Appointments Clause challenge (Claim 1)

- An Article II, Section 1 removal challenge (Claim 2)
- A private-nondelegation challenge (Claim 5),⁷ and
- An anti-commandeering challenge under the Tenth Amendment (Claim 8).

ii. National Horsemen's

The Horsemen plaintiffs' Original Complaint (Dkt. No. 1) and First Amended Complaint (Dkt. No. 23)—which was the operative complaint when the Court previously heard the defendants' motions to dismiss and the plaintiffs' partial motion for summary judgment—included an intelligible-principle claim and an Appointments Clause claim, but those were recognized as abandoned in the Court's memorandum opinion and order (Dkt No. 92 at 60 (“The plaintiffs abandoned their Appointments Clause claim (Claim II) and public non-delegation claim (Claim III), so they are dismissed.”)).

The Horsemen plaintiffs' live complaint (Dkt. No. 149) asserts that HISA violates the Constitution in three claims, none of which are abandoned:

- Delegation of legislative powers to a private entity in violation of Article I, Section 1,
- Delegation of executive powers to a private entity in violation of Article II, Section 1, and

⁷ The plaintiffs do not identify the constitutional source of this claim. Dkt. No. 142 at 45–49. The Fifth Circuit noted that “[c]ourts and commentators differ over the locus of the constitutional violation” (*Nat'l Horsemen's*, 53 F.4th at 881 n.23), but the parties do not dispute that such a violation is cognizable under the Constitution, so the Court does not reach this question.

- A violation of the Fifth Amendment’s Due Process Clause—alleging that self-interested industry participants are given regulatory power over their competitors.

iii. The intervenor-plaintiffs

The claims in the intervenor-plaintiffs’ operative complaint mirror those in the Horsemen plaintiffs’ complaint. The intervenor-plaintiffs assert that HISA violates the constitution in two claims:

- Delegation of legislative and executive powers to a private entity under Article I, Section I and Article II, Section II, and
- Violation of the Due Process Clause because self-interested industry participants regulate their competitors.

K. Multiple motions are currently pending.

Pending before the Court is the Horsemen plaintiffs’ Motion for a Preliminary Injunction (Dkt. No. 116). Also before the Court is the Gulf Coast plaintiffs’ Motion for Summary Judgment (Dkt. No. 136) and Motion for a Preliminary Injunction (Dkt. No. 139); the Authority Defendants’ Motion to Dismiss (Dkt. No. 137); and the FTC Defendants’ Motion for Summary Judgment (Dkt. No. 138).

The Horsemen plaintiffs’ Motion for Preliminary Injunction (Dkt. No. 116) asserts that HISA is facially unconstitutional on three bases: First, the Horsemen argue that “the Authority is not subordinate when exercising legislative powers.” *Id.* at 8. They argue that the Authority is delegated with rulemaking authority, more so (according to the plaintiffs) than other permissible private delegations. *Id.* at 8–9. They also argue that, post-amendment,

HISA still requires the FTC to approve rules that are consistent with the statute. *Id.* at 9–12. The Horsemen argue that the FTC must be able to approve, disapprove, or modify a rule at the time the Authority proposes it. *Id.* at 11. And they argue that the FTC is subordinate to the Authority because the FTC cannot initiate rulemaking. *Id.* at 12–13. They say the FTC cannot issue interim final rules. *Id.* at 13. And they argue that the Authority has behaved inconsistently with the Act and the Rules by, for instance, extending effective dates of Rules without FTC permission. *Id.* at 13–14. They also argue that the Authority exercises taxing-and-spending powers by issuing assessments. *Id.* at 15–16.

Excluding the abandoned claims, the Gulf Coast plaintiffs’ Motion for Summary Judgment and Motion for a Preliminary Injunction argue that HISA violates Article II’s Appointments Clause because the Authority’s directors are “Officers of the United States” under *Lucia v. SEC*, 138 S. Ct. 2044 (2018). No. 5:23-CV-077, Dkt. No. 36 at 28. They also argue that HISA violates Article II’s Vesting Clause because the President cannot remove the Authority’s directors. *Id.* at 34. They then argue that HISA violates the nondelegation doctrine because the Authority exercises legislative power in violation of the nondelegation doctrine (regardless of whether the Authority is a private or public entity). *Id.* at 37. The plaintiffs next argue that even if the Authority is a private entity, it violates the nondelegation doctrine. *Id.* at 45. Finally, the plaintiffs argue that HISA violates the anti-commandeering doctrine. No. 5:23-CV-077, Dkt. No. 36 at 57.

In addition to responding to the plaintiffs’ arguments, the FTC defendants argue in their Motion to

Dismiss (Dkt. No. 137) that the plaintiffs do not have standing to assert an anti-commandeering claim because they cannot enforce the rights of a state and Texas is not joined in that claim. No. 5:23-CV-077, Dkt. No. 46 at 27–30. In their motion for summary judgment, the Authority defendants argue that the plaintiffs’ fail to prove their claims. Dkt. No. 137.

L. The Court received evidence and heard argument at trial.

On April 26, the Court held a trial on the merits consolidated with the hearings of the plaintiffs’ motions for preliminary injunction. Dkt. No. 178. The plaintiffs admitted a number of exhibits, as well as witness testimony by declaration. Dkt. No. 179. The Horsemen admitted 57 exhibits, including matters of public record (e.g., HPX 14—HISA Racetrack Safety, 87 Fed. Reg. 435 (2022)); Authority guidance (e.g., HPX 26—Guidance of the Horseracing Integrity and Safety Authority (November 29, 2022)); and biographies of Authority board members (e.g., HPX 53-I—Biography of Jerry Black). The Horsemen also presented three witnesses by declaration, who testified regarding the economic and practical effects of HISA (HPXs 58; 59; 61). The Gulf Coast plaintiffs admitted exhibits in the public record, as well as the meeting minutes of the Authority’s board of directors (GPXs 41–53) and the Authority’s balance sheet (GPX 40). The Gulf Coast plaintiffs also presented three witnesses by declaration—all agents of the plaintiff entities—who testified regarding the effect of HISA on their businesses or association members. GPXs 29–32.

The FTC presented no evidence. The Authority presented seven witnesses, who are agents of the Authority, veterinarians, and horse trainers. DXs 1–

8. Lisa Lazarus, the CEO of the Authority, testified regarding the benefits of HISA and the Authority on the horseracing industry. DXs 1–2. The Authority’s CFO, Jim Gates, disputed the economic impact estimated by the Gulf Coast plaintiffs. DX 3. Sara Langsam (DX 4), Susan Stover (DX 7), and Mary Scollay (DX 8) are veterinarians who testified regarding the benefits, in their view, of the Authority’s anti-doping and medication control (ADMC) program. And Mark Casse (DX 5) and Graham Motion (DX 6), horse trainers, testified about the positives of uniform regulation. After the parties closed, the Court heard oral argument and took its ruling under advisement.

2. Standard of Review

When challenging the facial constitutionality of a statute, a plaintiff must show “that no set of circumstances exists under which the [statute] would be valid.” *United States v. McGinnis*, 956 F.3d 747, 752 (5th Cir. 2020) (alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). As a result, “[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully.” *Salerno*, 481 U.S. at 745. “Facial challenges to the constitutionality of statutes should be granted sparingly and only as a last resort.” *McGinnis*, 956 F.3d at 752–53 (citations omitted).

In addition to clearing this high bar, a plaintiff must also overcome the constitutional-doubt canon: “[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); see

also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 247 (2012) (“A statute should be interpreted in a way that avoids placing its constitutionality in doubt.”). The canon is not without limits, but “[i]t is the Court’s settled policy, however, to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.” *Gomez v. United States*, 490 U.S. 858, 858 (1989). In light of this standard of review and the Court’s findings of fact, the Court reaches the following conclusions of law detailed in Parts 3–7.

3. The plaintiffs’ Article II claims fail because the Authority is a private entity.

The Gulf Coast plaintiffs allege two violations of Article II of the Constitution. First, they claim that HISA violates Article II’s Appointments Clause by creating public officers—the Authority’s directors—who were not appointed by the President with the advice and consent of the Senate. No. 5:23-CV-077, Dkt. No. 36 at 21. Second, they claim that HISA violates Article II’s Vesting Clause because neither the President nor the FTC on his behalf may remove the Authority’s directors, which Gulf Coast believes are executive officials. *Id.* at 34. The Gulf Coast plaintiffs concede that their arguments fail if the Authority is a private entity. No. 5:23-CV-077, Dkt. No. 61 at 9. More broadly, the plaintiffs recognize that their Article II arguments and private-non-delegation arguments are mutually exclusive. Dkt. No. 182 at 75.

For two reasons, the Court finds that the Authority is a private entity. First, in light of the Fifth Circuit’s opinion, it is both the law of the case and foreclosed

by binding precedent. Second, even if that were not the case, the Authority is a private entity under *Lebron* and other relevant precedent because it is not government created, and its directors are not government appointed. This matters because private entities are not subject to the constitutional requirements governing appointment and removal of officers, and governmental entities are not subject to private-nondelegation claims. Like the rest of Article II, “the Appointments Clause says nothing” about private entities. *Fin. Oversight & Mgmt. Bd. For P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020).

Despite the Gulf Coast plaintiffs’ admission that finding the Authority to be private forecloses their arguments, they fail to squarely address the issue. Instead, they merely state that the Authority is different than other self-regulatory organizations (SROs) because it is not a voluntary association. No. 5:23-CV-077, Dkt. No. 61 at 14. But this argument ignores both the Fifth Circuit’s opinion in this case and *Lebron*’s application here, which weighs heavily in favor of the defendants’ argument that the Authority is private.

A. The Fifth Circuit’s holding in this case rests necessarily on finding that the Authority is a private entity.

On appeal, the Fifth Circuit held that the Authority was a private entity that was improperly delegated government authority. *Nat’l Horsemen’s*, 53 F.4th at 872. The Court explained that “HISA empowers a private entity called [the Authority]” to operate “under [FTC] oversight.” *Id.* The Court further explained that “[t]he end result is that Congress has given a private entity the last word over what rules govern our nation’s thoroughbred

horseracing industry.” *Id.* This was a constitutional issue, the Court concluded, because “Congress defies [the nondelegation doctrine] by vesting government power in a private entity not accountable to the people . . . [C]ourts have distilled the principle that a private entity may wield government power only if it ‘functions subordinately’ to an agency with ‘authority and surveillance’ over it.” *Id.* at 873, 881. This holding is necessarily predicated on the Authority being a private entity. Moreover, there is the simple fact that the Fifth Circuit called the Authority a private entity throughout its opinion. *Id.* at 872, 873, 881, 887 (the terms “private entity” and “private entities” appear a combined 31 times in the Fifth Circuit opinion).⁸

Of course, “[n]ot all text within a judicial decision serves as precedent.” BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 44 (2016) (collecting cases). Only an appellate court’s holding—those parts of the decision consisting of the “court’s determination of a matter of law pivotal to its decision”—are given the weight of binding precedent (and therefore, likewise become the law of that particular

⁸ Like the Fifth Circuit, other courts to consider challenges to the FTC-Authority structure have called the Authority a private entity. *Oklahoma v. United States*, 62 F.4th 221 *passim* (6th Cir. 2023) (calling the Authority “a private entity beyond public control” and referring to private entities more than 40 times); *Oklahoma v. United States*, No. 5:21-CV-104-JMH, 2022 WL 1913419, at *11 (E.D. Ky.) (“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. However, as repeatedly stated herein, . . . the Authority is a private entity.”).

case). *Id.* (quoting Francis Bacon, “The Lord Keeper’s Speech in the Exchequer” (1617), in 2 THE WORKS OF FRANCIS BACON 477, 478 (Basil Montagu ed., 1887)). While “commentators and judges don’t uniformly define what counts as a holding,” all agree that those propositions that are logically necessary to the outcome of the case are counted within the holding. *Id.* at 45; see also *United States v. Johnson*, 256 F.3d 895, 914–15 (9th Cir. 2001) (en banc) (discussing whether a holding is limited to that which is “necessary in some strict logical sense” or the broader “necessarily decided”); *Int’l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004) (defining a holding as a statement “necessary to the result or constitut[ing] an explication of the governing rules of law”).

Additionally, in the Fifth Circuit, “[t]he law of the case doctrine states that absent manifest error, or an intervening change in the law, an appellate court’s decision of a legal issue, whether explicitly or by necessary implication, establishes the law of the case and must be followed in all subsequent proceedings in the same case.” *Carnival Leisure Indus., Ltd. v. Aubin*, 53 F.3d 716, 718–19 (5th Cir. 1995). Although the doctrine “does not include determination of all questions which were within the issues of the case and which, therefore, might have been decided,” the doctrine “does mean that the duty of a lower court to follow what has been decided at an earlier stage of the case comprehends things decided by necessary implication as well as those decided explicitly.” *Terrell v. Household Goods Carriers’ Bureau*, 494 F.2d 16, 19 (5th Cir. 1974) (cleaned up). Thus, an issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal. *Todd*

Shipyards Corp. v. Auto Transp., 763 F.2d 745, 750 (5th Cir. 1985).

For example, in *Cooper Tire & Rubber Co. v. Farese*, the Fifth Circuit explained that a prior panel “held that the effective date of the separation agreement was ambiguous as a matter of law.” 248 F. App’x 555, 560–61 (5th Cir. 2007). In doing so, “the prior panel necessarily had to consider whether the contract’s apparent ambiguities could or should be resolved by applying the discretionary canons of construction.” *Id.* As a result, the court explained that the contract’s ambiguity became “the law of the case, and the question of whether the effective date of the separation agreement can be determined on summary judgment is now closed.” *Id.*

Here, the Fifth Circuit’s decision is necessarily predicated on a finding that the Authority is a private entity. The Fifth Circuit held that HISA violates the private-nondelegation doctrine because the statute delegates legislative and executive powers to a private entity. *Nat’l Horsemen’s*, 53 F.4th at 873 (applying “the settled constitutional principle that forbids private entities from exercising unchecked government power”). The Fifth Circuit recognized that “HISA empowers a ‘private, independent, self-regulatory, nonprofit corporation’—the Authority. *Id.* And the Fifth Circuit expressly disclaimed the idea that it was addressing the public-nondelegation doctrine. *Id.* at 883. The animating concern of the Fifth Circuit’s opinion—the “obnoxious” delegation of governmental authority to unaccountable private actors—is meaningless if the entity to whom power is delegated is considered a public body. Thus, the Fifth Circuit has already held—either expressly or, at the very least, by necessary implication—the Authority is

a private entity, and the recent Congressional amendment does nothing to disturb that holding. Bound by both precedent and the law of the case, the Court must deny the Gulf Coast plaintiffs' Article II claims.

The plaintiffs insist that the Court is not bound by the Fifth Circuit's private-entity holding. At trial, counsel for the Gulf Coast plaintiffs argued that the Authority's private-entity status was an uncontested assumption of the Fifth Circuit. Dkt. No. 182 at 70–72. When asked, counsel indicated that *Lebron* was his best case on this point, citing the following language: “[W]e think that *Atchison*’s assumption of Amtrak’s nongovernmental status (a point uncontested by the parties in that case . . .) does not bind us here.” *Id.* at 68.

But the plaintiffs misread *Lebron*, which held that Amtrak is a public entity for purposes of the First Amendment. *Lebron*, 513 U.S. at 399. In *Lebron*, Amtrak argued that another case, *Atchison*, foreclosed the question of Amtrak’s status as a private entity. *Id.* at 393–94. The Supreme Court identified two reasons it was not bound by *Atchison*, and neither was that *Atchison* rested on an uncontested assumption that Amtrak was a private entity. First, in *Atchison*, Amtrak’s governmental status was irrelevant because in any event no contractual obligation was imposed. *Nat’l R.R. Passenger Corp. v. Atchison Topeka & S.F. RR. Co.*, 470 U.S. 451, 471 (1985) (stating that “neither the Act nor the Basic Agreements created a contract between railroads and the United States”); *Lebron*, 513 U.S. at 393 (explaining that “[t]he Court said it did not have to consider th[e] question” of whether Amtrak was a governmental entity). Therefore, with no contractual

obligation, the *Atchison* court “ha[d] no need to consider whether an allegation of a governmental breach of its own contract warrants application of the more rigorous standard of review that the railroads urge[d] [it] to apply,” much less whether Amtrak was a governmental entity in the first place. *Atchison*, 470 U.S. at 470. Second, *Lebron* concluded that even if Amtrak were a governmental entity, there was an independent basis for the court’s decision. *See Lebron*, 513 U.S. at 394. (concluding that “even if Amtrak is a Government entity,” the statute claiming otherwise “suffices to disable that agency from incurring contractual obligations on behalf of the United States”—resolving the challenge). Thus, *Lebron* did not say that *Atchison* did not bind it because Amtrak’s governmental status in that case was an uncontested assumption; rather, *Atchison* simply did not need to resolve that issue—either expressly or by implication.

Moreover, the Fifth Circuit’s affirmative grant of relief in this case makes clear that it did not decide the case based on an uncontested assumption. Writing for the court, Judge Duncan emphasized that “Congress defies [the nondelegation doctrine] by vesting government power in a private entity.” *Nat’l Horsemen’s*, 53 F.4th at 872–73. The Fifth Circuit identified private-entity status as an element—a necessary condition—of a private-nondelegation claim. *See id.* Thus, unlike where *Lebron* distinguished *Atchison*—which denied relief—here the opinion in question granted relief and, therefore, necessarily decided certain issues, including the Authority’s status as a private entity. And not only was that decision made in this same case, invoking the law-of-the-case doctrine, it was made by a superior court that precedentially binds the Court.

Finally, while the Supreme Court may be able to consider the reach of its own precedent based on whether a case had “the benefit of full briefing or argument on the issue,” *McCutcheon v. Fed. Elec. Comm’n*, 572 U.S. 185, 202–03 (2014), the district court is in a different position. It is accepted that “[a]n inferior court cannot decide adversely to a decision of [a superior court] and send the case up to that court again upon the ground that in the former decision of the court . . . certain points were not sufficiently argued.” Basil Jones, *Stare Decisis*, in 26 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 158, 170 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1904).

Thus, the Court is bound by the Fifth Circuit’s holding that the Authority is a private entity, and that holding forecloses the Gulf Coast plaintiffs’ appointments and removal arguments. But even if the Fifth Circuit had never addressed the issue, the Court independently finds that the Authority is a private entity.

B. Even if the Fifth Circuit’s opinion only assumed the Authority’s status as a private entity, the Court finds that the Authority is not a government actor.

The Court now addresses the question that it previously assumed without deciding: whether the Authority is a private entity. *Nat’l Horsemen’s Benevolent and Protective Ass’n*, 596 F. Supp. 3d at 699. Before the Fifth Circuit’s remand, the Court assumed the Authority’s private-entity status, “respecting the contours of the claims before it” but noting the Authority’s “unique genesis.” *Id.* at 699 n.7. The Court now finds that the Authority is a private entity

because it is neither government-created nor government-appointed.

“[A]ctions of private entities can sometimes be regarded as governmental action for constitutional purposes.” *Lebron*, 513 U.S. at 378 (collecting cases); see also *Free Enter. Fund v. Pub. Co. Accounting Bd.*, 561 U.S. 477, 485–86 (2010) (citing to *Lebron* for purposes of determining whether another nonprofit corporation was “‘part of the government’ for constitutional purposes”). Even the Supreme Court has admitted that the “cases deciding when private action might be deemed that of the state have not been a model of consistency.” *Lebron*, 513 U.S. at 378 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting)). But one proposition that is clear is that corporations become more than a private entity when created or “selected by Government to accomplish purely governmental purposes.” *Id.* at 395 (quoting *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946)).

Lebron explained that to determine whether the Authority is a private entity for constitutional purposes, the Court need only look to other “corporations created and participated in by the United States for the achievement of governmental objectives.” *Id.* at 386. The first such corporation was the Bank of the United States, created in 1791. *Id.* And the federal government has had close ties with specially created private corporations throughout our nation’s history, chartering or buying outright banks, railroad companies, and grain corporations. *Id.* at 387–88; e.g., *Lebron*, 513 U.S. 374 (1995) (Amtrak); *McGinn, Smith & Co., Inc. v. FINRA*, 786 F. Supp. 2d 139, 147 (D.D.C. 2011) (FINRA); *McCulloch v. Maryland*, 4 Wheat. 316 (1819) (second Bank of the United

States); *Osborn v. Bank of United States*, 9 Wheat. 738 (1824) (same).

This case law teaches that to be considered a government entity for constitutional purposes, a corporation must be created by the government. *Lebron*, 513 U.S. at 394. In *Lebron*, for example, the Supreme Court determined that Amtrak is a government entity “for the purpose of individual rights guaranteed against the Government by the Constitution.” *Id.* The Supreme Court found it significant that “Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals.” *Id.* at 397. The Supreme Court also noted that six of the board’s nine directors were named by the President himself and that the government’s influence over Amtrak was not temporary. Instead, Amtrak was “established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees.” *Id.* at 398.

Courts continue to emphasize the requirement that a corporation is only “part of the government” if it is created by special law. “A corporation is part of the government for constitutional purposes when (1) the government creates the corporation by special law, (2) for the furtherance of governmental objectives, and (3) retains for itself permanent authority to appoint a majority of the directors of that corporation.” *Herron v. Fannie Mae*, 861 F.3d 160, 167 (D.C. Cir. 2017) (cleaned up). And in response to a challenge to Congress’s restrictions on removal of Fair Housing Finance Agency officers, the Supreme Court rejected an argument that an agency can be considered a private entity when “its authority stems from a

special statute.” *Collins v. Yellen*, 141 S. Ct. 1761, 1785 (2021).

Unlike Amtrak and the FHFA, the Authority is a private entity. First, the Authority is a private corporation incorporated under Delaware law. It was not created by the government through special law. No. 5:23-CV-077, Dkt. No. 47 at 5–10. Moreover, the government has no say over the appointment of the Authority’s directors—that’s the point of the Gulf Coast plaintiffs’ appointments argument. *See also* 15 U.S.C. § 3052(c)–(d) (establishing that appointment of the Authority’s directors is to be controlled by the corporate bylaws and the initial nominating committee).

Like FINRA, the Authority is a private entity. *Nat’l Horsemen’s*, 53 F.4th at 887. Courts have determined that FINRA, like its predecessor NASD, is a private entity. *Desiderio v. Nat’l Ass’n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999) (“The NASD is a private actor . . . It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee.”); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 699 n.5 (3d Cir. 1979) (“NASD is not a state agency.”); *see also United States v. Solomon*, 509 F.2d 863, 867 (2d Cir. 1975) (holding that the New York Stock Exchange is not an agency). To be sure, FINRA and the Authority were created in anticipation of aiding a federal agency, but that alone is insufficient to render it part of the government. *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 696 (“Had the Authority been created by Congress, it may have been subject to certain Article II requirements But because Congress ‘recognized’ it . . . the

Authority avoids some of the strictures of governmental entities, just as other private, self-regulatory organizations that operate nationwide do.”). Ultimately, because the Authority “is a private corporation” that “receives no federal or state funding,” whose “creation was not mandated by statute,” and whose directors, executives, and employees are not “government appoint[ed],” the Authority is a private entity. *See Desiderio*, 191 F.3d at 206.

Nor does *Cherry Cotton Mills* change the fact that the Authority is a private entity under relevant precedent. The plaintiffs neither cite nor rely on *Cherry Cotton Mills*, but because *Lebron* quotes its reference to corporations “selected by Government,” the Court notes here why that case is distinguishable. 327 U.S. at 539. In *Cherry Cotton Mills*, the Supreme Court held that a debt owed to the Reconstruction Finance Corporation was a debt owed to the federal government, which allowed the debt to be set off against a tax refund. *Id.* But *Cherry Cotton Mills* does not control this case because the RFC was clearly government-created and government-controlled. The RFC was created by special law. 47 Stat. 5 (“That there be, and is hereby, created a body corporate with the name ‘Reconstruction Finance Corporation.’”). Its directors were appointed by the President by and with the advice and consent of the Senate. *Cherry Cotton Mills*, 327 U.S. at 539. “[A]ll of its money came from the Government; its profits if any [went] to the Government; its losses the Government must bear.” *Id.* Thus, *Cherry Cotton Mills* is inapposite, and its statement that corporations “selected by” government are equivalent to corporations “created by” government is dicta. *See id.*

At trial, counsel for the Gulf Coast plaintiffs indicated that the *Lebron* standard was inapplicable in cases involving the power to appoint and remove federal officials. Dkt. No. 182 at 83. Instead, the plaintiffs argue that *Lucia* sets forth the standard for determining whether the Authority is subject to the Appointments Clause. *E.g.*, No. 5:23-CV-077, Dkt. No. 51 at 10 (citing *Lucia* for the proposition that “[t]he Authority’s Directors . . . are officers subject to the Appointments Clause”). But *Lucia* does not resolve an Appointments Clause question where the challenged entity is private. The Supreme Court in *Lucia* noted that *Freytag*, a case involving special trial judges of the United States Tax Court, “necessarily decide[d] th[e] case.” 138 S. Ct. at 2052. Thus, both *Lucia* and the case on which it relied resolved Appointments Clause challenges involving individuals who were clearly federal employees. There was never any possibility that the parties at issue were private employees from outside the government. And in any event, “[t]he sole question” in *Lucia* was “whether the Commission’s ALJs are ‘Officers of the United States’ or simply employees of the Federal Government.” *Id.* at 2051. Thus, *Lucia* does not answer the question presented by the parties.

Gulf Coast’s argument is further undermined by the fact that other courts apply *Lebron*—not *Lucia*—in cases involving private-nondelegation or Appointments Clause challenges. For instance, the Fourth Circuit rejected an Appointments Clause challenge to the Metropolitan Washington Airports Authority, an interstate compact, after finding that it was not a public entity under the *Lebron* standard. *Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152, 159 (4th Cir. 2018) (“MWAA does not satisfy either prong [of

the *Lebron* test]. In the first place, MWAA was not created by the federal government MWAA is not controlled by the federal government . . . [b]ecause the[] [federal] appointees are a distinct minority of the Board.”); *Free Enter. Fund*, 561 U.S. at 485–86 (relying on *Lebron* in stating that the Public Company Accounting Oversight Board is “part of the government” for constitutional purposes in an Appointments Clause challenge) (citing *Lebron*, 513 U.S. at 397).

Finally, while *Lucia* would be applicable if the Court found that the Authority were part of the government, the plaintiffs provide no argument or authority explaining why a private entity should be considered part of the government for purposes of the Appointments Clause. To the contrary, the current state of jurisprudential affairs indicates that the Authority’s directors are not “Officers of the United States” within the Constitution’s original public meaning. “[T]he phrase ‘of the United States’ limit[s] the Appointments Clause to ‘federal’ officers.” *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1666 (Thomas, J., concurring in the judgment). “Officers of the United States’ was probably not a term of art that the Constitution used to signify some special type of official. Based on how the Founders used it and similar terms, the phrase ‘of the United States’ was merely a synonym for ‘federal.’” *Lucia*, 138 S. Ct. at 2056 (Thomas, J., with whom Gorsuch, J. joins, concurring); see also Jennifer Mascott, *Who are “Officers of the United States”?*, 70 STAN. L. REV. 443, 531 (2018) (explaining that the First Congress provided that “individuals involved with [the] operation” of the national bank, such as the “bank directors,” “were not appointed in accordance with Article II’s requirements”; and that “the probable

explanation is that Congress saw the bank as a public-private nongovernmental entity”). True, neither the Fifth Circuit nor the Supreme Court has explained in detail the meaning of “Officers of the United States,” but the currently available precedent suggests that the Authority’s directors and committee members do not meet that definition. Thus, *Lebron*—rather than *Lucia*—supplies the appropriate standard, and the plaintiffs fail to prove their Article II appointments and removal claims.

4. As amended, HISA does not create an unconstitutional delegation of governmental power to a private entity.

A. The Constitution requires a private entity wielding government power to function subordinately to a federal agency’s authority and surveillance.

A pair of 80-year-old cases—*Carter Coal* (1936) and *Adkins* (1940)—lay the foundation for our modern non-delegation doctrine: “a private entity may wield government power only if it functions subordinately to an agency with authority and surveillance over it.” *Nat’l Horsemen’s*, 53 F.4th at 881 (internal marks omitted). In *Carter Coal*, the Supreme Court called private nondelegation “legislative delegation in its most obnoxious form” and held that it was “so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.” *Carter v. Carter Coal*, 298 U.S. 238, 311 (1936). A few years later, however, the Supreme Court clarified in *Adkins* that an agency can rely on a private entity as long as the private entity “function[s] subordinately to the” agency, which has

“authority and surveillance” over the private entity. *Adkins*, 310 U.S. at 399.

From these twin holdings spring our modern non-delegation jurisprudence, cemented in recent cases like the *Amtrak* line of cases,⁹ *Texas v. Rettig*,¹⁰ *National Horsemen’s*, and *Oklahoma v. United States*. In *Texas v. Rettig*, the Fifth Circuit held that an agency may subdelegate an accounting task to a private entity where the agency “reviewed and accepted,” “ha[d] the ultimate authority to approve,” and “superintended . . . in every respect” the private-entity determination. 987 F.3d at 533. Before the Supreme Court held that Amtrak was a public entity in *Amtrak II*, the D.C. Circuit concluded that Amtrak was a private entity that was delegated too much power. *Amtrak I*, 721 F.3d at 672, *rev’d on other grounds by Amtrak II*, 575 U.S. 43. Amtrak was impermissibly delegated government authority because, unlike the agency in *Adkins*, the Federal Railroad Administration did not have the authority

⁹ In *Amtrak I*, the D.C. Circuit struck down Section 207 of the Passenger Rail Investment and Improvement Act (PRIIA) because it unlawfully delegated “regulatory power to a private entity.” 721 F.3d 666, 668 (D.C. Cir. 2013), *rev’d on other ground by Dep’t of Transp. v. Ass’n of Am. R.R. (Amtrak II)*, 575 U.S. 43 (2015). While not disturbing the D.C. Circuit’s private-nondelegation analysis, the Supreme Court vacated *Amtrak I*, holding that Amtrak was a governmental—not private—entity. *Amtrak II*, 575 U.S. at 55. On remand, the D.C. Circuit held that Section 207 of PRIIA violated the Due Process Clause because it gave Amtrak, a self-interested entity with a statutorily required profit-seeking motive, regulatory power over its competitors. *Amtrak III*, 821 F.3d 19, 27–34 (D.C. Cir. 2016).

¹⁰ 987 F.3d 518, 533 (5th Cir. 2021).

to “unilaterally change regulations proposed to it.” *Amtrak I*, 721 F.3d at 671.

In *National Horsemen’s*, the Fifth Circuit surveyed this jurisprudence, noting that the private-non-delegation doctrine is rooted in “the government’s promised accountability to the people.” 53 F.4th at 880. The Fifth Circuit also reconciled this general principle with *Carter Coal* and *Adkins*, which together allow a private entity to “wield government power” so long as the private entity “functions subordinately’ to an agency with ‘authority and surveillance’ over it.” *Id.* at 881. Thus, the court explained it is within constitutional bounds for Congress to “formalize the role of private parties in proposing regulations so long as that role is merely ‘as an aid’ to a government agency that retains the discretion to ‘approve[], disapprove[], or modif[y]’ them.” *Id.* at 881 (quoting *Amtrak I*, 721 F.3d at 671).

B. As amended, HISA functions subordinately to the FTC and addresses the Fifth Circuit’s concerns.

The Court finds that the congressional amendment to § 3053(e) cured the constitutional issues identified by the Fifth Circuit. First, the Fifth Circuit identified that HISA improperly granted the Authority “sweeping rule-making power,” but the FTC’s new power to “abrogate, add to, and modify” the “rules of the Authority” closed the necessary gap in the relative rulemaking power between the FTC and the Authority. 15 U.S.C. § 3052(e). Second, the Fifth Circuit noted that the FTC’s review of Authority rulemaking was limited to so-called consistency review, which gave the Authority the final word on policy. But because the FTC now has the right to make its own policy choices, the amendment rem-

edied that concern. Finally, the Fifth Circuit noted that the FTC had less control over the Authority than the SEC does over FINRA. The congressional amendment cured these issues as well.

- i. Although the Authority retains its generous grant of authority to craft and propose rules, the amended statute significantly broadens the FTC's rule-making power.

The parties disagree on the correct reading of § 3053(e) as amended. The amended statute says that the FTC can “abrogate, add to, and modify” Authority rules. Does this mean, as the plaintiffs assert, that the FTC can abrogate, add to, and modify only the *content* of existing rules? *See* Dkt. No. 145 at 6 (claiming that “Congress granted only the power to modify, add to, or abrogate existing rules, not to issue new rules”). The defendants, in contrast, believe the amendment allows the FTC to “modify, add to, or abrogate” the entire body of Authority rules, meaning the FTC can promulgate new rules, as well as modify or abrogate existing rules. *E.g.*, Dkt. No. 128-1 at 18–19; Dkt. No. 129 at 10. Based on a plain reading of the statute and the canon of constitutional avoidance—and confirmed by the only other court to interpret this amended subsection—the Court concludes that the FTC has the power to “abrogate, add to, or modify” the body of Authority rules, rather than a single, proposed rule. In other words, the FTC can create new substantive rules, so it is the FTC that now has “sweeping rulemaking authority.” *See Nat’l Horsemen’s*, 53 F.4th at 882. If in practice, the FTC is derelict in performing its oversight, as-applied challenges may be brought. But this facial challenge must fail.

A plain reading of the statute confirms that the FTC can “abrogate, add to, or modify” the entire body of the Authority rules. Congress’s amendment included a single, yet significant, change: Section 3053(e), which previously gave the FTC the ability solely to issue interim final rules, was amended to read:

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

15 U.S.C. § 3053(e). As a result, the FTC now has the power to “add to . . . the rules of the Authority.” *Id.* When the FTC promulgates a new rule, it “add[s] to” the rules of the Authority. Thus, a plain, fair reading of this section confirms that the FTC can initiate rulemaking.

Even if the statute’s language were not clear, three additional reasons support this plain reading: the surplusage canon, the canon of avoidance, and the Sixth Circuit’s persuasive opinion. First, the surplusage canon confirms that the FTC can initiate rulemaking. Under the plaintiffs’ reading, only existing rules can be “abrogate[d], add[ed] to, [or] modif[ied].” But if this were the case, why did Congress include both “modify” and “add to” in the statute? If the FTC adds language to a rule promulgated under HISA, clearly it has modified the rule. *See* MODIFY,

WEBSTER'S THIRD INT'L DICTIONARY UNABRIDGED (2002) (defining Modify as to "make a basic or important change in: alter"). Thus, the plaintiffs' proposed reading of the statute—prohibiting the FTC from initiating rulemaking—would render "add to" a nullity. And it is a "cardinal principle of statutory construction" that the Court ought to give effect to every word of a statute. *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *see also Wash. Market Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879) ("As early as in Bacon's Abridgement, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'").

Second, the canon of constitutional avoidance favors the defendants' reading of the statute. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail" *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (Scalia, J.). Here, the Court agrees with the defendants' reading of § 3053(e), which demonstrates HISA's constitutionality.¹¹ The Fifth Circuit previously noted that the Authority was not subordinate to the FTC because it was the Authority who wrote the rules. *Nat'l Horsemen's*, 53 F.4th at 883. And the Fifth Circuit explained that the FTC's authority to issue temporary rules "on a break-

¹¹ For the reasons previously stated, the Court finds implausible the plaintiffs' reading of § 3053(e). But even if the Court found that the plaintiffs' reading were plausible, the canon of avoidance instructs that the Court should adopt the defendants' reading, which is also plausible and does not call into question the statute's constitutionality.

glass-in-case-of-an-emergency basis” was not enough to subordinate the Authority to the FTC. *Id.* That being the case, the Court finds that the proper reading of the statute gives the FTC the authority to initiate rulemaking because Congress does not ordinarily write statutes to be unconstitutional, particularly in cases of an amendment in direct response to a successful constitutional challenge.

Throughout its persuasive opinion, the Sixth Circuit—the only court to interpret the amended HISA’s constitutionality—confirms this reading. The court explained that “[t]he FTC now may create new rules.” *Oklahoma*, 62 F.4th at 230. It noted expressly that the FTC could decide to act either “by abrogating one of the Horseracing Authority’s rules or introducing its own.” *Id.* Leaving no doubt, it described the “FTC’s new discretion to adopt and modify rules” and its “complete authority to initiate new rules.” *Id.* at 232. And while the plaintiffs may disagree with the Sixth Circuit’s reading of the amended statute by pointing to the “nearly identical” language of the Maloney Act (Dkt. No. 116 at 12), the textual differences in the two subsections reveal that “add to” in HISA gives the FTC the power to initiate rulemaking. The Maloney Act gives the SEC the power to “abrogate, add to, and delete from” proposed rules submitted by FINRA. 15 U.S.C. § 78S(c). While the language is similar, Congress’s choice to use “modify” rather than “delete from” reveals that the FTC has the power to initiate rules. The term “modify” encompasses the power to both “add to” and “delete from” the content of rules. After all, to modify is to change, and regulations are only changed by adding to or deleting from the statutory text. But HISA’s grant of power to both “add to” and “modify” ensures the FTC can initiate rulemaking.

Finally, a recent example confirms the FTC's power to create new rules. The Court previously delayed the effective date of the ADMC Rule to May 1, 2023. Dkt. No. 134. In response to "substantial uncertainty regarding the criteria and procedures under which antidoping and medication control protocols will be implemented as the thoroughbred horseracing industry nears the Triple Crown events," the FTC issued a new, substantive rule delaying the effective date of the ADMC rule to May 22, 2023. Dkt. No. 180 at 6–7. Relying on its § 3053(e) authority, the FTC noted that it has the authority to initiate rulemaking, including in emergency circumstances. *Id.* at 8 ("Here, the Commission finds, for good cause, that notice and comment is impracticable and unnecessary with respect to the final rule."). This example is just one additional datapoint of the FTC's rule-making authority in practice.

In sum, the only fair reading of the statute is that the FTC can create new rules as necessary to accomplish its policy preferences. This is confirmed by the canons of surplusage and constitutional avoidance, as well as the only court to address the issue. It is no secret that Congress amended HISA in response to the Fifth Circuit's opinion. For Congress to amend the law without addressing one of the critical issues identified by the Fifth Circuit would be, to say the least, unusual.

- ii. The FTC is no longer limited to reviewing the Authority's proposed rules for consistency with HISA; to the contrary, Congress expressly empowered it to review and change policy choices.

The second constitutional flaw identified by the Fifth Circuit was that, prior to the congressional

amendment, the FTC was limited to consistency review and “lack[ed] the power to review the Authority’s policy choices.” *Nat’l Horsemen’s*, 53 F.4th at 884. But the amendment changes this. Through its rule-making authority explained above, the FTC can now exercise its own policy choices. And while it is true that the FTC is limited to reviewing the Authority’s proposed rules for consistency with HISA, this does not change that the Authority is subordinate to the FTC for three reasons. First, the FTC’s ability to abrogate, add to, and modify rules nullifies any material concern over consistency review. Second, the FTC’s power to promulgate new rules according to its own policy preferences transforms consistency review from a “high-altitude” standard of review into a substantive analysis that includes rejection or modification of the proposals. Finally, the FTC can cure any urgent problems that result from a delay between its consistency review and typical rulemaking by initiating its own expedited rulemaking, as it has already done.

At the outset, the Court notes that the congressional amendment now gives the FTC the power to write rules according to its policy preferences. The amended statute gives the FTC the power to abrogate, add to, and modify the rules of the Authority “as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.” 15 U.S.C. § 3053(e). This final phrase—“or otherwise in furtherance of the purposes of this chapter”—gives the FTC the clear authority to promulgate rules according to its own policy choices. As Chief Judge Sutton phrased it,

“[t]he final catchall indicates that § 3053(e) spans the Horseracing Authority’s jurisdiction.” *Oklahoma*, 62 F.4th at 230. And while the plaintiffs apparently do not dispute this, they claim that the front-end consistency review still poses an issue of constitutional magnitude because “the legislative rules of the Authority govern for at least some period of time.” No. 5:23-CV-077, Dkt. No. 61 at 31.

Again, however, the FTC’s front-end consistency review poses no constitutional problem because the FTC can abrogate, add to, and modify rules. As an initial matter, the plaintiffs identify no authority—on-point, analogous, or otherwise—to support their argument that short-term applicability of a rule approved under consistency review creates a constitutional defect. Dkt. No. 182 at 42–43 (the Court: “What is your authority, your legal authority for the fact that the delay . . . render[s] [HISA] unconstitutional? . . . I’m genuinely asking, is this just a novel argument or novel scenario that you’re responding to and so, Judge, I can’t point you to a case? . . . Mr. Suhr: Yeah, I think that’s right”). But more critical—and fatal to the plaintiffs’ arguments regarding consistency review—is the Fifth Circuit’s view of the SEC’s consistency review of FINRA rules: “[W]e find irrelevant Appellee’s argument that the SEC engages in the same ‘consistency’ review as the FTC . . . This again overlooks the separate provision empowering the SEC to ‘abrogate, add to, and delete from’ FINRA rules ‘as the [SEC] deems necessary or appropriate.’” *Nat’l Horsemen’s*, 53 F.4th at 888 n.35. Thus, as the Fifth Circuit previously indicated, it is “irrelevant” that the FTC conducts an initial review for consistency with the statute and rules, given that the FTC can later abrogate, add to, and modify Authority rules. *See id.*

Moreover, the FTC's power to initiate rulemaking according to its policy preferences gives consistency review teeth. As the FTC continues to promulgate new rules or modify existing rules according to its policy preferences, its consistency review will transform from "high-altitude oversight" to substantive analysis to ensure the proposed rule is consistent with the FTC's view of the proper national horseracing policy. And if the plaintiffs are concerned that the timing gap subjects the industry to regulation by a private entity in the meanwhile, the FTC's ability to initiate rulemaking on an expedited basis, as well as its ability to promulgate rules concerning the effective date of rules approved under consistency review, resolves the issue. The plaintiffs are under the impression that "for the FTC to do a rulemaking takes months to years." Dkt. No. 182 at 43. But as explained above, the FTC has already exercised its emergency rulemaking powers to, for instance, change the effective date of a rule. *See* Dkt. No. 180. Thus, the Court finds that front-end consistency review poses no constitutional problem, particularly because the Fifth Circuit has already identified the ability to modify rules as the key distinction.

iii. Heeding this Court's call, Congress amended HISA to expressly mirror the SEC-FINRA relationship.

In holding HISA unconstitutional, the Fifth Circuit looked to the SEC-FINRA model and noted that "the FTC has less supervisory power than the SEC." *Nat'l Horsemen's*, 53 F.4th at 887. But as amended, this is no longer the case. Congress noted the "key distinction" identified by the Fifth Circuit—that the SEC can "abrogate, add to, and delete from" FINRA

rules. *Id.* And by giving the FTC a similar, if not greater, rulemaking authority, Congress eliminated the only difference that “meaningfully distinguish[ed] the SEC–FINRA relationship from the FTC–Authority relationship.” *Id.* In this way, Congress considered the reasoning of the Fifth Circuit opinion and adjusted accordingly. Dkt. No. 182 at 110. No longer is the FTC limited to “recommend[ing] modifications”; now the FTC, like the SEC, “has the final word on the substance of the rules.” *Nat’l Horsemen’s*, 53 F.4th at 887–88. And the Authority is now on equal footing to FINRA in its role “in aid of” the federal agency that retains ultimate rulemaking authority. *Id.*

- iv. Combined, these changes allow HISA to survive a facial challenge.

Congress answered the call—identifying the three constitutional concerns that led the Fifth Circuit to hold HISA unconstitutional and rectifying each with the amendment to § 3053(e). The FTC can now initiate rule-making according to its own policy preferences. And while it still conducts an initial consistency review of the Authority’s proposed rules, the FTC can abrogate, add to, or modify those rules by following the typical agency rulemaking procedure—or step in to resolve emergency situations by exercising its good-cause emergency rule-making authority. And post-amendment, the FTC has at least as much supervisory control over the Authority as the SEC does FINRA. All told, “a productive dialogue occurred in this instance,” as the Fifth Circuit ably did the work to identify the constitutional flaws in HISA while Congress quickly worked to correct them. *Oklahoma*, 62 F.4th at 225.

C. The only court to address the issue post-amendment agrees.

Parallel challenges to HISA have been brought throughout the country. *See, e.g., Louisiana v. Horseracing Integrity & Safety Authority, Inc.*, 2020 WL 17074823 (5th Cir. Nov. 18, 2022). One such challenge was brought in the Eastern District of Kentucky and appealed to the Sixth Circuit. *Oklahoma*, 62 F.4th 221. But before the court could resolve the case, Congress amended HISA. As noted above, Chief Judge Sutton wrote for the panel and explained in detail how the congressional amendment cured the defects identified by the Fifth Circuit. *Id.* at 236. Notably, the Sixth Circuit held the amended HISA constitutional not because it disagreed with the Fifth Circuit’s private-nondelegation jurisprudence but because it agreed. *Id.* at 230.¹² Like the Court does today, the Sixth Circuit analyzed the Fifth Circuit’s opinion and noted the one-to-one match between the issues identified in that opinion and the solutions passed by Congress. *Id.* at 229–32.

D. Plaintiffs’ remaining assertions of unconstitutionality fall short.

In addition to the arguments rejected above, the plaintiffs wage an assortment of other post-amendment challenges. First, in three sentences, the plaintiffs rely on the fact that the FTC can no longer issue interim final rules. Dkt. No. 116 at 13. The plaintiffs understand “[t]he FTC [to] have less power today . . . because it can no longer promulgate an

¹² In a separate concurrence, Judge Cole explained that he agreed with the amended Act’s constitutionality but also would have held HISA constitutional before the amendment. *Id.* at 236 (Cole, J., concurring).

interim final rule.” *Id.* But as the defendants point out (Dkt. No. 128-1 at 22–23), the FTC can now issue rules without delay under the APA’s good-cause standard. *Compare* 15 U.S.C. § 3053(e) (conferring to the FTC rulemaking authority “in accordance with section 553 of Title 5”), *with* 5 U.S.C. § 553(b)(B) (allowing an agency to forego notice requirements where “the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”); *see also United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011) (stating that notice and comment “may be bypassed if ‘good cause’ exists”). Thus, the plaintiffs do not need to “hop[e] no emergencies happen in horseracing” because the FTC will be able to respond with the same emergency toolkit afforded to all federal agencies. Dkt. No. 116 at 13.

Next the plaintiffs argue that the FTC cannot police the Authority if it does not follow the rules. Dkt. No. 116 at 13. But as previously discussed, “[t]he FTC now may create new rules.” *Oklahoma*, 62 F.4th at 230. The FTC’s new power to surveille and supervise includes the ultimate authority to control “the Horseracing Authority’s implementation of th[e] rules.” *Id.* Section 3053(e) gives HISA “the tools to step in” (*id.* at 231) should the Authority choose to “adopt[] policies which in practice amend the Act and the rules” (Dkt. No. 116 at 13). The plaintiffs cite a number of examples in support of their argument that the Authority has allegedly rewritten HISA and the rules, but these challenges are better asserted through as-applied challenges, which the plaintiffs have omitted from this lawsuit. *See* Dkt. No. 149 (bringing only facial challenges).

The plaintiffs next claim that the FTC has no control over fees, spending, or the Authority’s budget. Dkt. No. 116 at 15–16. But this is not true. On fees—the Authority “shall” report to the FTC any “proposed increase” in fees. 15 U.S.C. § 3052(f)(1)(C)(iv)(I). The proposed increase must then undergo a notice-and-comment period. § 3052(f)(1)(C)(iv)(II). And FTC rules govern how fees are determined and allocated. §§ 3052(f)(2)(B), (3)(B)-(C), 3053(a)(11). On budget and spending—the FTC has interpreted HISA to require the Authority to propose its annual budget for FTC approval. Procedures for Oversight of the Horseracing Integrity and Safety Authority’s Annual Budget, 88 Fed. Reg. 18034 (March 27, 2023). Finally, the FTC retains the power to issue rules “as necessary or appropriate” to govern the Authority’s assessment and allocation of fees. 15 U.S.C. § 3053(e).

Additionally, the Gulf Coast plaintiffs’ reliance on *A.L.A. Schechter Poultry Corp. v. United States* is misplaced. 295 U.S. 495, 537 (1935). They insist that this 1935 Supreme Court case, on its own, controls the outcome of the private-nondelegation analysis. No. 5:23-CV-077, Dkt. No. 58 at 9–10. The plaintiffs believe their reliance on *Schechter Poultry* to be a case-winning argument, noting that neither the Fifth nor Sixth Circuit has addressed the case and claiming that the “[d]efendants ignore *Schechter Poultry* because they have no answer for it.” *Id.* While *Schechter Poultry* does hold that certain delegations to private industry groups are unconstitutional (295 U.S. at 551), it does not control this case for one simple reason—the fact here are nowhere near as extreme as in *Schechter Poultry*. The Third Circuit recognized that *Schechter Poultry* is “aberrational” and is one of just two instances of the

Supreme Court departing from its “generous recognition of congressional power to delegate rulemaking authority.” *United States v. Frank*, 864 F.2d 992, 1010 (3d Cir. 1988); *see also Milk Indus. Found. v. Glickman*, 949 F. Supp. 882, 889 (D.D.C. 1996) (stating that *Schechter Poultry* must be understood in its “unique historical context” and describing the relevant statute as “the most sweeping congressional delegation of all time”). The statute in question in *Schechter Poultry*, the National Industrial Recovery Act, gave the President “blanket authority . . . to prescribe and approve mandatory ‘codes of fair competition’ for various industries without additional congressional approval.” *South Dakota v. Dep’t of Interior*, 423 F.3d 790, 795 (8th Cir. 2005). *Schechter Poultry* is inapposite because it involves the most extreme example of delegation in this nation’s history, and it precedes *Carter Coal* and *Adkins*, which serve as the foundation of our modern nondelegation jurisprudence. *See Nat’l Horsemen’s*, 53 F.4th at 880 (explaining that *Carter Coal* and *Adkins* are “key to applying the [nondelegation] doctrine).

Finally, at trial, the plaintiffs argued that because an agency must exercise “pervasive surveillance and control” over regulation, HISA must fail. Dkt. No. 182 at 21– 22 (“[T]his case comes down to four words: pervasive surveillance and control.”). But as explained above and by the Fifth and Sixth Circuits, binding precedent makes clear that the FTC’s new power to “abrogate, add to, and modify the rules of the Authority” amounts to pervasive surveillance and control. Perhaps the plaintiffs disagree with that precedent, but the Court is bound by its role as an inferior court to faithfully apply it. Nevertheless, at trial, plaintiffs took the position that no version of a

HISA-empowered Authority could ever pass constitutional muster because, in their view, the SEC-FINRA model is likewise unconstitutional. Dkt. No. 182 at 31–33, 37–38. When the Court asked what else Congress could have done to bring HISA in bounds, plaintiffs explained that only a newly created federal agency could properly do this work. *Id.* at 37–38. The plaintiffs believe “the entire model [allowing private entities to have any role] is flawed, because, as the Fifth Circuit said, people outside government can’t wield government power.” *Id.* at 39. But that is not what the Fifth Circuit said. To the contrary, the panel explained that “a private entity may wield government power” as long as it “functions subordina- tely’ to an agency with ‘authority and surveillance’ over it.” *Nat’l Horsemen’s*, 53 F. 4th at 871. Thus, regardless of the equities of the plaintiffs’ argument, precedent teaches that pervasive surveillance and control is satisfied by HISA as amended, and this Court is bound by precedent.

5. The plaintiffs’ executive-delegation argument has already been resolved.

The plaintiffs also bring a claim under Article II, claiming that the executive power has been improperly delegated. The plaintiffs claim that the Authority is not subordinate because: (1) the FTC does not have meaningful oversight of investigations, (2) the FTC cannot review the Authority’s prosec- utorial discretion, (3) the FTC cannot prevent the Authority from seeking a temporary restraining order or preliminary injunction, (4) the FTC does not have oversight of the Authority’s programs, (5) the FTC does not have oversight of the Authority’s leadership, and (6) the FTC lacks the power to derecognize the Authority. In response, the def-

endants note that several of the complained-of activities are nongovernmental—such as hiring and contracting. Dkt. No. 128-1 at 24–25. And the defendants point out that any Authority enforcement decision will be reviewed by an ALJ and the FTC, a process which “is even more substantial than the SEC’s review of FINRA decisions.” *Id.* at 25 (quoting *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 726).

The Court declines to readdress its prior finding that the Authority’s exercise of enforcement and investigatory powers does not disturb the Constitution.¹³ When it first heard this case (pre-amendment and pre-remand), the Court found that the Authority’s “non-legislative regulatory functions” did not violate the private-non-delegation doctrine because “[t]hese functions . . . comport with due process as articulated” by binding precedent. *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 725 (citing *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 708 (5th Cir. 2017)). And while there has since been an opinion by the Fifth Circuit, a congressional amendment, and a remand, none of these intervening events have disturbed the Court’s prior finding or analysis. Specifically, the Fifth Circuit declined to address the Court’s finding that the

¹³ Like the plaintiffs’ other arguments concerning “non-legislative regulatory functions,” the Court finds the due-process argument was resolved by the Court’s prior order (*Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d 691). The Court previously found that “the Horsemen’s alternative due-process theory fails.” *Id.* at 728. And again, the Fifth Circuit’s opinion and the intervening congressional amendment change nothing about the Court’s prior findings on the due-process argument. Thus, the Court will not revisit the issue here.

Authority's non-legislative functions did not offend the private-nondelegation doctrine. *Nat'l Horsemen's*, 53 F.4th at 890 n.37 (“[W]e do not address . . . the Authority’s investigative and enforcement measures—without the rule-making authority, the investigative and enforcement powers are nugatory . . .”). Thus, the Court’s prior finding is the law of the case, which has not been disturbed by either the Fifth Circuit opinion or the congressional amendment.

6. The plaintiffs lack standing to bring the anti-commandeering claim.

The Gulf Coast plaintiffs argue that “HISA unconstitutionally commandeers the states” in violation of the Tenth Amendment. No. 5:23-CV-077, Dkt. No. 36 at 57. The Authority defendants challenge the plaintiffs’ standing to bring an anti-commandeering claim on behalf of the states and claim that any Tenth Amendment violation would not harm these private-party plaintiffs. No. 5:23-CV-077, Dkt. No. 46 at 29–30. The FTC defendants argue that the anti-commandeering claim fails because HISA takes a conditional-preemption approach, which has repeatedly been upheld as constitutional. No. 5:23-CV-077, Dkt. No. 49 at 39–42. First evaluating its jurisdiction to hear the claim, as it must, the Court finds the private-entity Gulf Coast plaintiffs do not have standing to bring a Tenth Amendment challenge to HISA.

“[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” *New York v. United States*, 505 U.S. 144, 166 (1992). Thus, Congress cannot 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.” *Oklahoma*, 62 F.4th at 234 (quoting *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018)). But these limitations do not prevent Congress from “encourag[ing] a State to regulate or hold[ing] out incentives in hopes of influencing a State’s policy choices.” *Id.* (internal marks and citation omitted).

To establish the irreducible constitutional minimum of Article III standing, a plaintiff must show “(1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief.” *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 399 (5th Cir. 2020). True, it is no longer the case that “a private citizen, acting on his own behalf and not in an official capacity or on behalf of the state citizenry, lacks standing to raise a Tenth Amendment claim.” *United States v. Torres*, 573 F. Supp. 2d 925, 950 (W.D. Tex. 2008), *abrogated by Bond*, 564 U.S. at 223 (holding that a plaintiff does not lack standing to assert a Tenth Amendment claim purely because he is not a state). But nothing in *Bond* contradicts the settled notion that “[a]n individual who challenges federal action on [Tenth Amendment] grounds is, of course, subject to the Article III requirements.” *Bond*, 564 U.S. at 225.

To the contrary, *Bond* reinforces this requirement. There, the indicted defendant challenged the constitutionality of a chemical-weapons statute criminalizing her conduct on Tenth Amendment grounds. *Id.* at 214. The Court of Appeals held that the defendant could not challenge the law under the Tenth Amendment because no state was a party to the

criminal proceeding. *Id.* The Supreme Court disagreed, holding private individuals can seek redress for their own injuries under the Tenth Amendment. *Id.* at 226. Notably, however, the *Bond* court emphasized throughout its opinion that the litigant still must assert a claim based on his own injury. *Id.* at 225 (“Individuals have ‘no standing to complain simply that their Government is violating the law.’”) (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)); *id.* (stating that the litigant relying on the Tenth Amendment must still suffer from injury in fact, traceable to the defendant’s conduct, and redressable by a favorable decision).

Here, the plaintiffs cannot show Article III standing to assert their Tenth Amendment claim. The plaintiffs’ professed injury—“[t]hey are harmed by the commandeering scheme because Plaintiffs prefer Texas’s [ADMC] and racetrack-safety rules”—is no injury at all. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 (1992) (providing that a plaintiff cannot seek relief “that no more directly and tangibly benefits him than it does the public at large). A party cannot establish constitutional injury by suggesting that he may be subject to rules that he does not prefer. Compare *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (explaining that the concrete harm necessary to establish an injury in fact is that with a “close relationship” to a harm traditionally recognized as providing a basis for a lawsuit in American courts), with *Lujan*, 504 U.S. at 573 (“We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy.”).

Additionally, even if this were a valid injury, it is not redressable by a court order. HISA allows states

to “elect[]” to assess and collect fees on covered persons. 15 U.S.C. § 3052(f)(2)(A). But if the state does not make such an election, then the Authority steps in. 15 U.S.C. § 3052(f)(3). In this way, covered persons like the Gulf Coast plaintiffs will be regulated and subject to assessments even if they were to succeed on the anti-commandeering claim. Because the plaintiffs’ Tenth Amendment argument is independent of their other claims, the Court examines it as such. And assuming that HISA survives the plaintiffs’ other challenges, the plaintiffs will be subject to fees and assessments through either HISA or Texas law, so any alleged Tenth Amendment injury is not redressable by this Court. Because it cannot “provide [the] plaintiff[s] “with any effectual relief,” the Court finds that the private-party plaintiffs lack standing to bring the anti-commandeering claim. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

The plaintiffs respond to the defendant’s standing argument in a footnote. No. 5:23-CV-077, Dkt. No. 61 at 51 n.12 (citing No. 5:23-CV-077, Dkt. No. 24 at 17). They first argue that the defendants are changing their position because the defendants previously represented (in opposition to Texas’s motion to intervene) that Texas’s interests are adequately represented. The defendants correctly point out that a party’s representation has no bearing on the constitutional standing analysis. *Id.* But more importantly, Judge Kacsmaryk found (prior to the transfer) that the “State Intervenors cannot show their interests are inadequately represented” because Texas’s claims, legal arguments, and prayers for relief have largely mirrored that of the plaintiffs. No. 5:23-CV-077, Dkt. No. 32 at 9. Moreover, the Court previously gave Texas a choice: intervene late in this litigation,

but be limited to the current claims, or file a separate suit and raise as many arguments as you like. Dkt. No. 84 at 3 (“[T]he Court notifies the parties that it is inclined to grant permissive intervention, subject to the following condition[:] the proposed intervenors . . . may not pursue their anti-commandeering claim.”). Texas chose the former, yet it later moved to intervene in the Gulf Coast litigation (before it was transferred here). No. 5:23-CV077, Dkt. No. 18. Judge Kacsmaryk properly denied that motion. No. 5:23-CV-077, Dkt. No. 31. The intervenor-plaintiffs joined this lawsuit with eyes wide open, and the Court does not find that any misrepresentation occurred.

7. The plaintiffs’ due-process challenges fail.

The plaintiffs claim that the Authority allows economically self-interested industry participants to regulate their competitors in violation of the Due Process Clause. Dkt. No. 176 at 16–21. First, to the extent the plaintiffs assert a facial due process claim, the Court denies that claim for the reasons articulated in its prior order. Prior to the remand, the plaintiffs moved for summary judgment on their claim that the Authority is a self-interested entity possessing regulatory authority over its competitors. *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 725; *see also Amtrak III*, 821 F.3d at 31. The Court denied that claim because of HISA’s statutory protections against conflicts of interest, the Authority’s nonprofit, self-regulatory nature, and, in the Court’s view, the Authority’s subordinate role to the FTC. Dkt. No. 38 at 7, 32. The Fifth Circuit’s opinion did not address the Court’s due-process analysis. *Nat’l Horsemen’s*, 53 F.4th at 830 n.37 (“[W]e do not address the district court’s conclusion

rejecting the Appellants' due process claims on the ground that the Authority is not a self-interested industry participant."). And there has been no intervening change in law. Thus, the Court's prior finding of no facial due-process violation stands as the law of the case and, in any event, fails for the reasons stated in the Court's prior order. *Nat'l Horsemen's Benevolent & Protective Ass'n*, 596 F. Supp. 3d at 725.

The Court also rejects the plaintiffs' as-applied due-process challenge. Dkt. No. 176 at 17. The plaintiffs claim that, from a boots-on-the-ground perspective, the Authority is made up of self-interested competitors. *Id.* At trial, the plaintiffs identified members of the Board, nominating committee, and the two policy-making committees whom they believe do not meet the requirement that certain directors or committee members be "independent," i.e., "from outside the equine industry." *Id.* (quoting 15 U.S.C § 3052(d)). In support, the plaintiffs submitted a number of exhibits that are effectively biographical information of the board and committee members. HPX 40–54 (HPX 53 consists of 28 biographies).

Other than five pages in the plaintiffs' trial brief, the parties did not brief the due-process claim. *See* Dkt. No. 176 at 16–21. The standard the plaintiffs set out, derived from *Amtrak III*, is that the Due Process Clause of the Fifth Amendment is violated when an "economically self-interested actor . . . regulate[s] its competitors." *Id.* at 21 (quoting *Amtrak III*, 821 F.3d at 23). But the plaintiffs fail to show either element. At the outset, the Authority does not "regulate[] its competitor." *See id.* As the Court previously explained, the Authority's power to submit proposed rules is cabined by the FTC's unilateral right to

“abrogate, add to, and modify” the rules of the Authority. *Supra* Part. 4.B.i.

Nor is the first requirement—that the Authority or its directors be “economically self-interested”—met here. “[T]he statute . . . [and] bylaws are replete with conflict-of-interest provisions.” Dkt. No. 182 at 131; *see* 15 U.S.C. § 3052(e). The plaintiffs admit that directors and committee members, and their family members, cannot have a financial interest in covered horses, but they argue that Authority officials can be self-interested if their involvement in the industry is related to racetracks or some other portion of the industry not related to covered horses. Dkt. No. 176 at 20. The plaintiffs apparently overlook section 3052(e)(2), which prohibits Authority officials from serving as “official[s] or officer[s]” of—or “in a governance or policymaking capacity” for—an “equine industry representative.” 15 U.S.C. § 3052(e)(2). HISA defines an equine industry representative as “an organization regularly and significantly engaged in the equine industry, including organizations that represent the interests of . . . racetracks.” 15 U.S.C. § 3051(8).¹⁴ Thus, HISA adequately protects against self-interested directors and committee members. And the plaintiffs do not cite any director or committee member who is economically self-interested; they only point out directors and committee members who they believe do not qualify as “independent members” under the statute. Dkt. No. 176 at 17–20. How this alleged defect qualifies as economic self-interest is unclear, and the plaintiffs do not explain.

¹⁴ The section also covers those who “represent the interests of, and whose membership consists of, owners, breeders, trainers, racetracks, veterinarians, State racing commissions, and jockeys.” *Id.*

But even if this were economic self-interest, HISA gives the FTC the authority to step in and define what it means to be an independent member. *See supra* Part 4.B.i; 15 U.S.C. § 3053(e) (explaining that the FTC can initiate rulemaking as necessary “to ensure the fair administration of the Authority”).

There are two final issues with the plaintiffs’ argument. First, even with the introduction of evidence and the passage of time, this as-applied challenge is essentially no different than the facial challenge the Court has already decided. The directors and nominating committee members are the same as when the plaintiffs originally brought their claim. Dkt. No. 182. at 130; Dkt. No. 39-1 at 13–15. None of the biographical evidence submitted changes the Court’s conclusion—the Authority is not a self-interested industry participant. And second, the plaintiffs have not identified a rule, policy, or enforcement decision that resulted in a worse outcome for one of the plaintiffs. *See* Dkt. No. 182 at 131. Basic notions of justiciability require that the plaintiffs do more than “complain simply that their Government is violating the law.” *Bond*, 564 U.S. at 225. In short, HISA affords sufficient protection through its conflicts-of-interest provisions, and the plaintiffs have not met their burden to show unconstitutional self-dealing by directors, committee members, or others associated with the Authority.

8. Conclusion

Given the Court’s findings of fact and conclusions of law, the plaintiffs fail to establish that HISA, as amended following the Fifth Circuit’s opinion, continues to violate the Constitution. The Court finds that Horsemen plaintiffs have failed to prove Counts 1–3, and the intervenor plaintiffs have failed to prove

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Counts 1–2. Similarly, the Gulf Coast plaintiffs fail to prove Counts 1, 2, 5, and 8. The Gulf Coast plaintiffs voluntarily withdrew Counts 3, 4, 6, 7, and 9. The Court denies all other requested relief. The Court will enter a final judgment by separate order.

So ordered on May 4, 2023.

/s/ James W. Hendrix
JAMES WESLEY HENDRIX
UNITED STATES DISTRICT JUDGE

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APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 24–489

GULF COAST RACING, L.L.C., *et al.*,
Petitioners

v.

HORSERACING INTEGRITY AND SAFETY AUTHORITY,
INC., *et al.*

ON PETITION FOR WRIT OF CERTIORARI to the
United States Court of Appeals for the Fifth Circuit.

THIS CAUSE having been submitted on the petition
for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered
and adjudged by this Court that the petition for a writ
of certiorari is granted. The judgment of the above
court in this cause is vacated with costs, and the case
is remanded to the United States Court of Appeals for
the Fifth Circuit for further consideration in light of
FCC v. Consumers’ Research, 606 U. S. ____ (2025).

IT IS FURTHER ORDERED that the petitioners,
Gulf Coast Racing, L.L.C., et al., recover from
Horseracing Integrity and Safety Authority, Inc., et al.,
Three Hundred Dollars (\$300.00) for costs herein
expended.

June 30, 2025

Clerk’s costs: \$300.00

SEAL A True copy SCOTT S. HARRIS

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Clerk of the Supreme Court of the United States

/s/ Scott S. Harris

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10520

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE
ASSOCIATION; ARIZONA HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION; ARKANSAS HORSEMEN'S
BENEVOLENT AND PROTECTIVE ASSOCIATION; INDIANA
HORSEMEN'S BENEVOLENT AND PROTECTIVE
ASSOCIATION; ILLINOIS HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION; LOUISIANA HORSEMEN'S
BENEVOLENT AND PROTECTIVE ASSOCIATION;
MOUNTAINEER PARK HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION; NEBRASKA HORSEMEN'S
BENEVOLENT AND PROTECTIVE ASSOCIATION;
OKLAHOMA HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION; OREGON HORSEMEN'S
BENEVOLENT AND PROTECTIVE ASSOCIATION;
PENNSYLVANIA HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION; WASHINGTON HORSEMEN'S
BENEVOLENT AND PROTECTIVE ASSOCIATION; TAMPA
BAY HORSEMEN'S BENEVOLENT AND PROTECTIVE
ASSOCIATION; GULF COAST RACING, L.L.C.; LRP
GROUP, LIMITED; VALLE DE LOS TESOROS, LIMITED;
GLOBAL GAMING LSP, L.L.C.; TEXAS HORSEMEN'S
PARTNERSHIP, L.L.P.,

Plaintiffs—Appellants,

STATE OF TEXAS; TEXAS RACING COMMISSION,

Intervenor Plaintiffs—Appellants,

versus

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JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN;
MD NANCY COX; JOSEPH DUNFORD; FRANK KEATING;
KENNETH SCHANZER; HORSERACING INTEGRITY AND
SAFETY AUTHORITY, INCORPORATED; FEDERAL TRADE
COMMISSION; COMMISSIONER NOAH PHILLIPS;
COMMISSIONER CHRISTINE WILSON; LISA LAZARUS;
STEVE BESHEAR; ADOLPHO BIRCH; ELLEN MCCLAIN;
CHARLES SCHEELER; JOSEPH DEFRANCIS; SUSAN
STOVER; BILL THOMASON; LINA KHAN, Chair; REBECCA
SLAUGHTER, Commissioner; ALVARO BEDOYA,
Commissioner; D. G. VAN CLIEF,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:21-CV-71
USDC No. 5:23-CV-77

ORDER:

The Appellees' unopposed motion for stay of the mandate pending petition for writ of certiorari is GRANTED. If the petition is granted, the stay will continue until the Supreme Court's judgment is handed down. If the petition is denied, the stay will dissolve.

IT IS FURTHER ORDERED that Appellees' unopposed motion for an expedited ruling on the motion is GRANTED.

/s/ Stuart Kyle Duncan
STUART KYLE DUNCAN
United States Circuit Judge

APPENDIX E

**Horseracing Integrity and Safety Act
15 U.S.C.**

§ 3051. Definitions

In this chapter the following definitions apply:

(1) Authority

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

(2) Breeder

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

(3) Commission

The term “Commission” means the Federal Trade Commission.

(4) Covered horse

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

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

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

(5) Covered horserace

The term “covered horserace” means any horserace involving covered horses that has a substantial relation to interstate commerce, including any

Thoroughbred horserace that is the subject of interstate off-track or advance deposit wagers.

(6) Covered persons

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

(7) Equine constituencies

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

(8) Equine industry representative

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

(9) Horseracing anti-doping and medication control program

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

(10) Immediate family member

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

(11) Interstate off-track wager

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

(12) Jockey

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

(13) Owner

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

(14) Program effective date

The term “program effective date” means July 1, 2022.

(15) Racetrack

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

(16) Racetrack safety program

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

(17) Stakes race

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

(18) State racing commission

The term “State racing commission” means an entity designated by State law or regulation that has

jurisdiction over the conduct of horseracing within the applicable State.

(19) Trainer

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

(20) Training facility

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

(21) Veterinarian

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

(22) Workout

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

§ 3052. Recognition of the Horseracing Integrity and Safety Authority

(a) In general

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

(b) Board of directors

(1) Membership

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

(A) Independent members

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

(B) Industry members

(i) In general

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

(ii) Representation of equine constituencies

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

(2) Chair

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

(3) Bylaws

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

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

(B) the establishment of standing committees;

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

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

(E) any other matter the Board considers necessary.

(c) Standing committees

(1) Anti-doping and medication control standing committee

(A) In general

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

(B) Membership

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

(i) Independent members

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

(ii) Industry members

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

(iii) Qualification

A majority of individuals selected to serve on the anti-doping and medication control standing

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committee shall have significant, recent experience in anti-doping and medication control rules.

(C) Chair

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

(2) Racetrack safety standing committee

(A) In general

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

(B) Membership

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

(i) Independent members

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

(ii) Industry members

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

(C) Chair

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

(d) Nominating committee

(1) Membership

(A) In general

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

(B) Initial membership

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

(C) Vacancies

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

(2) Chair

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

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

(A) Initial members

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

(B) Subsequent members

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

(e) Conflicts of interest

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

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

(2) An official or officer-

(A) of an equine industry representative; or

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

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

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

(f) Funding

(1) Initial funding

(A) In general

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

(B) Borrowing

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

(C) Annual calculation of amounts required

(i) In general

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

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

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

(ii) Basis of calculation

The amounts calculated under clause (i) shall—

(I) be based on-

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

(bb) the projected amount of covered racing starts for the year in each State; and

(II) take into account other sources of Authority revenue.

(iii) Requirements regarding budgets of Authority

(I) Initial budget

The initial budget of the Authority shall require the approval of $\frac{2}{3}$ of the Board.

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(II) Subsequent budgets

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

(iv) Rate increases

(I) In general

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

(II) Notice and comment

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

(2) Assessment and collection of fees by States

(A) Notice of election

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

(B) Requirement to remit fees

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

(C) Withdrawal of election

A State racing commission may cease remitting fees under this subsection not earlier than one year

after notifying the Authority of the intent of the State racing commission to do so.

(D) Determination of methods

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

(3) Assessment and collection of fees by the Authority

(A) Calculation

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

(B) Allocation

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

(C) Assessment and collection

(i) In general

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

(ii) Remittance of fees

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

(D) Limitation

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

(4) Fees and fines

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

(5) Rule of construction

Nothing in this chapter shall be construed to require—

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

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

(g) Quorum

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

§ 3053. Federal Trade Commission oversight

(a) In general

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

rule, or proposed modification to a rule, of the Authority relating to—

- (1) the bylaws of the Authority;
- (2) a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and methods;
- (3) laboratory standards for accreditation and protocols;
- (4) standards for racing surface quality maintenance;
- (5) racetrack safety standards and protocols;
- (6) a program for injury and fatality data analysis;
- (7) a program of research and education on safety, performance, and anti-doping and medication control;
- (8) a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons;
- (9) a schedule of civil sanctions for violations;
- (10) a process or procedures for disciplinary hearings; and
- (11) a formula or methodology for determining assessments described in section 3052(f) of this title.

(b) Publication and comment

(1) In general

The Commission shall-

- (A) publish in the Federal Register each proposed rule or modification submitted under subsection (a); and
- (B) provide an opportunity for public comment.

(2) Approval required

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

(c) Decision on proposed rule or modification to a rule**(1) In general**

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

(2) Conditions

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

(A) this chapter; and

(B) applicable rules approved by the Commission.

(3) Revision of proposed rule or modification**(A) In general**

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

(B) Resubmission

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

(d) Proposed standards and procedures**(1) In general**

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

(2) Notice and comment

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

(e) Amendment by Commission of rules of Authority

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

§ 3054. Jurisdiction of the Commission and the Horseracing Integrity and Safety Authority**(a) In general**

Beginning on the program effective date, the Commission, the Authority, and the anti-doping and medication control enforcement agency, each within the scope of their powers and responsibilities under this chapter, as limited by subsection (j)1, shall—

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

(2) exercise independent and exclusive national authority over—

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

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

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

(b) Preemption

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

(c) Duties

(1) In general

The Authority—

(A) shall develop uniform procedures and rules authorizing—

(i) access to offices, racetrack facilities, other places of business, books, records, and personal

property of covered persons that are used in the care, treatment, training, and racing of covered horses;

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

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

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

(2) Approval of Commission

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

(d) Registration of covered persons with Authority

(1) In general

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

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

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

(3) Cooperation

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

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

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

(4) Failure to comply

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

(e) Enforcement of programs**(1) Anti-doping and medication control enforcement agency****(A) Agreement with USADA**

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

(B) Agreement with other entity

If the Authority and the United States Anti-Doping Agency are unable to enter into the agreement described in subparagraph (A), the Authority shall enter into an agreement with an entity that is

nationally recognized as being a medication regulation agency equal in qualification to the United States Anti-Doping Agency to act as the anti-doping and medication control enforcement agency under this chapter for services consistent with the horseracing anti-doping and medication control program.

(C) Negotiations

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

(D) Elements of agreement

Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, and budgets of the United States Anti-Doping Agency while acting as the anti-doping and medication control enforcement agency under this chapter, as well as a provision for the revision of the agreement to increase in the scope of work as provided for in subsection (k)2, and any other matter the Authority considers appropriate.

(E) Duties and powers of enforcement agency

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

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

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

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

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

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

(F) Term and extension

(i) Term of initial agreement

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

(ii) Extension

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

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

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

provided by such rules and consistent with this chapter.

(2) Agreements for enforcement by State racing commissions

(A) State racing commissions

(i) Racetrack safety program

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

(ii) Anti-doping and medication control program

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

(B) Elements of agreements

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

(3) Enforcement of standards

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

(f) Procedures with respect to rules of Authority

(1) Anti-doping and medication control

(A) In general

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

(B) Consultation

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

(2) Racetrack safety

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

(g) Issuance of guidance

(1) The Authority may issue guidance that-

(A) sets forth—

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

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

(B) relates solely to—

(i) the administration of the Authority; or

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

(2) Submittal to Commission

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

(3) Immediate effect

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

(h) Subpoena and investigatory authority

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

(i) Civil penalties

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

(j) Civil actions

(1) In general

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

(2) Injunctions and restraining orders

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

(k) Limitations on authority**(1) Prospective application**

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

(2) Previous matters**(A) In general**

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

(B) State racing commission

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

(3) Other laws unaffected

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

horses and covered races, and the use of medication in human participants in covered races.

(l) Election for other breed coverage under chapter

(1) In general

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

(2) Election conditional on funding mechanism

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

(3) Apportionment

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

§ 3055. Horseracing anti-doping and medication control program**(a) Program required****(1) In general**

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

(2) Consideration of other breeds

In developing the horseracing anti-doping and medication control program with respect to a breed of horse that is made subject to this chapter by election of a State racing commission or the breed governing organization for such horse under section 3054(k)1 of this title, the Authority shall consider the unique characteristics of such breed.

(b) Considerations in development of program

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

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

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

to allow injured or unsound horses to train or race should be prohibited.

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

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

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

(6) The amount of therapeutic medication that a covered horse receives should be the minimum necessary to address the diagnosed health concerns identified during the examination and diagnostic process.

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

(c) Activities

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

(1) Standards for anti-doping and medication control

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

(A) uniform standards for-

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

(ii) laboratory testing accreditation and protocols; and

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

(2) Review process for administration of medication

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

(3) Agreement requirements

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

(4) Anti-doping and medication control enforcement agency

(A) Control rules, protocols, etc

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

rules, protocols, policies, and guidelines for approval by the Authority.

(B) Results management

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

(C) Testing

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

(D) Testing laboratories

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

(5) Anti-doping and medication control standing committee

The anti-doping and medication control standing committee shall, in consultation with the anti-doping and medication control enforcement agency, develop lists of permitted and prohibited medications,

methods, and substances for recommendation to, and approval by, the Authority. Any such list may prohibit the administration of any substance or method to a horse at any time after such horse becomes a covered horse if the Authority determines such substance or method has a long-term degrading effect on the soundness of a horse.

(d) Prohibition

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

(e) Advisory committee study and report

(1) In general

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

(2) Report

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

(3) Modification of prohibition**(A) In general**

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

(B) Condition

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

(i) That the modification is warranted.

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

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

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

(f) Exemption**(1) In general**

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

the use of furosemide on covered horses during such period.

(2) Exceptions

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

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

(B) covered horses competing in stakes races.

(3) Contents of request

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

(4) Grant of exemption

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

(g) Baseline anti-doping and medication control rules

(1) In general

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

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

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

(2) Baseline anti-doping medication control rules described

(A) In general

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

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

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

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

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

(B) Conflict of rules

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

(3) Modifications to baseline rules**(A) Development by anti-doping and medication control standing committee**

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

(B) Authority approval

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

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

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

§ 3056. Racetrack safety program**(a) Establishment and considerations****(1) In general**

Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the

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Authority shall establish a racetrack safety program applicable to all covered horses, covered persons, and covered horseraces in accordance with the registration of covered persons under section 3054(d) of this title.

(2) Considerations in development of safety program

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

(b) Elements of horseracing safety program

The horseracing safety program shall include the following:

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

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

(3) A racing surface quality maintenance system that—

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

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

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

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

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

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

(8) A schedule of civil sanctions for violations.

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

(10) Management of violation results.

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

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

(c) Activities

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

(1) Standards for racetrack safety

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

(2) Standards for safety and performance accreditation**(A) In general**

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

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

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

(B) Modifications**(i) In general**

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

(ii) Notice and comment

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

(C) Extension of provisional or interim accreditation

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

(3) Nationwide safety and performance database

(A) In general

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

(B) Collection of information

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

§ 3057. Rule violations and civil sanctions

(a) Description of rule violations

(1) In general

The Authority shall issue, by rule in accordance with section 3053 of this title, a description of safety, performance, and anti-doping and medication control

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rule violations applicable to covered horses and covered persons.

(2) Elements

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

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

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

(ii) the presence of a permitted substance in a sample in excess of the amount allowed by the horseracing anti-doping and medication control program; and

(iii) the use of a permitted method in violation of the applicable limitations established under the horseracing anti-doping and medication control program.

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

(C) Possession of any prohibited substance or method.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Testing laboratories

(1) Accreditation and standards

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

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

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

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

(2) Administration

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

(3) Extension of provisional or interim accreditation

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

(4) Selection of laboratories**(A) In general**

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

(B) Selection by the Authority

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

(c) Results management and disciplinary process**(1) In general**

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

(A) rules for safety, performance, and anti-doping and medication control results management; and

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

(2) Elements

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

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

(B) Hearing procedures.

(C) Standards for burden of proof.

(D) Presumptions.

(E) Evidentiary rules.

(F) Appeals.

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

(3) Due process

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

(d) Civil sanctions

(1) In general

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

(2) Requirements

The rules established under paragraph (1) shall—

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

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

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

(3) Severity

The civil sanctions under paragraph (1) may include—

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

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

(e) Modifications

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

§ 3058. Review of final decisions of the Authority

(a) Notice of civil sanctions

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

(b) Review by administrative law judge

(1) In general

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

subject to de novo review by an administrative law judge.

(2) Nature of review

(A) In general

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

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

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

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

(B) Conduct of hearing

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

(3) Decision by administrative law judge

(A) In general

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

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

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

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

(B) Final decision

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

(c) Review by Commission

(1) Notice of review by Commission

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

(2) Application for review

(A) In general

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

(B) Effect of denial of application for review

If an application for review under subparagraph (A) is denied, the decision of the administrative law

judge shall constitute the decision of the Commission without further proceedings.

(C) Discretion of Commission

(i) In general

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

(ii) Matters to be considered

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

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

(II) the decision involved—

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

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

(3) Nature of review

(A) In general

In matters reviewed under this subsection, the Commission may—

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

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

(B) De novo review

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

(C) Consideration of additional evidence

(i) Motion by Commission

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

(ii) Motion by a party

(I) In general

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

(aa) such additional evidence is material;
and

(bb) there were reasonable grounds for failure to submit the evidence previously.

(II) Procedure

The Commission may—

(aa) accept or hear additional evidence; or

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

(d) Stay of proceedings

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

§ 3059. Unfair or deceptive acts or practices

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

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

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

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

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

§ 3060. State delegation; cooperation**(a) State delegation****(1) In general**

The Authority may enter into an agreement with a State racing commission to implement, within the jurisdiction of the State racing commission, a component of the racetrack safety program or, with the concurrence of the anti-doping and medication control enforcement agency under section 3054(e) of this title,

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a component of the horseracing anti-doping and medication control program, if the Authority determines that the State racing commission has the ability to implement such component in accordance with the rules, standards, and requirements established by the Authority.

(2) Implementation by State racing commission

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

(b) Cooperation

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