IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

GULF COAST RACING LLC; LRP GROUP LTD.; VALLE DE LOS TESOROS LTD.; GLOBAL GAMING LSP, LLC,	§	
Plaintiffs,	§	Civil Action No. 2:22-cv-146
v.	§	
HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC., et al,	§	
Defendants.	§	

PLAINTIFFS' ORIGINAL COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF AND
REQUEST FOR A PRELIMINARY INJUNCTION

TO THE HONORABLE DISTRICT COURT JUDGE:

Plaintiffs Gulf Coast Racing LLC, LRP Group Ltd., Valle De Los Tesoros Ltd., and Global Gaming LSP, LLC (collectively, **"Plaintiffs"**) respectfully show this Court as follows:

Introduction

1. This suit is about power. It is about whether Congress can confer coercive powers upon individuals who have not been properly constituted as government officers. In the Horseracing Integrity and Safety Act of 2020 (**"HISA"**), 15 U.S.C. §§ 3051, *et seq*., Congress empowered a group of private individuals—incorporated weeks before the

law's passage under the laws of Delaware as the Horseracing Integrity and Safety Authority (the **"Authority"**)—to exercise governmental power over the horseracing industry. The "Authority" is empowered by law to, among other things, subpoena documents and compel testimony, search businesses and private databases and seize documents, conduct adjudicatory proceedings, and prosecute actions in federal court like other federal prosecutors. No private individuals have such powers. No private individual can show up at one's door and demand documents and testimony under sanction of law. No private individual can conduct a private search and seizure. And no private individual has the power to hale another private citizen into court to enforce offenses against the public. But the "Authority" does.

2. The powers of the "Authority" are the very definition of government power in general and executive power in particular. It does not matter how much oversight some other governmental entity has over its functions (and here there is almost none). It does not matter if there is, ultimately, an appeal to a real court (and here there is not). The very ability to coerce private individuals in the first instance is what only governments can lawfully do. *See* The Federalist No. 15 (Alexander Hamilton) ("Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience."); Max Weber, "Politics as Vocation" (1918) (the government or the state "claims the monopoly of the legitimate use of physical force"); *United States v. Ackerman*, 831 F.3d 1292, 1295–96 (10th Cir. 2016) (Gorsuch, J.) ("[W]hen an actor is endowed with law enforcement powers beyond those enjoyed by private citizens," that actor is exercising a "uniquely public function.")

(emphasis omitted).

3. And bringing prosecutions is the very core of "the executive power." 1 William Blackstone, *Commentaries on the Laws of England* *257-59 (1765) (as the Executive is "the fountain of justice and general conservator of the peace of the kingdom," the monarch is "the proper person to prosecute for all public offenses and breaches of the peace").

4. Not only does the "Authority" exercise governmental power through its enforcement functions, it also makes *legislative rules*—rules that alter the rights and obligations of private parties. ILAN WURMAN, ADMINISTRATIVE LAW THEORY AND FUNDAMENTALS: AN INTEGRATED APPROACH 193 (2021); *see also, e.g.*, *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). The Authority is empowered to promulgate legislative rules relating to anti-doping, medication protocols, and racetrack safety for the entire horseracing industry nationwide. And it does so with no government oversight, and no notice and comment, as to the substance and policy merits of those rules. In other words, the "Authority" exercises power that no private individual can exercise and that would be considered "executive power" if done by an officer of the United States or an official agency of the United States government.

5. And yet the "Board" of the "Authority," comprising private individuals appointed through a Nominating Committee whose membership is established by the Authority's own incorporation documents, has not been appointed through the constitutionally required mechanisms for the exercise of executive power. At a minimum,

the Board's directors are inferior officers not appointed by the President and Senate, or by the head of a department; and likely they are, with respect to their rulemaking functions, principal officers who require appointment by and with advice and consent of the Senate. *United States v. Arthrex*, 141 S.Ct. 1970, 1982 (2021) (an officer is principal if there is no other officer with a "means of countermanding [a] final decision already on the books"); *id.* at 1983 ("Since the founding, principal officers have directed the decisions of inferior officers on matters of law *as well as policy*.") (emphasis added).

6. If this Authority's powers are not executive power, which must be exercised by properly constituted officers, then the "Authority" is exercising nothing other than naked legislative power. The making of legislative rules altering the rights and obligations of private parties is, when done by executive officers, considered to be executive power. *City of Arlington v. FCC.*, 569 U.S. 290, 305 n.4 (2013) ("Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'"). That is because some degree of "lawmaking" or policymaking discretion inheres in the exercise of executive (or judicial) power. *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("The whole theory of *lawful* congressional 'delegation' is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.").

7. But if the Authority is promulgating binding legislative rules altering the

rights and obligations of private parties, but is not otherwise exercising executive or judicial power, then it is exercising *the* legislative power that only Congress can exercise. If the Authority's powers are allowed to stand, then Congress will have created "a new Branch altogether, a sort of junior-varsity Congress," *id.* at 427, alien and, indeed, hostile, to our system of constitutional government.

8. This Court should not allow such a novel and alien structure to stand. HISA violates several structural and overlapping provisions of the Constitution, and the Court should invalidate it on one or more of the following grounds.

9. First, the Authority exercises executive power, and its directors are principal officers who must be appointed by and with advice and consent of the Senate. Alternatively, they are inferior officers who must also be appointed by that process unless Congress has vested their appointment in the head of a department.

10. Second, and relatedly, the Authority's directors are unremovable except according to their own rules, violating the constitutional provision granting the executive power to the President of the United States.

11. Third, if the Authority does not exercise executive power, then Congress's conferral of legislative rulemaking power over the horseracing industry is a naked delegation of its legislative power—whether or not there is an intelligible principle.

12. Fourth, even if the Authority were properly constituted and its officers properly appointed, the law would violate the nondelegation doctrine for another reason: because the Authority need not take notice and comment on the substance of any of its legislative rules and need not consider relevant comments received from such process,

the Authority's rulemaking authority is far less cabined than such authority for most other agencies of the United States government.

13. Fifth—and in the alternative to the previous four grounds—if this Court were to conclude that the Authority is a "private" entity, then Congress's grant of powers to the Authority would still violate the "private nondelegation doctrine" by granting government power (whether executive or legislative) to a private entity.

14. Sixth, the Act's enforcement mechanism, and the Authority's enforcement rules, violate the Seventh Amendment by forgoing a jury trial for monetary penalties, which the Authority has established as $50,000-$100,000 *per* violation.

15. Seventh, the entire statutory scheme violates Article III because it channels the adjudication of private-rights claims through an administrative process with no jury trial, or without de novo factual review by a politically insulated and neutral federal judge.

16. Eighth, the statute violates the anti-commandeering doctrine by coercing states either to fund the Authority's activities, or to give up a portion of their legislative power of taxation—even if the Authority's regulations would not otherwise preempt that power, and by altering its regulatory requirements and conscripting state agents.

17. Ninth, the Authority has empowered itself to conduct wide-ranging administrative searches by coercing Plaintiffs to consent as a condition of registration, thereby violating the Fourth Amendment.

18. One way or another, this Court should enforce the Constitution's basic scheme of separated powers and invalidate the Authority.

19. The Plaintiffs are the owners and/or licensees of racetracks in Texas. They

bring this lawsuit to challenge HISA, which, as described above (and below), is unconstitutional on its face and in its application to Plaintiffs. The Authority began implementing and enforcing certain HISA regulations on July 2, 2022. Plaintiffs are entities that each hold a license issued by the Texas Racing Commission pursuant to the Texas Racing Act, Texas Occupations Code, Title 13, Subtitle A-1.

20. This Court should declare HISA unconstitutional and preliminarily and permanently enjoin Defendants from implementing and enforcing the statute and any regulations the Authority has purported to promulgate under it.

The Parties

21. Plaintiff Gulf Coast Racing LLC is a Texas limited liability company. Gulf Coast Racing LLC owns a greyhound racetrack located in Nueces County, Texas, that regularly simulcasts Thoroughbred horseraces. Additionally, Gulf Coast Racing LLC is working with the Texas Racing Commission to redesignate the racetrack as a Class 2 horseracing track.

22. Plaintiff LRP Group Ltd. is a Texas limited partnership and is working toward operating an active horseracing track in South Texas. The racetrack would have live horseraces as well as simulcast races.

23. Plaintiff Valle De Los Tesoros Ltd. is a Texas limited partnership and is working toward operating an active horseracing track in South Texas. The racetrack would have live horseraces as well as simulcast races. The racetrack is licensed by the Texas Racing Commission as an inactive racetrack.

24. Plaintiff Global Gaming LSP, LLC is a Texas limited liability company which

owns Lone Star Park, a racetrack in Grand Prairie, Texas, that has live horseracing including Thoroughbred races, as well as simulcasts races including Thoroughbred races. An affiliate of Global Gaming LSP, LLC owns Remington Park, a racetrack in Oklahoma City, Oklahoma, that has live horseracing including Thoroughbred races, as well as simulcasts races including Thoroughbred races.

25. Defendant Horseracing Integrity and Safety Authority, Inc. purports to be a nonprofit Delaware corporation with its principal place of business at 401 W. Main Street, Suite 222, Lexington, Fayette County, KY 40507. HISA gives it the power to draft rules to develop and implement a horseracing anti-doping and medication control program and a racetrack safety program.

26. Defendant Lisa Lazarus is the Authority's Chief Executive Officer. She oversees the Authority's full operations, including the implementation of HISA's regulatory regimes and its interactions with States and covered persons under the Act. On information and belief, Ms. Lazarus resides in Fayette County, Lexington, Kentucky.

27. Defendant Steve Beshear is an independent director serving on the Board of Directors of the Authority. He served as the Governor of Kentucky between 2007 and 2015. On information and belief, Beshear resides in Lexington, Fayette County, Kentucky.

28. Defendant Adolpho Birch is an independent director serving on the Board of Directors of the Authority. He is senior vice president of business affairs and the chief legal officer for the Tennessee Titans. On information and belief, Birch resides in Nashville, Davidson County, Tennessee.

29. Defendant Leonard S. Coleman, Jr. is an independent director serving on

the Board of Directors of the Authority and was co-chair of the Nominating Committee for the Authority. He served as the president of the National League of Professional Baseball Clubs from 1994 to 1999. On information and belief, Coleman resides in Palm Beach, Palm Beach County, Florida, and/or Atlantic Highlands, New Jersey.

30. Defendant Ellen McClain is an independent director serving on the Board of Directors of the Authority. She serves as chief operating officer for the nonprofit organization Year Up. On information and belief, McClain resides in New York, Bronx County, New York.

31. Defendant Charles Scheeler is an independent director serving on the Board of Directors of the Authority. He is a retired partner at the law firm DLA Piper. On information and belief, Scheeler resides in Towson, Baltimore County, Maryland.

32. Defendant Joseph DeFrancis is an industry director serving on the Board of Directors of the Authority. He is the managing partner of Gainesville Associates, LLC. On information and belief, DeFrancis resides in Columbia, Howard County, Maryland.

33. Defendant Susan Stover is an industry director serving on the Board of Directors of the Authority. She is a professor of surgical and radiological sciences at the University of California, Davis, School of Veterinary Medicine. On information and belief, Stover resides in Winters, Yolo County, California.

34. Defendant Bill Thomason is an industry director serving on the Board of Directors of the Authority. He is the former president and CEO of Keeneland Association, Inc., a Thoroughbred racetrack and horse-auction complex. On information and belief, Thomason resides in Lexington, Fayette County, Kentucky.

35. Defendant D.G. Van Clief is an industry director serving on the Board of Directors of the Authority. He was previously president of the Breeders' Cup. On information and belief, Van Clief resides in Charlottesville, Albemarle County, Virginia.

36. Defendant Jerry Black is a member of the Nominating Committee for the Horseracing Integrity and Safety Authority, Inc. and a Visiting Professor at the Texas Tech University School of Veterinary Medicine. On information and belief, he resides in Lubbock, Texas, in the Northern District of Texas.

37. Defendant Katrina Adams is a member of the Nominating Committee for the Horseracing Integrity and Safety Authority, Inc. and a past President of the United States Tennis Association. On information and belief, she resides in White Plains, New York.

38. Defendant Nancy Cox is a co-chair of the Nominating Committee for the Horseracing Integrity and Safety Authority, Inc. and Vice President for Land Grant Engagement and the Dean of the College of Agriculture, Food, and Environment at the University of Kentucky. On information and belief, she resides in Lexington, Kentucky.

39. Defendant Joseph Dunford is a member of the Nominating Committee for the Horseracing Integrity and Safety Authority, Inc. and a former Chairman of the Joint Chiefs of Staff. On information and belief, he resides in Marshfield, Massachusetts.

40. Defendant Frank Keating is a member of the Nominating Committee for the Horseracing Integrity and Safety Authority, Inc. and a former Governor of the State of Oklahoma. On information and belief, he resides in McLean, Virginia.

41. Defendant Kenneth Schanzer is a member of the Nominating Committee for the Horseracing Integrity and Safety Authority, Inc. and a former President of NBC Sports.

On information and belief, he resides in Avon, Colorado.

42. Defendant Federal Trade Commission (the "**FTC**") is a U.S. governmental agency headquartered in Washington, D.C. The Act delegates to the FTC a limited power to approve or disapprove certain of HISA's draft regulations governing horseracing anti-doping, medication control, and racetrack safety.

43. Defendant Lina Khan is sued in her official capacity as Chair of the FTC.

44. Defendant Rebecca Kelly Slaughter is sued in her official capacity as a Commissioner of the FTC.

45. Defendant Alvaro Bedoya is sued in his official capacity as a Commissioner of the FTC.

46. Defendant Noah Joshua Phillips is sued in his official capacity as Commissioner of the Federal Trade Commission.

47. Defendant Christine S. Wilson is sued in her official capacity as a Commissioner of the FTC.

Jurisdiction and Venue

48. This action arises under the U.S. Constitution and the laws of the United States, and therefore this Court has subject-matter jurisdiction over this case. *See* 28 U.S.C. §§ 1331, 2201; 5 U.S.C. §§ 701-706. This Court also has jurisdiction pursuant to 28 U.S.C. § 1337 because HISA purports to regulate commerce. Additionally, this Court has jurisdiction under 28 U.S.C. § 1346(a)(2) over this civil action against an agency of the United States.

49. This Court is authorized to award the requested relief under 5 U.S.C. § 706;

28 U.S.C. § 1361; 28 U.S.C. §§ 2201, 2202; and Fed. R. Civ. P. 57, 65.

50. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1) because the Defendants include United States agencies or officers sued in their official capacities, a defendant in the action resides in this judicial district, a plaintiff resides in the judicial district, and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district. *See* 28 U.S.C. § 1391(e)(1).

51. Venue is proper in this Court as to the remaining defendants under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district and, alternatively, because multiple Defendants are subject to this Court's personal jurisdiction with respect to this action.

52. Venue is proper in this Court as to all Defendants, alternatively, because all Defendants are acting as officers of the United States within the meaning of 28 U.S.C. § 1391(e)(1), and a defendant in the action resides in this judicial district, a plaintiff resides in the judicial district, and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

Factual Allegations

53. Plaintiffs are the owners and/or licensees of racetracks in Texas. At the horseracing tracks, live horseraces take place, including at times races of Thoroughbred horses. In addition to the live event, the races are typically simulcast to other locations in Texas, throughout the United States, and internationally. Plaintiffs with active tracks show simulcast races of Thoroughbred horses from other locations at their tracks, and Plaintiffs with inactive tracks plan to do so in the future.

54. For over 125 years, Thoroughbred racing has been regulated by the States. State laws establish a statutory framework, which is then administered and enforced by State Racing Commissions—in Plaintiffs' case, the Texas Racing Commission—whose members are appointed by the governor. All tracks (as well as owners, trainers, veterinarians, other horsemen personnel and racing officials) must be licensed by the Texas Racing Commission and are subject to rules and regulations promulgated by the Commission, including rules and regulations regarding racetrack safety and equine medication including, but not limited to, prohibited substances and therapeutic medications. The Texas Racing Commission was established in 1987 when voters passed a referendum that legalized pari-mutuel betting in Texas. The purpose of the Texas Racing Act, Texas Occupations Code, Title 13, Subtitle A-1, is to provide for the strict regulation of horse racing and greyhound racing and the control of pari-mutuel wagering in connection with that racing. Tex. Occ. Code § 2021.002. Plaintiffs are entities that each hold a license issued by the Texas Racing Commission pursuant to the Texas Racing Act.

55. Despite this existing state regulatory scheme, the Authority, via HISA and the regulations promulgated thereto, has attempted to step in and regulate horseracing in many states throughout the country. This unconstitutional nationwide effort has resulted in mass confusion and disruption, regulatory chaos, erratic implementation, and, more importantly, in numerous constitutional violations.

- **HISA Legislative History and Structure**

56. On September 8, 2020, the Authority filed a Certificate of Incorporation in Delaware. On September 29, 2020, the Horseracing Integrity and Safety Act of 2020, H.R.

1754, passed the U.S. House of Representatives. It was never subject to a Senate hearing. On October 6, 2020, the Authority selected and publicized the members of the Nominating Committee to select the members of the Board of the Authority—all pursuant to a statute that had not yet been enacted. Public Law No. 116-260, § 1203(d), 134 Stat. at 3255 (15 U.S.C. § 3052(d)).

57. On December 21, 2020, Congress enacted House Resolution 133, the 2,000-page Consolidated Appropriations Act, 2021, which was signed into law on December 27, 2020 as Public Law No. 116-260. Title XII of Division FF of the Consolidated Appropriations Act, 2021, constitutes HISA. Public Law No. 116-260, §§ 1201-1212, 134 Stat. 1182, 3252-75 (15 U.S.C. §§ 3051, *et seq*.).

58. HISA recognizes "[t]he private, independent, self-regulatory, nonprofit corporation, to be known as the 'Horseracing Integrity and Safety Authority,' . . . 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 delegates to the Authority federal regulatory authority over horseracing activities throughout the country. *Id*. § 3054. HISA delegates legislative rulemaking authority over the horseracing industry to the Authority, including the power to "develop[ ] and implement[ ] a horseracing anti-doping and medication control program and a racetrack safety program." *Id*. § 3052(a). The Authority is charged with developing programs and promulgating rules covering all facets of equine medication and horseracing safety. *Id*. § 3052, *et seq*. The Authority has regulatory control over track owners and track employees, horse owners and trainers, and others involved

in Thoroughbred horseraces if they have a substantial relation to interstate commerce in the United States. *Id*. Further, the Authority is given investigatory powers and the right to enforce alleged rule violations with fines, suspensions, and civil lawsuits brought in its own name. *Id*. HISA permits the Authority to bring civil enforcement actions, asserting the power of the federal government to enforce its rules. *Id*. § 3054(j). HISA also delegates legislative power to the Authority to collect revenue from those it regulates, and the Authority may charge state racing commissions their proportionate share of the fees needed to operate the Authority. *Id*. § 3052(f).

59. According to HISA, the Authority is governed by a nine-member Board of Directors appointed by the Nominating Committee, which itself consists of seven private citizen members "selected from business, sports, and academia." *Id*. § 3052(d).

60. HISA delegates to the Authority power to "exercise independent and exclusive national authority over . . . all horseracing safety, performance, and anti-doping and medication control matters for covered horses, covered persons, [and] covered horseraces." *Id*. § 3054(a)(2).

61. HISA defines "covered" horses, persons, and horseraces initially to include only Thoroughbreds. *Id*. § 3051. HISA delegates legislative power to state and private organizations to expand the Authority's regulatory jurisdiction to other breeds: "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 Act." *Id*. § 3054(l)(1). The election is made by filing an election form and obtaining the Authority's approval; if it is a state racing commission that makes the election, the expanded coverage

to the requested breed will apply only in that state. *Id*. If the state racing commission or breed-governing organization elects to expand HISA's coverage, it must put "in place a mechanism to provide sufficient funds to cover the costs of the administration of [HISA] with respect to the horses that will be covered" due to the election; the Authority will then "apportion costs" attributable to this election "fairly among all impacted segments of the horseracing industry, subject to approval by the Commission in accordance with section 3053." *Id*. § 3054(l)(2)–(3).

62. HISA defines the term "covered horserace" as "any horserace involving covered horses that has a substantial relation to interstate commerce." *Id*. § 3051(5). HISA defines the term "covered persons" to mean "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." *Id*. § 3051(6). HISA does not define "agents, assigns, and employees of such persons and other horse support personnel who are engaged in the care, training, or racing of covered horses." *Id*. The Authority expands this incredibly broad classification—particularly without any congressional explanation on "agent, assigns, and employees of such persons"—to include everyone "licensed by a State Racing Commission" and who has "access to restricted areas of a racetrack in the ordinary course of your work." *See* Registration, HISA (2022), https://bit.ly/3xToEIE. This means that even assistant attorneys general representing the racing commission are supposedly covered under HISA and required to register with the organization.

63. HISA delegates to the Authority power to promulgate binding legislative rules that alter the rights and obligations of private parties involved in the horseracing industry. 15 U.S.C. § 3053(a). The Authority's legislative rules need not go through the notice and comment process relating to their substance or policy merits, and the Authority need not respond to any such comments it does receive. *Id*. § 3053. Instead, HISA directs Defendant FTC to publish the Authority's proposed rules in the Federal Register for public comment, as if they had been drafted by a governmental agency. *Id*. § 3053(b)(1), (c)(1), and (d)(2). But the FTC may *not* consider any public comments on the substance or policy merits of the Authority's rules. The FTC may only consider for itself whether the Authority's rules are "consistent with" the statute, *Id*. § 3053(c), which they most inevitably will be because HISA broadly delegates to the Authority power, for example, to "establish a racetrack safety program" and to establish a "schedule of civil sanctions for violations," leaving a wide range of policy discretion. *Id*. § 3056(a)(1), (b)(8). Other delegations are similarly broad. *E.g.*, *id*. § 3055(a)(1) ("the Authority shall establish a horseracing anti-doping and medication control program"); *id.* § 3055(b) (listing numerous factors for consideration). The delegation for assessing and determining the amount of and basis for fees for the Authority's funding is also broad.

64. The only additional guidance given to the FTC on whether to approve a rule that has been drafted by the Authority—that is, in addition to ensuring the rule is "consistent with" the Act—is that the FTC must ensure the rule is also consistent with "applicable rules approved by the Commission." *Id*. § 3053(c)(2)(B). However, these FTC-promulgated rules are not substantive rules; they are only procedural rules detailing the

Authority's own rulemaking processes. *Id*. § 3053(a) ("The Authority shall submit to the Commission, in accordance with such rules as the Commission may prescribe . . . .").

65. Thus, in FTC orders giving official sanction to the Authority's rules, the FTC made clear that it was not considering the policy merits of the rules, nor considering public comments on the policy merits of the rules. *See, e.g.*, FTC, Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority, https://tinyurl.com/yw92tt74, March 25, 2022, at 4 ("the Commission received many comments that were unrelated to whether the proposed rule is consistent with the Act or procedural rule, and those comments have little bearing on the Commission's determination"); *id.* at 26 ("Under the Act, the Commission reviews the Authority's proposals for their consistency with the Act and the Commission's rule, not for general policy."); *id.* at 33 ("the state agencies that argued that the proposed Rule 8400(a)(1) access rights are broader than corresponding state laws have identified a policy difference but not an inconsistency with the Act").

66. In short, the FTC role in this process is essentially ministerial. It does not develop or implement federal regulatory authority but, instead, publishes the Authority's regulations for notice and comment rulemaking. The FTC may not consider, and the Authority need not consider, any comments on the substantive merits of their legislative rules. The FTC may not draft rules to regulate horseracing, nor may it modify rules drafted by the Authority. The FTC may only "approve or disapprove" rules that have already been drafted by the Authority. And if the FTC wants to modify a rule, it can only suggest to the Authority that it do so. 15 U.S.C. § 3053(c)(3).

67. HISA directs the Authority to obtain its initial funding through the program's effective date by securing loans. *Id*. § 3052(f)(1)(A). Thereafter, no later than 90 days before the effective date and no later than "November 1 each year thereafter," HISA instructs the Authority to "determine and provide to each State racing commission the estimated amount required from the State" for "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 "to liquidate the State's proportionate share of any loan or funding shortfall in the current calendar year and any previous calendar year." *Id*. § 3052(f)(1)(C)(i). Each state's proportional share is based on the Authority's annual budget for the following year and "the projected amount of covered racing starts for the year in each State." *Id*. § 3052(f)(1)(C)(ii)(I).

68. Under HISA, states are forced to adopt one of two options for funding the Authority. First, a state racing commission may "elect[] to remit fees" and, if they do so, "the election shall remain in effect and the State racing commission shall be required to remit fees . . . according to a schedule established in rule developed by the Authority and approved by" the Federal Trade Commission. *Id*. § 3052(f)(2). The state racing commission must give the Authority at least one year's notice before it withdraws that election. *Id*. § 3052(f)(2)(C). Second, if a state refuses to pay the demanded fees, the Authority shall, at least monthly, "calculate the applicable fee per racing start multiplied by the number of racing starts in the State during the preceding month." *Id*. § 3052(f)(3)(A). The Authority will then "allocate equitably the amount calculated . . . among covered persons involved with covered horseraces pursuant to such rules as the

Authority may promulgate," and the Authority will directly collect fees from the covered persons, who "shall be required to remit such fees to the Authority." *Id*. § 3052(f)(3)(B)–(C). If a state chooses this second route, however, a punishment follows: HISA prohibits that state racing commission from "impos[ing] or collect[ing] from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters for covered horseraces." *Id*. § 3052(f)(3)(D). "Nothing in this Act shall be construed to require . . . the appropriation of any amount to the Authority; or . . . the Federal Government to guarantee the debts of the Authority." *Id*. § 3052(f)(5).

69. HISA further states "[t]o avoid duplication of functions, facilities, and personnel, and to attain closer coordination and greater effectiveness and economy in administration of Federal and State law," in any case involving a violation of both the Authority's rules and state law, HISA requires "State law enforcement authorities" to "cooperate and share information" with the Authority. *Id*. § 3060(b).

70. The program effective date according to HISA was July 1, 2022, although, as explained below, the Authority has delayed implementation of various aspects of the program. *Id*. § 3051(14).

71. The Authority has not published its bylaws that govern the Authority's operations. HISA provides that the bylaws will govern the (A) administrative structure and employees of the Authority; (B) the establishment of standing committees; (C) the procedures for filling vacancies on the Board and the standing committees; (D) term limits for members and termination of membership; and (E) any other matter the Board considers necessary. *Id*. §§ 3052(b)(3), 3053(a)(1). At this time, the Authority's bylaws

have not been published or made available for public comment.

- **HISA Regulations**

72. HISA required the Authority to adopt regulations to establish two specific programs—a horseracing anti-doping and medication-control program and a racetrack safety program—and to adopt rules that govern the Authority's enforcement and sanctions authority.

73. By July 1, 2022, the Authority, following the notice-and-comment procedures described above, was required to "establish a racetrack safety program." 15 U.S.C. § 3056(a)(1). Similarly, by July 1, 2022, the Authority was required to "establish a horseracing anti-doping and medication control program" using the notice-and-comment procedures described above. 15 U.S.C. §3055(a)(1). However, the Authority, with the FTC's approval, opted to delay enforcement of the anti-doping and medication control program until January 2023. FTC, Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority, https://tinyurl.com/yw92tt74, March 25, 2022, at 5 n.14.

74. For the racetrack safety program, HISA required the regulations to speak to 12 specific areas of racetrack operations: (1) training and racing safety standards and protocols that account for regional differences and differences between racing facilities; (2) uniform training and racing safety standards "consistent with the humane treatment of covered horses"; (3) a "racing surface quality maintenance system"; (4) uniform "track safety standards"; (5) "[p]rograms for injury and fatality data analysis"; (6) investigations relating to safety violations; (7) "[p]rocedures for investigating, charging, and adjudicating

violations and for the enforcement of civil sanctions for violations"; (8) "[a] schedule of civil sanctions for violations"; (9) "[d]isciplinary hearings"; (10) "[m]anagement of violation results"; (11) "[p]rograms relating to safety and performance research and education"; and (12) "[a]n evaluation and accreditation program that ensures that racetracks" meet the standards of the racetrack safety program. *Id*. §3056(b). No less than 120 days before July 1, 2022, the Authority was required to issue a rule that establishes standards for the accreditation of racetracks under the racetrack safety program. *Id*. §3056(c)(2). Pursuant to this directive, the Authority has promulgated and the FTC has approved rules covering racetrack safety, enforcement, assessment, methodology and registration.

75. One such rule is the Registration Rule. HISA requires "a covered person" to "register . . . [a]s a condition of participating in covered races and in the care, ownership, treatment, and training of covered horses." *Id*. § 3054(d)(1). The registrant must agree "to be subject to and comply with" HISA's enforcement rules. *Id*. § 3054(d)(2). In accordance with this mandate, late on June 29, the FTC issued an order approving HISA's registration rule. FTC, Order Approving the Registration Rule Proposed by the Horseracing Integrity and Safety Authority, https://bit.ly/3OAsnC4 (March 3, 2022), at 2. The Registration Rule requires that a "Covered Person as defined by 15 U.S.C. § 3051(6) shall register with the Authority in accordance with this rule on the [Authority's] website." 87 Fed. Reg. at 29,866, https://www.govinfo.gov/content/pkg/FR-2022-05-17/pdf/2022-10709.pdf. The Registration Rule also states that "[f]ailure by a Responsible Person to register a Covered Horse with the Authority shall constitute a violation and shall be subject to the sanctions set forth in Rule 8200 and the disciplinary procedures set forth in Rule

8300," both of which the FTC already approved. *Id*. at 29,867. The Registration Rule, issued on June 29, was set to go into effect July 1.

76. Additional Racetrack Safety Rules include the following:

- Under Rule 2133, states that enter an agreement with the Authority must "enforce the safety regulations set forth in Rules 2200 through 2293." 87 Fed. Reg. at 449. If a state does not choose to enter an agreement, "the Racetracks in the jurisdiction shall implement the requirements set forth in Rule 2133, subject to the Racetrack Safety Committee's approval of the individuals named as stewards by the Racetracks." *Id*.

- Rule 2191 forces racetracks to "develop and implement a testing program for drugs and alcohol for Jockeys, subject to the approval of" the Authority. 87 Fed. Reg. at 453.

- Rule 2180, *et seq*., purports to delegate to state racing commissions (at 87 Fed. Reg. at 453) the Authority's statutory authority to develop and implement a program to educate horsemen on the new rules. *See* 15 U.S.C. §3056(b)(11) ("The horseracing safety program shall include . . . Programs relating to safety and performance research and education.").

- Rule 2280 limits a jockey's use of a crop (whip) to six strokes in increments of two during a race, regardless of the race's duration. 87 Fed. Reg. at 457.

- The Enforcement Rule empowers the Authority to assign adjudication of alleged regulatory violations to various quasi-administrative and private entities. Under Rule 8330, the Authority has unfettered discretion to assign adjudication of alleged rule violations to an undefined (and currently non-existent) "National Stewards Panel," to an unnamed (currently non-existent) "independent Arbitral Body," to state stewards, or to itself. 87 Fed. Reg. at 4029. Violations of those rules can be punished with "a broad range" of civil penalties. 87 Fed. Reg. at 4025.

- The Enforcement Rule also provides that, should the Board adjudicate a matter itself, "[a]n initial hearing before the Board shall be conducted by a panel of three Board members." Rule 8340(a). It provides the mechanism by which the Board will provide notice to the accused. Rule 8340(c). It provides that the Board "may require the submission of written briefs." Rule 8340(d). It provides that testimony shall be taken under oath. Rule 8340(e). It then provides for "a full presentation of evidence," during which the Board "shall not be bound by the technical rules of evidence," but further provides that the Board "may disallow evidence that is irrelevant or unduly repetitive

of other evidence," that the Board shall "determine, in its sole discretion, the weight and credibility of any evidence or testimony," that the Board "may admit hearsay evidence if it determines the evidence is of a type that is commonly relied on by reasonably prudent people," and that the Board may rule on assertions of privilege. Rule 8340(g). After conclusion of the hearing, the Board submits findings of fact and conclusions of law. Rule 8340(i). An appeal, if any, is then taken to the full Board, which upholds the initial panel decision "unless it is clearly erroneous or not supported by the evidence of applicable law." Rule 8350(f). In some circumstances, the full Board may take "additional testimony . . . under oath." Rule 8350(g)(4).

- Rule 8400(a)(1) gives the FTC, the Authority, "or their designees" "free access to the books, records, offices, racetrack facilities, and other places of business of Covered Persons that are used in the care, treatment, raining, and racing of Covered Horses, and to the books, records, offices, facilities, and other places of business of any person who owns a Covered Horse or performs services on a Covered Horse." 87 Fed. Reg. at 4031. And Rule 8400(a)(2) empowers the FTC, the Authority, "or their designees" to "seize any medication, drug, substance, [or] paraphernalia" that is "in violation or suspected violation of any provision of 15 U.S.C. [§] 57A or the regulations of the authority." *Id*.

77. While these rules were meant to go into effect July 1, the Authority has selectively delayed certain Racetrack Safety Rules, stating that it will not enforce them starting July 1. The Racetrack Safety Rules include specific requirements that federally regulate the particular type of horseshoe required for racing and training. 87 Fed. Reg. at 457 ("Except for full rims 2 millimeters or less from the ground surface of the Horseshoe, traction devices are prohibited on forelimb and hindlimb Horseshoes during racing and training on dirt or synthetic racing tracks."). Likewise, the Racetrack Safety Rules provide "riding crops specifications," regulating the type ("soft-padded"), size (up to "8 ounces"), length (up to "30 inches"), diameter (minimum of "three-eighths of one inch"), and material ("a waterproof, ultraviolet, and chemical resistant foam material that is durable and preserves its shock absorption in use under all conditions") of riding crops, just to

name a few specifications. *Id*. However, the Authority recognized that supply chain issues mean that there are not enough compliant horseshoes or riding crops available. Jeff Cota, HISA Clarifies Shoeing Rules, Confirms Delay, Am. Farriers J. (May 12, 2022), https://bit.ly/3a5lJn3. So compliance is a literal impossibility. *Id*. Therefore, the Authority postponed the rules governing horseshoes and riding crop specifications until at least August 1, 2022.

78. Additionally, the Authority delayed enforcement of the vaccination requirements until January 1, 2023 to allow horses to be vaccinated with previously unrequired vaccines at times that do not interfere with training and racing schedules.

79. The Authority made clear that the following regulations would go into effect July 1, 2022: all covered persons must register (enforcement of registration requirements starting July 2); use of the riding crop will be enforced under Rule 2280; Rule 2261 trainer treatment records requirements; Rules 2290-2293 jockey safety rules; rules governing medication and treatment records for covered horses; and rules governing when a horse is claimed. Announcement Concerning Enforcement of HISA Racetrack Safety Rules and Registration Requirements (June 28, 2022), https://static1.squarespace.com/static/604f6ab712afe14e11227976/t/62bb7b4e1f0cc4223684ffc5/1656453966718/Racetrack+Safety+Enforcement+Announcement+6.28+.pdf.

- **HISA implementation**

80. HISA's implementation has been haphazard, applied on a case-by-case/ad hoc basis, leading to mass regulatory confusion and causing harm to Plaintiffs.

81. Because the Texas Racing Commission regulates horseraces in Texas,

among other areas, it does not have the authority to allow other regulators to regulate horseraces in Texas. Further, because HISA only applies to some aspects of horseracing and has been implemented in a haphazard manner, the Texas Racing Commission made the decision to reject inter-state simulcast applications so that HISA would not apply in Texas.

82. The Texas Racing Commission was forced to inform racetracks in Texas including Lone Star Park, that they will not be allowed to export Thoroughbred simulcast signals beginning July 1, 2022 in order to avoid a complete shutdown of its on-going races by seeking to suspend races qualifying as a Covered Horserace under the HISA regulations. Because the Texas Racing Act requires the Texas Racing Commission to supervise all aspects of a horserace where there will be wagering, there was no statute enabling the Authority to override or supplant any duties of the Texas Racing Commission.

83. Lone Star Park has run live Thoroughbred horseraces in early July ending July 24. These races have not been simulcast to other states for betting. Remington Park is scheduled to being live thoroughbred horseraces starting August 19.

84. For Plaintiffs LRP Group Ltd., Valle De Los Tesoros Ltd., and Gulf Coast Racing LLC, business plans have been stymied due to HISA's implementation and the regulatory chaos and confusion that has resulted. Both Plaintiffs LRP Group Ltd. and Valle De Los Tesoros Ltd. are entities working to become active horserace tracks in Texas. With the ad hoc and haphazard implementation of HISA (and its ever-changing regulatory landscape), as well as the confusion that has been created with the Texas Racing Act, which governs the same space, the operations of these two entities have come to a halt.

These entities were in the process of establishing live races, which would allow other operations and simulcasts to commence for the two entities, but for the implementation of HISA. The Texas Racing Commission has postponed twice the date for applying for live races (which are required to be on the books for other operations like simulcasts to occur) due to HISA's implementation. Similarly, Gulf Coast Racing LLC's efforts to be redesignated as a Class 2 horsetrack with the Texas Racing Commission has been frustrated and delayed due to the confusion surrounding HISA's implementation.

85. The Authority requires racetracks to become accredited. Informally, the Authority has stated (without promulgating any rule) that obtaining National Thoroughbred Racing Association (**"NTRA"**) accreditation, an accreditation from a private entity, will waive the Authority's accreditation requirement for three years. For this reason, Plaintiff Global Gaming LSP, LLC has spent significant time and resources obtaining NTRA accreditation for Lone Star Park racetrack and its affiliate has done the same for Remington Park racetrack.

86. For its funding, the Authority has sent invoices to both Lone Star Park and Remington Park, the racetracks owned by Plaintiff Global Gaming LSP, LLC and its affiliate, assessing fees for hundreds of thousands of dollars. The fee assessments are based on inaccurate data regarding past horseraces.

87. Both Lone Star Park and Remington Park have become registered racetracks with HISA by e-mailing with Authority representatives, rather than registering using the online portal.

Causes of Action

Claim 1: Violation of Article II, Section 2, Clause 2 of the U.S. Constitution (Appointments Clause)

88. The allegations in all preceding paragraphs are incorporated herein by reference as if fully stated.

89. The Authority exercises executive power in at least the following ways: it issues and can compel compliance with subpoenas and it can compel testimony as part of its investigative activities; it can conduct searches and seizures *with no judicial authorization*; it can conduct hearings to adjudicate violations; it can initiate enforcement actions in federal court; and it promulgates legislative rules binding on third parties.

90. Because the Authority exercises executive power by implementing and enforcing federal law, its directors exercise "significant discretion when carrying out . . . important functions," and are therefore "officers of the United States." *Lucia v. SEC*, 138 S.Ct. 2044, 2053 (2018) (cleaned up); *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991).

91. In *Lucia* and *Freytag*, the Administrative Law Judges (**"ALJs"**) and Special Tax Judges (**"STJs"**) at issue were held to be "officers of the United States" who exercised "significant discretion when carrying out . . . important functions."

92. These ALJs and STJs could "take testimony," "receive evidence," "examine witnesses at hearings," and "take pre-hearing depositions." They could "conduct trials," and specifically "administer oaths, rule on motions, and generally regulate the course of a hearing, as well as the conduct of parties and counsel." They could "rule on the admissibility of evidence" and "thus critically shape the administrative record (as they also do when issuing document subpoenas)." And they had "the power to enforce compliance

with discovery orders," and to "punish all contemptuous conduct." *Lucia*, 138 S.Ct. at 2053 (cleaned up).

93. HISA authorizes the Authority to establish "[p]rovisions for notification of safety, performance, and anti-doping and medication control rule violations," "[h]earing procedures," "[s]tandards for burden of proof," "[p]resumptions," "[e]videntiary rules," and "[a]ppeals." 15 U.S.C. § 3057(c)(1)-(2). The Authority, after conducting an adjudication, may "impose[] a final civil sanction for a violation committed by a covered person pursuant to the rules or standards of the Authority," which an Administrative Law Judge may subsequently review. *Id*. § 3058(a)-(b).

94. The Authority has promulgated regulations establishing its hearing procedures for violations of its various rules. For example, the Authority has promulgated Rule 8340, 87 Fed. Reg. 4029 (Jan. 26, 2022), establishing a hearing procedure for determining violations of its racetrack safety rules.

95. The regulation provides that "[a]n initial hearing before the Board shall be conducted by a panel of three Board members." Rule 8340(a). It provides the mechanism by which the Board will provide notice to the accused. Rule 8340(c). It provides that the Board "may require the submission of written briefs." Rule 8340(d). It provides that testimony shall be taken *under oath*. Rule 8340(e). It then provides for "a full presentation of evidence," during which the Board "shall not be bound by the technical rules of evidence," but further provides that the Board "may disallow evidence that is irrelevant or unduly repetitive of other evidence," that the Board shall "determine, in its sole discretion, the weight and credibility of any evidence or testimony," that the Board "may admit

hearsay evidence if it determines the evidence is of a type that is commonly relied on by reasonably prudent people," and that the Board may rule on assertions of privilege. Rule 8340(g). After conclusion of the hearing, the Board submits findings of fact and conclusions of law. Rule 8340(i). An appeal, if any, is then taken to the full Board, which upholds the initial panel decision "unless it is clearly erroneous or not supported by the evidence of applicable law." Rule 8350(f). In some circumstances, the full Board may take "additional testimony . . . under oath." Rule 8350(g)(4).

96. Just as in *Lucia* and *Freytag*, the Board can "take testimony," "receive evidence," and "examine witnesses at hearings." They can "conduct trials" (hearings), and specifically "administer oaths, rule on motions, and generally regulate the course of a hearing, as well as the conduct of parties and counsel." They can "rule on the admissibility of evidence" and "thus critically shape the administrative record (as they also do when issuing document subpoenas)."

97. The Directors also "hold a continuing office established by law." *Lucia*, 138 S.Ct. at 2053.

98. For these reasons the Directors are officers of the United States.

99. Importantly, *it does not matter how much supervisory authority the FTC has over such actions*. The amount of supervisory authority relates to whether an officer is principal or inferior, not to whether he is an officer at all. The ALJ and STJ officers in *Lucia* and *Freytag* could have their decisions reviewed by the SEC and Tax Court, respectively. That did not make them any less officers of the United States.

100. Rule 8400(a)(1) gives the FTC, HISA, "or their designees" "free access to

the books, records, offices, racetrack facilities, and other places of business of Covered Persons that are used in the care, treatment, raining, and racing of Covered Horses, and to the books, records, offices, facilities, and other places of business of any person who owns a Covered Horse or performs services on a Covered Horse." 87 Fed. Reg. at 4031. And Rule 8400(a)(2) empowers the FTC, HISA, "or their designees" to "seize any medication, drug, substance, [or] paraphernalia" that is "in violation or suspected violation of any provision of 15 U.S.C. [§] 57A or the regulations of the authority." *Id*. In other words, Rules 8400(a)(1) and (a)(2) purport to authorize persons acting under ostensible government authority to search private effects *outside the judicial process* and *without supervision from officers accountable to elected officials*.

101. Plaintiffs are unaware of any private party with such authority. The power to conduct administrative searches and seizures is everywhere and always subject to the control of officers politically accountable to the President, who is accountable to the people, or to properly appointed judicial officers.

102. These duties of the Authority therefore include "significant discretion" over "important functions," and the Directors of the Authority and their "designees" are officers of the United States.

103. The Authority also brings public prosecutions in District Court—a core executive power, 1 William Blackstone, *supra*, at *257-59—which also involves "significant discretion" over "important functions." For this reason, too, the Directors are officers of the United States.

104. The Authority also promulgates legislative rules—the bread and butter of

the administrative process—with no supervision from any other official over the substance or policy merits of its rules. The Authority therefore for this additional and independent reason exercises "significant discretion" over "important functions" and its Directors are officers of the United States.

105. Additionally, "the original public meaning of 'Officers of the United States' . . . encompassed all federal civil officials with responsibility for an ongoing statutory duty." *Lucia*, 138 S. Ct. at 2056 (Thomas and Gorsuch, JJ., concurring); *see also* Jennifer Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 564 (2018).

106. Because the Directors of the Authority have "responsibility for an ongoing statutory duty" (in fact, for many ongoing statutory duties), they are officers of the United States.

107. The Directors are not merely officers of the United States, they are principal officers.

108. An officer is a principal if there is no other officer with a "means of countermanding [a] final decision already on the books" made by that officer. *United States v. Arthrex*, 141 S.Ct. 1970, 1982 (2021). "Since the founding, principal officers have directed the decisions of inferior officers on matters of law *as well as policy*." *Id.* at 1983 (emphasis added).

109. The Directors of the Authority have final say on policy matters involving the enforcement of the laws of the United States. The Authority promulgates binding legislative rules that alter the rights and obligations of third parties, the substance and policy merits of which *are reviewed by no other officer*.

110. Because the Directors are principal officers, they must be appointed by the President by and with advice and consent of the Senate.

111. None of the Directors of the Authority have been so appointed.

112. Even if the Directors are not principal officers, for the reasons discussed above they are at a minimum inferior officers who must be appointed by the President by and with the advice and consent of the Senate, unless Congress has vested their appointment in the head of department. U.S. Const. Art II, Sec. 2, Cl. 2.

113. Congress has not vested their appointment in a head of department and therefore the Directors must be appointed by and with advice and consent of the Senate.

114. The Directors have not been so appointed.

115. If the FTC were to try to ratify the Directors' appointments, that would also violate the Appointments Clause because Congress has not *by law* vested their appointment in the FTC.

116. Because the Board members of the Authority are appointed by a private Nominating Committee, which was also selected privately, with no governmental oversight, even before HISA was passed into law, they are unconstitutionally constituted and are purporting to act as officers of the United States without proper appointments.

117. Plaintiffs are harmed by the unconstitutional appointment of the Authority because they are subject to a regulatory process that they are forced to finance with fees imposed on them by the Authority. Also, Plaintiffs are harmed because they are subject to new and onerous Authority rules that change and supersede the state racing commission rules on which their businesses have long relied. And they harmed by being

liable to an adjudicatory process that does not comport with the Appointments Clause.

Claim 2: Violation of Article II, Section 1 of the U.S. Constitution (Vesting Clause)

118. The allegations in all preceding paragraphs are incorporated herein by reference as if fully stated.

119. The U.S. Constitution vests "the executive Power" of the United States in a "President." U.S. Const. art. II, § 1.

120. The core of "the executive Power" is the power to execute law, including any discretion left by law. "Since the founding, principal officers have directed the decisions of inferior officers on matters of law *as well as policy*." *United States v. Arthrex*, 141 S.Ct. at 1983 (emphasis added). And principal officers are accountable to the President.

121. Although "[t]he entire 'executive Power' belongs to the President alone," it "would be impossible for one man to perform all the great business of the State," and therefore "the Constitution assumes that lesser executive officers will assist the supreme Magistrate in discharging the duties of his trust." *Seila Law v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (cleaned up) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)).

122. As Fisher Ames said in the First Congress, because the President cannot possibly handle all the minutiae of law-execution, he "must therefore have assistants." 1 Annals of Cong. 474 (1789) (Joseph Gales ed., 1834) (hereinafter "1 Annals"); 11 Doc. Hist. of First Fed. Cong., 1789–1791, at 880 (Bickford et al. eds., 1992) (hereinafter **"DHFFC"**). But "in order that he may be responsible to his country, he must have a choice

in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist." 1 Annals at 474; 11 DHFFC at 880. The executive power thus includes a "choice in selecting . . . assistants, a control over them, with power to remove them." 1 Annals at 474; 11 DHFFC at 880.

123. The Supreme Court has held that two layers of for-cause removal protections impermissibly interfere with the President's exercise of executive power and duty to ensure the faithful execution of the laws. *Seila Law*, 140 S. Ct. at 2197.

124. Defendants FTC Commissioners are protected by for-cause removal provisions. 15 U.S.C. § 41 ("Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.").

125. Defendants Directors of the Board of Directors of the Authority cannot be removed by the FTC Commissioners at will; in fact, they cannot be removed by the FTC Commissioners *at all*, as their removals are governed by their own bylaws. *Id*. §§ 3052(b)(3)(D), 3053(a)(1).

126. The Authority is therefore unconstitutionally structured because the President cannot superintend the Authority's execution of the laws.

127. Even if the Authority's rules were genuinely promulgated by the FTC (they are not), they would still be unconstitutional because even one layer of for-cause removal protection violates Article II's Vesting Clause.

128. Plaintiffs are harmed by the unconstitutional removal structure of both the FTC and the Authority because they are subject to new and onerous obligations and prohibitions, and new and onerous enforcement and adjudicatory processes, over which

no elected official is accountable.

Claim 3: Violation of Article I, Section 1 of the U.S. Constitution (naked delegation of legislative power)

129. The allegations in all preceding paragraphs are incorporated herein by reference as if fully stated.

130. If the Authority exercises executive power, then its Directors are officers of the United States who have not been properly appointed.

131. If the Authority does not exercise executive power, then the Authority's promulgation of legislative rules constitutes an exercise of the legislative power that cannot be delegated by Congress.

132. That is because promulgating legislative rules, which alter the rights and obligations of private parties, is the core of the legislative power. 1 William Blackstone *44 (law is a "rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong"); The Federalist No. 75 (Alexander Hamilton) ("The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society.").

133. The reason that administrative agencies can ordinarily promulgate legislative rules is because some degree of policymaking discretion inheres in law execution. *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("The whole theory of *lawful* congressional 'delegation' is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.").

134. If the Authority is promulgating binding legislative rules altering the rights and obligations of private parties, but is not otherwise exercising executive or judicial power, then it is exercising *the* legislative power that only Congress can exercise. If the Authority's powers are allowed to stand, then Congress will have created "a new Branch altogether, a sort of junior-varsity Congress," *Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting), alien to our system of constitutional government.

135. Because the Authority would be nakedly exercising legislative power, the intelligible principle does not apply—*any* exercise of legislative power, not as an incident to a lawful exercise of executive or judicial power, is "legislative power" that cannot be delegated. "It is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation." *Mistretta*, 488 U.S. at 420 (Scalia, J., dissenting).

136. Plaintiffs are harmed by the Authority's unconstitutional exercise of legislative power because they are subject to the Authority's legislative rules.

Claim 4: Violation of Article I, Section 1 of the U.S. Constitution (no intelligible principle)

137. The allegations in all preceding paragraphs are incorporated herein by reference as if fully stated.

138. Even if the rules were promulgated by properly appointed government officers exercising executive power (and they were not), they would still be unconstitutional because HISA would still violate the nondelegation doctrine.

139. Article I, Section 1 of the United States Constitution says: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall

consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. Implicit in that exclusive "assignment of power to Congress is a bar on its further delegation." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). The Constitution thus prohibits Congress from transferring "to another branch 'powers which are strictly and exclusively legislative.'" *Id*. This rule is "mandate[d]" by "the integrity and maintenance of the system of government ordained by the Constitution." *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

140. To comply with the nondelegation doctrine, a statute must: (1) delineate a general policy; (2) the agency to apply it; and (3) the boundaries of the delegated authority. *See Mistretta*, 488 U.S. at 372-73. The boundaries of the delegated authority must meaningfully constrain the Executive branch's discretion.

141. Whenever Congress grants another branch decision-making authority, it must "lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Mistretta*, 488 U.S. at 372 (alteration omitted) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)). A Congressional grant of decision-making authority without such an intelligible principle to guide the exercise of the conferred discretion is a constitutionally "forbidden delegation of legislative power." *Id*. (quoting *J.W. Hampton*, 276 U.S. at 409).

142. HISA does not provide adequate boundaries that meaningfully constrain the authority of the FTC, state racing commissions, breed-governing organizations and the Authority.

143. In HISA, Congress decided to regulate "any Thoroughbred horse" engaged

in horseraces. 15 U.S.C. § 3051(4). But Congress also empowered other entities to expand HISA's regulatory scope: "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 Act by the filing of a designated election form and subsequent approval by the Authority." *Id*. § 3054(l)(1).

144. Whether HISA's regulations apply to any breeds other than Thoroughbred horses depends entirely on the decision of a state racing commission or a breed-governing organization to file an election form and on the decision of the Authority to approve that election. Congress has thus delegated to state racing commissions, breed-governing organizations, and the Authority the power to determine whether HISA's regulatory sweep includes any breeds other than Thoroughbred horses. These entities have the sole discretion of determining whether "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" non-Thoroughbred horses are subject to regulation under HISA. *Id.* § 3051(6).

145. Congress has not supplied any intelligible principle to which the state racing commissions or breed-governing organizations must conform in electing to have a non-Thoroughbred breed included within the scope of HISA, stating only that they "may elect to have such breed be covered." *Id*. § 3054(l)(1) (emphasis added).

146. Nor has Congress supplied any intelligible principle to which the Authority must conform in deciding whether to give its "approval" of an election to subject a non-

Thoroughbred breed to regulation under HISA. *Id*. § 3054(l)(1); *see also Panama Ref. Co. v. Ryan*, 293 U.S. 388, 418 (1935) (finding unlawful delegation where "Congress did not declare in what circumstances th[e] transportation [of "hot oil"] should be forbidden, or require the President to make any determination as to any facts or circumstances"; where "the President was not required to choose" "[a]mong the numerous and diverse objectives broadly stated"; and where "[t]he President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary," leaving "the matter to the President without standard or rule, to be dealt with as he pleased").

147. By delegating the authority to decide whether HISA regulates large swaths of the horseracing industry without any intelligible principle, HISA unconstitutionally delegates Congress's legislative power to state racing commissions, breed-governing organizations, and the Authority.

148. Additionally, HISA breaches the nondelegation doctrine by improperly delegating Congress's power to the Authority and the FTC without providing an intelligible guiding principle more generally.

149. HISA does not require that the Authority take any public comments on the substance and policy merits of its legislative rules.

150. The FTC must consider public comments on whether the Authority's rules are "consistent with" the statute but does not permit them to consider public comments on the substantive merits of the rules themselves.

151. The Authority has wide-ranging substantive and policymaking discretion

because the statute simply requires the Authority to "establish a racetrack safety program" and to establish a "schedule of civil sanctions for violations," leaving a wide range of policy discretion. *Id*. § 3056(a)(1), (b)(8). Other delegations are similarly broad. *E.g., id*. § 3055(a)(1) ("the Authority shall establish a horseracing anti-doping and medication control program"); *id.* § 3055(b) (listing numerous factors for consideration).

152. It is true that the statute provides a list of factors for the Authority to consider, those factors still leave wide-ranging discretion. For example, the Authority has promulgated a schedule of civil sanctions providing for $50,000-$100,000 *per* violation of its racetrack safety rules. Rule 8200(b)(2)(ii), 87 Fed. Reg. 4028 (Jan. 16, 2022).

153. The FTC's response to this rule illustrates the breadth of discretion. The FTC noted that the Authority "defended as 'sound' its proposed ranges of fines for first-time violations, repeat violations, and severe violations, which several industry commenters had criticized as too high." FTC, Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority, https://tinyurl.com/yw92tt74, March 25, 2022, at 14. The FTC had nothing to say about the substantive merits of the issue. The Authority could have chosen fines of $1,000,000 and the FTC would have had nothing to say because "[t]he Commission [found] that proposed Rule 8200 is consistent with the Act," since "[t]he list of available sanctions satisfies the Act's requirement of 'a schedule of civil sanctions for violation.'" *Id*. at 14-15 (quoting 15 U.S.C. § 3052(a)(8)). As would a civil sanction of $1 billion.

154. This example illustrates that ordinarily, the Administrative Procedure Act's notice-and-comment process cabins the discretion of most agencies. Agencies would not

be free to impose a $1 billion fine (and probably would not impose a $100,000 per-violation fine) because they would have to respond to public comments on the merits of their proposals and show that their rules are not arbitrary and capricious. 5 U.S.C. § 553, 706(2)(a).

155. Under HISA, not only are the substantive merits of the Authority's policies not subject to notice and comment rulemaking, but it is not at all clear that judicial review is available to ensure that the substance is not arbitrary and capricious. That is because the Administrative Procedure Act, section 706(2)(a) provides that an *agency's* action may be set aside as arbitrary and capricious. But the FTC's actions cannot be arbitrary and capricious so long as the substantive policies are consistent with the wide-ranging discretion left by the statute. And the Authority's actions cannot be arbitrary and capricious *if the Authority is not an agency*.

156. Thus, the Authority's rules are subject neither to notice-and-comment, nor to judicial review of reasonableness, and therefore the Authority has far broader discretion to fashion legislative rules than do most agencies. This absence of the notice-and-comment process, and the absence of judicial review, necessitates correspondingly more strict statutory standards—only that way the Commission's "consistent with" review would have bite and the Authority's discretion would not be so boundless.

157. To take another example, the Authority has sent invoices to both Lone Star Park and Remington Park, the racetracks owned by Plaintiff Global Gaming LSP, LLC and its affiliate, respectively, assessing fees for hundreds of thousands of dollars. The fee assessments are based on inaccurate data regarding past horseraces. Had the Authority

been required to engage in notice-and-comment rulemaking on the substantive merits of its policies, it would have been made aware of, and would have had to respond to, this issue. Without the benefit of such process, the Authority's discretion is nearly unbridled.

158. Therefore, the statute unlawfully delegates legislative power to the Authority by delegating to it legislative rulemaking power without sufficiently precise standards to cabin the Authority's discretion.

159. Plaintiffs are harmed by the Authority's unconstitutional exercise of legislative power because they are subject to the Authority's regulations.

160. Plaintiffs are further harmed by the Authority's unconstitutional statutory authority because they have non-Thoroughbred horseraces who might be subject to the Act at the future whim of the Authority, state racing commissions, or breeding organizations.

Claim 5: Violation of Private Nondelegation Doctrine

161. The allegations in all preceding paragraphs are incorporated herein by reference as if fully stated.

162. As noted above, the Authority is unconstitutionally exercising executive power because its Directors are not properly appointed. If the Authority is not exercising executive power, then it is exercising naked legislative power, which is also unconstitutional.

163. In the alternative, if the Authority is held to be a private entity, the result is the same because it would be exercising government power (whether legislative, executive, or judicial), which only government officials may exercise.

164. Congressional delegation of regulatory authority to "private persons" is "legislative delegation in its most obnoxious form." *Carter v. Carter Coal Co*., 298 U.S. 238, 311 (1936). Accordingly, while Congress may delegate regulatory authority to other branches in certain circumstances, "[f]ederal lawmakers cannot delegate regulatory authority to a private entity" at all. *Ass'n of Am. R.R.s. v. U.S. Dep't of Transp*., 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated and remanded on other grounds sub nom*. *Dep't of Transp. v. Ass'n of Am. R.R.s*., 575 U.S. 43 (2015).

165. A private entity may aid a governmental agency if that agency retains full discretion to approve, disapprove, and modify the private entity's proposals. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). If Congress makes a private entity part of a governmental regulatory program, the "amount of government oversight of the program" must be "considerable." *United States v. Frame*, 885 F.2d 1119, 1128 (3d Cir. 1989), *abrogated on other grounds by Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997). "Congress may employ private entities for ministerial or advisory roles, but it may not give these entities governmental power over others." *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004).

166. With HISA, Congress has delegated regulatory authority over the horseracing industry to the Authority. The Authority is declared to be a "private, independent, self-regulatory, nonprofit corporation." 15 U.S.C. § 3052(a). If the Authority is indeed a private entity, then it has been unlawfully delegated regulatory authority. This unlawful delegation of authority includes, among other things, the right to draft governmental rules on equine medication and racetrack safety, to assess millions of

dollars in fees on horse owners and trainers to finance the operations of the Authority, to assess civil penalties, civil sanctions, and rule violations, including levying fines and ordering suspensions of owners and trainers for alleged violations of Authority rules, to issue subpoenas and otherwise investigate purported violations, and to commence civil actions in federal court to enforce Authority rules.

167. Congress has subjected Plaintiffs to this entire regulatory scheme, which is (by hypothesis) unlawfully run by a private entity. HISA's delegation of such legislative, executive, and/or judicial authority to a private entity constitutes a violation of the private nondelegation doctrine.

168. The limited oversight given to the FTC over the Authority is not sufficient to cure the constitutional violation. Because the FTC may not draft rules on its own initiative, may not consider the substantive merits of the Authority's rules, and has virtually no say in enforcement proceedings, HISA places it in a subservient role to the Authority, and thus, violates the private nondelegation doctrine. In addition, HISA unlawfully delegates to the Nominating Committee the appointment power, and there is no FTC oversight whatsoever over its decisions.

169. In the past, courts have upheld Congress's delegation of authority to "self-regulatory organizations" (SROs) in the securities industry, and primarily the Financial Industry Regulatory Authority (FINRA), the rules of which are subject to approval by the Securities and Exchange Commission (SEC).

170. Under the original statute, the SROs were subject to the ultimate authority of the SEC, which could unilaterally "abrogate" or "amend" the SROs' proposed rules.

Maloney Act, Pub. L. No. 75-719, § 15A(k)(1), 52 Stat. 1070, 1074 (1938). And today, the SEC retains the authority to "abrogate, add to, and delete from all FINRA rules as it deems necessary." *Aslin v. FINRA*, 704 F.3d 475, 476 (7th Cir. 2013) (citing 15 U.S.C. § 78s(c)).

171. Unlike the SEC, the FTC has no discretion and no ability to implement its preferred policy. It has no power to "abrogate" or "amend" existing or proposed rules, except on the margins.

172. Additionally, unlike SROs, which are self-regulatory organizations that make rules for the conduct of *their own members*, Plaintiffs are not members of the Authority. The Authority, in other words, is not a "self-regulatory" organization at all; it is an "other-regulatory" organization that makes rules that bind private third parties.

173. Thus, the Authority, if it is a private entity, has been delegated governmental authority with insufficient supervision by the FTC, in violation of the private nondelegation doctrine.

174. Plaintiffs are harmed by the unconstitutional delegations because they are subject to a regulatory process that they are forced to finance with fees imposed on them by the Authority. Also, Plaintiffs are harmed because they are subject to new and onerous Authority rules that change and supersede the state racing commission rules on which their businesses have long relied.

Claim 6: Violation of U.S. Const., amend. VII (seeking monetary penalties without a jury trial)

175. The allegations in all preceding paragraphs are incorporated herein by reference as if fully stated.

176. Under HISA, the Authority or its designee may seek civil penalties from

covered persons. HISA enforcement actions under these rules that successfully obtain civil penalties will deprive aggrieved parties of their property rights and economic interests without providing aggrieved parties the right to a jury trial, in violation of the Seventh Amendment. *See Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 454 (5th Cir. 2022) (holding Seventh Amendment right to a jury trial applies to suits brought under a statute seeking civil penalties).

177. "We have consistently interpreted the [Seventh Amendment's] phrase 'Suits at common law' to refer to 'suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.'" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (quoting *Parsons v. Bedford*, 28 U.S. 433, 447 (1830)). The Amendment "also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Id.* at 42. The most important factor is whether the remedy sought "is legal or equitable in nature." *Id.* If *any* of the remedies are legal in nature—even if all the rest are equitable—the jury trial right attaches. *Id.* at 43-44.

178. Importantly, it is a "long-settled rule that suits in equity will not be sustained where a complete remedy exists at law," which rule "serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed." *Id.* at 48 (quoting *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94 (1932)).

179. Here, a complete remedy at law exists—seeking monetary payments as civil

penalties has traditionally been decided by common law courts. "Prior to the enactment of the Seventh Amendment, English courts had held that a civil penalty suit was a particular species of an action in debt that was within the jurisdiction of the courts of law. . . . After the adoption of the Seventh Amendment, federal courts followed this English common law in treating the civil penalty suit as a particular type of an action in debt, requiring a jury trial." *Tull v. United States*, 481 U.S. 412, 418 (1987); *see also id.* at 422 ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law.").

180. Returning to first principles, the key distinction between law and equity is that legal remedies do not require the defendant to *do* anything: the defendant can merely *pay*, or if the defendant does not pay, the sheriff can attach defendant's property and obtain the money sufficient for the judgment, all without the defendant taking any action. Equitable remedies operate on the body of the defendant—compelling defendants to take action (or inaction). Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 551-58 (2016).

181. Although the Supreme Court has sometimes required two inquiries—one into the nature of the claim itself, and the other into the nature of the remedy, *see Chauffeurs Loc. No. 391 v. Terry*, 494 U.S. 558, 565 (1990)—that distinction between "claims" and "remedies" is "anachronistic," because if the remedy is equitable, then so is the claim. Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 Tex. L. Rev. 467, 484-85, 488 (2022) (There may be claims that were *exclusively developed* in equity; such claims are then equitable to which the Seventh Amendment right does not attach,

regardless of the remedy.)

182. Civil monetary penalties are legal remedies; they do not compel the defendant to take action (or inaction), and the judgment can be satisfied entirely by attachment of property.

183. Because civil penalties are legal in nature, the Seventh Amendment jury right applies.

184. Because monetary payments and not equitable remedies are sought, "Congress may only deny trials by jury" if this case involves "public rights." *Granfinanciera*, 492 U.S. at 51. But Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." *Id.* at 51-52.

185. The reason jury trials are not required in cases involving public rights is because, as explained in Claim 7 below, in such cases no court is required at all—and thus the question whether the remedy is one that could only be given by a court of law is moot.

186. Because seeking monetary penalties involves a core private right—the deprivation of traditional, tangible property—and does not involve a public right where an individual is seeking something from the sovereign, the public rights doctrine does not apply. *See* Claim 7, *infra*.

187. Because HISA authorizes the pursuit of monetary penalties without a trial by jury, to that extent HISA violates the Seventh Amendment.

188. Plaintiffs are harmed by the unconstitutional deprivation of their jury trial rights because they are subject to HISA's adjudicatory processes.

Claim 7: Violation of U.S. Const., art. III (vesting FTC with judicial power over private rights).

189. The allegations in all preceding paragraphs are incorporated herein by reference as if fully stated.

190. HISA also violates Article III of the Constitution by vesting "the judicial power of the United States" in the FTC.

191. Any final adjudicatory decision by the Authority may be appealed to an FTC Administrative Law Judge, who reviews all factual findings and legal conclusions of the Authority under a de novo standard. 15 U.S.C. § 3058(b). The FTC Commissioners may, but need not, review the decision of the ALJ; if they do so review, their review of the ALJ's factual findings and conclusions of law is also de novo. *Id*. § 3058(c).

192. HISA does not provide for judicial review. Therefore, the Administrative Procedure Act's judicial review provisions would apply by default. The Administrative Procedure Act permits a reviewing court to set aside the FTC's (or ALJ's) factual findings only if "unsupported by substantial evidence," which is a deferential standard. 5 U.S.C. § 706(2)(E).

193. Article III of the Constitution provides that the "judicial power of the United States, shall be vested" in the federal courts, whose judges enjoy political insulation through lifetime tenure and salary protections, U.S. Const. art. III, § 1; and that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States," *id.* § 2, cl. 1.

194. HISA is a "law of the United States," and cases determined by the FTC's ALJ or the Commission itself arise "under . . . the laws of the United States."

195. Not all cases arising under the laws of the United States must be heard by courts. "[C]ongress can[not] withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1856). "At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.*

196. "Private rights" are rights that persons would have had in the state of nature, as modified by the civil law, such as the rights to life, liberty, and to acquire and possess property; "public rights" are rights belonging to the public or are entitlements private individuals can claim from the government. The classic examples of public rights are rights of way, such as public roads and waterways; and public privileges like welfare benefits, public employment, and public land grants. Caleb Nelson, *Adjudication in the Political Branches*, 107 Va. L. Rev. 559, 565-68 (2007); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 Geo. L.J. 1015, 1020-21 (2006).

197. Historically, public rights could be determined by the executive branch for three interrelated reasons.

198. First, adjudication of such rights fits comfortably within definitions of "executive power." "Much adjudicative activity by executive officials—such as granting or denying benefits under entitlement statutes—is *execution* of the laws by any rational standard, though it also fits comfortably within the concept of the judicial power if

conducted by judicial officers." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1246 (1994).

199. Second, and relatedly, determining the kinds of cases to which the judicial power must extend because the other powers (such as executive power) cannot reach them is an empirical and historical inquiry about the meaning and reach of the three respective powers. And to the Founding generation, the nature of the right at stake determined whether it had to be subject to the judicial power: core private rights to life, liberty, and property are "associated" in the "Lockean tradition . . . with the natural rights that individuals would enjoy even in the absence of political society." Public rights and privileges, on the other hand, only exist in political society and by the grace of the government. The Founding generation believed that judicial power was necessary to resolve matters involving the former type of right, but not the latter. Nelson, *supra*, at 567-72.

200. Third, because public rights and privileges are created by or belong to the government, sovereign immunity protects the government from suit without its consent when a private citizen complains that such rights have been wrongfully withheld. And if sovereign immunity would bar a suit in the judicial courts, then this greater power to deny consent to suit includes the lesser power to an executive-branch adjudication, or such an adjudication with limited Article III appellate review. Nelson, *supra*, at 582; *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67, (1982) (the public rights doctrine "may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued").

201. Sovereign immunity thus explains why not all *adjudications* arising under the laws of the United States require an exercise of the judicial power: The judicial power extends only to certain "cases" and "controversies," U.S. Const., art. III, § 2, cl. 1, and to be either, one needs a proper plaintiff and defendant. But in matters involving public rights, there would be no way for a defendant to hale the government into court unless the government had consented to suit. Sovereign immunity thus operates as a kind of doctrine of personal jurisdiction; if there were no waiver, there was no plaintiff, and if there was no plaintiff, there was no "case" within the meaning of Article III. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1565 (2002).

202. Sovereign immunity does not apply in matters involving private rights, such as where the sovereign has consented to suit for the purpose of prosecuting a citizen and securing monetary penalties for statutory violations.

203. Because seeking monetary penalties—as well as imposing lifetime bans on private persons engaging in an otherwise lawful and ordinary occupation such as horseracing, 15 U.S.C. § 3057(d)(3)(A)—involve core private rights to liberty and property, and sovereign immunity does not apply, the cases in which the government seeks to impose such penalties "arise under the . . . laws of the United States" and must be heard in Article III courts.

204. Because neither the Authority, nor the FTC's ALJs, nor the FTC is an Article III court, they cannot constitutionally hear cases under HISA unless an Article III court subsequently engages in de novo review.

205. For this reason, HISA violates Article III of the Constitution.

206. Plaintiffs are harmed by the unconstitutional deprivation of their right to Article III adjudications because they are subject to HISA's adjudicatory processes.

Claim 8: Violation of U.S. Constitution, amend. X (anti-commandeering)

207. The allegations in all preceding paragraphs are incorporated herein by reference as if fully stated.

208. States cannot be commanded by the federal government to administer a federal regulatory program. *Brackeen v. Haaland*, 994 F.3d 249, 298–99 (5th Cir. 2021). The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Congress's legislative powers are limited to those enumerated under the Constitution, and Congress's powers do not include issuing direct orders to the governments of the States or conscripting state governments as its agents. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018); *Brackeen*, 994 F.3d at 298. "The Constitution confers on Congress not plenary legislative power but only certain enumerated powers," as "the Tenth Amendment confirms." *Murphy*, 138 S. Ct. at 1476. Absent from Congress's list of powers "is the power to issue direct orders to the governments of the States," a constitutional limitation known as the "anticommandeering doctrine." *Id*. Congress may not "command 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). The "States are not mere political subdivisions of the United States," and our Constitution requires Congress to "exercise its legislative

authority directly over individuals rather than over States." *New York v. United States*, 505 U.S. 144, 165, 188 (1992).

209. Thus, the anti-commandeering doctrine prohibits federal laws commanding the executive or legislative branch of a state government to act or refrain from acting. *Murphy*, 138 S. Ct. at 1477–78 ("the anticommandeering principle prevents Congress from shifting the costs of regulation to the States").

210. Rule 2133 obligates state stewards to enforce HISA's safety rules. 87 Fed. Reg. at 449.

211. Rule 2191 instructs state racing commissions to "develop and implement a testing program for drugs and alcohol for Jockeys." 87 Fed. Reg. at 453.

212. Rule 2180, *et seq*., delegates to state racing commissions the Authority's statutory authority to develop and implement a program to educate horsemen on the new rules. 87 Fed. Reg. at 453; 15 U.S.C. § 3056(b)(11).

213. HISA requires states (via their state racing commissions) to remit state monies to fund the Authority's operations and to pay off the Authority's private loans authorized by the Act. If a state refuses to do so, HISA further commandeers state legislative and executive authorities by prohibiting the state from imposing or collecting certain taxes or fees. In other words, Congress has either (1) unconstitutionally shifted the costs of a federal regulatory program to the states or (2) commanded state legislators and officers not to impose or collect specific taxes or fees.

214. In other words, although Congress may provide financial inducements to encourage states to cooperate in the administration of federal programs (so long as those

inducements are not coercive), and Congress may preempt state law, Congress may not induce states to cooperate or regulate by *threatening* preemption. Forcing state involvement on the threat of boxing out state regulatory agencies from their traditional areas of jurisdiction is far more coercive than minor financial inducements, and therefore violates the anti-commandeering doctrine.

215. HISA also violates this constitutional principle by requiring "State law enforcement authorities" to "cooperate and share information" with the Authority whenever a person's conduct may violate both state law and the rules of the Authority. HISA § 1211(b), 134 Stat. at 3275. By requiring state law enforcement to cooperate with the Authority, HISA unconstitutionally conscripts the state governments into helping the Authority carry out a federal regulatory program. If Congress wants to regulate, "it must appropriate the funds needed to administer the program," and it must enforce it. *Murphy*, 138 S. Ct. at 1477. Congress has no constitutional authority to command the law-enforcement agencies of the several states to help the Authority administer a federal regulatory program.

216. HISA violates this constitutional principle by requiring state authorities to implement various regulations.

217. HISA violates the Tenth Amendment on anti-commandeering grounds by directing states to legislate in accordance with public policy, like in *New York*, 505 U.S. 144 (1992).

218. Plaintiffs are harmed by HISA's and the Authority's commandeering of the State of Texas's legislative process and their commandeering of State agents to enact

and enforce a federal regulatory program that directly applies to and impacts Plaintiffs.

Claim 9: Violation of U.S. Constitution, amend. IV (unreasonable searches and seizures)

219. The allegations in all preceding paragraphs are incorporated herein by reference as if fully stated.

220. HISA Rule 8400 subjects covered persons to searches and seizures by the Authority or its designated agents without prior approval by a judge or magistrate, violating the Fourth Amendment to the U.S. Constitution. *Arizona v. Grant*, 556 U.S. 332, 338 (2009) ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment").

221. The Rule provides that the Authority "or their designees," "[s]hall have free access to the books, records, offices, racetrack facilities, and other places of business of Covered Persons that are used in the care, treatment, training, and racing of Covered Horses, and to the books, records, offices, facilities, and other places of business of any person who owns a Covered Horse or performs services on a Covered Horse," and that the Authority and its designees "[m]ay seize any medication, drug, substance, paraphernalia, object, or device in violation or suspected violation of any provision of 15 U.S.C. 57A or the regulations of the Authority." 87 Fed. Reg. at 4031.

222. Although in historically heavily regulated industries such as liquor and firearms, *see Colonnade Catering Corp. v. US*, 397 U.S. 72 (1970); *US v. Biswell*, 406 U.S. 311 (1972), "inspection may proceed without a warrant where specifically authorized by statute," *Biswell*, 406 U.S. at 317, regulations of the horseracing industry are not "deeply rooted in history," *id.* at 315, and even if they were, the warrantless inspection system

here was not *specifically authorized by statute*, *id.* at 317.

223. Perhaps recognizing as much, the Authority purports to require Plaintiffs to *consent* to such searches through the required registration process. Rule 9000(g) requires as a condition of registration that the registrant "agree to be subject to and comply with the rules, standards, and procedures of the Authority developed and approved under 15 U.S.C. 3054(c)," which "are set forth in the Rule 8000 Series." 87 Fed. Reg. at 29867.

224. Consent to searches, however, must be given "voluntarily." *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Threatening Plaintiffs with having to give up their entire businesses and livelihoods or else subject themselves to a warrantless inspection system cannot be said to be voluntary—it is coercion.

225. Rule 8400 violates the Fourth Amendment and is unconstitutional.

226. Plaintiffs are harmed by the unconstitutionality of Rule 8400 because they have had to register with the Authority and have therefore been coerced into giving up their Fourth Amendment rights.

Prayer for Relief

227. WHEREFORE, Plaintiffs ask that Defendants be cited to appear and answer and, on final hearing, that Plaintiffs have judgment against Defendants and provide the following relief:

a. Pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, it is appropriate and proper that a declaratory judgment be issued by this Court declaring HISA and HISA regulations unconstitutional;

b. Pursuant to 28 U.S.C. § 2202 and Fed. R. Civ. P. 65, it is appropriate and proper that the Court issue preliminary and permanent injunctions prohibiting enforcement of HISA and HISA regulations;

c. An entry of judgment permanently enjoining Defendants, their employees, agents, successors, assigns and all persons acting in concert with them from continuing to implement and enforce HISA, as well as any and all HISA rules, regulations, practices and policies by which Defendants enforce HISA, against Plaintiffs or any other person;

d. A preliminary injunction prohibiting Defendants, their employees, agents, successors, assigns and all persons acting in concert with them from implementing or enforcing HISA, as well as any and all HISA rules, regulations, practices and policies by which Defendants enforce HISA, against Plaintiffs or any other person;

e. A preliminary injunction prohibiting the Defendants, their employees, agents, successors, assigns and all persons acting in concert with them from taking any action pursuant to HISA, as well as any and all HISA rules, regulations, practices and policies by which Defendants enforce HISA;

f. Award Plaintiffs nominal damages;

g. Award Plaintiffs compensatory damages in the amount of any fees charged to them by Defendant Horseracing Integrity and Safety Authority, Inc.; and

h. All other relief at law or in equity to which Plaintiff may be justly entitled, including attorneys' fees and costs.

Dated: July 29, 2022

Respectfully submitted,

SOLTERO SAPIRE MURRELL PLLC

By:_____

Gregory P. Sapire
Texas State Bar No. 00791601
greg@ssmlawyers.com
Carlos R. Soltero
Texas State Bar No. 00791702
carlos@ssmlawyers.com
Kayla Carrick Kelly
Texas State Bar No. 24087264
kayla@ssmlawyers.com

7320 N. MoPac Expy.
Suite 309
Austin, Texas 78731-2311
(512) 431-9518 Telephone
(512) 359-7996 Facsimile

- AND –

TULLY BAILEY LLP

Ilan Wurman
Arizona State Bar No. 034974
Texas State Bar No. 24090479 (inactive)
ilan.wurman@asu.edu
Pro Hac Vice Application Forthcoming

11811 N. Tatum Blvd.
Unit 3031
Phoenix, Arizona 85028
(480) 965-2245 Telephone

ATTORNEYS FOR PLAINTIFFS