

December 7, 2022

Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Dear Chairwoman Khan:

I am writing as counsel for the Association of Racing Commissioners International (“ARCI”)—the umbrella organization of the official governing and rulemaking bodies for professional horseracing and leader in international standards for horseracing regulation, medication policy, and racetrack operation in the U.S. As you probably know, on November 18, 2022, a three-judge panel of the U.S. Fifth Circuit Court of Appeals unanimously ruled unconstitutional the Horseracing Integrity and Safety Act (“Act”). The Act is the enabling statute of the Horseracing Integrity and Safety Authority (“HISA”) and the scheme under which HISA is seeking the FTC’s final approval of the HISA’s proposed Anti-Doping and Medication Control Program Rules.¹

In light of the Fifth Circuit’s ruling, the ARCI Board of Directors unanimously voted to strongly urge the FTC to suspend all consideration of HISA’s proposed Anti-Doping and Medication Control Rules (hereinafter, “Rules”) and withhold its approval of the Rules until after the constitutionality of the Act is finally resolved. Further, the FTC should insist that HISA indefinitely suspend its already once delayed January 1, 2023, implementation of the Anti-Doping and Medication Control Program.

To avoid industry-wide confusion and potential inequitable enforcement, the FTC must quickly and publicly confirm that it is no longer considering approval of the Rules. Existing state rules for anti-doping and medication control are largely similar to HISA’s proposed Rules and have been consistently upheld by courts when challenged, with rare exceptions. Therefore, a continuation of existing, enforceable state rules poses no threat to the public interest and will serve the public interest in animal safety and welfare and safeguard against doping. Any attempted enforcement of HISA’s proposed Rules, while their constitutionality is seriously in doubt, compromise public interests.

If the FTA were to approve HISA’s proposed Rules, it would lead to regulatory uncertainty and would exacerbate the confusion that continues to permeate throughout the horseracing

¹ 87 FR 65292.

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industry. Owners, trainers, and racetrack operators would undoubtedly struggle to understand how the FTC could possibly approve proposed Rules that were promulgated under a law already determined to be unconstitutional and that may later be determined to be unconstitutional by a higher court. Moreover, the same constituencies would be left to choose whose requirements to follow—the unconstitutional “Rules” proposed by HISA or the existing rules set by various state racing commissions. Consider, among many possible examples, the irreparable harm to the entire sport if anti-doping or equine welfare enforcement actions pursued under HISA’s proposed Rules were subsequently invalidated because of the Act’s unconstitutionality. Such a result would be inconsistent with regulatory certainty and would frustrate the intended goals of the Act.

There are additional important reasons to suspend consideration of HISA’s proposed Rules. First, another federal circuit court—the Sixth Circuit—will hear arguments today in an appeal concerning the Act.² A ruling in line with the Fifth Circuit’s decision would further confirm the unconstitutionality of the Act. But even if the Sixth Circuit decides the other way, its decision would create a split among federal circuit courts, making it all the more likely that the U.S. Supreme Court would hear the case.

Second, changes to the Act could be imminent. As reported last weekend by Reuters, U.S. Senator Mitch McConnell, who played an outsized role in the Act becoming law, is “pushing” to pass a “legislative fix” as part of the omnibus spending bill likely to be passed by Congress this month.³

The FTC is in a unique position to restore some level of regulatory certainty to the horseracing industry. It should do so by waiting to take any further action on HISA’s proposed Rules.

Thank you for your attention to this important issue.

Sincerely,

Joel B. Turner

² See *OK, et al. v. USA, et al.*, Case No. 22-5487 (oral argument calendar available at https://www.ca6.uscourts.gov/sites/ca6/files/documents/oral_argument_calendars/12052022_arg.pdf).

³ Rory Carroll, “Exclusive: Sen. McConnell pushing for legislative fix to horse racing law,” REUTERS (Dec. 5, 2022), <https://www.reuters.com/lifestyle/sports/horse-racing-us-senator-mcconnell-pushing-legislative-fix-safety-law-2022-12-04/>.

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