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The Rise and Fall of the Horseracing Integrity and Safety Act: How Congress Could Save the "Sport of Kings"

Lucy McAfee
Vanderbilt University Law School

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ABSTRACT

The Horseracing Integrity and Safety Act (HISA) has undergone several unsuccessful changes over the past decade in an effort to change how horseracing is regulated. After Congress successfully passed HISA in 2020, several lawsuits were filed to stop HISA from going into effect. Congress quickly passed an amendment to HISA—which the US Court of Appeals for the Sixth Circuit upheld—seemingly stopping such litigation, but it is clear from opponents' statements that this is just the beginning. This Note will examine the constitutional arguments' strengths and weaknesses through precedent to determine whether the long-awaited act, as amended, can stand the test of time—and its many legal challenges. First, this Note will provide a brief overview of the lead-up to HISA, its many iterations, and its current structure. Next, it will discuss the various constitutional problems with the Act and the viewpoints articulated. Then, it will analyze which of these provisions are truly susceptible to challenge and why, as analyzed through US Supreme Court precedent, and the effects on possible future litigation. This Note will also look at the possible problem of the independent regulatory structure. Lastly, it will conclude with the overall risks and whether the act crossed the line.

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I. INTRODUCTION

Thirty-eight states have state racing commissions that regulate horseracing in those individual states.[1] This system of thirty-eight separate jurisdictions results in different rules in different states regulating essentially the same cohort of horses and people.[2] The result of this disarray of different regulations has not been successful in protecting horses or the horseracing industry.[3] After the passage of the Horseracing Integrity and Safety Act (HISA), the federal government, through the provisions of HISA, will take control of all covered racehorses, horseraces, and related equine constituents in an attempt to return horseracing to its "hayday."

First, this Note provides relevant background information and context. In Part II, this Note reviews and analyzes the arguments presented. Part III analyzes the more relevant arguments through Supreme Court precedent, describes the effects it has on possible future litigation, and reviews some policy concerns. Lastly, Part IV lays out

1. Coalition for Horse Racing Integrity, *CHRI Applauds Introduction of Bipartisan "Horseracing Integrity Act of 2019,"* CISION PR NEWSWIRE (Mar. 14, 2019, 2:07 PM), https://www.prnewswire.com/news-releases/chri-applauds-introduction-of-bipartisan-horseracing-integrity-act-of-2019-300812711.html [https://perma.cc/C2B8-FLA9].

2. *Id.*

3. *See generally Understanding the Horseracing Integrity and Safety Act and a New Era of Racing Regulation*, ALB. L. SCH. (May 27, 2021), https://www.albanylaw.edu/government-law-center/news/understanding-the-horseracing-integrity-and-safety-act-and-new-era [https://perma.cc/EPZ5-XGDZ].

the important takeaways and concludes with an argument that HISA, as amended, should stand the test of time.

II. HISA HAS LINED UP AT THE GATE

A. How the Pre-HISA Treatment of Racehorses Led to Horseracing's Decline

Under the regime of the thirty-eight state regulatory entities, horse deaths have risen to an alarming rate as competitors seem to be more interested in winning the purse than in maintaining the sport.[4] Santa Anita Park in California came under widespread scrutiny in 2019 for its forty-two horse deaths, putting the safety of horses and racetracks on the nation's radar.[5] Although improving, this racetrack continued to have trouble maintaining its horses' safety, with seventeen horses dying in 2020, twelve dying in 2021, and eleven dying in 2022.[6] Unfortunately, this was not the first horseracing scandal, and it was not the last.

In 2021, Churchill Downs in Louisville, Kentucky banned Kentucky Derby horse trainer Bob Baffert for two years following his horse Medina Sprit's disqualification from winning the Derby after

4. Ed. Bd., Opinion, *Horse Racing Has Outlived its Time*, WASH. POST (Mar. 13, 2020, 7:00 AM), https://www.washingtonpost.com/opinions/horse-racing-has-outlived-its-time/2020/03/12/5dd48e46-6476-11ea-acca-80c22bbee96f_story.html [https://perma.cc/Q9SY-9LAC] ("The series of indictments unveiled in Manhattan makes clear that it is money like that in an industry valued at $100 billion that has given root to a culture of increasingly sophisticated performance-enhancing drugs that disregards the health and well-being of horses."); *see generally* Joe Drape, *Filly's Death Casts Shadow Over Big Brown's Derby Victory*, N.Y. TIMES (May 4, 2008), https://www.nytimes.com/2008/05/04/sports/othersports/04derby.html [https://perma.cc/FNH4-9VT8] (raising questions about the safety of traditional dirt horseracing tracks and the impact the makeup and long pedigree of horses has on the horses' safety); Beth Harris, *Horse Deaths Put Santa Anita Under Scrutiny on Big Race Day*, ASSOCIATED PRESS (Apr. 5, 2019), https://www.apnews.com/74e5eedaa2a54a65a3d1482d57980448 [https://perma.cc/HDE6-PGRR] (noting twenty-three horse deaths as of April 2019 and the publics' calls to shut the track down until it can determine the cause of the many deaths); David Wenner, *Horse Racing's Uncomfortable Truth: Horses Die*, ASSOCIATED PRESS (May 11, 2019), https://apnews.com/article/pa-state-wire-thoroughbred-racing-horse-racing-pennsylvania-sports-e15e7839b8c047b286f60921f7eaa4d2 [https://perma.cc/V5QH-J964] (discussing the twenty-three horse deaths at Santa Anita Park within fourteen weeks).

5. CNS Staff, *Santa Anita Park Reports Fourth Horse Death of 2022*, FOX 11 L.A. (Apr. 25, 2022), https://www.foxla.com/5news/santa-anita-park-reports-fourth-horse-death-of-2022 [https://perma.cc/TND7-V4D3].

6. *Id.*; KCAL-News Staff, *Horse Killed, Jockey Injured During Collision at Santa Anita Park*, CBS L.A. (Oct. 22, 2022, 1:22 PM), https://www.cbsnews.com/losangeles/news/horse-killed-jockey-injured-during-collision-at-santa-anita-park/ [https://perma.cc/E2WV-M9GV].

failing the post-win drug test.[7] Baffert has had horses fail at least thirty drug tests.[8] As a prime example of how the thirty-eight state racing jurisdictions operated, Medina Spirit ran in the Preakness Stakes at Pimlico Race Course in Maryland just days after the failed drug test and again in the Breeders Cup in November 2021 at Del Mar racetrack in California—just months after Baffert's suspension from Churchill Downs in June, which was reaffirmed by a federal judge in February 2023.[9]

Horseracing reached a point where industry members could not deny the impact their actions have on the industry, and politicians could not ignore the public outcry.[10] In 2017, the Humane Society's spokeswoman stated that the Horseracing Integrity Act of 2017, a precursor to HISA, followed thousands of horse deaths, a decreasing interest in horseracing, and "a general crisis of confidence in the sport."[11] A 2020 House report listed 441 fatal injuries to thoroughbred horses in 2019 and 129 jockey deaths due to training or racing accidents, often connected to a horse's death or injury, from 1940–2012.[12] In 2020, federal prosecutors for the US District Court for the Southern District of New York indicted twenty-seven industry

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7. Medina Spirit was disqualified after the post-win drug test showed betamethasone, a banned substance, in the horse's system. Greg Joyce, *Bob Baffert Gets Two-Year Churchill Downs Suspension Over Kentucky Derby Scandal*, N.Y. POST, https://nypost.com/2021/06/02/bob-baffert-suspended-two-years-by-churchill-downs-over-scandal/ [https://perma.cc/Z789-U8N8] (June 2, 2021, 4:53 PM).

8. *Id.* (citing Reina Kempt, *Here's What We Know Following Kentucky Derby Winner Medina Spirit's Positive Drug Test*, LOUISVILLE COURIER J. (May 10, 2021, 5:29 AM), https://www.courier-journal.com/story/sports/horses/kentucky-derby/2021/05/10/kentucky-derby-bob-baffert-and-medina-spirit-positive-drug-test/5016477001/ [https://perma.cc/JNU6-W5AL]).

9. Becky Sullivan, *Medina Spirit Allowed to Run in the Preakness Amid Controversy Over Failed Drug Test*, NPR (May 11, 2021, 4:16 PM), https://www.npr.org/2021/05/11/995951282/medina-spirit-allowed-to-run-in-the-preakness-amid-controversy-over-failed-drug#:~:text=Press-,Medina%20Spirit%20Allowed%20To%20Run%20In%20The%20Preakness%20Amid%20Controversy,leading%22up%20to%20the%20Derby [https://perma.cc/5MC3-NN6S]; Associated Press, *Kentucky Derby Champ Medina Spirit Wins in Comeback for Baffert*, NBC SPORTS (Aug. 30, 2021, 8:33 PM), https://sports.nbcsports.com/2021/08/30/kentucky-derby-champ-medina-spirit-wins-baffert-del-mar/ [https://perma.cc/GHA4-EZCG]; Associated Press, *Bob Baffert to Again Miss Kentucky Derby; Judge Upholds Ban*, ESPN (Feb. 17, 2023), https://www.espn.com/horse-racing/story/_/id/35681928/bob-baffert-again-miss-kentucky-derby-judge-upholds-ban [https://perma.cc/7QXQ-8YCT].

10. *See generally* Brief for Sen. Mitch McConnell et al. as Amici Curiae Supporting Respondents, Nat'l Horsemen's Benevolent and Protective Ass'n, et al., v. Black (N.D. Tex. Mar. 31, 2022) (No. 5:21-CV-00071-H).

11. *Id.* at 3–4 (citing *The Horseracing Integrity Act of 2017: Hearing on H.R. 2651 Before the H. Subcomm. on Digit. Com. and Consumer Prot.*, 115th Cong. 34 (2018) (statement of Kitty Block, Spokeswoman, Humane Society)).

12. *Id.* at 3 (citing H.R. REP. NO. 116-554, at 17 (2020)).

members for allegedly engaging in a performance-enhancing drug ring.[13] In 2022, a high-profile bettor sued Baffert and left the industry for good because of the rampant drug use.[14] Another high-profile bettor anonymously outlined the many reasons why he left the industry after fifty years and explained how his interest declined due to the scandals and abuses.[15] These indictments, the recent increase in high-profile horse deaths, and the public's growing dissatisfaction with the lack of progress created the incentive politicians needed to create legislative reform.

B. HISA and the Horseracing Integrity and Safety Authority

Former Senator Tom Udall (D-NM) and former Representative Joseph Pitts (R-PA) introduced the first version of HISA in May 2013.[16] HISA 2013 focused on reducing the use of drugs in horseracing by prohibiting the use of most drugs twenty-four hours before a race.[17] The second version of HISA—HISA 2015—and the Thoroughbred Horseracing Integrity Act of 2015 also targeted the use of drugs and medication in horseracing but were criticized for failing to regulate the long-term threat to equine welfare.[18] Representative Andy Barr (R-KY) introduced HISA 2017, which provided for the Horseracing Anti-Doping and Medication Control Authority (the ADMC Authority), the first

13. Ed. Bd., *supra* note 4; Gus Garcia-Roberts, *As His Doping Case Goes to Trial, a Veterinarian Says It's Horse Racing That's Corrupt*, WASH. POST (Jan. 19, 2022, 5:00 AM), https://www.washingtonpost.com/sports/2022/01/19/seth-fishman-horse-racing-doping/ [https://perma.cc/H432-KQMD].

14. Marty Irby, *U.S. Horse Racing Should Remember Washington Post Editorial: 'Horse Racing Has Outlived Its Time'*, HORSE NATION (Jan. 28, 2022), https://www.horsenation.com/2022/01/28/u-s-horse-racing-should-remember-washington-post-editorial-horse-racing-has-outlived-its-time/ [https://perma.cc/GKD7-W3AS].

15. *See Letter to the Editor: Why I Am Leaving the Sport I Loved for 50 Years*, PAULICK REP. (Jan. 20, 2022, 5:04 PM), https://paulickreport.com/news/ray-s-paddock/letter-to-the-editor-why-i-am-leaving-the-sport-i-loved-for-50-years/ [https://perma.cc/XUP2-H6T5].

16. Horseracing Integrity and Safety Act, H.R. 2012, 113th Cong. (2013); S. 973, 113th Cong. (2013).

17. Lewis Bollard, *The Legal Tipping Point on Horse Soring, Racing, & Slaughter*, 7 KY. J. EQUINE AGRIC. & NAT. RES. L. 423, 442 (2015). HISA 2013 was introduced but did not receive a vote. *S. 973 (113th): Horseracing Integrity and Safety Act of 2013*, GOVTRACK, https://www.govtrack.us/congress/bills/113/s973 [https://perma.cc/GJ9W-7E6E].

18. Conor Crawford, Note, *Nutraceuticals in American Horseracing: Removing the Substantive Blinkers from National Racing Legislation*, 23 ANIMAL L. 163, 165 (2016); Thoroughbred Horseracing Integrity Act of 2015, H.R. 3084, 114th Cong. (2015). HISA 2015 never made it to a Congressional subcommittee. John T. Wendt, *Third Time's the Charm? The Horseracing Integrity Act of 2019*, 36 ENT. & SPORTS LAWYER 4, 4 (2020).

independent entity introduced specifically to regulate drug use in the horseracing industry.[19]

After several versions, on March 14, 2019, Representative Paul Tonko (D-NY) successfully introduced HISA 2020 to the House of Representatives.[20] On September 9, 2020, Senator Mitch McConnell (R-KY) introduced a similar bill to the Senate.[21] At the end of 2020, Congress passed, and President Donald Trump signed, the Horseracing Integrity and Safety Act of 2020.[22] As discussed above, Congress primarily enacted HISA because of the horseracing industry's many high-profile headlines highlighting how horses are treated.[23] In addition to the industry's years of bad publicity, HISA received another big push from the now-infamous trainer Baffert's two-year suspension from Churchill Downs.[24] Because of this, Representatives Tonko and Barr had a new ally in then-Senate Majority Leader McConnell, and together, they passed HISA through both houses of Congress.[25]

1. The Authority-ADMCP Enforcer Relationship

HISA requires the Horseracing Integrity and Safety Authority, Inc. (the Authority) to contract with the US Anti-Doping Agency (USADA) or a similar entity to serve as the enforcer of the Anti-Doping and Medication Control Program (ADMCP).[26] This enforcement agency shall operate on behalf of the Authority to ensure that regulated people and horses do not engage in activities prohibited by the ADMCP and will execute anti-doping research and testing, implement education and adjudication programs, and conduct any other duties required pursuant

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19. H.R. 2651, 115th Cong. § 6 (2017). HISA 2017 made it to a Congressional subcommittee, where one hearing was held. Wendt, *supra* note 18.

20. H.R. 1754, 116th Cong. (2019).

21. S. 4547, 116th Cong. (2020).

22. Consolidated Appropriations Act 2021, H.R. 133, 116th Cong. § 1203 (2020); *Understanding the Horseracing Integrity and Safety Act and a New Era of Racing Regulation*, *supra* note 3.

23. H.R. REP. NO. 116-554, at 17–19 (2020). *See generally Letter to the Editor: Why I Am Leaving the Sport I Loved for 50 Years*, *supra* note 15; Ed. Bd., *supra* note 4.

24. *Understanding the Horseracing Integrity and Safety Act and a New Era of Racing Regulation*, *supra* note 3.

25. *'Common Sense Legislation': Barr, Tonko Introduce Thoroughbred Horseracing Integrity Act of* 2015, PAULICK REP. (July 16, 2015 12:46 PM), https://paulickreport.com/news/the-biz/common-sense-legislation-barr-tonko-introduce-thoroughbred-horseracing-integrity-act-of-2015/ [https://perma.cc/SY9R-T77H]; *Sen. McConnell Introduces Horseracing Integrity and Safety Act; Matching Legislation Moves to House Floor*, PAULICK REP. (Sept. 9, 2020 4:21 PM), https://paulickreport.com/news/the-biz/sen-mcconnell-introduces-horseracing-integrity-and-safety-act/ [https://perma.cc/Q9VL-QR67].

26. 15 U.S.C. § 3054(e)(1).

to its contract.[27] The Authority was unable to come to terms with USADA and ultimately agreed to a five-year contract with Drug Free Sport International (DFSI).[28] DFSI is a third-party drug-testing company that also works with other professional sports organizations such as the National Football League and the National Collegiate Athletic Association.[29]

2. The Authority-FTC Relationship

To enforce HISA, Congress recognized the Authority as a private entity in charge of "developing and implementing" the Racetrack Safety Program (RSP) and the ADMCP.[30] The RSP contains operational safety rules and racetrack accreditation requirements, and the ADMCP will create a centralized drug testing and management program as well as oversee the uniform application of violations.[31] Both programs were intended to go into effect on July 1, 2022.[32] While the RSP went into effect on July 1, 2022, the ADMCP was postponed first to January 2023 and then March 2023.[33]

HISA provides that the Authority will propose and draft rules regarding anti-doping and medication control,[34] racetrack safety,[35] and

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27. § 3054(e)(1)(E).

28. Irby, *supra* note 14 ("There's been great controversy over . . . [HISA's] failure to secure a contract with [USADA]. . . . It's concerning that there's been an audible called so quickly after the Congressional action so clearly pointed to USADA as the drug-testing authority."); Tim Sullivan, *Horseracing Brings in Major Company to Crack Down on Doping. Here's What We Know*, LOUISVILLE COURIER J., https://www.courier-journal.com/story/sports/horses/horse-racing/2022/05/03/center-drug-free-sport-take-charge-horseracing-drug-testing/9625259002/ [https://perma.cc/TP4S-BJTA] (May 3, 2022, 3:03 PM).

29. *About Drug Free Sport International*, DRUG FREE SPORT INT'L, https://www.drugfreesport.com/about-us/ [https://perma.cc/BR4V-XTKN] (last visited Mar. 22, 2023).

30. H.R. REP. NO. 116-554, at 24 (2020); 15 U.S.C. §§3052(a) (recognizing the Authority), 3054 (implementing the RSP), 3055 (implementing the ADMCP).

31. 15 U.S.C. § 3052(c)(1), (2).

32. 15 U.S.C. §§ 3051(14), 3054(a), 3055(a) (requiring the program be implemented "[n]ot later than the program effective date." Defined as "July 1, 2022.").

33. Madeline Orlando, *HISA Enters the Starting Gate July 1; Texas Balks*, NAT. L. REV. (June 29, 2022), https://www.natlawreview.com/article/hisa-enters-starting-gate-july-1-texas-balks [https://perma.cc/DUG2-EWVU]. Following the Fifth Circuit's decision in Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (*Black II*), 53 F.4th 869 (5th Cir. 2022), the ADMCP has been delayed further. *See* Press Release, *FTC Disapproves Anti-Doping and Medication Control Proposed Rule Submitted by the Horseracing Integrity and Safety Authority*, FTC (Dec. 12, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-disapproves-anti-doping-medication-control-proposed-rule-submitted-horseracing-integrity-safety [https://perma.cc/9XFP-MTUK]; *Regulations*, HORSERACING INTEGRITY & SAFETY AUTH., https://hisaus.org/regulations [https://perma.cc/MDV7-A5PE] (last visited Mar. 22, 2023).

34. 15 U.S.C. § 3055.

35. 15 U.S.C. § 3056.

disciplinary proceedings for violations.[36] The promulgation of such rules will be through the Federal Trade Commission (FTC).[37] HISA states that "[t]he Authority shall submit" to the FTC "any proposed rule, or proposed modification" which relates to the horseracing industry;[38] the FTC "shall approve" the proposal—after notice and an opportunity for public comment—if the FTC "finds that the proposed rule or modification is consistent with (A) this Act; and (B) applicable rules approved by the [FTC]."[39] Because of this plain language of the statute, there have been several challenges to HISA based on the "Authority-proposal-FTC-approval scheme."[40]

3. The Authority's Previous Litigation and the 2022 Amendment

In *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Black I)*, several states and horseracing organizations sought summary judgment, arguing HISA violates Private Nondelegation, Public Nondelegation (later dropped), the Appointments Clause (later dropped), and the Due Process Clause.[41] In *Oklahoma v. United States (Oklahoma I)*, a similar lawsuit was brought in Kentucky to challenge the delegation of power from Congress to the Authority.[42] *Oklahoma I*, relying on *Black I*, dismissed the plaintiffs' case with prejudice for failure to state a claim.[43] However, in *Louisiana v. Horseracing Integrity and Safety Authority, Inc.*, the plaintiffs successfully sought a preliminary injunction, thereby preventing HISA from being enforced in the states of Louisiana and West Virginia.[44] All three cases have been appealed to the Fifth or Sixth Circuit courts.[45]

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36. 15 U.S.C. § 3057.

37. 15 U.S.C. § 3053.

38. § 3053(a).

39. § 3053(c)(2).

40. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (*Black I*), 596 F. Supp. 3d 691, 704 (N.D. Tex. 2022). *See generally* Oklahoma v. United States (*Oklahoma I*), No. 5:21-CV-104-JMH, 2022 U.S. Dist. LEXIS 99448 (E.D. Ky. June 3, 2022); Louisiana v. Horseracing Integrity & Safety Auth. Inc., No. 6:22-CV-01934, 2022 U.S. Dist. LEXIS 132929 (W.D. La. July 26, 2022).

41. *Black I*, 596 F. Supp. 3d at 698–99.

42. *See Oklahoma I*, 2022 U.S. Dist. LEXIS 99448, at *22.

43. *Id.* at *52–53.

44. *See* Louisiana, 2022 U.S. Dist. LEXIS 132929, at *36–37.

45. *See* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (*Black II*), 53 F.4th 869 (5th Cir. 2022); Dick Downey, *6th Circuit Appeals Court Declares HISA Constitutional*, BLOOD HORSE, (Mar. 3, 2023), https://www.bloodhorse.com/horse-racing/articles/266957/6th-circuit-appeals-court-declares-hisa-constitutional [https://perma.cc/4WJC-M2M4]; *Court Says Racing Authority Is Still Unconstitutional*, HORSE RACING NATION, (Feb. 1, 2023, at 8:22 AM)

On November 18, 2022, the Fifth Circuit in *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Black II)* reversed *Black I*, declared that HISA is unconstitutional because it violates the Private Nondelegation Doctrine, and remanded it back to the district court.[46] However, when the states of Louisiana and West Virginia and their racing commissions requested the *Black II* court give effect to its decision on December 19, the Fifth Circuit declined, thereby allowing for a delay in the lower court injunction against HISA.[47]

In response to *Black II*, on December 22, 2022, by a sixty-eight to twenty-nine vote, the Senate included in its $1.7 trillion omnibus spending bill an amendment to § 3053(e) of HISA, strengthening the FTC's rulemaking and oversight role.[48] HISA, as amended, provides that the FTC may

> abrogate, add to, and modify the rules of the Authority promulgated in accordance with this Act as the [FTC] finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of [HISA] and applicable rules approved by the [FTC], or otherwise in furtherance of the purposes of [HISA].[49]

Following the Fifth Circuit's decision in *Black II* and Congress's amendment, the Sixth Circuit found in *Oklahoma v. United States (Oklahoma II)* that HISA is constitutional because the "Authority is subordinate to the" FTC.[50] The court relied on the lack of emergency language in § 3053(e) (as amended), thereby allowing the FTC to step in as "appropriate," to determine that the FTC has the "ultimate discretion" over the Authority—although, as the plaintiff-appellant

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https://www.horseracingnation.com/news/Court_denies_appeal_in_federal_racing_authority_case_123 [https://perma.cc/YGV3-6BMR].

46. *Black II*, 53 F.4th at 890.

47. Dick Downey, *Anti-HISA Ruling Could be Delayed for Months*, BLOOD HORSE (Dec. 16, 2022), https://www.bloodhorse.com/horse-racing/articles/265489/anti-hisa-ruling-could-be-delayed-for-months [https://perma.cc/W4Z3-L8UW].

48. Consolidated Appropriations Act 2021, H.R. 133, 116th Cong. § 1203 (2020) (as amended by Consolidated Appropriations Act 2023, H.R. 2617, 117th Cong. §701 (2022)); Julia Benbrook, *Spending Bill to Avert Shutdown Includes Horseracing Measure*, SPECTRUM NEWS 1 N.Y. (Dec. 22, 2022, 4:16 PM), https://www.ny1.com/nyc/all-boroughs/politics/2022/12/22/bill-to-avert-government-shutdown-includes-horseracing-law [https://perma.cc/NL89-AHLL].

49. Consolidated Appropriations Act 2021, H.R. 133, 116th Cong. § 1203 (2020) (as amended by Consolidated Appropriations Act 2023, H.R. 2617, 117th Cong. § 701 (2022)); Ray Paulick, *Government Spending Bill Includes Language Strengthening FTC Role in HISA Rulemaking*, PAULICK REP. (Dec. 20, 2022, 8:20 AM), https://paulickreport.com/news/integrity_art/government-spending-bill-includes-language-strengthening-ftc-role-in-hisa-rulemaking/ [https://perma.cc/EAK2-7PRF].

50. Oklahoma v. United States (*Oklahoma II*), No. 22-5487, 2023 U.S. App. LEXIS 5169, at *14 (6th Cir. 2023) ("The Horseracing Authority is subordinate to the agency.").

noted, the amendment does not change consistency review under § 3053(c).[51]

Although the Sixth Circuit found that the amended language cleaned up the constitutional issues laid out in *Black II*, opponents of HISA stated they will continue to file lawsuits challenging HISA.[52] For example, the National Horsemen's Benevolent and Protective Association's Chief Executive Officer Eric J. Hamelback and General Counsel Peter Ecabert issued a statement that the amendment confirms that HISA was unconstitutional and fails to correct the "other substantive issues, nor does it address the funding disaster."[53] It goes on to state that the "one-sentence 'fix' does not alleviate the glaring constitutional infirmities this law has created . . . by handing the regulation of an entire industry over to an unelected, unaccountable private corporation."[54] Although not a party, following *Oklahoma II*, Hamelback doubled down on the National Horsemen's stance that HISA is unconstitutional and confirmed that opponents will continue to file lawsuits—even seeking the US Supreme Court's review.[55]

III. HISA IS OUT THE GATE

A. Nondelegation Doctrine and the Appointments Clause

Under the Nondelegation Doctrine, Congress cannot delegate its legislative powers to other entities unless Congress gave the delegee an "intelligible principle" on which to base its regulations.[56] Opponents of

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51. *Id.* at *14–16 ("A comparison with § 3053(e)'s pre-amendment language reenforced the point. Before the amendment . . . the FTC [was allowed] to adopt interim rules only if 'necessary,' and only if good cause existed. . . . The FTC now may create rules or modify existing rules as it deems 'appropriate'. . . . In seeking to head off this conclusion, Oklahoma points out that the amendment does not change one feature of the Act—that the FTC has power only to review . . . for 'consistency.' . . . [Section] 3053(e)'s amended text gives the FTC ultimate discretion over the content of the rules that govern.").

52. Paulick, *supra* note 49.

53. *Id.*; *see also Oklahoma II*, 2023 U.S. App. LEXIS 5169, at *24 (declining to address the Anti-Commandeering Doctrine due to the plaintiff-appellants' lack of standing) ("Oklahoma and the other State plaintiffs lack standing to challenge [commandeering]").

54. Paulick, *supra* note 49.

55. Ray Paulick, *Sixth Circuit Court of Appeals Finds HISA Constitutional*, PAULICK REP. (Mar. 3, 2023, 4:44 PM), https://paulickreport.com/news/the-biz/sixth-circuit-court-of-appeals-finds-hisa-constitutional/ [https://perma.cc/G8MP-AZA8] ("We have stated from the onset that there are multiple aspects of unconstitutionality plaguing HISA. . . . We will keep fighting all the way to the Supreme Court if necessary to protect our industry and make sure our rules and regulations are built on a legal foundation.").

56. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) (holding that Congress cannot transfer its "essential legislative functions" to another entity).

HISA argue that the Nondelegation Doctrine prohibits Congress from delegating its legislative authority to a private entity; however, that is what HISA did: it delegated its power to make laws pursuant to its organic statute to the Authority, a private organization comprised of private individuals.[57]

The first question is whether the Authority is a private entity, as stated in HISA, or if it is a private entity operating as a public entity.[58] Although the Authority is not a government-created entity, Congress "recognized" it for purposes of carrying out HISA's regulations.[59] Despite the fact that HISA established the Nominating Committee and laid out requirements of its membership, the Authority is a fully self-appointed entity.[60] The members of the initial Nominating Committee—who then appoint the members of the Authority's Board and standing committees—were appointed by the Authority's incorporation documents.[61] According to opponents, the issue with this structure is that the Authority's incorporation documents hide the ball as to whom actually selected the Nominating Committee's members.[62]

Opponents further argue that Congress delegated its legislative powers to a private entity because the regulatory process HISA implemented requires the FTC to promulgate whatever regulations the Authority proposes, with the only exception being that it must comport with the Act.[63] The plain language of the statute inverts this structure. For example, the FTC might prefer option one, but the Authority prefers and proposes option two—both of which are consistent with the FTC's rules and are within the realm of the Authority's jurisdiction. The FTC appears to have an obligation to promulgate option two pursuant to § 3053(c).[64] Opponents argue that this consistency review deprives

57. Consolidated Appropriations Act 2021, H.R. 133, 116th Cong. § 1203 (2020); Jennie Rees, *HBPA Panel: Horseracing Integrity and Safety Act 'Destine for Failure,'* PAULICK REPORT (Mar. 3, 2022, 11:19 AM), https://paulickreport.com/news/the-biz/hbpa-panel-horseracing-integrity-and-safety-act-destined-for-failure/.

58. 15 U.S.C. § 3052(a); *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-96 (2000) (explaining the tests of a state actor).

59. § 3052(a).

60. § 3052(d) (requiring only that the "seven independent members" represent "business, sports, and academia").

61. *Id.*

62. Brief for Appellant at 19, Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869 (5th Cir. 2022) (No. 22-10387).

63. *See id.* at 20–24; 15 U.S.C. § 3053(c)(2) (the FTC "shall approve a proposed rule or modification" if it is "consistent with (A) this [statute] and (B) applicable rules approved by the [FTC]."). H.R. 2617 amends the language in § 3053(e), not § 3053(c). Consolidated Appropriations Act 2023, H.R. 2617, 117th Cong. §701 (2022).

64. § 3053(c). *But see Oklahoma II*, 2023 U.S. App. LEXIS 5169, at *14–15 (noting that § 3053(e) (as amended) is a "catchall" ensuring "that the FTC retains ultimate . . . authority")

the FTC of its legislative authority and that the FTC simply acts as a rubber stamp to a private, independent entity, the Authority.[65] Furthermore, opponents argue that the FTC is a rubber stamp because the FTC does not have preexisting expertise in horseracing or equine care.[66] Therefore, even if the FTC was not limited to consistency review, as proponents might argue following the amendments to § 3053(e) and *Oklahoma II*, the FTC would not be able to truly oversee the Authority.[67] Opponents point to the Authority's delay in enforcing the ADMCP to demonstrate how the FTC is unable to control the Authority.[68]

The district court in *Black I* found that HISA does not violate the Nondelegation Doctrine because precedent currently sets the bar low, and "[a]lthough the [plaintiffs] make compelling arguments that HISA goes too far, only appellate courts may expand or constrict their precedent."[69] The Fifth Circuit found that the FTC lacks meaningful oversight of the Authority because it cannot write or change the rules, nor can the FTC question the substance of the Authority's proposed rules.[70] However, in *Oklahoma I*, the district court stated that the FTC maintains power through its ability to approve or deny the Authority's recommendations, and the FTC may modify the proposals through indirect requirements that the Authority adopt the FTC's modifications if the Authority wants the rule promulgated.[71] The Sixth Circuit

("The final catchall indicates that § 3053(e) spans the Horseracing Authority's jurisdiction . . . that the FTC retains ultimately authority over the implementation of the Horseracing Act.").

65. *Black I*, 596 F. Supp. 3d at 718.

66. *Id.*

67. Brief for Appellant, *supra* note 62, at 29; *see also Understanding the Horseracing Integrity and Safety Act and a New Era of Racing Regulation*, *supra* note 3 (noting that the FTC as an oversight body must enforce laws of greater consequence than horseracing and has no animal welfare expertise like the Department of Agriculture does).

68. Louisiana v. Horseracing Integrity & Safety Auth. Inc., No. 6:22-CV-01934, 2022 U.S. Dist. LEXIS 132929, at *7 (W.D. La. July 26, 2022) (noting that the Authority delayed enforcement of the ADMCP until January 2023); Brief for Appellant, *supra* note 62, at 36–37; *see also* Letter from Sens. Charles E. Grassley, Joe Manchin III, Joni Ernst & John Kennedy, to Lina Khan, Chair, Fed. Trade Comm'n, & Lisa Lazarus, President and CEO of the Horseracing Integrity and Safety Auth. (June 27, 2022), https://www.grassley.senate.gov/imo/media/doc/grassley_et_al-toftchorseracingintegrityandsafetyauthorityhisaimplementation.pdf [https://perma.cc/P7KW-ZY9A] (noting that under HISA, the Authority does not have the power to change any implementation dates).

69. *Black I*, 596 F. Supp. 3d at 712 (the Supreme Court only found two delegations unconstitutional because "Congress had failed to articulate *any* policy or standard' to confine discretion.").

70. *Black II*, 53 F.4th at 872 ("Congress has given a private entity the last word over what rules govern our nation's thoroughbred horseracing industry.").

71. *Oklahoma I*, 2022 U.S. Dist. LEXIS 99448, at *43–44.

affirmed the lower court's decision based on the amended language.[72] Meanwhile, *Louisiana* granted the plaintiffs a preliminary injunction against HISA but did not discuss the Nondelegation Doctrine issues presented in the first two cases.[73]

In addition, opponents argue that HISA violates the Appointments Clause.[74] If the Authority is an officer of the United States, then it must be appointed by the President.[75] The Appointments Clause divides officers into two categories: superior and inferior officers.[76] If it is a superior officer, then the President must appoint it, and the Senate must confirm.[77] However, if it is an inferior officer, i.e., one "whose work is directed and supervised at some level" by an officer who was appointed by the President and confirmed by the Senate,[78] then Congress may allow the President, the Judiciary, or the head of the department to appoint the inferior officer.[79] The President may remove executive officers at will,[80] but may only remove quasi-legislative and quasi-judicial officers for good cause.[81]

Opponents argue that HISA violates the Appointments Clause because the Authority, a private organization, appointed itself while carrying out the inherently executive function of enforcement.[82]

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72. *Oklahoma II*, 2023 U.S. App. LEXIS 5169, at * 31 (6th Cir. 2023) ("We affirm.").

73. Louisiana differs from the prior two cases because Louisiana was the first to address the legality of the HISA rules enacted. *Louisiana*, 2022 U.S. Dist. LEXIS 132929, at *8, *36.

74. *See* Rees, *supra* note 57 ("a private entity appoint[ed] its own people. That runs afoul of the appointment clause in our constitution, which says if you're dealing with an agency, the executive branch of government should be making those appointments"); *cf. Black I*, 596 F. Supp. 3d at 696 (because the Authority is "recognized" and Congress left the appointment up to the Nominating Committee, the Authority may avoid certain strictures of government-created entities).

75. U.S. CONST. art. II, § 2 ("The President... with the advice and consent of the Senate, shall appoint... all other officers of the United States"); *see also* Dep't of Transp. v. Ass'n of Am. R.R (*Amtrak II*), 575 U.S. 43, 54 (2015) (finding the entity to be a government entity, even though the statute expressly intended it to be a private entity).

76. *See* Morrison v. Olson, 487 U.S. 654, 671 (1988).

77. *Id.* at 670 (quoting Buckley v. Valeo, 424 U.S. 1, 132 (1976)).

78. Edmond v. United States, 520 U.S. 651, 663 (1997).

79. Morrison, 487 U.S. at 670 (quoting Buckley, 424 U.S. at 132).

80. Myers v. United States, 272 U.S. 52, 134 (1926) ("There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties.").

81. Humphrey's Executor v. United States, 295 U.S. 602, 631 (1935) ("[w]hether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office.").

82. 15 U.S.C. §§ 3054(h) (granting the Authority "subpoena and investigatory authority with respect to civil violations"), 3054(e)(1) (directing the Authority to work with a nationally recognized medication regulation agency to enforce the ADMCP), 3054(e)(2) (authorizing the

Therefore, because Congress and the President were not involved in the selection process—nor will they be involved in any removal processes—opponents argue that this violates the Appointments Clause and the Nondelegation Doctrine because the appointment and removal power essentially determine what laws are created and enforced.[83]

B. States' Rights, Commandeering, and Preemption

Under section five of the Tenth Amendment, the powers not delegated to the federal government are reserved to the states.[84] Prior to HISA, the industry maintained that "[t]he only role of the Federal Government" was "to prevent interference by one State with the gambling policies of another."[85] This structure was supported by the Interstate Horseracing Act of 1978, which stated that "the States should have the primary responsibility" for regulating horseracing within their respective state, and the federal government's role was to "prevent interference" and "to protect identifiable national interests."[86] Furthermore, in the 1980s, Congress considered banning the use of drugs in horseracing but ultimately decided that it was a decision that should be left up to the individual state jurisdictions.[87] Opponents argue that HISA violates the Tenth Amendment because, although it is the "sport of kings," regulating horseracing is not mentioned in the Constitution, nor barred to the states.[88] Therefore, it is a power that should be—and has traditionally been—"reserved to the States."[89] Even

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Authority to work with the state racing commissions to enforce the RSP); *see Black I*, 596 F. Supp. 3d at 696; Rees, *supra* note 57.

83. 15 U.S.C. § 3052(b)(3) ("The Board of the Authority shall be governed by bylaws for the operation of the Authority with respect to . . . (D) term limits for members and termination of membership."); Brief for Appellant, *supra* note 62, at 45 (citing Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020)); Rees, *supra* note 57.

84. U.S. CONST. amend. X, § 5, cl. 1 ("The 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."); *see also* Printz v. United States, 521 US 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

85. Bennett Liebman, *Introducing the Horseracing Integrity and Safety Act and a New Era of Racing Regulation*, 32 ENT., ARTS & SPORTS L. J. 64, 64–65 (2021) (quoting COMM'N ON THE REV. OF THE NAT'L POLICY TOWARD GAMBLING, GAMBLING IN AMERICA 2a. (1976)).

86. *Id.* (quoting 15 U.S.C. § 3001).

87. John T. Wendt, *Horse Racing in the United States: A Call for a Harmonized Approach to Anti-Doping Regulation*, 25 J. LEGAL ASPECTS OF SPORT 176, 179 (2015).

88. Michael Kilian, *The Evolution of the Sport of Kings*, CHI. TRIB., (May 4, 1988, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-1988-05-04-8803140377-story.html [https://perma.cc/A2YH-J6SW].

89. U.S. CONST. amend. X, § 5, cl. 1.

though horseracing historically has been regulated at the state level,[90] proponents of HISA argue that the transportability of horses and the introduction of interstate simulcast wagering changed the structure of horseracing so much that it is now inappropriate for the thirty-eight state jurisdictions to continue regulating horseracing because it is now a matter of national—and sometimes, international—concern.[91]

Furthermore, opponents argue that HISA requires the states to spend state resources to enforce and fund federal regulations, in violation of the Anti-Commandeering Doctrine.[92] The Anti-Commandeering Doctrine, stemming from the Tenth Amendment and case law, prohibits the federal government from issuing directives requiring the states to address certain problems or enforce federal regulations.[93] Yet, for example, to enforce the standards set by the Authority's regulations, HISA provides that the Authority "may coordinate" with the states to ensure compliance.[94] However, HISA also states that the Authority and state law enforcement "shall cooperate and share information," leading opponents to argue that HISA violates the Anti-Commandeering Doctrine by issuing directives to the states to enforce federal regulations.[95] Similar to the plain language of § 3053(c)(2), opponents point to the mandatory language of "shall" to argue that the federal government is forcing the states to enact federal

90. Liebman, *supra* note 85; Wendt, *supra* note 87.

91. Brief for Sen. Mitch McConnell et al., *supra* note 10, at 4–5. "Simulcast" is a term that combines "simultaneous" and "broadcast." Simulcast horseracing is a race that occurs at a track that is broadcast simultaneously in real time on television. Simulcast wagering is the betting that occurs. Prior to the 1970s, Nevada was the only state that allowed off-track betting, i.e., betting on a horserace while not physically at the track—although this did not stop underground off-track betting in other states. Due to a push for legalized off-track betting and the ability to simulcast, in the 1980s and 1990s, simulcast wagering and off-track betting rapidly grew around the world. The 1984 Kentucky Derby was the first Triple Crown race to be simulcasted, with twenty-four tracks broadcasting the race and making about $19 million from "all-sources" (the term used to state the amount generated from simulcast and off-track betting). The 2022 Kentucky Derby broke a betting record, making $391.8 million from all-sources, a 14 percent increase from the 2019 record of $343 million. *What is the History of Simulcasting?*, TWIN SPIRES, https://www.twinspires.com/what-is-the-history-of-simulcasting [https://perma.cc/V6PL-QMCT] (last visited Mar. 23, 2023); Jonathan Saxon, *Bettors Make History with Record-Setting Kentucky Derby Wagering Amounts*, LOUISVILLE COURIER J., https://www.courier-journal.com/story/sports/horses/kentucky-derby/2022/05/08/kentucky-derby-payouts-2022-records-set-kentucky-derby-churchill-downs/6552263001/ [https://perma.cc/ANU4-CSCY] (May 9, 2022, 12:49 PM).

92. *See Black II*, 53 F.4th at 875.

93. New York v. United States, 505 U.S. 144, 188 (1992); Printz v. United States, 521 U.S. 898, 935 (1997).

94. 15 U.S.C. § 3054(e)(3).

95. 15 U.S.C. § 3060(b); *Black II*, 53 F.4th at 875.

law by forcing cooperation with the Authority to prosecute violators of its programs.[96]

Although neither *Black I* nor *Louisiana* discussed the Anti-Commandeering Doctrine, the plaintiffs in *Oklahoma I* argued that HISA violates the doctrine by requiring the states to fund the Authority's operations and provide enforcement of the Authority's regulations.[97] The plaintiffs point to § 3052(f)(2) to argue that HISA requires the states to fund the Authority via fees, but the district court and Sixth Circuit disagreed because of the permissive language and the alternative option requiring covered persons to fund the Authority.[98] The *Oklahoma I* court agreed with the defendants that § 3060(b) merely imposes a requirement on the Authority to cooperate with enforcement agencies but does not impose a requirement on state enforcement to cooperate with the Authority.[99] *Oklahoma II* declined to address § 3060(b) due to the plaintiff-appellants' lack of standing.[100]

Lastly, the Preemption Doctrine provides that, pursuant to the Supremacy Clause, federal laws will displace state laws when the laws conflict.[101] Congress has preempted state regulation in its entirety, but has also allowed states to regulate where there was no conflict or where the federal government sets a floor and the states set more stringent regulations.[102] In this case, HISA explicitly precludes "any provision of State law or regulation" that conflicts with HISA's regulations.[103] However, HISA does not create a field preemption designed to oust

96. *Compare* 15 U.S.C. § 3053(c)(2) ("The [FTC] shall approve a proposed rule or modification if [the FTC] finds that the proposed rule or modification is consistent with (A) this chapter; and (B) applicable rules approved by the [FTC]."), *with* 15 U.S.C. § 3060(b) ("[W]here conduct by any person subject to [the Authority's programs] may involve both a [program] violation and violation of Federal or State law, the Authority and Federal or State Law enforcement authorities shall cooperate and share information.").

97. *Oklahoma I*, 2022 U.S. Dist. LEXIS 99448, at * 47–48.

98. *Id.* at *48–49 (comparing 15 U.S.C.A. § 3052(f)(2) ("Any state racing commission that elects to remit fees.") with 15 U.S.C. § 3053(f)(3) ("If a State racing commission does not elect to remit fees . . . [c]overed persons . . . shall be required to remit such fees to the Authority."); *Oklahoma II*, 2023 U.S. App. LEXIS 5169, at *26 ("[Section] 3052(f) . . . presents States with a choice, not a command.").

99. *Oklahoma I*, 2022 U.S. Dist. LEXIS 99448, at * 50–51 ("Plaintiffs argue that HISA mandates the States cooperate with the Authority. . . . [T]he better reading . . . is simply a requirement for the Authority to cooperate with the States[,] not the other way around.").

100. *Oklahoma II*, 2023 U.S. App. LEXIS 5169, at *24 ("Oklahoma separately claims that . . . § 3060(b) and § 3052(f), violate the anti-commandeering guarantee. . . Oklahoma lacks standing to challenge the first provision.").

101. U.S. CONST. art. VI, § 2.

102. *Preemption*, LEGAL INFO. INST.: CORNELL L. SCH., https://www.law.cornell.edu/wex/preemption#:~:text=The%20preemption%20doctrine%20refers%20to,two%20authorities%20come%20into%20conflict [https://perma.cc/7NEC-SA84] (last visited Mar. 23, 2023).

103. 15 U.S.C. § 3054(b).

state jurisdictions entirely. Rather, HISA only prohibits inconsistent regulations,[104] leaving state jurisdictions somewhat in the picture.

The *Black II* and *Oklahoma II* courts found the preemption scheme was standard and a nonissue.[105] The *Louisiana* court faced a different issue because the plaintiffs sought a preliminary injunction; the court held that the plaintiff states demonstrated standing partly because the issues affect the states' "quasi-sovereign interests" in that the states, by being preempted, lose authority over the industry.[106] In the context of gambling, Texas attempted to regain this loss of power by prohibiting out-of-state patrons from placing bets on its horse races by banning the importation and exportation of parimutuel simulcast signals.[107]

III. HISA RACES TO THE FINISH LINE

A. The Constitutionality of the Provisions

1. (Private) Nondelegation Doctrine

Although the purpose of the Nondelegation Doctrine is to maintain the separation of powers envisioned by the Constitution by preventing Congress from delegating away its Article I power to another entity, as currently interpreted by the Supreme Court, the standard used to determine whether Congress has violated this doctrine is lenient.[108] For a delegation to survive the Nondelegation Doctrine, Congress merely needs to establish an "intelligible principle" in the statute such that the delegee has a guide in exercising its

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104. *Id.*

105. *Black II*, 53 F.4th at 874; *Oklahoma II*, 2023 U.S. App. LEXIS 5169, at * 26 (citing Hodel v. Va. Surface Mining & Reclamation Assoc., Inc. 452 U.S. 264, 290 (1981) (Congress may encourage the States through conditional preemption).

106. Louisiana v. Horseracing Integrity & Safety Auth. Inc., No. 6:22-CV-01934, 2022 U.S. Dist. LEXIS 132929, at *16–17 (W.D. La. July 26, 2022).

107. Maribeth Kalinich, *They're Out of the Gate! HISA is Setting the Pace*, PAST THE WIRE (July 1, 2022), https://pastthewire.com/theyre-out-of-the-gate-hisa-is-setting-the-pace/ [https://perma.cc/Q6J9-7KGP].

108. CONG. RSCH. SERV., ANALYSIS OF POTENTIAL CONSTITUTIONAL CHALLENGES TO DELEGATIONS MADE TO A PRIVATE ENTITY UNDER H.R. 3084 3 (2015) (citing Mistretta v. United States, 488 U.S. 361, 371 (1989)) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."); *see also* Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935) (holding that the power granted by the National Recovery Act to the President did not contain guidance sufficient to satisfy the Nondelegation Doctrine); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding that the standards provided by the National Industrial Recovery Act did not contain sufficient direction for the President to follow when formulating policy). *But see* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (plurality opinion) (Gorsuch, J., dissenting).

delegated authority.[109] The "intelligible principle" requirement ensures that when Congress delegates its authority the delegee is subordinate to Congress, and therefore the delegation does not violate the separation of powers.[110]

When Congress delegates authority to a private entity, Congress must ensure that it does not delegate "legislative Powers" in contravention of the Constitution.[111] For example, in *Sunshine Anthracite Coal Co. v. Adkins*, the Supreme Court upheld the Bituminous Coal Act of 1937's provision authorizing coal producers to propose minimum prices for coal because the producers did not set the official prices.[112] Not only did Congress provide a set of guidelines the coal producers were to follow in proposing prices, which "far exceed[ed] in specificity others which have been sustained," Congress also constrained the coal producers' proposals with the National Bituminous Coal Commission's ability to "approve[], disapprove[], or modif[y]" the proposals.[113] Therefore, the members of the private entity remained subordinate to the governmental entity, and thus the "statutory scheme [was] unquestionably valid."[114] However, *Adkins* evaluated the Private Nondelegation issue not by the *J.W. Hampton* "intelligible principle" standard, but rather by reviewing whether Congress delegated "its legislative authority to the industry."[115] Since the industry exercised an advisory role, the statute did not violate the Nondelegation Doctrine.[116]

A different test was used in *Carter v. Carter Coal Co.* when reviewing a delegation from Congress to a private entity.[117] *Carter Coal*

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109. Gundy, 139 S. Ct. at 2129 (the Supreme Court has "held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized [to exercise the delegated authority] is directed to conform.'") (quoting J.W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

110. CONG. RSCH. SERV., *supra* note 108, at 4.

111. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.").

112. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388 (1940).

113. *Id.* at 388, 397–98.

114. *Id.* at 399 (citing United States Rock v. Royal Coop., 307 U.S. 533 (1939); Currin v. Wallace, 306 U.S. 1 (1939)).

115. *Id.*

116. *Id.*; *see also Currin*, 306 U.S. at 15 ("[t]his is not a case where Congress has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution.").

117. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) ("The powers conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.").

Co. relied on the Fifth Amendment's Due Process Clause, rather than the budding Private Nondelegation Doctrine, to hold Congress's delegation to a majority of the coal producers and miners unconstitutional.[118] In a more recent opinion, the US Court of Appeals for the District of Columbia Circuit held in *Association of American Railroads v. United States Department of Transportation (Amtrak I)* that *Carter Coal Co.* prohibited *any* delegation of authority from Congress to a private entity.[119] In *Amtrak I*, the court separated delegations to governmental entities, which only require Congress to provide an "intelligible principle," from delegations to private entities, which are unconstitutional even if Congress provided an "intelligible principle."[120] The D.C. Circuit found Amtrak to be a private entity to whom Congress delegated "regulatory power," thereby placing Amtrak on "equal footing" with the Federal Railroad Administration.[121] This structure "vitiates the principle that private parties must be limited to an advisory or subordinate role in the regulatory process."[122] Although the Supreme Court vacated the D.C. Circuit's opinion on appeal, the basis of the Supreme Court's opinion was that Amtrak was a governmental entity.[123] The Court did not discuss the D.C. Circuit's blanket ban on Congress delegating to private entities.[124] Therefore, the question to determine HISA's validity is whether the Authority is best interpreted as a private entity, and if so, whether Congress gave the Authority limited power to participate in the regulatory process or whether Congress impermissibly delegated regulatory power to the Authority in contravention of the Private Nondelegation Doctrine.

Based on the tools of statutory interpretation, the Authority is best interpreted as a private entity. Section 3052 expressly states that the Authority is a "private, independent, self-regulatory, nonprofit

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118. *Id.*

119. CONG. RSCH. SERV., *supra* note 108, at 5–6 (citing Ass'n of Am. R.R. v. Dep't of Transp. (*Amtrak I*), 721 F.3d 666, 670 (D.C. Cir. 2013)) (holding that "[f]ederal lawmakers cannot delegate regulatory authority to a private entity. To do so would be 'legislative delegation in its most obnoxious form.'") (quoting *Carter Coal Co.*, 298 U.S. at 311).

120. *Id.* at 6 (citing *Amtrak I*, 721 F.3d at 671).

121. *Id.* (the court found no cases "embracing the position that a private entity may jointly exercise regulatory power on equal footing with an administrative agency. This fact is not trivial.").

122. *Id.*

123. *Id.* at 7 (citing Dep't of Transp. v. Ass'n of Am. R.R, 575 U.S. 43, 46 (2015) (*Amtrak II*) (2015) (holding "for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity").

124. *Id.*; *see also* Alexander Volokh, *The Shadow Debate over Private Nondelegation in DOT v. Association of American Railroads*, 14 CATO SUP. CT. REV. 359, 362 (2015) (the Supreme Court "decid[ed] the case on the narrowest possible, most Amtrak-specific theory. The Court held that Amtrak is in fact public, and not private, for purposes of the nondelegation doctrine, without explaining whether this matters.").

corporation," comprised of independent and industry members, that is "recognized" by Congress to "develop[] and implement[]" the ADMCP and RSP.[125] Furthermore, although unsuccessful, the previous versions of HISA would have also used an independent entity to regulate horseracing.[126] These previous versions of HISA modeled the ADMCP after two independent drug-testing companies: the World Anti-Doping Agency and USADA[127] This structure continued in the current version under §§ 3054(e)(1)(A) and (B).[128] Lastly, three of HISA's advocates, Senator McConnell and Representatives Tonko and Barr, wrote in an amicus brief in support of HISA that the Authority-FTC relationship is modeled after two other private entity-federal agency relationships.[129] The first is the Financial Industry Regulatory Authority (FINRA)—a private entity created pursuant to the Maloney Act—which proposes rules to the Securities and Exchange Commission (SEC), a federal agency; and the second is the Bituminous Coal Act's structure, which was approved in *Adkins*.[130]

Although congressional pronouncements are not dispositive as to the Authority's status, if a court applies the appropriate test, the Authority's structure further supports the Authority's status as a private entity.[131] Unlike in *Amtrak I*, the Authority's board members are not appointed by the President nor selected with restrictions on political party makeup.[132] Although the Authority must pursue certain statutory goals, the Authority is not dependent on federal funds nor are the day-to-day operations dictated by Congress.[133] Therefore, unlike

125. 15 U.S.C. § 3052(a)–(d).

126. Brief for Sen. Mitch McConnell et al., *supra* note 10, at 6 (citing H.R. 2012, 113th Cong. (2013) (Rep. Joseph Pitts' (R-PA) Horseracing Integrity and Safety Act of 2013 would have changed the Interstate Horseracing Act to require a new "independent anti-doping organization" to consent before a track could accept an interstate off-track wager); S. 973, 113th Cong. (2013) (the same requirement in Sen. Tom Udall's (D-NM) Horseracing Integrity and Safety Act of 2013)).

127. Wendt, *supra* note 87, at 178–180; Wendt, *supra* note 18, at 4.

128. 15 U.S.C. §§ 3054(e)(1)(A) ("The Authority shall seek to enter into an agreement with the [USADA]."), 3054(e)(1)(B) ("If the Authority and the United States Anti-Doping Agency are unable to enter into the agreement . . . the Authority shall enter into an agreement with an entity that is nationally recognized as being . . . equal in qualification to [USADA].").

129. Brief for Sen. Mitch McConnell et al., *supra* note 10, at 2.

130. *Id.* at 2–3.

131. *Cf. Amtrak II*, 575 U.S. at 51, 54 (2015) (citing Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392 (1995)).

132. *Cf. Id.* at 51–52. *Compare* 49 U.S.C. § 24302(a)(3) ("Not more than 5 individuals appointed... may be members of the same political party."), *with* 15 U.S.C. § 3052(b)-(d) (providing only that the majority of the members of the Nominating Committee, Standing Committees, and Board of Directors must be "independent members selected from outside the equine industry").

133. 15 U.S.C. § 3052(f) (providing that initial funding of the Authority is to be via loans, with subsequent funding provided by fees paid by covered personnel or the state). *See also, e.g.*, 15 U.S.C. § 3059 (the Authority is to stop "[u]nfair or deceptive acts or practices" in horseracing); *cf.*

Amtrak, the Authority should be considered an independent entity because "its priorities, operations, and decisions are [not] extensively supervised and substantially funded by the political branches."[134] That being the case, the Appointments Clause is a nonissue.[135]

Due to the structure of HISA's litigation, there is a unique circuit split: prior to the 2022 amendment, the Fifth Circuit determined in *Black II* that HISA is unconstitutional for want of FTC oversight authority; after the amendment, the Sixth Circuit found that HISA is constitutional, but noted that it will take time for the FTC's consistency review to become its own rulemaking power.[136] If the *Oklahoma II* opponents follow Hamelback's lead, and the Supreme Court analyzes the delegation to the Authority under *J.W. Hampton Jr. & Co.*, then HISA will likely survive scrutiny because the "intelligible principle" bar has historically been set quite low.[137] If HISA is analyzed under *Amtrak I*, then HISA's delegation to the Authority is unconstitutional regardless of whether Congress provided an "intelligible principle."[138] On the other hand, if it turns on whether Congress delegated "its

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Amtrak II., 575 U.S. at 53. *Compare* 49 U.S.C. § 24902(b) ("When selecting and scheduling specific projects, Amtrak shall apply the following considerations, in the following order of priority."), *with* 15 U.S.C. § 3055(b) ("In developing the [ADMCP], the Authority shall take into consideration the following.").

134. *Amtrak II*, 575 U.S. at 53.

135. *See* CONST. Art. II, § 2, cl. 2.

136. *Black II*, 53 F.4th 869; *Oklahoma II*, 2023 U.S. App. LEXIS 5169, at *21–22 ("Over time, the FTC's threshold consistency review will account for its own full-throated rulemaking power.").

137. *See* Paulick, *supra* note 55 ("We will keep fighting all the way to the Supreme Court if necessary to protect our industry and make sure our rules and regulations are built on a legal foundation."); *see also, e.g.*, Mistretta v. United States, 488 U.S. 361, 373 (1989) ("we have upheld, again without deviation, Congress'[s] ability to delegate power under broad standards."); Marshall Field & Co. v. Clark, 143 U.S. 649, 694 (1892) ("[t]he legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government."); Yakus v. United States, 321 U.S. 414, 425 (1944) ("the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the [delegee] is to act so that it may be known whether he has kept within it in compliance with the legislative will."). *But see*, Gundy v. United States, 139 S. Ct. 2116 (2019) (plurality opinion) (Alito, J., concurring) ("[I]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); Gundy v. United States, 139 S. Ct. 2116 (2019) (plurality opinion) (Gorsuch, J., dissenting) ("This mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, In history, or even in the decision from which it was plucked. Judges and scholars . . . have condemned it as resting on 'misunderst[ood] historical foundations.' . . . [and] explained . . . that it has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional.")

138. Ass'n of Am. R.R. v. Dep't of Transp., 721 F.3d 666, 671 (*Amtrak I*) (D.C. Cir. 2013).

legislative authority" to a private entity, then HISA's validity is dependent on whether the Authority makes the rules and the FTC operates merely as a rubber stamp for the Authority.[139] The newer version of HISA, as amended in the 2022 omnibus spending bill, should remedy the Private Nondelegation issue in the prior versions of HISA by better mirroring *Adkins*' structure.[140] Providing that the FTC may now approve, disapprove, and *modify* the Authority's proposed rules, the Authority-FTC scheme should be found "unquestionably valid."[141]

2. The Authority's (Legislative) Powers

Similar to the FTC, the SEC is an independent administrative agency established by Congress to create and enforce regulations regarding the securities markets.[142] Due to the scope of the SEC's responsibilities, the SEC is comprised of many divisions and offices, including nonprofit, self-regulatory organizations such as FINRA.[143] Like the Authority, FINRA is a nonprofit organization, overseen by the SEC and authorized by Congress to regulate brokers in the securities market.[144] So too is FINRA funded by the entities regulated by FINRA through member fees with a Board of Governors (Board) comprised of both independent and industry members with certain constraints to represent various aspects of the market.[145] As with the Authority,

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139. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940). Opponents of HISA argue that the FTC acts merely as a rubber stamp to the rules the Authority "proposes" because HISA restricts the FTC to consistency review. *Black I*, 596 F. Supp. 3d at 718; *Oklahoma I*, 2022 U.S. Dist. LEXIS 99448, at *27; *see also* Volokh, *supra* note 124, at 369.

140. *Compare Adkins*, 310 U.S. at 388, 387–88 (1940) (upholding the Bituminous Coal Act because the National Bituminous Coal Commission retained oversight power through its ability to "approve[], disapprove[], or modif[y]" the private parties' proposed standards), *with* Consolidated Appropriations Act 2021, H.R. 133, 116th Cong. § 1203 (2020) (as amended by Consolidated Appropriations Act 2023, H.R. 2617, 117th Cong. §701 (2022)) (providing that the FTC "may abrogate, add to, and modify the rules" proposed by the Authority).

141. *Adkins*, 310 U.S. at 398–99 (citing United States Rock v. Royal Coop., 307 U.S. 533 (1939); Currin v. Wallace, 306 U.S. 1 (1939)).

142. *About the SEC*, U.S. SEC. & EXCHANGE COMM'N, https://www.sec.gov/strategic-plan/about [https://perma.cc/J33X-DWK2] (Nov. 23, 2022); William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085, 2087 (2015).

143. *About the SEC*, *supra* note 142; *About FINRA*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/about [https://perma.cc/L4AY-LUC8] (last visited Mar. 22, 2023).

144. *About FINRA*, *supra* note 143; *Financial Reports and Policies*, FIN. INDUS. REGUL. AUTH. (May 9, 2022), https://www.finra.org/about/annual-reports [https://perma.cc/D245-ATNV].

145. 15 U.S.C. §§ 3052(b)–(d); Andrew F. Tuch, *The Self-Regulation of Investment* Bankers, 83 GEO. WASH. L. REV. 101, 102, 104–05 (2014); *FINRA Board of Governors*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/about/governance/finra-board-governors [https://perma.cc/3G58-SKDA] (last visited Mar. 22, 2023).

FINRA's bylaws require FINRA to have certain standing committees to assist in the Board's execution of its duties.[146]

To create a new rule, the Authority first writes and proposes a new rule or modification to the FTC.[147] Then, the FTC publishes the proposed rule or modification in the Federal Register and provides an opportunity for comments.[148] Lastly, the FTC will decide to either approve, add to, or modify the proposed rule to conform to HISA's requirements and the FTC's rules and ensure the Authority's fair administration and the furtherance of HISA's purposes.[149] FINRA also has power to write and enforce new rules.[150] FINRA writes and proposes a new rule or modification, then presents it to FINRA's management, the relevant committees, and then the Board to review.[151] Then, FINRA issues a Regulatory Notice soliciting comments on the proposed rule or modification.[152] Next, FINRA files the proposed rule or modification with the SEC "to determine whether it is consistent with the requirements of the Securities Exchange Act of 1934."[153] The SEC shall either "approve or disapprove the proposed rule change."[154] Finally, if the SEC approves of FINRA's proposed rule or modification, then the SEC publishes it in the Federal Register, receives comments from the public, and announces a final rule in the Federal Register followed by FINRA's Regulatory Notice announcing the SEC's approval of the new rule.[155]

Although FINRA's structure has more stages of review than the Authority's, this should not be fatal, because the Authority retained FINRA's structure of the agency having the final say.[156] The Supreme

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146. *FINRA Standing Committees*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/about/governance/standing-committees [https://perma.cc/7VA8-ENRG] (last visited Mar. 22, 2023).

147. 15 U.S.C. § 3053(a).

148. § 3053(b).

149. Consolidated Appropriations Act 2021, H.R. 133, 116th Cong. § 1203 (2020) as amended by Consolidated Appropriations Act 2023, H.R. 2617, 117th Cong. §701 (2022).

150. *FINRA Rules & Guidance*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/rules-guidance [https://perma.cc/BJF6-HEXY] (last visited Mar. 22, 2023).

151. 15 U.S.C. § 78s(3)(b)(1); *FINRA Rulemaking Process*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/rules-guidance/rulemaking-process [https://perma.cc/N6FE-YDGG] (last visited Mar. 22, 2023).

152. *FINRA Rulemaking Process*, *supra* note 151.

153. 15 U.S.C. § 78s(b)(C)(i) ("[The SEC] shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter..."); *FINRA Rulemaking Process*, *supra* note 151.

154. § 78s(b)(2)(A)(i).

155. *FINRA Rulemaking Process*, *supra* note 151.

156. § 78s; 15 U.S.C. § 3053; *see also Oklahoma II*, 2023 U.S. App. LEXIS 5169, at *13, *19 ("An illuminating example comes from securities law.... The FTC's review authority in this

Court in *Currin* and *Adkins* upheld two statutory schemes where Congress delegated power to a private entity comprised of industry members because the governmental entity maintained superior oversight power.[157] In *Currin*, the industry members operated merely as an "on-off switch" to the governmental entity's regulations; in *Adkins*, the governmental entity retained power to "approve[], disapprove[], or modify[]" the private entity's proposed regulations.[158] Historically, the FINRA structure is allowed because it requires SEC approval before FINRA's proposed rule may be enforced with the force of law, thereby ensuring that the governmental entity retains power over the private delegee.[159] Similarly, the Authority's structure ensures that the governmental entity retains power over the private delegee through its approval structure.[160] Both the Securities Exchange Act and HISA explicitly provide that the private delegee's proposed rule or modification is not effective until it is approved by the governmental agency charged with overseeing the private delegee.[161]

However, current pending litigation in the US District Court for the Middle District of Florida may change that.[162] *Scottsdale Cap. Advisors Corp., et al. v. Fin. Indus. Regul. Auth., Inc.* challenges FINRA on separation of powers, Appointments Clause, and Nondelegation Doctrine grounds.[163] Assuming the courts will maintain the status quo, FINRA—and the Authority—should be upheld against the constitutional challenges because the governmental entity retains the final say.[164] As in *Currin*, the Authority's powers to propose rules and modifications are not the same as a group of industry members making

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respect parallels similar authority exercised by the SEC under the Maloney Act."). *See generally,* Currin v. Wallace, 306 U.S. 1, 15 (1939); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).

157. Volokh, *supra* note 124, at 367–68 (citing Currin, 306 U.S. at 6; Adkins, 310 U.S. at 388, 397).

158. *Id.*

159. § 78s; *see also Black II,* 53 F.4th at 877 (citing Sorrell v. SEC, 679 F.2d 1323, 1325–26 (9th Cir. 1982); Todd & Co. v. SEC, 557 F.2d 1008, 1012 (3d Cir. 1977); R.H. Johnson & Co. P. SEC, 198 F.2d 690, 695 (2d Cir. 1952)).

160. § 3053; Consolidated Appropriations Act 2021, H.R. 133, 116th Cong. § 1203 (2020) (as amended by Consolidated Appropriations Act 2023, H.R. 2617, 117th Cong. §701 (2022)).

161. § 78s(b)(1); § 3053(b)(2).

162. *See* Scottsdale Cap. Advisors Corp.v. Fin. Indus. Regul. Auth., No. 8:22-cv-02347-MSS-TGW (M.D. Fla. filed Oct. 12, 2022); Martina Barash, *FINRA Operation, Structure Unconstitutional, Brokerage Firm Says,* BLOOMBERG L. (Oct. 13, 2022, 5:56 PM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XBH55L4K000000?bna_news_filter=us-law-week#jcite [https://perma.cc/56BL-P879].

163. *See generally* Complaint, Scottsdale Cap. Advisors Corp.v. Fin. Indus. Regul. Auth., No. 8:22-cv-02347-MSS-TGW (M.D. Fla. Oct. 12, 2022), ECF No. 1.

164. § 78s(b)(1); § 3053(b)(2).

a law and forcing it upon the minority.[165] Rather, it is one where Congress exercised its legislative authority in passing HISA and outlined the standards by which the agent is to carry out the Act.[166] The *Adkins* court determined that Congress retained its legislative authority when it defined what "bituminous coal" is and delineated what areas are to be controlled.[167] Similarly, HISA defines what and whom are to be regulated.[168] However, as subsection (B) notes, there are some policy concerns that cut against allowing FINRA and the Authority to continue as is.[169]

3. The Authority as Applied Against the States

While the states make compelling arguments regarding the central role state governments have and should continue to play in regulating horseracing, the industry was never fully "reserved to the States."[170] Horseracing is an ancient sport dating back to 1174 CE, with the first purse race in the early seventeenth century.[171] In 1894, the largest racetracks and stables owners created the American Jockey Club, modeled after England's.[172] The Jockey Club, a private organization, regulates thoroughbred horse-breeding registration and naming, as well as racing silks.[173] It also funds welfare, safety, and medication reform initiatives.[174] Although the Jockey Club does not regulate all aspects of the industry, horseracing has a long history of

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165. Currin v. Wallace, 306 U.S. 1, 15 (1939) (citing Carter v. Carter Coal Co., 298 U.S. 238, 310, 318).

166. *Id.* at 18; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397 (1940).

167. *Adkins*, 310 U.S. at 399 (citing Shields v. Utah Idaho Central R. Co., 305 U.S. 177 (1938)).

168. 15 U.S.C. § 3051.

169. *See supra* Part III.

170. U.S. CONST. amend. X, § 5, cl. 1. *See generally,* Liebman, *supra* note 85; Letter from Stuart Janney III, Chair, Jockey Club, to Jan Schakowsky, Chair, H. Subcomm. on Consumer Affs. & Com. of the H. Comm. on Energy & Com., & Cathy McMorris Rodgers, Ranking Member, H. Subcomm. on Consumer Affs. & Com. of the H. Comm. on Energy & Com., https://www.congress.gov/116/meeting/house/110418/documents/HHRG-116-IF17-20200128-SD022.pdf [https://perma.cc/9NLN-NHM2].

171. Kilian, *supra* note 88.

172. *History of the Jockey Club*, JOCKEY CLUB, https://www.jockeyclub.com/Default.asp?section=About&area=0 [https://perma.cc/6MEB-BVX9] (last visited Mar. 22, 2023).

173. *Id.*; John Branch, *Racing Silks in Every Color, Provided You Wear a Small*, N.Y. TIMES (May 31, 2010), https://www.nytimes.com/2010/06/01/sports/01silks.html [https://perma.cc/8T4K-QT3P]; Isabella Bruni, *How Does a Racehorse Get Its Name?*, NBC L.A., https://www.nbclosangeles.com/news/sports/how-does-a-racehorse-get-its-name/2885876/ [https://perma.cc/SLX9-FVPJ] (May 19, 2022, 7:05 AM).

174. Letter from Stuart Janney III, *supra* note 170.

being regulated by both private and public entities, therefore, it is not an industry traditionally "reserved to the states."[175]

Although the states' argument that HISA violates the Tenth Amendment should fail for want of reservation to the states, the opponents of HISA have a stronger argument in their claim that the Act violates the Anti-Commandeering Doctrine because of the mandatory language in § 3060(b).[176] Although the *Oklahoma I* court agreed with the defendants that it merely imposes a one-sided requirement, *Oklahoma II* declined to analyze the issue due to lack of standing, leaving the issue for a better situated opponent to litigate.[177]

B. Possible Policy Concerns of HISA

1. The Self-Regulatory Organization

Recent case law raised the issue regarding the impropriety of the government delegating its authority to a private entity.[178] FINRA has been criticized as a failed self-regulatory organization and a violation of the Constitution.[179] FINRA's general rules and lack of institutional expertise have been credited as reasons why FINRA fails to regulate.[180] Because FINRA's personnel do not understand investment banking practices and client expectations, FINRA is unable to determine what standards by which to regulate investment banking.[181] Therefore, FINRA's rules tend to be broad, leading to ineffective regulation of the regulated entities.[182]

However, this Note argues that FINRA and the Authority do not encounter this problem. The Authority and FINRA are both comprised of a mixture of independent and industry members, and both have standing committees to ensure the organization carries out its duties.[183]

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175. U.S. CONST. amend. X, § 5, cl. 1.

176. 15 U.S.C. § 3060(b) ("the Authority and Federal or State law enforcement authorities *shall* cooperate and share information.") (emphasis added).

177. *Oklahoma I*, 2022 U.S. Dist. LEXIS 99448, at *50–51; *Oklahoma II*, 2023 U.S. App. LEXIS 5169, at *24 (6th Cir. 2023) ("Oklahoma separately claims that . . . § 3060(b) . . . violate[s] the anti-commandeering guarantee. . . . Oklahoma lacks standing to challenge the first provision.").

178. *See, e.g.*, Complaint at ¶ 20, Scottsdale Cap. Advisors Corp. v. Fin. Indus. Regul. Auth., Inc., No. 8:22-cv-02347-MSS-TGW (M.D. Fla. Oct. 12, 2022).

179. *See, e.g.*, Tuch, *supra* note 145, at 109; Jay Schaefer, *FINRA is a Double-Delegation Disaster*, NEW C.L. ALL. (July 19, 2019), https://nclalegal.org/2019/07/finra-is-a-double-delegation-disaster/ [https://perma.cc/YKJ2-TY3R].

180. Tuch, *supra* note 145, at 109.

181. *Id.* at 154.

182. *Id.* at 153–54.

183. *Id.* at 104–05.

The industry members are specifically selected to ensure that the various facets of the regulated are represented, thereby ensuring that there is firsthand knowledge and experience. Alternatively, even if FINRA faces this issue, the Authority does not because the rules are not as general as FINRA's "just and equitable" rule, which merely requires the regulated to "observe high standards of commercial honor and just and equitable principles of trade."[184] Rather, the Authority's rules are more specific and implicitly define what "just and equitable" practices are. For example, Rule 2000 provides step-by-step requirements to receive racetrack accreditation, a list of the new required personnel and their roles, and how the racetrack facilities are to be set up and maintained.[185] Another example is the Authority's proposed Rule 4000, which explicitly lists what substances and methods of horse care are prohibited.[186] The most comparable rule to FINRA's general "just and equitable" rule is § 3059 of HISA, which states what is considered an "unfair or deceptive act or practice."[187] This too goes beyond a mere statement of "observ[ing] high standards" because it explicitly defines what is considered "unfair or deceptive."[188]

On the other hand, opponents of HISA argued that the FTC lacks expertise.[189] The *Black I* court, recognizing that the private entity-public entity relationship is traditionally between two entities with independent expertise over the regulated, determined that this was a nonissue.[190] Nevertheless, this Note appreciates the concern that the FTC might serve merely as a rubber stamp due to its lack of independent expertise in animal welfare, as compared to the Department of Agriculture (USDA).[191] Yet, Congress determined that it was a job best suited for the FTC, the agency charged with ensuring fair

184. *Id.* at 153.

185. Racetrack Safety Program, 87 Fed. Reg. 445 (Jan. 5, 2022)

186. HISA Anti-Doping and Medication Control Rule, 88 Fed. Reg. 5070 (proposed Jan. 26, 2023).

187. 15 U.S.C. § 3059.

188. *Id.* (listing failure to disclose that the horse has been administered a substance or method that the Authority listed as having "a long-term degrading effect" on the horse).

189. *Black I*, 596 F. Supp. 3d at 718; *Understanding the Horseracing Integrity and Safety Act and a New Era of Racing Regulation*, supra note 3.

190. *Black I*, 596 F. Supp. 3d at 719 (citing FCC v. Schreiber, 381 U.S. 279, 296 (1965)) (the Court must assume that the FTC "will act properly and according to law.").

191. The USDA is the federal agency charged with enforcing the animal welfare regulations under the Animal Welfare Act (AWA). The AWA establishes standards for the care, transportation, and sale of pets, research animals, or animals transported commercially. *Animal Welfare Act*, U.S. DEP'T OF AGRIC., https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa#:~:text=USDA%20Animal%20Care%2C%20a%20unit,Animal%20Welfare%20Act%20(AWA) [https://perma.cc/4GX2-AZLH] (Jan. 12, 2022).

business practices by protecting both competition and consumers.[192] This is an appropriate placement because the purpose of HISA is to "improve the integrity and safety of horseracing by requiring uniform safety and performance standards."[193]

Horseracing is a billion-dollar industry that has come under fire due to its treatment of horses.[194] HISA and the Authority's goal is to improve the horseracing industry through uniform nationwide regulation.[195] It can be argued that the USDA is better suited to regulate the industry, but the USDA lacks the independent expertise of protecting competition and the consumers of horseracing.[196] HISA and the Authority seek to ensure fair methods of competition through, among other procedures, leveling the playing field by setting racetrack surface quality standards and disallowing the use of certain performance-enhancing or injury-masking medication.[197] HISA and the Authority protect competition by ensuring that all competitors are bound by the same set of rules, which were designed to promote the longevity of the main aspect of the competition: the horse.[198] It protects the consumers by prohibiting the "unfair or deceptive act or practice" of selling a horse with knowledge or reason to know that it has been administered a substance or method which the Authority determined causes long-term effects on the horse without disclosure.[199] Therefore, if Congress placed HISA under the USDA, there might be similar arguments regarding the USDA's lack of independent expertise relative to the FTC, based on the FTC's experience in reigning in large businesses to ensure these fair methods of competition and the protection of both the competitors and the consumers.[200]

More generally, self-regulatory organizations have become part and parcel of the government.[201] Professor Benjamin Edwards warns of

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192. *What the FTC Does*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/what-ftc-does [https://perma.cc/ZNE9-WSKS] (last visited Mar. 22, 2023).

193. H.R. REP. NO. 116-554, at 17 (2020).

194. Letter from Stuart Janney III, *supra* note 170; *see also, e.g.*, Ed. Bd., *supra* note 4.

195. Letter from Stuart Janney III, *supra* note 170.

196. *Compare Mission Areas*, U.S. DEP'T OF AGRIC., https://www.usda.gov/our-agency/about-usda/mission-areas [https://perma.cc/9ZN3-86ZV] (last visited Mar. 22, 2023), *with What the FTC Does*, *supra* note 192.

197. 15 U.S.C. §§ 3053(a)(4)–(5), 3055(b)(3), (6), 3056(b)(3); HISA Anti-Doping and Medication Control Rule, 88 Fed. Reg. 5070 (proposed Jan. 26, 2023).

198. *See, e.g.*, H.R. REP. NO. 116-554, at 17–19 (2020).

199. 15 U.S.C. § 3059.

200. *What the FTC Does*, *supra* note 192.

201. Benjamin Edwards, *The Supreme Court as a Source of Systemic Risk*, DUKE FIN. ECON. CTR.: FINREG BLOG (Sept. 9, 2021), https://sites.duke.edu/thefinregblog/2021/09/09/the-supreme-court-as-a-source-of-systemic-risk/. [https://perma.cc/SG95-PE4W].

a possible domino effect if the Supreme Court invalidates one self-regulatory organization's rule.[202] Professor Edwards likens self-regulatory organizations to the beat cop because, without the self-regulatory organizations, the federal regulators will fail to enforce its rules due to oversight failures.[203] Although Professor Edwards focuses on the role self-regulatory organizations play in nonbank financial regulation, the idea is applicable to the Authority's regulation of horseracing because both rely on a private-sector regulator to serve as the frontline defense against the regulated, with federal law giving the Authority its power through mandatory membership.[204] Besides, the Authority is based on one such nonbank financial self-regulatory organization, FINRA.[205]

2. The Public's Cry for Change

The previous system of having thirty-eight separate racing jurisdictions with thirty-eight separate sets of rules has failed the industry.[206] The industry, which has been around for millennia, grew to be worth over a hundred billion dollars and employs almost two million people.[207] If the sport is to continue to provide its massive economic impact, then it needs to change with the times. Congress listened to its constituents' plea for more humane practices and a decrease in the use of performance-enhancing drugs and therapeutic medications which may contribute to the sharp increase in horses' deaths.[208]

V. HISA CROSSES THE FINISH LINE

Had Congress not amended HISA to permit the FTC to "abrogate, add to, and modify" the Authority's proposed rules, then the future of HISA would look a lot different.[209] The strongest argument

202. *Id.*; *see also* Benjamin P. Edwards, *Supreme Risk*, 74 FLA. L. REV. 543, 546–47 (2022).

203. Edwards, *supra* note 201.

204. *Id.*

205. *Id.*; Brief for Sen. Mitch McConnell et al., *supra* note 10, at 2.

206. *See, e.g.*, Letter from Stuart Janney III, *supra* note 170.

207. *Id.*

208. H.R. REP. NO. 116-554, at 17 (2020); *see also* Crawford, *supra* note 18 ("[I]ndustry leaders and legal scholars ubiquitously decry American racing's 'drug addiction.'"); Megan Guthrie, Note, *Get Off Your High Horse: Drugs, Breeding, and Laws of the Modern American* Racehorse, 25 DRAKE J. AGRIC. L. 425, 426 (2020) (arguing that the leading contender for the rise in horse breakdowns is the rampant drug use and inbreeding).

209. *Compare* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388, 397–98 (1940) (upholding the Bituminous Coal Act because the National Bituminous Coal Commission retained oversight power through its ability to "approve[], disapprove[], or modif[y]" the private parties' proposed standards), *with* Consolidated Appropriations Act 2021, H.R. 133, 116th Cong. § 1203

HISA's opponents had was that it violated the Nondelegation Doctrine by limiting the scope of the FTC's powers over the Authority.[210] However, because Congress quickly added the new language to the 2023 omnibus spending bill, Congress was able to address the issues raised in *Black II*, thereby changing the outcome in *Oklahoma II* and halting *Black II*'s court from giving effect to its decision.[211] Although opponents' second strongest argument might be the Anti-Commandeering Doctrine, the *Oklahoma II* court's analysis of § 3052(f) will likely hinder any opponents' future success.[212] Thanks to the quick change in HISA's language, the largest concerns are likely that of policy: what role should self-regulatory organizations play in government and whether Congress should be allowed to slide amendments into bills. *Black I* and *Black II* are also good reminders on the importance of timing in lawsuits.

Lucy McAfee[*]

(2020) (as amended by Consolidated Appropriations Act 2023, H.R. 2617, 117th Cong. §701 (2022)) (providing that the FTC "may abrogate, add to, and modify the rules" proposed by the Authority).

210. *Fifth Circuit Court of Appeals Finds HISA Unconstitutional*, THOROUGHBRED DAILY NEWS, https://www.thoroughbreddailynews.com/fifth-circuit-court-of-appeals-finds-hisa-unconstitutional/ [https://perma.cc/7PGM-T7UP] (Nov. 18, 2022, 2:46 PM).

211. Downey, *supra* note 47.

212. *Oklahoma II*, 2023 U.S. App. LEXIS 5169, at * 6, *24 (comparing 15 U.S.C. § 3052(f)(2) ("[a]ny state racing commission that elects to remit fees...") with 15 U.S.C. § 3053(f)(3) ([i]f a State racing commission does not elect to remit fees... [c]overed persons... shall be required to remit such fees to the Authority...")) ("The States have two options. They may collect the fees themselves... § 3052(f)(2)(D). Or they may allow the Authority to collect the fees directly. § 3052(f)(3)(A)–(C).... Oklahoma separately claims that... § 3060(b) and § 3052(f), violate the anti-commandeering guarantee.... Oklahoma lacks standing to challenge the first provision and the second one does not count as a cognizable form of commandeering.").

* J.D. Candidate, Vanderbilt University Law School, 2024; B.A. Earlham College, 2021. The Author would like to thank Professor James Blumstein for contributing his time, expertise, and insight. She would also like to thank Anne McAfee, John Cook, and her many mentors and role models for their inspiration and continual support, as well as the *Vanderbilt Journal of Entertainment and Technology Law* staff for contributing their time and efforts.