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

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION et al., Plaintiffs, and THE STATE OF TEXAS et al., Intervenor-Plaintiffs, v. JERRY BLACK et al., Defendants.	No. 5:21-cv-00071-H **PLAINTIFFS' BRIEF IN SUPPORT OF AN EMERGENCY PRELIMINARY INJUNCTION AGAINST THE MEDICATION RULE**

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I. INTRODUCTION

Plaintiffs currently have a motion for preliminary injunction pending against the racetrack safety, enforcement, and assessment rules on the books at the time of that filing (March 8). ECF 116. That motion will be fully briefed by April 12. ECF 121. This motion is specific to the Anti-Doping and Medication Control (ADMC) Rule, which the Federal Trade Commission (FTC) approved today, with an effective date also today. Up until this point, the Plaintiffs have been unable to challenge the ADMC, because one cannot challenge an unadopted rule, any more than one can sue an unadopted bill pending in Congress. *Bristol-Myers Co. v. Fed. Trade Com.*, 424 F.2d 935, 940 (D.C. Cir. 1970). To this point, Plaintiffs were unsure if the rule would be approved (*see, e.g.*, F.T.C. Order (Dec. 12, 2022), denying ADMC proposal without prejudice) or if the rule would be approved with modifications.[1] Now the AMDC has been adopted—without modifications—and Plaintiffs seek an injunction before April 1 when racing happens next.

Though Plaintiffs maintain their arguments as to the harm and interests on the other rules, the ADMC is in a totally different position. "The purpose of a preliminary injunction is to preserve the status quo and thus prevent irreparable harm…" *Med-Cert Home Care, LLC v. Azar*, 365 F. Supp. 3d 742, 748 (N.D. Tex. 2019). Here, the status quo for racing will be fundamentally altered by these rules. And it will change the rules in substantial, negative ways for horses and horsemen. An immediate preliminary injunction is necessary to stop serious disruption of the industry.

[1] Plaintiffs do not read the statute as permitting the FTC to modify proposed rules on initial review. And now we know the FTC does not read the statutes as permitting it to modify proposed rules either. *See* F.T.C. Order (March 27, 2023), at n.2. But we did not know until now that the FTC would read the statute that way.

II. STANDARD OF REVIEW

"[T]he familiar four factors which govern grants of a preliminary injunction" are "(1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest." *Louisiana v. Biden*, 55 F.4th 1017, 1021 (5th Cir. 2022).

III. ARGUMENT

The Horsemen qualify for a preliminary injunction on all four factors.

A. The framework for analyzing these claims favors the Horsemen.

As a guiding principle, the Supreme Court "has set its face against giving public power to private bodies" because private actors are not subject to "basic safeguard[s]" that ensure power remains "accountable to the people." *Nat'l Horsemen's Benevolent & Protective Ass'n (NHBPA) v. Black*, 53 F.4th 869, 873 (5th Cir. 2022). The Supreme Court is 4 for 4 rejecting statutory schemes that separate power from electoral accountability. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021); *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020); *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010). The private nondelegation doctrine upholds this same principle. 19 Op. O.L.C. 208, 220 (1995).

The Court's skepticism should double where "private entities whose objectivity may be questioned on grounds of conflict of interest" are delegated authority. *See Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983). Here, four of nine members of the Authority's board are insiders by law, and of the five "independent" directors, one is a former board member of Churchill Downs, another is a former president of the New York Racing Association, and a

third is a longtime horse farm owner.[2] The CEO, general counsel, and staff directors are all also longtime industry insiders.

B. Plaintiffs are likely to succeed on their Article I & II claims that the FTC does not exercise "pervasive surveillance and authority" over the Authority.

A private entity delegated governmental powers must "'function subordinately' to and 'in aid of' an agency with 'pervasive surveillance and authority' over it." *NHBPA*, 53 F.4th at 890 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 399 (1940)). In exercising its delegated powers, such as authoring and administering the ADMC rule, the Authority does not function subordinately to the FTC, and the FTC does not exercise pervasive authority and surveillance over the Authority.

1. The Authority is not subordinate when exercising legislative powers.

a. The Authority is in the saddle when developing new rules.

The Authority retains all its "sweeping" powers to create regulatory programs in the first instance. *NHBPA*, 53 F.4th at 882. The amended HISA still "does not create antidoping [or] medication … programs. Nor does HISA empower the FTC to do so. Instead, HISA delegates the task of creating such programs to the Authority." *Id.* at 883. And the amended HISA still provides "considerations" and "factors" to "guide the Authority's development of the rules," which "only underscores the point that it is the Authority, not the agency, that is tasked with weighing policies that go into formulating rules." *Id.* at 882-83. "It is 'the Authority'—not the FTC—that 'shall establish' the anti-doping [and] medication … programs… And it is 'the Authority'—not the FTC—that 'shall issue' descriptions of rule violations, and 'shall

[2] Visit https://www.hisaus.org/about for biographies of the board and staff.

establish' sanctions for them." *Id*. at 882 (cleaned up). This "generous grant of authority to the Authority to craft entire industry 'programs' strongly suggests it is the Authority, not the FTC, that is in the saddle." *Id*. at 883. The Authority remained in the saddle when crafting the ADMC. The Authority wrote the rule, the FTC rushed it through with less than the normal time for staff review, and then timed approval of the rule for the effective date itself.

b. The FTC "shall approve" rules as w whole if they are "consistent" with the Act.

Nothing in the amendment changes the process by which the FTC reviews Authority rules at the initial stage. The FTC still "shall approve" whatever rules the Authority sends it as long as they are "consistent" with HISA and the Authority's rules. 15 U.S.C. § 3053(c)(2). The amendment did not excise or change this. If proposed "rules are 'consistent' with HISA's broad principles, the FTC *must* approve them." *NHBPA*, 53 F.4th at 872 (emphasis original). And the FTC continues to act in line with the statute post-amendment. *See, e.g.*, F.T.C. Order (Jan. 9, 2023), at 1-2; F.T.C., Press Release (Jan. 9, 2023) ("The Act requires that the FTC approve submitted rules if it finds that they are 'consistent with' the Act and the FTC's procedural rules governing the submission process."). The FTC's order approving the ADMC notes throughout that it only exercised consistency review. F.T.C. Order (March 27, 2023), at 1-5 & n.2. Indeed, the Authority acted on the assumption the FTC would rubber-stamp the ADMC without modification as it entered into state and racetrack implementation agreements before the ADMC's actual approval.[3]

[3] Voluntary Implementation Agreement, Horseracing Integrity and Safety Authority and the California Horse Racing Board, March 2, 2023, pg. 16; Voluntary Implementation Agreement, Horseracing Integrity and Safety Authority and the Kentucky Horse Racing Commission, March 2, 2023, pg. 17. *See* "HIWU Set to Administer HISA Anti-Doping and Medication Control Program in Cooperation with State Racing Commissions, Racetracks, and Laboratories," Horseracing Integrity & Welfare Unit, Press Release (March 25, 2023).

Yet the "baseline" standards found in HISA are so "open-ended" that "[s]aying a rule is or is not 'consistent' with [those] standard[s] says next to nothing." *NHBPA*, 53 F.4th at 885. This unchanged "high-altitude" review "hardly subjects the Authority's rules to 'independent' oversight." *Id*. This type of "oversight is too limited to ensure the Authority 'function[s] subordinately…'" *Id*. at 884.[4]

Not only must the FTC approve the rule on a consistency basis, but it must approve it as a whole, without any modification. F.T.C. Order (March 27, 2023), at n.2. This fails the constitutional standard: the supervising agency must be able to "approve, disapprove, or modify" rules *when they are proposed* by a private party. *Adkins*, 310 U.S. at 388 (revised coal statute passed constitutional muster because agency could now approve, disapprove, or modify proposed prices). *See NHBPA*, 53 F.4th at 881. The amended HISA still does not give the FTC the power to "disapprove" or "modify" "propos[ed] regulations"—it *must* approve them as a whole if they are consistent with HISA. The amended HISA gives the FTC the power to abrogate or modify rules only *after* promulgation. That "the FTC cannot unilaterally change the Authority's proposed rules" remains damning. *NHBPA*, 53 F.4th at 889.

Because the FTC must wait until after a rule is promulgated, and then go through a second rulemaking process to abrogate or modify that rule based on policy issues, the law that governs for at least some period of time (often a long period of time) will have been made by a private entity. Indeed, that will be exactly the circumstance under the ADMC—a rule written by the Authority and only reviewed for consistency will now govern the industry. Regardless of

[4] *Compare Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) (industry committee provided "advice" and "recommendations," while "the Department retains ultimate authority to issue the regulation[;] the Secretary does not rubber stamp the[m].").

whether a private entity makes the law for two months or two years, the constitutional problem remains: for some period of time, a private corporation made federal law with no real oversight.

In a separate challenge to HISA, the Sixth Circuit recently answered this objection by saying the FTC should simply adopt a procedural rule delaying the effective date of all rules by, say, 180 days, so the FTC has time to adopt a rule on a consistency basis, then amend it on a policy basis before the original consistency-reviewed rule goes into effect. *Oklahoma v. United States*, No. 22-5487, 2023 U.S. App. LEXIS 5169, at *21 (6th Cir. Mar. 3, 2023).

First, this is not the world we live in under the statute's text—the ADMC governs today after a rubber-stamp consistency review by the FTC. Second, this is the wrong way to approach a facial challenge. "The proper framework to apply in a facial challenge is not to require the challenger to disprove every possible hypothetical situation in which the restriction might be validly applied, but rather to apply the appropriate constitutional test to determine whether the challenged restriction is invalid on its face." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1122 (10th Cir. 2012). *Accord Bruni v. City of Pittsburgh*, 824 F.3d 353, 363 (3d Cir. 2016). Applying the appropriate test, the statute is unconstitutional on its face because as written, it allows a private corporation to make public law for some time based only on consistency review. The Court ought not indulge in fanciful gymnastics to fix problems with the law; rather, it should recognize that the law as written has serious problems.

c. The FTC lacks the power to initiate rulemaking on a new topic.

Separately, the FTC *still* cannot initiate rulemaking on a new topic; it can only "abrogate, add to, and modify" existing Authority rules. 15 U.S.C. § 3053(e). Again, the FTC's ADMC order says this: "This new power [under the amended act] extends only to changing existing Authority rules…" F.T.C. Order (March 27, 2023), at n.2. If the Authority flatly refuses to

send the FTC a rule on a topic, the FTC remains powerless in the face of the Authority's decision. The Defendants may argue that the new power to "add to" the existing rules includes the power to issue a new rule on a new topic,[5] but nearly identical language in the SEC statute, which provided the model for this language, points to the opposite conclusion. *See* F.T.C. Order (March 27, 2023), at n.6. The Exchange Act subsection which permits the Securities & Exchange Commission ("SEC") to "abrogate, add to, and delete from" rules is entitled "Amendment by Commission of rules of self-regulatory organizations." 15 U.S.C. § 78s(c). The statute thereafter uses the term "amend" to collectively describe the power to abrogate, add to, and delete from. *Id.* Obviously the power to "amend" a rule is different from the power to initiate a new rule on a new topic. The Financial Industry Regulatory Authority's ("FINRA") own website says that "[n]ew rule proposals are generated from a number of sources, including . . . [r]ecommendations from the [SEC]."[6] In other words, the SEC sends its recommendations for new rules to FINRA, which then decides whether to formally propose the new rule to the SEC for approval.

Having the FTC merely recommend rules to the Authority fell flat last time around. *NHBPA*, 53 F.4th at 883. Congress's failure to amend section 3053(c)(3)(A), the existing provision limiting the FTC to "make recommendations" for modifications to proposed rules, underscores Congress's intentional use of the same "add to" language as the SEC statute. The Authority and only the Authority is allowed to drive the rulemaking agenda.

[5] The Sixth Circuit presumes the "the FTC has power to initiate new rules, not just to modify rules it does not like," slip op. at 13, but it never explains the legal basis for this conclusion.
[6] *FINRA Rulemaking Process*, https://www.finra.org/rules-guidance/rulemaking-process.

d. The FTC lacks the power to issue interim final rules.

The FTC has less power today in one respect because it can no longer promulgate an interim final rule. 15 U.S.C. § 3053(e). That power wasn't worth much, but it was worth something. Hopefully no emergencies happen in horseracing, because the FTC will have to wait months, potentially even years, for any rule to take effect.

e. The Authority uses its independence to rewrite the Act and rules.

The Authority consistently and independently adopts policies which in practice amend the Act and the rules, behavior which again shows who is subordinate to whom. The Act required a medication control program and racetrack safety program by July 1, 2022. 15 U.S.C. §§ 3055(a)(1), 3056(a)(1). Because of its failure to timely secure an anti-doping agency partner, the Authority unilaterally delayed the proposed ADMC rule's effective date to January 1, 2023.[7] The FTC approved the racetrack safety rule with an effective date of July 1, *HISA Racetrack Safety*, 87 Fed. Reg. 435, 446 (Jan. 5, 2022), but the Authority unilaterally decided to push the effective date for two provisions out by one month, and another provision by six months.[8] The Authority also unilaterally amended the racetrack safety rule by adopting policies not to enforce provisions on certain toe-grabs,[9] certain therapy devices,[10] and certain riding crops.[11] And on March 7, the Authority announced a new "can't race" enforcement policy for

[7] *See* Matt Hegarty, *HISA, USADA fail to reach agreement*, DRF.com (Dec. 24, 2021), https://www.drf.com/news/hisa-usada-fail-reach-agreement.
[8] *Announcement Concerning Enforcement of HISA Racetrack Safety Rules and Registration Requirements*, (June 28, 2022), hisaus.org.
[9] *Announcement Concerning Enforcement of HISA Rule 2276 (HORSESHOES) as It Pertains to Full Outer Rim Shoes and Toe Grabs*, (July 29, 2022), hisaus.org.
[10] *Announcement Concerning the Prohibition on the Use of Certain Electrical Devices in HISA Rule 2271(f) and on Shockwave Therapy Disclosure and Reporting Requirements in HISA Rule 2272(a)* (Dec. 21, 2022), hisaus.org.
[11] *Guidance* (Aug. 15, 2022), hisaus.org.

its racetrack rule by press release, the FTC cannot review or veto policies made via press releases.[12] And later in March, various state commissions made public their agreements with the Authority to implement the ADMC. While the ADMC's text requires only two specific persons present in the test barn for sample collection (a veterinarian and a security officer), the state agreements require at minimum a veterinarian, veterinary tech, supervisor, five assistants, and a security officer.[13] In other words, the number of staff required jumped from two or more to at least nine, all additional costs for each race, without any oversight from the FTC. Once again, the Authority, not the FTC, is really deciding the rules that actually govern.

This is a facial and not an as-applied problem because the FTC lacks any tool to control the Authority when it unilaterally rewrites rules. The SEC can discipline FINRA—it can remove its board members for cause, 15 U.S.C. § 78s(h)(4); remove FINRA's power to enforce a particular rule, 15 U.S.C. § 78s(g)(2); or step in and enforce the rule as written on its own. 15 U.S.C. § 78o(b)(4). The FTC lacks any of these powers—it cannot force the Authority to enforce, apply, or administer the Act and rules as written because the Authority is in ultimate charge.

f. The Authority is in charge when making decisions on fees and spending.

The power to tax and spend is a legislative power, *State of W. Va. v. Dep't of the Treasury*, 2023 U.S. App. LEXIS 1493, *46 (11th Cir. 2023), and though it may be delegated, its

[12] *HISA to Begin Using Can't-Race Flags to Enforce Racetrack Safety and Registration Rules Beginning March 27* (March 7, 2023), hisaus.org.
[13] Voluntary Implementation Agreement, Horseracing Integrity and Safety Authority and the California Horse Racing Board, March 2, 2023, pg. 16; Voluntary Implementation Agreement, Horseracing Integrity and Safety Authority and the Kentucky Horse Racing Commission, March 2, 2023, pg. 17.

delegation must be subject to sufficient oversight. Here the Authority exercise the power to tax and spend without any oversight from the FTC.[14]

Consider as a baseline the U.S. Department of Agriculture's ("USDA") oversight of the Cattlemen's Board and its operating committee, which run the USDA's beef marketing program. Congress itself set the annual assessment amount in statute (7 U.S.C. § 2904(8)(C)). The USDA reviews an annual audit of the Board (7 C.F.R. § 1260.150(l)); approves all budgets (*id*. at (f) & (g)); approves all investments (7 C.F.R. § 1260.149(f)); approves all projects (7 C.F.R. § 1260.168(e)); and approves all contracts (*id*. at (f)). The USDA regularly uses these powers to decline proposals from the Board. *Charter v. USDA*, 230 F. Supp. 2d 1121, 1138 (D. Mont. 2002) (giving examples), *vacated on other grounds*, 412 F.3d 1017 (9th Cir. 2005). In short, "Congress has set the amount of the assessments and the Secretary ultimately decides how the funds will be spent." *Goetz v. Glickman*, 920 F. Supp. 1173, 1181 (D. Kan. 1996). Thus, "the amount of government oversight of the program is considerable, and … render[s] the … Board subject to the Secretary's pervasive surveillance and authority." *U.S. v. Frame*, 885 F.2d 1119, 1128-29 (3d Cir. 1989).

By contrast, the Authority borrows funds, sets fees, crafts budgets, and cuts checks with no FTC oversight. 15 U.S.C. § 3052(f). When the Authority increases fees, it must report that decision to the FTC, and the FTC must publish the notice in the Federal Register for public comment, 15 U.S.C. § 3052(f)(1)(C)(iv), but the FTC has zero authority to do anything else. The Authority, in other words, is given the governmental power to impose and increase mandatory fees and to spend those funds to implement the ADMC without any government

[14] The Sixth Circuit did not address taxing and spending as a delegated power, only rulemaking.

oversight (ADMC related costs constitute the substantial majority of the Authority's 2023 budget, as shown later).

On March 22, a few weeks after the Plaintiffs first raised this argument in their second amended complaint, the FTC announced a rule giving it oversight of the Authority's fees and expenses.[15] Because the FTC characterized it as an internal procedural rule, it did not engage in notice-and-comment rulemaking. Regardless, this is a facial challenge to the statute, which contains no provision for FTC oversight of the Authority's budget. The government may not defeat a facial challenge to a statute by declaring in a rule after being sued: "We shall only do constitutional things in a constitutional manner." This Court should not credit a rule that was adopted under pressure of litigation, announced without notice-and-comment, and that can be instantly repealed after the litigation ends without notice-and-comment. As shown in the discussion above of *Doe*, it is the statute on trial, not hypothetical versions of the statute as modified by the FTC's rules to paper over the statute's obvious constitutional flaws.

2. The Authority is not subordinate when exercising executive powers.

One of the core responsibilities of "the executive power" is that the president "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, either personally or through his appointees. Prosecuting those who violate the law and carrying out programs are major manifestations of that power. *See Ammex, Inc. v. Wenk*, 936 F.3d 355, 364 (6th Cir. 2019) (Bush, J., concurring). Here, investigation, enforcement, administration, appointment, and removal rest in the Authority.

[15] *Procedures for Oversight of the Horseracing Integrity and Safety Authority's Annual Budget*, https://www.ftc.gov/system/files/ftc_gov/pdf/P222100-HISA-Budget-Oversight-Procedural-Rule.pdf.

a. The FTC does not have meaningful oversight of Authority investigations.

HISA grants the Authority the power to issue subpoenas, 15 U.S.C. § 3054(c)(1)(A)(ii); R. 8400(d), to inspect documents or facilities, 15 U.S.C. § 3054(c)(1)(A)(i); R. 8400(a)(1), and even to seize materials. R. 8400(a)(2). Any FTC review comes only after the Authority has concluded its investigation, issued a sanction, and an appeal is opened. If the Authority perennially delays closing a case or closes a case without issuing a sanction, the FTC has no vehicle for review. And there is certainly no requirement that the FTC pre-approve a subpoena, inspection, or seizure, even though a magistrate would need to approve a warrant before an identical act by the FTC.[16] *See Marshall v. Barlow's*, 436 U.S. 307, 325 & n.23 (1978) (OSHA inspections by Department of Labor must satisfy Fourth Amendment).

That danger is exacerbated by the Authority's announced strategy for investigation: "All test selection will be overseen by HIWU using an intelligence-based strategy. While HIWU has the ultimate discretion to select Covered Horses for testing, intelligence from "boots-on-the-ground" industry participants, including state stewards and veterinarians, and continued cooperation with state racing commissions and laboratory/scientific partners will also inform the test selection process."[17] *See* ADMC R.5620. In other words, rather than testing everyone or testing randomly, the Authority's anti-doping unit (HIWU) will spy on horsemen, collect gossip about them, and use that "intelligence" to determine who gets called down to the test barn for sample collection. This is the type of executive power that HISA invests in the Authority. *See Quinn v. United States*, 349 U.S. 155, 161 (1955) (general power to investigate

[16] The law on its face gives horsemen no such protection. *Contra Oklahoma*, slip op. at 12.
[17] "HISA and HIWU Highlight "Day One" Changes on Eve of Expected Implementation of Anti-Doping and Medication Control Program," Press Release (March 26, 2023), www.hiwu.org.

and prosecute belongs to the executive). It is also why investigatory power is normally vested in neutral governmental officials; entrusting investigatory power to industry insiders who are not neutral is all the worse when the procedures do not rely on random or uniform testing.

b. The FTC cannot review Authority exercise of prosecutorial discretion.

Under HISA, "covered persons" register directly with the Authority rather than with the FTC. 15 U.S.C. § 3054(d). The SEC, by contrast, directly licenses all brokers and dealers. 15 U.S.C. § 78o(b)(1). Without the involvement of FINRA, the SEC may directly punish any licensee by "censure, plac[ing] limitations on the activities, functions, or operations of, suspend[ing] for a period not exceeding twelve months, or revok[ing] the registration." 15 U.S.C. § 78o(b)(4). *See* 15 U.S.C. § 78s(h)(2). The SEC may suspend any licensee during an investigation, 15 U.S.C. § 78o(b)(5), and may even bar any person from associating with FINRA or a FINRA member. 15 U.S.C. § 78o-3(g)(2); 15 U.S.C. § 78s(h)(3). This system of direct licensure gives the SEC the independent power to backstop FINRA's enforcement discretion. Emily Hammond, *Double Deference in Administrative Law,* 116 Colum. L. Rev. 1705, 1736-37 (2016). If FINRA decides not to enforce a rule provision, or not to prosecute an individual case, or only to give a slap on the wrist, the SEC can step in to enforce the rule. The FTC has no similar power to back-stop the Authority's exercise of its enforcement discretion. Nor can this be fixed by rule—the statute confers on the FTC no independent power to act, investigate, or enforce.

This lack of agency enforcement power matters. In another USDA case, the agency announced a plan to withhold enforcement of federal rules when an industry organization meted out punishment to a violator. In holding this delegation lawful, the District of D.C. noted that if the USDA determined an industry organization "is not taking steps to detect and penalize

violations," it may act to enforce the rules. *Am. Horse Prot. Ass'n v. Veneman*, No. 01-00028 (HHK), 2002 U.S. Dist. LEXIS 29097, at *12 (D.D.C. July 9, 2002). If the agency determines a penalty is too lenient, the agency may prosecute for sufficient penalties. *Id.* at *15. If the agency determines the industry organization is dragging its feet on a case, the agency may prosecute it directly. *Id*. at *15. And if the agency finds the industry organization is not prosecuting a case at all, it may step in and prosecute. *Id*.

In another case, the D.C. District Court twice noted that the nondelegation doctrine was violated because the agency "retains virtually no final authority over" "the inactions" of the delegated organization. *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 18 & 20 (D.D.C. 1999). In both cases, in other words, it mattered whether the agency could step in and act when the private entity would not. *See generally* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009). The FTC lacks that power—it must stand blithely by as the Authority ignores the rules with no option to enforce them as approved and no leverage on the Authority to change its policy (as outlined above in A(1)(e)).

c. The FTC does not have oversight of the Authority's civil equitable powers.

In addition to seeking penalties through an administrative law process, where the FTC has some oversight, 15 U.S.C. § 3058, the Authority may also seek an injunction against any covered person "that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this Act or any rule established under this Act." 15 U.S.C. § 3054(j). This extraordinary power of enforcement is granted with no FTC oversight or approval of Authority decisions to file such cases.

d. The FTC does not have oversight of the Authority's contracting.

HISA authorizes the Authority to partner with the states and an anti-doping agency, but these sub-delegates are not subject to any direct FTC oversight. The Authority must enter into a contract with an anti-doping agency, which is a key partner in administering the ADMC program. 15 U.S.C. § 3054(e)(1). The statute also empowers the Authority to enter into agreements with state racing commissions to provide services for the ADMC. *Id*. at (2). The Authority has used this power to enter into multiple agreements with states and racetracks, and these agreements incorporate new substantive expectations not spelled out in the rules themselves.[18] Yet the FTC has zero oversight or revisal authority regarding any agreement's terms, parties, payments, or renewal.

e. The FTC does not have oversight of the Authority's leadership.

Another core executive prerogative is the power to appoint and remove the officers responsible for making and carrying out agency policy. *Arthrex, Inc.*, 141 S. Ct. at 1976. Again, a comparison to other similar delegations to private actors is useful. The USDA appoints the members of the Cattleman's Board, 7 C.F.R. § 1260.141(b), and may remove board members. 7 C.F.R. § 126.211(b)(1). FINRA's independent and industry directors are elected by FINRA's membership, and the SEC may remove any FINRA board member for cause, 15 U.S.C. § 78s(h)(4). Indeed, numerous congressionally recognized corporations are governed by board appointees of the president. *Lebron v. Nat'l Railroad Passenger Corp*., 513 U.S. 374, 387-91

[18] Voluntary Implementation Agreement, Horseracing Integrity and Safety Authority and the California Horse Racing Board, March 2, 2023, pg. 16; Voluntary Implementation Agreement, Horseracing Integrity and Safety Authority and the Kentucky Horse Racing Commission, March 2, 2023, pg. 17. *See* "HIWU Set to Administer HISA Anti-Doping and Medication Control Program in Cooperation with State Racing Commissions, Racetracks, and Laboratories," Horseracing Integrity & Welfare Unit, Press Release (March 25, 2023).

(1994) (giving examples). The Authority's Board is a self-selecting, self-perpetuating oligarchy. 15 U.S.C. § 3052(d). And because this is set in HISA, it cannot be fixed by an FTC rule. *Compare Oklahoma*, slip op. at 11-12.[19] Neither the president nor the FTC exercise any appointment or removal power over the Authority's Board or CEO. This is a facial violation of the constitutional principle that some measure of agency appointment and/or removal power must exist over the delegated entity, whether as a whole (derecognition) or over its individual leaders, to ensure executive accountability under Article II. *See Arthrex, Inc.*, 141 S. Ct. at 1976. *See also Ammex, Inc.*, 936 F.3d at 365 (Bush, J., concurring).

f. The FTC lacks the ultimate power: to limit or de-recognize the Authority.

Congress has empowered the SEC in two different places to revoke FINRA's recognition. 15 U.S.C. § 78s(a)(3) & (h)(1). And the SEC may recognize alternative entities besides FINRA to perform the same functions. 15 U.S.C. § 78o-3(b)(1). Short of these steps, the SEC may relieve FINRA of its responsibilities as to a particular rule, 15 U.S.C. § 78s(g)(2), and may "impose limitations upon [FINRA's] activities, functions, and operations." 15 U.S.C. § 78s(h)(1). The FTC has none of these powers over HISA: "The FTC may never divest [the Authority] of its powers." *NHBPA*, 53 F.4th at 872, 886-87. *See* 15 U.S.C. § 3052(a). This is meaningful because "[t]he power to strip the private organization's power altogether" sets "a clear hierarchy" as to who is subordinate to whom. *NHBPA*, 53 F.4th at 89.

3. From an original/historical perspective, HISA is facially flawed.

At the end of the day, advocates for the Authority want a binding, nationwide "new federal regulatory regime," Authority Mot. To Vacate, No. 22-10387 (Doc. 198-1), 3, without a new

[19] *Oklahoma* did not consider appointment and removal as executive powers, only enforcement.

federal regulatory agency. They want the clique of people who share their views to maintain perpetual control of the regulation of their industry without governmental meddling or the transparency and accountability that come along with a federal agency. They want all the power with none of the "operational headaches," like having to respond to Freedom of Information requests from the NHBPA. *Id*. at 15. Ultimately, their entire project is flawed. It is incompatible with the "cardinal constitutional principle . . . that federal power can be wielded only by the federal government," *NHBPA*, 53 F.4th at 872, and that transparency, accountability, and fairness are at the heart of our constitutional structure. *Id*.

Recent scholarship by Professors Jennifer Mascott of George Mason University and Aditya Bamzai of the University of Virginia confirms that these principles follow from an originalist understanding of the Constitution. Their research demonstrates that in the founding era, private actors were contracted "to perform outside empirical services, such as weighing imported goods, evaluating the technical similarity of patent claims, or completing expert medical exams." These private parties could "conduct ministerial tasks" but not "engage in the exercise of delegated authority to bind third parties" or exercise "sovereign authority." Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 Harv. J.L. & Pub. Pol'y 837, 925 (2022). *See* Aditya Bamzai, *Tenure of Office and the Treasury*, 87 Geo. Wash. L. Rev. 1299, 1346 (2019). Their conclusion is reinforced by Justice Scalia's comprehensive review of other private corporations recognized by Congress or executive agencies in the past—all of them exercised proprietary roles, primarily making or guaranteeing loans or building or running infrastructure. *Lebron*, 513 U.S. at 387-91. None of them exercised "sovereign authority" like regulation, prosecution, and administrative adjudication (in this sense, sovereign authority of Article I or Article II powers). Yet sovereign authority is exactly what

the Authority exercises—authority to write and rewrite rules, to investigate and enforce rules, and to administratively adjudicate violations of rules—with minimal FTC oversight. That is directly contrary to the historical understanding of private delegation.[20]

Ultimately the corporation is named the Horseracing Integrity and Safety *Authority*, and not *Advisors* or *Administrators*, because its purpose is not to advise the FTC or perform ministerial tasks. Its purpose is to exercise "jurisdiction" over an entire industry, 15 U.S.C. § 3054, to exercise sovereign federal authority. Giving such governmental authority to a private corporation was and remains "delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

B. The Authority is causing irreparable harm to the Horsemen.

1. The Medication Control Rule causes irreparable harm.

First, as noted above, "[t]he purpose of a preliminary injunction is to preserve the status

[20] The Sixth Circuit notes, "at a minimum, a private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge. Whether subordination always suffices to withstand a challenge raises complex separation of powers questions. Simplifying matters for today, if not for a future day, the parties accept this framing of the appeal." *Oklahoma*, 2023 U.S. App. LEXIS 5169 at *13. Plaintiffs have demonstrated above the Authority is clearly *not* subordinate to the FTC. But they also argue in this section that it's not only the level of oversight, but the nature of authority exercised, that matters. Though Congress or the Executive may delegate ministerial or proprietary functions to private actors, they may not delegate sovereign functions.

The Sixth Circuit says elsewhere, "the parties simply have not engaged with this feature of the Act, including briefing with respect to founding-era or contemporary analogs showing the role private entities may, and may not, play in law enforcement. . . . [Appellants have not litigated this case] as a categorical Article II inquiry or as a question of historical meaning" *Id*. at 14. In this section, Plaintiffs do assert a categorical Article II proposition—the executive must have some power of appointment and/or removal over the delegated entity, either through the power of derecognition (such as canceling a government contract or amending a rule to remove a reference to a delegated entity) or through the power to appoint and remove entity leadership. Plaintiffs also assert the founding-era history contained in Professors Mascott and Bamzai's articles support their view of the private nondelegation clause as to Articles I & II.

quo and prevent irreparable injury until the court renders a decision on the merits." *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 U.S. App. LEXIS 4347, at *8 (5th Cir. Feb. 17, 2022). Here, the status quo is that state law regulates up until the rule's entry into force March 27. F.T.C. Order, at 2 (Dec. 12, 2022).

Second, the ADMC Rule places at risk the health of the equine athlete. As the North American Association of Racetrack Veterinarians ("NAARV") told this Court previously, the Authority's rules "will irreparably harm the racing industry ... because NAARV members will be unable to honor their oath to care for the equine athlete..." ECF 41 at 13 (May 14, 2021). The rule poses several threats to horse welfare. Dr. Doug Daniels, an equine veterinarian and president of the NHBPA, and Dr. Clara Fenger, an equine veterinarian and officer of NAARV, together helped draft the attached analysis, which reflects their best medical judgment. They conclude that under the rule "veterinarians will be handicapped as to what can be used for the health and welfare of the horse, because of extremely long terminal half-lives for therapeutics such as aminocaproic acid or trazodone."[21] Indeed, the rule's use of "'limit of detection' comes with a high price, rendering many, if not most therapeutic substances out of reach of the veterinary practitioner," because trace elements can remain months or years later.[22] Many legitimate veterinary pharmaceuticals besides Lasix are impacted. For instance, Isoxsuprine and Carbazochrome Salicylate are labeled low risk under the Association of Racing Commissioners International (ARCI) guidelines, but the ADMC imposes 14-month ineligibility period after administration.[23] "Many pre-anesthetic, anesthesia induction agents

[21] Daniels & Fenger Report, pg. 1.
[22] *Id*.
[23] *Id*. at 4.

and medications such as reversal agents are in the prohibited S0 category. Further, all long-acting sedatives in use to keep horses safe during the peri-surgical period are effectively banned. A simple surgery to remove a chip fracture, usually accompanied by a 6-to-8-week respite from racing, could inadvertently turn into a 14-month ineligibility period."[24]

When two experienced veterinarians, who each lead a national horseracing organization, conclude that equine health and safety are at risk, a preliminary injunction is appropriate. *See United States v. Lowe*, No. 20-cv-0423-JFH, 2021 U.S. Dist. LEXIS 8328, at *42 (E.D. Okla. Jan. 15, 2021) (safeguarding health of zoo animals from irreparable harm). "[R]acehorses are individual, sentient animals, not fungible, inanimate property. [Plaintiffs] would be meaningfully worse off—and thus irreparably harmed—if the horse suffered injury or death." *NPF Racing Stables, LLC v. Aguirre*, No. 18 C 6216, 2019 U.S. Dist. LEXIS 90993, at *21-22 (N.D. Ill. May 31, 2019) (cleaned up) (citing *Kinderhill Select Bloodstock, Inc. v. U.S.*, 835 F. Supp. 699, 700 (N.D.N.Y. 1993) ("horses are unique, [so] money damages would not be an adequate remedy")). The ADMC's effective ban on multiple well-accepted therapies for horses will cause more injuries and potentially worse harms.

Third, in the context of a sporting event, being forced to compete under illegal rules taints the event irreparably. Changing "an essential rule of competition for anyone would fundamentally alter the nature of [racing] tournaments." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001). *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991) (rules about what clubs golfers can use is an irreparable harm); *Jackson v. Nat'l Football League*, 802 F. Supp. 226, 231 (D. Minn. 1992) (rules affecting football player eligibility an irreparable

[24] *Id*. at 5.

harm); *Powell v. Nat'l Football League*, 690 F. Supp. 812, 818 (D. Minn. 1988) (similar); *Linesman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1319 (D. Conn. 1979) (similar). In this instance, horsemen are particularly concerned about race disqualifications based on trace amounts of banned substances, which may have come from a pre-rule medical administration or from environmental exposure or normal dietary ingestion.[25] They are also concerned about race disqualifications from substances that were licit when administered but are banned under the rule. The ADMC's last-minute approval (literally the day of its entry into force) did not have the 30-day pre-enforcement window normally required under the Administrative Procedure Act (5 U.S.C. § 553(d). This window is intended "to give affected parties time to adjust their behavior before the final rule takes effect." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 675 n.15 (9th Cir. 2021). Here the horsemen never had that opportunity, so substances that were legal one day were illegal the next, even as those substances may stay in a horse's system for days, weeks, or even months.[26] Again, if the Authority's answer is that horsemen should have molded their behavior to the proposed rule assuming its approval, it shows you how much the Authority expects the FTC to use its supposed power to modify its proposed rules.

Fourth, there are significant compliance costs for horsemen. Horsemen will have to pay for additional veterinarian visits, additional pre-race lab testing, and other expenses to ensure their horses are clean. *See BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021)

[25] Daniels & Fenger Report, pg. 1 ("A full 12% of substances on the list are at risk of environmental transfer either from their common, legal use as an oral medication, or their stability in the environment."); pg. 12 (dietary exposure); pg. 18-19 (environmental exposure).

[26] Daniels & Fenger Report, pg. 26-27.

("[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.").

2. The Authority's financial assessments are causing irreparable harm.

The 2023 financial assessments are overwhelmingly built on the cost of implementing the ADMC. Of the Authority's revised 2023 budget, over $50 million of the $66 million total budget are for costs related to the ADMC program.[27] That $50 million dollar cost falls on the horsemen, as state commissions and racetracks pass along the costs to race participants.[28] Admittedly, financial loss is generally not a basis for irreparable injury. However, there are exceptions to this rule. One is "when economic rights are especially difficult to calculate." *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 (5th Cir. 1991). In this instance, because purses are drawn down to pay the assessment after a negotiation between the racetrack and the horsemen's association, it is difficult to calculate what money would be owed to whom. Each horseman could have a different recovery based on his horse's place in each race, making recoveries impossible to calculate in a nationwide action such as this one.

Another exception pertains when the defendant is likely to become insolvent, because there will be no money left to collect at the end of the case. *Fort James Corp. v. Ratliff*, No. 3:99-CV-0148-D, 1999 U.S. Dist. LEXIS 1763, at *6 (N.D. Tex. Feb. 12, 1999). In this instance, the Authority is a startup organization initially financed with loans. 15 U.S.C. § 3052(f)(1)(A). If HISA is again struck down, the Authority will have no source of income and will almost

[27] https://hisaus.org/about-us#financial-materials ("Summary Budget – Revised (2023)").
[28] "The amount charged each track is based on a per-start calculation that factors in numbers of starts and the total purses paid out." Daniel Ross, *Lisa Lazarus Talks HISA Budget*, Thoroughbred Daily News (Oct. 27, 2022), https://www.thoroughbreddailynews.com/lisa-lazarus-talks-hisa-budget/.

assuredly be insolvent. The Authority continues paying staff, office rent, legal fees, and other expenses—depleting, if not exhausting, the money taken from the purses in 2022.

A third exception is when a business may be forced to close because of costs while a case is pending. *Xiongen Jiao v. Ningbo Xu*, 28 F.4th 591, 598 (5th Cir. 2022). Many horsemen are "of modest means," *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021), working the blue-collar end of the industry, and the financial reality of smaller purses will drive some out of the business entirely, either directly or because of competitive pressures.[29]

C. Relief is in the public interest and favored by the balance of harms.

When the government is the party opposing equitable relief, the third and fourth factors merge. *Schelske v. Austin*, No. 6:22-CV-049-H, 2022 U.S. Dist. LEXIS 229432, at *88-89 (N.D. Tex. Dec. 21, 2022). But to a large degree they merge into the first factor, because "[t]he government usually cannot rely on the harm from stopping its likely unconstitutional conduct." *Id.* at 89 In other words, "there is generally no public interest in the perpetuation of unlawful agency action." *State v. Biden*, 10 F.4th 538, 560 (5th Cir. 2021). Moreover, "any abstract 'harm a stay might cause the [Authority] pales in comparison and importance to the harms the absence of a stay threatens to cause countless individuals and companies." *BST Holdings*, 17 F.4th at 618. Here, the harm to the Plaintiffs is real, as shown above. But the harm to the Defendants is minimal; "[i]n the meanwhile … State law will continue to regulate the matters that the proposed rule would have covered." F.T.C. Order, Dec. 12, 2022, at 2. States have

[29] *See HISA COSTS WILL FALL ON TRACKS & HORSEMEN*, Ass'n of Racing Commissioners Int'l (Oct. 20, 2022), https://www.arci.com/2022/10/hisa-costs-will-fall-on-tracks-horsemen/.

been regulating horseracing for over a century, *NHBPA*, 53 F.4th at 873; they can do so for a few more months until summary judgment.

D. A nationwide injunction is appropriate.

Plaintiffs are entitled to a nationwide injunction against the ADMC. Plaintiff NHBPA has 32 affiliate member organizations representing over 30,000 owners and trainers of racehorses nationwide. Federal district courts appropriately issue nationwide injunctions when the plaintiffs are nationwide associations. *See, e.g., Nat'l Fed. of Indep. Businesses v. Perez*, No. 5:16-cv-00066-C, 2016 U.S. Dist. LEXIS 89694, at *129 (N.D. Tex. June 27, 2016); *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016). "[T]he scope of the injunction is primarily based not on any abstract principle favoring nationwide injunctions, but on the actual geographic and professional breadth of the members of the plaintiff organizations." *Am. Coll. of Obstetricians & Gynecologists v. FDA*, 506 F. Supp. 3d 328, 349 (D. Md. 2020) (citing *Richmond Tenants Org. v. Kem*p, 956 F.2d 1300, 1309 (4th Cir. 1992) (affirming nationwide injunction where plaintiff was a national association)).

Here, it is impractical to think that race-day stewards will check for a horseman's NHBPA membership card before deciding whether the ADMC rules apply to his horse in that race. Plus, it would be unfair to non-NHBPA members to race under the ADMC while NHBPA members' horses can run the same race under the preexisting state rules, which are substantially different from the ADMC. "[U]niform rules . . . promote[] fair competition on a level playing field." *NHBPA*, 596 F. Supp. 3d at 719. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 703 (2001) (Scalia, J., dissenting) ("the very nature of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence."). The goal of uniform rules at races requires a nationwide injunction that covers the entire industry, not just the

NHBPA's members. Indeed, the FTC has expressed concern about the "confusion [that] could result for industry participants and regulators" if the ADMC were in effect in some places but enjoined in others. F.T.C. Order (Dec. 22, 2022).

IV. CONCLUSION

The prudent course is to promptly grant a nationwide preliminary injunction to prevent long-term damage to the plaintiffs and the industry by rushed implementation of the rule.

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