

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA**

THE STATE OF LOUISIANA, by and through
its attorney general, JEFF LANDRY, et al.,
PLAINTIFFS,

v.

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

CASE NO. 6:22-cv-01934-TAD-PJH

[PROPOSED] COMPLAINT IN INTERVENTION

Fourteen Horsemen’s Benevolent and Protective Associations from across the country, four racetracks, one racing association, and one veterinarian association (collectively “Associational Intervenors”)¹, as well as the Oklahoma Horse Racing Commission and the State of Oklahoma (collectively, “State Intervenors;” together with Association Intervenors, “Intervenors”)² regulated under the Horseracing Integrity and Safety Act of 2020 (the “Act”) bring this civil action against Defendants³ for declaratory and injunctive relief and allege as follows:

¹ The “Associational Intervenors” are fourteen Horsemen’s Benevolent and Protective Associations: (1) Arizona Horsemen’s Benevolent and Protective Association, (2) Arkansas Horsemen’s Benevolent and Protective Association, (3) Illinois Horsemen’s Benevolent and Protective Association, (4) Iowa Horsemen’s Benevolent and Protective Association, (5) Indiana Horsemen’s Benevolent and Protective Association, (6) Kentucky Horsemen’s Benevolent and Protective Association, (7) Minnesota Horsemen’s Benevolent and Protective Association, (8) Nebraska Horsemen’s Benevolent and Protective Association, (9) Ohio Horsemen’s Benevolent and Protective Association, (10) Oklahoma Horsemen’s Benevolent and Protective Association, (11) Pennsylvania Horsemen’s Benevolent and Protective Association, (12) Washington Horsemen’s Benevolent and Protective Association, (13) Charles Town Horsemen’s Benevolent and Protective Association, and (14) Tampa Bay Downs Horsemen’s Benevolent and Protective Association; four racetracks: (1) Fonner Park (Nebraska), (2) Horseman’s Park (Nebraska), (3) Legacy Downs Racetrack (Nebraska), and (4) Turf Paradise Racetrack (Arizona); one racing association: Colorado Horse Racing Association; and one medical association: North American Association of Racetrack Veterinarians.

² The “State Intervenors” are the Oklahoma Horse Racing Commission and the State of Oklahoma, by and through its attorney general, John M. O’Connor.

³ As the Court has observed, this case includes numerous Defendants. Doc. 38 at 1 n.2. The two “Agency Defendants” are Horseracing Integrity & Safety Authority, Inc. (“HISA”) and the

INTRODUCTION

1. For decades, participants in the horseracing industry have been subject to regulation solely by States exercising their traditional police powers. Congress tried to change that about 18 months ago when, as part of a consolidated appropriations bill, it passed the Horseracing Integrity and Safety Act of 2020. 15 U.S.C. §§3051-3060.

2. The Act establishes a private, nonprofit corporation known as the Horseracing Integrity and Safety Authority and purports to delegate to HISA vast federal regulatory power over the horseracing industry. *Id.* §3052(a).

3. Congress's efforts to federalize horseracing regulations through a private entity like HISA suffer from a host of constitutional problems, and legal challenges to HISA's structure based on those constitutional problems are pending in other jurisdictions. *See Oklahoma v. United States*, No. 22-5487 (6th Cir., filed June 9, 2022); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, No. 22-10387 (5th Cir., filed Apr. 20, 2022).

4. The claims in this lawsuit do not seek to enjoin an act of Congress, but rather focus squarely on the HISA Rules. This suit concerns legal flaws with HISA regulations purporting to implement HISA's authority under the Act. Implicitly acknowledging the constitutional problems attendant to vesting federal rulemaking power in a private entity, Congress provided that HISA regulations cannot take effect until they are submitted to and approved by the FTC—an independent agency with no specialized knowledge about or experience with horseracing. 15 U.S.C. §3053(a), (b)(2). Even so, the Act makes the FTC largely a ministerial rubber stamp: the FTC “shall” approve HISA's

Federal Trade Commission (“FTC”). The remaining Defendants are individuals responsible for the governance of HISA and the FTC: Lisa Lazarus, Steve Beshear, Adolpho Birch, Leonard S. Coleman, Jr., Joseph DeFrancis, Ellen McClain, Susan Stover, Bill Thomason, D.G. Van Clief, Lina M. Khan, Alvaro Bedoya, Noah Joshua Phillips, Rebecca Kelly Slaughter, and Christine S. Wilson.

proposed regulations as long as those regulations are consistent with the Act and “applicable rules approved by the [FTC].” *Id.* §3053(c)(2).

5. The regulatory power that Congress purported to delegate to HISA is breathtaking in scope, covering virtually all aspects of horseracing. *See generally id.* §§3053(a), 3054(a). HISA claims power to adopt rules governing doping, medication control, and racetrack safety. It claims power to investigate violations of its rules by issuing and enforcing *subpoenas*. After investigating alleged violations, it claims to then be able to act as judge in its own cases and adjudicate alleged violations of its rules. If that’s not enough, HISA claims power to bring civil actions in federal court in response to known or anticipated violations of its regulations. And for those it deems guilty of disobeying its commands, HISA claims disciplinary power to issue sanctions up to and including lifetime bans from horseracing, disgorgement of purses, and monetary fines and penalties.

6. Since the scope of HISA’s purported regulatory authority extends to virtually all *activities* related to horseracing, it’s not surprising that HISA likewise claims authority to regulate nearly all *persons* associated with the horseracing industry. Specifically, HISA claims power to regulate trainers, owners, breeders, jockeys, racetracks, veterinarians, others licensed by a state racing commission, and *agents* of any of those persons.

7. Despite purporting to exercise this breathtakingly broad federal regulatory power over all activities and persons related to horseracing, HISA is unaccountable to any political actor. No federal official can remove the members of HISA’s Board of Directors. The Act thus delegates to a private body the full coercive power of the federal government while simultaneously insulating it completely from political accountability.

8. A private, politically unaccountable entity with breathtaking regulatory power over an entire industry requires significant funding to carry out its work. HISA, however, *is not funded by Congress*. *See id.* §3052(f)(5). Instead, Congress forced the responsibility of funding HISA onto the States.

The Act forces States to choose either to fund HISA with money from the State treasury (or racing commission) or—if a State refuses—HISA intends to assess fees to the racetracks, which will undoubtedly be passed on to participants in that State’s racing industry. *Id.* §3052(f)(2)-(3); 87 Fed. Reg. at 9352-53 (“If a State racing commission does not elect to remit fees pursuant to 15 U.S.C. §3052(f), then “[e]ach Racetrack shall pay its share of the Assessment Calculation to [HISA]”).

9. Under the Act, a State who chooses the latter course is then *banned* from collecting similar taxes or fees itself from those persons. 15 U.S.C. §3052(f)(3)(D) (“A State racing commission that does not elect to remit fees . . . shall not impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters for covered horseraces.”).

10. At the time Plaintiffs prepared to file the operative Complaint (Doc. 1), the FTC had approved three sets of regulations from this private, unfunded, politically unaccountable entity known as HISA. Those three sets of rules cover (1) racetrack safety, (2) HISA enforcement proceedings, and (3) HISA’s methods for assessing and collecting funds. All three sets of rules will wreak havoc on the racing industry within a matter of days. And all three sets must be preliminarily and permanently enjoined because they suffer from fatal flaws under the Administrative Procedure Act or contradict constitutional guarantees. Briefly consider each set of rules in turn.

11. First, consider HISA’s Racetrack Safety Rule (Rule 2000 Series) (Exhibit U),⁴ which the FTC approved March 3, 2022. Fed. Trade Comm’n, Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity and Safety Authority at 2 (Mar. 3, 2022), <https://bit.ly/3Nn2ST8> (Racetrack Safety Rule Order). The FTC provided only a *14-day* public comment period on the Racetrack Safety Rule, while conceding that it “typically provides at least 30

⁴ All documentary evidence is authenticated by declaration of counsel. Decl. of John Duveilh (August 12, 2022) (Exhibit AA).

and often 60 days or more for public comment.” *Id.* at 5. The FTC further brushed aside criticisms about the rushed and piecemeal nature of the review process. *Id.* at 6-8. That rushed, piecemeal process led to substantive errors: the FTC approved the Racetrack Safety Rule despite well-founded, unaddressed concerns that the rule exceeds statutory authority and commandeers state legislative and executive authority by (1) saddling state officials with enforcement responsibility or (2) imposing punitive financial penalties on non-cooperating States. HISA plans to invoke the Racetrack Safety Rule to scratch or disqualify horses and strip those in the horseracing industry, including Intervenor and their members, of their financial due if persons covered under the Act failed to register with HISA by the Act’s July 1, 2022, effective date.

12. Second, consider HISA’s Enforcement Rule (Rule 8000 Series) (Exhibit V), which the FTC approved on March 25, 2022. Fed. Trade Comm’n, Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority at 1 (Mar. 25, 2022), <https://bit.ly/3HRGekS> (Enforcement Rule Order). Again, the FTC provided only a 14-day public comment period. *Id.* at 5. And the FTC ignored that the Enforcement Rule is incomplete and cannot operate as proposed because it incorporates a not-yet-approved series of rules and relies upon undefined entities, such as the “National Stewards Panel” or “an independent Arbitral Body,” to impose broad civil penalties. *Id.* at 2. As a result, the Rule’s structure blatantly disregards regulated persons’ Seventh Amendment jury trial rights and further purports to authorize search and seizure powers outside the scope of the Act and in violation of the Fourth Amendment.

13. Third, consider HISA’s Assessment Methodology Rule (Rule 8500 Series) (Exhibit W), which the FTC approved April 1, 2022. Fed. Trade Comm’n, Order Approving the Assessment Methodology Rule Proposed by the Horseracing Integrity and Safety Authority at 1 (Apr. 1, 2022), <https://bit.ly/3HRGekS> (Assessment Methodology Rule Order). Continuing its unlawful pattern, the FTC again provided only a 14-day public comment period on this rule. *Id.* at 1. And the FTC ignored

commentators who identified that HISA's rules for assessing fees are contrary to law because HISA bases assessments on purse size *and* racing starts but the Act limits the assessment methodology solely to race starts, with no mention of purse size. 15 U.S.C. §3052(f)(C)(ii)(I)(bb). This unlawful methodology affects how HISA imposes fees both for cooperating and non-cooperating States.

14. Each of these rules suffers from serious legal flaws that violate the APA. Specific regulatory provisions in them also violate the constitutional rights of persons regulated by the Act. To protect regulated persons' rights under the APA and the Constitution, HISA must be enjoined from enforcing the unlawful rules. Intervenor suffer immediate and irreparable harm through the implementation and enforcement of HISA's unlawful rules that took effect on July 1, 2022.

PARTIES

15. Intervenor State of Oklahoma is a sovereign State of the United States of America. Oklahoma sues to vindicate its sovereign, quasi-sovereign, proprietary, and *parens patriae* interests. The State of Oklahoma has significant interests in the horseracing industry given the industry's economic impact on the State and the State's longstanding, reticulated regulatory regime governing the horseracing industry, which it passed as an exercise of its traditional police powers. *See* Decl. of Kelly Cathey (Aug. 11, 2022) (describing the horseracing industry and economic impact in Oklahoma that "contributed 9,574 direct jobs and adds \$482 million in direct value to the state economy") (Exhibit A). Attorney General Mike Hunter is authorized to bring legal actions on behalf of the State of Oklahoma and its citizens. Okla. Stat. tit. 74, § 18b. His office is located at 313 NE 21st St. Oklahoma City, Oklahoma 73105.

16. Intervenor Oklahoma Horse Racing Commission is a state agency of the State of Oklahoma and is responsible for regulating horseracing integrity and safety in the State of Oklahoma. Its county of residence is Oklahoma County, Oklahoma.

17. Intervenor Arizona Horsemen's Benevolent and Protective Association represents horseman and trainers in Arizona who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Arizona and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Leroy Gessmann ¶¶7-8 (Aug. 10, 2022) (Exhibit B). The Arizona Horsemen's Benevolent and Protective Association has approximately 2,000 members. *Id.* ¶1.

18. Intervenor Arkansas Horsemen's Benevolent and Protective Association represents horseman and trainers in Arkansas who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Arizona and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Bill Walmsley ¶¶7-8 (Aug. 10, 2022) (Exhibit C). The Arkansas Horsemen's Benevolent and Protective Association has approximately 2,000 members. *Id.* ¶1.

19. Intervenor Illinois Horsemen's Benevolent and Protective Association represents horseman and trainers in Arkansas who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Arizona and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Jim Watkins ¶¶7-8 (Aug. 11, 2022) (Exhibit D). The Illinois Horsemen's Benevolent and Protective Association has approximately 1,500 members. *Id.* ¶1.

20. Intervenor Iowa Horsemen's Benevolent and Protective Association represents horseman and trainers in Arkansas who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Arizona and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Jon Moss ¶¶7-8 (Aug. 9, 2022) (Exhibit E). The Iowa Horsemen's Benevolent and Protective Association has approximately 700 members. *Id.* ¶1.

21. Intervenor Indiana Horsemen's Benevolent and Protective Association represents horseman and trainers in Indiana who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Indiana and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Brian Elmore ¶¶7-8 (Aug. 10, 2022) (Exhibit F). The Indiana Horsemen's Benevolent and Protective Association has approximately 2,000 members. *Id.* ¶1.

22. Intervenor Kentucky Horsemen's Benevolent and Protective Association represents horseman and trainers in Kentucky who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Kentucky and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Marty Maline ¶¶7-8 (Aug. 10, 2022) (Exhibit G). The Kentucky Horsemen's Benevolent and Protective Association has approximately 5,000 members. *Id.* ¶1.

23. Intervenor Minnesota Horsemen's Benevolent and Protective Association represents horseman and trainers in Minnesota who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Minnesota and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Pete Mattson ¶¶7-8 (Aug. 10, 2022) (Exhibit H). The Minnesota Horsemen's Benevolent and Protective Association has approximately 1,000 members. *Id.* ¶1.

24. Intervenor Nebraska Horsemen's Benevolent and Protective Association represents horseman and trainers in Nebraska who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Nebraska and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Garald Wollesen ¶¶7-8 (Aug. 10, 2022) (Exhibit I). The Nebraska Horsemen's Benevolent and Protective Association has approximately 450 members. *Id.* ¶1.

25. Intervenor Ohio Horsemen's Benevolent and Protective Association represents horseman and trainers in Ohio who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Ohio and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Dave Basler ¶¶7-8 (Aug. 10, 2022) (Exhibit J). The Ohio Horsemen's Benevolent and Protective Association has approximately 2,000 members. *Id.* ¶1.

26. Intervenor Oklahoma Horsemen's Benevolent and Protective Association represents horseman and trainers in Oklahoma who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Oklahoma and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Danielle Barber ¶¶7-8 (Aug. 9, 2022) (Exhibit K). The Oklahoma Horsemen's Benevolent and Protective Association has approximately 1,800 members. *Id.* ¶1.

27. Intervenor Pennsylvania Horsemen's Benevolent and Protective Association represents horseman and trainers in Pennsylvania who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Pennsylvania and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Todd Mostoller ¶¶7-8 (Aug. 10, 2022) (Exhibit L). The Pennsylvania Horsemen's Benevolent and Protective Association has approximately 2,000 members. *Id.* ¶1.

28. Intervenor Washington Horsemen's Benevolent and Protective Association represents horseman and trainers in Washington who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Washington and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Mary Ann O'Connell ¶¶7-8 (Aug. 9, 2022) (Exhibit

M). The Washington Horsemen's Benevolent and Protective Association has approximately 1,000 members. *Id.* ¶1.

29. Intervenor Charles Town Horsemen's Benevolent and Protective Association represents horseman and trainers in West Virginia who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in West Virginia and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of James Miller ¶¶7-8 (Aug. 10, 2022) (Exhibit N). The Charles Town Horsemen's Benevolent and Protective Association has approximately 1,200 members. *Id.* ¶1.

30. Intervenor Tampa Bay Downs Horsemen's Benevolent and Protective Association represents horseman and trainers in Florida who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through "the inability for an owner and/or trainer to race a horse in Florida and/or be disqualified from any purse money won by an owner's horse" for violations of the challenged HISA Rules. Decl. of Mike Dini ¶¶7-8 (Aug. 11, 2022) (Exhibit O). The Tampa Bay Downs Horsemen's Benevolent and Protective Association has approximately 2,000 members. *Id.* ¶1.

31. Intervenor Fonner Park is a racetrack that hosts thoroughbred horse races in Nebraska. Decl. of Chris Kotulak ¶4 (Aug. 10, 2022) (Exhibit P). Fonner Park faces grave, immediate, and irreparable harm through "the inability to host races, termination of business from inability to generate revenue, and associated expenses for the care and welfare of the racetrack" from the HISA regulations. *Id.* ¶8

32. Intervenor Horsemen's Park is a racetrack that hosts thoroughbred horse races in Nebraska. Decl. of Garald Wollesen ¶4 (Aug. 10, 2022) (Exhibit Q). Horsemen's Park faces grave, immediate, and irreparable harm through "the inability to host races, termination of business from

inability to generate revenue, and associated expenses for the care and welfare of the racetrack” from the HISA regulations. *Id.* ¶8

33. Intervenor Legacy Downs Racetrack is a racetrack that hosts thoroughbred horse races in Nebraska. Decl. of Garald Wollesen ¶4 (Aug. 10, 2022) (Exhibit R). Legacy Downs Racetrack faces grave, immediate, and irreparable harm through “the inability to hose races, termination of business from inability to generate revenue, and associated expenses for the care and welfare of the racetrack” from the HISA regulations. *Id.* ¶8

34. Intervenor Turf Paradise Racetrack is a racetrack that hosts thoroughbred horse races in Arizona. Decl. of Jerry Simms ¶4 (Aug. 10, 2022) (Exhibit S). Turf Paradise Racetrack faces grave, immediate, and irreparable harm through “the inability to hose races, termination of business from inability to generate revenue, and associated expenses for the care and welfare of the racetrack” from the HISA regulations. *Id.* ¶8.

35. Intervenor Colorado Horse Racing Association represents horseman and trainers in Colorado who are regulated as covered persons under HISA and face grave, immediate, and irreparable harm through “the inability to race, failure to compete for purse money, forfeiture of purse money, [and] termination of business” for violations of the challenged HISA Rules. Decl. of Jim Mulvihill ¶¶7-8 (Aug. 9, 2022) (Exhibit T). The Colorado Horse Racing Association has approximately 450 members. *Id.* ¶1.

36. Intervenor North American Association of Racetrack Veterinarians (NAARV) is a professional association of licensed veterinarians. NAARV represents racetrack veterinary practitioners in all horseracing jurisdictions and its approximately 400 members are licensed by both state veterinarian licensing agencies as well as state racing commissions and regulators. Decl. of Dr. Clara Fenger ¶¶1, 3-4. (Aug. 12, 2022) (Exhibit Z). It represents racetrack practitioners in all 35 states that have racetracks and its members are licensed to practice at more than 75 racetracks. NAARV and

its member face grave, immediate, and irreparable harms through the “inability to treat horses, termination of business from inability to generate revenue, and associated expenses for the care and welfare of horses beyond norms and standards used throughout the profession” for violations of the challenged HISA Rules. *Id.* ¶9.

37. Defendant Horseracing Integrity and Safety Authority, Inc. is a nonprofit corporation chartered under the laws of Delaware with its principal place of business at 401 W. Main Street, Suite 222, Lexington, Fayette County, KY 40507. The Act purports to delegate to HISA the power to draft regulations that govern virtually all aspects of the horseracing industry, including a horseracing anti-doping and medication-control program and a racetrack safety program.

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

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

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

41. Defendant Leonard S. Coleman, Jr. is an independent director serving on the Board of Directors of HISA. He served as the president of the National League of Professional Baseball Clubs from 1994 to 1999. On information and belief, Mr. Coleman resides in Palm Beach, Palm Beach County, Florida.

42. Defendant Joseph De Francis is an industry director serving on the Board of Directors of HISA. He is the managing partner of Gainesville Associates, LLC. On information and belief, Mr. De Francis resides in Columbia, Howard County, Maryland.

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

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

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

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

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

48. Defendant Lina Khan is the Chair of the Federal Trade Commission. Chairwoman Khan is sued in her official capacity only.

49. Defendant Alvaro Bedoya is a Commissioner of the Federal Trade Commission. Commissioner Bedoya is sued in his official capacity only.

50. Defendant Noah Joshua Phillips is a Commissioner of the Federal Trade Commission. Commissioner Phillips is sued in his official capacity only.

51. Defendant Rebecca Kelly Slaughter is a Commissioner of the Federal Trade Commission. Commissioner Slaughter is sued in her official capacity only.

52. Defendant Christine S. Wilson is a Commissioner of the Federal Trade Commission. Commissioner Wilson is sued in her official capacity only.

JURISDICTION & VENUE

53. This Court has subject-matter jurisdiction over this case because it arises under the Constitution and laws of the United States. *See* 28 U.S.C. §§1331, 2201; 5 U.S.C. §§701-706.

54. This Court is authorized to award the requested relief under 5 U.S.C. §706, 28 U.S.C. §1361; 28 U.S.C. §§2201, 2202.

55. Venue is proper in this District because Defendants include United States agencies or officers sued in their official capacities, the State of Louisiana, as Plaintiff, is a resident of this judicial district, and a substantial part of the events or omissions giving rise to the Complaint occur within this judicial district. *See* 28 U.S.C. §1391(e)(1).

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

BACKGROUND

I. The Horseracing Integrity and Safety Act of 2020

57. Congress passed the Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§3051-3060, in late December 2020 as part of the Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

58. The Act recognizes “[t]he private, independent, self-regulatory, nonprofit corporation, to be known as the ‘Horseracing Integrity and Safety Authority,’ ... for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces.” 15 U.S.C. §3052(a).

59. The Act defines the term “covered horse” to mean:

any Thoroughbred horse, or any other horse made subject to this chapter by election of the applicable State racing commission or the breed governing organization for such horse ... during the period—(A) beginning on the date of the horse’s first timed and reported workout at a racetrack that participates in covered horseraces or at a training facility; and (B) ending on the date on which [HISA] receives written notice that the horse has been retired.

Id. §3051(4).

60. While the Act expressly (currently) applies only to Thoroughbred horses, “[a] State racing commission or a breed governing organization for a breed of horses other than Thoroughbred horses may elect to have such breed be covered by” the Act by filing an election form and obtaining HISA’s approval. *Id.* §3054(j)(1). If it is a State racing commission that makes the election, the expanded coverage to the requested breed will apply only in that State. *See id.* If the State racing commission or breed-governing organization elects to expand the Act’s coverage, it must put “in place a mechanism to provide sufficient funds to cover the costs of” administering the Act “with respect to the horses that will be covered” due to the election. *Id.* §3054(j)(2). HISA will then “apportion costs” attributable to that election “fairly among all impacted segments of the horseracing industry, subject to approval by the” FTC. *Id.* §3054(j)(3).

61. The Act defines the term “covered horserace” to mean “any horserace involving covered horses that has a substantial relation to interstate commerce, including any Thoroughbred horserace that is the subject of interstate off-track or advance deposit wagers.” *Id.* §3051(5).

62. The Act defines the term “covered persons” to mean “all trainers, owners, breeders, jockeys, racetracks, veterinarians, persons (legal and natural) licensed by a State racing commission and the agents, assigns, and employees of such persons and other horse support personnel who are engaged in the care, training, or racing of covered horses.” *Id.* §3051(6).

63. The Act defines a “breeder” to mean “a person who is in the business of breeding covered horses.” *Id.* §3051(2).

64. The Act defines a “jockey” as “a rider or driver of a covered horse in covered horseraces.” *Id.* §3051(12).

65. The Act defines “owner” as “a person who holds an ownership interest in one or more covered horses.” *Id.* §3051(13).

66. The Act defines a “trainer” as “an individual engaged in the training of covered horses.” *Id.* §3051(19).

67. The Act defines a “veterinarian” as “a licensed veterinarian who provides veterinary services to covered horses.” *Id.* §3051(21).

68. The Act does not define “agents, assigns, and employees of such persons and other horse support personnel who are engaged in the care, training, or racing of covered horses.” *Id.* §3051(6). HISA itself expands this incredibly broad classification—particularly without any congressional explanation on “agent, assigns, and employees of such persons”—to include everyone “licensed by a State Racing Commission” and who has “access to restricted areas of a racetrack in the ordinary course of your work.” *See* Registration, HISA (2022), <https://bit.ly/3xToEIE>. This means

that even assistant attorneys general representing the racing commission are supposedly covered under HISA and required to register with the organization.

69. HISA is governed by a nine-member Board of Directors, consisting of five “independent members selected from outside the equine industry”—one of whom shall be the Chairman—and four “industry members selected from among the various equine constituencies,” provided that the Board “include not more than one industry member from any one equine constituency.” *Id.* §3052(b).

70. The Act also creates various standing committees to advise HISA on specific issues related to the horseracing industry. One of those standing committees is a “nominating committee,” which is “comprised of seven independent members selected from business, sports, and academia,” and whose initial composition “shall be set forth” in HISA’s “governing corporate documents.” *Id.* §3052(d)(1).

71. The nominating committee chose each member of HISA’s first board of directors. Only eight of those first nine directors remain because one has since left that position.

72. The Act does not grant any governmental entity, official, or employee the right to approve or disapprove the persons selected to be on the nominating committee, or to approve or disapprove the nominating committee’s selection of members of HISA’s board of directors.

73. The Act directs HISA to obtain its initial funding through the program’s effective date (July 1, 2022) by securing loans. 15 U.S.C §3052(f)(1)(A). After that, no later than 90 days before the effective date and no later than “November 1 each year thereafter,” HISA must “determine and provide to each State racing commission the estimated amount required from the State” for “the State’s proportionate share of the horseracing anti-doping and medication control program and the racetrack safety program for the next calendar year” and “to liquidate the State’s proportionate share

of any loan or funding shortfall in the current calendar year and any previous calendar year.” *Id.* §3052(f)(1)(C)(i).

74. The program effective date was July 1, 2022. *Id.* §3051(14).

75. Each State’s proportional share is based on HISA’s annual budget for the following year and “the projected amount of covered racing starts for the year in each State.” *Id.* §3052(f)(1)(C)(ii)(I). The budget is not subject to approval by the FTC, but only HISA’s unelected, unaccountable board on an annual basis. *Id.* §3052(f)(1)(C)(iii).

76. The Act forces States to fund HISA. States must do so through either of two ways. First, a State racing commission may “elect[] to remit fees” payable from a State’s treasury and, if it does so, “the election shall remain in effect and the State racing commission shall be required to remit fees ... according to a schedule established in rule developed by [HISA] and approved by” the FTC. *Id.* §3052(f)(2)(A)-(B). The State racing commission cannot withdraw that election without giving HISA at least one year’s advance notice. *Id.* §3052(f)(2)(C).

77. Second, if a State decides not to pay from its treasury HISA’s demanded fees, Congress specified a formula by which HISA shall assess fees to fund itself. At least monthly, HISA shall “calculate the applicable fee per racing start multiplied by the number of racing starts in the State during the preceding month.” *Id.* §3052(f)(3)(A). HISA will then “allocate equitably” that amount “among covered persons involved with covered horseraces pursuant to such rules as [HISA] may promulgate,” and HISA will collect fees *directly from the covered persons*, who “shall be *required* to remit such fees to” HISA. *Id.* §3052(f)(3)(B)-(C) (emphasis added). To dissuade States from choosing this second route, Congress put a poison pill in the Act: State racing commissions in States who follow that route cannot “impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters for covered horseraces.” *Id.* §3052(f)(3)(D).

78. The Act eliminates all doubt that Congress is not funding HISA but is instead forcing States to fund this private, politically unaccountable regulatory corporation: “Nothing in this Act shall be construed to require ... the appropriation of any amount to [HISA]; or ... the Federal Government to guarantee the debts of [HISA].” *Id.* §3052(f)(5).

79. By giving HISA the power to collect fees from members of the horseracing industry and requiring those members to comply with HISA’s demands, *id.* §3052(f)(3)(B)-(C), the Act also effectively delegates to a private entity the governmental power of taxation. Yet, it is unclear how HISA will collect monies from racetracks and covered persons because Louisiana law makes clear that the Louisiana State Racing Commission must ensure pari-mutuel wagering revenue is distributed in a particular manner—namely, that “fifty percent of [specific proceeds] shall be distributed by such track licensee as purses” and the remaining fifty percent “shall be distributed by such track licensee as purses.” La. Stat. Ann. §4:149.2.

80. Likewise, the “Horsemen’s Bookkeeper” may only make authorized distribution of funds for particular purposes—“to daily purses, jockey fees, stakes, handicaps, rewards, claims, deposits, monies, if any, for horsemen’s medical and hospital benefit programs, National Thoroughbred Racing Association, Inc. dues, and pony lead fees”—none of which is to fund HISA. La. Stat. Ann. §4:185(B)(2)-(3)(a).

81. The Act also delegates rulemaking authority to HISA and specifies HISA’s rulemaking process. Implicitly acknowledging the constitutional problems inherent in delegating federal rulemaking authority to a private entity, the Act requires HISA to submit to the FTC proposed rules or proposed modifications of rules on eleven topics: (1) HISA’s bylaws; (2) “a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and methods”; (3) “laboratory standards for accreditation and protocols”; (4) “standards for racing surface quality maintenance”; (5) “racetrack safety standards and protocols”; (6) “a program

for injury and fatality data analysis”; (7) “a program of research and education on safety, performance, and anti-doping and medication control”; (8) “a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons”; (9) “a schedule of civil sanctions for violations”; (10) “a process or procedures for disciplinary hearings”; and (11) “a formula or methodology for determining assessments” against State racing commissions or covered persons. 15 U.S.C. §3053(a).

82. The FTC must publish HISA’s proposed rule or modification in the Federal Register and provide an opportunity for public comment. *Id.* §3053(b). Within 60 days of publication in the Federal Register, the FTC “shall approve” HISA’s proposed rule or modification as long as it is “consistent with” the Act and with “applicable rules approved by the” FTC. *Id.* §3053(c).

83. The Act specifies a separate process for “any proposed rule, standard, or procedure developed by” HISA “to carry out the horseracing anti-doping and medication control program or the racetrack safety program.” *Id.* HISA must submit those kinds of proposals to the FTC for public notice and comment, but the Act does not explicitly state whether those proposals are subject to §3053(c)’s procedural requirements, whether the FTC has the power to approve or disapprove them, or how they become effective. *See generally id.* §3053(d). Nor is it clear how the subject matter of proposals submitted under §3053(d) might differ from the types of rules listed in §3053(a).

84. Apart from the FTC’s very narrow power to draft interim final rules in certain exigent circumstances that do not apply here, *see id.* §3053(e), the Act does not permit the FTC to draft rules to regulate horseracing. It can *only* approve or disapprove rules promulgated by HISA.

85. The Act does not even permit the FTC to modify any rule promulgated by HISA. Rather, if the FTC disapproves HISA’s proposed rule or modification, the FTC shall within 30 days of its disapproval “make recommendations to” HISA “to modify the proposed rule or modification,” and HISA may resubmit a new proposed rule or modification incorporating the FTC’s

recommendations. *Id.* §3053(c)(3). The FTC has no independent freedom of action for permanent rule-making. In other words, HISA alone sets the regulatory agenda.

86. The Act also requires HISA to “enter into an agreement with the United States Anti-Doping Agency” (or a nationally recognized equivalent entity, if the USADA and HISA can’t reach an agreement) to be the “enforcement agency” with power to “implement the anti-doping and medication control program on behalf of” HISA with respect to “covered horses, covered persons, and covered horseraces.” *Id.* §3054(e)(1)(A)-(B), (E)(i).

87. When Congress grants a special role in rulemaking to a private entity, that entity cannot supplant the work of a governmental agency but can only “help a government agency make its regulatory decisions.” *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013) (vacated and remanded on other grounds by *Dep’t of Transp. V. Ass’n of Am. R.R.*, 575 U.S. 43, 57 (2015) (*Amtrak II*)). In fact, “private parties must be limited to an advisory or subordinate role in the regulatory process.” *Id.* at 673. But here the process is inverted: HISA, not the FTC, holds the power in this regulatory apparatus. *Amtrak II*, 575 U.S. at 57 (Alito, J., concurring) (“[E]veryone should pay close attention when Congress ‘sponsors corporations that it specifically designates not to be agencies or establishments of the United States Government.’”).

88. Recently, four U.S. Senators wrote to Defendant Khan and Defendant Lazarus to question whether the FTC is providing adequate oversight of HISA, whether Congress should extend HISA’s statutory deadlines, and why HISA decided to delay implementation of some rules but not others. Letter from Senators Grassley, Manchin, Ernst, and Kennedy to Chairwoman Kahn & Ms. Lazarus at 1-2 (June 27, 2022) (Senators’ Letter) (Exhibit X). The Senators harbor grave concerns regarding HISA’s ability to implement the Act and the FTC’s ability to ensure HIRA complies with the Act. *Id.* The Senators also identified several areas that appear most troubling, including HISA’s failure “to meet the statutorily mandated deadline of July 1, 2022 to implement the Anti-Doping and

Medication Control program,” “newly approved rules regarding horseshoes and riding crop specifications,” and piecemeal implementation causes budgetary and transparency concerns discussed in relevant part below. *Id.*

89. Congressman Lance Gooden, a co-sponsor of the Act, likewise wrote to Defendant Khan and Defendant Lazarus to sound the alarm that HISA’s “attempts to implement [the Act] are causing great harm and significant problems in the racing industry.” Letter From Congressman Gooden to Chairwoman Kahn & Ms. Lazarus at 1 (June 28, 2022) (Congressman’s Letter) (Exhibit Y). Put simply, “[t]his is not how the law was intended to work.” *Id.* Congressman Gooden explained that “[m]any issues could have been avoided if [HISA] had not rushed the implementation of [the Act] and failed to collaborate with stakeholders and regulators.” *Id.* “Unfortunately, there has been minimal good-faith effort to collaborate with stakeholders on the part of [HISA], and the results will be disaster out to the horse racing industry in Texas.” *Id.* In light of these concerns, the Act’s cosponsor requested HISA “to postpone its regulations.” *Id.* at 2.

A. HISA’s Powers and Duties

90. The Act purports to give HISA, the FTC, and the anti-doping and medication-control enforcement agency “independent and exclusive national authority over—(A) the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces; and (B) all horseracing safety, performance, and anti-doping and medication control matters for covered horses, covered persons, and covered horseraces.” *Id.* §3054(a)(2). And the Act expressly purports to make the authority it gives to HISA, the FTC, and the anti-doping enforcement agency “similar to” the “authority” that “State racing commissions” exercised before July 1, 2022. *Id.* §3054(a)(3).

91. The Act then expressly states that HISA’s rules “preempt any provision of State law or regulation with respect to matters within” HISA’s jurisdiction. *Id.* §3054(b).

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

93. It’s no secret that the structure and scope of today’s federal administrative state exceeds anything the Founders could have envisioned. Just as well known are the consequences when the administrative state goes unchecked. What’s more, federal agency actions that improperly upset the “allocation of powers in our federal system” harm “the integrity, dignity, and residual sovereignty of the States.” *Bond v. United States*, 564 U.S. 211, 221 (2011).

94. The Act requires HISA to adopt regulations to establish two specific programs—a horseracing anti-doping and medication-control program and a racetrack safety program—and to adopt rules that govern HISA’s enforcement and sanctions authority. Consider each requirement in turn.

i. The Horseracing Anti-Doping and Medication-Control Program

95. By July 1, 2022, HISA had to “establish a horseracing anti-doping and medication control program” using the notice-and-comment procedures described above. 15 U.S.C. §3055(a)(1). This is a direct statutory command; HISA has no discretion to decline to establish an anti-doping and medication-control program.

96. Even so, HISA—with the FTC’s approval—opted to delay enforcement of the anti-doping and medication control program until January 2023. Enforcement Rule Order at 5 n.13. And HISA will not even submit its future anti-doping rules to the FTC for public comment until July 1, 2022. Thus, HISA has demonstrated its willingness to delay adopting and enforcing statutorily mandated rules to avoid problems of a rushed rollout when it so chooses.

97. Senator Grassley and his colleagues specifically identified this failure to meet statutory deadlines and the arbitrary decision to delay enforcement of anti-doping rules while moving forward with others as major problems with HISA. Senators' Letter at 2. HISA has yet to answer why it believes it has the authority to delay implementation and enforcement of some aspects of the Act while carrying others forward.

ii. The Racetrack Safety Program

98. By July 1, 2022, HISA was to “establish a racetrack safety program applicable to all covered horses, covered persons, and covered horseraces” using the notice-and-comment procedures described above. 15 U.S.C. §3056(a)(1). The Act imposes on HISA a nondiscretionary duty to adopt a series of regulations to enforce this racetrack safety program. In developing this program, HISA must consider existing national, foreign, and international safety standards. *Id.* §3056(a)(2).

99. The Act requires the racetrack safety program to speak to 12 specific areas of racetrack operations: (1) training and racing safety standards and protocols that account for regional differences and differences between racing facilities; (2) uniform training and racing safety standards “consistent with the humane treatment of covered horses”; (3) a “racing surface quality maintenance system”; (4) uniform “track safety standards”; (5) “[p]rograms for injury and fatality data analysis”; (6) investigations relating to safety violations; (7) “[p]rocedures for investigating, charging, and adjudicating violations and for the enforcement of civil sanctions for violations”; (8) “[a] schedule of civil sanctions for violations”; (9) “[d]isciplinary hearings”; (10) “[m]anagement of violation results”; (11) “[p]rograms relating to safety and performance research and education”; and (12) “[a]n evaluation and accreditation program that ensures that racetracks” meet the standards of the racetrack safety program. *Id.* §3056(b).

100. No less than 120 days *before* July 1, 2022, HISA had to issue a rule that establishes standards for the accreditation of racetracks under the racetrack safety program. *Id.* §3056(c)(2).

Within one year after July 1, 2022, HISA must issue a rule establishing a “nationwide database of racehorse safety, performance, health, and injury information” and “may require covered persons to collect and submit to the database ... such information as [HISA] may require to further the goal of increased racehorse welfare.” *Id.* §3056(c)(3).

iii. HISA’s Enforcement and Sanctions Authority

101. The Act requires HISA to develop and issue (using the notice-and-comment process described above) uniform rules permitting (1) “access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses”; (2) “issuance and enforcement of subpoenas and subpoenas *duces tecum*”; and (3) “other investigatory powers of the nature and scope exercised by State racing commissions before” July 1, 2022. *Id.* §3054(c)(1)(A). HISA may also “recommend that the [FTC] commence an enforcement action” concerning “an unfair or deceptive act or practice.” *Id.* §3054(c)(1)(B).

iv. Regulated Parties Must Register With HISA

102. Because horseracing regulations have for decades been matters solely of State concern, no preexisting federal mechanism exists for identifying the myriad participants in the horseracing industry—untold thousands of trainers, owners, breeders, jockeys, racetracks, veterinarians, others licensed by a state racing commission, and their agents, employees and “assigns” in multiple States—or for attempting to police those participants’ compliance with (previously non-existent) federal regulations.

103. Congress identified a way to fill that gap: The Act requires “a covered person” to “register” with HISA “[a]s a condition of participating in covered races and in the care, ownership, treatment, and training of covered horses.” *Id.* §3054(d)(1). The registrant must agree “to be subject to and comply with” HISA’s enforcement rules. *Id.* §3054(d)(2).

104. Registered persons also must “cooperate with the [FTC], [HISA], the anti-doping and medication control enforcement agency, and any respective designee, during any civil investigation,” and must “respond truthfully and completely” to any question asked by the FTC, HISA, “the anti-doping and medication control enforcement agency, or any respective designee.” *Id.* §3054(d)(3). A registered person’s failure to cooperate is a civil violation of the Act that could subject the registrant to penalties or sanctions. *Id.* §3054(d)(4).

105. The Act further grants HISA “subpoena and investigatory authority with respect to civil violations committed under its jurisdiction” and requires it to “develop a list of civil penalties with respect to the enforcement of rules for covered persons and covered horseraces under its jurisdiction.” *Id.* §3054(h)-(i).

106. HISA’s decision to issue a subpoena or exercise its investigatory authority is *not* subject to the approval or disapproval *any* governmental entity, official, or employee.

107. The Act requires HISA to “establish uniform rules, in accordance with section 3053, imposing civil sanctions against covered persons or covered horses” for violations of its safety, performance, and anti-doping and medication-control rules. *Id.* §3057(d)(1). Those sanctions may include “lifetime bans from horseracing, disgorgement of purses, monetary fines and penalties, and changes to the order of finish in covered races.” *Id.* §3057(d)(3).

108. A “person aggrieved by the civil sanction” may *apply* to the FTC for review of the sanction by an administrative law judge. *Id.* §3058(b)(1). The decision of the administrative law judge is to be the final decision of the FTC, unless the FTC exercises its discretion to review the decision of the administrative law judge. *Id.* §3058(b)(3)(B)-(c). Thus, aggrieved persons have no right to review by the FTC.

109. But for the Act, HISA would have no power to regulate the horseracing industry beyond entities that voluntarily affiliated with HISA. But because the Act purports to give HISA’s

regulations the force of federal law and preemptive force over contrary state law, *id.* §3054(b), HISA’s regulations are binding on the States and on members of the regulated industry, *see* U.S. Const. art. VI, cl. 2. That is, without the ability to invoke the full coercive power of the federal government, HISA’s rules would be mere recommendations, and HISA would have no means to compel compliance.

II. Current HISA Rules

110. In the runup to the filing of the operative Complaint, the FTC approved three series of HISA rules covering racetrack safety, enforcement, and assessment methodology. Each suffers from a host of procedural or constitutional problems that make the rules unlawful under the APA or unconstitutional (or both).

111. The APA commands courts to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion.” 5 U.S.C. §706(2)(A). To meet this standard, “[f]ederal administrative agencies are required to engage in ‘reasoned decisionmaking.’” *Texas v. United States*, 524 F. Supp. 3d 598, 652 (S.D. Tex. 2021). “This necessarily means that [n]ot only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.” *Id.*

112. Most pressingly, HISA’s rules require all “covered persons” to register with the organization by the July 1, 2022 effective date or be considered in violation of HISA’s rules and face sanctions. 87 Fed. Reg. at 446; 87 Fed. Reg. at 4028. At recent meetings, Defendant Lazarus claimed *that HISA will attempt to scratch horses associated with covered persons who refuse to register with HISA or otherwise seek to disqualify horses post-race associated with unregistered personnel.* Lisa Lazarus, *KY HBPA – HISA Zoom Meeting*, YouTube (June 20, 2020), <https://bit.ly/3bxzNY4>.

113. If HISA is allowed to enforce this punitive system, it will strip jockeys, owners, trainers, and all individuals involved in the horseracing industry of their economic interests in race purses—which are *not* set by HISA—and call the integrity of the entire industry into question.

A. Racetrack Safety Rule (Rule 2000 Series)

114. The Racetrack Safety Rules contain fatal legal deficiencies. Among them, the Act commandeers state legislative and executive authorities by forcing them to either remit funds from the state treasury to HISA or to surrender their right to collect certain fees or taxes, at the apparent discretion of HISA to determine. 15 U.S.C. §3052(f)(2). The Racetrack Safety Rule amplifies the commandeering problem in at least three ways.

115. First, under Rule 2133, States that enter an agreement with HISA must “enforce the safety regulations set forth in Rules 2200 through 2293.” 87 Fed. Reg. at 449. And, in States like Louisiana that choose not to enter into such an agreement, “the Racetracks in the jurisdiction shall implement the requirements set forth in Rule 2133, subject to the Racetrack Safety Committee’s approval of the individuals named as stewards by the Racetracks.” *Id.*

116. But the Act does not—and constitutionally cannot—give HISA or the FTC the authority to commandeer state employees *or* coerce racetracks into enforcing HISA’s own rules.

117. Second, Rule 2191 forces racetracks to “develop and implement a testing program for drugs and alcohol for Jockeys, subject to the approval of” HISA. 87 Fed. Reg. at 453. Again, this requirement unlawfully commandeers or deputizes non-federal actors to do HISA’s bidding and contradicts HISA’s uniformity goal by requiring increased regulation at the most local level.

118. Third, the Racetrack Safety Rule purports to delegate to state racing commissions (at 87 Fed. Reg. at 453) HISA’s statutory authority to develop and implement a program to educate horsemen on the new rules. *See* 15 U.S.C. §3056(b)(11) (requiring that HISA’s horseracing safety program “shall include ... [p]rograms relating to ... education”); *see also id.* §3053(a)(7). The Racetrack

Safety Rule Delegating HISA’s educational responsibility not only unlawfully commandeers state employees but also contradicts the Act’s overarching goal of bringing uniformity to the horseracing industry across states, since one State’s racing commission’s educational program could vary from another’s. This potential State-by-State inconsistency opens the door to mass confusion among trainers, breeders, jockeys, veterinarians, and other covered persons across States.

119. The Racetrack Safety Rules also exceed HISA’s statutory authority. The Act gives HISA and the FTC power to regulate “covered horse[s].” 15 U.S.C. §3051(4). The Act defines a “covered horse” in relevant part to include “any Thoroughbred horse ... during” one specific “period”—“beginning on the date of the horse’s first timed and reported workout at a racetrack that participates in covered horseraces or at a training facility” and “ending on the date on which the authority receives written notice that the horse has been retired.” *Id.* §3051(4).

120. Rule 2010, in contrast, defines a “Covered Horse” to include Thoroughbred horses “beginning on the earlier of” any of *four* potential dates: (1) “[t]he date of the Horse’s first timed and reported workout at a Racetrack;” (2) “the date of the Horse’s first timed and reported workout at a Training Facility;” (3) “the date of the Horse’s entry in a Covered Horserace;” or (4) “the date of the Horse’s nomination for a Covered Horserace.” 87 Fed. Reg. at 446.

121. Thus Rule 2010 defines “covered horse” differently and more broadly than the Act. *Compare* 87 Fed. Reg. at 446, *with* 15 U.S.C. §3051(4). Specifically, Rule 2010 subjects a horse to HISA’s regulatory strictures once it is entered into or nominated for a covered race—even if it has *not yet* met the statutory requirement of having a timed and reported workout at a racetrack or training facility. This expanded definition makes more horses (and therefore more covered people) subject to HISA regulation at points in a horse’s career earlier than those Congress authorized. This expanded definition also directly harms the State of Louisiana by preempting more state regulations than the statute permits. *See, e.g.*, La. Stat. Ann. §4:158 (governing licensure of horseracing tracks under

Louisiana law); La. Admin. Code tit. 35, pt. I, §505 (governing the accreditation and registration of horses under Louisiana law); La. Admin. Code tit. 35, pt. I, §101 (requiring jockeys to be licensed in Louisiana); La. Admin. Code tit. 35, pt. VII, §8901 (“No jockey carrying a whip during a race shall fail to use the whip in a manner consistent with using his best efforts to win.”). And given the hefty penalties in place for civil violations related to covered horses, the Intervenors’ members may be dragged before a private tribunal and forced to defend themselves against alleged violations of regulations based on activity that falls outside the Act’s scope and thus that HISA cannot lawfully regulate.

122. The Racetrack Safety Rules are further inconsistent because a “covered horse” does not include a Thoroughbred foal nominated for the Breeders’ Cup because that occurs during the first year of the horse’s life. *See* 87 Fed. Reg. at 446 (establishing the criteria for a “covered horse” by HISA); *see also* Horses of Racing Age Nomination Program, Breeders’ Cup (2021), <https://bit.ly/3ubIrSr>. Further, a timed workout for a two-year-old training sale would also not be covered, even though “time and reported workout[s] at a Training Facility” triggers coverage by HISA. 87 Fed. Reg. at 446. This inconsistency is arbitrary and capricious. As yet another example in Louisiana, the eligibility to race a Thoroughbred horse in the Louisiana Futurity requires a nomination fee to be paid on behalf of a brood mare with foal. *See* Fair Grounds Race Course: The Louisiana Futurity 2022 (2022), <https://bit.ly/3nndmHJ>. Of course, a brood mare is a retired racehorse and would thus not be a “covered horse” under HISA’s rules. Likewise, its subsequent foal would not have any timed workouts in their first two years of life and therefore not be a “covered horse.” *See* 87 Fed. Reg. at 446. The arbitrary line-drawing around what is and is not a covered horse is riddled with these nonsensical inconsistencies.

123. The Racetrack Safety Rules are also arbitrary and capricious because HISA and the FTC failed to consider important aspects of horseracing safety and failed to meaningfully engage with commenters' feedback and submissions on the proposed regulations.

124. Of particular concern is Rule 2280's one-size-fits-none crop rule. Rule 2280 limits a jockey's use of a crop (whip) to six strokes in increments of two during a race, regardless of the race's duration. 87 Fed. Reg. at 457. This is a major change from Louisiana's incoming rule, for instance, which will likewise limit the use of the crop to six overhand strokes but *permits* the use of underhand strikes at different junctures in a race, which is critical to the integrity of the race and participant safety. Notice of Intent, 48 La. Reg. 1621(E) (2022).

125. The Jockeys' Guild told the FTC about this critical HISA oversight in its comments, supporting its rule critique with strong competitive and safety bases. *See* Comment from Jockeys' Guild, Inc., FTC-2021-0076-0039 (Jan. 20, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0039>. For instance, the Jockeys' Guild identified that HISA's riding crop rule unnecessarily constrains jockeys and puts them in danger. *Id.* at 2 (referring to the riding crop rule, HISA "chose to go with a rule that we believe will have serious ramifications and *cause even more safety concerns* to both the equine and human athletes" (emphasis added)). "Additionally, the penalties as adopted with regards to the use of the riding crop, impose severe fines and/or suspensions upon jockeys for minor infractions of the new rule." *Id.* "Further, the jockeys are the only licensees under these rules which will be faced with a point system." *Id.*

126. But the FTC failed to engage with the comments from the Jockeys' Guild. *See generally* Racetrack Safety Rule Order. Indeed, the FTC and HISA chose not to consider problems with state-specific concerns that were raised during the comment period and instead arbitrarily issued a rule without addressing comments criticizing that rule. The FTC's failure to meaningfully respond to these comments on the crop rule makes the rule arbitrary and capricious. After all, "a central

purpose of notice-and-comment rulemaking is to subject agency decisionmaking to public input and to obligate the agency to consider and respond to the material comments and concerns that are voiced.” *Make the Road New York v. Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020). And the “significant mismatch” between the decision and the administrative rationale indicates a lack of reasoned decisionmaking and pretext. *See Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (“We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decisionmaking process.”).

127. On other critical issues, the FTC’s order approving these regulations summarily recites the concerns voiced by commenters, regurgitates HISA’s responses, and then concludes that the proposed regulations are consistent with the Act. The FTC’s order contains no independent assessment nor any meaningful response to comments that raise serious concerns about the scope of the rules. For example, the National Horsemen’s Benevolent and Protective Association identified several other important flaws in HISA’s rules that the FTC failed to address. Comment from National Horsemen’s Benevolent and Protective Association, FTC-2021-0076-0017 (Jan. 19, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0017>.

128. Among them, the Act requires HISA to enter into a contract with a national anti-doping and medication control enforcement agency. *Id.* at 2 (citing 15 U.S.C. §3054(e)). Yet, HISA had yet to secure a contract at the time and now refuses to make the contract public, such that the full “cost structure and the funding mechanism for the entirety of the new regulatory structure cannot be known.” *Id.* Industry “members deserve certainty and transparency in the fee structure as they budget for current and future racing seasons.” Yet, the FTC never addressed transparency in its approval and merely acknowledged without rebutting why “commenters complained about the omission of a funding mechanism or cost analysis and requested that the [FTC] not approve the rules without a

funding mechanism in place where states lack information about the costs to be imposed on state authorities.” Racetrack Safety Rule Order at 6.

129. The National Horsemen’s Benevolent and Protective Association also identified that the Act creates educational requirements for horsemen, but HISA delegates to state authorities the obligation to implement training programs, which cuts against the uniformity goal of the Act. Comment from National Horsemen’s Benevolent and Protective Association at 3. Further, the association explained that the HISA rules create confusion concerning ownership of a claiming horse in the event of a positive drug test. “Under normal circumstances, a new owner takes possession and ownership of a claiming horse as soon as the race is concluded.” *Id.* at 3. “However, with a positive drug test, there is a time lag between testing a horse for medications and receiving the results of the test,” under HISA rules, so “it is unclear who owns the horse during this time and who will ultimately be responsible for the payment of its upkeep.” *Id.* At bottom, “[i]t is impractical to transfer ownership of the horse only to transfer it back days or even weeks later.” *Id.* Again the FTC acknowledged that commentators raised the issues, but failed to explain away commentators’ concerns. Racetrack Safety Rule Order at 26-28 (educational requirement); 35, 37 (claiming races issue). Concerning the educational requirement, the FTC simply explained that guidance would follow but nonetheless approved the provision. Racetrack Safety Rule Order at 26-28. And concerning the claiming races issue, the FTC dismissed concerns out-of-hand, by claiming “that no commenter raised a plausible argument that [rules governing ownership of a horse in the event of a positive drug test after a claiming race] do not comply with the Act’s requirements.” *Id.* at 37. Such a conclusory rejection of legitimate concerns falls short of the Administrative Procedure Act’s requirements.

130. Yet again, HISA is selectively delaying enforcement of certain aspects of the Act by selecting some components of the Racetrack Safety Rule that it will not enforce on July 1. Namely, the Racetrack Safety Rule includes specific requirements that federally regulate the particular type of

horseshoe required for racing and training. 87 Fed. Reg. at 457 (“Except for full rims 2 millimeters or less from the ground surface of the Horseshoe, traction devices are prohibited on forelimb and hindlimb Horseshoes during racing and training on dirt or synthetic racing tracks.”). Likewise, the Racetrack Safety Rule provides “riding crops specifications,” regulating the type (“soft-padded”), size (up to “8 ounces”), length (up to “30 inches”), diameter (minimum of “three-eighths of one inch”), and material (“a waterproof, ultraviolet, and chemical resistant foam material that is durable and preserves its shock absorption in use under all conditions”) of riding crops, just to name a few specifications. *Id.* However, HISA recognized that supply chain issues mean that there are not enough compliant horseshoes or riding crops available. Jeff Cota, HISA Clarifies Shoeing Rules, Confirms Delay, *Am. Farriers J.* (May 12, 2022), <https://bit.ly/3a5IJn3>. So compliance is a literal impossibility. *Id.*

131. Senator Grassley and his colleagues took note, explaining that “[t]his is also concerning because we understand the initial rules were functionally impossible for industry participants to implement due to limited supply chain availability of horseshoes and riding crops.” Senators’ Letter at 2. “This raises questions about what industry representatives were consulted in the drafting of the rule” and “now, only one week before the rule was set to take effect, [HISA] published a notice announcing a one month delay in enforcement of these rules.” *Id.* “This chaotic implementation process and poor communication by [HISA] makes it difficult for industry participants to comply with the new rules and regulations.” And “continuously changing implementation dates for new rules and regulations, and last minute delays, cause more confusion and difficulty with implementation.” *Id.* Yet, that is exactly what HISA and its rules accomplish: confusion with no regard for industry comments. *Cf. California v. Bernhardt*, 472 F. Supp. 3d 573, 600-01 (N.D. Cal. 2020) (“[A]n agency cannot flip-flop regulations on [a] whim[.]” Rather, “[t]he APA requires reasoning, deliberation, and process. These requirements exist, in part, because markets and industries rely on stable regulations.”).

132. Beyond those substantive shortcomings, the Racetrack Safety Rule also suffers from two procedural problems related to the rule's timing. *See* Comment from National Horsemen's Benevolent and Protective Association at 24.

133. First, Congress plainly intended HISA to submit its anti-doping and medication regulations and its safety regulations to the FTC in tandem. *See* 15 U.S.C. §3055(a)(1) (requiring HISA to adopt anti-doping and medication rules “[n]ot later than” July 1, 2022); *see also id.* §3056(a)(1) (same for racetrack safety rules).

134. HISA has violated this requirement and instead taken a piecemeal approach. It submitted *only* its safety regulations to the FTC, while expressly *withholding* its anti-doping and medication regulations. Enforcement Rule Order at 5 n.13.

135. HISA's failure to follow the mandatory statutory timeline for creating rules for both programs deprived the public of the chance to submit adequate comments. *See* Senators' Letter at 2. Neither program operates in a vacuum; the rules for each program will affect and interact with each other. But because regulated parties have not yet seen any proposed rules for one of the two programs, it is impossible for them to know what effects or consequences each program will have on the other, and thus on them. And because regulated parties cannot know those facts, they could not have explained them to the FTC—meaning if the FTC necessarily could not have considered these important aspects of the problem the Act purports to solve.

136. Second, the FTC allotted only 14 days for the public comment period on the Racetrack Safety Rules even while conceding that it “typically provides at least 30 and often 60 days or more for public comment.” *Id.* at 5. The FTC further brushed aside criticisms about the rushed and piecemeal nature of the review process. *Id.* at 6-8.

137. Fourteen days was an insufficient amount of time for regulated parties to be informed of the comment period, analyze the proposed rules, and prepare comments to address the rules'

substantive deficiencies. “When substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.” *Nat’l Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019). Hence, “a rule that has a comment period of less than 30 days typically must fall under the good cause exception.” *Coal. for Workforce Innovation v. Walsh*, 2022 WL 1073346, at *7 (E.D. Tex. Mar. 14, 2022); *see also Texas v. United States*, 524 F. Supp. 3d. at 654 (observing that even thirty days “did not leave much time for reflection and analysis.”).

138. The Act’s requirement that the FTC approve or disapprove of the proposed rules within sixty days does not justify the improperly abbreviated comment period. The FTC acted arbitrarily and capriciously by providing only two weeks of public comment and then reserving the remaining six-and-a-half weeks for review and decisionmaking.

139. Because this deficiency applies to the Racetrack Safety Rules as a whole, the Court should set them aside and require the FTC to conduct a new notice-and-comment period of sufficient length to protect Intervenors’ procedural rights under the APA. *See, e.g., id.* at *11 (vacating the agency’s rule in part because the unreasonably short notice-and-comment period deprived the “meaningful opportunity for comment”); *see also U.S. Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 n.17 (5th Cir. 1984) (“Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated.”).

B. Enforcement Rule (Rule 8000 Series)

140. The Enforcement Rule violates covered persons’ Seventh Amendment jury trial rights. The Enforcement Rule empowers HISA to assign adjudication of alleged regulatory violations to various quasi-administrative and private entities. Under Rule 8330, HISA has unfettered discretion to assign adjudication of alleged rule violations to an undefined (and currently non-existent) “National

Stewards Panel,” to an unnamed (currently non-existent) “independent Arbitral Body,” to state stewards, or to itself. 87 Fed. Reg. at 4029. Violations of those rules can be punished with “a broad range” of civil penalties. 87 Fed. Reg. at 4025.

141. But “the Seventh Amendment jury-trial right applies to suits brought under a statute seeking civil penalties.” *Jarkesy v. SEC*, 34 F.4th 446, 452 (5th Cir. 2022). Courts determine whether that right has been violated by considering “whether an action’s claims arise ‘at common law’ under the Seventh Amendment.” *Id.* at 453. If so, “a court must determine whether the Supreme Court’s public-rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial.” *Id.* “[R]elevant considerations include: (1) whether ‘Congress creat[ed] a new cause of action, and remedies therefor, unknown to the common law, because traditional rights and remedies were inadequate to cope with a manifest public problem’; and (2) whether jury trials would ‘go far to dismantle the statutory scheme’ or ‘impede swift resolution’ of the claims created by statute.” *Id.*

142. Here, the actions which the Act and HISA’s Enforcement Rule allow HISA to assign to agency adjudication arise at common law. HISA’s claims seek fines and the permanent deprivation of financial gain as civil penalties. These types of civil penalties were “a type of remedy at common law that could only be enforced in courts of law.” *Tull v. United States*, 481 U.S. 412, 422 (1987). In fact, these HISA proceedings cannot be meaningfully distinguished from SEC actions to impose civil penalties under securities laws, which qualify as an action at common law. *Jarkesy*, 34 F.4th at 454.

143. Nor do the Fifth Circuit’s and Supreme Court’s precedents permit these actions to be assigned to agency adjudication without a jury trial. There is no reason to believe that traditional rights and remedies were inadequate to address the problem, and honoring the jury-trial right would not dismantle the scheme. Like the securities laws in *Jarkesy*, the Act expressly permits HISA to prosecute an action in federal court. 15 U.S.C. §3054(j).

144. Rule 8330 thus deprives Intervenors' members and others in their same position of their Seventh Amendment jury-trial right.

145. But that is not the only constitutional problem the Enforcement Rule raises. Rule 8400(a)(1) gives the FTC, HISA, "or their designees" "free access to the books, records, offices, racetrack facilities, and other places of business of Covered Persons that are used in the care, treatment, raising, and racing of Covered Horses, and to the books, records, offices, facilities, and other places of business of any person who owns a Covered Horse or performs services on a Covered Horse." 87 Fed. Reg. at 4031. And Rule 8400(a)(2) empowers the FTC, HISA, "or their designees" to "seize any medication, drug, substance, [or] paraphernalia" that is "in violation or suspected violation of any provision of 15 U.S.C. [§] 57A or the regulations of the authority." *Id.* In other words, Rules 8400(a)(1) and (a)(2) purport to authorize persons acting under ostensible government authority to search private effects outside the judicial process.

146. But "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009).

147. The search scheme created by the HISA Enforcement Rule does not fall under any of those exceptions. In particular, it does not qualify for the administrative-search exception. *See City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015) ("in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker"). Rules 8400(a)(1) and (a)(2) do not give covered persons any chance to obtain precompliance review before any neutral decisionmaker.

148. Furthermore, the Fourth Amendment requires more than mere suspicion to seize personal property. *United States v. Musa*, 45 F.3d 922, 924 (5th Cir. 1995) ("The probable cause

necessary to support a seizure” requires “more than mere suspicion.”). But that unconstitutionally low standard is the very basis for the searches authorized under Rule 8400(a)(2).

149. The FTC approved Rule 8400(a)(1) and (a)(2) despite acknowledging that HISA’s seizure authority is unnecessarily broad, and that it awaits the proposal of a rule modification defining the type of “object” or “device” eligible for seizure. Enforcement Rule Order at 34-35. Those yet-to-be-disclosed modifications will be cold comfort to those covered persons whose Fourth Amendment rights are violated by unlawful searches and seizures conducted under Rule 8400 before the as-yet-unproposed modifications take effect.

150. In requesting that HISA postpone its regulations, a cosponsor of the Act acknowledged that “many individuals in the industry have been informed they must register with the Authority and allow *unbridled and unconstitutional authority* to enter and search their property.” Congressman’s Letter at 1. In fact, the Constitution demands it. U.S. Const. Amend. IV.

151. Besides those fatal constitutional flaws, Rule 8400’s authorization for searches and seizures exceeds HISA’s statutory authority.

152. First, Rule 8400 gives HISA much broader investigatory power than the Act permits. The Act instructs HISA to develop rules authorizing “access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses.” 15 U.S.C. §3054(c)(1)(A)(i). Rule 8400 parrots that language but it then *adds* an additional clause purporting to grant “free access” “to the books, records, offices, facilities, and other places of business of *any person* who owns a Covered Horse or performs services on a Covered Horse.” 87 Fed. Reg. at 4031 (emphasis added). That additional clause, which has no basis in the statute, unlawfully expands HISA’s power beyond what Congress granted.

153. Second, Rule 8400 empowers HISA to seize personal property, even though the Act's grant of authority is limited to providing *investigatory power*. 15 U.S.C. §3054(c)(1)(A). The power to investigate does *not* include the power to seize.

154. The FTC's approval of Rule 8400 was also arbitrary and capricious. The FTC did not explain how Rule 8400 is consistent with the Fourth Amendment, and its analysis of whether Rule 8400 comports with the Act was unreasonable. "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). That standard requires reviewing courts to make sure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.* "Put simply, [the court] must set aside any action premised on reasoning that fails to account for relevant factors or evinces a clear error of judgment." *Texas v. Biden*, 20 F.4th 928, 989 (5th Cir. 2021).

155. The Enforcement Rule makes Intervenors' members subject to search and seizure without proper constitutional safeguards in place and exceeds the FTC's statutory authority. It must be enjoined to protect the rights of Intervenors' members.

156. HISA's Enforcement Rule also suffers from procedural defects similar to those that plague the Racetrack Safety Rule. The FTC must provide sufficient notice about a proposed rule "to permit interested parties to comment meaningfully." *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988). But here again, the FTC failed to provide sufficient notice as a matter of law because the HISA Enforcement Rule repeatedly references and incorporate provisions that were not yet available during the comment period (and still are not available). And even if all those referenced provisions were available, a 14-day comment period like the one allotted was an insufficient length of time to review the proposed rules, assess their problems, and draft comments explaining those problems to the FTC. *See Nat'l Lifeline Ass'n*, 921 F.3d at 1117.

C. Assessment Methodology Rule (Rule 8500 Series)

157. Finally, HISA’s Assessment Methodology Rule is contrary to law.

158. Congress refused to fund HISA with federal funds, but instead directed HISA to establish its own funding structure. 15 U.S.C. §5302(f). State racing commissions that do not agree to fund HISA using money from the State’s treasury or its own operations must “fund the State’s proportionate share of the horseracing anti-doping and medication control program and the racetrack safety program.” *Id.* §5302(f)(1)(C)(i)(I). In short, the Act requires HISA to create a method for collecting funds that ensures that States are in fact paying their proportionate share.

159. The Act specifies how HISA must do that. Its assessment methodology must be “based on” “the projected amount of covered racing starts for the year in each State.” *Id.* §5302(f)(C)(ii)(I)(bb). For Louisiana, this requires HISA to assess fees on covered persons according to the number of “racing starts” in the State. *Id.* §5302(f)(3).

160. Contrary to the Act—which instructs that the fees must be assessed based on “racing starts” and “covered racing starts”—HISA’s rules calculate assessments in part based on the *purse size* from the races held within a state. 87 Fed. Reg. at 9352.

161. The FTC *itself* acknowledged that this methodology “focuses on a metric that is not part of the Act’s basis of calculation of fees—purses.” Assessment Methodology Rule Order at 11. By definition, then, the Assessment Methodology Rule is contrary to law and the FTC should have rejected it. But the FTC summarily dismissed this contention by appealing to the Act’s supposed “broad directive” for HISA to come up with an assessment methodology. *Id.* at 16. Whatever discretion HISA might have to adopt a methodology, its chosen course cannot exceed the bounds Congress set. Yet on its face, the Assessment Methodology plainly does just that.

162. The Assessment Methodology Rule thus contravenes statutory authority because it adopts an assessment methodology that bases fee assessments in parts on purse size—a nonstatutory

factor. This error affects how HISA imposes fees both for cooperating and non-cooperating states and increases what Intervenor will have to pay to cover their alleged proportionate share of HISA's operating costs. *See United States v. Bass*, 404 U.S. 336, 349 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”); *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984) (“Absent a clear statement of intention from Congress, there is a presumption against a statutory construction that would significantly affect the federal-state balance.”).

III. The Effects of HISA's Unlawful Rules on Intervenor

A. The State of Oklahoma and the Louisiana State Racing Commission

163. HISA's unlawful rules will harm Intervenor in numerous ways. *See Massachusetts v. EPA*, 549 U.S. 497, 518-520 (2007) (States afforded “special solicitude” in standing inquiry); *see also Texas v. United States*, 809 F.3d 134, 151-55 (5th Cir. 2015) (same).

164. Oklahoma's horse racing sector “contributes 9,574 direct jobs and adds \$482 million in direct value to the state economy.” Cathey Decl. ¶6. Oklahoma hosts over 2,100 races per year and the Oklahoma Horse Racing Commission issues over 4,400 occupational licenses per year for individual directly working at racetracks and in the horse racing industry. *Id.*

165. As the state regulator for horse racing, the Oklahoma Horse Racing Commission regulates all aspects of the horse racing industry in the state. The OHRC is “charged by clear statutory mandate to design, create and maintain a racing program which is free of even a suggestion of corruption or dishonesty.” *Okla. Park, Inc. v. Okla. Horse Racing Comm'n*, 716 P.2d 666, 667 (Okla. 1986).

166. The Act threatens to upend this regulatory regime. It requires Oklahoma and the Oklahoma Horse Racing Commission to cooperate and share information with HISA; forces them to remit taxes and fees to fund HISA, or lose the ability to collect taxes and fees for their own anti-

doping, medication-control, and racetrack safety programs; and preempts many Oklahoma laws and regulations.

167. The Act also imposes on Oklahoma the false option of either submitting to HISA's plenary authority and collecting fees on HISA's behalf, or be precluded from imposing fees and taxes it has imposed for years to regulate and support horseracing in Oklahoma. 15 U.S.C. §3052(f)(2)-(3). This false option, and threats to Louisiana's monetary and sovereign interests that stem from it, harm Louisiana.

168. The Act further purports to require Oklahoma "law enforcement authorities" to "cooperate and share information" with HISA. 15 U.S.C. §3060(b). The Act and HISA's rules promulgated under it thus force the State of Louisiana against its will to devote substantial resources to helping HISA carry out a federal program. This mandate harms Oklahoma's sovereign interests in running its government free from federal coercion.

169. Finally, even though Oklahoma has successfully regulated horseracing for decades, the Act and HISA's rules promulgated under it preempt state laws and regulations on which Oklahoma's citizens and regulated industry have long relied to ensure the safety and integrity of horseracing. 15 U.S.C. §3054(b). HISA's rules purport to preempt these Oklahoma laws with no meaningful oversight by politically accountable actors.

170. The Act and HISA's rules promulgated under it divest Oklahoma of its police powers over horseracing in Louisiana, conscript Louisiana employees to help HISA carry out non- Oklahoma functions, and force Oklahoma to choose between remitting funds to HISA or losing some of its powers of taxation. These harms are immediately impending. The Oklahoma Horse Racing Commission also has devoted resources to preparing to implement the Act (under protest), which injures the State and its People both by intruding on their sovereignty and by requiring them to spend state resources in ways they otherwise would not. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army*

Corps of Eng'rs, 531 U.S. 159, 172-73 (2001) (“Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”).

B. Associational Intervenors

171. Fourteen Horsemen’s Benevolent and Protective Associations and one racing association, through its members, including persons covered as owners and trainers under the Act, will suffer harm through unlawful regulation that interferes with their mission and purpose. *See* Ex. B-O, T. HISA’s rules will affect the distribution of race purse money for the organization’s members, which the organizations have a role in negotiating.

172. NAARV, through its members, will likewise suffer harm through unlawful regulation of the veterinary practice and related burdens imposed by the HISA Rules on racetrack veterinarians. *See* Ex. Z.

173. The organization’s members will also suffer harm through the enforcement of rules inconsistent with each State’s longstanding rules and regulations. *See* Ex. B-O, T, Z.

174. Defendant Lazarus’s statement that HISA intends to scratch or disqualify otherwise qualified horses associated with owners who decline to register with HISA confirms that enforcing HISA’s rules will preclude the organization’s members from competing for purse money, cause the forfeiture of purse money, terminate business interests, and increase costs for horsemen. *See* Ex. B-O, T, Z.

175. Likewise, racetracks stand to suffer severe and irreparable harm HISA’s imposition of restrictions and penalties on noncompliant tracks that include “inability to host races, termination of business ... , and associated expenses for the care and welfare of the racetrack.” Ex. P-S.

CLAIMS FOR RELIEF

COUNT I

**Anti-commandeering
(Racetrack Safety Rule)**

U.S. Const. amend. X, 87 Fed. Reg. at 449, 87 Fed. Reg. at 453

176. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

177. “Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” *New York v. United States*, 505 U.S. 144, 161 (1992) (alterations omitted).

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

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

180. Because the Racetrack Safety Rule commandeers that State of Oklahoma’s legislative process and compels the State and its agents to enact and enforce a federal regulatory program, it must be vacated and enjoined.

COUNT II

**Administrative Procedure Act
(Racetrack Safety Rule—Rule 2010 Exceeds Statutory Authority)
5 U.S.C. §706, 15 U.S.C. §3051(4), 87 Fed. Reg. at 445**

181. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

182. A “reviewing court shall ... hold unlawful and set aside agency action ... found to be ... not in accordance with law” or “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. §706(2)(A), (C).

183. Rule 2010 defines “covered horse” more broadly than the Act. This expands the bounds of HISA’s authority beyond the statutory authority granted to the FTC and HISA. *Compare* 87 Fed. Reg. at 445, *with* 15 U.S.C. §3051(4).

184. Because Rule 2010 contravenes the limits of the FTC’s and HISA’s authority under the Act, it must be enjoined and vacated.

COUNT III
Administrative Procedure Act
(Racetrack Safety Rule—Arbitrary and Capricious)
5 U.S.C. §706, 87 Fed. Reg. at 445-59

185. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

186. A “reviewing court shall ... hold unlawful and set aside agency action ... found to be arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. §706(2)(A).

187. The FTC failed to meaningfully address problems with the Racetrack Safety Rule raised in the improperly abbreviated comment period, including that the crop rules is dangerous and threatens the integrity of races, and that the FTC-approved rule is tailored for Thoroughbreds but can be applied to other types of horses at the election of a state racing commission.

188. Because the Racetrack Safety Rule is arbitrary and capricious, it must be vacated and enjoined.

COUNT IV
Seventh Amendment
(Enforcement Rule—Violation of the Right to a Jury Trial)
U.S. Const. amend VII, 87 Fed. Reg. at 4028-31

189. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

190. “[T]he Seventh Amendment jury-trial right applies to suits brought under a statute seeking civil penalties.” *Jarkesy*, 34 F.4th at 452.

191. The Enforcement Rule allows HISA or its designee to seek civil penalties from covered persons. HISA enforcement actions under these rules that successfully obtain civil penalties will deprive aggrieved parties of their property rights and economic interests without providing aggrieved parties the right to a jury trial. The Enforcement Rule thus violates the Seventh Amendment's guarantee of a jury trial.

192. Because the Enforcement Rule violates the Seventh Amendment, it must be vacated and enjoined.

COUNT V
Fourth Amendment
(Enforcement Rule—Violation of the Protection Against Unreasonable Search and Seizure)
U.S. Const. amend IV, 87 Fed. Reg. at 4031

193. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

194. “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.” *Gant*, 556 U.S. at 338.

195. Rule 8400 subjects covered persons, including the Intervenors’ members, to searches and seizures by HISA without prior approval by a judge or magistrate.

196. Because Rule 8400 violates the Fourth Amendment, it must be vacated and enjoined.

COUNT VI
Administrative Procedure Act
(Enforcement Rule—Rule 8400 Exceeds Statutory Authority)
5 U.S.C. §706, 15 U.S.C. §3053(c)(1)(A), 87 Fed. Reg. at 4031

197. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

198. Even if Rule 8400 were constitutional, it gives HISA much broader investigatory power than the Act permits. *Compare* 87 Fed. Reg. at 4031, *with* 15 U.S.C. §3053(c)(1)(A).

199. Rule 8400 also empowers HISA to seize personal property when the Act limits it to *investigatory* power. *Compare* 87 Fed. Reg. at 4031, *with* 15 U.S.C. §3053(c)(1)(A).

200. Because Rule 8400 contravenes the limits of the FTC’s and HISA’s authority under the Act, it must be enjoined and vacated.

COUNT VII
Administrative Procedure Act
(Enforcement Rule—Arbitrary and Capricious)
5 U.S.C. §706, 87 Fed. Reg. at 4028-31

201. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

202. A “reviewing court shall ... hold unlawful and set aside agency action ... found to be arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. §706(2)(A).

203. The FTC failed to meaningfully address problems with the Enforcement Rule raised in the improperly abbreviated comment period, including the Fourth Amendment issues and inconsistencies between Rule 8400 and the Act.

204. Indeed, the FTC did not explain why the Enforcement Rule was consistent with the Fourth Amendment, and its analysis of the statutory issue was unreasonable.

205. Because the Enforcement Rule is arbitrary and capricious, it must be vacated and enjoined.

COUNT VIII
Administrative Procedure Act
(Assessment Methodology Rule—Rule 8400 Exceeds Statutory Authority)
5 U.S.C. §706, 15 U.S.C. §3052(f), 87 Fed. Reg. at 9352

206. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

207. Under Rule 8510, HISA will calculate fees for covered persons in States that decline to agree to the HISA rules—including Louisiana—based in part on the purse size from races held

within the State. This contravenes the Act’s plain statutory text mandating that fees in this situation “shall” be assessed based on “racing starts.” *Compare* 87 Fed. Reg. at 9352, *with* 15 U.S.C. §3052(f).

208. Because Rule 8510 contravenes and exceeds the limits of the FTC’s and HISA’s authority under the Act, it violates the APA and must be enjoined and vacated.

COUNT IX
Administrative Procedure Act
(Assessment Methodology Rule—Arbitrary and Capricious)
5 U.S.C. §706, 87 Fed. Reg. at 9352

209. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

210. A “reviewing court shall ... hold unlawful and set aside agency action ... found to be arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. §706(2)(A).

211. The FTC failed to meaningfully address problems with the Assessment Methodology Rule raised in the shortened comment period, including that the rule “focuses on a metric that is not part of the Act’s basis of calculation of fees—purses.” Assessment Methodology Rule Order at 11.

212. Because the Assessment Methodology Rule is arbitrary and capricious, it must be vacated and enjoined.

COUNT X
Administrative Procedure Act
(Racetrack Safety Rule—Failure to Employ Adequate Notice and Comment)
5 U.S.C. §553, 87 Fed. Reg. at 445-59

213. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

214. The FTC’s approval of the Racetrack Safety Rule is a final agency action.

215. The Racetrack Safety Rule is a substantive rule issued without adequate notice-and-comment procedures required by 5 U.S.C. §553. *Nat’l Lifeline Ass’n*, 921 F.3d at 1117 (“[A] 30-day

comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.”)

216. Because the Racetrack Safety Rule is a substantive rule and does not fit an exception to the APA’s notice-and-comment requirement, they must be vacated and enjoined for lack of an adequate notice-and-comment period.

COUNT XI
Administrative Procedure Act
(Enforcement Rule—Failure to Employ Adequate Notice and Comment)
5 U.S.C. §553, 87 Fed. Reg. at 4028-31

217. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

218. The FTC’s approval of the Enforcement Rule is a final agency action.

219. The Enforcement Rule is a substantive rule issued without adequate notice-and-comment procedures required by 5 U.S.C. §553. *Nat’l Lifeline Ass’n*, 921 F.3d at 1117 (“[A] 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.”)

220. Because the Enforcement Rule is a substantive rule and does not fit an exception to the APA’s notice-and-comment requirement, they must be vacated and enjoined for lack of an adequate notice-and-comment period.

COUNT XII
Administrative Procedure Act
(Assessment Methodology Rule—Failure to Employ Adequate Notice and Comment)
5 U.S.C. §553, 87 Fed. Reg. at 4028-31

221. Intervenors repeat and re-allege the allegations in paragraphs 1-173 as if set forth fully herein.

222. The FTC’s approval of the Assessment Methodology Rule is a final agency action.

223. The Assessment Methodology Rule is a substantive rule issued without adequate notice-and-comment procedures required by 5 U.S.C. §553. *Nat'l Lifeline Ass'n*, 921 F.3d at 1117 (“[A] 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.”)

224. Because the Assessment Methodology Rule is a substantive rule and does not fit an exception to the APA’s notice-and-comment requirement, they must be vacated and enjoined for lack of an adequate notice-and-comment period.

WHEREFORE, Intervenors ask this Court to enter judgment in their favor and to provide the following relief:

- a. A declaratory judgment that the FTC exceeded its statutory authority by approving each of the HISA rules;
- b. A declaratory judgment that the HISA rules are arbitrary and capricious under the APA;
- c. A declaratory judgment that HISA’s Enforcement Rule violates the Fourth and Seventh Amendments to the United States Constitution;
- d. A declaratory judgment that the HISA rules are procedurally invalid under the APA because the FTC failed to promulgate them through proper notice-and-comment rulemaking procedures;
- e. A declaratory judgment and permanent injunction finding the HISA rules invalid and setting them aside;
- f. A temporary restraining order and an injunction prohibiting HISA or the FTC from taking any actions based on the HISA rules currently in place;
- g. All other relief to which Intervenors are entitled, including but not limited to attorneys’ fees and costs.

Dated: August 12, 2022

/s/ Bryan Cleveland

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**Pro Hac Vice application forthcoming*

Respectfully submitted,

Dated: August 12, 2022

/s/ John L. Duvieilh

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