

THE FIFTH CIRCUIT'S HOLDING IN *NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION V. BLACK* KEEPS HIS A FROM CROSSING THE WIRE

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INTRODUCTION

*When any one, or more, shall take upon them to make laws,  
whom the people have not appointed so to do,  
they make laws without authority,  
which the people are not therefore bound to obey.*

*-John Locke*<sup>1</sup>

The Framers of the Constitution deliberately divided federal powers among three branches, ensuring that each branch is held accountable by the others.<sup>2</sup> The private non-

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<sup>1</sup> Frank D. Garrison, *Will the Supreme Court Finally Address the Private Nondelegation Doctrine?*, THE FEDERALIST SOC'Y (Dec. 12, 2024) (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 426 (1960 ed.)), <https://fedsoc.org/commentary/fedsoc-blog/will-the-supreme-court-finally-address-the-private-nondelegation-doctrine> [<https://perma.cc/GN74-GY6T>].

<sup>2</sup> See U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1; THE FEDERALIST NO. 51 (James Madison).

delegation doctrine stands for the common-sense principle that granting such power to a private entity, not vested with such power by the Constitution or subject to the checks of the other branches, would “dash the whole scheme.”<sup>3</sup>

Under the private non-delegation doctrine, it is inaccurate to claim that private entities can play *no* role in exercising federal power. For example, in *Sunshine Anthracite Coal Co. v. Adkins*, the Supreme Court upheld a statutory scheme that allowed private boards to set wages and hours for coal producers that were then “approved, disapproved, or modified by the [National Bituminous Coal Commission].”<sup>4</sup> Despite the fact that this sort of regulation “is necessarily a governmental function,”<sup>5</sup> the Court reasoned that such delegation was permissible because the private boards “function[ed] subordinately” and “operate[d] as an aid to the Commission[,] … subject to its pervasive surveillance and authority.”<sup>6</sup> To sum up the doctrine, “a private entity may wield government power only if it ‘functions subordinately’ to a[] [federal] agency with ‘authority and surveillance’ over it.”<sup>7</sup>

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<sup>3</sup> Dep’t of Transp. v. Ass’n of Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring).

<sup>4</sup> Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 377–78, 400 (1940).

<sup>5</sup> Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

<sup>6</sup> *Adkins*, 575 U.S. at 388, 399.

<sup>7</sup> Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (*Black II*), 107 F.4th 415, 423 (5th Cir. 2024) (quoting Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (*Black I*), 53 F.4th 869, 881, n. 21 (5th Cir. 2022) (“*Black I'*)) *cert. granted, judgement vacated sub nom. Texas v. Black*, No. 24-465, 2025 WL 1787677 (U.S. June 30, 2025).

In 2024, the Fifth Circuit held, for the second time, that the Horseracing Integrity and Safety Act (“HISA”) violates the private non-delegation doctrine in *National Horsemen’s Benevolent and Protective Association v. Black* (“*Black II*”).<sup>8</sup> A group including the National Horsemen’s Benevolent and Protective Association (“NHBPA”)<sup>9</sup> challenged HISA as facially unconstitutional, claiming that the statute violated the Constitution in various ways.<sup>10</sup> Though most of these challenges failed, the Fifth Circuit concluded that “HISA is enforced by private entities that are not subordinate to the [Federal Trade Commission],” and therefore ultimately struck down HISA as unconstitutional under the private non-delegation doctrine due to its enforcement scheme.<sup>11</sup>

This comment argues that the Fifth Circuit’s holding in *Black II* is flawed and may lead to disastrous consequences both within and beyond the horseracing industry. Part I begins by outlining the development of HISA. Part II then discusses legal challenges to the current version of the statute. In Part III, I discuss the Fifth Circuit’s holding in *Black II* before critiquing the ruling and explaining how it may lead to devastating consequences that expand beyond the sport in Part IV. Part V concludes with a discussion of HISA’s future.

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<sup>8</sup> *Black II*, 107 F.4th at 441.

<sup>9</sup> See *infra* note 27 and accompanying text.

<sup>10</sup> *Black II*, 107 F.4th at 423.

<sup>11</sup> *Id.* at 441.

## I. BACKGROUND

Horseracing has never faced so turbulent a period as the present. Throughout the 2010s, an average of nearly 600 Thoroughbred racehorses suffered fatal injuries each year.<sup>12</sup> In 2021, Hall of Fame trainer Bob Baffert began his three-year suspension from Churchill Downs, the home of the Kentucky Derby, resulting from the failed drug test of subsequently disqualified Kentucky Derby winner Medina Spirit.<sup>13</sup> In 2023, tens of thousands of eyes were on-site at Santa Anita Park, and many more at home, to watch the then undefeated fan-favorite Maple Leaf Mel break down just seconds before crossing the wire in the leading position.<sup>14</sup> These events, among countless others, led to scathing attacks on the sport from multiple fronts. Commentators from some of the most prominent news outlets questioned its ethics and claimed that the “entire sport

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<sup>12</sup> See Shannon Luce, *The Jockey Club Releases Data from the Equine Injury Database for 2022*, THE JOCKEY CLUB (Mar. 20, 2023), <https://jockeyclub.com/Default.asp?section=Resources&area=10&story=1390> [https://perma.cc/5NNZ-WDSX].

<sup>13</sup> *Baffert Is Back. Churchill Downs Puts End to Hall of Fame Trainer’s Three-Year Suspension*, LEXINGTON HERALD LEADER (July 19, 2024 5:54 PM), <https://www.kentucky.com/sports/horses/kentucky-derby/article290249994.html> [https://perma.cc/8RYG-S5TU].

<sup>14</sup> Tim Layden, *Maple Leaf Mel and the Long Arc of a Horse-Racing Tragedy*, NBC SPORTS (Nov. 1, 2023, 1:15 PM), <https://www.nbcsports.com/news/maple-leaf-mel-and-the-long-arc-of-a-horse-racing-tragedy> [https://perma.cc/2XUP-E55Y].

is a foul.”<sup>15</sup> Other, less condemnatory, commentators pointed out the obvious: there was “unquestionably a need for unified oversight.”<sup>16</sup>

Congress addressed these challenges in 2020 by enacting HISA to “improve the integrity and safety of horseracing by requiring a uniform anti-doping and medication control program to be developed and enforced.”<sup>17</sup> HISA recognized the Horseracing Integrity and Safety Authority (“Authority”), described as a “private, independent, self-regulatory, nonprofit corporation,”<sup>18</sup> and tasked it with “developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program.”<sup>19</sup> To accomplish these tasks, Congress assigned the Authority the responsibility of forming both (i) an Anti-Doping and Medication Control Standing

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<sup>15</sup> Sally Jenkins, *Forget Maximum Security’s Misstep; The Whole of Horse Racing Is a Foul*, WASH. POST (May 5, 2019, 2:43 PM), <https://www.washingtonpost.com/sports/2019/05/05/forget-maximum-securitys-misstep-whole-horse-racing-is-foul/> [https://perma.cc/F276-EV7C]; see Jeremy Engle, *Is Horse Racing Ethical?*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/learning/is-horse-racing-ethical.html> [https://perma.cc/DR37-5PMV].

<sup>16</sup> Tim Layden, *Horse Racing’s Biggest Problem Will Dominate the 2019 Kentucky Derby*, SPORTS ILLUSTRATED (Apr. 29, 2019), <https://www.si.com/horse-racing/2019/04/29/kentucky-derby-horses-deaths-racetrack-rule-changes> [https://perma.cc/8XEP-6QV6].

<sup>17</sup> H.R. REP. NO. 116-554, at 1 (2020).

<sup>18</sup> 15 U.S.C. § 3052(a). The Authority is “governed by a board of directors,” which is comprised of both directors within the equine industry and independent directors. *Id.* § 3052(b).

<sup>19</sup> *Id.* § 3052(a).

Committee and (ii) a Racetrack Safety Standing Committee to advise and guide the “development and maintenance” of the programs.<sup>20</sup>

HISA requires the Authority to submit its proposed rules, including those regarding racing standards and enforcement, to the Federal Trade Commission (“FTC”), which must approve the rule before it takes effect.<sup>21</sup> The FTC “shall approve a proposed rule” if consistent with the Act and rules formerly approved by the FTC.<sup>22</sup> Once approved, covered persons<sup>23</sup> must comply with these rules as “a condition of participating in covered races and in the care, ownership, treatment, and training of covered horses.”<sup>24</sup>

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<sup>20</sup> *Id.* §§ 3052(a), 3052(c)(1)(A), 3052(c)(2)(A).

<sup>21</sup> *Id.* § 3053(b)(2).

<sup>22</sup> *Id.* § 3053(c)(2).

<sup>23</sup> *See Id.* § 3051(6) (“The term ‘covered persons’ means 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.”).

<sup>24</sup> *Id.* § 3054(d)(1); *see also id.* § 3051(5) (“The term ‘covered horserace’ means 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(6) (“The term ‘covered horse’ means any Thoroughbred horse, or any other horse made subject to this chapter . . . 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

Many industry actors welcomed the legislation, declaring it “the beginning of a new, safer era for our storied sport.”<sup>25</sup> However, praise was not universal. Others soon challenged the legality of HISA, including the NHBPA.<sup>26</sup> The NHBPA, comprised of thousands of racehorse owners and trainers,<sup>27</sup> claimed that HISA was facially unconstitutional due to violations of various constitutional principles, including the private non-delegation doctrine.<sup>28</sup>

In 2022, the NHBPA’s challenge made it to the Fifth Circuit Court of Appeals, which ruled HISA unconstitutional for violating the private non-delegation doctrine.<sup>29</sup> In ruling HISA unconstitutional, the Fifth Circuit focused on the Authority’s rulemaking power.<sup>30</sup> As noted by the court, if the Authority proposed a rule that was consistent with HISA, the FTC was *required*

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facility; and (B) ending on the date on which the Authority receives written notice that the horse has been retired.”).

<sup>25</sup> American Association of Equine Practitioners et al., *Our Voices: HISA Leads to Safer, More Transparent Sport*, BLOOD HORSE (Apr. 21, 2021), <https://www.bloodhorse.com/horse-racing/articles/247577/our-voices-hisa-leads-to-safer-more-transparent-sport> [<https://perma.cc/32EM-8B4K>].

<sup>26</sup> See *Black I*, 53 F.4th 869 (5th Cir. 2022).

<sup>27</sup> *About HBPA*, NAT’L HORSEMAN’S BENEVOLENT & PROTECTIVE ASS’N, <https://nationalhbpa.com/about-hbpa/> [<https://perma.cc/LV7C-XUD3>] (“We are Horsemen Helping Horsemen.”).

<sup>28</sup> *Black I*, 53 F.4th at 875.

<sup>29</sup> *Id.* at 890.

<sup>30</sup> *Id.* at 872.

to approve it.<sup>31</sup> Moreover, if the FTC found the rule inconsistent with the Act, it could only suggest changes.<sup>32</sup> The FTC also lacked the power to review policy choices made by the Authority and directed the public to engage directly with the Authority if they disagreed with such choices.<sup>33</sup> The court noted that “[a]n agency does not have meaningful oversight if it does not write the rules, cannot change them, and cannot second-guess their substance.”<sup>34</sup> Therefore, the Fifth Circuit held that Congress violated the private non-delegation doctrine by “giv[ing] a private entity the last word over what rules govern our nation’s thoroughbred horseracing industry.”<sup>35</sup>

The court further rejected HISA’s contention that the statute was constitutional because it was modeled after the Maloney Act, which no court has ever found to violate the private non-delegation doctrine.<sup>36</sup> The Maloney Act “authorizes a private entity, [the Financial Industry Regulatory Authority], to propose rules that the Securities and Exchange Commission . . . decides whether or not to promulgate into law.”<sup>37</sup> However, unlike the original version of HISA,

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<sup>31</sup> *Id.*; *see also* 15 U.S.C. § 3053(c)(3).

<sup>32</sup> *Black I*, 53 F.4th at 872; *see also* 15 U.S.C. § 3053(d).

<sup>33</sup> *Black I*, 53 F.4th at 872.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 887–88.

<sup>37</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Paul Tonko and Andy Barr in Support of Applicants at 5, *Walmsley v. Fed. Trade Comm’n*, 117 F.4th 1032 (8th Cir. 2024) (No. 23-2687).

the Maloney Act allows the Securities and Exchange Commission (“SEC”) to “‘abrogate, add to, and delete from’ FINRA rules ‘as the [SEC] deems necessary or appropriate[.]’”<sup>38</sup> This language is meaningful, as it gives the SEC the “final word on the substance of [securities industry] rules” and leaves FINRA subordinate to the SEC.<sup>39</sup> Because this grants the SEC the power to *require* changes to FINRA rules, whereas the FTC could only *recommend* changes to rules, the particular language of the Maloney Act “ma[de] all the difference.”<sup>40</sup>

On account of the Fifth Circuit’s ruling, Congress quickly amended HISA in 2022.<sup>41</sup> As amended, the statute now gives the FTC the power to “abrogate, add to, and modify the rules of the Authority promulgated in accordance with [HISA].”<sup>42</sup> The amendment was heavily inspired by language of the Maloney Act focused on in *Black I* and the Bituminous Coal Act of 1937, which the Supreme Court upheld as constitutional in *Adkins*.<sup>43</sup> By deliberately structuring HISA’s amendment to be “consistent in every material respect with a regulatory configuration

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<sup>38</sup> *Black I*, 53 F.4th at 887 (quoting 15 U.S.C. § 78s(c)).

<sup>39</sup> *Black I*, 53 F.4th at 887.

<sup>40</sup> *Id.* at 888.

<sup>41</sup> See 15 U.S.C. § 3053(e).

<sup>42</sup> *Id.*

<sup>43</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Paul Tonko and Andy Barr in Support of Applicants, *supra* note 37, at 6–7 (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381(1940)).

long used by Congress and sustained by the courts,” Congress hoped to ensure HISA’s constitutionality.<sup>44</sup>

## II. POST-AMENDMENT CHALLENGES

### A. Oklahoma v. United States:

Despite the carefully crafted amendment, HISA soon faced additional legal challenges based on, among other claims, the private non-delegation doctrine. One such challenge appeared before the Sixth Circuit Court of Appeals in 2023, where a group that included numerous industry actors objected to HISA’s constitutionality.<sup>45</sup> The Sixth Circuit, in *Oklahoma v. United States*, ultimately held HISA constitutional following its amendment.<sup>46</sup>

First addressing the private non-delegation challenge in the rulemaking context, the Sixth Circuit held that the additional power granted to the FTC by the amendment “creates ‘a clear hierarchy.’”<sup>47</sup> In sum, the challenge to the Authority’s rulemaking power failed because:

In full, § 3053(e)’s amended text gives the FTC ultimate discretion over the content of the rules that govern the horseracing industry and the Horseracing Authority’s implementation of those rules. By the same token, ultimate “law-making is not

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<sup>44</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Paul Tonko and Andy Barr in Support of Applicants, *supra* note 37, at 7.

<sup>45</sup> *Oklahoma v. United States*, 62 F.4th 221, 224 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024) *reh’g granted and opinion vacated*, No. 23-402, 2025 WL 1787679 (U.S. June 30, 2025), and *cert. granted, judgment vacated*, No. 23-402, 2025 WL 1787679 (U.S. June 30, 2025).

<sup>46</sup> *Id.* at 225.

<sup>47</sup> *Id.* at 230 (quoting *Black I*, 53 F.4th 869, 888–89 (5th Cir. 2022)).

entrusted to the [Authority].” That makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one.<sup>48</sup>

The court then turned to the private non-delegation challenge in the enforcement context. Though the court acknowledged the “extensive” enforcement powers held by the Authority, namely “implement[ing] the Act, investigat[ing] potential rule violations, and enforc[ing] the rules through internal adjudications and external civil lawsuits,” it determined that the rulemaking and revision power granted to the FTC by Congress’ amendment provides the FTC “‘pervasive’ oversight and control” of such enforcement activities, “just as it does in the rulemaking context.”<sup>49</sup> To make this evident, the court provided various examples of how the FTC could ultimately control the Authority’s enforcement actions, listing numerous rules the FTC could pass to both grant itself more enforcement power and limit that of the Authority.<sup>50</sup>

The Sixth Circuit further relied on the FTC’s ability to reverse decisions made by the Authority and review the Authority’s decisions regarding adjudication before they are deemed final, concluding that “the FTC has full authority to review the Horseracing Authority’s

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<sup>48</sup> *Oklahoma*, 62 F.4th at 230 (quoting Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940)) (internal citations omitted).

<sup>49</sup> *Oklahoma*, 62 F.4th at 231 (quoting *Adkins*, 310 U.S. at 388).

<sup>50</sup> *Oklahoma*, 62 F.4th at 231 (“To ensure a fair enforcement process, the FTC could issue rules protecting covered persons from overbroad subpoenas or onerous searches. The FTC could require that the Authority provide a suspect with a full adversary proceeding and with free counsel. And the FTC could require that the Authority meet a burden of production before bringing a lawsuit or preclear the decision with the FTC.”).

enforcement actions.”<sup>51</sup> Therefore, the court determined that the Authority “is ‘subject to [the FTC’s] pervasive surveillance and authority,’ revealing that the Authority ‘operate[s] as an aid to the [FTC],’ nothing more.”<sup>52</sup> For these reasons, the Sixth Circuit rejected the private non-delegation challenge and held HISA facially constitutional.<sup>53</sup>

**B. *Walmsley v. Federal Trade Commission:***

The Eighth Circuit followed suit in 2024, holding the amended HISA facially constitutional in *Walmsley v. Federal Trade Commission*.<sup>54</sup> Addressing the Authority’s rulemaking power, the court stated, “[HISA] as amended gives the Commission ‘ultimate discretion over the content of the rules that govern the horseracing industry.’”<sup>55</sup> Because the FTC has the power to change the Authority’s rules when it disagrees with them, the Eighth Circuit deemed the FTC the “primary rule-maker,” leaving the Authority “inferior” and “subordinate.”<sup>56</sup> Therefore, the court rejected the private non-delegation challenge to HISA’s rulemaking structure.<sup>57</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (quoting *Adkins*, 310 U.S. at 388).

<sup>53</sup> *Oklahoma*, 62 F.4th at 225.

<sup>54</sup> *Walmsley v. Fed. Trade Comm’n*, 117 F.4th 1032, 1036 (8th Cir. 2024) *cert. granted, judgment vacated sub nom.* No. 24-420, 2025 WL 1789398 (U.S. June 30, 2025).

<sup>55</sup> *Id.* at 1038 (quoting *Oklahoma*, 62 F.4th at 230).

<sup>56</sup> *Walmsley*, 117 F.4th at 1038 (quoting *Oklahoma*, 62 F.4th at 230).

<sup>57</sup> *Walmsley*, 117 F.4th at 1039.

The court then addressed the Authority's enforcement powers under HISA. Like the Sixth Circuit, the Eighth Circuit illuminated the FTC's superiority over the Authority by listing numerous ways in which the FTC could utilize its newfound rulemaking and revision powers to control the Authority's enforcement actions.<sup>58</sup> This, combined with the FTC's power to review and reverse the Authority's enforcement actions, led the court to conclude that the FTC has “pervasive oversight and control of the Authority's enforcement activities.”<sup>59</sup> Accordingly, the court rejected the private non-delegation challenge and held HISA facially constitutional.<sup>60</sup>

However, unlike the Sixth Circuit's opinion in *Oklahoma, Walmsley*'s holding was met with dissent. Judge Raymond Gruender disagreed with the majority's reasoning regarding the Authority's enforcement power under HISA.<sup>61</sup> Focusing on “the plain text of HISA,” he viewed the statute as creating “a clear delegation of enforcement power between the FTC and the

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<sup>58</sup> *Id.* (“The Commission may, for example, ‘issue rules protecting covered persons from overbroad subpoenas or onerous searches.’ The Commission may choose to create rules that require the Authority to obtain the Commission's approval before the Authority acts to commence a civil action under § 3054(j). The Commission has power to review the Authority's enforcement actions and to reverse them.”) (quoting *Oklahoma*, 62 F.4th at 231) (internal citations omitted).

<sup>59</sup> *Walmsley*, 117 F.4th at 1039 (quoting *Oklahoma*, 62 F.4th at 231).

<sup>60</sup> *Walmsley*, 117 F.4th at 1039–40.

<sup>61</sup> *Id.* at 1041–42 (Gruender, J., dissenting).

Authority, ‘each within the scope of their powers and responsibilities under [HISA].’”<sup>62</sup>

Specifically, Judge Gruender reasoned:

HISA expressly provides that the Authority’s “powers” include full investigatory authority and the ability to bring suit against alleged violators for injunctive relief. Therefore, by the plain text of the statute, the FTC cannot impede upon the power granted to the Authority, nor can the FTC compel Authority enforcement action. In this fashion, the Authority does not “function subordinately” to an agency with “authority and surveillance” over it, in violation of the private nondelegation doctrine.<sup>63</sup>

Judge Gruender further reasoned that the FTC cannot use its newfound rulemaking and revision powers to grant itself greater enforcement powers or limit those of the Authority.<sup>64</sup> In his view, doing so would “rewrite the statutory scheme that Congress enacted” because “the plain text of HISA empowers the Authority, and not the FTC, with broad enforcement power.”<sup>65</sup> In sum, he would have held that HISA as amended violates the private non-delegation doctrine.<sup>66</sup>

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<sup>62</sup> *Id.* at 1042 (citing 15 U.S.C. § 3054(a)).

<sup>63</sup> *Walmsley*, 117 F.4th at 1042 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)) (internal citations omitted).

<sup>64</sup> *Walmsley*, 117 F.4th at 1043.

<sup>65</sup> *Id.*; see also 15 U.S.C. § 3054(h) (“The Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.”); *id.* § 3054(j)(1) ([T]he Authority may commence a civil action against a covered person or racetrack that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter.”).

<sup>66</sup> *Walmsley*, 117 F.4th at 1043–44.

### III. THE FIFTH CIRCUIT'S RULING IN *BLACK II*

Judge Gruender's dissenting opinion in *Walmsley* largely reflects, and indeed relied on, the Fifth Circuit Court of Appeals' 2024 decision in *Black II*.<sup>67</sup> After initially ruling HISA unconstitutional in 2022 for its original rulemaking structure, the Fifth Circuit once again struck down HISA as unconstitutional two years later, despite Congress' amendment.<sup>68</sup>

The Fifth Circuit's opinion in *Black II* recognized that "in light of Congress' amendment to HISA [], the Authority's rulemaking power is subordinate to the FTC's," and instead found issue with the Authority's enforcement powers.<sup>69</sup> Addressing this issue, the court first listed various enforcement actions that the Authority can perform "without the FTC's involvement."<sup>70</sup> In the court's view, the FTC's ability to "review sanctions at the back end" is not enough to save HISA, as "each and every one of those actions is 'enforcement' of HISA," and, therefore, "[a]s far as enforcement goes, the horse was already out of the barn."<sup>71</sup> Specifically, the court reasoned:

The Act's plain terms permit only one conclusion: HISA is enforced by a private entity, the Authority. The Authority decides whether to investigate a covered entity for violating HISA's rules. The Authority decides whether to subpoena the entity's records or search its premises. The Authority decides whether to sanction it. And the Authority decides whether to sue the entity for an injunction or to enforce a sanction it has imposed. To be sure, the Authority does not perform these functions itself. Rather, HISA requires the Authority to contract with another private entity, USADA, which undertakes enforcement "on behalf of the Authority." §

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<sup>67</sup> See *id.* at 1042.

<sup>68</sup> *Black II*, 107 F.4th 415, 435 (5th Cir. 2024).

<sup>69</sup> *Id.* at 426.

<sup>70</sup> *Id.* at 429.

<sup>71</sup> *Id.* at 430.

3054(e)(1)(E)(i). The bottom line, though, is that a private entity, not the agency, is in charge of enforcing HISA.<sup>72</sup>

The court further rejected the argument that the FTC could “rein in” the Authority’s enforcement actions using its rulemaking power under the amended HISA.<sup>73</sup> In the Fifth Circuit’s view, doing so would “let the [FTC] rewrite the statute.”<sup>74</sup> Focusing on the same language Judge Gruender highlighted in *Walmsley*, the court concluded that HISA set out a “definite enforcement scheme.”<sup>75</sup> In the court’s view, any rule change by the FTC to grant itself more enforcement power under HISA would impermissibly “amend the enforcement scheme delineated by the statute.”<sup>76</sup>

Despite originally stating that the language absent in the original version of HISA, but present in the Maloney Act, created a “key distinction” that made “all the difference” between the two pieces of legislation,<sup>77</sup> the Fifth Circuit in *Black II* held that Congress’ inclusion of

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<sup>72</sup> *Id.* at 429.

<sup>73</sup> *Id.* at 431.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (citing 15 U.S.C. §§ 3054(e)(2), 3054(c)(1), 3054(e)).

<sup>76</sup> *Black II*, 107 F.4th at 431.

<sup>77</sup> *Black I*, 53 F.4th 869, 887–88 (5th Cir. 2022).

nearly identical language to the Maloney Act in the amended HISA<sup>78</sup> could not save it.<sup>79</sup> In the court’s view, the division of power outlined in HISA “gives the FTC scant oversight until the enforcement has actually occurred,” which fails to make the Authority subordinate to the FTC.<sup>80</sup> Because the court also ruled that the FTC’s newfound rulemaking power does not allow it to “amend the plain division of enforcement power laid out in HISA’s text,” the court reasoned that the FTC-Authority relationship strays materially from the SEC-FINRA relationship, as laid out in the Maloney Act, because “the FTC lacks any tools to ensure that the law is properly

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<sup>78</sup> Compare 15 U.S.C. § 78s(c) (“The Commission, by rule, *may abrogate, add to, and delete from . . . the rules of a self-regulatory organization...as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter.”*”) (emphasis added), with 15 U.S.C. § 3053(e) (“The Commission . . . *may abrogate, add to, and modify the rules of the Authority promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.*”) (emphasis added).

<sup>79</sup> *Black II*, 107 F.4th at 435.

<sup>80</sup> *Id.*

enforced.”<sup>81</sup> Therefore, the Fifth Circuit once again held that HISA violates the private non-delegation doctrine.<sup>82</sup>

#### IV. DISCUSSION

##### A. Interpretation:

The Fifth Circuit’s decision in *Black I* initially focused on the Authority’s rulemaking powers under HISA.<sup>83</sup> In *Black II*, the court acknowledged that Congress effectively addressed that issue by amending the statute and instead shifted its focus to the Authority’s enforcement powers, which it entirely failed to address in *Black I*.<sup>84</sup> Despite the fact that Congress amended HISA to include nearly identical language to the Maloney Act, which the court originally used to distinguish the two pieces of legislation, the Fifth Circuit held that the amended HISA remains unconstitutional.<sup>85</sup> The court’s decision in *Black II* therefore puzzlingly moves the finish line, which is particularly concerning given that it serves as the lone circuit preventing HISA from protecting horses and jockeys across the country.

In my view, the Fifth Circuit’s decision relied on a flawed interpretation of HISA. Under HISA, the Authority only has “subpoena and investigatory authority” over “violations committed

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Black I*, 53 F.4th 869, 887 (5th Cir. 2022).

<sup>84</sup> *Black II*, 107 F.4th at 424, 426 (“Our [*Black I*] decision did not address this challenge to the Authority’s enforcement powers[.]”).

<sup>85</sup> *Id.* at 435.

*under its jurisdiction.*<sup>86</sup> Put more simply, when considering HISA as a whole, even before the amendment, the Authority could only exercise these powers if they were in accordance with rules approved by the FTC.<sup>87</sup> The court was also concerned by the Authority’s ability to impose sanctions and commence civil actions under HISA.<sup>88</sup> However, as amended, the statute allows the FTC to “abrogate, add to, and modify the rules of the Authority.”<sup>89</sup> Therefore, “the FTC could easily set criteria for the Authority’s enforcement activities,” such as “requir[ing] the Authority to clear enforcement actions [including imposing sanctions and commencing civil actions] in advance.”<sup>90</sup> Consequently, using the “scope of [its] powers”<sup>91</sup> under HISA, the FTC can implement rules granting them greater enforcement power, thereby subordinating the Authority’s enforcement powers under HISA.

Doing so would not require the FTC to “rewrite the enforcement scheme Congress enacted” as the Fifth Circuit and Judge Gruender concluded.<sup>92</sup> “[I]ssu[ing] rules protecting

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<sup>86</sup> 15 U.S.C. § 3054(h) (emphasis added).

<sup>87</sup> *Id.* § 3053(b)(2).

<sup>88</sup> *Black II*, 107 F.4th at 429.

<sup>89</sup> 15 U.S.C. § 3053(e).

<sup>90</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Paul Tonko and Andy Barr in Support of Applicants, *supra* note 37, at 9.

<sup>91</sup> 15 U.S.C. § 3054(a).

<sup>92</sup> *Walmsley v. Fed. Trade Comm’n*, 117 F.4th 1032, 1043 (8th Cir. 2024) (Gruender, J., dissenting); *Black II*, 107 F.4th at 431.

covered persons from overbroad subpoenas or onerous searches,”<sup>93</sup> for example, does not eliminate the Authority’s power granted under § 3054(h). Rather, it simply imposes a limitation to the exercise of such enforcement power, which the FTC would be entirely within its “scope of [] powers”<sup>94</sup> under the scheme created by HISA to do.<sup>95</sup> Still, the FTC’s ability to subordinate the Authority’s power under HISA in this way “gives it ‘pervasive oversight and control of the Authority’s enforcement activities.’”<sup>96</sup> Because the FTC can work *within* HISA’s framework to grant itself greater enforcement powers and limit that of the Authority, creating such rules would not rewrite HISA’s enforcement scheme. To this point, the Eighth Circuit stated, “To subordinate the Authority’s enforcement activity, moreover, the Commission need only work within the structure of the Act as designed, not create a new statutory regime.”<sup>97</sup>

Crucially, the FTC also has the power to review and reverse any final decision regarding civil sanctions imposed by the Authority.<sup>98</sup> This power “reveal[s] that the Authority ‘operate[s] as

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<sup>93</sup> Oklahoma v. United States, 62 F.4th 221, 231 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024) *reh’g granted and opinion vacated*, No. 23-402, 2025 WL 1787679 (U.S. June 30, 2025), and *cert. granted, judgment vacated*, No. 23-402, 2025 WL 1787679 (U.S. June 30, 2025).

<sup>94</sup> 15 U.S.C. § 3054(a).

<sup>95</sup> See *id.* § 3053(e).

<sup>96</sup> *Walmsley*, 117 F.4th at 1039 (quoting *Oklahoma*, 62 F.4th at 231).

<sup>97</sup> *Walmsley*, 117 F.4th at 1040.

<sup>98</sup> See 15 U.S.C. § 3058(c).

an aid to the [FTC],’ nothing more.”<sup>99</sup> Combined with its rulemaking power, this allows the FTC to “control the Authority’s enforcement activities and ensure that the FTC, not the Authority, ultimately decides how the Act is enforced.”<sup>100</sup>

I also disagree with the Fifth Circuit’s conclusion that the FTC-HISA relationship materially differs from the SEC-FINRA relationship. HISA’s “back-end” language is nearly identical to that of the Maloney Act, which allows the SEC to “‘abrogate, add to, and delete from’ FINRA’s rules ‘as the Commission deems necessary or appropriate.’”<sup>101</sup> According to the court, the absence of this language in the original version of HISA “ma[de] all the difference” between the FTC-HISA and SEC-FINRA relationships.<sup>102</sup> Now that Congress amended HISA to address this difference, legislators supporting HISA believe that “there can be no question that the Authority is properly subordinated to the FTC, just as FINRA is to the SEC.”<sup>103</sup>

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<sup>99</sup> *Oklahoma*, 62 F.4th at 231 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)).

<sup>100</sup> *Oklahoma*, 62 F.4th at 231.

<sup>101</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Andy Barr and Paul Tonko in Support of Defendants-Appellees and Affirmance of Judgment, *supra* note 37, at 17 (citing 15 U.S.C. § 78s(c)); *see also supra* note 78.

<sup>102</sup> *Black I*, 53 F.4th 869, 888 (5th Cir. 2022).

<sup>103</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Andy Barr and Paul Tonko in Support of Defendants-Appellees and Affirmance of Judgment, *supra* note 37, at 17.

Despite its reasoning in *Black I*, the Fifth Circuit held that the two relationships *still* differ materially after HISA's amendment.<sup>104</sup> It reasoned that whereas the SEC can initiate its own investigations and seek sanctions, along with other enforcement powers, the FTC's power is limited to a tail-end review of enforcement actions that already occurred.<sup>105</sup> In the court's view, this tail-end enforcement power is insufficient to make the Authority subordinate to the FTC.<sup>106</sup> However, as previously discussed, the FTC's enforcement power is *not* limited to a tail-end review, as it can grant itself greater enforcement powers *within* HISA's enforcement scheme.<sup>107</sup>

Moreover, like the SEC-FINRA relationship, the FTC must approve rules proposed by the Authority before they take effect.<sup>108</sup> And like the SEC, the FTC can propose its own rules under HISA.<sup>109</sup> As discussed, the language in the amended HISA granting the FTC this power is nearly identical to that granting the SEC such power.<sup>110</sup> And like the SEC-FINRA relationship, any enforcement decision handed down under HISA is subject to review by the FTC.<sup>111</sup> Indeed,

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<sup>104</sup> *Black II*, 107 F.4th 415, 434 (5th Cir. 2024).

<sup>105</sup> *Id.* at 435.

<sup>106</sup> *Id.*

<sup>107</sup> See *supra* text accompanying notes 92–97.

<sup>108</sup> See Response Brief of Authority Defendants-Appellees at 3, *Walmsley v. Fed. Trade Comm'n*, 117 F.4th 1032 (8th Cir. 2024) (No. 24-420) (citing 15 U.S.C. § 3053(b)).

<sup>109</sup> See *id.* at 17–18 (citing 15 U.S.C. §§ 3053(e), 78s(c)).

<sup>110</sup> See *supra* note 78 and accompanying text.

<sup>111</sup> See Response Brief of Authority Defendants-Appellees, *supra* note 108, at 4–5, 17 (citing 15 U.S.C. §§ 3058, 78s(c)).

Judge Cole’s concurrence in *Oklahoma* argues that HISA’s enforcement scheme is “even more constitutionally sound” than that found in the Maloney Act.<sup>112</sup> He reasons, “HISA, unlike the Maloney Act, unambiguously empowers the FTC to obtain additional evidence not in the record below and to review the proceeding *de novo*.<sup>113</sup> Therefore, I agree with the legislators who claim that “the statute as amended is materially indistinguishable from the Maloney Act,”<sup>114</sup> if not stronger. Since the Maloney Act is universally accepted as constitutional, so should be HISA.<sup>115</sup>

**B. Policy Considerations:**

While there is a sound legal foundation for upholding HISA, important policy considerations provide additional support for maintaining the legislation. Whereas other sports are governed by uniform standards put forth by their respective leagues—such as the MLB, NFL,

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<sup>112</sup> *Oklahoma v. United States*, 62 F.4th 221, 244 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024) (Cole, J., concurring).

<sup>113</sup> *Id.* (citing 15 U.S.C. § 3058(c)(3)(C)).

<sup>114</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Andy Barr and Paul Tonko in Support of Defendants-Appellees and Affirmance of Judgment, *supra* note 37, at 15.

<sup>115</sup> See *Black I*, 53 F.4th 869, 887 (5th Cir. 2022) (“[E]very court to consider a non-delegation challenge to the Maloney Act has concluded that there is ‘no merit in the contention that the Act unconstitutionally delegates power to’ a private entity.”) (quoting Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black, 596 F. Supp. 3d 691, 717 (N.D. Tex.), *rev’d and remanded*, 53 F.4th 869 (5th Cir. 2022)).

and NHL—horseracing lacks such an entity.<sup>116</sup> It is important to note that racehorses, too, are athletes that put their bodies on the line to compete. Because horses have noticeably thin legs that carry their roughly half-ton body weight when running at high speeds, just one awkward step can cause a leg to break.<sup>117</sup> Such an injury nearly always requires euthanasia.<sup>118</sup>

The risk for injury is heightened when horses are drugged to mask any sign of pain. Drugging may allow an injured horse to pass veterinarian checks and cause “the horse to overexert itself during periods of intense exercise, which can lead to accidents, broken limbs, or death.”<sup>119</sup> These accidents harm not only horses, but the jockeys who ride them as well. In fact,

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<sup>116</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Andy Barr and Paul Tonko in Support of Defendants-Appellees and Affirmance of Judgment, *supra* note 37, at 4.

<sup>117</sup> *Protecting Racehorses*, AM. MUSEUM OF NAT. HIST., <https://www.amnh.org/exhibitions/horse/an-enduring-bond/protecting-racehorses#:~:text=Fatigued%20bodies%20are%20prone%20to,legs%20can%20twist%20and%20break> [https://perma.cc/6E3F-AP5D]; *All About the Thoroughbred*, THE JOCKEY CLUB, <https://www.thejockeyclub.co.uk/the-racing/all-about-the-thoroughbred/> [https://perma.cc/HKV6-RM6K].

<sup>118</sup> *Protecting Racehorses*, *supra* note 117.

<sup>119</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Andy Barr and Paul Tonko in Support of Defendants-Appellees and Affirmance of Judgment, *supra* note 37, at 9 (quoting Sealed Indictment ¶ 3, at 3, United States v. Grasso, No. 1:20-cr-00163 (S.D.N.Y. unsealed Mar. 9, 2020)).

hundreds of jockeys have died due to “training or racing accidents in the United States[,] . . . often because of grave injury to a horse.”<sup>120</sup> Because horses, unlike humans, cannot verbalize their pain, and financial incentives exist to perform such abusive practices, uniform regulation and oversight through HISA is perhaps even more necessary for horseracing than other sports that currently enjoy it.<sup>121</sup>

While the need for regulation and oversight is apparent, some argue that it should be handled at the state level. As the Sixth Circuit noted in *Oklahoma*, “no one doubts the imperative for oversight. The question, as is so often the case, is whether the regulation should be national or local.”<sup>122</sup> Serious problems exist when each state is allowed to set their own standards for the sport. The result of such a scheme is a “patchwork” of rules that allow some states to gain a competitive advantage over others by adopting more lenient regulations that put horses and jockeys at risk.<sup>123</sup> Furthermore, horses generally race in multiple states throughout their careers.

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<sup>120</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Andy Barr and Paul Tonko in Support of Defendants-Appellees and Affirmance of Judgment, *supra* note 37, at 7 (citing H.R. REP. NO. 116-554, at 17 (2020)).

<sup>121</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Andy Barr and Paul Tonko in Support of Defendants-Appellees and Affirmance of Judgment, *supra* note 37, at 8–9.

<sup>122</sup> *Oklahoma v. United States*, 62 F.4th 221, 226 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024).

<sup>123</sup> Luke P. Breslin, *Reclaiming the Glory in the “Sport of Kings”—Uniformity is the Answer*, 20 SETON HALL J. SPORTS & ENT. L. 297, 315 (2010).

This can cause difficulty for trainers, veterinarians, and other industry actors who need to keep track of the various rules each state puts forth to ensure compliance. Kenny McPeek, trainer of 2024 Horse of the Year, Thorpedo Anna,<sup>124</sup> recently explained, “every racetrack . . . and every state has different rules.”<sup>125</sup> Attempting to align these rules without a federal body would be inefficient. As noted in an amicus brief filed by legislators in support of HISA, “each of horseracing’s well-meaning attempts to create uniformity through state-by-state compacts and other agreements failed.”<sup>126</sup> Instead, McPeek believes that states should use HISA as an opportunity to align their rules.<sup>127</sup> For these reasons, the need for federal regulation of the sport through HISA is evident.

This need is heightened because horseracing is currently enduring a crisis.<sup>128</sup> A member of the Board of Stewards of The Jockey Club, attorney William M. Lear Jr., declared that the

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<sup>124</sup> Joe Perez, *Thorpedo Anna Wins Horse of the Year*, BLOOD HORSE (Jan. 23, 2025), <https://www.bloodhorse.com/horse-racing/articles/282241/thorpedo-anna-wins-horse-of-the-year> [<https://perma.cc/5KXP-6P32>]

<sup>125</sup> *Breaking Down HISA with Kenny McPeek*, HORSES RACES NOW, at 09:10 (Dec. 9, 2024) (downloaded using Apple Podcasts).

<sup>126</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Andy Barr and Paul Tonko in Support of Defendants-Appellees and Affirmance of Judgment, *supra* note 37, at 10.

<sup>127</sup> *Breaking Down HISA with Kenny McPeek*, HORSES RACES NOW, at 09:15 (Dec. 9, 2024) (downloaded using Apple Podcasts).

<sup>128</sup> See *supra* text accompanying notes 12–16.

sport is facing an “existential threat.”<sup>129</sup> He further emphasized, “If our response to that threat is or even appears to be business as usual, we’re going to lose.”<sup>130</sup> The long-term consequences of maintaining the status quo would be disastrous, if not terminal, for the sport. Therefore, while HISA has made horseracing slightly more costly for industry actors,<sup>131</sup> it seems like a fair trade off to help ensure the future of the sport. And as noted by Lisa Lazarus, HISA’s chief executive officer, “any added costs from HISA are a fraction of what honest horse people lose in purse money each year to dishonest ones.”<sup>132</sup> To make the most of their investment, industry actors would be wise to ensure not only their compliance with the regulations put forth by HISA, but

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<sup>129</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Andy Barr and Paul Tonko in Support of Defendants-Appellees and Affirmance of Judgment, *supra* note 37, at 8 (quoting Statement by William M. Lear, Jr. at 3, Legislation to Promote the Health and Safety of Racehorses: Hearing on H.R. 1754, the Horseracing Integrity Act of 2019, Before the Subcomm. on Consumer Prot. & Com. of the H. Comm. on Energy & Com., 116th Cong. (2020)).

<sup>130</sup> *Id.*

<sup>131</sup> Andrew Cohen, *Keeping Pace: The Costs of HISA Come Into View*, PAULICK REP. (Jan. 22, 2024), <https://paulickreport.com/features/keeping-pace/keeping-pace-the-costs-of-hisa-come-into-view#:~:text=HISA%20costs%2C%20when%20they%20are,any%20per%2Drace%20start%20ees> [https://perma.cc/2SHX-MPQ7].

<sup>132</sup> *Id.*

their counterparts' as well. Failing to do so would risk allowing a few bad seeds to kill the garden they harvest from.

Industry actors opposed to HISA would like people to believe that uses of unethical practices are too rare to justify the restrictions and costs that the Authority's regulations subject them to.<sup>133</sup> However, in February 2025, the Authority announced that it would pursue charges against fourteen horse trainers as part of what they alleged was a "widespread conspiracy" to violate rules designed to prevent pre-race pain-masking injections.<sup>134</sup> Of the horses receiving such alleged injections, 30 percent never ran another race after the race they were injected in preparation for, 10 percent were deemed lame post-race by veterinarians, and three died from injuries sustained during the race.<sup>135</sup> Four more of these horses died within just months of the injections.<sup>136</sup> One of the trainers implicated by this investigation criticized HISA less than a year prior, claiming that HISA's rules were "a nightmare" and "detrimental to the horse."<sup>137</sup>

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<sup>133</sup> Natalie Voss, *'Rogue Veterinarian': Documents Reveal Background of 245 Allegedly Illegal Joint Injections, Investigation Is Ongoing*, PAULICK REP. (Feb. 21, 2025), <https://paulickreport.com/news/the-biz/rogue-veterinarian-documents-reveal-background-of-245-allegedly-illegal-joint-injections-investigation-is-ongoing> [https://perma.cc/C6KD-S2L4].

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

## *Black II Keeps HISa from Crossing the Wire*

Concerningly, the dark side of horseracing extends well beyond this scandal.<sup>138</sup> These situations bring justifiable criticism to the sport, jeopardizing its future entirely.

The collapse of horseracing would lead to disastrous consequences. For starters, the sport is a popular source of entertainment, as it has been for centuries.<sup>139</sup> Tens of millions of people tuned into the Kentucky Derby in 2025, setting the highest viewership mark since 1989.<sup>140</sup> Dedicated fans continue to travel to racetracks across the country to view the horses in action, bet, and spend time with family and friends.<sup>141</sup> Especially in regions where horseracing plays an

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<sup>138</sup> See, e.g., Cecilia Vega, Aliza Chasan, Sarah Koch & Madeleine Carlisle, *Amid Doping Scandals and Deaths, Can a New National Regulator Clean Up Horse Racing?*, CBS NEWS (Nov. 12, 2023), <https://www.cbsnews.com/news/horse-racing-doping-scandals-deaths-60-minutes/> [<https://perma.cc/ZH6L-ULDJ>] (“The FBI said horse doping led to broken legs, cardiac issues and, in some cases, death. Richards was the lead FBI agent on the doping investigation that led to the conviction of 29 veterinarians, horse trainers and drug distributors.”).

<sup>139</sup> *Why Is Horse Racing Still Popular in 2025?*, THE PLAID HORSE (June 25, 2025), <https://www.theplaidhorse.com/2025/06/25/why-is-horse-racing-still-popular-in-2025/> [<https://perma.cc/J6FM-QB55>].

<sup>140</sup> *Kentucky Derby 2025 Draws Largest TV Audience Since 1989*, HORSE RACING NATION (May 5, 2025), [https://www.horseracingnation.com/news/Kentucky\\_Derby\\_2025\\_draws\\_largest\\_audience\\_since\\_1989\\_123](https://www.horseracingnation.com/news/Kentucky_Derby_2025_draws_largest_audience_since_1989_123) [<https://perma.cc/WD8G-M9FZ>].

<sup>141</sup> *How Popular is Horseracing?*, THE JOCKEY CLUB, <https://www.thejockeyclub.co.uk/the-racing/racing-explained/days-at-races/how-popular-is-horseracing>

important cultural role, losing such a long-standing and valued source of entertainment would be devastating.

Second, the loss of the sport would cause economic havoc, as the equine industry supports approximately 2.2 million jobs in the United States.<sup>142</sup> While some careers are quite clearly linked to horses, such as veterinarians, farriers, and breeders, other less-obvious careers are also supported by the equine industry, including truck drivers, chemists, and journalists.<sup>143</sup> As a whole, the equine industry contributed roughly \$177 billion to the United States economy in 2023.<sup>144</sup> The impact is substantial at the state and local level as well. The Thoroughbred industry has an economic impact of billions of dollars in Kentucky alone, with racing operations contributing over \$500 million to that sizable figure.<sup>145</sup> In 2022, the Breeders' Cup World Championships were hosted at Keeneland Race Course in Lexington, Kentucky, and brought a

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horseracing/#:~:text=The%20sport%20was%20popular%20in,popular%20sports%20in%20the%20world [https://perma.cc/P3JQ-5M96].

<sup>142</sup> American Horse Council, *2023 National Survey Reveals Horse Industry Supports 2.2 Million Jobs*, PAULICK REP. (Jan. 31, 2024), <https://paulickreport.com/horse-care-category/2023-national-survey-reveals-horse-industry-supports-2-2-million-jobs> [https://perma.cc/W49Y-HVU7].

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Economic Impact of the Equine Industry in Kentucky*, KY. THOROUGHBRED ASS'N, <https://www.kentuckybred.org/kentucky-equine-industry-impact/> [https://perma.cc/5ADG-SMZV].

nearly \$82 million economic impact to the area.<sup>146</sup> Clearly, losing horseracing would lead to disastrous economic consequences at the national, state, and local levels.

## **V. THE FUTURE OF HISA**

In June 2024, the Supreme Court denied certiorari in the Sixth Circuit's ruling in *Oklahoma*, which upheld HISA.<sup>147</sup> However, in September 2024, the Court issued an administrative stay, which put a temporary pause on the effects of the Fifth Circuit's ruling.<sup>148</sup> Predicting how the Supreme Court would rule should it review HISA based on purely ideological grounds is challenging, given that HISA was passed with bipartisan support<sup>149</sup> and upheld by two

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<sup>146</sup> *\$82m Economic Impact of Keeneland Breeders' Cup Revealed*, THOROUGHBRED DAILY NEWS (Mar. 17, 2023, 9:55 AM), <https://www.thoroughbreddailynews.com/82m-economic-impact-of-keeneland-breeders-cup-revealed/> [<https://perma.cc/9C9Q-JYUM>].

<sup>147</sup> T.D. Thornton, *Supreme Court Won't Hear HISA Constitutionality Challenge to Sixth Circuit Ruling*, THOROUGHBRED DAILY NEWS (June 24, 2024, 8:28 PM), <https://www.thoroughbreddailynews.com/supreme-court-wont-hear-hisa-constitutionality-challenge-to-sixth-circuit-ruling/> [<https://perma.cc/B85J-Y5Q9>].

<sup>148</sup> Andrew Cohen, *Keeping Pace: The Supreme Court May Soon Take a HISA Case*, PAULICK REP. (Sept. 24, 2024), <https://paulickreport.com/features/keeping-pace/keeping-pace-the-supreme-court-may-soon-take-a-hisa-case> [<https://perma.cc/2ZC4-6A5Z>].

<sup>149</sup> Brief *Amici Curiae* of Senator Mitch McConnell and Representatives Andy Barr and Paul Tonko in Support of Defendants-Appellees and Affirmance of Judgment, *supra* note 37, at 14. ("Indeed, HISA was so uncontroversial and bipartisan that it was selected for inclusion in the annual appropriations bill consistent with this process and consequently enacted by large

of the three circuit courts that reviewed it—all of which lean conservative.<sup>150</sup> Additionally, the issuance of the stay does not necessarily mean that the Court will ultimately uphold HISA. That said, the Court’s decision to prevent the Fifth Circuit’s ruling from taking effect just months after it declined to review the Sixth Circuit’s ruling in *Oklahoma*, indicates that it would be likely to uphold HISA.

Should it decide to review HISA, the Supreme Court would have the opportunity to add clarity to a muddied doctrine that lower courts have struggled to apply for decades.<sup>151</sup> As noted by the Fifth Circuit, “[k]ey to applying the [private non-delegation] doctrine are two eighty-year-old Supreme Court cases.”<sup>152</sup> In June 2025, the Court issued a ruling in *Federal Communications Commission v. Consumers’ Research*, which held that a different statutory scheme—in which a private entity aids the Federal Communications Commission by “manag[ing] the [Universal Service] Fund’s<sup>153</sup> day-to-day operations and also play[ing] a role in producing the financial

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majorities in both chambers. And Congress’ response to the Fifth Circuit’s decision of November 18, 2022, also came to the floor of the Senate by unanimous consent.”).

<sup>150</sup> See *Circuit Status*, DEMAND JUSTICE (Aug. 11, 2025), <https://demandjustice.org/circuit-status/> [<https://perma.cc/372E-G5ZY>].

<sup>151</sup> See Garrison, *supra* note 1.

<sup>152</sup> *Black I*, 53 F.4th 869, 880 (5th Cir. 2022) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940)).

<sup>153</sup> “[E]very carrier providing interstate telecommunications services [is required] to ‘contribute[]’ . . . to a fund designed to ‘preserve and advance universal service.’ The FCC must use the money in that fund, now known as the Universal Service Fund, to pay for subsidy

projections that end up determining the contribution factor<sup>154</sup>—did not violate the private non-delegation doctrine.<sup>155</sup> As a result, the Court vacated the Fifth, Sixth, and Eighth Circuits’ rulings, ordering them to give HISA “further consideration.”<sup>156</sup> However, HISA and the statute at issue in *Consumers’ Research* clearly differ, meaning that the decision may not have a drastic impact on the circuits’ holdings. In fact, it appears that each side plans on making similar, if not the same, arguments the next go-around.<sup>157</sup> Therefore, it is difficult to predict how the Court would work with its precedent in ruling on HISA’s statutory scheme.

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programs for designated populations and facilities needing improved access.” Fed. Commc’ns Comm’n v. Consumers’ Rsch., No. 24-354, slip op. at 4 (U.S. June 27, 2025) (citing 47 U.S.C. §§ 254(a), (d), (e); Wisconsin Bell, Inc. v. United States ex rel. Heath, No. 23-1127, slip op. at 2 (U.S. Feb. 21, 2025)) (internal citations omitted).

<sup>154</sup> “To calculate how much carriers must contribute to the Fund . . . , the FCC has devised a formula, known as the ‘contribution factor.’” Fed. Commc’ns Comm’n v. Consumers’ Rsch., No. 24-354, slip op. at 7 (U.S. June 27, 2025) (citing 47 CFR §54.709(a)).

<sup>155</sup> Fed. Commc’ns Comm’n v. Consumers’ Rsch., No. 24-354, slip op. at 7, 37 (U.S. June 27, 2025).

<sup>156</sup> *HISA Issues Statement on Supreme Court Orders*, HORSERACING INTEGRITY & SAFETY AUTH. (June 30, 2025), <https://hisaus.org/news/hisa-issues-statement-on-supreme-court-orders> [<https://perma.cc/FF92-BNFA>].

<sup>157</sup> *See id.* (“That [*Consumers’ Research*] ruling aligns with what every district court has already said in the HISA cases: the private nondelegation doctrine challenges against the Act have no merit.”); *HBPA Confident That 5th Circuit Will Rule HISA Unconstitutional a Third Time*, NAT’L

In the Appointments Clause context, the Supreme Court has recently placed a particular emphasis on the power to issue a final, unreviewable decision in determining whether an officer is deemed inferior or superior. In *United States v. Arthrex, Inc.*, the Supreme Court held that “the unreviewable authority wielded by [administrative patent judges] during inter partes review is incompatible with their appointment by the Secretary to an inferior office.”<sup>158</sup> To fix this defect, the Court granted the Director of the Patent and Trademark Office the power to “review [such] decisions and, upon review, . . . issue decisions himself on behalf of the Board.”<sup>159</sup> As the Court declared, this decision is consistent with “the rule from *Edmond* that the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate.”<sup>160</sup>

Should the Court apply similar principles in determining whether the Authority is subordinate in the context of the private non-delegation doctrine, HISA would almost certainly be upheld as constitutional. The FTC has the power to review de novo decisions of the Authority, and subsequently, an administrative law judge, at its discretion and may “affirm, reverse, modify,

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HORSEMEN’S BENEVOLENT & PROTECTIVE ASSOCIATION, <https://nationalhbpa.com/hbpa-confident-that-5th-circuit-will-rule-hisa-unconstitutional-a-third-time/> [https://perma.cc/X8SB-VD9J] (“Our well-founded arguments regarding HISA remain unchanged—it is . . . deeply flawed, unconstitutionally delegates governmental authority to a private corporation and places unfair burdens on horsemen.”).

<sup>158</sup> *United States v. Arthrex, Inc.*, 594 U.S. 1, 23 (2021).

<sup>159</sup> *Id.* at 25.

<sup>160</sup> *Id.* at 27.

set aside, or remand” such decisions.<sup>161</sup> This, combined with the FTC’s ability to adopt rules granting itself greater enforcement powers and limiting that of the Authority,<sup>162</sup> should be considered more than enough oversight to make the Authority subordinate to the FTC in satisfaction of the private non-delegation doctrine.

Still, the Court may very well eventually strike down the statute as unconstitutional, in which case Congress would need to once again work to amend HISA. If the recent amendment of the statute was not enough to satisfy the constitutional concerns, Congress will likely need to turn to an extensive re-writing of the statute. Such an outcome would be rather disappointing, however, as a logical interpretation of HISA as it stands satisfies the private non-delegation doctrine.<sup>163</sup> Forcing Congress to act once again will only serve to unnecessarily delay the implementation of HISA, putting more people and horses at risk in the meantime.

## **CONCLUSION**

HISA is already making a noticeable impact on the horseracing industry. The statute has led to “year-over-year declines” in horse death rates, reflecting the sport’s improved safety and integrity.<sup>164</sup> Meanwhile, the death rate at tracks without HISA regulation is nearly double that of

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<sup>161</sup> See 15 U.S.C. § 3058(c).

<sup>162</sup> See 15 U.S.C. § 3053(e).

<sup>163</sup> See *supra* Section IV.A.

<sup>164</sup> HISA Communications, *Continued Decline in Racing Fatalities Among HISA’s Third Quarter Metrics*, PAULICK REP. (Dec. 17, 2024), <https://paulickreport.com/news/the-biz/continued-decline-in-racing-fatalities-among-hisas-third-quarter->

HISA-regulated tracks.<sup>165</sup> Despite the increased responsibilities for industry actors under HISA, trainer Kenny McPeek recognizes the positive potential of HISA and hopes that regulations under the statute will eventually expand into areas such as financial responsibility within the sport.<sup>166</sup> In his words, “horsemen should support [the Authority].”<sup>167</sup>

The private non-delegation doctrine reflects some of this country’s most foundational principles,<sup>168</sup> and therefore unlawful delegations of federal power should absolutely be struck down as unconstitutional. However, as the Sixth Circuit noted, “[s]ometimes government works”—in HISA’s case, it does. While the Fifth Circuit’s ruling in *Black II* currently prevents HISA from crossing the wire, one can hope that the legal challenges will soon be resolved upon

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metrics#:~:text=The%20third%20quarter%20of%202024,began%20on%20May%2022%2C%202023 [https://perma.cc/5FRS-RGXY].

<sup>165</sup> HISA Communications, *HISA: Non-Covered States Have Nearly Double Fatality Rate of Covered States*, PAULICK REP. (Mar. 17, 2025), <https://paulickreport.com/news/the-biz/hisa-non-covered-states-have-nearly-double-fatality-rate-of-covered-states> [https://perma.cc/KB84-7S3E].

<sup>166</sup> *Breaking Down HISA with Kenny McPeek*, HORSES RACES NOW, at 06:30 (Dec. 9, 2024) (downloaded using Apple Podcasts).

<sup>167</sup> *Id.* at 35:45.

<sup>168</sup> See *supra* text accompanying notes 1–3.

<sup>169</sup> *Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024).

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further review. Only at that point can HISA operate at its fullest potential, increasing the safety and integrity of horseracing and thereby “preserv[ing] the sport for generations to come.”<sup>170</sup>

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<sup>170</sup> See HISA Communications, *supra* note 164.