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.	CIVIL ACTION NO. _____

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

With nothing more than a ministerial rubber stamp from a federal agency, Congress imbued a private, nonprofit corporation with the power of the federal government to regulate a multi-billion dollar industry. *See* A Brief Description of the World of Horseracing (describing the horseracing industry and economic impact in Louisiana) (Exhibit A); *see also* Decl. of Charles A. Gardiner, III (Exhibit B). Unsurprisingly, that corporation has devised a litany of rules untethered from both law and reason. The agency charged by statute with reviewing the corporation's rules has likewise failed in its duty to ensure promulgated rules adhere to both substantive and procedural requirements. Time is of the essence before the unlawful rules go into effect on **July 1, 2022**, causing irreparable harm to every class of industry participant united in this lawsuit.

For the history of this Nation, 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. The Act establishes a private, nonprofit corporation known as the Horseracing Integrity and Safety Authority ("HISA") and purports to delegate to HISA vast federal regulatory power over the horseracing industry. *Id.* §3052(a). This delegation of power to a private entity suffers 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).

The claims in this lawsuit complement those other pending claims. This suit concerns legal flaws with 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 Federal Trade Commission—an independent agency with no specialized knowledge about or experience with horseracing. 15 U.S.C. §3053(a), (b)(2). Even so, the Act minimizes the FTC's participation in the regulatory process: the FTC "shall" approve HISA's proposed regulations as long as those regulations are consistent with the Act and "applicable rules approved by the [FTC]." *Id.* §3053(c)(2).

Plaintiffs—a collection of States, racing commissions, industry groups representing nearly every type of participant in the horseracing industry, and the individual themselves who will be regulated as "covered persons" under the Act—bring this suit to vindicate their rights under the Fourth Amendment, Seventh Amendment, Tenth Amendment, and Administrative Procedure Act. The Court should prevent HISA's procedurally and substantively deficient regulations from going into effect, grant Plaintiffs' motion, and enjoin implementation of the unlawful regulations.

BACKGROUND

I. THE IMPLEMENTATION OF HISA'S BREATHTAKING REGULATORY POWER MUST COMPLY WITH THE ACT.

The regulatory power that Congress purported to delegate to HISA is breathtaking in scope, covering virtually all aspects of horseracing. *See generally* 15 U.S.C. §§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.

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.

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.

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]").

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.").

A. The Act's scope.

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). 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). The Act's effective date, triggering the implementation of its regulatory apparatus, is July 1, 2022. *Id.* §3051(14).

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). 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(*l*)(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(*l*)(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(*l*)(3).

Under the Act, "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(5). A "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." *Id.* §3051(6).

The Act further defines many regulated roles within the horseracing industry. A "breeder" is "a person who is in the business of breeding covered horses." *Id.* §3051(2). A "jockey" is "a rider or driver of a covered horse in covered horseraces." *Id.* §3051(12). An "owner" is "a person who holds an ownership interest in one or more covered horses." *Id.* §3051(13). A "trainer" is "an individual engaged in the training of covered horses." *Id.* §3051(19).A "veterinarian" is a "a licensed veterinarian who provides veterinary services to covered horses." *Id.* §3051(21). The Act also includes a catchall for others in the industry. Yet, 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.

B. The Act establishes an unaccountable governance structure for HISA.

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). 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). 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. 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.

C. The Act relies on the States and the racing industry to fund HISA.

The Act further 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).

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). 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).

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).

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). 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.

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).

D. The Act delegates rulemaking authority to HISA with minimal government oversight.

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).

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). 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).

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. 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. 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).

II. THE FTC'S APPROVAL OF HISA'S RULES MUST COMPLY WITH THE ADMINISTRATIVE PROCEDURE ACT AND CONSTITUTIONAL PROTECTIONS.

As things stand today, the FTC has approved only 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.

First, consider HISA's Racetrack Safety Rule (Rule 2000 Series) (Exhibit C), 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 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 Plaintiffs, of their financial due if persons covered under the Act fail to register with HISA by the Act's July 1, 2022, effective date.

Second, consider HISA's Enforcement Rule (Rule 8000 Series) (Exhibit D), 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.

Third, consider HISA's Assessment Methodology Rule (Rule 8500 Series) (Exhibit E), 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.

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 temporarily restrained, and preliminarily and permanently enjoined, from enforcing the unlawful rules. Without a TRO or an injunction, Plaintiffs, and others like them, will suffer immediate and irreparable harm when HISA's unlawful rules take effect on July 1, 2022.

A. HISA's purported powers and duties.

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).

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). 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).

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).

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.

B. HISA was unable to establish the Horseracing Anti-Doping and Medication-Control Program.

Under the Act, by July 1, 2022, HISA must "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.

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.

Senator Grassley and his collogues 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. Letter from Senators Grassley, Manchin, Ernst, and Kennedy to Chairwoman Kahn & Ms. Lazarus at 2 (June 27, 2022) (Senators' Letter) (Exhibit F). 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.

C. The Act's Racetrack Safety Program requirements are quite onerous.

By July 1, 2022, HISA must "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).

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).

No less than 120 days *before* July 1, 2022, HISA must 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).

D. The Act creates HISA's Enforcement and Sanctions authority.

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).

E. Regulated parties must register with HISA.

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.

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." 15 U.S.C. §3054(d)(1). The registrant must agree "to be subject to and comply with" HISA's enforcement rules. *Id.* §3054(d)(2).

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).

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). 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.

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).

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.

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.[1]

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE IMPLEMENTATION OF HISA'S RULES.

Plaintiffs have standing to challenge the implementation of HISA's rules because those actions—and the agency actions taken or foregone in reliance on them—harm each Plaintiff.

A. The Plaintiff States have standing.

To begin with, the HISA rules place the State of Louisiana's sovereign, proprietary, and *parens patriae* interests in imminent danger. *See Massachusetts v. EPA*, 549 U.S. 497, 518-520 (2007); *see also Texas v. United States*, 809 F.3d 134, 151-55 (5th Cir. 2015); *Texas v. United States*, 524 F. Supp. 3d 598, at 608-19 (S.D. Tex. 2021). Though Louisiana has standing under the traditional analysis, they also receive "special solicitude" on this issue. *Massachusetts v. EPA*, 549 U.S. at 518-520.

The State of Louisiana 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. Attorney General Jeff Landry is authorized to bring legal actions on behalf of the State of Louisiana and its citizens. La. Const. art. IV, §8. Relatedly, Plaintiff Louisiana State Racing Commission is an executive

[1] It is worth noting that Defendant Lazarus told participants at recent meetings that anyone who registers with HISA can also unregister. *See* Fenasci Decl. ¶7; Chatters Decl. ¶7; Lisa Lazarus, *KY HBPA – HISA Zoom Meeting*, YouTube (June 20, 2020), https://bit.ly/3bxzNY4. That statement is not true. Neither the HISA website nor customer service provide any mechanism to unregister with HISA after an individual signs up with the organization.

agency of the State of Louisiana and is responsible for regulating horseracing integrity and safety in the State of Louisiana. La. Stat. Ann. §4:144.

For the same reasons, Plaintiff State of West Virginia has standing through its power to bring legal actions on behalf of the State of West Virginia and its citizens. W. Va. Const. art. VII, §1; W. Va. Code §5-3-2; *see also State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 103-04 (W. Va. 2002). And Plaintiff West Virginia Racing Commission is charged by statute to supervise all horserace meetings and all persons involved in the holding or conducting of horserace meetings in West Virginia.

B. The Associational Plaintiffs have standing.

Next, several organizations who represent participants in the horseracing industry—all regulated as "covered persons" under the Act—likewise have standing to protect their organizational and members' interests. "An association may file suit 'to redress its members' injuries, even without a showing of injury to the association itself.'" *Thole v. U. S. Bank N.A*, 140 S. Ct. 1615, 1633 (2020) (quoting *Food and Commercial Workers v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996)). All the U.S. Constitution "requires is that a member would otherwise have standing to sue in their own right and that the interests the association seeks to protect are germane to the organization's purpose." *Id.* (alterations omitted). The same is true for "the other side of the same coin:" where the association "would have standing to sue in its own right" to protect the association's interests.

Plaintiff Louisiana Horsemen's Benevolent and Protective Association 1993, Inc. is a nonprofit corporation that operates "to foster, protect, represent, and promote the welfare and common interest of thoroughbred and quarter horse owners and trainers, to improve conditions in the horse racing industry, to improve relationships between horsemen, other members of the racing industry, and the general public in the State of Louisiana." Louisiana Horsemen's Benevolent and Protective Association 1993, Inc. and Subsidiaries, Consolidate Financial Statements at 7 (Dec. 31, 2020), https://bit.ly/3HS96JN (alterations omitted). The organization has the exclusive power to

enter into contracts with each racetrack in Louisiana. La. Stat. Ann. §4:179.1 (the organization is "designated and recognized as an authorized representative that shall represent member and other horsemen racing at licensed race meetings held in the state of Louisiana for the purpose of but not limited to negotiating contracts for such horsemen with all racing associations licensed by the state of Louisiana."). In addition, as representative of the Horsemen in Louisiana, the organization must grant its permission to send racing signals across state lines and has a perfected interest in purse monies of Louisiana races. La. Stat. Ann. §§27:361, 27:438 (perfected interest). Importantly, the organization and its members are subject to HISA rules and will be directly affected by HISA's attempts to implement them. Decl. of Edwin J. Fenasci ¶¶1, 4-7 (June 21, 2022) (Exhibit G). And they face imminent harm from HISA's unlawful enforcement.

Likewise, Plaintiff Louisiana Thoroughbred Breeders Association is a nonprofit corporation comprised primarily of members who are actively engaged in the breeding of a thoroughbred horse domiciled in Louisiana. Louisiana Thoroughbred Breeders Association, By-laws at 2-3 (Jan. 1, 2021), https://bit.ly/3OG05FM. The organization plays the vital role of providing registration and accreditation of Louisiana-bred foal (young horses). *Id.* at 10-12. The organization and its members are subject to HISA rules and will be directly affected by HISA's attempts to implement them. Decl. of Warren J. Harang, III ¶¶1, 5-8 (June 20, 2022) (Exhibit H).

Next, Plaintiff Jockeys' Guild, Inc. is a not-for-profit corporation that represents jockeys in Thoroughbred and Quarter Horse racing throughout the United States. Decl. of Terence J. Meyocks ¶1 (June 28, 2022) (Exhibit I). The Guild has approximately *950 active members* in the *thirty-six states* which allow pari-mutuel horse racing. *Id.* ¶3. The vast majority of jockeys who are licensed by the Louisiana State Racing Commission and engage in Thoroughbred racing in Louisiana are members of the Guild. *Id.* But the Guild's scope is by no means limited to Louisiana or any one particular State. In fact, the Guild is under the leadership of Hall of Fame and world renowned Co-Chairmen John

Velazquez and Mike Smith, with fellow Hall of Fame jockey Javier Castellano, well known jockey Julien Leparoux, and top Quarter Horse jockey James Flores serving as Vice Co-Chairmen. *Id.* ¶2. These individuals have raced around the world and Guild members continue to race and plan to race in all thirty-six states that allow pari-mutuel horse racing. *Id.* ¶2. The safety and welfare of human and equine athletes is paramount to the Guild. *Id.* ¶4. Guild members are covered under HISA and their physical safety and livelihood are put at risk by the implementation of HISA's rules anywhere in the country.

C. The Individual Plaintiffs have standing.

Finally, the Individual Plaintiffs have standing to sue to redress their injuries caused by the HISA rules. "The APA cause of action is broad." *Collins v. Mnuchin*, 938 F.3d 553, 573 (5th Cir. 2019), *aff'd in part, rev'd in part on other grounds sub nom. Collins v. Yellen*, 141 S. Ct. 1761 (2021). "The Administrative Procedure Act embodies the basic presumption of judicial review to one suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Id.* (alterations omitted). In fact, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id.* at 573-74. And "Congress has granted an APA claim to any party that alleges the challenged action had caused them injury in fact, and the alleged injury was to an interest arguably within the zone of interests to be protected or regulated by the statutes that the agencies were claimed to have violated." *Id.* at 574 (alterations omitted). The Individual Plaintiffs, as with all Plaintiffs, easily clear this low threshold.

The Individual Plaintiffs are: Plaintiff Bernard K. Chatters, a thoroughbred racehorse trainer, licensed by the Louisiana State Racing Commission, Decl. of Bernard K. Chatters, III ¶¶1, 8 (June 20, 2022) (Exhibit J); Plaintiff Edwin J. Fenasci, a thoroughbred racehorse owner, licensed by the Louisiana State Racing Commission, and executive director of the Louisiana Horsemen's Benevolent

and Protective Association, Fenasci Decl. ¶¶1, 4; Plaintiff Larry Findley, Sr., DVM, a thoroughbred racehorse veterinarian, licensed by the Louisiana State Racing Commission, Decl. of Larry Findley, Sr., DVM ¶1 (June 20, 2022) (Exhibit K); Plaintiff Warren J. Harang, III, a breeder of accredited Louisiana thoroughbred racehorses and president of the Louisiana Thoroughbred Breeders Association, Harang Decl. ¶1; and Plaintiff Gerard Melancon, a thoroughbred racehorse jockey, licensed by the Louisiana State Racing Commission. Decl. of Gerard Melancon ¶1 (June 20, 2022) (Exhibit L). Each of the Individual Plaintiffs qualify as a "covered person" under HISA and therefore face irreparable harm through the implantation of the HISA rules.

II. PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION.

To obtain a temporary restraining order or a preliminary injunction, Plaintiffs "must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012); *Karaha Bodas Co. v. Perusahaan Pertambangan*, 335 F.3d 357, 363 (5th Cir. 2003) (the same elements for a temporary restraining order).

A. Plaintiffs are likely to succeed on their claims.

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.'"). Just this week, 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. Senators' Letter at 1-2. 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.*

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 M). 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.

To date, the FTC has 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). 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 at 652. "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.*

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.* Fenasci Decl. ¶7; Chatters Decl. ¶7. 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.

B. The Racetrack Safety Rule (Rule 2000 Series) is unlawful and should be enjoined.

The Racetrack Safety Rule contains 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. Additionally, the Racetrack Safety Rule violates the Administrative Procedure Act's substantive and procedural requirements.

1. The Racetrack Safety Rule commandeers the States in violation of the Tenth Amendment.

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.* 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.

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.

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.

2. The Racetrack Safety Rule exceeds HISA's statutory authority.

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).

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.

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 Individual Plaintiffs 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.

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.

3. The Racetrack Safety Rule is arbitrary and capricious.

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.

Of particular concern to Plaintiffs 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).

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.*

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.").

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.

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.

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 commentors' 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.

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.*

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.").

4. The Racetrack Safety Rule failed to employ adequate notice and comment.

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.

First, Congress plainly intended HISA to submit its anti-doping and medication regulations and its safety regulations to the FTC in tandem. *See* §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). 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.

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.

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. 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.").

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.

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 Plaintiffs' 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.").

C. The Enforcement Rule (Rule 8000 Series) is unlawful and should be enjoined.

The Enforcement Rule likewise contains fatal legal deficiencies. Among them, the Enforcement Rule violates covered persons' Seventh Amendment jury-trial right and Four Amendment right against unreasonable search and seizure. The Enforcement Rule further violates the Administrative Procedure Act's substantive and procedural requirements.

1. The Enforcement Rule violates Seventh Amendment jury-trial rights.

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.

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.*

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.

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). Rule 8330 thus deprives the Individual Plaintiffs and others in their same position of their Seventh Amendment jury-trial right.

2. The Enforcement Rule violates Fourth Amendment seizure rules.

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, raining, 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.

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). 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).

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.

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.

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.

3. The Enforcement Rule exceeds HISA's statutory authority.

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

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.

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.

4. The Enforcement Rule is arbitrary and capricious.

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).

The Enforcement Rule makes Individual Plaintiffs 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 Individual Plaintiffs' rights.

5. The Enforcement Rule failed to employ adequate notice and comment.

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.

D. The Assessment Methodology Rule (Rule 8500 Series) is unlawful and should be enjoined.

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

1. The Assessment Methodology Rule exceeds HISA's statutory authority.

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.

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). 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.

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.

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 Plaintiffs 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.").

2. The Assessment Methodology Rule failed to employ adequate notice and comment.

HISA's Assessment Methodology Rule also suffers from procedural defects similar to those that plague its other rules. The FTC must provide sufficient notice about a proposed rule "to permit interested parties to comment meaningfully." *Fla. Power & Light Co.*, 846 F.2d at 771. But here again, the FTC failed to provide sufficient notice as a matter of law because the HISA Assessment Methodology Rule was promulgated through a piecemeal approach with an inadequate, 14-day comment period. *See Nat'l Lifeline Ass'n*, 921 F.3d at 1117.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT INJUNCTIVE RELIEF.

"To show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986). Instead, Plaintiffs "need only show it 'cannot be undone through monetary remedies"'5 and that it is "'*likely* to suffer irreparable harm in the absence of preliminary relief.'" *Texas v. United States*, 524 F. Supp. 3d at 663. All Plaintiffs easily clears that threshold. *See Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627, 638-39 (E.D. La. 2010) ("[I]n making the determination of irreparable harm, 'both harm to the parties and to the public may be considered.'").

Mere loss of customers is "widely recognized" as an injury "incapable of ascertainment in monetary terms and may thus be irreparable." *River Servs. Co. v. Peer*, 2017 WL 1407894 (E.D. La. Apr. 20, 2017) (Milazzo, J.). Here, Plaintiffs are threatened with irreparable harm in the form of vast destruction of the horseracing industry through individual penalties and systemic changes to the longstanding regulatory structure and revenue model. *Cf. Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332, 340 (E.D. La. 2011) (finding irreparable harm because "the plaintiff's operations in the Gulf of Mexico are threatened with endless disability"); *Hornbeck Offshore Servs.*, 696 F. Supp. 2d at 639 (finding irreparable harm because "[t]he effect on employment, jobs, loss of domestic energy supplies caused

by the moratorium as the plaintiffs ... lose business, ... will clearly ripple throughout the economy in this region"). Indeed, the 2016-2019 Rulemaking makes that clear that the horseracing industry and all participants face financial costs so great that large numbers of industry participants would be driven out of business if HISA's unlawful rules are enforced.

A. The State of Louisiana and the Louisiana State Racing Commission will suffer irreparable harm without injunctive relief.

HISA's unlawful rules will harm the State of Louisiana and the Louisiana State Racing Commission in numerous ways. *See Massachusetts v. EPA*, 549 U.S. at 518-20 (States afforded "special solicitude" in standing inquiry); *see also Texas v. United States*, 809 F.3d at 151-55 (same). Louisiana's "horse racing facilities and races generated over $1 billion in gaming in the United States" in 2016. Dek Terrell, Ph.D., *The Economic Impact of Horse Racing in Louisiana*, at 2 (Sept. 3, 2016) (Exhibit N). According to a recent industry study, Louisiana horse racing injected $578 million into Louisiana's economy for the most recent fiscal year. *Id.* Further, the government of the State of Louisiana collected "over $64 million directly from the horse industry in state taxes during the fiscal year ended June 30, 2016," and $73 million when considering indirect sources of taxation. *Id.* This accounts for 1% of Louisiana's total annual tax revenue. *Id.* Aside from monetary gains, Louisiana horse racing is also an important part of the Louisiana labor force, having created "a total of 12,640 Louisiana jobs." *Id.*

For two centuries, the State of Louisiana has exercised its police powers over the horseracing industry.[2] La. Stat. Ann. §4:141 *et seq.* The Louisiana Legislature has delegated significant regulatory

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[2] The longstanding history of state-regulated horseracing in Louisiana is recognized in the State's jurisprudence. In 1829, the Louisiana Supreme Court addressed the following case:

> On the trial in the court below, witnesses were adduced to prove such misconduct of the rider on the winning horse, as ought, according to established rules on the subject of racing, to destroy all advantage which would otherwise have accrued, in consequence of his having first passed the goal which terminated the race–to prove (in the jockey term) foul riding. Disputes of this kind are generally referred to the judges of the race, and their decision ought to have weight.

Morgan v. Maddox, 8 Mart. (n.s.) 294, 295 (1829).

In fact, three horse racing cases reached the Louisiana Supreme Court in the 1820's. *See id.*; *Criswell v. Gaster*, 5 Mart. (n.s.) 129 (1826) (addressing allegations of "of a fraud practi[c]ed on him in

authority over horseracing to the Louisiana State Racing Commission, including the power to "make rules and regulations for the holding, conducting, and operating of all race tracks, race meets, and races held in Louisiana." La. Stat. Ann. §4:147(6); *see also* La. Stat. Ann. §4:148.

The Louisiana State Racing Commission also has power to enforce, through fines and other measures, violations of statutes and regulations governing the health and safety of horses and all other participants in the horseracing industry in Louisiana. La. Stat. Ann. §§4:155, 4:160, 4:175. Additionally, the Louisiana State Racing Commission collects significant fees and taxes on behalf of the State as part of its duties. *See id.* §§4:161, 4:168. Indeed, the Louisiana State Racing Commission receives monies through both the regular appropriation process and through self-generated funds. These funds are vital to all aspects of the Commission's budget to carry out its intended functions. The HISA assessment will subvert the ability of the Louisiana State Racing Commission to perform all its duties as required by Louisiana law. These functions include the regulation of wagering, determining race dates, overseeing non-racing facilities at racetracks, and overseeing off track betting facility operations. *See* Louisiana Act 525, Louisiana 2022 Regular Session (effective June 16, 2022); Louisiana Act 530, Louisiana 2022 Regular Session (effective June 22, 2022).

HISA's implementation threatens to upend this regulatory regime. The Act requires Louisiana and its State 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 Louisiana laws and regulations. The Act also imposes on Louisiana 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

a horse race"); *Henderson v. Stone,* 1 Mart. (n.s.) 639, 639-40 (1823) (determining whether parties fulfilled a promise "to run with certain horses 'a fair and honorable race'"). And Fair Grounds in New Orleans, Louisiana is the second oldest continuously run racing site in the United States, dating back to 1838. 9 Am. Turf Reg. and Sporting Magazine at 227 (1838), https://bit.ly/3xZG7PH.

imposed for years to regulate and support horseracing in Louisiana. 15 U.S.C. §3052(f)(2)-(3). This false option, and threats to Louisiana's monetary and sovereign interests that stem from it, irreparably harm Louisiana.

The Act further purports to require Louisiana "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 Louisiana's sovereign interests in running its government free from federal coercion.

Finally, even though Louisiana has successfully regulated horseracing for decades, the Act and HISA's rules promulgated under it preempt state laws and regulations on which Louisiana'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 Louisiana laws with no meaningful oversight by politically accountable actors.

The Act and HISA's rules promulgated under it divest Louisiana of its police powers over horseracing in Louisiana, conscript Louisiana employees to help HISA carry out non-Louisiana functions, and force Louisiana to choose between remitting funds to HISA or losing some of its powers of taxation. These harms are immediately impending. The Louisiana State 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. Louisiana Horsemen's Benevolent and Protective Association will suffer irreparable harm without injunctive relief.

Plaintiff Louisiana Horsemen's Benevolent and Protective Association and 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. HISA's rules will affect the distribution of race purse money for the organization's members, which the organization has a role in negotiating. Fenasci Decl. ¶¶1, 4-7.

Of course, the Louisiana Horsemen's Benevolent and Protective Association is a non-profit entity. One of its mandates is to provide a workers' compensation program. La. Stat. Ann. §4:251. Any reduction to the number of starts in Louisiana and other states' racing jurisdictions, by its members, will reduce revenue for the workers' compensations program and thus will result in higher per start fees for all racing participants. La. Stat. Ann. §9:2616.

The organization's members will also suffer harm through the enforcement of rules inconsistent with Louisiana's longstanding rules and regulations. 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. Fenasci Decl. ¶¶7-8. Once the horse is out of the barn, there is no turning back.

C. Louisiana Thoroughbred Breeders Association will suffer irreparable harm without injunctive relief.

Plaintiff Louisiana Thoroughbred Breeders Association and its members, including persons covered as breeders under the Act, will suffer harm through unlawful regulation that interferes with the organization's mission and purpose. HISA's rules will affect breeders' ability to breed, sell, and earn breeder's purse-based awards. Harang Decl. ¶4. Accordingly, Plaintiff Louisiana Thoroughbred Breeders Association and its members will suffer the same irreparable harms as Plaintiff Louisiana

Horsemen's Benevolent and Protective Association and its members due to unlawful enforcement, scratches, and the inability to enter races.

D. Jockeys' Guild will suffer irreparable harm without injunctive relief.

Plaintiff Jockeys' Guild and its members—which includes 950 active members who race as jockeys in thirty-six states—face imminent physical and economic harm under HISA's rules. Meyocks Decl. ¶¶3-5. Jockeys are "covered persons" under the Act and are specifically singled out for fines and penalties under the Racetrack Safety Rule's punitive point system. *Id.* ¶16. No other particular category of covered person is singled out with a point system. *Id.* Worse still, the arbitrary and capricious crop rule most acutely affects jockeys and puts the Guild's members in danger by restricting their ability to use the tools available to them to run a safe and clean race. *Id.* ¶¶8-12. Further, Guild members race across the country in thirty-six states. *Id.* ¶3. So Guild members will suffer severe harm throughout the country if HISA is allowed to enforce its hastily, unlawfully promulgated rules in any jurisdiction, thus giving rise to the need for nationwide relief. *Id.*

E. The State of West Virginia and the West Virginia Racing Commission will suffer irreparable harm without injunctive relief.

HISA's unlawful rules will cause irreparable harm to the State of West Virginia and the West Virginia Racing Commission in many ways. Like Louisiana, the State of West Virginia has exercised its police powers over the horseracing industry for nearly a century. W. Va. Code §19-23-1 *et seq.* The West Virginia Legislature delegated significant regulatory authority over horseracing to the West Virginia Racing Commission. The Commission has "full jurisdiction" over "all horse race meetings," and "in this regard, [the Commission] has plenary power and authority." *Id.* §19-23-6. This authority includes the power to "promulgate reasonable rules under which all horse races … [and] horse race meetings … shall be held and conducted." *Id.* §19-23-6(3). The Commission also has the power to enforce, through "reasonable fines and other sanctions," violations of statutes and regulations

governing the horse racing industry in West Virginia. W. Va. Code §19-23-6(9). And the Commission collects significant fees and taxes on behalf of the State. *See*, *e.g.*, *id.* §§19-23-10, 19-23-14.

The Act threatens to upend this regulatory regime. As it does with Louisiana, it requires West Virginia and its 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 West Virginia laws and regulations. What's more, in doing so, HISA fails to take into account the realities of small-circuit racing most prevalent in West Virginia.

The Act also imposes on West Virginia 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 West Virginia. 15 U.S.C. §3052(f)(2)-(3). This false option, and the threats to West Virginia's monetary and sovereign interests that stem from it, harms West Virginia. It further weakens the State's horseracing industry—and, by extension, the State's economy—at a time when the industry is already facing increasing operating costs and other economic pressures.

The Act further purports to require West Virginia "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 West Virginia against its will to devote substantial resources to helping HISA carry out a federal program. This mandate harms West Virginia's sovereign interests in running its government free from federal coercion. And it burdens the State's and Commission's budgets in a State facing other serious and pressing economic challenges.

Finally, even though West Virginia has successfully regulated horseracing for decades, the Act and HISA's rules promulgated under it preempt state laws and regulations on which West Virginia 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 West Virginia laws with no meaningful oversight by politically accountable actors. The Act and HISA's rules promulgated under it divest West Virginia of its police powers over horseracing in West Virginia, conscript West Virginia employees to help HISA carry out non-West Virginia functions, and force West Virginia to choose between remitting funds to HISA or losing some of its powers of taxation. These harms are immediately impending. The West Virginia 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.

F. The Individual Plaintiffs will suffer irreparable harm without injunctive relief.

Each of the Individual Plaintiffs will suffer irreparable harm through untold economic havoc under HISA's threat to drive them out of the industry. *See Ensco Offshore Co.*, 781 F. Supp. 2d at 340 (threat to destroy a business or industry suffices); *Hornbeck Offshore Servs.*, 696 F. Supp. 2d at 639 (the loss of business that will "will clearly ripple throughout the economy" suffices).

Plaintiff Bernard K. Chatters and similarly situated trainers will face disqualification, forfeiture of purse money, termination of business interests, fines, suspension, and increased operational costs due to the enforcement of HISA's registration requirement and regulatory scheme. Chatters Decl. ¶¶7-8. Plaintiff Edwin J. Fenasci and similarly situated owners will face disqualification, forfeiture of purse money, termination of business interests, fines, suspension, and increased operational costs due to the enforcement of HISA's registration requirement and regulatory scheme. Fenasci Decl. ¶¶7-8. Plaintiff Larry Findley, Sr., DVM and similarly situated veterinarians will be restricted in their ability to treat thoroughbred racehorses, incur significant recordkeeping costs, and face additional operational expenses due to the enforcement of HISA's onerous rules. Findley Decl. ¶¶7-8. Plaintiff Warren J. Harang, III and similarly situated breeders will be inhibited from continuing to breed and

sell horses, and from earning breeders' purse-based awards. Harang Decl. ¶¶4, 7-8. Breeders will also face fines and increased operational costs due to the enforcement of HISA's onerous regulations that routinely conflict with or multiply burdens on breeders already subject to regulation under Louisiana law. *Id.* Finally, Plaintiff Gerard Melancon and similarly situated jockeys will face restrictions from entering races, disqualification, fines, and penalties for violations of arbitrary and capricious rules like HISA's crop rule, which conflicts with the Louisiana's longstanding rule without any proper justification and jeopardizes jockeys' ability to competitively ride racehorses. Melancon Decl. ¶¶6-9. The harm to all Plaintiffs is immediate and severe.

IV. AN INJUNCTION WOULD NOT HARM DEFENDANTS OR DISSERVE THE PUBLIC INTEREST.

Finally, the public interest and balance of harms weigh in favor of granting a preliminary injunction. Simply put, Defendants "have no legitimate interest in the implementation of an unlawful" regulations. *Texas*, 524 F. Supp. 3d., at 663. Instead, "the public is served when the law is followed." *Id.* at *51 (quoting *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013)); *see also League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action."). And the public has a strong interest in the proper function of the horseracing industry nationwide. *See, e.g.*, *Hornbeck*, 696 F. Supp. 2d at 639 ("An invalid agency decision to suspend [business] simply cannot justify the immeasurable effect on the plaintiffs, the local economy, the Gulf region, and the critical present-day aspect of the availability of domestic energy in this country."). Accordingly, the public interest and balance of harms weigh heavily in Plaintiffs' favor.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's Motion and enjoin Defendants from wreaking havoc on the horseracing industry across the Nation.[3]

[3] *See* Decl. of Elisabeth A. Daigle (authenticating additional documentary evidence) (Exhibit O).

Respectfully submitted,

Dated: June 29, 2022

/s/Elizabeth B. Murrill

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Pro Hac Vice admission application forthcoming