UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

BILL WALMSLEY, et al.,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants.

Case No. 3:23-cv-81-JM

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs Bill Walmsley, Jon Moss, and the Iowa Horsemen's Benevolent and Protective Association, move for a preliminary injunction against Defendants, the Federal Trade Commission and its Commissioners, and the Horseracing Integrity and Safety Authority (the Authority) and its Directors, to immediately halt the implementation and enforcement of rules issued by the Authority pursuant to the Horseracing Integrity and Safety Act of 2020 (the Horse Act). The Horse Act unconstitutionally delegates lawmaking power from Congress to the Authority—a private corporation made up of industry insiders who are not accountable to any branch of the federal government. And the Authority has purportedly exercised that power by issuing binding rules that impose significant obligations on the plaintiffs. These rules threaten Plaintiffs' ability to participate in the horseracing industry entirely, even as the 2023 racing season has already begun. This Court's immediate intervention is needed.

INTRODUCTION

Bill Walmsley loves horses. From his home nestled in the Arkansas Ozarks, Mr. Walmsley spends much of his days thinking about all things equine. The 81-year-old Mr. Walmsley dedicated

his life to public service—as both a state legislator and a state appellate judge. Now retired, Mr. Walmsley enjoys watching his horses do what they love most: run.

But Mr. Walmsley's retirement is no idle affair. To the contrary, Mr. Walmsley races his Thoroughbreds and leads the Arkansas chapter of the National Horsemen's Benevolent and Protective Association (HBPA), a group dedicated to providing housing, meals, and other services to employees in the horse industry.

Hundreds of miles away in Iowa, Jon Moss takes up the mantle for horsemen at the Iowa HBPA. And Mr. Moss knows horses—day in, day out, he works with jockeys, veterinarians, trainers, and owners to improve Hawkeye State racing.

Yet America's centuries-old relationship with horses and horseracing has been turned upside down. Under the Horseracing Integrity and Safety Act of 2020 (the "Horse Act") longstanding legal principles have fallen by the wayside. No longer will states govern horseracing (as they have for more than a century). Instead, the Horse Act has created a brand-new entity—a private nonprofit corporation known as the Horseracing Integrity and Safety Authority (the "Authority")—that wields power over all horseraces from coast to coast.

The Authority creates, enforces, and adjudicates horseracing rules—with hardly any limit. Under the Horse Act, the Authority picks what substances horses may ingest. It also sets racetrack safety standards, governs horseshoes, limits a jockey's ability to steer and control the horse, and requires everyone subject to the Act to register and pay fees. Any noncompliance comes with a lawsuit—filed by the Authority itself. And—to top it off—its own internal court system decides who wins.

Even worse, the Horse Act barely pretends to comply with the Constitution's separation of powers. The Act allows a private corporation to issue binding rules with no guiding principle. The

Federal Trade Commission's ostensible oversight serves as a mere mirage. After all, the Horse Act *requires* the FTC to approve the Authority's rules. FTC Commissioners can't initiate their own rulemaking or oversee the Authority's enforcement actions, appoint and remove board members, or control the Authority's funding. The Authority, in other words, is a law unto itself.

Congress cannot outsource governmental power in such a manner. Our Constitution vests specific powers in discrete branches of government for a simple reason: to protect liberty. And Congress may not end-run those structural protections merely because doing so makes its job easy. To the contrary, "when so much is at stake, ... 'the Government should turn square corners in dealing with the people.'" *DHS v. Regents of the Univ. Cal.*, 140 S.Ct. 1891, 1909 (2020) (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

America's horsemen deserve better. Bill Walmsley, Jon Moss, and the members of the Iowa HBPA face imminent harm—requiring testing, registration, fines, and a tsunami of new rules—without this Court's intervention. They are likely to succeed on their claims, and the equities and public interest resoundingly weigh in favor of stopping the Horse Act. This Court should enjoin the FTC and Authority from enforcing any rules.

BACKGROUND

A. The Plaintiffs: *America's Horsemen*

Plaintiffs Bill Walmsley and Jon Moss are just two of America's thousands of horsemen dedicated to improving the lives of workers and horses in the industry. From his home in Batesville, Arkansas, Mr. Walmsley devotes much of his time with his horses. A retired state legislator and state appellate judge, Mr. Walmsley now holds an ownership interest in three horses that he enters into racing events at Arkansas's lone racetrack, Oaklawn Racing in Hot Springs, Arkansas. *See* Ex. A ("Walmsley Decl.") at ¶¶ 4-5. His horses have raced this year at Oaklawn and are scheduled to

race in future events during the season, which goes through May. *Id.* ¶¶ 4-6. As a horse owner licensed by the state of Arkansas, Mr. Walmsley must—under the dictates of the Horse Act—register with the Authority. *Id.* at ¶ 1. He must also comply with the Authority's rules and regulations, which impose stringent restrictions on Mr. Walmsley—including requiring him to open his books and records to any search without reasonable suspicion and to provide his horses for testing whenever the Authority decides. *Id.* at ¶¶ 7-15.

Plaintiff Jon Moss shares a similar love for all things equine. His life has revolved around the racing industry for decades. Mr. Moss is a licensed horse owner in the State of Iowa and is also a "covered person" required to comply with the Horse Act. *See* Ex. B. ("Moss Decl.") at ¶ 1.

Mr. Moss leads the Iowa Horsemen's Benevolent and Protective Association (IHBPA), a group dedicated to providing healthcare, fair pay, and other benefits to racetrack workers. *Id.* at ¶¶ 2-3. IHBPA's members include large numbers of covered persons who must also comply with the Horse Act. *Id.* ¶¶ 4-5, 12-20. IHBPA members are currently participating in horse races in Arkansas and routinely participate in races around the country. *Id.* ¶ 6-8. Many members plan to participate in Iowa racing that begins in May. *Id.* ¶ 9-11. The IHBPA comprises more than 900 owners and trainers working with horses every day, each of whom is affected by the Authority's rules. *Id.* ¶¶ 4, 12-18.

B. The Horse Act

Seeking to create national uniformity in horseracing rules, Congress passed the Horse Act in 2020. And rather than regulate the industry directly, Congress outsourced that job to a brand-new entity: the Authority.

Recognized as a "private, independent, self-regulatory, nonprofit corporation," the Authority is tasked with "developing and implementing a horseracing anti-doping and mediation

control program and a racetrack safety program for covered horses, covered persons, and covered horseraces." 15 U.S.C. § 3052(a). The Authority consists of nine members—five "independent" members, and four "industry" members—who wield substantial power regulating the industry. 15 U.S.C. § 3052(b). The five independent members are "selected from outside the equine industry." 15 U.S.C. § 3052(b)(1)(A). The industry members "shall be ... selected from among the various equine constituencies." *Id.* § 3052(b)(1)(B)(i).

The Authority includes both an "anti-doping and medication control standing committee" and a "racetrack safety standing committee," which "provide advice and guidance to the Board on the development and maintenance of" the anti-doping program and racetrack safety program. 15 U.S.C. § 3052(c).

The Authority has the power to (among other things) issue legislative rules for laboratory standards, racing surface quality and maintenance, racetrack safety standards, anti-doping and medication control, civil sanctions, and procedures for finding violations of the Act. 15 U.S.C. § 3053(a). Rules from the Authority may also cover "access to offices, racetrack facilities, other places of business, books, records, and personal property" of covered persons. *Id.* § 3054(c)(1)(A)(i). Rules from the Authority preempt conflicting state laws. *Id.* § 3054(b).

The Authority possesses full subpoena and investigatory power, *id.* § 3054(c)(1)(A)(ii), (h), may issue guidance interpreting rules, *id.* § 3054(g), creates civil penalties that apply to covered persons, *id.* § 3054(i), and may file civil lawsuits for penalties or injunctive relief in federal court, *id.* § 3054(j). On top of those powers, the Authority creates its own internal adjudication scheme to enforce violations of the rules that the Authority creates. *Id.* § 3057, 3058.

The FTC has limited oversight of the Authority. Under Section 3053 of the Act, the Authority submits proposed rules to the Commission, and the Commission *must* approve the rules

so long as they are procedurally consistent with the Act and rules approved by the Commission. *Id.* § 3053(c). The FTC has no power to initiate rulemaking or to create rules based on its own policy preferences. *See id.* Moreover, the Commission has no ability to oversee the Authority's enforcement actions in federal court.

Since the passage of the Horse Act, the Authority has issued multiple sets of rules—including those governing racetrack safety and anti-doping. 87 Fed. Reg. 435 (Jan. 5, 2022); 87 Fed. Reg. 65,292 (Oct. 28, 2022). In each case, the Authority followed its own notice-and-comment procedures, and then submitted its finalized rules to the FTC for procedural approval. *See id.* Rather than engage in its own substantive notice-and-comment process, which, for instance, would normally require a cost-benefit analysis and the evaluation of substantive comments, the Commission reviewed the proposals purely for procedural compliance with the Horse Act. *See id.*

The Commission initially approved all rules (except for the anti-doping rules). *See* Complaint ¶ 72. (citing orders). In November 2022, the U.S. Court of Appeals for the Fifth Circuit ruled that the Horse Act unconstitutionally delegated government power to a private organization. *See Nat'l Horsemen's Benevolent and Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022).[1]

Seeking to address the Fifth Circuit's ruling, Congress amended Section 3053(e) of the statute in December 2022. *See* Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. (2022). The new version states:

> The Commission, by rule in accordance with section 553 of title 5, United States Code, may abrogate, add to, or modify the rules of the Authority promulgated in accordance with this Act as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act.

[1] As set out in the Complaint, the Commission did not initially approve the anti-doping rules because of the Fifth Circuit's ruling. *See* Complaint ¶¶ 74-76.

15 U.S.C. § 3053(e).

The amendment did not alter Section 3053(c), which requires the Commission to approve the Authority's rules if they are procedurally consistent with the Horse Act. On March 27, 2023, the Commission approved the Authority's Anti-Doping and Medication Control Rules. *See* FTC, *Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority* ("Anti-Doping Order") (March 27, 2023), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/P222100CommissionOrderAntiDopingMedication.pdf. As the Commission confirmed, the Horse Act still requires the FTC to approve the Authority's decisions, and the FTC cannot initiate its own rulemaking. *See id.* at 1 n.2 ("[T]his new power [under Section 3053(e)] extends only to changing existing Authority rules and does not allow the Commission to modify a proposed rule. Accordingly, here, the Commission's powers remain limited to approving or disapproving the proposed rule under § 3053(c).") On remand from the Fifth Circuit, the U.S. District Court for the Northern District of Texas has thus enjoined the implementation of the Anti-Doping Rule for a period of 30 days, pending further review. *See Nat'l Horsemen's Benevolent and Protective Ass'n v. Black*, 5:21-cv-071, ECF No. 134 (N.D. Tex. Mar. 31, 2023), attached as Exhibit C.

C. The Authority's Regulations

Rules promulgated by the Authority touch nearly every aspect of horseracing. Indeed, even the Authority itself admits that "the development of the [Anti-Doping rules] is unprecedented." 88 Fed. Reg. 5070, 5071 (Jan. 26, 2023); *see id.* at 5072 (rules "will create a comprehensive program that is unprecedented in horseracing as previously conducted and regulated in the United States.").

Combined, the rules determine racetrack safety standards, ban multiple drugs and substances, regulate how much of a banned substance may be in a horse's system, require owners

to submit to warrantless searches, mandate testing of horses at the Authority's request, require covered persons to register with the agency, impose fees on states or racing commissions, regulate horseshoes, limit what a jockey can do during a race and more. *See generally* 87 Fed. Reg. 435 (Jan. 5, 2022); 87 Fed. Reg. 44,399 (July 26, 2022); 88 Fed. Reg. 5070 (Jan. 26, 2023).

The most recent rules—anti-doping and medication control—cover substances that horses may no longer consume. In particular, the rules "set forth a list of anti-doping and controlled medication rules," and "set forth a list of prohibited substances and methods." 88 Fed. Reg. at 5070. Some violations are strict liability. *Id.* at 5074. And the Authority has created "civil sanctions that apply" to such violations. *Id.* at 5070. The Authority further created "procedures for disciplinary hearing." *Id.*

But that is not all. The new rules (1) prohibit associating with any banned person, *id.* at 5074, (2) allow the Authority to test horses outside of race time whenever and wherever it wants, *id.*, (3) ban any "disruptive or offensive conduct towards doping control personnel," *id.* at 5076, (4) outlaw "improper" or "insulting" conduct, *id.* at 5096, (5) require covered parties to "provid[e] complete and accurate information to the Authority" when the Authority asks, *id.* at 5093, (6) require covered parties to "mak[e] available for inspection *any* facility, office, stall, or equipment or other relevant location" used for Covered Horses, *id.*, and (7) grant the Authority *immediate and unfettered access* to *all* data, documents, and records used in the care, treatment, training, or racing of any Covered Horse," which includes any data on mobile devices, *id.* Many more rules create affirmative duties on covered persons, such as an owner reporting "in writing within 7 days of becoming aware" that his horse "has been castrated." *Id.* at 5094.

The rules are, in the Authority's words, "unprecedented." 88 Fed. Reg. at 5071. Yet, the FTC had no ability to reject the rules or approve them with changes reflecting the FTC's policy

preferences. Instead, the Commission's role is "limited to approving or disapproving the proposed rule" so long as it is consistent with the Horse Act and prior rules. *See* Anti-Doping Order at 1, n.2.

Mr. Moss and Mr. Walmsley are covered persons under the Act. *See* 15 U.S.C. § 3051(6) ("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."); *see* Walmsley Decl. ¶ 1; Moss Decl. ¶ 1. Indeed, they each must register with the Authority, which requires them to comply with all of its rules. Walmsley Decl. ¶ 8; Moss Decl. ¶ 12. Mr. Walmsley already has entered horses at Oaklawn Racing and intends to enter one or more of his horses into more races in the 2023 season at Oaklawn Racing. *See* Walmsley Decl. ¶¶ 4-6.

Members of the Iowa HBPA and Mr. Moss also qualify as "covered persons" under the act. Moss Decl. ¶ 5. As such, the more than 900 members of these organizations must also comply with all rules and regulations the Authority creates. *Id.* ¶¶ 12-18. These members intend to enter their horses into numerous events across the country in the 2023 racing season. *Id.* ¶¶ 6-9. Penalties for noncompliance include civil fines and potential lifetime bars from the industry. *Id.* ¶¶ 12-13, 15, 20-21.

The sudden shift has upended America's horseracing. The 2023 racing season is ongoing. And at Oaklawn in Arkansas, horses ran under Arkansas state rules one day, then the Authority's rules planned to take effect the next. A Texas district court issued an injunction, but the injunction covers only the anti-doping rules—not the racetrack safety rules. In other words, Mr. Walmsley and Iowa HBPA members must race under *both* Authority *and* state rules, so it remains unclear what precisely applies—and to whom (IHBPA members were not a party to the lawsuit in which

the injunction issued). The current injunction runs until May 1. But Iowa training begins in April and races in May. Moss Decl. ¶¶ 10-11, 21. Being subject to a change in rules will sow confusion and cause horsemen to be subject to fines, searches, testing, enforcement, and potential bans. *Id.* ¶¶ 12-18.

STANDARD OF REVIEW

"When determining whether to issue a preliminary injunction, the district court considers: '(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that [the] movant will succeed on the merits; and (4) the public interest.'" *D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 999 (8th Cir. 2019) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc*., 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). "No single factor in itself is dispositive; in each case all factors must be considered to determine whether on balance they weigh towards granting an injunction." *Calvin Klein Cosms. Corp. v. Lenox Lab'ys., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987).

ARGUMENT

I. Plaintiffs Have a Fair Chance of Succeeding on the Merits

Plaintiffs need show only that they have a "fair chance of prevailing" on the merits. *Bao Xiong*, 917 F.3d at 999. Sometimes courts apply a "more rigorous standard" that asks whether a movant is "likely to prevail" when a party seeks to enjoin "administrative actions by federal state or local government agencies." *Planned Parenthood of Minn., N.D., S.D., v. Rounds*, 530 F.3d 724, 732 n.6 (8th Cir. 2008) (en banc). But that higher standard is triggered only when "the full play of the democratic process[] was involved." *Id.* Here the rules did not follow a democratic process.

First, the rulemaking did not involve "both the legislative and executive branches"—such as bicameralism and presentment. *Bao Xiong*, 917 F.3d at 1000. Instead, a private entity promulgated rules—with little oversight from anyone in government. Second, the board members creating the rules were *not* elected or even appointed by the people or anyone in government. *See id.*

As courts have made clear, lawmaking by private and unaccountable corporate bodies means "citizens cannot readily identify the source of legislation or regulation that affects their lives." *Dept. of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 57 (2015) (Alito, J., concurring). Otherwise, the "[g]overnment [could] regulate without accountability ... by passing off a Government operation as an independent private concern." *Id.* And "[a]ccountability for lawmakers constitutes the sine qua non of a representative democracy." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 374 (2002) (citation omitted). Thus, the "fair chance" standard applies here, though even under the "likely-to-succeed" standard, Plaintiffs would prevail.

a. The Horse Act violates the private nondelegation doctrine

Our Constitution rests on a fundamental—and revolutionary—principle: *We the People* hold all power. *See* U.S. CONST. preamble; *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471-72 (1793) ("the sovereignty of the nation is in the people of the nation" because the people "are truly the sovereigns of the country."). And we have delegated that power not to some amorphous or unintelligible "government," but to *separate branches* of government. *Ass'n of Am. R.R.*, 575 U.S. 43 at 67 (Thomas, J., concurring) This helps the Constitution achieve its core goal: to protect liberty. *Collins v. Yellen*, 141 S.Ct 1761, 1780 (2021) ("the separation of powers is designed to preserve the liberty of all the people.").

"Our Constitution permits only the federal government to exercise federal power." *Black*, 53 F.4th at 880. "In Article I, 'the People,' vested '[a]ll' federal 'legislative powers ... in Congress." *W. Va. v. EPA*, 142 S.Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (quoting U.S. Const. Preamble and art. 1 § 1). These "simple[] terms" should "prevent all cessions of legislative power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring). The Constitution "permits no [further] delegation" of legislative power. *Whitman*, 531 U.S. at 472. "While the Court has allowed limited delegations of authority to government agencies, … it has set its face against giving public power to private bodies. 'Such a delegation of legislative power,' the Court thundered nearly a century ago, 'is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.'" *Black*, 53 F.4th at 880 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935)); *see also Ass'n of Am. R.R.*, 575 U.S. at 62 (Alito, J., concurring) ("When it comes to private entities, ... there is not even a fig leaf of constitutional justification" for delegation). "Not content merely to reject the idea, the Court has also called it insulting names." *Black*, 53 F.4th at 880 (citing *Carter v Carter Coal Co.*, 298 U.S. 238, 311 (1936) (private delegation is "legislative delegation in its most obnoxious form.").

i. Private entities may act as "aids" to agencies only when they are truly "subordinate" to government oversight

Under the "private non-delegation doctrine," "courts have distilled the principle that a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Black*, 53 F.4th at 880-81. Indeed, even where the Court has upheld laws that give private groups a say in making rules, it's because the private actors remain subordinate to government oversight. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). *Adkins* clarifies the principle. There, the Coal Act regulated the sale and distribution of bituminous coal—and two players performed key roles: (1) boards of code (private entities), and

(2) the National Bituminous Coal Commission (a government agency). The statute supplied the duties of each body and "specifie[d] *in detail* the methods of the" private entities' "organization and operation, the scope of their functions, and the jurisdiction of the Commission over them." *Id.* (emphasis added). Industry members could submit proposals, but when it came to making important decisions, all came from the Commission. It set minimum and maximum prices. *Id.* The Commission could—vitally—"approve[], disapprove[], or modif[y]" any *proposed* prices from the private groups. *Id.* And the Commission had "authority and surveillance over the activities of the[] [private] authorities." *Id.* at 399. In short, the Court concluded, the Commission had such "pervasive surveillance and authority" over the private group that it simply "operate[d] as an aid to the Commission." *Id.* at 388.

ii. The Horse Act requires a private entity to wield legislative and executive power

The Horse Act is of a different breed. It creates, *by statute*, the Authority, a "private, independent, self-regulatory, nonprofit corporation," which has incorporated under the laws of Delaware. 15 U.S.C. § 3052(a). The FTC cannot disband the Authority—or even reprimand it. Board members are selected by the Authority itself and its committees. *Id.* § 3052(b), (d)(3). The FTC has no say. Nor does the FTC (or any governmental entity) have any ability to remove Authority Board members; instead the Authority, through its bylaws, makes that choice. *Id.* § 3052(b)(3). Authority members set their own budget, *id.* §3052(f), and assess fees and fines to fund their activities, *id.* § 3052(f)(3), (4). In short, the Authority is a law unto itself—a private entity with no accountability to the FTC, or the People. *See Black*, 53 F.4th at 880.

Moreover, rules created by the Authority come with the force of law. Indeed, they map neatly onto what legislative power means: the ability to "prescribe the rules by which the duties and rights of every citizen are to be regulated." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222

(1995) (cleaned up); *see also Gundy v. United States*, 139 S.Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) ("the framers understood" legislative power "to meant he power to adopt generally applicable rules of conduct governing future actions by private persons ... or the power to 'prescribe general rules for the government of society.'") (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810)).

The Horse Act tells the Authority to issue rules addressing every aspect of American horseracing from coast to coast. Rules cover (1) permitted and prohibited medications and methods for substances; (2) laboratory standards for accreditation; (3) racetrack surface quality standards; (4) racetrack safety standards; (5) safety, performance, and anti-doping and medication control programs. 15 U.S.C. § 3052(a). Anti-doping rules include "standards for ... the administration of mediation to covered horses" as well as "a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and methods." *Id.* § 3055(c)(1). And the "racetrack safety program" covers (1) training standards; (2) track surface quality; (3) track safety standards and protocols; (4) investigations at racetracks; (5) civil sanctions, and more. *Id.* § 3056(b).

Authority directors have not been shy about wielding this mandate, promulgating rules that ban and control substances in horseracing across the country. *See* 88 Fed. Reg. 5070. Rules require horsemen to register with the Authority and submit to searches of their records and testing of their horses. *Id.* at 5094. Parties must tell the Authority of all "medications and treatments" given to covered horses. *Id.* at 5072. And horses must be "made available" for testing "at any time and any place." *Id.* at 5094. Violations can be strict liability, fines can top $100,000, and horsemen can face a lifetime ban. *Id.* at 5094; 87 Fed. Reg. at 44,400. The rules carry the force of law. They preempt

all conflicting state law, which has regulated horseracing for more than a century. 15 U.S.C. § 3054(b). As the Authority itself put it, the rules are "unprecedented." 88 Fed. Reg. at 5071.

Other Authority powers look executive—something Congress cannot place outside the executive branch. *See Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (per curiam) (Congress cannot "appoint the agents charged with the duty of ... enforcement" of the laws); *Ass'n of Am. R.R.*, 575 U.S. at 68 (Alito, J., concurring). So like legislative power, executive power cannot be given to private entities by Congress. Yet, the Authority can seek civil penalties and injunctive relief in federal court or simply file an in-house adjudication to sanction alleged wrongdoers. 15 U.S.C. §§ 3054(j), 3057(c), 3058. And as the Supreme Court has made clear, "the power to seek daunting monetary penalties against private parties" is "quintessentially executive power." *Seila Law, LLC v. CFPB*, 140 S.Ct. 2183, 2200 (2020). The Authority also possesses full investigatory power and may issue subpoenas. *Id.* § 3054(c). Under the Horse Act, the FTC can review internal adjudications but only if a party appeals an adverse decision. 15 U.S.C. § 3058(c). And nothing gives the FTC power to direct or oversee Authority-filed lawsuits *in court*, *id.* § 3054(j).

All this boils down to three points not in dispute. *One*, Congress cannot delegate governmental power to a private entity. Instead, "Congress may formalize the role of private parties in *proposing* regulations so long as that role is merely 'as an aid' to a government agency that retains the discretion to 'approve[], disapprove[], or modif[y]' them. *Ass'n of Am. R.R. v. Dept. of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013) (quoting *Adkins*, 310 U.S. at 388), *vacated on other grounds*, 575 U.S. 43 (2015). *Two*, the Authority is a private corporation. And *three*, the Authority takes the lead in making regulations and enforcing the Horse Act.

iii. The Authority is not meaningfully controlled by or subordinate to any government agency

Only one question remains: Does the Authority "wield the government's power," or is it "subordinate" to the FTC by acting as an "aid?" *Black*, 53 F.4th at 880. The answer could hardly be clearer: The Authority is superior—not subordinate—to the FTC. For one (as explained above) the FTC cannot control whether the Authority exists, who sits on the board, the hiring and firing of Authority personnel, or the Authority's enforcement decisions. *See id.* at 872 ("The FTC may never ... divest [the Authority] of its powers."). On top of that, the FTC cannot oversee whether the Authority issues subpoenas or investigates violations. In all aspects, the FTC takes a back seat.

More importantly, the Horse Act *requires* the FTC to sign off on anti-doping and racetrack safety rules issued by the Authority. 15 U.S.C. 3053(c). The FTC engages in a ministerial "consistency" review, which *commands* approval so long as the Authority's proposals are "consistent" with the Act. *Id.* § 3053(c). And the Act merely instructs the Authority to "consider" certain factors in formulating its anti-doping rules. *Id.* § 3055(b). Nothing in the Act explains how the Authority weighs those competing factors, which are most important, or what policies it should pursue. So long as the Authority "considered"—and possibly *rejected*—the statutory elements, the FTC must approve the rule.

"The FTC's limited review of proposed rules [under Section 3053(a) and (c)] falls short of the pervasive surveillance and authority an agency must exercise over a private entity." *Black*, 53 F.4th at 884 (citation omitted). Thus, the Authority develops all policy. "[W]hatever 'consistency' review includes, we know one thing it excludes: the Authority's policy choices in formulating rules." *Black*, 53 F.4th at 885. The FTC cannot disapprove a proposed rule on policy grounds or because it believes the Authority's rule could be improved. *Id.* By the agency's own reckoning, FTC Commissioners may not weigh the statutory factors differently from the Authority. *See id.* Nor can they direct the Authority to reconsider certain elements in the statute. *Id.* Instead, as long

as the Authority complied with the bare minimum under the Act, the FTC must put the rule in place. And once the rules take effect, they have the full force of law. *See* 15 U.S.C. § 3054(b) (rules preempt state laws); *id.* § 3057(d) (violations come with civil sanctions). "In sum, … the FTC's limited review of proposed rules does not make the Authority function subordinately to the agency." *Black*, 53 F.4th at 887.

iv. The 2022 Amendment failed to fix the private nondelegation issue

The December 2022 amendment to Section 3053(e)—added after the Fifth Circuit's ruling—does not save the statute. Under the amendment, the FTC can "abrogate, add to, or modify" an Authority rule "as the Commission finds necessary or appropriate to ensure the fair administration of the Authority" or "in furtherance of the purposes of this Act." But this amendment did not alter Section 3053(c)'s "consistency" review, which was the basis for the Fifth Circuit's ruling. *See Black*, 53 F.4th at 884-85.

Indeed, Section 3053(c) remains in its same form, while Section 3053(e) simply adds a new level of authority to the FTC in a different context. As the FTC itself says, the statute "extends only to *changing existing* Authority rules and does not allow the Commission to modify a *proposed* rule." Anti-Doping Order at 1 n.2 (emphasis added). Thus, when the Authority submits a rule, the FTC *must* accept it pursuant to Section 3053(b)'s consistency review. *See id.* at 4 ("the Commission's statutory mandate to approve or disapprove a proposed Authority rule is limited to considering only whether the proposed rule is 'consistent with' the Act and the Commission's procedural rule."). And the proposed rules take *immediate* effect if they pass this procedural review. *See id.* The Commission can also never initiate its own rulemaking—it can only try to amend Authority rules later. *See id.* But the statute violates the private non-delegation doctrine because "the FTC's consistency review does not include reviewing the substance of the rules themselves." *Black*, 53 F.4th at 886. Simply granting the FTC later authority to initiate a

modification process—which may or may not alter the already binding policy choices of the Authority—can't save the Act from its initial defect.

For this reason, the Sixth Circuit erred when it upheld the amended version of the Horse Act because, in its view, the FTC can "introduce[e] its own" rules; is "free to prescribe" the rules; and acts as "the primary rule-maker." *See Oklahoma v. United States*, --- F.4th ---, 2023 WL 2336726, at *6 (6th Cir. 2023). The Court believed that "the FTC has power *to initiate new rules*, not just to modify rules it does not like." *Id*. at *7 (emphasis added); *see id.* (stating that FTC has "complete authority to initiate new rules."). The panel also thought that the FTC could "create new rules" because it holds "broad power to write ... the rules." *Id.* at *5, *6. In short, the Court said, "the FTC could issue rules" on any subject it wished. *Id.* And on that basis, the Court held that the FTC had "true oversight authority." *Id.* at *5.

Wrong—as even the FTC admits. As the Commission explained, it has no authority to propose *any* rules. It can only modify *existing* rules, and only do so once those have already taken effect and bound the public. *See* Anti-Doping Order at 1 n.2. And rules exist only if approved by the Commission. Said another way: The FTC must approve a rule before it can modify it. The result is that even where the FTC disagrees with the Authority's policy, the Authority's rules go into place. The FTC may later modify those rules—after approving them—but it must do so under the APA's notice-and-comment procedure, which traditionally takes months. *See* 15 U.S.C. § 3053(e) (FTC modifications must be made pursuant to 5 U.S.C. § 553). And so the statute guarantees that rules and policy that the government disagrees with will go into effect—and have the force of law.

v. The Horse Act allows a private entity to expand its own jurisdiction and power with no oversight

One final factor seals the Horse Act's fate. The statute allows the Authority to choose unilaterally—with *no* FTC oversight—whether to expand its jurisdiction to non-thoroughbred horses. 15 U.S.C. § 3054(l). The Authority may "approv[e]" any request from a state racing commission or "breed governing organization" to be covered by the Horse Act. *Id.* The Authority has this power *by statute*, so it need not issue any rule to give life to its ability to expand its reach to any horse breed. *See id.*

The Sixth Circuit considered, and rejected, this argument, but it did so based on a faulty reading of the statutory amendment. The Sixth Circuit understood the amendment to give the Commission the power "to *revoke the Authority's decision*" to "expand its jurisdiction to breeds other than thoroughbreds." *Oklahoma*, 2023 WL 2336726, at *8 (emphasis added). But that misunderstands the review process. Section 3053(e) merely allows the Commission to alter rules issued by the Authority and already approved by the Commission. But nothing in the Horse Act requires any substantive rulemaking to expand the Authority's jurisdiction. The statute allows the Authority to approve an "election form" submitted by a "breed governing organization." 15 U.S.C. § 3054(l)(1). And even if the FTC later tried to revoke that decision by a modification of its own, the FTC's rules can't trump Congress's statutes. So all it takes is a request and Authority approval. Voila. Just like that, the Authority has expanded its power to other breeds. The FTC has no say in the matter.

* * * *

In sum, the Authority possesses legislative and executive power—to make and enforce horseracing rules—with little oversight. The FTC cannot second guess the Authority's policy decisions. It cannot initiate rulemaking. And it cannot stop the Authority from bringing civil

actions in court. Private entities may not have such free rein over government power. The Horse Act thus violates the private nondelegation doctrine.

b. The Horse Act violates the public nondelegation doctrine

Even if the Authority is a public entity—or if 3053(e) cures the problem—the Horse Act violates the public nondelegation doctrine. For just as Congress may not delegate lawmaking power to private entities, it may not turn over legislative power to the executive branch. *Whitman*, 531 U.S. at 472.

Under current doctrine, Congress may delegate when it supplies an "intelligible principle" to the agency. *Gundy*, 139 S. Ct. at 2123. Congress must supply—by statute—something to "guide the delegee's use of discretion." *Id.*; *Whitman*, 531 U.S. at 473 (statute must place "limits on the [agency's] discretion."). A statute violates the nondelegation where it provides no guidance, or it confers authority to regulate based on nebulous terms like "fair competition." *Whitman*, 531 U.S. at 474 (citing *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935)); *A.L.A. Schechter Poultry Corp.,* 295 U.S. 495.

The modification provision here added by the amendment—Section 3053(e)—provides no direction on what the FTC must consider to limit its discretion. Instead, the statute says the FTC can act to alter rules that have already gone into effect, when it is "necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to the requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this act." 15 U.S.C. § 3053(e). Nothing else in the Act tells the FTC how to exercise its choices. The Horse Act contains no purposes or legislative findings on which the FTC can rely.

By granting the FTC unfettered discretion to decide the (unidentified) "purposes" of the Act, the statute allows the FTC to pick and choose what rules it wants to later modify—with no limiting principle. As the FTC's own Order approving prior rules made clear, the Commission holds the view that it may "exercise its own policy choices whenever *it determines* that the Authority's proposals, even if consistent with the Act, are not the policies that the Commission *thinks would be best* for horseracing integrity or safety." *See* Fed. Trade Comm'n, *Order Ratifying Previous Commission Orders as to Horseracing Integrity and Safety Authority's Rules*, at 3, *available at,* https://www.ftc.gov/system/files/ftc_gov/pdf/HISA%20Order%20re%20Ratification%20of%20Previous%20Orders%20-%20Final%20not%20signed.pdf (emphasis added).

Because the Commission may issue rule modifications based on what it "thinks would be best," the statute violates the nondelegation doctrine. In fact, the statute's open-ended grant of power mirrors *Schechter* where the Supreme Court struck down a law allowing the executive to promulgate "codes of fair competition." 295 U.S. at 538-39. And just as in *Panama Refining*, here the statute nowhere speaks to "whether or in what circumstances or under what conditions the" executive should engage in rulemaking. 293 U.S. at 415. When there is "no criterion to govern the [agency's] course"—not even a requirement that the agency make "any findings ... as a condition of his action"—the statute violates nondelegation. *Id.* An agency cannot wield legislative power merely when it believes a rule is "desirable." *Id.* at 420-21.

Something more must guide the FTC, but nothing does. True, parts of the statute tell the *Authority* to consider certain factors when creating anti-doping rules. *See* 15 U.S.C. § 3055(b). But nothing in the statute directs the *FTC* to consider anything. If the FTC thinks a rule modification would further the (undefined) "purposes of the act," it can do so. Nothing even requires the FTC to say what the purpose *is*. The FTC cannot rely on the statute's directions to the Authority as an

intelligible principle because the statute does not require the FTC to also look to those criteria. And a nondelegation problem arises from what the *statute says*—not what an *agency does*. *Whitman*, 531 U.S. at 472 ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."). Indeed, it would be "internally contradictory" to allow an agency to "cure an unconstitutionally standardless delegation of power by declining to exercise some of that power" because "[t]he very choice of which portion of the power to exercise ... would *itself* be an exercise of the forbidden legislative authority." *Id.* at 473 (emphasis in original).

Thus, because no intelligible principle—or *any* principle—guides the FTC's authority to issue rule modifications here, the Horse Act violates the nondelegation doctrine.

c. The Authority violates the Appointments Clause

The Horse Act and Authority also violate the Constitution's Appointments Clause, which requires that (1) the President, (2) Courts of Law, or (3) Head of Departments appoint "Officers of the United States." U.S. Const. art. II, § 2. No such person appoints board members. Instead, the Authority's own committees and board members pick board members. The only question here centers on whether directors qualify as "officers of the United States." If so, the Authority fails the constitutional test, and its rules must be enjoined.

"Officers" come in two varieties—principal and inferior. *Id.* The Senate must confirm the former but not the latter. But in either case, the Constitution requires that someone in government appoint the person to his office. That constraint "guarantees accountability for the appointees' actions because the 'blame of a bad nomination would fall upon the president'"—or other appointing official—"'singly and absolutely.'" *United States v. Arthrex*, 141 S.Ct. 1970, 1979 (2021) (quoting *The Federalist Papers, No. 77* (Hamilton)).

Anyone who wields "significant authority" qualifies as at least an "inferior officer." *Lucia v. SEC*, 138 S.Ct. 2044, 2051 (2018); *Buckley*, 424 U.S. at 125-26. An individual's status as "employee" or "officer" turns on the nature of his power—not the individual's title or "location ... in the agency's organization chart." *Arthrex*, 141 S.Ct. at 1982; *see also id.* at 1983 ("the unchecked exercise of executive power by an officer buried many layers beneath the President poses more, not less, of a constitutional problem."). Functions, not labels, guide the inquiry.

In determining officer status, courts have considered whether the individuals (1) "hold a continued office established by law," (2) "serve on an ongoing, rather than a temporary or episodic, basis," and (3) "their duties, salary, and means of appointments are all specified" by law. *Lucia*, 138 S. Ct. at 2052 (cleaned up). One need not make binding final decisions to fall within the Appointments Clause. *See Arthrex*, 141 S.Ct. at 1985-86 ("Many decisions by inferior officers do not bind the Executive Branch to exercise executive power in a particular manner."); *Lucia*, 138 S.Ct. at 2052 (explaining that exercising "significant discretion" in the executive branch "meant they were officers, even when their decisions were not final.").

Authority board members are officers of the United States. *First*, they hold a continued office established by law. 15 U.S.C. § 3052(b)(1); *see also* Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 Harv. J. L. & Pub. Pol'y, 837, 847 (2022) (describing a "continuing position as one that transcends each unique officeholder, existing separate and apart from any particular person that fills it—in contrast to a contractual arrangement established just for the purpose of a discrete set of tasks and fulfillment by one particular entity."). *Second*, they serve on an ongoing basis—not as some interim group organized ad hoc. And *third*, the statute lays out their duties that confer significant authority.

For example, the Horse Act allows directors to promulgate safety, performance, and anti-doping rules, as well as rules regarding an adjudicatory process. 15 U.S.C. §§ 3055, 3056, 3057(c)(1)(A)-(F). Board members "develop and implement" anti-doping, medication-control, and racetrack-safety rules and procedures. 15 U.S.C. § 3052(a). Indeed, the Authority—which the board leads—exercises "exclusive national authority over the safety of covered horses." *Id.* §3054(a)(2)(A). And its rules preempt and displace a century worth of state law across the country. 15 U.S.C. § 3054(b) ("The rules of the Authority ... shall preempt any provision of State law or regulation.").

More still, the Authority oversees lawsuits to seek civil penalties and injunctive relief in federal courts. *Id.* § 3054(j). The Authority has full investigatory power, and it may issue subpoenas, or rummage through the books, papers, and records of any covered person. *Id.* § 3054(c). As the Supreme Court has explained, this amounts to "a quintessentially executive power." *Seila Law*, 140 S.Ct. at 2200.

Since board members wield significant government power, they must satisfy the Appointments Clause. They do not. No one in the federal government appointed board members. And so they "never really" occupied the office, and they "lack the authority to carry out the functions of the office." *Collins*, 141 S.Ct. at 1788. As a result, the Authority's rules were "never really a part of the body of governing law (because the Constitution automatically displaces any conflicting ... provision from the moment of the provision's enactment)." *Id.* at 1788-89. Indeed, courts routinely wipe out actions taken by improperly appointed officials because such "remedies are designed not only to advance" constitutional purposes "but also to create incentives to raise Appointments Clause challenges." *Lucia*, 138 S.Ct. at 2055 n.5. In *Lucia*, the Court vacated a

completed agency adjudication because a hearing officer failed the Appointment Clause test—and sent the case back to the agency to start over. *Id.* at 2055.

In sum, "the Court has invalidated actions taken by individuals who were not properly appointed under the Constitution" *Collins v. Mnuchin,* 938 F.3d 553, 593 (5th Cir. 2019) *aff'd in part, rev'd in part, vacated in part sub nom*. *Collins v. Yellen*, 141 S.Ct. at 1787. Board members (and their committees) picked *themselves*. This structure runs roughshod over the Constitution's democratic accountability guarantee. This Court should enforce it, hold that the Authority violates the Appointments Clause, and enjoin enforcement of the Authority's rules.

II. Plaintiffs Face Irreparable Harm

Plaintiffs will suffer irreparable harm for at least two reason. *First*, they are subject to unconstitutional regulation from an unconstitutional agency. Horsemen—like all Americans—have a right to be governed by lawful and constitutional rules. And "[t]he deprivation of constitutional rights unquestionably constitutes irreparable injury." *Little Rock Fam. Plan. Servs. v. Jegley*, 549 F.Supp.3d 922, 935 (E.D. Ark. 2021) (citation omitted). *Second*, Plaintiffs face drastic changes in the status quo—longstanding state rules governing horseracing—that have subjected the plaintiffs to new fines, tests, searches, and sweeping regulations that threaten to upend ongoing sporting events. Such rule changes cause textbook irreparable harm because the plaintiffs cannot later recover any portion of these new costs.

1. Start with constitutional harm. Structural constitutional violations like the one here inflict here-and-now injuries. *Seila Law*, 140 S.Ct. at 2196; *see also Bond v. United States*, 564 U.S. 211, 222 (2011) (explaining that courts can enjoin action where "individuals sustain discrete, justiciable injury form actions that transgress separation-of-powers limitations"). As then-Judge Kavanaugh explained, "[i]rreparable harm occurs almost by definition when a person or entity

demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency that has issued binding rules governing the plaintiff's conduct and that has authority to bring enforcement actions against the plaintiff." *John Doe Co. v. CFPB*, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citations omitted).

Here, the statute violates the private and public nondelegation doctrine and the Appointments Clause. Such constitutional infractions cause irreparable harm. *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("when constitutional rights are threatened or impaired, irreparable injury is presumed."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("it is the alleged violation of a constitutional right that triggers a finding of irreparable harm"). These injuries come with no possible monetary relief later—the definition of irreparable harm. *Gen. Motors Corp. v. Harry Brown's, LLC,* 563 F.3d 312, 319 (8th Cir. 2009). ("Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages.").

Moreover, the Authority's unconstitutional rulemaking would subject Plaintiffs to crushing fines and potentially a lifetime ban. Walmsley Decl. ¶¶ 8-16; Moss Decl. ¶¶ 12-20. With so much at stake, Plaintiffs may challenge rules at the outset. After all, the Supreme Court does "not require plaintiffs to bet the farm ... by taking the violative action before testing the validity of the law." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 490 (2010) (citation omitted). *Free Enterprise* arose, as here, in a separation-of-powers context, challenging unlawful agency action. *Id.* And the Supreme Court explained that a "separation-of-powers claim should [not] be treated differently than every other constitutional claim." *Id.* at 492 n.2. Because unconstitutional rules and actions expose plaintiffs to crushing sanctions, Plaintiffs will suffer irreparable harm.

2. Regardless, because the Plaintiffs are currently subject to the Authority's unlawful rules, they are facing irreparable harms from their new obligations. As a general rule, "a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs," *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and in the judgment)), "because federal agencies generally enjoy sovereign immunity for any monetary damages," *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021) (citations omitted). Indeed, irreparable harm occurs where rules subject individuals to costs "with no guarantee of eventual recovery." *Ala. Ass'n of Realtors v. Dept. of Health and Human Servs.*, 141 S.Ct. 4285, 2489 (2021). Plaintiffs here must comply with the Authority's illegal rules *now*, and they must begin incurring immediate compliance costs or risk fines or banishment from the industry. Walmsley Decl. ¶¶ 11-17 (explaining compliance burden of Authority rules); Moss Decl. ¶¶ 12-21 (same). They cannot later recover those costs from anyone, and thus, by definition, the harm is irreparable.

Looking at the effect of specific rules confirms this conclusion. Time and again, courts have held that rule changes that alter ongoing sporting events cause irreparable harm. Indeed, a district court has even found irreparable harm when the Professional Golf Association's anti-doping rules prohibited a golfer from competing in a tournament. *Barron v. PGA Tour, Inc.*, 670 F.Supp.2d 674, 678, 690 (W.D. Tenn. 2009). Rules requiring new golf clubs cause irreparable injury too. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991). And so do rule changes that could affect NFL players' eligibility. *Jackson v. Nat'l Football League*, 802 F.Supp. 226, 231 (D. Minn. 1992).

The harm caused by the Authority's rules here mirrors harms in other sports. The changes turn century-old state law upside down. Even trace amounts of formerly therapeutic drugs can

result in serious punishments. Walmsley Decl. ¶ 14; Moss Decl. ¶ 14-18. And some violations are strict liability. 88 Fed. Reg. at 5074. Moreover, horses participate in races for a short amount of time, and most events allow horses only of a certain age (e.g., two-year-olds). Missing even one race—especially a qualifier for a bigger race—would result in irreparable harm. *See Linesman v. World Hockey Ass'n*, 439 F.Supp. 1315, 1319 (D. Conn. 1977) ("the career of a professional athlete is more limited than that of persons engaged in almost any other occupation. Consequently the loss of even one year of playing time is very detrimental."); *accord Brady v. NFL*, 779 F.Supp.2d 992, 1005 (D. Minn. 2011) ("the threat of ... lost playing time[] constitutes irreparable harm."), *vacated on other grounds*, 644 F.3d 661 (8th Cir. 2011). Of the more than 900 Iowa HBPA members, the only way they can compete in the upcoming season is to follow the unlawful rules issued by the Authority. If they refuse, they lose the chance to compete, and thus the valuable playing time they otherwise would have. Moss Decl. ¶¶ 12-21. Those harms are irreparable.

III. The Harm to Plaintiffs Outweighs any Harm to Defendants and the Public Interest Supports an Injunction

a. The balance of harms favors an injunction

As explained, Plaintiffs will face drastic hardship without an injunction. The Authority and FTC, on the other hand, face no harm in waiting to implement the rules. Indeed, it would be in the Authority's *interest* to give horsemen time to adjust to the new rules. Otherwise, owners and trainers will struggle to understand the scope of the new obligations, raising enforcement costs for the Authority.

Additionally, as shown by the FTC's refusal to approve the anti-doping rules in a prior order, the Authority and FTC can afford to wait to impose the rules. *See* Federal Trade Comm'n, *Order Disapproving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority*, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/order_r

e_hisa_anti-doping_disapprove_without_prejudice_0.pdf (Dec. 12, 2022). There, the FTC admitted that Authority rules could wait and "[s]tate law will continue to regulate the matters that the proposed rule would have covered." *Id.* at 2. The Authority has taken a similar position. When the FTC failed to approve rules by the statutory required deadline (July 2022), the Authority explained that the delay did not pose a problem because "existing State laws and regulations governing matters not covered by a duly promulgated HISA rule will remain in effect." Guidance of the Horseracing Integrity & Safety Auth. at 2 (Mar. 14, 2022), *available at* https://bphisaweb.wpengine.com/wp-content/uploads/2023/01/HISAGuidance3.14.22.pdf.

Just so here. State rules can govern with no harm to the Authority or FTC. Yet if the Authority's rules take effect in Arkansas and Iowa, regulated parties face clear irreparable harm.

Moreover, a preliminary injunction exists "to preserve the status quo until the merits are determined." *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113, n.5 (8th Cir. 1981). And sometimes it is "necessary to require a party who has recently disturbed the status quo to revers its actions" to "restore[], rather than disturb[], the status quo ante." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004).

In Arkansas, Oaklawn remains in the midst of its season. Walmsley Decl. ¶ 6; Moss Decl. ¶ 6-8. And in Iowa, race training begins in April, with races starting in May. Moss Decl. ¶¶ 10-11. Until now, state rules have governed in both states. Those should remain in place until this Court reaches the merits so as to avoid mass confusion in horseracing and subjecting owners and trainers to rules that ping pong between state law and the Authority's rules.

b. The public interest favors an injunction

The public interest is always served by the "preservation of constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 694 (8th Cir. 2008) (overruled on other grounds). And the

government "does not have an interest in enforcing a law that is likely constitutionally infirm." *Chamber of Com. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Relators*, 141 S.Ct. at 2490. As then-Judge Kavanaugh put the point: "The public interest is not served by letting an unconstitutionally structured agency continue to operate until the constitutional flaw is fixed. And in this circumstance, the equities favor the people whose liberties are being infringed, not the unconstitutionally structured agency." *John Doe Co.*, 849 F.3d at 1137 (Kavanaugh, J., dissenting).

Here, the Horse Act is unconstitutional. Allowing an unconstitutional law to continue to deprive people of their rights does not serve the public interest. Instead, "preservation" of those rights does. *Phelps-Roper*, 545 F.3d at 694. The public interest here resoundingly supports an injunction.

IV. No Security Should Be Required

Bond under Rule 65 is not required when there is no evidence of "damages resulting from a wrongful issuance of an injunction." *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016); *see also* Fed. R. Civ. P. 65(c) (security offered only "to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."). Neither the FTC nor the Authority faces any damages resulting from wrongful issuance of an injunction. An injunction would simply stop the Authority from enforcing its rules. If anything, that would save the Authority significant enforcement costs. Thus, security should be waived or set at a nominal amount.

CONCLUSION

Much must go right for a jockey to stand on a podium after a horse race. The horse must be well trained. Injuries must be avoided. The jockey must pick the right time to make his move.

And down the stretch, the horse must have enough energy left for one final sprint. Shortcuts at any stage rarely produce a winner.

So too when the government seeks to impose daunting regulations on private parties nationwide. The Constitution serves not merely as a suggestion—it is a requirement. And here Congress attempted to end-run the Constitution's structural constraints. But the government must "turn square corners when dealing with the people." *Regents*, 140 S.Ct. at 1909. Because Congress failed to do so and because horsemen now face imminent irreparable harm, this Court should preliminarily enjoin any enforcement of the Authority's rules.

DATED: April 11, 2023.

Respectfully submitted,

s/*John Kerkhoff*

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2023, I submitted the foregoing to the Clerk of the Court via the District Court's CM/ECF system. I also certify that courtesy copies of the foregoing have been served via certified mail to the following:

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s/ John Kerkhoff
JOHN KERKHOFF*
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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

BILL WALMSLEY, ET AL.,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION, ET AL.,

,

Defendants.

DECLARATION OF BILL WALMSLEY

Pursuant to 28 U.S.C. § 1746, I, Bill Howard Walmsley hereby declare as follows:

1. I am a resident of Arkansas who qualifies as a "covered person" under the Horseracing Integrity and Safety Act because I am a person licensed by a state racing commission.
2. I am currently the President of the Board of Directors of the Arkansas Horsemen's Benevolent and Protective Association, a position I have held for many years.
3. I have been involved in the thoroughbred racehorse business for many years. Over the years, I have owned multiple horses.
4. I currently have an ownership interest in three thoroughbred horses.
5. My horses have all either participated in or will participate in thoroughbred races at Oaklawn Racing in Hot Springs, Arkansas this year.
6. The racing season at Oaklawn Racing runs through May 6, 2023.
7. The Authority has promulgated both (1) anti-doping and medication control rules, and (2) racetrack safety rules. The racetrack safety rules are currently in effect and causing immediate harm. The anti-doping rules were enjoined by a federal district

court until May 1, but are scheduled to take effect after that date. They will also cause imminent and irreparable harm to me.

8. The Authority's rules promulgated under the Horse Act require me to register with the Authority. Failure to do so could result in serious punishments, such as a scratch from a race, or many other sanctions and punishments as determined by the Authority.
9. Additionally, the proposed rules subject me to potential fines and sanctions that I otherwise would not be subjected to.
10. Under the Authority's rules I will also be required to turn over information to the Authority, consent to warrantless searches, submit horses for on-demand testing, and the rules threaten my ability to participate in horseracing activity.
11. The Authority's rules impose significant costs on me.
12. I must comply with all applicable rules from the Authority, including the anti-doping and medication control rules, and the racetrack safety rules. Any violation exposes me to civil sanctions, including possibly being barred from horseraces.
13. I am also subject to inspections, investigations, subpoenas, and enforcement actions from the Authority.
14. Additionally, the Authority's rules prohibit many substances—including "therapeutic medications"—from being in a horse's system prior to a race. I will face imminent harm if even a trace of a banned substance is detected by the Authority.
15. I am forced to help remit dues to the Authority through the Horseperson Purse Fund, which helps provide purse money for races at Oaklawn. Because the Authority takes

funds through the purse fund, horsemen receive smaller winnings than they otherwise would receive.

16. The rules will cause and are causing imminent and irreparable harm. And the harm is serious. Potential violations can result in the inability to race, loss of purse money, civil fines, a ban from horseracing, and the loss of the right to engage in a lawful profession.

17. Without an injunction stopping the Authority's rules I am forced to comply with the rules and bear these enormous costs.

18. I am over 18 years of age, competent to testify in this case, and have personal knowledge of the matters in this declaration.

19. I declare under penalty of perjury that the foregoing is true and correct.

Date: April 5, 2023

Bill Walmsley

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

BILL WALMSLEY, ET AL.,
Plaintiffs,

v.

FEDERAL TRADE COMMISSION, ET AL.,

Defendants.

DECLARATION OF JON MOSS

Pursuant to 28 U.S.C. § 1746, I, Jon Moss hereby declare as follows:

1. I am a resident of Iowa who qualifies as a "covered person" under the Horseracing Integrity and Safety Act because I am a person licensed by a state racing commission.
2. I am currently the Executive Director of the Iowa Horsemen's Benevolent and Protective Association.
3. As the Executive Director, I am familiar with the HBPA's membership and the owners and trainers we represent.
4. The Iowa HBPA currently has 924 members.
5. Iowa HBPA members include "covered persons" under the Horseracing Integrity and Safety Act, specifically horse owners and trainers.
6. Many Iowa HBPA members participate in horseracing outside of the state of Iowa—including at Oaklawn in Hot Springs, Arkansas.
7. The racing season at Oaklawn runs through May 6, 2023.
8. Iowa HBPA members are currently entering horses into races at Oaklawn.
9. Iowa HBPA members will enter horses into races in Iowa.

10. A mixed meet of Thoroughbred only horseracing at Iowa's Prairie Meadows Racetrack in Altoona, Iowa begins on May 12 and runs through June 17.

11. Thoroughbred and Quarter Horse races run concurrently from June 18 to September 30.

12. The Authority's rules promulgated under the Horse Act require covered persons—including hundreds of members of the Iowa HBPA—to register with the Authority. Failure to do so could result in serious punishments, such as a scratch from a race, or many other sanctions and punishments as determined by the Authority.

13. Additionally, the proposed rules subject Iowa HBPA members to potential fines and sanctions that they otherwise would not be subjected to.

14. Iowa HBPA members will also be required to turn over information to the Authority, consent to warrantless searches, submit horses for on-demand testing, and the rules threaten the Iowa HBPA members' ability to participate in activity that, for many, is their livelihood.

15. The Authority's rules impose significant costs on members of the Iowa HBPA.

16. Iowa HPBA members will have to comply with all applicable rules from the Authority, including the anti-doping and medication control rules, and the racetrack safety rules. Any violation exposes members to civil sanctions, including possibly being barred from horseraces.

17. Iowa HBPA members will be subject to inspections, investigations, subpoenas, and enforcement actions from the Authority.

18. Additionally, the Authority's rules prohibit many substances—including "therapeutic medications"—from being in a horse's system prior to a race. Any Iowa HBPA

member will face imminent harm if even a trace of a banned substance is detected by the Authority.

19. Iowa HBPA and/or members will be forced to either directly or indirectly remit fees to fund the Authority.

20. The rules will cause imminent and irreparable harm. And the harm is serious. Potential violations can result in the inability to race, loss of purse money, civil fines, a ban from horseracing, and the loss of the right to engage in a lawful profession.

21. Without an injunction stopping the Authority's rules from taking effect before May 12, the Iowa HBPA members will have to comply with the rules and bear these enormous costs.

22. I am over 18 years of age, competent to testify in this case, and have personal knowledge of the matters in this declaration.

23. I declare under penalty of perjury that the foregoing is true and correct.

Date: April 4, 2023

Jon Moss

EXHIBIT C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

NATIONAL HORSEMEN'S BENEVOLVENT AND PROTECTIVE ASSOCIATION, et al.,

Plaintiffs,

THE STATE OF TEXAS and THE TEXAS RACING COMMISSION,

Intervenor-Plaintiffs,

v.

JERRY BLACK, et al.,

Defendants.

No. 5:21-CV-071-H

MEMORANDUM OPINION AND ORDER

For several years, high-stakes litigation has occurred throughout the nation over the fate of the federal regulatory body designed to govern horseracing. Injunctions have issued, regulatory regimes have been declared unconstitutional, and Congress has amended the statute as a result. When Congress changes a statute in response to a court's opinion, the result is usually a second wave of litigation: Was the attempted remedy sufficient? What new arguments arise? But those larger questions are not yet before the Court. Currently, the plaintiffs make a narrow procedural claim that a new anti-doping rule violates the Administrative Procedure Act because not enough time passed between when the rule was published as final and when the rule took effect. When an agency issues a substantive rule—the type of rule that controls our behavior—it must ordinarily wait 30 days between when the final rule is issued and when it takes effect. This ensures that regulated parties have the time to challenge the rule's validity or bring themselves into compliance. But the anti-doping rule took effect the same day that it was published as final. As a result, the rule

issued in violation of the APA, so the plaintiffs—and everyone else—will get their 30 days. The Court enjoins implementation or enforcement of the anti-doping rule until May 1, 2023.

The Court notes at the outset the limited scope of this Order. In their Motion for an Emergency Preliminary Injunction Against the Medication Rule (Dkt. No. 124), the plaintiffs indicate that they seek relief on the anti-doping rule because "the rule's approval was announced *on its effective date*." *Id.* at 4 (emphasis in original). And the plaintiffs recognize that they have a separate motion for preliminary injunction already pending, which attacks the facial constitutionality of the FTC–Authority framework. Yet the plaintiff's brief in support of its recent, more limited motion (Dkt. No. 125) rehashes the arguments made in the prior motion, primarily that the FTC–Authority framework remains unconstitutional, notwithstanding the congressional amendment. *See* Dkt. No. 125 at 11 ("[T]he statute is unconstitutional on its face because as written, it allows a private corporation to make public law."). Plaintiffs' only new argument is that section 553(d), absent good cause, requires an agency rule to take effect 30 days after the final rule is published. In the interest of judicial economy—and because the plaintiffs only seek emergency relief as to the anti-doping rule—the Court will limit its analysis to the sole issue at hand: whether the FTC failed to comply with section 553's required 30-day waiting period and, if so, whether the plaintiffs are entitled to equitable relief.

1. Background

A. The ADMC Rule

On January 26, 2023, the Horseracing Integrity and Safety Authority (the Authority) published its proposed Anti-Doping and Medication Control Rule (the ADMC rule) in the

Federal Register for consideration by the Federal Trade Commission. 88 Fed. Reg. 5070 (Jan. 26, 2023). The ADMC rule allowed members of the public to submit comments until February 9. *Id.* at 5084. The Commission was to approve or disapprove the ADMC rule by March 27. *Id.* If approved, it would take immediate effect. *Id.*

And on March 27, the Commission did approve the ADMC rule, issuing its Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority. Dkt. No. 126-1 at 34. The order discusses the public comments and notes the Commission's finding that the ADMC rule is consistent with the Authority's implementing statute. *Id.* at 35. The Commission chose to make the rule effective immediately. *Id.*

To establish "uniform standards for racetrack safety and medication control," the ADMC rule bans certain substances and methods, sets forth a framework for testing covered horses, and specifies investigatory, compliance, and disciplinary procedures in the event of a violation. 88 Fed. Reg. 5070. The ADMC rule in particular bans certain anabolic agents, peptide hormones, growth factors, beta-2 antagonists, hormone and metabolic modulators, diuretics, masking agents, and other substances lacking regulatory health approval or recognition as having a valid veterinary use. *Id.* at 5122. It also prohibits blood manipulation, chemical castration, and gene and cell doping. *Id.* at 5123. A violation could result in, among other sanctions, ineligibility to race or disqualification of prior results. *Id.* at 5100–02, 5114–15. If a covered horse's results are disqualified, all compensation and prizes associated with the horse must be forfeited and redistributed. *Id.* at 5101.

B. Procedural History

In March 2021, National Horsemen's and its affiliates filed suit against the FTC, its commissioners, the Authority, and its Nominating Committee members, lodging a challenge that the Horseracing Integrity and Safety Act (HISA) is facially unconstitutional. Dkt. No. 1. The plaintiffs' filed their First Amended Complaint, adding claims under the private-nondelegation doctrine, public-nondelegation doctrine, Appointments Clause, and the Due Process Clause. Dkt. No. 23 at 27–29. The plaintiffs requested declaratory and injunctive relief, as well as compensatory and nominal damages. *Id.*

Dispositive motions and an evidentiary hearing followed. Motions to dismiss (Dkt. Nos. 34, 36), a motion for partial summary judgment (Dkt. No. 37), outside attention in the form of amicus curiae briefing by industry participants (Dkt. Nos. 49, 51) and United States Congressmen (Dkt. No. 53), as well as requests to participate in oral argument (Dkt. Nos. 67, 72) and to intervene in the action (Dkt. No. 73) were all filed within a few short months. In a lengthy order, the Court expressed concern about HISA's constitutionality, but relying on its reading of binding precedent, concluded that the FTC–Authority framework was constitutional. Dkt. No. 92.

On appeal, the Fifth Circuit reversed, holding that the FTC–Authority regulatory scheme was unconstitutional because it gave the FTC too little control over a private entity with regulatory authority. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F. 4th 869, 872 (5th Cir. 2022). Demonstrating its commitment to the new law, Congress reacted within months to the Fifth Circuit's opinion, amending the Act to expressly "give the Federal Trade Commission discretion to 'abrogate, add to, and modify' any rules that bind the industry." *Oklahoma v. United States*, 62 F. 4th 221, 225 (6th Cir. 2023) (quoting

Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022)). In the words of the Sixth Circuit, "[s]ometimes government works." *Oklahoma*, 62 F. 4th at 225. The defendants sought rehearing in the Fifth Circuit in light of the amendment, but the panel remanded the case to this Court. *Nat'l Horsemen's Benevolent v. Black*, No. 22-10387, Dkt. Nos. 223–24 (5th Cir. Jan. 31, 2023) (denying rehearing and issuing mandate).

Undeterred by the amendment, the plaintiffs filed a motion for a preliminary injunction (Dkt. No. 116), asking the Court to enjoin the Authority from implementing and enforcing HISA while the parties dispute whether Congress's recent modification to HISA makes the statute constitutional. *Id.* at 6. The plaintiffs proposed that the Court order an expedited briefing schedule on the motion so the Court could issue its order by March 27, 2023—the date the ADMC rule could have gone (and eventually did go) into effect. Dkt. No. 117. After considering the parties' respective positions, the Court declined to order expedited briefing and instead set a regular briefing schedule. Dkt. No. 121.

On March 27, 2023—the very day that the ADMC rule was approved and went into effect—the plaintiffs filed their Motion for an Emergency Preliminary Injunction Against the Medication Rule. Dkt. No. 124. The emergency motion focuses specifically on the ADMC rule, alleging that it violates the APA. *Id.* The Court ordered expedited briefing for this emergency motion only (Dkt. No. 127) and has since received the defendants' responses (Dkt. Nos. 128-1; 129) and the plaintiffs' reply (Dkt. No. 130). The briefing for this emergency motion primarily emphasizes the broader claims that the plaintiffs raised in their prior motion for a preliminary injunction. *Compare* Dkt. No. 116, *with* Dkt. Nos. 128-1; 129; 130. Today, however, the Court addresses only the unique component of the plaintiffs' emergency motion—the ADMC rule's alleged violation of the APA. *See* Dkt. No. 124. The

plaintiffs' emergency preliminary-injunction motion is ripe and ready for review. *See* Dkt. Nos. 128-1; 129; 130.

2. Legal Standards

A. The Preliminary Injunction Standard

Federal Rule of Civil Procedure 65(a) authorizes federal courts to issue preliminary injunctions. "A preliminary injunction is an extraordinary remedy," requiring a "clear showing" that plaintiffs are entitled to such relief. *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008). The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable injury until the court renders a decision on the merits. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). "In order to obtain a preliminary injunction, a movant must demonstrate (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction does not issue; (3) that the threatened injury outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction is in the public interest." *Moore v. Brown*, 868 F.3d 398, 402–03 (5th Cir. 2017) (citing *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009)). The Court takes each question in turn, but in the final analysis, "[l]ikelihood of success and irreparable injury to the movant are the most significant factors." *Louisiana v. Becerra*, 20 F.4th 260, 262 (5th Cir. 2021) (citing *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014)).

B. Section 553(d)'s 30-day waiting period

Section 553(d) of the Administrative Procedure Act provides that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date," unless the rule is a policy statement or grants an exemption or the agency shows good cause. 5 U.S.C. § 553(d). As a result, the APA "requires public notice and

comment and a thirty-day grace period before a proposed rule takes effect." *E. Bay Sanctuary Covenant v. Biden*, 993 F. 3d 640, 675 (9th Cir. 2021). The "thirty-day waiting period is 'intended to give affected parties time to adjust their behavior before the final rule takes effect.'" *Id.* at 675 n.15 (quoting *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992)). The 30-day period also provides litigants and courts sufficient time to handle challenges to the final rule. The rule is not absolute, and agencies who find good cause, for example, are not subject to the 30-day waiting period.

3. Analysis

A. The plaintiffs are likely to succeed on the merits of their section 553(d) argument.

Section 553(d)'s waiting period applies to the FTC's order approving the ADMC rule. That section provides: "The required publication or service of a substantive rule shall be made not less than 30 days before its effective date," unless one of three exceptions applies. The "required publication" contemplated under the rule is a final rule, rather than a proposed rule. *See, e.g.*, *Ctr. for Marine Conservation v. Brown*, 917 F. Supp. 1128, 1153 (S.D. Tex. 1996) (stating that section 553(d) applies to "rules actually adopted by an agency"); *Ngou v. Schweiker*, 535 F. Supp. 1214, 1216 (D.D.C. 1982) ("The weight of authority . . . reads section 553(d) as requiring a 30-day delay between publication of the *final rule* and its effective date.") (emphasis added); *Rowell v. Andrus*, 631 F.2d 699, 702 (10th Cir. 1980) ("We are convinced that the 'required publication' under § 553(d) . . . [refers to] substantive rules as actually adopted by an agency.").

The ADMC rule, after being published in the Federal Register but before being approved by the FTC, was a proposed rule. For one thing, the Authority itself recognized

that its submission was a proposed rule until approved by the FTC. HISA Anti-Doping and Medication Control Rule, 88 Fed. Reg. 5070–71 (Jan. 26, 2023) (stating that the Authority "is charged with developing proposed rules on a variety of subjects"); *id.* at 5073 ("The Protocol will go into effect if and when the Commission approves the proposed rule."). That the ADMC rule, when first published in the Federal Register, was a proposed rule is also made clear by the Authority's enabling statute. 15 U.S.C. § 3053(a) provides that the Authority shall submit to the Commission "any proposed rule . . . relating to . . . anti-doping and medication control." And subsection (b) requires the FTC to publish in the Federal Register each "proposed rule submitted under subsection (a)."

Given this law and the undisputed facts before the Court, the defendants have not complied with section 553(d)'s 30-day waiting period. The proposed rule noted that the FTC "has 60 days from the date of publication to approve or disapprove the proposed rule or rule modification." HISA Anti-Doping and Medication Control Rule, 88 Fed. Reg. 5070 (Jan. 26, 2023). How long did it take for the FTC to approve the proposed rule? Exactly 60 days. *Id.* at 5083 ("This rule would take effect upon approval by the Commission, and the Commission must approve or disapprove the rule by March 27, 2023."). This would have been permissible—had the effective date of the rule been at least 30 days after the rule had been approved—but because the ADMC rule took effect on the same day it was approved by the FTC, a section 553(d) violation occurred.

And no exception to the 30-day waiting period applies here. The 30-day waiting period does not apply (1) when the rule "grants or recognizes an exemption or relieves a restriction"; (2) where the putative rule is an "interpretive rule[or] statement[] of policy"; or (3) or where "good cause [is] found and published with the rule." 5 U.S.C. § 553(d)(1)–(3).

Here, the defendants do not assert that the ADMC is a rule that recognizes an exemption or relieves a restriction, and it is not. Nor do they assert that the Rule is an interpretive rule or a statement of policy. "Legislative or substantive rules are those which 'affect individual rights and obligations.'" *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001) (citing *Chrysler Corp v. Brown*, 441 U.S. 281, 302 (1979)). The ADMC rule plainly affects individual rights and obligations because it, among other things, requires covered persons to submit to surprise inspection of eligible facilities and to ensure that no prohibited substances are present in a covered horse, as well as prescribing punishments with significant financial implications.

Nor have the defendants attempted to show—let alone established—good cause. "The burden of establishing good cause is on the agency, and the exception is applicable in 'emergency situations, or where delay could result in serious harm.'" *Coalition for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346, at *5 (E.D. Tex. March 14, 2022) (quoting *United States v. Dean*, No. 08-CR-67(LAP), 2020 WL 3073340, at *2 (S.D.N.Y. June 9, 2020)). "To determine whether good cause exists, the court must 'rely only on the basis articulated by the agency itself at the time of the rulemaking.'" *Id.* (quoting *Texas v. Becerra*, No. 5:21-CV-300-H, 2021 WL 6198109, at *13 (N.D. Tex. Dec. 31, 2021)). Because neither the Authority nor the FTC provided any explanation for good cause during the administrative process (or even in response to the emergency motion), the good-cause exception is inapplicable.

Thus, no exception applies, and the decision to have the ADMC rule take effect the same day that it was approved violated section 553(d)'s 30-day waiting period. And tellingly, the defendants do not argue otherwise. In their combined 60 pages of briefing

submitted in the past few days, neither the FTC defendants nor the Authority defendants meaningfully address the plaintiff's section 553(d) argument. *See* Dkt. Nos. 128-1, 129. Instead, the Authority defendants claim that the argument was not adequately pled (Dkt. No. 128-1 at 29), and the FTC defendants fail to even mention section 553(d).

Instead of addressing the merits, the defendants claim that the instant motion is outside the scope of the plaintiffs' complaint. Dkt. No. 128-1 at 29. They argue that the "Plaintiffs' amended complaint raises a facial constitutional challenge to HISA itself, not any as-applied administrative challenge to the rules." *Id.* But the defendants read too narrowly the plaintiff's request for relief. While, yes, the plaintiffs request that the Court, for instance, "[d]eclare that HISA violates the Due Process Clause," they also request that the Court "[e]njoin defendants, preliminarily and permanently, from taking any action to implement" HISA. Dkt. No. 23 at 28. The Court finds, unsurprisingly, that the Authority's attempt to issue a rule consistent with its congressional mandate constitutes "taking an[] action to implement" HISA. *See* 15 U.S.C. § 3054(a)(1) ("[T]he Authority . . . shall . . . implement and enforce the horseracing anti-doping and medication control program . . . ."). The Amended Complaint also seeks "any further relief to which Plaintiffs may be entitled." Dkt. No. 23 at 29. And regardless of whether this particular regulation was pled, "a challenge to the constitutionality of a statute necessarily encompasses a challenge to every agency action taken to implement [or enforce] the unconstitutional command." *Braidwood*

Mgmt. Inc v. Becerra, No. 4:20-CV-283-0, 2023 WL 2703229, at *11 (N.D. Tex. March 30, 2023).[1]

Finally, the defendants accuse the plaintiffs of crying wolf. *See* Dkt. No. 128-1 at 29 ("Plaintiff's attempt to create a late-breaking 'emergency' . . . hardly provides an excuse); *id.* at 28–29 ("The FTC published the proposed ADMC rules over two months ago, specifying that the rules 'would take effect immediately' on March 27 if approved."). But the defendants fail to realize the difference between a proposed rule and a final rule. Before the FTC approved the rule, the defendants were in a state of limbo—uncertain if they should begin preparing for compliance with the rule as proposed or whether the FTC would disapprove or modify the proposed ADMC rule. "[T]he time lag required by § 553(d) after publication of the regulation as finally issued is [designed] to afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of the rules may prompt." *Rowell*, 631 F.2d at 703 (internal citation omitted). The plaintiffs have been denied this opportunity. "Focusing solely on the issue of whether defendant has violated the requirements of section 533(d), the Court finds that plaintiffs have demonstrated a substantial likelihood of success on the merits." *Ngou*, 535 F. Supp. at 1217.

[1] The Court also notes that it would have been impossible for the plaintiffs to plead this issue with specificity because the rule was not approved until March 27, 2023—the same day the motion was filed. Just as the defendants fairly point out that the ADMC rule came as a surprise to no one, the plaintiffs fairly point out that there can be no procedural violation (and therefore no motion to enjoin) where there is no final rule. *See Bristol-Myers Co. v. FTC*, 424 F.2d 935, 940 (D.C. Cir. 1970) ("[T]he claim for permanent injunctive relief is not yet ripe for adjudication. The Commission has merely proposed a rule, which may never be adopted or enforced.").

B. The plaintiffs have adequately shown a threat of irreparable injury.

Next, the Court must determine whether the plaintiffs have shown a substantial threat that they will suffer irreparable harm absent a preliminary injunction. They have. "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. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986). A plaintiff need only show that he is "likely to suffer irreparable harm in the absence of preliminary relief." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). "In general, harm is irreparable where there is no adequate remedy at law, such as monetary damages." *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). Nonetheless, "there must be more than an unfounded fear" or "speculative injury." *Daniels Health Servs., L.L.C. v. Vascular Health Servs., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). Thus, a court will not grant a preliminary injunction "simply to prevent the possibility of some remote future injury." *Morrell v. City of Shreveport*, 536 F. App'x 433, 435 (5th Cir. 2013). Instead, the plaintiffs must point to "a likelihood that irreparable harm will occur." *Id.*

The Court agrees that the ADMC rule violates section 553(d) because the Authority did not wait 30 days between the date that the final rule was published and when it went into effect. *See supra* Part 3.A; Dkt. No. 125 at 26. Thus, the ADMC's last-minute approval and immediate effect deprived the plaintiffs of the "time to adjust their behavior before the final rule t[ook] effect," which the APA requires. *E. Bay Sanctuary Covenant*, 993 F.3d at 675 n.15. In the absence of a preliminary injunction at this time, the plaintiffs will not receive this mandatory 30-day period between when the final rule was published and when it goes into effect to adjust their practices and behavior in accordance with the ADMC rule. This

type of procedural injury constitutes irreparable harm. *See Texas v. Becerra*, No. 5:22-CV-185, 2022 WL 3639525, at *29 (N.D. Tex. Aug. 23, 2022) ("A procedural injury, by definition, is irreparable injury . . . ."); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (stating that the plaintiff's procedural injury, in conjunction with "other, concrete injuries" satisfies the irreparable-harm standard).

Irreparable harm also results from the likelihood of tainted horseraces under the ADMC rule. Dkt. No. 125 at 25–26. Other courts have concluded that plaintiffs can "make a sufficient showing of irreparable harm" by demonstrating that they "remain restricted under an illegal system" or rule in a sporting event that would lead to disqualification. *See Jackson v. Nat'l Football League*, 802 F. Supp. 226, 230–31 (D. Minn. 1992); *see also Powell v. Nat'l Football League*, 690 F. Supp. 812 (D. Minn. 1988); *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1319–20 (D. Conn. 1977). As the plaintiffs explain, "horsemen are particularly concerned about race disqualifications based on trace amounts of banned substances that were licit when administered only days before the ADMC rule was published. Dkt. No. 125 at 26. And some of these substances may remain in a horse's system for days, weeks, or even longer. *Id.*; Dkt. No. 126 at 8–9. Thus, the plaintiffs show a substantial threat of irreparable harm by demonstrating that under the ADMC rule, which did not comply with the APA's 30-day requirement, the plaintiffs' horses face immediate disqualification. The defendants argue in response that "few substances that were broadly legal" are now prohibited under the ADMC rule and that any inconvenience is offset by the benefits of "streamlining regulation," but that does not remove the threat of disqualification that the plaintiffs face without being offered the opportunity to adjust their behavior.

In addition, the plaintiffs face nonrecoverable compliance costs. Dkt. No. 125 at 26. Generally, where monetary damages would adequately remedy the plaintiffs' injuries, the plaintiffs' harms are not irreparable. *Greer's Ranch Café v. Guzman*, 540 F. Supp. 3d 638, 651 (N.D. Tex. 2021) (quoting *Janvey*, 647 F.3d at 600). But that is not always the case. "A regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016). This is "because federal agencies generally enjoy sovereign immunity for any monetary damages." *Wages v. White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021). Thus, injunctive relief is justified where a regulated entity can never recover its compliance costs. *See LabMD, Inc. v. FTC*, 678 F. App'x 816, 821 (11th Cir. 2016) (finding irreparable harm by irrecoverable compliance costs pending appeal). Here, "[h]orsemen will have to pay for additional veterinarian visits, additional pre-lab race lab testing, and other expenses to ensure their horses are clean" and comply with the ADMC rule. Dkt. No. 125 at 26. Therefore, the plaintiffs face a substantial threat of irreparable harm through nonrecoverable compliance costs.

The defendants argue, however, that the plaintiffs delayed in seeking injunctive relief, which cuts against their irreparable-harm arguments. Dkt. No. 128-1 at 28. This Court has previously recognized that "delay in seeking relief is a consideration when analyzing the threat of imminent and irreparable harm." *Anyadike v. Vernon Coll.*, No. 7:15-CV-157, 2015 WL 12964684, at *3 (N.D. Tex. Nov. 20, 2015). Nevertheless, a "good explanation" for any alleged delay mitigates that effect. *VanDerStok v. Garland*, No. 4:22-CV-691-O, 2022 WL 4009048, at *9 (N.D. Tex. Sept. 2, 2022). Focusing specifically on the APA-violation claim before the Court today, the Court finds that the plaintiffs did not delay

or, at the very least, have a good explanation. The ADMC rule was not approved until March 27, 2023, and it went into effect immediately. Dkt. No. 126-1 at 34–35. The plaintiffs sought relief for the APA violation by filing a motion for an emergency preliminary injunction that same day. *See* Dkt. No. 124. The plaintiffs could not have filed such a claim until it was certain that the FTC would adopt the rule and would not provide the 30-day window between the date the final rule was published and the date it went into effect. Therefore, the Court is not persuaded by the defendants' argument.

C. The balance of interests militates in favor of granting limited relief.

The third and fourth requirements for issuance of a preliminary injunction—the balance of harms and whether the requested injunction will serve the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Therefore, the Court considers them together. The Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987)).

Here, the balance of interests suggests that the limited remedy of a 30-day injunction is appropriate. The plaintiffs have shown a serious risk of harm—potential physical injury to racehorses, potential disqualification from Triple Crown prep races, and the burden of coming into compliance with a new anti-doping regulatory scheme without the legally required delayed effective date. Dkt. No. 124 at 2–3; Dkt. No. 125 at 23–25. This harm—when balanced against the limited harm that could result from a 30-day hold on a new rule (and, in essence, a return to the long-time status quo up until a few days ago)—is sufficient to justify the limited relief this order provides.

D. The appropriate remedy is to stay the effective date of the ADMC rule for 30 days.

"The final question to be resolved is the nature of the injunctive relief to be granted." *Ngou*, 535 F. Supp. at 1217. "Some courts have held that regulations issued in violation of section 553(d) are merely ineffective until passage of the 30-day period." *Id.* (citing *Rowell*, 631 F.2d at 704). On the other hand, some courts suggest "that this approach should be questioned since it invites violations of section 553(d)." *Id.* And the D.C. Circuit recognized that "[w]hile failure to comply with the notice and comment requirements of § 553(d)'s 30-day requirements calls for a different solution[, w]e agree with the Tenth Circuit that '§ 553(d) is susceptible of a reasonable construction that the regulation may be saved and held valid after passage of the 30-day notice period." *Prows v. Dep't of Justice*, 938 F.2d 274, 276 (D.C. Cir. 1991) (citing *Rowell*, 631 F.2d at 704). The D.C. Circuit went on to explain that section 533(d) "protects those who are affected by agency action taken during the 30-day waiting period without disturbing later action that is not the product of the violation." *Id.*

Here, neither vacatur nor a long-term injunction is appropriate. Instead, given "the special circumstances of this case" and the limited issue currently before the Court, the appropriate remedy is to declare the ADMC rule invalid for a 30-day notice period and valid thereafter absent further order of the Court. *Ngou*, 535 F. Supp. at 1217. This rule protects the parties affected by FTC action taken during the 30-day waiting period without disturbing later action that is not the product of the violation. *See Prows*, 938 F.2d at 276. Thus, the Court enjoins implementation or enforcement of the ADMC rule until May 1, 2023.

4. Conclusion

The plaintiffs' Motion for an Emergency Preliminary Injunction (Dkt. No. 124) is granted in part. The Authority defendants' Motion for Leave to File Combined Expanded Opposition to Plaintiffs' Motion for a Preliminary Injunction (Dkt. No. 128) is granted for the reasons stated in the motion.

So ordered on March 31, 2023.

JAMES WESLEY HENDRIX
UNITED STATES DISTRICT JUDGE

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Eastern District of Arkansas

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