No. 23-2687

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BILL WALMSLEY, ET AL.,
Plaintiffs–Appellants,
v.
FEDERAL TRADE COMMISSION, ET AL.,
Defendants–Appellees.

On Interlocutory Appeal from the
United States District Court
for the Eastern District of Arkansas
Civil Action No.: 3:23-cv-81-JM

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This interlocutory appeal arises from the district court's denial of Plaintiff-Appellants' (Appellants) motion to preliminarily enjoin Defendant-Appellees (Appellees) from enforcing the Horseracing Integrity and Safety Act of 2020 (Horse Act) and the regulations issued under it. This case raises significant constitutional issues: (1) Whether the Constitution's Separation of Powers allows Congress to delegate legislative and executive power to a private association—the Horseracing Integrity and Safety Authority (Authority)—under the private nondelegation doctrine; (2) whether the Separation of Powers allows Congress to delegate the Federal Trade Commission power to legislate with no intelligible principle; and (3) whether Congress's vesting of the Authority with executive power without its board being properly appointed violates the Appointments Clause. The specific question presented is whether the district court erred in denying Appellants' motion for a preliminary injunction by concluding that Appellants did not have a fair chance or were unlikely to succeed on the merits of these claims. These important issues and the questions presented warrant oral argument and Appellants thus request 15 minutes of argument time.

CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure and 8th Cir. R. 26.1.A, Appellant Iowa Horsemen's Benevolent and Protective Association states that it is an Iowa not-for-profit corporation, that it is not a subsidiary of any corporation, and that no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because this case involves federal constitutional issues. App. 011; R. Doc. 1, at 4. Appellants moved for a preliminary injunction under Fed. R. Civ. P. 65(a), which the district court denied on July 11, 2023. App. 143; R. Doc. 43, at 1. This Court has jurisdiction to review "interlocutory orders of the district courts of the United States ... refusing ... injunctions." 28 U.S.C. § 1292(a)(1). Appellants timely filed this appeal on July 21, 2023.

STATEMENT OF THE ISSUES

1. Whether the district court erred in finding that Appellants do not have a fair chance or are not likely to succeed on the merits of their claim that the Horseracing Integrity and Safety Act (Horse Act) unconstitutionally delegates legislative and executive power to the Authority under the private nondelegation doctrine. *See* U.S. Const. art. I; *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Buckley v. Valeo*, 424 U.S. 1 (1976).

2. Whether the district court erred in finding that Appellants do not have a fair chance or are not likely to succeed on the merits of their

claim that the Horse Act unconstitutionally delegates the FTC legislative power under the public nondelegation doctrine. *See* U.S. Const. art. I; *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

3. Whether the district court erred in finding that Appellants do not have a fair chance or are not likely to succeed on the merits of their claim that the Horse Act violates the Constitution's Appointments Clause. *See* U.S. Const. art. II, § 2; *United States v. Arthrex*, 141 S. Ct. 1970 (2021); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Free Enter. Fund v. Public Co. Acct. and Oversight Board*, 561 U.S. 477 (2010).

4. Whether this Court should enter an injunction against Appellees in the first instance. *Home Instead, Inc. v. Florance*, 721 F.3d 494 (8th Cir. 2013).

INTRODUCTION

Appellants Bill Walmsley, Jon Moss, and the Iowa Horsemen's Benevolent and Protective Association seek reversal of the district court's denial of their motion for preliminary injunction against Appellees—the FTC, its Commissioners, and the Authority and its Directors—because the court concluded that they do not have a fair chance or are not likely

to succeed on the merits of their constitutional claims. Appellants also request that this Court address the other required injunction factors the district court did not address and preliminarily enjoin the Appellees from enforcing the Horse Act and any rules adopted under the statute.

Appellants are all dedicated to participating and bettering the equine industry. Bill Walmsley resides in the Arkansas Ozarks and spends much of his time thinking about all things equine. He has dedicated his life to public service—as both a state legislator and a state appellate judge. Now retired, Mr. Walmsley enjoys watching his horses run on the tracks of Oaklawn Racing. He also leads the Arkansas chapter of the National Horsemen's Benevolent and Protective Association (NBPA)—a group dedicated to providing housing, meals, and other services to employees in the horse industry.

Appellant Jon Moss also takes up the mantle for horsemen at the Iowa HBPA. Like Mr. Walmsley, he is dedicated to furthering the horse racing industry and helping the people who make that industry their calling. In this way, he works with jockeys, veterinarians, trainers, and owners to improve Hawkeye State racing.

The Horse Act has upended Appellants' way of life. It unconstitutionally delegates lawmaking power from Congress to the Authority—a private corporation made up of industry insiders who are unaccountable to any branch of the federal government. The private Authority is charged with exercising what amounts to legislative, executive, and judicial powers. Indeed, it creates, enforces, and adjudicates horseracing rules—with little to no check on its actions. For example, 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 potential lawsuit—filed not by the government, but by the Authority itself. And—to top it off—its own internal court system decides who wins.

This regime does not comply with the Constitution's Separation of Powers. Put simply, the Act allows a private corporation—with Board members who are not appointed or removable by the President or any other government official—to issue binding rules with no guiding principle.

The Horse Act tries to cure its constitutional defects by giving the Federal Trade Commission superficial oversight. But that supposed oversight is nothing but a mirage—the Act *requires* the FTC to approve the Authority's rules. And FTC Commissioners cannot initiate their own rulemaking or oversee the Authority's enforcement actions, cannot appoint and remove Board members, and cannot 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 the separate branches of government for a simple reason: to protect liberty. And Congress may not trample on those structural protections merely because doing so makes its job easy. But Congress has done just that in the Horse Act.

These constitutional violations and the irreparable harm they cause show that equity and the public interest resoundingly favor enjoining the Horse Act. This Court should thus reverse the district court and issue a preliminary injunction preventing the FTC and the Authority from enforcing any rules promulgated under the Act.

* * * * *

STATEMENT OF THE CASE

A. Legal and Factual Background

The Horse Act and the Authority

Congress passed the Horse Act in 2020 seeking to create national uniformity in horseracing rules. *See* 15 U.S.C. §§ 3051–3060. But rather than regulate the industry directly, Congress outsourced that job to a private entity: the Authority. The Authority is constructed as a "private, independent, self-regulatory, nonprofit corporation," that 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 is governed by a nine-member Board of Directors (Board)—five "independent" members, and four "industry" members—who wield substantial power regulating the horseracing industry. 15 U.S.C. § 3052(b). None of the nine members are appointed or removable by the President or any other government official. Instead, five independent members are "selected from outside the equine industry." 15 U.S.C. § 3052(b)(1)(A). And 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. § 3054(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 also 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's sweeping powers. Under Section 3053 of the Act, the Authority submits proposed rules to the Commission, and the Commission *must approve* the rules if they are procedurally consistent with the Act and rules approved by the Commission. *Id.* § 3053(c). Under the Act's plain language, the FTC has no power to initiate rulemaking or to create rules based on its own policy preferences. *See id.* The Commission also has no ability to oversee the Authority's enforcement actions in federal court.

The Authority's Initial Regulations

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). For each rule, the Authority followed its own notice-and-comment procedures, and then submitted its finalized rules to the FTC for procedural approval. *See id.* But 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 Horse Act Is Declared Unconstitutional

The Commission at first approved all rules (except for the anti-doping rules). App. 022; R. Doc. 1, at 15, ¶ 72. (citing orders). Then in November 2022, 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) (*NHBPA*).[1]

In *NHBPA*, the Fifth Circuit recognized, under the private-nondelegation doctrine, "a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Id.* at 881. But under the Horse Act, the Authority was not subordinate to the FTC: it was granted "'sweeping' power," *id.* at 882, allowing it "to craft entire industry 'programs'"—which the court explained, "strongly suggests it is the Authority, not the FTC, that is in the saddle," *id.* at 883.

[1] As set out in Appellants' Complaint, the Commission did not initially approve the anti-doping rules because of the Fifth Circuit's ruling. App. 022–023; R. Doc. 1, at 15–16, ¶¶ 74–76.

NHBPA also rejected defendants' argument that the FTC provided the necessary oversight, concluding that consistency review is "too limited to ensure the Authority 'function[s] subordinately' to the agency." *Id.* at 884. Indeed, "consistency" review excludes reviewing the policy choices of the Authority, as the FTC itself had admitted in earlier reviews of the Authority's proposed rules. *Id.* at 885–86.

The *NHBPA* court concluded, "the Authority writes the rules," and while the FTC "may suggest certain changes, ... the Authority can take them or leave them." *Id.* at 886. The Horse Act therefore delegated "unsupervised government power to a private entity," violated the private nondelegation doctrine, and was unconstitutional. *Id.* at 890.

Congress Attempts to Fix
the Horse Act's Constitutional Flaws

In December 2022, seeking to address the Fifth Circuit's ruling, Congress amended only one subsection of the Act—Section 3053(e). *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.

15 U.S.C. § 3053(e).

But the amendment altered no other part of the statute, including Section 3053(c), which requires the Commission to approve the Authority's rules if they are procedurally consistent with the Horse Act. Nor did the amendment alter 15 U.S.C. § 3052(a), (b), which still do not provide for appointment or removal of the Board's members as outlined in Article II of the Constitution.

Subsequent Regulatory Approval

After Congress amended the statute, 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") (Mar. 27, 2023).[2] As the Commission confirmed in the Anti-Doping Order, the Horse Act still requires the FTC to approve the Authority's decisions, and the FTC

[2] https://www.ftc.gov/system/files/ftc_gov/pdf/P222100CommissionOrderAntiDopingMedication.pdf.

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."). Thus, the Commission's powers remain limited to approving or disapproving the proposed rule under Section 3053(c).

The Horse Act's Reach

The Authority's rules touch nearly every aspect of horseracing. Indeed, even the Authority itself admits that "the development of the [Anti-Doping rule] is unprecedented." 88 Fed. Reg. 5070, 5071 (Jan. 26, 2023); *see also 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; and
- 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 anti-doping and medication control rules also 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.*

The new rules also:

- (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.

Again, these rules are, in the Authority's words, "unprecedented." *Id.* at 5071.

Yet the FTC had no ability to reject these rules or approve them with changes reflecting the FTC's policy preferences before the rules took binding effect. Instead, the Commission's role was (and remains) "limited to approving or disapproving the proposed rule" so long as it follows the Horse Act and prior rules. *See* Anti-Doping Order at 1 n.2.

Appellants and the Harm Caused by the Horse Act and Its Regulations

Appellant Jon Moss is a licensed horse owner and a covered person under the Horse 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"). App. 128; Moss Decl. ¶ 1.[3]

Mr. Moss is also the Executive Director of the IHBPA and is familiar with the owners and trainers that comprise the IHBPA's membership. *Id.*; Moss Decl. ¶¶ 2–3. IHBPA's membership includes over

[3] The declarations of Mr. Moss and Mr. Walmsley were entered as exhibits during the July 11, 2023 hearing on Appellants' motion for preliminary injunction and are not electronically available on the district court docket. *See* App. 125; R. Doc. 47, at 44.

900 persons, many of whom are "covered persons" who must also comply with the Act. *Id.*; Moss Decl. ¶¶ 4–5. IHBPA members have and will continue to enter horses in races in Arkansas, Iowa, and other races around the country that are regulated by the Horse Act and its regulations. *Id.*; Moss Decl. ¶¶ 6–8.

IHBPA members are required to register with the Authority and failure to do so could result in serious punishments, among other things, the inability to race. App. 129; Moss Decl. ¶ 9. IHBPA members also must pay yearly assessments to the Authority. *Id.*; Moss Decl. ¶ 10. These assessments cannot be recovered from the government in damages actions and these assessments also reduce the amount of prize money available for race winners. *See id.*; Moss Decl. ¶¶ 11–18. IHBPA members are also, among other things, required to turn over information to the Authority, consent to warrantless searches, and submit horses for on-demand testing. App. 130; Moss Decl. ¶ 22. Penalties for noncompliance with the Authority's rules include civil fines and potential lifetime bans from the industry. App. 130; Moss Decl. ¶ 22. IHBPA members are subject to notification requirements, inspections, investigations,

subpoenas, and enforcement actions from the Authority. App. 131–32; Moss Decl. ¶¶ 24–35.

Appellant Bill Walmsley is also a covered person under the Horse Act and is the President of the Board of Directors of the AHBPA. App. 139; Walmsley Decl. ¶¶ 1–2. He holds an ownership interest in three horses that have entered and will continue to enter racing events at Arkansas's lone racetrack, Oaklawn Racing in Hot Springs, Arkansas. *Id.*; Walmsley Decl. ¶¶ 5–6, 10. These horses have won past races with purse prizes that have been reduced by the Horse Act and its implementing regulations. *See* App. 140; Walmsley Decl. ¶ 9. As a horse owner licensed by the state of Arkansas, Mr. Walmsley also must—under the dictates of the Horse Act—register with the Authority. *Id.*; Walmsley Decl. ¶ 12. He has done so and will continue to do so if required in future racing seasons. *Id.*; Walmsley Decl. ¶ 13.

He must also comply with the Authority's rules and regulations, which impose stringent restrictions on his rights—including, but not limited to, 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. App. 140–41; Walmsley Decl. ¶¶ 14–20.

If Mr. Walmsley does not comply, he faces the inability to race his horses, loss of purse money, civil fines, a lifetime ban from horseracing, and the loss of the right to engage in a lawful profession. App. 141; Walmsley Decl. ¶ 21. Being subject to the Authority's rules and regulations has caused and will continue to cause Mr. Walmsley imminent and irreparable harm. *Id.*

B. Procedural History

Appellants filed their Complaint on April 6, 2023. App. 008; R. Doc. 1, at 1. In the Complaint, Appellants allege the Horse Act violates the Constitution's Appointments and Vesting Clauses (Count I); Private Nondelegation Doctrine (Count II); Public Nondelegation Doctrine (Count III); Due Process Clause (Count IV); and Article III and the Seventh Amendment (Count V). App. 032–44, R. Doc. 1, at 25–37. As relief, Appellants request, among other things, a judgment declaring the Horse Act unconstitutional; injunctive relief prohibiting Appellees from enforcing the Act; injunctive relief prohibiting the Appellees from enforcing any of the rules promulgated under the Act; and an order setting aside and vacating all rules issued under the Act. App. 044; R. Doc. 1, at 37.

Right after filing their Complaint, Appellants moved for a preliminary injunction on Counts I–III. App. 48; R. Doc. 5, at 1. *See also* App. 069–081; R. Doc. 34, at 1–13. The district court held a hearing on Appellants' motion on July 11, 2023. App. 143; R. Doc. 43, at 1. During the hearing, the district court denied the motion because "[a]fter I read the Sixth Circuit opinion in—whether it's *Black* one, two, or three—I just can't get passed at this point in time the lack of probability of success on the merits." App. 125, R. Doc. 47, at 44. The district court also declined to issue a written opinion. App. 126; R. Doc. 47, at 45.[4]

After the hearing, the district court issued a text order denying the motion for the reasons stated on the record at the hearing. App. 143; R. Doc. 43, at 1.

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[4] While the district court's holding is not entirely clear on which case it was relying for its decision, the briefing before, and discussion during, the hearing focused on the Sixth Circuit's decision in *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), upholding the Horse Act as constitutional after Congress amended the Act. *See, e.g.*, App. 072; R. Doc. 34, at 4 (Appellants' reply to FTC's reliance on the Sixth Circuit's decision); App. 101–106; R. Doc. 47, at 20–25; App. 120–21; R. Doc. 47, at 39–40 (portions of hearing addressing the Sixth Circuit's decision). Additionally, the court's reference to *Black* reflects that following a remand after the amendment to the Horse Act, the district court in *NHBPA* had upheld the Act. *See* No. 5:21-CV-071-H, 2023 WL 3293298 (N.D. Tex. May 4, 2023) (*NHBPA II*), *appeal docketed*, No. 23-10520 (5th Cir. 2023).

SUMMARY OF THE ARGUMENT

I. Appellants have, at least, a fair chance of success on the merits of their claims. *First*, handing over federal power to private entities is "legislative delegation in its most obnoxious form." And under the private nondelegation doctrine, private entities may only act as subordinate aids to governmental bodies who exercise sufficient control over those private actors.

The FTC's oversight of the Authority does not meet this standard. The Authority is superior—not subordinate—to the FTC. The Commission cannot control whether the Authority exists, who sits on the Authority's board, and it cannot veto the Authority's enforcement decisions. The Horse Act also requires the FTC to approve anti-doping and racetrack safety rules issued by the Authority if those rules are "consistent" with the Act.

And Congress's amendment to the Act did not fix the private nondelegation violation. The Authority may continue to write the rules regulating the horseracing industry with binding effect on regulated parties' private rights. The Commission still must approve those rules unless they conflict with the Act. That the FTC has gained some other

oversight does not render the Authority an aid to, subordinate to, or under the pervasive surveillance of the FTC—all necessary requirements to withstand a private nondelegation challenge.

Second, the Horse Act, as amended, also violates the "public" nondelegation doctrine. Under that doctrine, Congress may delegate when it supplies an "intelligible principle" to an executive agency. In other words, Congress must supply—by statute—something to guide and cabin the agency's exercise of discretion. But a statute that provides no guidance or confers authority to regulate based on overly vague terms, violates the Constitution's vesting of legislative power in Congress.

Congress's amendment to the Horse Act—Section 3053(e)—provides no limiting principle on how the FTC is to exercise its discretion. The statute instead delegates the Commission the ability to alter rules that have already gone into effect. But only when "necessary or appropriate" to ensure the "fair administration of the Authority," or 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 th[e] act." Nothing else in the Act tells the

FTC how to exercise these choices. This unfettered discretion violates the nondelegation doctrine.

Third, Congress's vesting of executive power in the Authority without requiring its members to be appointed by a government official violates the Appointments Clause. Any individual wielding government power, and who satisfies the definition of an officer, must be properly appointed under the Constitution. The Authority's Directors are, at a minimum, inferior officers of the United States. They hold a continuing office established by law, serve on an ongoing basis, and their duties, salary, and means of appointments are all provided for in the Horse Act. And they wield significant power under the Act.

II. These constitutional violations are causing Appellants ongoing and irreparable harm. Appellants are subject to unconstitutional regulations from the Authority, which deprives them of the protections the rule of law provides in the Constitution. As a result of these sweeping unconstitutional rules, Appellants face drastic fines, tests, illegal searches, and even bans from horseracing altogether. Regulated entities are also forced to pay assessments to the Authority, which will not be returned should Appellants prevail, so they are suffering irreparable

financial harms from the Act. These deprivations are textbook irreparable harm because plaintiffs cannot later remedy any of the financial costs and burdens placed on them.

III. Both Appellants' harm and the public interest favor this Court issuing a preliminary injunction. Appellants will face drastic hardship without an injunction. Indeed, they will remain subject to draconian fines, illegal and arbitrary testing mandates, illegal searches, and outright bans on racing if they do not submit to the Authority's rules. Yet the Authority and FTC will face no harm by being unable to enforce unconstitutional rules. The public interest is always served by preserving citizens' constitutional rights. And the government has no interest in enforcing unconstitutional statutes and unconstitutional regulations promulgated under it.

ARGUMENT

STANDARD OF REVIEW

When reviewing a motion for preliminary injunction, a district court reviews: "(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. Minnesota State High Sch. League*, 917 F.3d 994, 999 (8th Cir. 2019) (citation omitted). "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).

This Court reviews a district court's "denial of a preliminary injunction for abuse of discretion." *Bao Xiong*, 917 F.3d at 999. A district court abuses its discretion when it "rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *Id.* The district court's legal conclusions are reviewed de novo. *Id.*

I. The district court erred in finding Appellants do not have a fair chance or are not likely to succeed on the merits. [5]

Appellants need show only that they have a "fair chance of prevailing" on the merits. *Bao Xiong*, 917 F.3d at 999. Sometimes courts

[5] When a district court commits reversable error on one injunction factor but does not reach the other factors, the Eighth Circuit's "common approach" is to remand for the district court to address the remaining factors. *Home Instead, Inc. v. Florance*, 721 F.3d 494, 499–500 (8th Cir. 2013) (citation omitted). But this Court has discretion to independently address the remaining injunction factors and grant injunctive relief. *Id.* (citing *Coteau Props. Co. v. Dep't of Interior*, 53 F.3d 1466, 1480–81 (8th

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 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 that bind Appellants did not follow a democratic process and the lower standard should apply. First, the rulemakings that directly cause Appellants' constitutional harm did not involve "both the legislative and executive branches"—and thus did not involve 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.*

Cir. 1995)). Because of the importance of the constitutional issues involved and the continuing irreparable harm that is being inflicted on them, Appellants request this Court address all the required injunction factors without remand to the district court.

All the same, not only do Appellants have a "fair chance of prevailing," but they are also likely to succeed on the merits. Thus, the district court should be reversed no matter which standard applies.

A. The Horse Act violates the private nondelegation doctrine.

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." *Dep't 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).

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) ("[T]he 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. 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) ("[T]he separation of powers is designed to preserve the liberty of all the people.").

"Our Constitution permits only the federal government to exercise federal power." *NHBPA*, 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."

NHBPA, 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." *NHBPA*, 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")).

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

Even so, the Supreme Court has held that there is no unconstitutional delegation to a private party if, but only if, that private party is truly "subordinate" to a government body that is itself acting constitutionally. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940).

But what does it mean to be "subordinate?" The Supreme Court provided guidance in both *Carter Coal*, 298 U.S. at 311, and *Adkins*, 310 U.S. at 388. In *Carter Coal*, Congress delegated the ability to set maximum labor hours and minimum wages to private groups of producers and miners. 298 U.S. at 310–11. Because this allowed "one person ... to regulate the business of another," the Court declared the law

unconstitutional. *Id.* at 311. In doing so, the Court found that Congress had given effectively legislative power—or in other words the "governmental function"—to "private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* This created "an intolerable and unconstitutional interference with personal liberty and private property." *Id.* Not unlike what happened with the Horse Act, "Congress then rewrote the law" to attempt to address the constitutional defect—leading four years later to *Adkins*. *NHPBA*, 53 F.4th at 881.

In *Adkins*, the Court again addressed the Coal Act, which 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." 310 U.S. at 388 (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. And from these decisions, 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." *NHBPA*, 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 truly subordinate to government oversight.

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

The Horse Act is of a different breed from the statutory scheme upheld in *Adkins*. 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—not any constitutionally accountable actor. *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 NHBPA*, 53 F.4th at 880.

And rules created by the Authority come with the force of law—they are effective before the FTC has any authority to "approve, disapprove, or modify" any of those rules. 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) ("[T]he framers understood" legislative power "to mean the 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; and (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 medication 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.*; 87 Fed. Reg. at 44,400. Not only do the rules carry the force of law, but they also 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 also 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. 15 U.S.C. § 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 federal 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. Dep't 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.

3. The Authority is not meaningfully controlled 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?" *NHBPA*, 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 is subordinate.

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.* 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." *NHBPA*, 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." *NHBPA*, 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, if 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—binding private parties and altering private rights. *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." *NHBPA*, 53 F.4th at 887.

4. Congress failed to fix the private nondelegation issue in the 2022 amendment.

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—the basis for the Fifth Circuit's ruling. *See NHBPA*, 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 under Section 3053(b)'s consistency review. *See id.* at 4 ("[T]he 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.* In other words, at that point, the Authority—if its rule is procedurally consistent with the Act and passes this "consistency review"—has issued a rule that is binding on private parties and determines private rights.

The Commission can also never initiate its own rulemaking—it can only try to amend Authority rules later. *See id.* But the statute still violates the private nondelegation doctrine because "the FTC's consistency review does not include reviewing the substance of the rules themselves." *NHBPA*, 53 F.4th at 886. Simply granting the FTC post-hoc authority to initiate a modification process—which may or may not alter the Authority's existing and binding policy choices—cannot save the Act from its initial defect.

For this reason, the Sixth Circuit, as well as the Northern District of Texas following remand (and the district court, which relied on these decisions, *supra* at 19 n.3) erred when they upheld the amended version of the Horse Act. In the Sixth Circuit's view, the FTC can "introduce[e]

its own" rules; is "free to prescribe" the rules; and acts as "the primary rule-maker." *Oklahoma v. United States*, 62 F.4th 221, 230 (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 232; *see also 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 230. 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.* On remand, the Northern District of Texas simply relied on this reasoning. *See NHBPA II*, 2023 WL 3293298, at *18 ("Throughout its persuasive opinion, the Sixth Circuit—the only court to interpret the amended HISA's constitutionality—confirms this reading.").[6]

Respectfully, this is wrong. 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

[6] The plaintiffs in that case appealed the district court's second decision, which the Fifth Circuit is now, once again, reviewing. No. 23-10520 (5th Cir. 2023).

Commission. Said another way: The FTC must procedurally approve a rule before it can go through notice-and-comment rulemaking to abrogate, add to, or modify it. The result is that even where the FTC disagrees with the Authority's policy, the Authority's rules go into place affecting binding obligations on the public and their private rights. 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 to years. *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.

Below, the Commission latched onto the Sixth Circuit's decision and reversed course from its earlier pronouncement in the Anti-Doping Order that it could only alter existing Authority rules. Instead, the Commission now believes, like the Sixth Circuit, Congress gave it sweeping independent rulemaking authority to initiate its own rulemakings and "effectively nullify any proposals for any rules that the Authority submits or has submitted previously." App. 104; R. Doc. 47, at 23. But the Commission had it right the first time. Indeed, its first view

was correct under the statutory text—which allows the FTC to "*add to*" or "*modify*" "the rules of the Authority." 15 U.S.C. § 3053(e) (emphasis added). In other words, the FTC can *change* the Authority's rules sometimes. But that is all the FTC can do—it may not initiate its own rules based on its preferred policy. The statute's text—allowing the FTC to "abrogate," "modify," or "add to" the Authority's rules—does not change this fact.

As the Supreme Court has made explicit, the word "modify" in a statute allowing an agency to issue rules "has a connotation of increment or limitation." *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 225 (1994). Modify means to "change in a minor fashion" not "introduce[] a whole new regime of regulation." *Id.* at 234. So where the Horse Act says "modify" it means "moderate change." *Id. See also Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023) (quoting *MCI Telecomms. Corp.*, 512 U.S. at 225).

"Add to" simply means what it says: to add elements to an Authority rule. Nothing in Section 3053(e) gives the FTC carte blanche to make any rule it wants for whatever reason it wants, or even initiate its own rulemaking. Again, as the Commission itself insisted, it can instead only tinker with what the Authority promulgates. *See* Anti-Doping Order at 1

n.2. That's it. And that is not the type of control to make the Authority subordinate to the FTC for the private nondelegation doctrine.

And keep in mind, too, that this all centers on review of the Authority by the FTC. But the Authority makes initial decisions—whether to issue rules or to begin an investigation at all. And those are vital policy decisions. Maybe the Authority would not want to issue rules. Maybe, too, it decides not to investigate industry officials that it favors. The FTC can oversee none of those decisions. It has no say over what the Authority does. It can only tweak what the Authority has already done.

5. 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*, 62 F.4th at 232–33. 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 Refin. Co. v. Ryan*, 293 U.S. 388 (1935)); *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495.

The modification provision added by the amendment—Section 3053(e)—provides no direction on what the FTC must consider when

limiting its discretion. Instead, the statute says the FTC can act to alter rules that have already gone into effect. But only 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 (Jan. 3, 2023).[7]

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 the nondelegation doctrine. *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. To be sure, parts of the statute tell *the Authority* to consider certain factors when

[7] https://www.ftc.gov/system/files/ftc_gov/pdf/HISA%20Order%20re%20Ratification%20of%20Previous%20Orders%20-%20Final%20not%20signed.pdf

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 public 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 if they wield government power.* 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 ("[T]he 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 about 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. *Id.* § 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. *Id.* § 3054(b) ("The rules of the Authority ... shall preempt any provision of State law or regulation.").

Even more, the Authority oversees lawsuits to seek civil penalties and injunctive relief in federal courts—a quintessential executive power. *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 too 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.[8] They do not. No one in the federal government appointed the 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

[8] *See Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 73–74 (2007) (any position "invested by legal authority with a portion of the sovereign powers of the federal Government" is a federal office).

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 returned the case 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 tramples on the Constitution's democratic accountability guarantee and cannot be fixed unless Congress once again amends the statute.[9] This Court should enforce and uphold the Constitution's structure, find that

[9] Moreover, the FTC cannot "ratify" the decisions of the Authority. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10–14 (D.C. Cir. 2019); *Landry v. FDIC*, 204 F.3d 1125, 1132 (D.C. Cir. 2000) (ratification does not moot Appointments Clause challenge to an inferior officer). And here, the Authority's board members are at least inferior officers.

the Authority violates the Appointments Clause, and enjoin enforcement of the Authority's rules.

II. Appellants face continuing irreparable harm.

Appellants have and continue to suffer irreparable harm for at least two reasons. First, they are subject to unconstitutional regulations 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) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Second, Appellants face drastic continuing changes in the status quo—longstanding state rules governing horseracing—that have subjected Appellants to new registration and fee obligations, fines, tests, searches, and sweeping regulations that threaten to upend ongoing sporting events. Such rule changes cause textbook irreparable harm because plaintiffs cannot later recover any portion of these new costs.

A. Appellants are being irreparably injured by being subjected to an unconstitutional statute and unconstitutional regulations.

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 from 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. These constitutional defects cause irreparable harm. *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("[W]hen constitutional rights are threatened or impaired, irreparable injury is presumed."); *Jolly v.*

Coughlin, 76 F.3d 468, 482 (2d Cir. 1996) ("[I]t 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.").

The Authority's unconstitutional rulemaking also subject Appellants to crushing fines and potentially a lifetime ban. App. 130; Moss Decl. ¶ 22; App. 141; Walmsley Decl. ¶ 21. With so much at stake, Appellants should be able to challenge these 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*, 561 U.S. at 490 (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 Appellants to crushing sanctions, they will suffer irreparable harm.

B. The Authority's unconstitutional rules are causing Appellants irreparable harm.

In any event, because Appellants are 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., LLC 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. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

Appellants 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. App. 129; Moss Decl. ¶¶ 9–10. The Authority has even assessed fees to them, payable immediately. *See id.*

And assessments paid, and reduced prize money, cannot be recovered from the government in damages actions. *See id.*; Moss Decl. ¶¶ 11–18. 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. App. 132; Moss Decl. ¶ 34; App. 141; Walmsley Dec. ¶ 19. And some violations are strict liability. 88 Fed. Reg. at 5074. Horses

participate in races for a short 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 Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1319 (D. Conn. 1977) ("[T]he 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) ("[T]he 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 continue to compete in upcoming races is to continue 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. These harms are significant, ongoing, and irreparable.

III. The Appellants' harm outweighs any harm to Appellees and the public interest supports an injunction.

A. Appellants' harm.

As explained, Appellants will face drastic hardship without an injunction. The Authority and FTC, on the other hand, face no harm in

in not enforcing unconstitutional rules. 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 cease imposing the rules.[10] 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).[11]

Just so here. State rules have not been repealed and can govern with no harm to the Authority or FTC. Yet if the Authority's rules remain in effect in Arkansas and Iowa, regulated parties face clear and continuing irreparable harm.

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[10] *See* Federal Trade Comm'n, Order Disapproving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority.https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_hisa_anti-doping_disapprove_without_prejudice_0.pdf (Dec. 12, 2022).

[11] https://bphisaweb.wpengine.com/wp- content/uploads/2023/01/HISAGuidance3.14.22.pdf.

And 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 reverse 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).

B. The Public Interest cannot be served by constitutional violations.

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 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, if the Court issues an injunction, security should be waived or set at a nominal amount.

CONCLUSION

The district court erred when it found that Appellants are not likely to succeed on the merits of their constitutional claims. The Horse Act violates the basic structure of our Constitution by delegating the Authority core legislative and executive powers, allowing the FTC unfettered discretion within the Act, and compounds these structural violations by flouting the Constitution's Appointments Clause. This Court should stop these constitutional violations and provide Appellants preliminary relief from the irreparable harm the Horse Act and its regulations are causing.

DATED: October 11, 2023.

Respectfully submitted,

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