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Note

Hold Your Horses: The Horseracing Integrity and Safety Act of 2020 Is in Its Own Race to Beat Constitutional Invalidity

Kalen Youtsey[[1]](#footnote-1)\*

**I. Introduction**

Horseracing is many people’s favorite pastime. The sport has been present in the United States since early colonial times. Though its popularity has ebbed and flowed, horseracing currently enjoys broad viewership. However, there are many prevalent issues, and horseracing has faced increasing backlash as a result. This Note will focus on, in particular, inconsistency in state horseracing regulations.

For many years, horseracing was only regulated on the state-level.[[2]](#footnote-2) Each state had its own regulations and agencies that governed races.[[3]](#footnote-3) It was not until 1978 that the first federal act regarding gambling was passed.[[4]](#footnote-4) Later in the 2000s, Congress attempted to pass other acts, but they were struck down in the legislative chambers.[[5]](#footnote-5) Overall, the horseracing industry still “lacks a centralized authority” to enforce uniform regulations.[[6]](#footnote-6) This lack of uniformity has led to the passage of the Horseracing Integrity and Safety Act of 2020 (HISA) in hopes of providing more stability to the sport of Thoroughbred horseracing. However, the Act is facing constitutional challenges and it is in its own race to beat those challenges.

This Note will discuss horseracing in the United States and the constitutional validity of HISA. It will first begin by discussing the background of state and federal law. Then, it will examine HISA and the potential constitutional issues in lawsuits in both the Eastern District of Kentucky and the Northern District of Texas. The Note will then conclude with hopes about the future of HISA.

**II. History of Horseracing Regulations by States**

Horseracing began in the United States in the mid-1600s and was popular among a majority of the colonies.[[7]](#footnote-7) In the beginning, towns were the ones that passed ordinances which governed each race.[[8]](#footnote-8) In the late 19th century, state racing commissions were established. These commissions had the authority to both enact, and enforce, rules and conditions during races.[[9]](#footnote-9) At this time, some states attempted to ban horseracing through legislation, but they were unsuccessful because of the sport’s popularity.[[10]](#footnote-10) Overall, there were few rules, and they were inconsistently enforced.[[11]](#footnote-11) In fact, during the years leading up to the American Civil War, horseracing only increased and Kentucky became the breeding headquarters of the American Thoroughbred breed.[[12]](#footnote-12) During this period of increasing popularity, proponents of horseracing began to call for a national uniform regulation system, but those efforts were swiftly undercut by the outbreak of war.[[13]](#footnote-13)

At the start of the 20th century, Protestant opposition to horseracing was rampant, which led to a decline in the sport.[[14]](#footnote-14) Then, shortly after World War I, horseracing emerged again as a prominent sport.[[15]](#footnote-15) During World War II, national organizations were formed—like the American Jockey Club—in an effort to maintain private control of horseracing, with horse trainers and owners controlling regulations instead of the government.[[16]](#footnote-16) This was put to an end in 1951. In *Fink v. Cole*, the Court held that it was unconstitutional for the legislature to delegate regulatory authority to the American Jockey Club.[[17]](#footnote-17) The American Jockey Club was therefore officially replaced by state racing commissions as the body for regulating races nationally.[[18]](#footnote-18)

Today, every state that allows horseracing has a racing commission that regulates the sport in that state.[[19]](#footnote-19) The racing commissions have broad freedom.[[20]](#footnote-20) Courts will generally give the commissions discretion when it pertains to carrying out their regulations.[[21]](#footnote-21) Most states have broadly similar regulations, but there is variation in areas that concern prohibited substances, testing, and penalties.[[22]](#footnote-22) These varying regulations have led to issues with both gambling and drug abuse in the horse industry, which in turn has resulted in the federal government stepping in to establish federal regulations.

**III. History of Horseracing Acts by the Federal Government**

**a. Interstate Horseracing Act of 1978**

The passage of the Interstate Horseracing Act of 1978 (IHA) marked the first time that the federal government intervened to regulate horseracing. The IHA was a compromise between the horseracing industry’s desire to prohibit the legalization of interstate off-track betting and the states’ desire to derive revenue from the off-track betting.[[23]](#footnote-23) The IHA permitted off-track betting so long as consent was obtained from the host state’s racing commission.[[24]](#footnote-24) It also presented a departure from Congress’s traditional lack of interference with states’ decisions regarding gambling.[[25]](#footnote-25) The IHA provided that any person who violated the Act would be held civilly liable for damages to the host state’s racing commission.[[26]](#footnote-26) It was enacted to protect the horseracing industry by stopping unregulated off-track betting[[27]](#footnote-27) and to ensure that states would cooperate with one another.[[28]](#footnote-28) The structure of the IHA allowed it to survive several constitutional challenges and the Act itself helped increase the total revenue for horseracing.[[29]](#footnote-29)

**b. Versions of the Horseracing Integrity and Safety Act**

After the IHA, Congress attempted to enforce uniformity in horseracing through several additional bills. The first bill was the Interstate Horseracing Improvement Act of 2011. In that bill, Congress attempted to prohibit individuals from entering, or otherwise providing for the sake of entering, a horse in a race involved in off-track betting if the individual knew that the horse was under the influence of some performance enhancing drug.[[30]](#footnote-30) That bill was followed by the Horseracing Integrity and Safety Acts of 2013, 2015, 2017, and 2019.[[31]](#footnote-31) The main objective of those bills was to establish some uniformity in the regulations of performance enhancing drugs.[[32]](#footnote-32) However, none of the bills passed due to opposition among the states’ most influential horseracing proponents, who were uncomfortable with the idea of federal regulation.[[33]](#footnote-33) The failure of those bills, and the increased number of horses dying on the racetracks due to the lack of uniform regulations,[[34]](#footnote-34) led to the enactment of the current law: the Horseracing Integrity and Safety Act of 2020.[[35]](#footnote-35)

**IV. The Horseracing Integrity and Safety Act of 2020**

HISA was enacted “to improve the safety and integrity of the [Thoroughbred] horse racing [industry].”[[36]](#footnote-36) The Act establishes the Horseracing Integrity and Safety Authority (Authority) which is a “private, independent, self-regulatory, nonprofit corporation.”[[37]](#footnote-37) The Authority is meant to develop and implement an anti-doping and medication control program for horseracing as well as a racetrack safety program. The Authority must consist of nine people, five of which must be from outside the equine industry and four from within the equine industry.[[38]](#footnote-38) The Board of Directors must be comprised of those nine members.[[39]](#footnote-39) The Authority must establish both an Anti-Doping and Medication Control Standing Committee and a Racetrack Safety Standing Committee.[[40]](#footnote-40)

The Anti-Doping Committee will provide advice to the Authority on the development of the anti-doping and medicine control program. The Racetrack Safety Standing Committee will provide advice on the development of the racetrack safety program.[[41]](#footnote-41) The Authority is supposed to enter into an agreement with the United States Anti-Doping Agency, which will become the enforcement agency of the anti-doping and medicine control program.[[42]](#footnote-42) The Authority is also required to submit all proposed rules and regulations to the Federal Trade Commission (FTC) for approval.[[43]](#footnote-43) HISA provides that the Authority can develop a list of civil penalties and can impose sanctions, however, the sanctions must be submitted to the FTC for review.[[44]](#footnote-44)

The Act allows for state racing commissions to still participate in regulating horseracing. This is done through agreements between the Authority and the state racing commissions so long as the services are “consistent with the enforcement of the [programs].”[[45]](#footnote-45) The state racing commissions may not implement less restrictive requirements than the standard that the Authority has set.[[46]](#footnote-46) The Authority may coordinate with the commissions so that it can monitor and enforce the standards that are developed to ensure uniformity.[[47]](#footnote-47)

Another important feature of HISA is the funding provision. The Act requires the states to be responsible for the overall funding of the Authority. Each state racing commission is required to provide an estimated annual amount to fund both programs mentioned above.[[48]](#footnote-48) The state racing commissions can assess and collect fees pertaining to horseracing such as foal registration, starter fees, and track fees. The state racing commissions shall be the ones to “determine . . . the method by which the requisite amount of fees . . . shall be allocated, assessed, and collected.”[[49]](#footnote-49) If a state racing commission chooses to not remit fees, then the Authority may assess and collect fees according to the procedures outlined in the Act. However, if a state racing commission elects not to remit fees, it cannot impose a fee or tax regarding anti-doping control or racetrack safety matters on individuals.[[50]](#footnote-50)

HISA has received both positive and negative reactions from parties interested in the horseracing industry. Proponents have argued that the horseracing industry is incapable of resolving issues because of the lack of uniformity among the states.[[51]](#footnote-51) Additionally, they have argued that the policies in the Act would “ensure a level playing field and enhance the overall integrity of the sport.”[[52]](#footnote-52) It is their belief that the Act will enhance public opinion, causing more people to support the horseracing industry.[[53]](#footnote-53) They also praise the fact that the authority is placed in an independent organization that is free of conflicts of interest.[[54]](#footnote-54)

In contrast, opponents have stated that HISA removes authority from the states and places it in a federally created entity that lacks knowledge of the horseracing industry.[[55]](#footnote-55) They fear that this lack of knowledge will lead to the creation of regulations and rules that are inconsistent with the best interests of the horseracing industry.[[56]](#footnote-56) They have also argued that allowing horseracing to be under federal control places an unnecessary additional layer of oversight on the state system.[[57]](#footnote-57) Despite the arguments against the Act, it was passed and the regulations are set to go in effect on July 1, 2022.[[58]](#footnote-58)

However, HISA is now facing constitutional challenges in two courts. The states of Oklahoma and West Virginia, along with other non-state parties, have filed a complaint in the United States District Court in the Eastern District of Kentucky, Lexington Division.[[59]](#footnote-59) The plaintiffs have challenged the Act on multiple grounds, including the non-delegation doctrine, the anti-commandeering doctrine, the Due Process Clause of the Fifth Amendment, and the Appointment Clause.[[60]](#footnote-60) The plaintiffs have argued that the Act should be found unconstitutional and therefore void.[[61]](#footnote-61) The other challenge was filed by the National Horsemen’s Benevolent and Protective Association and other parties in the United States District Court for the Northern District of Texas, Lubbock Division.[[62]](#footnote-62) Those plaintiffs have argued that the Act is unconstitutional because it violates the non-delegation doctrine, the Appointment Clause, and the Due Process Clause of the Fifth Amendment.[[63]](#footnote-63) The plaintiffs have asked for the court to enjoin the defendants from implementing the Act.[[64]](#footnote-64)

While both actions have been dismissed in the district courts, they are awaiting hearings on appeal.[[65]](#footnote-65) Whether or not the Act is deemed constitutional, it is still important to analyze the constitutional challenges to fully understand how HISA and future acts can withstand these same challenges. The outcome of these appeals might be especially important, because if this issue were to reach the United States Supreme Court, the Court could use one or both cases to reexamine the “intelligible principle” standard.

**V. The Non-Delegation Doctrine**

**a. Public Non-Delegation Doctrine and Intelligible Principle Standard**

The idea of non-delegation dates back to 1825 in the case of *Wayman v. Southard*, where Chief Justice John Marshall wrote that “[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”[[66]](#footnote-66) Chief Justice Marshall then went on to state that Congress does have the ability to “delegate to others, powers which the legislature may rightfully exercise itself.”[[67]](#footnote-67) The idea was examined again in *Mistretta v. United States*, in which the Court stated that the non-delegation doctrine “is rooted in the principle of separation of powers that underlies our tripartite system of Government.”[[68]](#footnote-68) The Court further emphasized that the legislature is the entity that has the authority to legislate and that “Congress generally cannot delegate its legislative power to another Branch.”[[69]](#footnote-69) However, the Court did hold that the non-delegation doctrine does not prohibit Congress from receiving assistance from the other two branches so long as Congress provides an “intelligible principle,”[[70]](#footnote-70) or, in other words, some sort of guidance—even if fairly broad—for the other entity to follow.[[71]](#footnote-71)

That is still the current standard according to *Gundy v. United States*.[[72]](#footnote-72) The Court stated that “Congress . . . may confer substantial discretion on executive agencies to implement and enforce the laws.”[[73]](#footnote-73) The Court maintained that this is constitutional so long as Congress gives an intelligible principle to the agency.[[74]](#footnote-74)

**b. Private Non-Delegation Doctrine**

The private non-delegation doctrine is the lesser-known counterpart of the public non-delegation doctrine.[[75]](#footnote-75) It is a constitutional prohibition that articulates that Congress “cannot delegate regulatory authority to a private entity.”[[76]](#footnote-76) In *Association of American Railroads v. United States Department of Transportation*, the court compares the two doctrines and explains the difference between them. It states that the public non-delegation doctrine has “scarce practical application,” because as long as Congress gives an intelligible principle, the delegation will be found constitutional.[[77]](#footnote-77) In contrast, the private non-delegation doctrine is much stricter. The court held that the “Constitution commits no executive power” to private entities and that “[e]ven an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority.”[[78]](#footnote-78)

Despite this prohibition, private entities can assist federal agencies in making regulations. However, this poses another question: when does that assistance cross the line? This issue was raised in Kentucky’s complaint, which cited *Sunshine Anthracite Coal Co. v. Adkins*. The Court in *Adkins* held that a private entity can propose a regulation so long as the private entity is only aiding a governmental agency and that agency retains the ability to “approve[], disapprove[], or modify[]” the regulation.[[79]](#footnote-79) *Association of* *American Railroads v. United States Department of Transportation* reaffirmed this principle.[[80]](#footnote-80) With these standards in mind, we now look to the two pending cases and analyze the HISA’s constitutional validity.

**c. Analyzing the Act**

Both pending lawsuits argue that the Act violates the private non-delegation doctrine because the legislature has granted regulatory authority to a private entity.[[81]](#footnote-81) The Act in question shows that the legislature gave regulatory authority to a “private, independent, self-regulatory, nonprofit corporation.”[[82]](#footnote-82) Under the Act, the Authority has the discretion to establish committees to promulgate rules and regulations as well as the discretion to assess fees and issue civil sanctions.[[83]](#footnote-83) The Kentucky action cites to several cases that affirm the notion that the legislature cannot delegate that type of regulatory authority to a private entity.[[84]](#footnote-84) The Texas action also references the same cases that the Kentucky action uses to defend its argument.[[85]](#footnote-85)

One of the primary cases, *Carter v. Carter Coal Co.*, held that delegating to a private entity or persons is “legislative delegation in its most obnoxious form.”[[86]](#footnote-86) This was because the delegation was not to a disinterested official body, but instead to a private person or entity whose interests can be “adverse to the interests of others in the same business.”[[87]](#footnote-87) The Court made it known that a person or entity should not be entrusted with the authority to regulate the business of a competitor and that a statute that does allow that “undertakes an intolerable and unconstitutional interference with personal liberty and private property.”[[88]](#footnote-88) Both sets of plaintiffs also cited to *Association of American Railroads v. United States Department of Transportation*, another case which discussed the idea of a private entity being granted regulatory authority.[[89]](#footnote-89) Kentucky’s complaint also mentioned *United States v. Frame*, drawing attention to the idea that if a private entity is “part of a governmental regulatory program” then “the ‘amount of government oversight of the program’ must be ‘considerable.’”[[90]](#footnote-90)

Kentucky’s complaint argued further that the Authority is not a governmental entity, but instead a private entity which has no governmental oversight involved in the promulgation of its regulations.[[91]](#footnote-91) That leads to the crucial question of whether or not the Authority is a private entity or a public entity, because the answer could mean life or death for this Act. In *Association of American Railroads v. United States Department of Transportation*, the court analyzed whether Amtrak was a private entity. The court began by looking at the people who sat on the Board of Directors to determine if they were interested parties.[[92]](#footnote-92) The court then moved on to highlight the fact that Congress has the “power to charter private corporations.”[[93]](#footnote-93) That, however, led to the discussion of whether Congress intended to create a private corporation or a public governmental entity. Crucially, the court said that it would look to the function of the entity rather than the label.[[94]](#footnote-94) This involved the two key reasons behind the distinction of private and public entities. The first being that “delegating the government’s powers to private parties saps our political system of democratic accountability.”[[95]](#footnote-95) The second is “the belief that disinterested government agencies . . . look to the public good, not private gain.”[[96]](#footnote-96)

Now, looking at HISA, the Authority is at least nominally labeled as a private corporation with nine board members. Five of those members are independent individuals that are outside of the equine industry and the other four are equine industry members.[[97]](#footnote-97) This is important because it is highly imperative that the entity is held accountable and that the entity looks to the public good. Congress has not stated that the Authority’s status is anything else but an instrumentality of the government. The Authority may be listed as a private non-profit corporation that is given the authority by the government to promulgate regulations, but throughout HISA the Authority is still subject to the review of the FTC.[[98]](#footnote-98) The Authority is required to submit all proposed rules pertaining to certain topics listed under § 1204(a) of the Act so that a federal agency has the final say in the rules.[[99]](#footnote-99) The Authority must also enter into an agreement with an agency, or other entity that is nationally recognized “to act as the anti-doping and medication control enforcement agency,” for the anti-doping and medication program under the Act.[[100]](#footnote-100)

Therefore, it would appear that through the structure of the Act the Authority is held to a high degree of accountability. In regard to whether or not this Authority is looking to the public good or to private gain, we look again at the Authority and its board members. *Association of American Railroad* highlights how those delegations of authority to private persons or entities may be perilous due to the fact that private parties are looking to get ahead of their competition, and having the authority to regulate the field will lead to rules and regulations that only benefit the private entity and not the public as a whole.[[101]](#footnote-101) However, the majority of the board members are outside of the equine industry. The Authority itself is not a corporation that is involved in racing its own horses. The rules and regulations that the Authority promulgates have no real effect on the individuals sitting on the board, and would not help them get an unfair advantage since they are not involved in the competition.

If we were to analyze the Authority under *Association of American Railroads*, we would find that the Authority is a non-profit corporation that is a part of a governmental regulatory program. In fact, the Authority could be viewed as functioning more as a government agency rather than simply a private entity that is aiding another government agency. This is because the Authority is charged with promulgating and enforcing rules and is not an entity that is conducting business on its own behalf. If a court holds that the Authority is in fact a public agency despite its formal label as a private entity, then the delegation of power would be constitutional so long as there is an intelligible principle which the Authority must follow.

One potential counterargument is that the Authority is a private entity because it was expressly labeled by Congress as a private entity, and it is structured like a private entity. However, even so, the Act could still stand as constitutional. According to *Adkins*, a private entity is allowed to aid another governmental agency.[[102]](#footnote-102) However, the government agency must still maintain discretion when it comes to approving and modifying policy proposals.[[103]](#footnote-103) The Court in *Adkins* stated that “[s]ince law-making is not entrusted to the [private entity], this statutory scheme is unquestionably valid.”[[104]](#footnote-104) The Authority does have the ability to propose rules; however, the Act states that “[a] proposed rule, or a proposed modification to a rule, of the Authority shall not take effect unless the proposed rule or modification has been approved by the [Federal Trade] Commission.”[[105]](#footnote-105) This section illustrates that the FTC maintains discretion in approving any proposed rules. It would be fair to argue that the Authority is not charged with law-making abilities, and that it is merely aiding the FTC. *Frame* also mentions that when a private entity is a part of a government regulatory scheme there must be a considerable amount of government oversight.[[106]](#footnote-106) In the present situation, the FTC is tasked with maintaining a watchful eye over the Authority and the Authority is required to enter into agreements with other federal agencies to have them enforce the rules. That, in itself, appears to be a considerable amount of government oversight.

**d. Discussion of Current Litigation**

**1. The United States District Court for the Northern District of Texas Case**

Both sides presented compelling arguments in two separate district courts. The United States District Court for the Northern District of Texas concluded that the Authority is a “novel structure” that falls under the category of a private entity.[[107]](#footnote-107) The court explained that if Congress gives an intelligible principle to the agency and “properly gives a private party” the ability to aid the agency in the administration of the act then there is no constitutional violation.[[108]](#footnote-108) On the other hand, it quoted *Association of American Railroad* in stating that an intelligible principle is not capable of saving an act that empowers a private entity with regulatory authority.[[109]](#footnote-109) The court also cited to *Currin v. Wallace* to emphasize that lawmaking power is not given to the private entity when Congress “conditions an agency’s regulatory power on private party approval.”[[110]](#footnote-110) It also discussed the relevant two-part test that is used to determine whether a statute violates the private non-delegation doctrine.[[111]](#footnote-111) A statute is not unconstitutional when “(1) the statute ‘imposes a standard to guide’ the private party and (2) provides ‘review of that determination that prevents the [private party] from having the final say.’”[[112]](#footnote-112) The court then analyzed the Act under this two-part test to determine whether the Act violated the private non-delegation doctrine.

The court first began with the intelligible principle prong.[[113]](#footnote-113) It quoted *Am. Power & Light Co. v. SEC* to show that for there to be an intelligible principle, Congress needed to have described the general policy, the agency that was to apply the policy, and the boundaries of the authority.[[114]](#footnote-114) The court stated that the Act’s general policy is clear because the Act states that its purpose is to protect the safety and integrity of the horseracing industry through two programs and that the Act does not affect existing regulations.[[115]](#footnote-115) The Act explicitly states the FTC and Authority’s roles and boundaries, including that the Authority is charged with creating and implementing the two programs and that the FTC is charged with overseeing the Authority so that it “only . . . possess[es] the power to give draft rules the force of law.”[[116]](#footnote-116) The primary limitation that the Act establishes, according to the court, is that the FTC can approve rules only if the rules are consistent with the Act and applicable to other rules that have been approved.[[117]](#footnote-117) Also, the Act is limited to rules about medicine and racetrack safety and the Authority is bound to mandatory considerations listed within the Act when creating rules.[[118]](#footnote-118) The court rejected the plaintiff’s argument that the Act has no boundaries or standards by showing that the Authority is limited in its modification and creation abilities by the language in the Act, and by reiterating the idea that the FTC must approve of all of the Authority’s rules.[[119]](#footnote-119) It ultimately concluded that the Act contained a sufficient intelligible principle to satisfy the first prong of the test and moved on to discuss the second prong.[[120]](#footnote-120)

The court began the analysis of the second prong by comparing the Authority to the private party in *Carter Coal*.[[121]](#footnote-121) It stated that the Authority, unlike the private entity in *Carter Coal*, “lack[ed] unrestrained, unreviewable power to regulate the rest of the thoroughbred horseracing industry.”[[122]](#footnote-122) The court further explained that the Authority has “no independent power to enact binding rules” because it can propose rules but all rules must go through the FTC for review.[[123]](#footnote-123) Therefore, this was evidence that the Authority is subordinate to the FTC.[[124]](#footnote-124) The court highlighted that without the FTC’s approval, the Authority can only pass standards that are in accordance with its bylaws but those will not be binding on private entities.[[125]](#footnote-125) It quoted *Adkins*, stating that the Authority was not charged with lawmaking because lawmaking “[was] ‘not entrusted to the industry’” in this case.[[126]](#footnote-126) It also stated that the Authority functions like other self-regulatory organizations that are all constitutional under the private non-delegation doctrine.[[127]](#footnote-127)

To further the argument that the Authority met the second prong, the court drew comparisons with multiple circuit cases wherein delegations of authority were upheld.[[128]](#footnote-128) The most relevant of these were *R.H. Johnson & Co. v. SEC*, *Texas v. Rettig*, and *City of Dallas v. FCC*.[[129]](#footnote-129) The court started with *Rettig*, which concerned a private board that was given the power to certify that the rates the states had to pay to insurers were sound.[[130]](#footnote-130) In that case, the court held that the delegation was constitutional because the private board acted subordinately to the Department of Health and Human Services and the Department maintained the final review.[[131]](#footnote-131) The court then held that the Authority passed the *Rettig* standard from *Texas v. Rettig* because the FTC has the final review ability over all of the Authority’s rules.[[132]](#footnote-132) It went further to say that unlike the act in *Rettig*, the HISA actually gives more oversight ability to the FTC,[[133]](#footnote-133) because the FTC has the power to not only approve of the rules, but can also reject the rules and recommend modifications.[[134]](#footnote-134)

The last case the court relies upon to explain its holding is the *City of Dallas v. FCC*, wherein the FCC promulgated a blanket rule that banned cable operators from being able to provide video programming from other service providers, but under another FCC rule, the private entities could selectively lift this ban without FCC reviewal.[[135]](#footnote-135) In that case, the court held that the power that was delegated was unconstitutional because the FCC could not review the decision made by the private entities.[[136]](#footnote-136) Comparing that case to the powers granted to the Authority, the court explained that the FCC in that case could not modify, approve or disapprove the decision whereas the FTC has those abilities.[[137]](#footnote-137) The court explained that the sub-delegation cases are helpful in analyzing delegation issues because those cases involve an agency taking its congressional authority and redelegating it to a private entity, which courts find even more problematic than cases where Congress delegates power to a private entity directly.[[138]](#footnote-138)

The court then gestured to the fact that despite the FTC’s inability to draft rules, the FTC is not subordinate to the Authority.[[139]](#footnote-139) It explained that that the FTC can adopt interim final rules without Authority proposals if the Commission “finds that such a rule is necessary to protect (1) the health and safety of covered horses; or (2) the integrity of covered horseraces and wagering on those horseraces.”[[140]](#footnote-140) The court also stated that the FTC’s inability to formally modify rules was not dispositive because the Fifth Circuit in *Adkins* and the Supreme Court in *Currin* concluded that the ability to modify proposed rules did not affect the holding.[[141]](#footnote-141) Similarly, the FTC still maintains the ability to continuously reject proposed rules if the Authority does not follow the Commission’s recommendation to modify.[[142]](#footnote-142) Even though this is not equivalent to drafting rules, “the power to approve, disapprove, or recommend modification subject to continued rejection ensures that the Authority” will function subordinately to the FTC.[[143]](#footnote-143) The Northern District Court of Texas concluded its opinion and essentially held that the Authority satisfied the threshold requirements of the private non-delegation doctrine and that “only appellate courts may expand or constrict their precedent.”[[144]](#footnote-144)

**2. The Eastern District of Kentucky Case**

The court in *Eastern District of Kentucky in Oklahoma v. United States* began its analysis on the delegation of power by stating that there is Supreme Court precedent that states if Congress gives an intelligible principle, then the agency is not wielding any legislative authority when it enacts binding rules in accordance with that intelligible principle.[[145]](#footnote-145) It cited to a case out of the Northern District of Texas in stating that if Congress gives an intelligible principle, and also properly gives a private entity power to assist an agency in administering the statute, then there can be no delegation problem because the legislative authority would still remain with Congress.[[146]](#footnote-146) However, an intelligible principle cannot save a statute that grants a private entity regulatory authority.[[147]](#footnote-147) The court then highlighted that a private entity can only “play a role in the regulatory process” when it “‘functions subordinately’ to an agency.”[[148]](#footnote-148) Ultimately the court concluded that for the Act to be constitutional, “HISA ‘must contain an intelligible principle guiding the Authority and the FTC,’ . . . and ‘the Authority must function subordinately to the FTC.’”[[149]](#footnote-149)

After discussing the current precedent and what is required for the Act to remain constitutional, the court shifted its attention to whether there was any intelligible principle, if the Authority acted subordinate to an agency, and specific arguments pertaining to the private non-delegation doctrine.[[150]](#footnote-150) The court referenced *Am. Power & Light*, stating that if Congress has clearly expressed to the delegee the general policy of what must be pursued and the boundaries of the authority, then the delegation is permissible because there is a proper intelligible principle.[[151]](#footnote-151) It also drew attention to the fact that the Supreme Court has only ever struck down two delegations of authority, and that in those cases Congress had not articulated any standard that would confine the entity’s discretion.[[152]](#footnote-152) In analyzing the Act, the court found that the Act does expressly define both the FTC and the Authority’s purposes and their boundaries.[[153]](#footnote-153) In quoting the language of the Act, the Court illustrated that the policy does communicate Congress’s intent to “protect the safety and integrity of horseracing through nationalizing and streamlining regulation under two specific programs.”[[154]](#footnote-154)

The court further pointed to §§ 3052 and 3053 of the Act, explaining that those sections state that the Authority’s purpose is to develop and implement the two programs and that the FTC has oversight.[[155]](#footnote-155) It was noted that the Act set boundaries under §§ 3052 through 3054 by stating that the FTC “shall approve proposed rules if they are ‘consistent with (A) this [statute] and (B) applicable rules [already] approved by the [FTC]’” and that the Authority is limited to only creating rules about medication control and racetrack safety.[[156]](#footnote-156) The court also mentioned that the Act outlines multiple considerations that the Authority must take into account when it is creating the rules and the programs and that those same considerations also apply to the FTC when they are reviewing the rules for approval.[[157]](#footnote-157) For the reasons listed above, the court came to the conclusion that Congress had given a sufficient intelligible principle and that this Act is more constitutional than some of the “very broad delegations” that the Supreme Court has upheld.[[158]](#footnote-158)

The court then moved on to discuss whether the Authority was acting as a “subordinate private entity.”[[159]](#footnote-159) It used the Northern District of Texas case to outline that it is not an impermissible delegation to a private entity “when the entity ‘functions subordinately’ to a governmental agency” and that law-making is not entrusted to the private entity when an agency has oversight authority over the private entity.[[160]](#footnote-160) The plaintiffs argued that the FTC was in a “merely ministerial role” and that therefore the Authority was not acting subordinately to them.[[161]](#footnote-161) The court agreed with the FTC when it asserted that the standard in place in the Act is the same standard that the Securities and Exchange Commission (SEC) uses when it decides to approve rules proposed by a private entity and that this standard has been upheld multiple times by various courts of appeal.[[162]](#footnote-162) It further stated that while the Act is unique in its features, those features do not take the Act outside the “established constitutional limits.”[[163]](#footnote-163) The FTC still maintains the ability to “approve, disapprove, and recommend modifications to the Authority’s proposed standards and its inability to formally modify the Authority’s rules is not fatal.”[[164]](#footnote-164) The court noted that in both *Currin* and *Amtrak*, the agencies were not able to modify the rules and those acts were still upheld as constitutional.[[165]](#footnote-165)

The plaintiffs argued that the court should not rely upon the holding of the Northern District of Texas case, because that court was constrained by the *Rettig* precedent which they stated does not apply to this court.[[166]](#footnote-166) The court rejected that argument by stating that the other court did not rely solely on the *Rettig* precedent when making its decision, but that it also relied on the holding from *Adkins*.[[167]](#footnote-167) It went even further by stating that *Adkins*, *Aslin*, *Todd & Co.*, *Rettig*, and the *Nat’l Horsemen’s* courts, which are binding and persuasive authority, “correctly found [that] ‘[c]ourts have limited their rulemaking analyses to whether the agency could ‘approve or disapprove’ the private entity’s rules.’”[[168]](#footnote-168) The court held that the Authority functioned as a subordinate entity since the FTC still maintained the ability to approve and disapprove all of the proposed rules of the Authority.[[169]](#footnote-169)

The last argument advanced by the plaintiffs was that the Authority’s enforcement powers violated the private non-delegation doctrine.[[170]](#footnote-170) The plaintiffs argued that the Authority’s ability to commence civil actions against parties who violate the Act, investigate potential violations, impose sanctions for violations, and adjudicate anti-doping violations is unconstitutional.[[171]](#footnote-171) However, the court said this argument was without merit because the Act limits the ability to investigate potential violations by establishing uniform procedures that are approved by the FTC, and that any sanctions imposed must be reviewed and approved by the FTC. Also, any decision made by the Authority is subject to review by an adjudicative legal judge whose decision is also subject to review by the FTC.[[172]](#footnote-172) This type of delegation power is not unheard of and has been previously upheld.[[173]](#footnote-173) The court ultimately held that the Act is constitutional because it does not violate either of the non-delegation doctrines.[[174]](#footnote-174)

Both district courts came to the same conclusion using similar arguments and case law. However, there could be a departure when the cases reach their respective appellate courts. The Fifth Circuit handed down a decision in May of 2022 that may affect the outcome of the Texas case.[[175]](#footnote-175) In *Jarkesy v. SEC*, the Fifth Circuit held that Congress had unconstitutionally delegated its legislative authority to the SEC when it failed to provide an adequate intelligible principle for the SEC to follow.[[176]](#footnote-176) The reasoning behind the holding was that Congress left the grant of power to the SEC open-ended, meaning that the SEC had exclusive and absolute discretion with the power given.[[177]](#footnote-177) The court stated that Congress had not indicated how the SEC should use its authority and therefore the court felt that it was a “total absence of guidance” which is “impermissible under the Constitution.”[[178]](#footnote-178) It is possible that the Fifth Circuit will also hold that the HISA does not have an adequate intelligible principle.

As mentioned at the start of this paper, the Northern District of Texas case and the Eastern District of Kentucky case could potentially be used to challenge the current precedent of the intelligible principle standard that has long been critiqued as being too low of a threshold requirement, and could potentially be used to challenge the non-delegation doctrine in general.

**VI. The Constitutional Issues with the Removal and Appointment Power of the Horseracing Integrity and Safety Authority**

**a. Appointment Power Standards**

Under the Appointment Clause in the United States Constitution Article II, the President, the courts of law, or even the head of a department has the authority to appoint an inferior officer whereas the President alone may nominate a principal officer that must be confirmed by the Senate.[[179]](#footnote-179) According to the Supreme Court in *Edmond v. United States*, an inferior officer is an “officer[] whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.”[[180]](#footnote-180) The term “officer” is further defined in *Lucia v. Securities Exchange Commission* as a person who “occup[ies] a ‘continuing’ position established by law” and “exercise[es] significant authority pursuant to the laws of the United States.”[[181]](#footnote-181)

**b. Removal Power Standards**

The Constitution also vests all executive power in the President under Article II, § 1, Clause 1.[[182]](#footnote-182) According to the Court in *Seila Law LLC v. Consumer Financial Protection Bureau*, the Constitution “assumes that lesser executive officers will ‘assist’” the President in his executive duties.[[183]](#footnote-183) It continues by stating that those lesser officers “must remain accountable to the President” since they wield the President’s authority.[[184]](#footnote-184) Accordingly then, the President’s power includes “the ability to remove executive offic[ers], for it is ‘only the [President’s] authority that can remove’ such officials.”[[185]](#footnote-185)

There are two congressional limitations on the President’s removal power, so that the President may, in certain circumstances, only remove an officer for “good cause,” defined as “inefficiency, neglect of duty, or malfeasance in office.”[[186]](#footnote-186) The first limitation is, when dealing with a principal officer that is part of a quasi-judicial or quasi-legislative multimember agency that does “not wield substantial executive power,” the President needs good cause for that officer’s removal.[[187]](#footnote-187) The second limitation is that Congress can impose the good cause requirement on the President’s removal power over inferior officers if the inferior officer possesses limited duties and does not possess any policy-making or administrative authority.[[188]](#footnote-188)

**c. Analyzing the Act**

The Act established the Authority which as mentioned previously is a “private, independent, self-regulatory, nonprofit corporation” and it is governed by a nine-member board of directors that must be governed by bylaws.[[189]](#footnote-189) The question then presented is whether the board is comprised of officers that must be appointed and removed according to the Constitution or merely just employees. As mentioned above, an officer is defined as an individual who “occup[ies] a ‘continuing’ position established by law” and “exercise[es] significant authority pursuant to the laws of the United States.”[[190]](#footnote-190) It would appear that each member of the board is occupying a continuing position that was established by law, since the Act creates the Authority and each of the positions on the board. It would also appear that the board possesses a significant amount of authority pursuant to the laws of the United States, since it governs the Authority which has the ability to promulgate regulations,[[191]](#footnote-191) impose sanctions,[[192]](#footnote-192) and bring civil actions to enforce the Authority’s rules and sanctions.[[193]](#footnote-193) Based off of that interpretation, the members of the board would most likely be considered officers under the above given definition.

One must now look to see what type of officers the members of the board are, so as to shed light on how they must be appointed and removed. There is no direct language in the Act that states that the board will consist of principal officers or inferior officers. The board’s rules and sanctions are subject to review of the FTC.[[194]](#footnote-194) Therefore, arguably, the board is supervised by a higher official that is nominated by the President and confirmed by the Senate.[[195]](#footnote-195) If so, then the board would be comprised of inferior officers and the proper appointment method would be appointment by the President, a court, or a department head. However, that is not the case; according to the Act, the board is instead appointed through a nominating committee.[[196]](#footnote-196) Additionally, the nominating committee members are appointed through the “governing corporate documents of the Authority,”[[197]](#footnote-197) not by the procedures established in the Appointment Clause. With all of that in mind, a court could potentially find that the appointment process of the board violates the Constitution; however, that finding would be contingent upon how a court classified the Authority.

In regard to the removal process, there is no exact language in the Act as to how members of the board could be removed. The Act merely states that the bylaws are to contain information regarding the termination of membership.[[198]](#footnote-198) If the President is not given the ability to remove the members of the board, either unconditionally or under one of the two congressional exceptions, then the Act could be considered unconstitutional—depending, again, on the classification of the Authority itself. For now, the Authority is still considered to be merely a private entity. However, these two constitutional provisions—the Appointment Clause and the removal power of the President—could pose future hurdles for the constitutionality of the Act if that were to change.

**d. Discussing the Current Litigation**

Both complaints alleged that the Act violates the Appointment Clause, but only the Eastern District of Kentucky complaint alleged that the Act violates the President’s removal power.[[199]](#footnote-199) The complaint in the Northern District of Texas stated that if the Authority constructively functions as a public entity, then the appointment of the board via a private nominating committee violates the Appointment Clause.[[200]](#footnote-200) They claimed that members of the board operate as officers of the United States because “they ‘occupy a continuing position established by law’ and ‘exercise[] significant authority pursuant to the laws of the United States’” and therefore should be appointed by either the President, a court, or a department head.[[201]](#footnote-201) The complaint in the Eastern District of Kentucky made an argument similar to that of the complaint in Texas; however, they also alleged that since the President has no ability to remove any of the members of the board conditionally or unconditionally, the Act is unconstitutional on those grounds as well.[[202]](#footnote-202)

Ultimately, the Northern District of Texas dismissed the plaintiff’s Appointment Clause claim on a procedural basis, because the plaintiffs did “not oppos[e] the defendants’ motions to dismiss that claim, by failing to pursue it in their motion for summary judgment, and by conceding at oral argument that they were no longer asserting it.”[[203]](#footnote-203) The Eastern District of Kentucky dismissed both arguments out of hand, stating that it did not need to consider the plaintiff’s alternative arguments regarding appointment and removal since the Authority was a private entity and not a public entity.[[204]](#footnote-204) It is highly likely that the appellate courts will affirm the holdings of the district courts on these claims. Both parties in both cases have alleged that the Authority is a private entity, which would nullify the appointment and removal claims since those pertain to public entities. An appellate court could theoretically decide to reclassify the Authority as a public entity, but it is unlikely.

**VII. The Tenth Amendment**

**a. The Tenth Amendment and the Anti-Commandeering Principle**

The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”[[205]](#footnote-205) *Murphy v. National Collegiate Athletic Association* held that “[t]he Constitution confers on Congress not plenary legislative power but only certain enumerated powers” leaving “all other legislative power [to be] reserved for the States, as the Tenth Amendment confirms.”[[206]](#footnote-206) The Court further stated that absent from the list of powers given to Congress is the “power to issue direct orders to the governments of the States.”[[207]](#footnote-207) *Murphy* discussed *New York v. United States*, the case that “pioneered” the anti-commandeering principle.[[208]](#footnote-208) It traced the principle all the way back to the basic structure of the government, where the Constitution gives Congress the ability to regulate individuals but not the states.[[209]](#footnote-209) It quoted that opinion when it stated that “Congress may not simply ‘commandee[r] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program’” which is otherwise known as the anti-commandeering principle.[[210]](#footnote-210)

Another important case *Murphy* discussed was *Printz v. United States*, which gave us the holding that Congress “may not ‘command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”[[211]](#footnote-211) *Murphy* explained that it is important to adhere to the principle because it is a “structural protection[] of liberty,” “promotes political accountability,” and “prevents Congress from shifting the cost[] of regulation to the States.”[[212]](#footnote-212) Therefore, an act that violates either the anti-commandeering principle or the Tenth Amendment will be deemed unconstitutional by the courts.

**b. Analyzing the Act**

The Act contains multiple provisions that could potentially violate the anti-commandeering principle. For example, there is a provision that discusses collecting an amount of money from each state to fund that state’s share of the programs, a provision discussing the states’ racing commissions’ decision whether to remit fees, and a provision discussing procedure for when the states’ racing commissions do not elect to remit fees.[[213]](#footnote-213) There is also a provision stating that the “Federal or State law enforcement authorities shall cooperate and share information” when a person’s conduct may be in violation of one or both of the programs.[[214]](#footnote-214)

The first two provisions mentioned above could be seen as Congress shifting the cost of the programs onto the states and forbidding the states to collect fees if they do not remit fees. Like *Murphy* stated, when Congress enacts a law which requires enforcement, Congress must appropriate the funds needed and not shift that cost over to the states.[[215]](#footnote-215) Additionally, the last provision could be seen as Congress commanding state officers to administer or enforce its regulatory programs since the Act demands that state law enforcement authorities cooperate and share information. This could be a violation of the anti-commandeering principle as well, because Congress does not have the authority to command state law enforcement to assist in administering a regulatory program. However, the anti-commandeering principle “does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.”[[216]](#footnote-216) If a law does not “regulate the States’ sovereign authority to ‘regulate their own citizens’” and it “applie[s] equally to state and private actors” then it is not commandeering.[[217]](#footnote-217) None of those provisions require the states to enact or to refrain from enacting a law or regulatory program. The Act is meant to regulate the horseracing industry—which both the states and private actors participate in—through federal regulatory programs. While the Act offers the opportunity for states to implement the programs or to yield to them, it does not require the states to implement anything. The Act appears to apply equally to all participants involved in the horseracing industry as well. It is highly unlikely that a court would find that the Act violates the anti-commandeering principle or the Tenth Amendment.

**c. Discussing the Current Litigation in the Eastern District of Kentucky**

Only the plaintiffs of the Eastern District of Kentucky alleged that the Act violated the Tenth Amendment and the anti-commandeering principle.[[218]](#footnote-218) They argued that the provisions that discuss the remittance of fees and the provision about law enforcement cooperation are unconstitutional, because the “HISA unconstitutionally conscripts the state governments into helping the Authority carry out a federal regulatory program” and it “command[s] state legislators and officers not to impose or collect specific taxes or fees.”[[219]](#footnote-219) However, the Eastern District of Kentucky thought otherwise.

The Eastern District of Kentucky began its analysis by outlining what the anti-commandeering principle is. It stated that “[t]he Supreme Court has clearly stated that Congress may not pass legislation which requires a state to regulate or enforce a federal statute.”[[220]](#footnote-220) It also discussed the holding of *Printz* as mentioned above. The court analyzed the remittance of fees provision and concluded that it is “clearly a choice [that the States] may elect to do so” because the language of that section indicates that if the states do not elect to remit the fees, then the covered persons shall be required to instead.[[221]](#footnote-221) The provision does not require the state to collect the fees nor does it require the state to use its own finances.[[222]](#footnote-222) Therefore, the collection of any fees is purely voluntary on the part of the states.[[223]](#footnote-223) The court also held that the provision that dealt with the consequences of the state not remitting fees was merely a preemption scheme,[[224]](#footnote-224) because the Act provided that it had “exclusive national authority over covered activities and stat[ed] that [the] Authority[’s] rules . . . preempt[ed] any provision of State law or regulation with respect to matters within the jurisdiction of the Authority under this Act.”[[225]](#footnote-225)

The court also explained that the plaintiff’s reading of the law enforcement cooperation provision misconstrued the actual meaning. It determined that the plain meaning of that section was that the Authority was required to cooperate with the states; not the other way around.[[226]](#footnote-226) The court looked to the statutory scheme as a whole, and the placement of the provision within the context of the Act, when interpreting the plain meaning.[[227]](#footnote-227) It found that the whole objective of the Act was to “create a framework for regulatory action” and to “define the duties and obligations of the Authority” which meant the proper meaning is that the section requires the Authority to cooperate, not the states.[[228]](#footnote-228) The court concluded that the Act does not violate the anti-commandeering principle.[[229]](#footnote-229)

**VIII. Fifth Amendment Due Process Clause**

**a. Due Process Clause**

The Due Process Clause of the Fifth Amendment states that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”[[230]](#footnote-230) Implicit in the Due Process Clause is the concept that a person or entity cannot be “[e]ntrusted with the power to regulate the business of another, and especially of a competitor.”[[231]](#footnote-231) The Court in *Carter Coal Co*. stated that a statute that gives the above-mentioned power is “an intolerable and unconstitutional interference with personal liberty and private property.”[[232]](#footnote-232) The Court reasoned that private persons have interests that are often adverse to the interests of the other people in the business, so allowing one to control the regulations of the other is a “denial of rights [that are] safeguarded by the due process clause.”[[233]](#footnote-233)

**b. Analyzing the Act**

It has been argued that since the Authority is a private entity made up of a nine-member board, five of which are from outside the industry and four from the industry, its delegation of power violates the Due Process Clause.[[234]](#footnote-234) It is unlikely that a court would find that the Act violates the Due Process Clause since the majority of the board is independent—meaning not a member of the equine industry—and the chair of the board must be one of the independent members.[[235]](#footnote-235) On top of that, both programs created by the Act have standing committees that are also to be comprised of a majority of independent individuals.[[236]](#footnote-236) There is also a conflict-of-interest provision that states that certain individuals cannot be selected as a member of the board or standing committees. That includes an “individual who has a financial interest in, or provides goods or services to, covered horses,” “an official or officer of an equine industry representative[] or who serves in a governance or policy making capacity for an equine industry representative,” or an “employee of, or an individual who has a business or commercial relationship with, an individual described [above].”[[237]](#footnote-237) Another layer of protection from self-interested people controlling the industry is the FTC’s oversight. Since the FTC must review all proposed rules, it can deny rules that are considered self-interested. However, there are parties that still argue that those layers of protection are still not enough to prevent the Act from being deemed unconstitutional.

**c. Discussing the Current Litigation**

Both complaints alleged that the Act violates the Due Process Clause because the Authority and standing committees allow for a minority of self-interested individuals to be members.[[238]](#footnote-238) The Kentucky complaint alleged that the conflict-of-interest provision does not provide protection from all the ways in which self-interested actors may control the decisions made by the Authority.[[239]](#footnote-239) It still allows for a person in the equine industry to be a member “so long as he is not regularly and significantly engaged” in the equine industry.[[240]](#footnote-240) However, both district courts disagreed with the arguments presented.

The Northern District of Texas held that the Act complies with the Due Process Clause that was articulated in *Boerschig v. Trans-Pecos Pipeline, LLC*.[[241]](#footnote-241) It stated that *Boerschig* recognized that there is a private non-delegation doctrine that arises from the Due Process Clause;[[242]](#footnote-242) however, for the reasons stated above in examining the non-delegation doctrine, the court held that the Act also does not violate the Due Process Clause.[[243]](#footnote-243) The court then went on to focus on the self-interested party argument and concluded that the Authority is not self-interested.[[244]](#footnote-244) It held that the Authority “explicitly protects against self-interest while preserving [the] industry representation in the Authority.”[[245]](#footnote-245) It reiterated the Act’s membership requirements for the board and standing committees, highlighting that a majority of the board and committees must be independent members from outside the industry. It also highlighted the conflict-of-interest provision mentioned at length above.[[246]](#footnote-246) The court concluded that the Act prevents the Authority “from having ‘the unrestrained ability to decide whether another citizen’s property rights can be restricted.’”[[247]](#footnote-247)

Similarly, the Eastern District of Kentucky also agreed that an inquiry into whether self-interest is a Due Process violation is the same as an inquiry into the private non-delegation doctrine.[[248]](#footnote-248) The court also agreed that the Due Process Clause argument failed for the same reasons that caused the private non-delegation doctrine argument to fail.[[249]](#footnote-249) It also explained that even if the Authority was comprised of self-interested individuals, it is still subordinate to the FTC, which means the Authority is “not regulating its competitors in violation of the due process clause.”[[250]](#footnote-250) Both courts overall concluded that the Act is constitutional, as it does not violate either of the non-delegation doctrines or the Due Process Clause. It is now left to the appellate courts, because “[these] district court[s] will not read tea leaves to predict where [the doctrines] might end up.”[[251]](#footnote-251)

**IX. Conclusion**

The integrity and safety of the horseracing industry is teetering on a dangerous edge. There is a necessity for uniformity among the rules and regulations pertaining to medication and racetrack safety for all the horses involved. Since the states were unwilling or unable to create that uniformity, then it was left to the federal government to intervene. The Horseracing Integrity and Safety Act of 2020 is a unique act, which has opened it to questions of constitutional validity. The question remains, though: has Congress gone too far with its delegation to a private entity as to violate the Constitution, or are the states just bitter that the federal government has intruded?

This Act and its regulations could be the turning point, not just in horseracing, but also in non-delegation doctrine precedent. With so many precedents being overturned in the recent months by the Supreme Court, will this be the next precedent to go? Two district courts have already ruled that the Act is constitutional, but the respective appellate courts may not agree in the coming months. There is always the chance that the Horseracing Integrity and Safety Act of 2020 will not beat its race for constitutional validity. However, my hope is that it wins its race and that it is amended to include the other breeds of horses in the horseracing industry, so that all horse races across the states are not only uniform, but that they are safe and humane for both the horses and the people participating.

1. \* Juris Doctor candidate, Oklahoma City University School of Law, May 2023. This Note is dedicated to my beloved Nana, who was my partner in crime and biggest cheerleader. Nana, your unwavering love, and support meant the world to me, and I miss you every day. I also dedicate this work to my parents Aaron and Katie, my sister Kirsten, and my significant other Rodrigo, who have been my pillars of strength throughout this journey. Thank you for being there for me every step of the way. A special thank you to my faculty supervisor Dean Jim Roth, for his guidance and support during this project. Finally, thank you to the members of OCU Law Review and Professor Timothy Gatton for making this publication a reality.

   \* This Note was written before the 5th and 6th Circuits handed down their respective opinions. [↑](#footnote-ref-1)
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3. . *Id.* at 42. [↑](#footnote-ref-3)
4. . *Id.* at 43. [↑](#footnote-ref-4)
5. . *Id.* at 53. [↑](#footnote-ref-5)
6. . Lauren Stelly, *Uniform Drug Reform in Horseracing*, 6 Miss. Sports L. Rev. 71, 77 (2016). [↑](#footnote-ref-6)
7. . Carter, *supra* note 1, at 10. [↑](#footnote-ref-7)
8. . *Id.* [↑](#footnote-ref-8)
9. . *Id.* at 42. [↑](#footnote-ref-9)
10. . *Id.* at 13. [↑](#footnote-ref-10)
11. . *Id.* at 22. [↑](#footnote-ref-11)
12. . *Id.* at 14. [↑](#footnote-ref-12)
13. . *Id.* [↑](#footnote-ref-13)
14. . *Id.* at 15. [↑](#footnote-ref-14)
15. . *Id.* at 15-16. [↑](#footnote-ref-15)
16. . *Id.* [↑](#footnote-ref-16)
17. . *Id*. at 16. [↑](#footnote-ref-17)
18. . *Id.* [↑](#footnote-ref-18)
19. . *Id.* at 23-24. [↑](#footnote-ref-19)
20. *. Id*. at 42. [↑](#footnote-ref-20)
21. . *Id.* [↑](#footnote-ref-21)
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23. . Heidi J. Seebauer, *The Interstate Horseracing Act of 1978: An Evaluation*, 12 Conn. L. Rev. 883, 883 (1980). [↑](#footnote-ref-23)
24. . *Id.* [↑](#footnote-ref-24)
25. . *Id.* [↑](#footnote-ref-25)
26. . *Id.* at 911. [↑](#footnote-ref-26)
27. . *Id.* at 915. [↑](#footnote-ref-27)
28. . Carter, *supra* note 1, at 44. [↑](#footnote-ref-28)
29. . *Id.* [↑](#footnote-ref-29)
30. . Bennett Liebman, *Introducing the Horseracing Integrity and Safety Act and a New Era of Racing Regulation*, 32 NYSBA Ent., Arts & Sports L.J. 64, 2 (2021). [↑](#footnote-ref-30)
31. . *Id.* [↑](#footnote-ref-31)
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33. . *Id.* [↑](#footnote-ref-33)
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35. . Liebman, *supra* note 29. [↑](#footnote-ref-35)
36. . Carter, *supra* note 1, at 47. [↑](#footnote-ref-36)
37. . Horseracing Integrity and Safety Act of 2020, H.R. 1754, 116th Cong. § 1203(a) (2020) (enacted) (hereinafter referred to as H.R. 1754). [↑](#footnote-ref-37)
38. . *Id.* § 1203(b)(1)(A) & (B). [↑](#footnote-ref-38)
39. . *Id.* § 1203(b). [↑](#footnote-ref-39)
40. . *Id.* § 1203(c). [↑](#footnote-ref-40)
41. . *Id.* [↑](#footnote-ref-41)
42. . *Id.* § 1205(e)(1). [↑](#footnote-ref-42)
43. . *Id.* § 1208. [↑](#footnote-ref-43)
44. . *Id.* § 1209. [↑](#footnote-ref-44)
45. . *Id.* § 1205(e)(2). [↑](#footnote-ref-45)
46. . *Id.* § 1211(a)(2). [↑](#footnote-ref-46)
47. . *Id.* § 1205(e)(3). [↑](#footnote-ref-47)
48. . *Id.* § 1203(f)(1). [↑](#footnote-ref-48)
49. . *Id.* § 1203(f)(2)(D). [↑](#footnote-ref-49)
50. . *Id.* § 1203(f)(3)(D). [↑](#footnote-ref-50)
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54. . Carter, *supra* note 1, at 54. [↑](#footnote-ref-54)
55. . *Id.* at 55. [↑](#footnote-ref-55)
56. . *Id.* at 56. [↑](#footnote-ref-56)
57. . John T. Wendt, *In This Issue, Third Times the Charm? The Horseracing Integrity Act of 2019*, Ent. & Sports Law., 4, 4-5 (2020). [↑](#footnote-ref-57)
58. . H.R. 1754 at § 1202(14). There have been no regulations published as of October of 2022. [↑](#footnote-ref-58)
59. . First Amended Complaint for Declaratory Judgment and Injunctive Relief at 1, Oklahoma v. United States, Civ. No. 5:21-cv-104-JMH, 2022 U.S. Dist. LEXIS 99448 at \*1 (E.D. Ky. 2021). [↑](#footnote-ref-59)
60. . *Id.* at 3-5. [↑](#footnote-ref-60)
61. . *Id.* at 5. [↑](#footnote-ref-61)
62. . First Amended Complaint in Intervention for Declaratory and Injunctive Relief at 1, Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black, 596 F. Supp. 3d 691 (N.D. Tex. 2022). [↑](#footnote-ref-62)
63. . *Id.* at 20-27. [↑](#footnote-ref-63)
64. . *Id.* at 27-28. [↑](#footnote-ref-64)
65. . As of March 2023, the 5th Circuit held HISA unconstitutional and the 6th Circuit held it constitutional. [↑](#footnote-ref-65)
66. . Wayman v. Southard, 23 U.S. (1 Wheat.), 42-43 (1825). [↑](#footnote-ref-66)
67. . *Id.* at 43. [↑](#footnote-ref-67)
68. . Mistretta v. United States, 488 U.S. 361, 371 (1989). [↑](#footnote-ref-68)
69. . *Id.* at 371-72. [↑](#footnote-ref-69)
70. . *Id.* [↑](#footnote-ref-70)
71. . *Id.* [↑](#footnote-ref-71)
72. . Gundy v. United States, 139 S. Ct. 2116, 2119 (2019). [↑](#footnote-ref-72)
73. . *Id.* at 2123. [↑](#footnote-ref-73)
74. . *Id.* [↑](#footnote-ref-74)
75. . Ass’n of Am. R.R. v. U.S. Dep’t of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013) *vacated on other grounds* by DOT v. Ass’n of Am. R.R., 575 U.S. 43 (2015). [↑](#footnote-ref-75)
76. . *Id.* [↑](#footnote-ref-76)
77. . *Id.* [↑](#footnote-ref-77)
78. . *Id.* at 670-71. [↑](#footnote-ref-78)
79. . Sunshine Anthracite Coal Co. v. Adkins, 60 S. Ct. 907, 910 (1940). [↑](#footnote-ref-79)
80. . *Ass’n of Am. R.R.*, 721 F.3d at 671. [↑](#footnote-ref-80)
81. . First Amended Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 59, at 41; First Amended Complaint in Intervention for Declaratory and Injunctive Relief, *supra* note 62, at 20-21. [↑](#footnote-ref-81)
82. . H.R. 1754 at § 1203(a). [↑](#footnote-ref-82)
83. . *Id.* § 1203. [↑](#footnote-ref-83)
84. . First Amended Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 59, at 41-45. [↑](#footnote-ref-84)
85. . First Amended Complaint in Intervention for Declaratory and Injunctive Relief, *supra* note 62, at 21. [↑](#footnote-ref-85)
86. . Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936). [↑](#footnote-ref-86)
87. . *Id.* [↑](#footnote-ref-87)
88. . *Id.* [↑](#footnote-ref-88)
89. . *Ass’n of Am. R.R.*, 721 F.3d at 666. [↑](#footnote-ref-89)
90. . First Amended Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 59, at 41. [↑](#footnote-ref-90)
91. . *Id*. [↑](#footnote-ref-91)
92. . *Ass’n of Am. R.R.*, 721 F.3d at 674. [↑](#footnote-ref-92)
93. . *Id.* [↑](#footnote-ref-93)
94. . *Id.* at 675. DOT v. Ass’n of Am. R.R., 575 U.S. 43 (2015) vacated *Ass’n of Am. R.R.*, 721 F.3d 666 (D.C. Cir. 2013) but still discussed that a label from Congress is not dispositive but that you must look to the structure and function of the entity to determine if it is a private entity or a government agency. [↑](#footnote-ref-94)
95. . *Id.* [↑](#footnote-ref-95)
96. . *Id.* [↑](#footnote-ref-96)
97. . H.R. 1754 at § 1203(b). [↑](#footnote-ref-97)
98. . *Id.* § 1204. [↑](#footnote-ref-98)
99. . *Id.* § 1204(a). [↑](#footnote-ref-99)
100. . *Id.* § 1205(e)(1). [↑](#footnote-ref-100)
101. . *Ass’n of Am. R.R.*, 721 F.3d at 675. [↑](#footnote-ref-101)
102. . *Adkins*, 310 U.S. at 399. [↑](#footnote-ref-102)
103. . *Id.* [↑](#footnote-ref-103)
104. . *Id.* [↑](#footnote-ref-104)
105. . H.R. 1754 at § 1204(b)(2). [↑](#footnote-ref-105)
106. . United States v. Frame, 885 F.2d 1119, 1128 (3d Cir. 1989). [↑](#footnote-ref-106)
107. . Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black, 596 F. Supp. 3d 691, 708 (N.D. Tex. 2022). [↑](#footnote-ref-107)
108. . *Id.* [↑](#footnote-ref-108)
109. . *Id.* at 711. [↑](#footnote-ref-109)
110. . *Id.* [↑](#footnote-ref-110)
111. . *Id.* at 710-12. [↑](#footnote-ref-111)
112. . *Id.* at 711 (citing Boerschig v. Trans-Pecos Pipeline, LLC, 872 F.3d 701, 707-09 (5th Cir. 2017)). [↑](#footnote-ref-112)
113. . *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d 691 at 712-13. [↑](#footnote-ref-113)
114. . *Id.* [↑](#footnote-ref-114)
115. . *Id.* at 713. [↑](#footnote-ref-115)
116. . *Id.* [↑](#footnote-ref-116)
117. . *Id.* [↑](#footnote-ref-117)
118. . *Id.* [↑](#footnote-ref-118)
119. . *Id.* at 713-16. [↑](#footnote-ref-119)
120. . *Id.* at 715. [↑](#footnote-ref-120)
121. . *Id.* at 716. [↑](#footnote-ref-121)
122. . *Id.* (discussing *Carter*, 298 U.S. at 310-11). [↑](#footnote-ref-122)
123. . *Id.* [↑](#footnote-ref-123)
124. . *Id.* [↑](#footnote-ref-124)
125. *. Id.* [↑](#footnote-ref-125)
126. . *Id.* (citing *Adkins*, 310 U.S. at 399). [↑](#footnote-ref-126)
127. . *Id.* [↑](#footnote-ref-127)
128. . *Id.* at 717-18. [↑](#footnote-ref-128)
129. . *Id.* [↑](#footnote-ref-129)
130. . *Id.* at 716-17 (discussing Texas v. Rettig, 987 F.3d 518, 532 (5th Cir. 2021)). [↑](#footnote-ref-130)
131. . *Id.* at 717. [↑](#footnote-ref-131)
132. *. Id*. [↑](#footnote-ref-132)
133. . *Id.* [↑](#footnote-ref-133)
134. . *Id.* [↑](#footnote-ref-134)
135. . *Id.* at 717-18 (discussing City of Dallas v. FCC, 165 F.3d 341, 357-58 (5th Cir. 1999)). [↑](#footnote-ref-135)
136. . *Id.* at 718. [↑](#footnote-ref-136)
137. . *Id.* [↑](#footnote-ref-137)
138. . *Id.* at 718-19. [↑](#footnote-ref-138)
139. . *Id.* at 719. [↑](#footnote-ref-139)
140. . *Id.* (quoting H.R. 1754 § 3053(e)). [↑](#footnote-ref-140)
141. .  *Id*. at 724 (discussing generally *Adkins*, 310 U.S. 381 and Currin v. Wallace, 306 U.S. 1, 16 (1939)). [↑](#footnote-ref-141)
142. . *Id*. [↑](#footnote-ref-142)
143. . *Id.* [↑](#footnote-ref-143)
144. . *Id.* at 708. [↑](#footnote-ref-144)
145. . Oklahoma v. United States, 2022 U.S. Dist. Lexis 99448, No. 5:21-cv-104-JMH (E.D. Ky. June 3, 2022) at \*33. [↑](#footnote-ref-145)
146. . *Id.* at \*34. [↑](#footnote-ref-146)
147. . *Id.* [↑](#footnote-ref-147)
148. . *Id.* (quoting *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 706 which cites to *Adkins*, 310 U.S. at 399). [↑](#footnote-ref-148)
149. . *Id.* [↑](#footnote-ref-149)
150. . *Id.* at \*34-47. [↑](#footnote-ref-150)
151. . *Id.* at \*35 (citing Am. Power & Light v. SEC, 329 U.S. 90, 105 (1946)). [↑](#footnote-ref-151)
152. . *Id.* (citing A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935); and *Mistretta*, 488 U.S. 361). [↑](#footnote-ref-152)
153. . *Id.* [↑](#footnote-ref-153)
154. . *Id.* at \*36 (quoting *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp 3d at 713). [↑](#footnote-ref-154)
155. . *Id.* [↑](#footnote-ref-155)
156. . *Id.* (quoting *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp 3d at 713). [↑](#footnote-ref-156)
157. . *Id.* at \*37. [↑](#footnote-ref-157)
158. . *Id.* at \*38. [↑](#footnote-ref-158)
159. . *Id.* [↑](#footnote-ref-159)
160. . *Id.* at \*39 (citing *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 710). [↑](#footnote-ref-160)
161. . *Id.* at \*40. [↑](#footnote-ref-161)
162. . *Id.* at \*40-41. [↑](#footnote-ref-162)
163. . *Id.* at \*42. [↑](#footnote-ref-163)
164. . *Id.* (citing *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 723-24). [↑](#footnote-ref-164)
165. . *Id.* (citing *Currin*, 306 U.S. 1 and Ass’n of Am. R.R. v. DOT (Amtrak IV), 896 F.3d 539, 545 (2018)). [↑](#footnote-ref-165)
166. . *Id.* at \*42-43 (discussing *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 704-05). [↑](#footnote-ref-166)
167. . *Id.* at \*43. [↑](#footnote-ref-167)
168. . *Id*.(quoting *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 724). [↑](#footnote-ref-168)
169. . *Id.* at \*44. [↑](#footnote-ref-169)
170. . *Id.* [↑](#footnote-ref-170)
171. . *Id.* at \*45. [↑](#footnote-ref-171)
172. . *Id.* [↑](#footnote-ref-172)
173. . *Id.* at \*45-46. [↑](#footnote-ref-173)
174. . *Id.* at \*46. [↑](#footnote-ref-174)
175. . Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022). [↑](#footnote-ref-175)
176. . *Id.* at 453. [↑](#footnote-ref-176)
177. . *Id.* at 462. [↑](#footnote-ref-177)
178. . *Id.* [↑](#footnote-ref-178)
179. . U.S. Const. art. II, § 2, cl. 2. [↑](#footnote-ref-179)
180. . Edmond v. United States, 520 U.S. 651, 663 (1997). [↑](#footnote-ref-180)
181. . Lucia v. SEC, 138 S. Ct. 2044, 2051-52 (2018) (discussing Buckley v. Valeo, 424 U.S. 1, 126 (1976) and United States v. Germaine, 99 U.S. 508, 510 (1879)). [↑](#footnote-ref-181)
182. . U.S. Const. art. II, § 1, cl. 1. [↑](#footnote-ref-182)
183. . Seila Law, LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020). [↑](#footnote-ref-183)
184. . *Id.* [↑](#footnote-ref-184)
185. . *Seila*, 140 S. Ct. at 2197 (citing Bowsher v. Synar, 478 U.S. 714, 726 (1986)). [↑](#footnote-ref-185)
186. . *Id.* (discussing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); Humphrey’s Ex’r v. United States, 295 U.S. 602 (1935); and Meyers v. United States, 272 U.S. 52 (1926)). [↑](#footnote-ref-186)
187. . *Id.* at 2199-2200. [↑](#footnote-ref-187)
188. . *Id.* [↑](#footnote-ref-188)
189. . H.R. 1754 § 1203(a) and (b). [↑](#footnote-ref-189)
190. . *Lucia*, 138 S. Ct. at 2051 (discussing *Buckley*, 424 U.S. at 126 and *Germaine*, 99 U.S. at 510). [↑](#footnote-ref-190)
191. . H.R. 1754 at § 1203(a). [↑](#footnote-ref-191)
192. . H.R. 1754 at § 1208. [↑](#footnote-ref-192)
193. . H.R. 1754 at § 1205(j). [↑](#footnote-ref-193)
194. . H.R. 1754 at § 1204. [↑](#footnote-ref-194)
195. . *Commissioners and Staff*, https://www.ftc.gov/about-ftc/commissioners-staff (last visited on Sept. 25, 2022) (discussing that the Federal Trade Commission is nominated by the President and confirmed by the Senate). [↑](#footnote-ref-195)
196. . H.R. 1754 at § 1203(d). [↑](#footnote-ref-196)
197. . H.R. 1754 at § 1203(d)(1)(B). [↑](#footnote-ref-197)
198. . H.R. 1754 at § 1203(b)(3)(D). [↑](#footnote-ref-198)
199. . First Amended Complaint in Intervention for Declaratory and Injunctive Relief, *supra* note 62, at 25; and First Amended Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 59, at 43-46. [↑](#footnote-ref-199)
200. . First Amended Complaint in Intervention for Declaratory and Injunctive Relief, *supra* note 62, at 25-26. [↑](#footnote-ref-200)
201. .  *Id.* (citing *Lucia*, 138 S. Ct. at 2051). [↑](#footnote-ref-201)
202. . First Amended Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 59, at 43-46. [↑](#footnote-ref-202)
203. . *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 698-99. [↑](#footnote-ref-203)
204. . Oklahoma v. United States, 2022 U.S. Dist. Lexis 99448, at \*52. [↑](#footnote-ref-204)
205. . U.S. Const. amend. X. [↑](#footnote-ref-205)
206. . Murphy v. Nat’l Collegiate Athletic Ass’n, 138 S. Ct. 1461, 1476 (2018). [↑](#footnote-ref-206)
207. . *Id.* [↑](#footnote-ref-207)
208. . *Id.* [↑](#footnote-ref-208)
209. . *Id.* [↑](#footnote-ref-209)
210. . *Id.* at 1477 (quoting New York v. United States, 505 U.S. 144). [↑](#footnote-ref-210)
211. . *Id.* (quoting Printz v. United States, 521 U.S. 898 (1997)). [↑](#footnote-ref-211)
212. . *Id.* [↑](#footnote-ref-212)
213. . H.R. 1754 at § 1203(f). [↑](#footnote-ref-213)
214. .  *Id.* § 1211(b). [↑](#footnote-ref-214)
215. . *Murphy*, 138 S. Ct. at 1477. [↑](#footnote-ref-215)
216. . *Id.* at 1478. [↑](#footnote-ref-216)
217. . *Id.* at 1479 (quoting Reno v. Condon, 528 U.S. 141, 151 (2000)). [↑](#footnote-ref-217)
218. . First Amended Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 59, at \*39. [↑](#footnote-ref-218)
219. . *Id.* at \*40. [↑](#footnote-ref-219)
220. . Oklahoma v. United States, 2022 U.S. Dist. Lexis 99448, at \*48. [↑](#footnote-ref-220)
221. . *Id.* at \*49. [↑](#footnote-ref-221)
222. . *Id.* [↑](#footnote-ref-222)
223. . *Id.* [↑](#footnote-ref-223)
224. . *Id.* [↑](#footnote-ref-224)
225. . *Id.* at \*49-50. [↑](#footnote-ref-225)
226. . *Id*. at \*51. [↑](#footnote-ref-226)
227. . *Id.* at \*52. [↑](#footnote-ref-227)
228. . *Id.* at \*51-52. [↑](#footnote-ref-228)
229. . *Id.* at \*52. [↑](#footnote-ref-229)
230. . U.S. Const. amend. V. [↑](#footnote-ref-230)
231. . *Carter*, 298 U.S. at 311. [↑](#footnote-ref-231)
232. . *Id.* [↑](#footnote-ref-232)
233. . *Id.* [↑](#footnote-ref-233)
234. . H.R. 1754 at § 1203(b). [↑](#footnote-ref-234)
235. . H.R. 1754 at § 1203(b)(2). [↑](#footnote-ref-235)
236. . H.R. 1754 at § 1203(c). [↑](#footnote-ref-236)
237. . H.R. 1754 at § 1203(e)(1)-(3). [↑](#footnote-ref-237)
238. . First Amended Complaint in Intervention for Declaratory and Injunctive Relief, *supra* note 62, at 26-27; and First Amended Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 59, at 41-43. [↑](#footnote-ref-238)
239. . First Amended Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 59, at 42. [↑](#footnote-ref-239)
240. . *Id.* [↑](#footnote-ref-240)
241. . *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 725-26 (citing *Boerschig*, 872 F.3d at 707-09). [↑](#footnote-ref-241)
242. . *Id.* at 711-12. [↑](#footnote-ref-242)
243. . *Id.* at 726. [↑](#footnote-ref-243)
244. . *Id.* at 726-27. [↑](#footnote-ref-244)
245. . *Id.* [↑](#footnote-ref-245)
246. . *Id.* [↑](#footnote-ref-246)
247. . *Id.* at 728 (citing *Boerschig*, 872 F.3d at 708). [↑](#footnote-ref-247)
248. . Oklahoma v. United States, 2022 U.S. Dist. Lexis 99448, at \*47 (citing *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 705). [↑](#footnote-ref-248)
249. . Oklahoma v. United States, 2022 U.S. Dist. Lexis 99448, at \*47. [↑](#footnote-ref-249)
250. . *Id.* [↑](#footnote-ref-250)
251. . *Nat’l Horsemen’s Benevolent & Protective Ass’n*, 596 F. Supp. 3d at 728 (citing Big Time Vapes, Inc. v. FDA, 963 F.3d 436, 447 (5th Cir. 2020)). [↑](#footnote-ref-251)