No. 22-5487

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OKLAHOMA, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky

BRIEF FOR APPELLEES' THE UNITED STATES OF AMERICA, THE FEDERAL TRADE COMMISSION, THE CHAIR OF THE COMMISSION, AND THE COMMISSIONERS

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STATEMENT REGARDING ORAL ARGUMENT

The government respectfully requests oral argument in this case. Plaintiffs challenge the constitutionality of a recently enacted federal statute. The government believes the district court correctly dismissed the complaint, but that oral argument may provide substantial assistance to this Court in its consideration of the issues.

INTRODUCTION

The Horseracing Integrity and Safety Act of 2020 creates a framework for the development and implementation of a nationwide system of racetrack safety and anti-doping rules. Congress modeled the statute on the longstanding regulatory scheme found in the securities industry, where private self-regulatory organizations are subject to oversight by the Securities and Exchange Commission (SEC). Under the Horseracing Act, the private Horseracing Integrity and Safety Authority (Authority) occupies a role analogous to that of the securities self-regulatory organizations, and Congress vested the Federal Trade Commission (Commission or FTC) with oversight authority analogous in respect of plaintiffs' claims here to that vested in the SEC. The Authority is tasked with proposing draft rules to the Commission, but the Commission has the ultimate responsibility to determine whether those proposed rules become law. Similarly, the Authority is tasked with conducting investigations and performing initial adjudications for disciplinary actions pursuant to rules and procedures approved by the Commission, but any decision to impose a disciplinary sanction is subject to plenary Commission review.

In this facial challenge, plaintiffs contend that the role the Act assigned to the Authority violates the private-nondelegation doctrine and that the Act unlawfully commandeers the States in violation of the Tenth Amendment. The district court correctly rejected both claims. The private Authority "function[s] subordinately" to the Commission, in satisfaction of the private-nondelegation doctrine. *Sunshine*

Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940). And the Act does not unlawfully commandeer any state functions, but rather offers States a permissible choice to participate in a federal program.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. *See* Am. Compl., R. 53, PageID#368. The district court dismissed the complaint for failure to state a claim on June 3, 2022. Order, R. 105, PageID#1511. Plaintiffs filed a timely notice of appeal on June 7, 2022. *See* Notice of Appeal, R. 109, PageID#1518. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the Act does not violate the private-nondelegation doctrine because the Authority functions subordinately to the Federal Trade Commission?

2. Whether the district court correctly concluded that the Act does not unlawfully commandeer States or their officials?

STATEMENT OF THE CASE

A. Statutory Background

1. Congress enacted the Horseracing Integrity and Safety Act of 2020 to "improve the integrity and safety of horseracing" after numerous race-related fatalities. *See* H.R. Rep. No. 116-554, at 17-19 (2020). In 2019 alone, "441 Thoroughbred racehorses suffered fatal injuries"—a fatality rate that "is two and a

half to five times greater per race start than the fatality rates in Europe and Asia." *Id.* at 17. Among the factors contributing to the terrible loss of life among U.S. racehorses were unsafe racetrack conditions, the use of performance-enhancing drugs (doping), lax testing protocols, and patchwork regulation by 38 different States with no uniform national safety or anti-doping standards. *Id.* at 17-19.

Congressional leaders grew concerned that these "tragedies on the track, medication scandals, and an inconsistent patchwork of regulations have cast clouds over the future" of horseracing. 166 Cong. Rec. S5514 (daily ed. Sept. 9, 2020) (statement of Sen. McConnell). To address these problems, Congress held multiple committee hearings and considered multiple alternative bills before passing the Act with "large bipartisan majorities in both chambers." Amicus Br. of Sen. McConnell, et al., R. 73-1, PageID#658.

2. The Act creates a framework for the development and implementation of a nationwide system of racetrack safety and anti-doping rules, "[m]odel[ed]" after the self-regulatory scheme found in the securities industry. *See* Amicus Br. of Sen. McConnell, et al., R. 73-1, PageID#651. It does so by enlisting the Authority—a "private, independent, self-regulatory nonprofit corporation," 15 U.S.C. § 3052(a)—to provide expert assistance to the Commission, which exercises "oversight" over the Authority and has the sole power to enact rules and standards into law, *id.* § 3053.

The Act "recognize[s]" the Authority and places important governance constraints on its membership. *See* 15 U.S.C. § 3052(a). A majority of the Authority's

board of directors "shall be independent members selected from outside the equine industry." *Id.* § 3052(b)(1)(A). The rest shall be "selected from among the various equine constituencies" of "owners, breeders, trainers, racetracks, veterinarians, State racing commissions, and jockeys who are engaged in the care, training, or racing of covered horses." *Id.* §§ 3051(7), 3052(b)(1)(B)(i). "To avoid conflicts of interest," the members of the board of directors (and their "immediate family member[s]") may not have a "financial interest in" or "provide[] goods or services to" covered horses, nor may a member of the board of directors be an "employee of, or an individual who has a business or commercial relationship with," an individual with such a conflict of interest. *Id.* § 3052(e).

The Act tasks the Authority with proposing draft rules covering, among other things, anti-doping and medication control, racetrack safety, and disciplinary proceedings. *See* 15 U.S.C. § 3053; *see also id.* §§ 3055 (anti-doping and medication control program), 3056 (track-safety program), 3057 (disciplinary proceedings). The Act makes clear, however, that the Authority lacks the power to enact these proposals into law. *See id.* § 3053. Rather, the Act directs the Authority to submit proposed draft rules to the Commission, "in accordance with such rules as the Commission may prescribe." *Id.* § 3053(a). As confirmed by the Commission's implementing regulations, "[p]roposed rule[s]" include any and all proposals by the Authority that "would have the force of law if approved as a final rule." 16 C.F.R. § 1.140; *see also id.* § 1.141(*l*) (requiring submission of enumerated types of proposed rules as well as

"[a]ny other proposed rule or modification"). No proposed rule may "take effect unless [it] has been approved by the Commission," 15 U.S.C. § 3053(b)(2), after public notice and comment, *see id.* § 3053(b)(1), (d)(2).

The Commission approves a rule proposed by the Authority only if the Commission concludes that the proposed rule is "consistent with" the Act and other "applicable rules approved by the Commission." 15 U.S.C. § 3053(c)(2). The Act specifies various requirements, considerations, factors, standards, and principles that must guide the development of rules. *See, e.g.*, *id.* § 3055 (providing requirements and necessary considerations for anti-doping program); *id.* § 3056 (providing elements and necessary considerations for track-safety program). As the Commission has made clear, its review of proposed rules under the Act includes an evaluation of the rule's "consistency with the specific requirements, factors, standards, or considerations in the text of the Act as well as the Commission's procedural rule." *E.g.*, 87 Fed. Reg. 4023, 4027 (Jan. 26, 2022) (notice of proposed enforcement rule). If the Commission disapproves a proposed rule, the Commission recommends modifications to the Authority. *See* 15 U.S.C. § 3053(c)(3)(A). The Authority may "resubmit for approval by the Commission a proposed rule . . . that incorporates the modifications recommended" by the Commission. *Id.* § 3053(c)(3)(B).

To date, the Commission has approved the Authority's draft proposed rules governing racetrack safety, enforcement, fee assessments, and registration. *See* 87 Fed. Reg. 435 (Jan. 5, 2022); 87 Fed. Reg. 4023; 87 Fed. Reg. 9349 (Feb. 18, 2022); 87 Fed.

Reg. 29,862 (May 17, 2022) (notices of proposed rulemaking); *see also* FTC, *Tag: Office of the General Counsel*, https://www.ftc.gov/office-general-counsel (last visited Sept. 19, 2022) (FTC Orders approving rules).

The Commission may also engage in rulemaking under the Act without the involvement of the Authority. The Commission may adopt "an interim final rule, to take effect immediately," whenever "the Commission finds that such a rule is necessary to protect . . . the health and safety of covered horses" or the "integrity of covered horseraces and wagering on those horseraces," 15 U.S.C. § 3053(e)—that is, whenever such rulemaking is necessary to serve the express purposes of the Act—in satisfaction of the cross-referenced good-cause requirements for bypassing notice-and-comment procedures under the Administrative Procedure Act (APA), *see* 5 U.S.C. § 553(b)(B). The Commission may institute a rulemaking proceeding on its own initiative or in response to a petition for rulemaking from the public. *See* 16 C.F.R. § 1.31 (FTC's procedural rule governing petitions for rulemaking). The Commission has regularly reminded the public of its ability to petition for a rulemaking to protect "the health and safety of horses" and "the integrity of horseraces and wagering on horseraces." *E.g.*, 87 Fed. Reg. at 4027.

"As a condition of participating in covered races and in the care, ownership, treatment, and training of covered horses, a covered person shall register with the Authority." 15 U.S.C. § 3054(d)(1). The Act authorizes the Authority—pursuant to rules approved by the Commission, *see id.* § 3053(b)(2)—to investigate rules violations,

id. § 3054(c), (h), and, in the event of a rule's violation, to conduct disciplinary proceedings in front of an independent hearing officer, with required due process protections, *id.* § 3057(c). Any final decision by the Authority to impose penalties is subject to two layers of de novo Commission review. "[O]n application by the Commission or a person aggrieved by [a] civil sanction" imposed in a disciplinary proceeding, "the civil sanction shall be subject to de novo review by" an FTC administrative law judge, *id.* § 3058(b)(1), who may make necessary findings and conclusions and "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part," *id.* § 3058(b)(3). And the Commission, on its own motion or an application from an aggrieved person, may review a decision of the administrative law judge "de novo," take additional evidence, make any necessary factual findings and conclusions of law, and "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge." *Id.* § 3058(c). The administrative law judge or the Commission may stay the effectiveness of any sanction pending their review. *Id.* § 3058(d).

The Authority's activities are to be funded by fees assessed on regulated entities—*i.e.*, horseracing participants. *See* 15 U.S.C. § 3052(f). The fees shall be calculated, allocated, and collected by the Authority in accordance with rules approved by the Commission, *id.* § 3052(f)(3)(B), or, at the election of a state racing commission, shall be remitted to the Authority by such state racing commission on behalf of horseracing participants in the State, *id.* § 3052(f)(2).

B. Prior Proceedings

Plaintiffs are a group of States, state racing commissions, and private entities involved in horseracing; plaintiffs bring a facial challenge to the Act, asserting that the Act delegates regulatory power to the Authority in violation of the private-nondelegation doctrine and unlawfully commandeers the States in violation of the Tenth Amendment.

The district court dismissed the complaint for failure to state a claim. With respect to plaintiffs' private-nondelegation claim, the district court recognized that "Congress does not impermissibly delegate its legislative authority to a private entity[] when the entity 'function[s] subordinately' to a governmental agency." Order, R. 105, PageID#1499 (second alteration in original) (quoting *National Horsemen's Benevolent & Protective Ass'n v. Black*, 2022 WL 982464, at *12 (N.D. Tex. Mar. 31, 2022) (in turn quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)). The district court held that this standard was satisfied here, where the Commission "retains the power to approve or disapprove all rules" proposed by the Authority and therefore "the ability to control what becomes a binding rule." *Id.* PageID#1503 (quoting *National Horsemen's*, 2022 WL 982464, at *23). Similarly, with respect to the Act's enforcement mechanisms, the district court recognized that the Commission was responsible for reviewing and approving the procedures under which the Authority may investigate rule violations, and that "any Authority decision with final, legal effect is subject to de novo review" by the Commission. *Id.* PageID#1504 (quoting *National*

Horsemen's, 2022 WL 982464, at *24). The district court explained that the relationship between the Commission and the Authority was analogous to that of the SEC and the self-regulatory organizations, which "has been upheld against constitutional challenges on many occasions." *Id.* PageID#1505 (quoting *National Horsemen's*, 2022 WL 982464, at *24).

The district court also dismissed plaintiffs' anti-commandeering claim. The district court rejected plaintiffs' assertion that the Act's fee provision, 15 U.S.C. § 3054(f), "require[s] States . . . to remit State monies" to the Authority, explaining that the Act merely gives state racing commissions "a choice" to remit fees to the Authority on behalf of covered persons who owe the fees under the Act. *See* Order, R. 105, PageID#1508. Thus, any fees remitted to the Authority by a state racing commission would "only involve money owed to the federal government" by covered persons, "as opposed to State funds," and state racing commissions "clearly" had a choice whether or not to participate in remitting such fees. *See id.* The district court acknowledged that, under the Act, if a state racing commission chooses not to participate in remitting fees to the Authority, the State will be unable to collect its own taxes or fees "for related regulation." *Id.* PageID#1508-1509. But the district court explained that this was "nothing more" than the operation of a "typical preemption scheme" that is fully consistent with the Tenth Amendment. *See id.* PageID#1509 (citing *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018)). The district court similarly rejected plaintiffs' argument that a separate provision of the

Act, 15 U.S.C. § 3060(b), unlawfully "mandates the States cooperate with the Authority," explaining that the better reading of that provision was that it simply requires "the Authority to cooperate with the States not the other way around." *Id.* at PageID#1509-1510.

SUMMARY OF ARGUMENT

The district court correctly rejected plaintiffs' claims under the private-nondelegation doctrine and the Tenth Amendment.

I. The private-nondelegation doctrine addresses the due-process concerns that would arise if a private entity were to have the "final" word over how delegated authority is used over other private entities. *Rice v. Village of Johnstown*, 30 F.4th 584, 590 (6th Cir. 2022); *see Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Plaintiffs' claim here fails as a matter of law because, under the Act, the private Authority "function[s] subordinately" to the Federal Trade Commission. *Sunshine Anthracite Coal Co v. Adkins*, 310 U.S. 381, 399 (1940). While the Authority proposes rules, no proposed rule can become law unless approved by the Commission. The Commission approves a proposed rule only when it finds, after its own "independent" and "critical[]" review, *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 447-48 (D.C. Cir. 2017), that the proposal is "consistent with" the detailed requirements, factors, considerations, elements, and principles that Congress set out in the Act as well as applicable rules approved by the Commission. 15 U.S.C. § 3053(c)(2). The Commission can modify a proposed rule by rejecting it and

directing the Authority to revise and resubmit it. And the Commission can promulgate rules itself, without the Authority's participation, whenever doing so is necessary to serve the Act's purposes of safeguarding the health and safety of horses and the integrity of horseracing. The Commission likewise exercises plenary review over the Authority's initial adjudication of rules violations, including the power to stay any sanction pending review; to make findings of fact and conclusions of law as the Commission deems appropriate; and to affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, as the Commission sees fit.

As Senator McConnell and the Act's other sponsors explained, Congress modeled the Act on the statutory scheme found in the securities industry, under which private self-regulatory organizations propose rules and adjudicate disciplinary proceedings in the first instance and the SEC retains authority to approve or disapprove those proposals and review disciplinary actions. *See* Order, R. 105, PageID#1500-1501, 1505. As the district court here recognized, "[e]very court of appeals to consider a non-delegation challenge to this framework has rejected it." *Id.* PageID#1500 (citing, *e.g.*, *R.H. Johnson & Co. v. SEC*, 198 F.2d 690 (2d Cir. 1952)). The same result is warranted here.

II. The district court correctly dismissed plaintiffs' Tenth Amendment anti-commandeering claim. The anti-commandeering doctrine reflects Tenth Amendment limits on Congress's ability to "issue direct orders to the government of the States." *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). But

commanding a State to act is distinct from a variety of mechanisms by which Congress can "encourage a State to regulate in a particular way." *New York v. United States*, 505 U.S. 144, 166 (1992). In particular, where "Congress has the authority to regulate private activity under the Commerce Clause" and preempt state regulation, Congress may permissibly "offer States the choice" between such preemption or participating in the federal program. *Id.* at 167.

The fee provision that plaintiffs challenge presents precisely such a permissible choice. Under the Act, state racing commissions may "elect" to participate in remitting fees to the Authority on behalf of horseracing participants in the State who owe the fees under the Act. *See* 15 U.S.C. § 3052(f)(2). If a State chooses not to participate, then the Act provides that the Authority will calculate, assess, and collect the required fees in accordance with rules approved by the Commission, and the State will be preempted from imposing duplicative taxes and fees on horseracing participants for programs that are within the jurisdiction of the Authority and the Commission under the Act, *see id.* § 3052(f)(3)—that is, programs for which the States' regulations are preempted pursuant to the Act's express preemption provision, *see id.* § 3054(b). By contrast, if a State chooses to participate in administering the federal fee regime, it would not be preempted from imposing such fees. *See id.* § 3052(f)(2). The Supreme Court has made clear that this type of "conditional exercise of Congress' commerce power . . . does not intrude on the sovereignty reserved to the States by the Tenth Amendment." *New York*, 505 U.S. at 174. Nor does it blur any

lines of political accountability between States and the federal government; to the contrary, the Act ensures that racing participants will know "who to credit or blame." *Murphy*, 138 S. Ct. at 1477.

Plaintiffs' argument with respect to a different provision of the statute that addresses cooperation between the Authority and federal and state law-enforcement, 15 U.S.C. § 3060(b), is premised on a misreading of the Act. As the district court correctly held, that provision is best read in context as providing a direction to the Authority and not as a command to or conscription of state law-enforcement officials.

STANDARD OF REVIEW

This Court reviews de novo a district court's order granting a motion to dismiss. *See In re NM Holdings Co.*, 622 F.3d 613, 618 (6th Cir. 2010).

ARGUMENT

I. The District Court Correctly Dismissed the Private-Nondelegation Challenge

A. A Private Entity Can Assist in the Implementation of a Statute If It Functions Subordinately to the Government

The Supreme Court and this Court have recognized two types of nondelegation doctrines, public and private. The public-nondelegation doctrine addresses the separation-of-powers concerns that would arise if Congress were to delegate lawmaking authority to an agency without providing adequate standards regarding how that authority should be used. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989). Plaintiffs do not dispute that Congress provided intelligible standards in the

Act. *See* Br. 36 n.4. Indeed, the Act sets out the regulatory scheme in detail, as discussed further *infra* pp. 24-26. Where, as here, Congress has supplied much more than an intelligible principle to guide development and implementation of a regulatory scheme, there is no concern that Congress has unconstitutionally delegated away its legislative authority. The claim here instead concerns the role of a private entity in helping to implement a detailed statutory scheme. Although the principles applied in addressing that issue are generally referred to as the "private nondelegation doctrine," that doctrine is rooted in due process, as this Court has recognized. *Kiser v. Kamdar*, 831 F.3d 784, 791-92 (6th Cir. 2016); *see also Rice v. Village of Johnstown*, 30 F.4th 584, 590 (6th Cir. 2022) (referring to doctrine "as a due process doctrine"); *Stevens v. City of Columbus*, 2022 WL 2966396, at *9 (6th Cir. July 27, 2022) (same).

1. The private-nondelegation doctrine's earliest applications concerned ordinances that allowed homeowners to set zoning requirements for their neighborhoods. *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121-22 (1928); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530 (1917); *Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912). Such ordinances, the Supreme Court explained, were generally unconstitutional because they "conferr[ed] the power on some property holders to virtually control and dispose of the property rights of others," without setting any standard to prevent the private property owners from making public policy "solely for their own interest, or even capriciously." *Eubank*, 226 U.S. at 143-44; *accord Rice*, 30 F.4th at 589 (explaining that the Court in *Eubank*

"was concerned that private property owners, with their own interests at stake, had been given total, standardless control over an important aspect of their neighbors' property"). Such ordinances were unlawful where they "gave [the decision of private entities] the effect of law." *Thomas Cusack Co.*, 242 U.S. at 531. Where municipal officials were "bound by the decision" of entities who themselves were not "bound by any official duty," the "delegation of power so attempted [was] repugnant to the due process clause of the Fourteenth Amendment." *Roberge*, 278 U.S. at 122.

The Supreme Court applied that doctrine to the federal government in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), and held unlawful a federal statute that allowed the producers of two-thirds of the coal in any given district to set wages and hours for all the producers in that district, unconstrained by review by any public agency. *Id.* at 281-83. That "obnoxious" delegation "to private persons whose interests may be and often are adverse to the interests of others in the same business," the Court held, was "clearly arbitrary" and "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." *Id.* at 311.

In the wake of *Carter Coal*, Congress enacted a new statute under which local boards consisting of private coal producers would be organized under the Bituminous Coal Code and would "operate as an aid to the [National Bituminous Coal] Commission but subject to its pervasive surveillance and authority." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). The new statute "specifie[d] in detail the methods of [the boards'] organization and operation, the scope of their

functions, and the jurisdiction of the [Coal] Commission over them." *Id.* The Coal Commission was "empowered to fix minimum prices . . . in accordance with stated standards" following a procedure in which the boards would "propose minimum prices pursuant to prescribed statutory standards," which "may be approved, disapproved, or modified by the [Coal] Commission." *Id.*

The *Adkins* Court explained that the new statute did not "contain an invalid delegation of legislative power" because the "standards which Congress has provided," by which the Coal Commission and boards would fix prices, included various considerations that "far exceed[ed] in specificity others which have been sustained." 310 U.S. at 397-98. Then, addressing the plaintiff's private-nondelegation contentions, the Court held that no constitutional problem arose from involving private industry in the regulatory scheme because "members of the [boards] function subordinately to the [Coal] Commission." *Id.* at 399. The Coal Commission, "not the [boards], determines the prices," and "has authority and surveillance over the activities of these authorities." *Id.* Because "law-making [was] not entrusted to the industry," the Court found the statute "unquestionably valid." *Id.*

2. Particularly instructive here, as the district court recognized, are decisions of the courts of appeals addressing private-nondelegation challenges to regulatory schemes established in the securities law, which provided the "model[]" for the legislation at issue. 86 Fed. Reg. 54,819, 54,822 (Oct. 5, 2021) (quoting letter from the Act's sponsors); *see* Amicus Br. of Sen. McConnell, et al., R. 73-1, PageID#661-662

(explaining that the Act "is patterned on" the "familiar" scheme under the securities law).

The Securities Exchange Act establishes a regulatory scheme for the securities industry where the SEC oversees private, self-regulatory organizations (SROs) that have the frontline responsibility to supervise their members. *See Mohlman v. Financial Indus. Regulatory Auth.*, 977 F.3d 556, 559 (6th Cir. 2020). Like the statute at issue here, the Exchange Act authorizes the SEC to approve or disapprove proposed SRO rules based on whether those rules are "consistent with" the statute's requirements and SEC regulations. 15 U.S.C. § 78s(b)(2)(C). One SRO—first organized as the National Association of Securities Dealers, Inc. (NASD), and later succeeded by the Financial Industry Regulatory Authority (FINRA)—has been subject to several private non-delegation challenges. Every court of appeals to have addressed the question has concluded, under the test established by the Supreme Court in *Adkins*, that Congress did not "unconstitutionally delegate[] power to" the SRO because the Commission has the "power, according to reasonably fixed statutory standards, to approve or disapprove of [the SRO's] Rules" and to "review . . . any disciplinary action" after initial adjudication by the SRO. *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 965 (2d Cir. 1952); *see also Todd & Co. v. SEC*, 557 F.2d 1008, 1012-13 (3d Cir. 1977) (same); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (same); *Sorrell v. SEC*, 679 F.2d 1323, 1325-26 (9th Cir. 1982) (same); *cf. Association of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 n.5 (D.C. Cir. 2013) (approvingly

discussing these NASD/FINRA cases as "resembl[ing] *Adkins* insofar as they approve structures in which private industry members serve in purely advisory or ministerial functions"), *vacated on other grounds*, 575 U.S. 43 (2015).

B. The Authority Functions Subordinately to the Commission

Like the coal boards in *Adkins* and the securities SROs, the Authority here does not wield independent regulatory power. Instead, it "function[s] subordinately to the Commission," *Adkins*, 310 U.S. at 399, which exercises "oversight" over the Authority, 15 U.S.C. § 3053, and has the power to "approve or disapprove" its proposed rules and to review disciplinary actions, *id.* §§ 3053(c)(1), 3058(c). The Commission's oversight power thus defeats the facial challenge here. If the Commission were, in the future, to implement the statute in a manner that a party believed to be inconsistent with the private nondelegation doctrine, it might bring an as-applied challenge; but speculation about implementation is not appropriate in a facial challenge to a statute. *See Warshak v. United States*, 532 F.3d 521, 528-29 (6th Cir. 2008) (en banc) (explaining "courts' reluctance to grant relief in the face of facial, as opposed to as-applied, attacks on statutes").

1. In adopting the SEC-SRO model, the Horseracing Act "recognize[s]" a "private, independent, self-regulatory, nonprofit corporation"—the Authority—and enlists the Authority to help with "developing and implementing" programs under the Act. *See* 15 U.S.C. § 3052(a). The Act does not purport to empower the Authority itself to promulgate governing rules. To the contrary, the Act designates the

Authority as a source of expertise to aid the rulemaking function over which the Commission retains "control." Order, R. 105, PageID#1503.

Specifically, like the coal boards in *Adkins* and the securities SROs, the Authority may only "propose[]" rules to the Commission. 15 U.S.C. § 3053(a). No proposed rule may take effect "unless the proposed rule . . . has been approved by the Commission." *Id.* § 3053(b)(2); *accord Adkins*, 310 U.S. at 388 (coal boards "propose" prices that do not take effect unless and until the Coal Commission "fix[es]" them); 15 U.S.C. § 78s(b)(1) (securities SROs may "propose[]" rules but, generally, "[n]o proposed rule change shall take effect unless approved by the [SEC]"). The Commission may approve a proposed rule only if it finds, in its own judgment, that the proposal "is consistent with" the Act and other "applicable rules approved by the Commission." *Id.* § 3053(c)(2).

As the Coal Commission in *Adkins* could "approve, disapprove, or modify [the] proposed minimum prices" of the coal boards "to conform [them] to the requirements of" the Bituminous Coal Act of 1937, § 4, pt. II(a), 50 Stat. 72, 78, the Commission here may approve or disapprove a proposed rule of the Authority, and it may specify the modifications that will be required to secure the Commission's approval on resubmission. In a section entitled "[r]evision of proposed rule[s]," the Act provides that, in the "case of disapproval of a proposed rule," the Commission "shall make recommendations to the Authority to modify the proposed rule," and the Authority "may resubmit for approval by the Commission a proposed rule . . . that

incorporates the modifications recommended" by the Commission. 15 U.S.C. § 3053(c)(3). This revise-and-resubmit procedure empowers the Commission to accomplish a modification to a proposed rule (by establishing the conditions necessary for approval upon resubmission).

As relevant to plaintiffs' challenge here, these procedures put the Commission on a similar footing to the SEC in its supervision of the securities SROs. The SEC determines whether to approve an SRO proposed rule based on whether the proposal is "consistent with the requirements" of the Exchange Act and SEC regulations, *see* 15 U.S.C. § 78s(b)(2), a statutory responsibility that is substantively identical to that of the Commission's here, *see id.* § 3053(c)(2). Under a separate statutory provision, the SEC may "amend" an SRO's existing rules by engaging in rulemaking itself where "necessary or appropriate" to further the purposes of the statute. *See id.* § 78s(c). Here, through the revise-and-resubmit procedure discussed above, the Commission has the authority to effectuate a modification even of a proposed rule of the Authority. In addition, the Commission may engage in rulemaking itself without the participation of the Authority whenever "the Commission finds that such a rule is necessary to protect . . . the health and safety of covered horses" or "the integrity of covered horseraces" and wagering on those horseraces, *id.* § 3053(e)—that is, whenever such rulemaking is necessary to advance the express purposes of the Act—in satisfaction of the cross-referenced good-cause requirement for dispensing with APA notice-and-comment procedures, *see* 5 U.S.C. § 553(b)(B).

In sum, the Commission here, like the SEC and the Coal Commission in *Adkins*, determines what rules have the force of law, not the Authority. *See Adkins*, 310 U.S. at 399. As the district court concluded, and as another district court held in rejecting the same challenge plaintiffs press here, the Act ensures that "[t]he ability to adopt generally applicable rules of conduct remains" at all times with the Commission, "according to the legislative policy Congress established in [the Act]." *National Horsemen's Benevolent & Protective Ass'n v. Black*, 2022 WL 982464, at *17 (N.D. Tex. Mar. 31, 2022) (quotation marks omitted); *see* Order, R. 105, PageID#1503 ("[T]he FTC retains the ability to control what becomes a binding rule.").

2. Just as the Commission is ultimately responsible for rulemaking for purposes of the private-nondelegation challenge here, it is also ultimately responsible for disciplinary proceedings. Like the decisions of the securities SROs, the Authority's initial decisions in disciplinary proceedings are "subject to plenary review" by the Commission. *See National Ass'n of Sec. Dealers v. SEC*, 431 F.3d 803, 807 (D.C. Cir. 2005).

As with all other rules promulgated under the Act, rules governing investigations of rules violations, disciplinary proceedings, and civil sanctions must all be approved by the Commission before they can become binding on covered industry participants. *See* 15 U.S.C. § 3053(b)(2) ("A proposed rule . . . shall not take effect unless . . . approved by the Commission."). Moreover, any initial decision of the Authority imposing a civil sanction for a rule violation is subject to two layers of de

novo Commission review. First, upon request by an aggrieved person or by the Commission, any initial Authority decision is subject to "de novo review" in a hearing before an FTC administrative law judge, *id.* § 3058(b)(1), who may "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part" after making "any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record," *id.* § 3058(b)(3)(A). Second, the Commission, "on its own motion" or on a petition from an aggrieved person, *id.* § 3058(c)(1), (2), may "review de novo the factual findings and conclusions of law made by the administrative law judge," *id.* § 3058(c)(3)(B). In doing so, the Commission may "allow the consideration of additional evidence." *Id.* § 3058(c)(3)(C). The Commission has full authority to "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge" and "make any finding or conclusion that, in the judgment of the Commission, is proper and based on the record." *Id.* § 3058(c)(3)(A). And, of course, an aggrieved person can seek judicial review of the Commission's final decision pursuant to the APA. *See* 5 U.S.C. § 704.

The initial adjudications before the Authority are therefore in no way comparable to the "total, standardless control" private entities held to make "final" decisions with respect to other citizen's property rights that doomed the laws at issue in *Carter Coal* and its progeny. *See Rice*, 30 F.4th at 589-90. Here again, the Commission's supervision over the investigatory and disciplinary functions of the

Authority resembles the SEC's over the SROs—a statutory scheme that "has been upheld against constitutional challenges on many occasions." *See* Order, R. 105, PageID#1505 (quotation marks omitted) (citing *e.g.*, *Sorrell*, 679 F.2d at 1326 & n.2).

C. Plaintiffs' Arguments to the Contrary Are Unavailing

Plaintiffs' contrary arguments misunderstand the relationship between the Commission and the Authority and the extent to which Congress itself has prescribed the consideration and criteria to be applied in implementing the statute. Moreover, plaintiffs ask this Court at every turn to adopt the narrowest possible view of the Commission's powers and the broadest possible view of what they described as the Authority's unchecked powers. They thereby disregard the basic precept that statutes should be interpreted to avoid constitutional problems, not to create them. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). They also disregard the Supreme Court's repeated admonition that "[a] facial challenge to a legislative Act" is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *accord Green Party of Tenn. v. Hargett*, 700 F.3d 816, 826 (6th Cir. 2012). Plaintiffs make no such showing.

1. Plaintiffs mistakenly insist that, rather than enlisting the Authority's expertise to help the Commission, the Act puts the Authority "in control of the regulatory process" while stripping the Commission of any ability to "determin[e] the content of federal law" or to exercise policy judgment when reviewing the Authority's

proposed rules. Br. 30, 37. Plaintiffs' argument reflects a pervasive disregard for the extent to which Congress has established the applicable substantive requirements, considerations, and priorities under the Act, and granted to the Commission the ultimate authority to approve or disapprove any proposed rule based on the Commission's own independent determination as to whether the proposed rule is "consistent with" those statutory guideposts. *See* 15 U.S.C. § 3053.

a. Plaintiffs disregard the extent to which Congress has set forth detailed requirements regarding many of the rules mandated by the Act. In the section of the Act governing the anti-doping program, for example, Congress specified in detail the "baseline" requirements of the program, including specific "permitted and prohibited substances," specific "[s]tandard[s] for [l]aboratories," and specific "testing standards." 15 U.S.C. § 3055(g)(2)(A). Congress further required that the anti-doping program "prohibit the administration of any prohibited or otherwise permitted substance to a covered horse within 48 hours" of a race. *Id.* § 3055(d). Other specific requirements appear throughout the Act. For example, the statute sets out a list of rule violations that may be subject to sanction, including strict liability for the presence of a prohibited substance in a covered horse and liability for refusal to submit a covered horse for submission of a sample without a compelling justification. *See id.* § 3057(a). Similarly, the rules governing investigation and enforcement must authorize "access to offices, racetrack facilities, other places of business, books,

records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses." *Id.* § 3054(c)(1)(A)(i).

The Commission's review is central to ensuring that the Authority's proposed rules carry out Congress's prescriptive choices. Thus, for example, when commenters expressed "grave concern with the breadth of the access rights provided by" the Authority's proposed enforcement rule, the Commission explained that "the language of the proposed rule closely mirrors the language of the Act," and "[t]he objections to" the proposed rule were "really objections to" the statute. FTC, Order Approving Enforcement Rule 33-34 (Mar. 25, 2022), https://perma.cc/HF9D-YR59. If the proposed enforcement rule had failed to provide for the access that Congress had required, by contrast, the Commission would have had the power to reject the proposed rule and require that it be revised and resubmitted to the Commission in conformance with Congress's specifications. *See* 15 U.S.C. § 3053(c)(2), (3).

Congress also set forth in the statute the somewhat broader "considerations" that should apply in developing other rules, the "elements" such rules should include, and the "activities" that should be undertaken in the statutorily required programs. The anti-doping program, for example, must take into account seven "[c]onsiderations," such as the principles that "horses should compete only when they are free from the influence of medications"; that horses "should not train or participate in covered races" while "injured or unsound"; that medication should not be used to "mask or deaden pain in order to allow injured" horses to "train or race";

and that the "amount of therapeutic medication . . . should be the minimum necessary." 15 U.S.C. § 3055(b). The racetrack safety program must include twelve specified "[e]lements," such as a "racing surface quality maintenance system" that "takes into account regional differences"; and "[p]rograms relating to safety and performance research and education," *id.* § 3056(b); as well as three "activities," such as "safety and performance standards of accreditation for racetracks," *id.* § 3056(c)(2). Congress also required the creation of a disciplinary process that includes seven specified "[e]lements," and mandated as well that the rules "shall provide for adequate due process." *Id.* § 3057(c)(2), (3).

All of these provisions are part of the Act, and the statute charges the Commission with ensuring that any proposed rule gives adequate consideration to the principles that Congress laid down in order to protect "the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces." *See* 15 U.S.C. § 3054(a)(2)(A). Exercising its statutory responsibilities, therefore, the Commission has independently considered congressionally prescribed principles when reviewing proposed rules, disagreed with the Authority's implementation of those principles, and directed a modification of the relevant rules in such a way as to conform them with the Commission's understanding of the regulatory scheme. In approving the Authority's enforcement rules, for example, the Commission concluded that the Authority's proposed power to "seiz[e]" items during investigations "falls comfortably within" the statutory authorization of "'other investigatory powers of the nature and

scope exercised by' the state agencies," but the Commission also expressed "concern[] that the seizure power, without further development from a future proposed rule modification, could be used in an unanticipated manner that could offend the due process required by" the Act. *See* FTC, Order Approving Enforcement Rule, *supra*, at 34 (quoting 15 U.S.C. § 3054(c)(1)(A)(iii)). The Commission therefore "direct[ed] the Authority to submit to the Commission a supplemental proposed rule" refining the set of objects that may be seized and providing "a process for the return of seized property if no violation is found." *Id.* at 34-35; *see also, e.g.*, *id.* at 29 (directing Authority to submit "a supplemental proposed rule modification" because proposal did not explicitly discuss an "element" specified in the Act regarding confidentiality and the public reporting of decisions).

The broad nature of the Commission's review is underscored by the requirement that the Commission publish proposed rules and solicit public comment before considering whether or not to approve them, 15 U.S.C. § 3053(b), a requirement that ensures that the Commission has the benefit of public feedback on any proposed rule and can therefore best exercise its own independent judgment to determine whether the proposal is consistent with the statute. And it is further confirmed by the Commission's procedural rule governing its review, which requires the Authority to make detailed submissions to the Commission justifying its proposed rules in order to facilitate both public comments and the Commission's review. *See* 16 C.F.R. § 1.142(a) (requiring, for example, the Authority to explain its "reasons for

adopting the proposed rule[s]"; "any reasonable alternatives"; "an explanation" for why those alternatives were not adopted; and an explanation of how the proposal will "affect covered persons, covered horses, and covered horseraces"); *id.* § 1.142(b) (requiring Authority to submit the factual information underlying its proposal).

Plaintiffs are therefore quite wrong to assert that the Commission lacks "any discretion" to determine the content of federal law or exercise its own policy judgment in approving or disapproving the Authority's rules. Br. 30. To the contrary, the Commission is required to take an independent look at the Act's requirements, considerations, principles, and elements, and the Commission can and will direct the Authority to make revisions and resubmit proposed rules where, in the Commission's own judgment, the Authority's proposed rules do not satisfy those criteria. The Commission's statutory obligation to review proposed rules for consistency with the requirements and principles that Congress laid down ensures that Congress and the Commission—and not the Authority—have the final say over the regulatory scheme in satisfaction of the private-nondelegation doctrine.

b. The sufficiency of the Commission's review authority is confirmed by the cases that have unanimously rejected private-nondelegation-doctrine challenges to the SEC's analogous responsibility to approve or disapprove rules proposed by SROs, as discussed *supra* pp. 17-18. Although plaintiffs attempt to distinguish these cases by asserting that the SEC in fact has plenary authority to modify an SRO's "proposed" rules, Br. 44, plaintiffs elide two statutory provisions. As stated above, the Exchange

Act provides that the SEC "shall approve" an SRO's proposed rule if the SEC determines that the proposal is "consistent with" the statute and SEC regulations. 15 U.S.C. § 78s(b)(2)(C)(i). That language is substantively identical to the Commission's power here to approve a proposed rule of the Authority if it finds that the proposal is "consistent with" the Act and the Commission's rules. *See id.* § 3053(c)(2). A separate provision authorizes the SEC to initiate an independent rulemaking to amend an SRO's existing rules where doing so is "necessary or appropriate" to further the purposes of the Exchange Act. *See id.* § 78s(c). But that independent rulemaking authority—which is analogous in any event to the Commission's own independent rulemaking authority, *see infra* pp. 32-35—does not alter the standard specified in § 78s(b) under which the SEC must review an SRO's proposed rules to determine whether they should be enacted into law. The courts of appeals that have upheld the SEC's oversight role against private-nondelegation challenges have uniformly done so based on the SEC's authority to "approve or disapprove" an SRO's proposed rules—without any mention of the SEC's separate authority to modify existing rules. *See, e.g.*, *R.H. Johnson & Co.*, 198 F.2d at 695 (holding that the securities statute does not "unconstitutionally delegate[] power to" an SRO because the statute gives the

Commission the power "to approve or disapprove" proposed rules "according to reasonably fixed statutory standards").[1]

Plaintiffs' reliance on the D.C. Circuit's decision in *Susquehanna International Group, LLP v. SEC*, 866 F.3d 442, 445-46 (D.C. Cir. 2017), reflects their misunderstanding. Br. 46. The D.C. Circuit recognized in that case that the SEC "shall approve" an SRO proposed rule "if it finds that such proposed rule change is consistent with" the statute. 866 F.3d at 445 (quoting 15 U.S.C. § 78s(b)(2)(C)). At issue was the fact that the SEC had "abdicated" this responsibility in the context of a particular rulemaking and had approved a proposed rule without making an "independent" determination as to whether it was "consistent with" the Exchange Act's "specified requirements." *Id.* at 446-47. The D.C. Circuit's analysis in that case

[1] The SEC's power to review SRO proposed rules has remained largely unchanged since the Exchange Act first covered such organizations. *See* Maloney Act of 1938, Pub. L. No. 719, § 15A(j), 52 Stat. 1070, 1074 (SEC approves rules that are "consistent with the requirements" of the statute). Not only do the cases upholding this scheme against private-nondelegation challenges not mention (much less rely on) the SEC's independent rulemaking authority, the SEC did not even receive its general independent rulemaking authority over such rules until 1975. *See* Securities Act Amendments of 1975, Pub. L. No. 94-29, § 19(c), 89 Stat. 97, 150 (providing SEC more general rulemaking authority to "abrogate, add to, and delete from" SRO rules as it deems "necessary or appropriate" to further purposes of the statute). Before 1975, the SEC had only the more limited power to "abrogate" certain rules upon making particular findings or to "alter or supplement" only four enumerated types of rules. *See* Maloney Act of 1938, § 15A(k), 52 Stat. at 1074. Many of the cases upholding the SEC regime against private-nondelegation challenges did so with respect to the statute as it existed before the SEC received its more general independent rulemaking authority. *See, e.g.*, *R.H. Johnson & Co.*, 198 F.2d at 965; *Todd & Co.*, 557 F.2d at 1012-13 & n. 6 (rejecting private-nondelegation challenge and explaining the Court's analysis was based on the pre-1975 statute).

only underscores the robust oversight authority that the Commission possesses and must exercise in undertaking its analogous responsibility under the Act to review the Authority's proposed rules. The D.C. Circuit emphasized, for example, that in determining whether a "proposal is consistent with the requirements of the [Exchange] Act," the SEC cannot simply rely on an SRO's statement and analysis without further inquiry, but must "critically review [that] analysis or perform[] its own." *See id.* at 447.

c. Plaintiffs' reliance on the D.C. Circuit's *Amtrak* cases (Br. 39-40) is likewise unavailing. The Amtrak statute charged Amtrak and the Federal Railroad Administration with "jointly" developing "metrics and minimum standards" for passenger train operations, with disagreements to be resolved by an arbitrator. *See Association of Am. R.Rs. v. U.S. Dep't of Transp.* (*Amtrak IV*), 896 F.3d 539 (D.C. Cir. 2018). The D.C. Circuit's initial decision treated Amtrak as a private entity, but after Supreme Court review the court of appeals recognized Amtrak's governmental status; nevertheless, the plaintiff urged the statute violated due-process principles because Amtrak was a self-interested entity. *See id.* at 543. Citing *Adkins* and other Supreme Court precedent, the D.C. Circuit made clear that "Amtrak's ability to engage in joint regulatory action with the Administration" did not call the constitutionality of the statute into question. *See id.* at 547 (alteration and quotation marks omitted). "Such joint efforts between a self-interested group and a government agency," the Court explained, raise "no constitutional eyebrow as long as the government agency c[an]

hold the line against the entity's overreaching to advance its own self-interests." *Id.* (quotation marks omitted). The problem, instead, was the statute's arbitration provision, which altered the paradigm considered in other cases and created the danger that the Federal Railroad Administration could not "keep Amtrak's naked self-interest in check." *Id.* (quotation marks omitted). The remedy, therefore, was to "sever[] the arbitration provision" because, without binding arbitration, "[n]o rule will go into effect without the approval and permission of a neutral federal agency." *Id.* at 541.

The Amtrak cases therefore confirm the absence of a private-nondelegation issue here. Similar to the Amtrak statute after the arbitration provision was severed, the Act here ensures that while the Authority is responsible for proposing rules to the Commission, any such proposal will "hit a dead-end" and cannot become law "unless the [Commission] independently determine[s] that" it satisfies the principles and requirements that Congress set forth in the Act. *See Amtrak IV*, 896 F.3d at 546. Under the Act, "[n]o rule will go into effect without the approval and permission" of the Commission. *See id.* at 541. That places the Commission, and not the Authority, in charge of the regulatory scheme in satisfaction of the private-nondelegation doctrine. *See id.*

2. Plaintiffs' argument that the Commission lacks any discretion over the content of federal law or the ability to exercise its own policy judgment also disregards the Commission's own independent rulemaking authority. As discussed above, the

Act provides that the Commission may unilaterally promulgate rules, without the Authority's participation, where doing so is "necessary to protect" the "health and safety" of covered horses or the "integrity" of covered horseraces. *See* 15 U.S.C. § 3053(e).

Plaintiffs mistakenly assert that this is an "emergency power." Br. 52. But the statute does not refer to emergencies, directly or indirectly. The statute authorizes the Commission to promulgate interim final rules, which may be promulgated without first going through notice-and-comment procedures. And it cross-references the APA's "good cause" provision, which permits issuance of such rules where notice-and-comment procedures would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).

As plaintiffs note (Br. 52), courts are generally reluctant to read the APA's good-cause exception too broadly, in order to avoid allowing that "exception [to] swallow the rule" of notice-and-comment procedures provided under the APA. *United States v. Cain*, 583 F.3d 408, 421 (6th Cir. 2009). Here, however, Congress itself prescribed the conditions specific to this statute that warrant promulgation of a rule without notice and comment: such a rule is authorized whenever the Commission finds that a "rule is necessary to protect" the "health and safety of covered horses" or "the integrity of covered horseraces and wagering on those horseraces," 15 U.S.C. § 3053(e)—that is, whenever such rulemaking is necessary to carry into effect the core purposes of the Act. *See, e.g.*, *id.* § 3054(a)(2) (tasking the Commission and the

Authority with exercising responsibility over "the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces"); *see also* 87 Fed. Reg. at 4027 (notice of proposed enforcement rule) (inviting petitions for rulemaking "[i]f members of the public wish to provide comments to the Commission that bear on protecting the health and safety of horses or the integrity of horseraces and wagering on horseraces").

Even assuming, however, that the APA's good-cause requirements had to be independently satisfied, there is no reason to believe, as plaintiffs insist, that the Commission would be left with only a "narrow" power. Br. 52. The Commission would have good cause to forgo notice-and-comment procedures, for example, if the Authority had previously proposed a draft rule and that proposal had been made available for public comment, as the Act requires. *See* 15 U.S.C. § 3053(b)(1) ("The Commission shall . . . publish in the Federal Register each proposed rule."). Additional public comment would be "unnecessary," 5 U.S.C. § 553(b)(B), if the Commission were to issue its own rule addressing matters on which the public had already had the opportunity to comment based on the Authority's proposal. *E.g.*, 16 C.F.R. § 1.142(a)(3) (requiring, *inter alia*, that any proposed rule of the Authority include a discussion of "any reasonable alternatives" and why the Authority chose its proposal instead); *see Mobil Oil Corp. v. U.S. EPA*, 35 F.3d 579, 584 (D.C. Cir. 1994) ("If the original record is still fresh, a new round of notice and comment might be unnecessary."); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 276

(D.C. Cir. 2014) (similar), *vacated on other grounds by Zubik v. Burwell*, 578 U.S. 403 (2016).

Plaintiffs are incorrect that the Authority could "overrule" an interim final rule issued by the Commission. Br. 52. If the Commission has promulgated an interim final rule under the Act, then the Commission has necessarily concluded that that rule is "necessary to protect" "the health and safety" of horses or "the integrity" of horseraces. *See* 15 U.S.C. § 3053(e). If the Authority were to propose a draft rule that was inconsistent with the Commission's interim final rule—and therefore inconsistent with the Commission's view of what is "necessary to protect" the core purposes of the statute, *id.*—then the Commission would be required to disapprove that proposal. *See id.* § 3053(c)(2). The Commission would, in that circumstance, recommend modifications to the Authority for resubmission, and the Commission would not approve any proposed rule unless it independently determined that it was consistent with the statutory criteria and the Commission's rules. *See id.* § 3053(c)(3).

3. Plaintiffs advance a host of additional reasons for why the Act violates the private-nondelegation doctrine, but those contentions similarly fail to advance their claim. Indeed, plaintiffs' arguments only emphasize the extent to which they mistakenly ask the Court to accept the broadest possible view of the Authority's powers and make unfounded predictions regarding the operation of the statutory scheme.

a. Plaintiffs complain that the Authority has the power to "issue guidance" that sets forth the Authority's "interpretation of an existing rule" or "a policy or practice" of the Authority. Br. 31. The statute provides, however, that any guidance issued by the Authority other than that which "relates solely to" "the administration of the Authority" can be issued only "as specified by the Commission, by rule, consistent with the public interest." 15 U.S.C. § 3054(g)(1)(B). Consistent with that statutory framework, the Commission's regulations make clear that any Authority guidance that is not independently approved by the Commission "does not have the force of law." *See* 16 C.F.R. § 1.140.

Plaintiffs similarly overstate the Authority's power to assess fees to fund its operations. *See* Br. 31. Any "formula or methodology" the Authority could use to assess fees must be approved by the Commission. 15 U.S.C. § 3053(a)(11), (b)(2). Calculating fees pursuant to a formula approved and promulgated by an agency is plainly a "ministerial task." *Pittston Co. v. United States*, 368 F.3d 385, 396-97 (4th Cir. 2004). Indeed, the statute at issue in *Adkins* provided that the "expense of administering the code by the respective district boards shall be borne" by industry through an assessment made pursuant to "regulations prescribed by such boards with the approval of the [Coal] Commission." Bituminous Coal Act, § 4, pt. I(b), 50 Stat. at 77.

b. Plaintiffs' arguments with respect to the Act's breed-election provision (Br. 32), fail for several reasons. That provision allows a state racing commission or a

"breed governing organization for a breed of horses other than Thoroughbred horses" to "elect to have such breed be covered" by the Act, which otherwise applies only to Thoroughbred horses; if a state racing commission makes such an election, the election will apply only within the State. *See* 15 U.S.C. § 3054(*l*).

As a threshold matter, plaintiffs lack Article III standing to bring a facial challenge based on the breed-election provision because there is no "certainly impending" injury-in-fact. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013). Plaintiffs offer no basis to conclude that a relevant state racing commission or breed governing organization will imminently elect to have another breed of horses covered by the Act, much less that such an election would be approved and would cause them injury. The Oklahoma Horse Racing Commission and the West Virginia Racing Commission—both plaintiffs here—provide no basis to believe that they themselves would imminently seek such an extension, and if they wished to do so, surely would not contend that the Constitution prohibits *them* from exercising an option provided by Congress to apply existing regulation of Thoroughbred racehorses to another breed within their State. The United States Trotting Association, an "association of Standardbred" breeders that is also a plaintiff here, *see* Am. Compl., R. 53, PageID#391, similarly provides no basis to believe that it would imminently make or

face such an election.[2] If a relevant state racing commission or breed governing organization were to elect coverage, and the statute were to be applied in such a way as to give rise to an injury-in-fact to an appropriate plaintiff, the application of the Act's requirements could properly be analyzed in that case.

In any event, plaintiffs are mistaken that the Commission exercises no oversight over an expansion of the Act. Br. 32. To the contrary, any expansion of the Act's coverage is "conditional" on whether the entity making the election can provide "sufficient funds to cover the costs" of such an expansion. 15 U.S.C. § 3054(*l*)(2). And the Commission reviews a breed-coverage election, and the Authority's decision to approve that election, in the course of considering how the costs resulting from such an election should be allocated. *See id.* § 3054(*l*)(3) (providing that the Commission approves or disapproves cost apportionment "in connection with an election under paragraph (1)").

c. The Authority's ability to investigate and adjudicate (in the first instance) rule violations also raises no private-nondelegation concerns. Br. 33-34. The Authority's ability to issue subpoenas, subject to the limitations and requirements in

[2] Indeed, plaintiffs the United States Trotting Association, the Oklahoma Quarter Horse Association, and Hanover Shoe Farms, Inc.—a Pennsylvania corporation that works with standardbred horses—lack standing to challenge the Act *at all*, as those entities all work with non-Thoroughbred horses and they allege only a vague "risk of future regulation and enforcement actions under" the Act if a relevant entity were to elect to extend the Act to other breeds in the future. *See* Am. Compl., R. 53, PageID#364, 390, 391-392.

rules and procedures approved by the Commission, *see* 15 U.S.C. § 3054(h), is similar to FINRA's investigatory powers, under rules and procedures approved by the SEC, to compel testimony and the production of evidence, *see, e.g.*, FINRA Rule 8210(a), https://perma.cc/BJ27-GHT7. Any initial adjudication by the Authority with respect to a civil sanction resulting from a rules violation is subject to due process limitations and can be conducted only pursuant to rules and procedures approved by the Commission. *See* 15 U.S.C. § 3057. And as discussed above, any civil sanction that may be imposed is subject to two layers of de novo review before an FTC administrative law judge and the Commission—both of which may make any proper finding of fact or conclusion of law; may affirm, reverse, modify, set aside, or remand any sanction as they see fit; and may stay the effectiveness of any sanction pending their review. *See id.* § 3058(b), (c), (d). Again, the Commission's plenary oversight is analogous to that of the SEC's, which "has been upheld against constitutional challenges on many occasions." Order, R. 105, PageID#1505.

The role specified in the Act for a qualified anti-doping agency, 15 U.S.C. § 3055(c)(4), is also unexceptional. Br. 34. The Act directs the Authority to "enter into an agreement with the United States Anti-Doping Agency"—a non-profit organization that Congress has separately recognized as the "independent national anti-doping organization for the United States," *see* 21 U.S.C. § 2001(b)—or an "entity that is nationally recognized as being . . . equal in qualification to the United States Anti-Doping Agency." 15 U.S.C. § 3054(e). The statute provides for this anti-doping

agency to assist in performing certain functions under the Act's anti-doping program, such as collecting samples, managing testing, and accrediting laboratories. *See id.* § 3055(c)(4). The testing and accreditation functions that this anti-doping agency will undertake must be pursuant to rules and standards approved by the Commission in accordance with the Act's requirements, *see, e.g.*, *id.* § 3055(c)(1), (g); *id.* § 3057(b), (c); and the Act makes clear that any rules violation this anti-doping agency may charge in the course of testing would be subject to plenary review by the Commission under the same process discussed above with respect to an initial decision of the Authority, *see id.* § 3055(c)(4)(B) (cross-referencing the review procedures in § 3058).

Plaintiffs' argument (Br. 32-33) with respect to a statutory provision that authorizes the Authority to commence certain civil suits for injunctive relief or to enforce civil sanctions that have been issued pursuant to the Act, 15 U.S.C. § 3054(j), likewise does not aid their facial challenge here. Plaintiffs lack Article III standing to bring a facial challenge based on the hypothetical initiation of a civil action against unknown defendants in some unknown circumstance at some unknown time in the future. *See Clapper*, 568 U.S. at 401. In all events, such speculation is insufficient to establish that the Act presents any private-nondelegation problem on its face. Indeed, given that due process protections would, of course, apply in any suit in federal court, it is difficult to see how the Authority's hypothetical initiation of such a suit could risk the type of due process problem for which the private-nondelegation doctrine is concerned. *See, e.g.*, *Rice*, 30 F.4th at 588-89 (explaining due process concern with

private parties having "total, standardless" control to make "final" decisions with respect to another citizen's property rights). If the Authority were ever to initiate such a suit in the future, the actual defendant in that case could challenge that action as appropriate in that as-applied setting.

d. Finally, plaintiffs do not advance their claim by insisting that the Authority is controlled by economically self-interested members of the industry. Br. 35. Even if that were true, it would not change the analysis. No one disputes that the coal boards in *Adkins* were composed of economically self-interested members of the coal industry; under the statute, members of the coal boards were chosen by majority vote, where votes were appointed by the "tonnage" each producer mined in the prior calendar year. *See* Bituminous Coal Act, § 4, pt. I(a), 50 Stat. at 76. The point, however, is that involving economically self-interested private actors in a regulatory scheme does not violate due process where, as here, the private actors "function subordinately" to an agency. *Adkins*, 310 U.S. at 399; *Amtrak IV*, 896 F.3d at 545-47 (explaining that "joint efforts between 'a self-interested group and a government agency'" raise "no constitutional eyebrow as long as the government agency c[an] 'hold the line' against the entity's 'overreaching' to advance its own self-interests").

In any event, plaintiffs' argument entirely omits the provisions of the Act that are intended to guard against self-interest. Five of the nine board members must come from "outside the equine industry," while the remaining four minority board members each come from different "equine constituencies." 15 U.S.C. § 3052(b).

And *all* board members are precluded from having any "financial interest in" covered horses; "provid[ing] goods or services to" covered horses; being an "official or officer" of an "equine industry representative"; being an "employee of, or an individual who has a business or commercial relationship with," an individual with any of those conflicts of interest; and being an "immediate family member" of an individual with any of those conflicts of interest. *Id.* § 3052(e).

II. The District Court Correctly Dismissed Plaintiffs' Anti-Commandeering Challenge

The anti-commandeering doctrine reflects Tenth Amendment limits on Congress's ability to "issue direct orders to the governments of the States." *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). Plaintiffs assert that two provisions of the statute violate this principle: a provision of the statute governing the collection of fees, 15 U.S.C. § 3052(f); and a provision respecting cooperation between the Authority and federal and state law-enforcement, *id.* § 3060(a). The district court correctly rejected both arguments. The fee provision gives States a permissible choice to participate in a federal program, and plaintiffs misread the cooperation provision.

A. The Fee Provision Does Not Unlawfully Commandeer States

Under the anti-commandeering doctrine, Congress may not "command[] state legislatures to enact or refrain from enacting state law," *Murphy*, 138 S. Ct. at 1478, nor may it "conscript[] the State's officers . . . to administer or enforce a federal

regulatory program," *see Printz v. United States*, 521 U.S. 898, 935 (1997). The Supreme Court has made clear, however, that commanding a State to act is distinct from a variety of mechanisms by which Congress can "encourage a State to regulate in a particular way" or "hold out incentives to the States as a method of influencing a State's policy choices." *New York v. United States*, 505 U.S. 144, 166 (1992). In particular, the Supreme Court has recognized that "where Congress has the authority to regulate private activity under the Commerce Clause" and preempt State law, Congress may "offer States the choice" between "having state law pre-empted by federal regulation" or else participating in the federal program "according to federal standards." *Id.* at 167.

The district court correctly recognized that the Act's fee provision provides precisely such a permissible choice to States and their racing commissions. The Act provides that the regulatory programs under the Act are to be funded by fees assessed on regulated entities—*i.e.*, horseracing participants. *See* 15 U.S.C. § 3052(f). Congress provided state racing commissions with a choice to "elect[]" to participate in administering this federal fee regime, in which case the state racing commission will be responsible for remitting fees on behalf of covered persons in the State to the Authority, in accordance with a schedule approved by the Commission. *See id.* § 3052(f)(2). If a state racing commission elects to participate in this manner, then the state racing commission will be able to maintain its current fee collection program and will have broad discretion over "the method by which the" required fees "shall be

allocated, assessed, and collected" from covered persons in the State. *See id.* § 3052(f)(2)(D). But state racing commissions are free to elect not to participate, in which case the Authority shall calculate, assess, and collect the required fees from covered persons in accordance with rules approved by the Commission. *Id.* § 3052(f)(3)(A)-(C). In this circumstance, however, the State will be preempted from "impos[ing] or collect[ing]" its own taxes or fees "relating to anti-doping and medication control or racetrack safety matters for covered horseraces." *See id.* § 3052(f)(3)(D).

Plaintiffs assert that this latter provision would preclude States from collecting "fees for their own racetrack-safety and medication-control programs, even if [the Act] does not preempt those programs," Br. 55, but that is incorrect. The anti-doping and track-safety "matters" for which States would be unable to collect fees (if the Authority instead collects them) are not abstract subject areas untethered from the rest of the statute. Rather, they are those anti-doping and track-safety matters for which fees would be collected under the Act, 15 U.S.C. § 3053(f)(1)(C)(i)(I)—that is, the anti-doping and track-safety programs discussed in the Act's substantive provisions, *id.* §§ 3055, 3056, which are established and governed by rules proposed by the Authority and approved by the Commission. Once the relevant rules governing those programs are in place, they "preempt any provision of State law . . . with respect to matters within the jurisdiction of the Authority." *Id.* § 3054(b). It is those same "matters" regulated under the Act for which States would be preempted

from collecting duplicative taxes and fees. In this way, if a State does not elect to participate in the federal fee regime, then the Authority will be responsible for assessing the required fees and the State will be precluded from imposing "double" fees on horseracing participants for programs within the purview of the Act. *See* Amicus Br. of Sen. McConnell, et al., R. 73-1, PageID#664. But a State that does elect to participate in administering the federal fee regime would not be preempted in this manner.

Contrary to plaintiffs' suggestion, there is nothing improper about Congress presenting States with such a choice as an "incentive[]" to participate in a federal program. *New York*, 505 U.S. at 166. Congress undoubtedly has authority under the Commerce Clause to preempt state legislation, including state taxes and fees, in areas such as horseracing in which it has the power to regulate. *See Aloha Airlines, Inc. v. Director of Taxation of Haw.*, 464 U.S. 7, 9-11 (1983) (federal statute preempted state "gross receipts taxes on the sale of air transportation or the carriage of persons traveling in air commerce" in order to prevent "double taxation on air travelers"). And as explained above, where "Congress has the authority to regulate private activity under the Commerce Clause" and preempt state laws, Congress may "offer States the choice" of either having state law preempted by the operation of such a provision or participating in the federal scheme according to federal standards. *See New York*, 505 U.S. at 167 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). This type of "conditional exercise of Congress' commerce power . . .

does not intrude on the sovereignty reserved to the States by the Tenth Amendment." *Id.* at 174.

Plaintiffs are therefore wrong to assert that the Act unlawfully commandeers States because they must "change their behavior" under either option. Br. 60. The Act is clear that if a State elects not to participate in administering the federal fee regime, the "full regulatory burden" of implementing the fee program will be borne by the Authority and the Commission, and the State will not be required to "expend any state funds." *Murphy*, 138 S. Ct. at 1479 (quoting *Hodel*, 452 U.S. at 288). The State in that circumstance will not have discretion over how fees under the Act are calculated, allocated, and collected in the State, and the State will be unable to collect its own duplicative taxes and fees for programs that are within the purview of the Authority and the Commission under the Act. 15 U.S.C. § 3052(f)(3). But that would be the consequence only of State law being preempted in this respect by federal law; it would not be because the federal government had in any sense "commandeered the state legislative process." *Murphy*, 138 S. Ct. at 1479; *see Hodel*, 452 U.S. at 289-90 (explaining that it is a mistake to "assume that the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce").

Plaintiffs are likewise incorrect that the Act unlawfully commandeers the States because the "threat of preemption" functions as a "gun to the head" that deprives States of a "legitimate" choice. Br. 59 (quoting *National Fed'n of Indep. Bus. v. Sebelius*,

567 U.S. 519, 581 (2012) (opinion of Roberts, C.J.)). The Supreme Court has specifically rejected the argument "that the threat of federal usurpation of [States'] regulatory roles" in the form of a conditional preemption provision "coerces the States into enforcing" federal law. *Hodel*, 452 U.S. at 289. The cases relied upon by plaintiffs for their "gun to the head" theory (Br. 59) did not concern a choice between the operation of a preemption provision or participation in a federal scheme but rather involved "Congress's authority under the Spending Clause" to impose conditions on federal funds—an authority that is subject to specific limitations "because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers." *Sebelius*, 567 U.S. at 575, 577-78, 580-81; *South Dakota v. Dole*, 483 U.S. 203, 207, 211 (1987); *see also Westside Mothers v. Haveman*, 289 F.3d 852, 858-59 (6th Cir. 2002) (discussing Congress's authority under the Spending Clause in suit brought by private parties against State officials not involving any anti-commandeering claim).

That authority is not at issue here, where Congress has legislated pursuant to its Commerce Clause powers and has broad latitude to preempt State law in this subject area, as discussed above. *See New York*, 505 U.S. at 167 (discussing Congress's different authority under its spending power and its commerce power with respect to encouraging State participation in a federal scheme). Given that Congress "could constitutionally have enacted a statute" under its Commerce Clause authority "prohibiting any state regulation" in the area of interstate horseracing, there is nothing

"constitutionally suspect" about Congress offering States the choice to opt out of such preemption in certain respects if they participate in the federal scheme in accordance with federal standards. *Hodel*, 452 U.S. at 290. Like other schemes of "cooperative federalism," "[t]he most that can be said" about the Act's fee provision is that it "allows the States," "within limits established by" the Act, to participate in an otherwise preempted space and maintain their own fee programs, "structured to meet their own particular needs." *Id.* at 289.

Plaintiffs' assertion that the choice given to the States is impermissible here because Congress has not "require[d] uniform federal standards" (Br. 63) is difficult to understand. As explained above, the primary purpose of the Act is to create a national framework over anti-doping and track-safety matters for covered horseraces, and to that end, Congress explicitly provided that rules promulgated under the Act shall displace any State laws "within the jurisdiction of the Authority." 15 U.S.C. § 3054(a), (b). Within this federal framework, Congress has offered States the choice to maintain a "regulatory role" in certain respects, but States must do so "within [the] limits established by" the Act. *Hodel*, 452 U.S. at 289. The option presented to States in the Act's fee provision resembles that presented to States in other portions of the Act, which similarly offer States the option to participate in implementing the Act's components so long as they do so in accordance with "federal minimum standards." *Id.* at 289; *see, e.g.*, 15 U.S.C. § 3060(a) (providing states option to implement

components of the Act's programs so long as they do not do so in a manner that is "less restrictive than" the rules established under the Act).

Providing States with such a choice does not "shift the costs of regulation to the States." Br. 64 (quoting *Murphy*, 138 S. Ct at 1477). The only "expense" that plaintiffs identify from a State exercising its choice *not* to participate in the Act's fee regime is the States' inability to collect its own taxes and fees for programs that are within the jurisdiction of the Authority and the Commission under the Act. Br. 64. But again, that would only be the consequence of State law being preempted in this respect by federal law, not because the State or its officers have been forced to implement federal law. Plaintiffs' assertion that Congress has "evaded its duty to pay for its own regulatory programs" (*id.*) is meritless. There is nothing remarkable about Congress funding a federal program through fees assessed on regulated entities—as Congress has done here, 15 U.S.C. § 3052(f)—rather than through appropriated funds. *See, e.g.*, Bituminous Coal Act, § 4 pt. I(b), 50 Stat. at 77 (expense of administering coal regime "shall be borne" by industry participants); *see also United States v. Frame*, 885 F.2d 1119, 1122 (3d Cir. 1989) (recognizing that regulatory program "receive[d] no direct funding from the federal government" and "resemble[d] a number of" other laws "designed to make various federal regulatory programs partially or entirely self-financing").

Nor does the Act "mudd[y] the line of accountability" between States and the federal government. Br. 63. Precisely the opposite. If a state racing commission

chooses to participate in the Act's fee regime and collect money on behalf of horseracing participants in the State to remit to the Authority, those participants will pay their fees to the state racing commission and know that it has decided to be a part of the federal regulatory process. By contrast, if the State declines to participate, its own ability to collect taxes and fees for programs within the jurisdiction of the Authority and the Commission under the Act will be pre-empted, and participants will pay only the Authority—thus making clear to those participants that it is the Authority and the Commission administering the collection of fees and not the State. Either way, racing participants will "know who to credit or blame." *Murphy*, 138 S. Ct. at 1477.

B. The Act Does Not Require State Officials to Cooperate with the Authority

Plaintiffs' argument with respect to the Act's cooperation provision, 15 U.S.C. § 3060(b), is premised on a misreading of the statute. Section 3060(b) provides that "[t]o avoid duplication of functions, facilities, and personnel," where conduct "may involve both a" rule violation under the Act "and [a] violation of Federal or State law, the Authority and Federal or State law enforcement authorities shall cooperate and share information." *Id.* As the district court recognized, this provision is best understood as a direction to the Authority to cooperate with Federal or State officials where appropriate, not as a command to or conscription of State law enforcement. *See* Order, R. 105, Page ID#1510. That reading is consistent with the overall purpose

and framework of the Act, which sets forth the duties and obligations of the Authority as well as the obligations of covered persons subject to the Act's requirements. Although certain provisions in the Act address the elective role that state racing commissions may play in this scheme and preempt state law in certain circumstances, *see supra* pp. 44-48, no part of the Act purports to regulate other government entities or persons not subject to the Act's provisions, and § 3060(b) should not be read out of context to impose such a demand. If there were any doubt, the statute should be read to avoid any potential constitutional concerns. *See Zadvydas*, 533 U.S. at 689.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,914 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

s/ Courtney L. Dixon
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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

s/ Courtney L. Dixon
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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	**Description**	**Page ID # Range**
R. 53	Amended Complaint	358-414
R. 105	Memorandum Opinion and Order	1480-1512
R. 106	Judgment	1513
R. 109	Notice of Appeal	1518-1521