EXECUTIVE ROUNDUP: SADDLING PRIVATE ARTICLE II ENFORCEMENT UNDER THE HORSERACING INTEGRITY AND SAFETY ACT OF 2020

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ABSTRACT

In the heart of an emerging circuit split is a constitutional doctrine that is also still yet to be clarified. The Framers of the United States Constitution carefully designed the three branches of government to be separate and distinct from one another to preserve personal liberty and prevent one branch from unilaterally holding too much power. Flowing logically from this separation of powers structure is the private nondelegation doctrine, which prohibits Congress from delegating regulatory governmental power to a private entity. In passing the Horseracing Integrity and Safety Act of 2020 (HISA), Congress bypassed this constitutional protection and vested a private entity, not the President, with the power to enforce federal law upon the thoroughbred horseracing industry.

This Comment examines HISA, focusing squarely on its congressional delegation of coercive governmental power to the private entity recognized to implement its law—the Horseracing Integrity and Safety Authority. In recognizing the private entity's discretionary Article II powers, this Comment expands on the Fifth Circuit's holding that HISA is unconstitutional. The Fifth Circuit held that HISA violated the private nondelegation doctrine. Notably, the Supreme Court has not struck down a statute based on the private nondelegation doctrine since 1935. As many have called for Supreme Court clarification on this doctrine, this Comment asserts an alternative approach to more soundly cure the constitutional infirmity: the Horseracing Integrity and Safety Authority functions as officers of the United States and thus must be appointed by the President per Article II, Section 2, Clause 2 of the United States Constitution. Because this private entity is exercising significant authority pursuant to the laws of the United States on a continuing and permanent basis, the Appointments Clause presents the best method to preserve democratic accountability within the Executive Branch.

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I. INTRODUCTION

It would be no surprise to find federal agents at the door of a person that violated federal law.[1] By contrast, it would be very surprising if a private citizen showed up instead.[2] This is self-evident, for it would be nonsensical, even viewed on a local level, if police officers contracted private citizens to issue speeding tickets or conduct arrests on their behalf.[3] Yet a thoroughbred horse trainer found herself at the mercy of three private individuals who showed up at her residence, served her with a notice of an alleged doping violation, subjected her to a coercive interrogation, and searched her barn and her mother's car for banned substances.[4] The Constitution does not permit private parties to enforce federal law, and the Fifth Circuit held as such.[5]

The passage of the Horseracing Integrity and Safety Act of 2020 (HISA) brought thoroughbred horseracing under federal purview to uniform legislation among the states and promote safer practices within the sport.[6] However, the Fifth Circuit held that HISA is unconstitutional for violating the private nondelegation doctrine—a constitutional doctrine that limits a private party's involvement within the federal government to be only in a ministerial capacity.[7] The court found that HISA delegated comprehensive regulatory power solely to a private entity to enforce its rules upon the thoroughbred horseracing industry.[8] This private nondelegation analysis pivoted on the fact that HISA's recognized regulatory entity, the Horseracing Integrity and Safety Authority (the Authority), is a private entity and not a federal instrumentality.[9] The Fifth Circuit thus concluded that the Authority's power can only be restored by reforming its power to be more ministerial in nature and fulfill only a subordinate role to the Federal Trade Commission (FTC) under HISA.[10] Yet this Comment suggests an alternative fix that better aligns HISA with constitutional principles by dismissing the Authority's private-public distinction.[11] Based on the understanding that the President

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1. *See generally Our Work*, U.S. DEP'T. OF JUST., https://www.justice.gov/our-work (last visited Nov. 5, 2024) (describing the various federal agencies within the Department of Justice employed to enforce federal law).

2. *Id.*

3. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 431 (5th Cir. 2024).

4. Statement of Contested Facts and Specification of Additional Evidence at 3–4, *In re Lynch*, No. D09423 (F.T.C. A.L.J. 2024).

5. *Black*, 107 F.4th at 430–31.

6. H.R. REP. NO. 116-554, at 17–19 (2020).

7. *See Black*, 107 F.4th at 428–29; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940).

8. *Black*, 107 F.4th at 435.

9. *Id.* at 431–34.

10. *Id.* at 438–41.

11. *See infra* Section III.C (asserting that the Authority's members function as officers of the United States and should be appointed in accordance with the Appointments Clause); Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1544–46 (2015).

must control those who execute the law on his behalf, the President must appoint the members of the Authority in accordance with the Appointments Clause under Article II.[12]

The private nondelegation doctrine is a doctrine considered "dead" by many courts and scholars because the Supreme Court has not struck down a statute on a private nondelegation ground since 1935.[13] Therefore, a more proper cure to this constitutional infirmity is to recognize the Authority as officers of the United States subject to presidential appointment.[14] The Authority's incorporation under Delaware law (mere weeks before Congress passed HISA) becomes constitutionally irrelevant when confronted against its performance of core governmental powers on a continuing and permanent basis.[15] The President currently does not have any control over the Authority's actions, which frustrates the separation of powers and democratic principles that preserve personal liberty.[16] Thus, rather than narrowing the scope of the Authority's powers under the private nondelegation doctrine, adherence to the Appointments Clause better maintains political accountability solely with the President.[17]

This Comment analyzes the conflict between the Authority and its delegated regulatory power under the Constitution and proposes that adherence to the Appointments Clause best cures HISA's deficiency.[18] Part II describes the constitutional principles designed to control and prevent congressional delegation of executive power to private entities, the statutory framework of HISA, and the circuit split on its constitutionality.[19] Part III analyzes how HISA is unconstitutional under its current structure and explores the two leading approaches that courts and advocates have adopted to cure the constitutional infirmity: the private nondelegation doctrine and the Appointments Clause.[20] Part III advances that the Appointments Clause best conforms HISA to the demands of the Constitution, but concedes that whether the Supreme Court adopts either approach, at a minimum, the

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12. U.S. CONST. art. II, § 2, cl. 2.

13. *See, e.g.*, United States v. Cooper, 750 F.3d 263, 270 (3d Cir. 2014) ("The Supreme Court has not invalidated a statute for violating the nondelegation doctrine . . . since *Panama Refining* and *Schechter Poultry*.").

14. Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 NOTRE DAME L. REV. 203, 211 (2023).

15. *See* Mishra, *supra* note 11.

16. *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring).

17. *Id.*

18. *See infra* Part III (presenting the Appointments Clause as the proper solution to fix the unconstitutional delegation).

19. *See infra* Part II (defining the private nondelegation doctrine and the Appointments Clause, the scope and responsibilities divided among three separate entities under HISA, and the Sixth Circuit and Fifth Circuit split on HISA's constitutionality).

20. *See infra* Part III (arguing that the Appointments Clause approach best cures the constitutional infirmity).

Executive Branch must hold greater control over the Authority to adhere to democratic principles.[21]

II. THE HORSERACING INTEGRITY AND SAFETY ACT OF 2020 FRAMEWORK

Horseracing is a thrilling and illuminating display of American exceptionalism, with equine athletes personifying the grace, power, and strength of the nation.[22] Whether a fan of the sport or not, horseracing is infused into American culture—having its permanent stamp on our vernacular today with many phrases originating from horseracing, such as "win hands down," meaning to win by a large margin as it was used to describe when a horse was so far ahead of the pack, the jockey would loosen his grip, lower his reins, and confidently win with his hands down; or "down to the wire," which although today embodies procrastinators who wait until the last minute, "the wire" actually comes from the thin wire that was strung across the finish line to help officials and cameras spot which horse crossed the line first in tight races, hence the race went down "to the wire."[23]

In support of this time-honored tradition, bipartisan representatives from New York and Kentucky introduced HISA to improve and unify safety and performance standards among the thirty-eight states independently regulating the sport of horseracing.[24] Encountering over 441 thoroughbred racehorse fatalities in 2019, this bill acted as a direct response to aggressive training methods, poor racetrack conditions, performance-enhancing drugs, certain harmful therapeutic techniques, and lack of drug testing outside competition—all of which waded through different state rules without a central point of control.[25] Therefore, Congress recognized the Authority to "develop[] and implement[] a national horseracing anti-doping and medication control program and a racetrack safety program."[26] In delegating federal power to the Authority, HISA has come into conflict with constitutional safeguards that limit the exercise of government power beyond the three branches.[27]

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21. *See infra* Part III (recognizing that a greater delegation of power requires a higher degree of presidential control mechanisms).

22. 166 CONG. REC. H4981 (daily ed. Sept. 29, 2020) (statement of Rep. Tanko).

23. Elizabeth Harrison, *7 Expressions You Might Not Know Came from Horse Racing*, HIST., https://www.history.com/news/7-expressions-you-might-not-know-came-from-horse-racing (last updated May 16, 2023).

24. H.R. REP. NO. 116-554, at 17–19 (2020).

25. *Id.* at 17–18 (citing *Supplemental Tables of Equine Injury Database Statistics for Thoroughbreds*, JOCKEY CLUB (Mar. 12, 2020), jockeyclub.com/pdfs/eid_11_year_tables.pdf; Joe Drape & Corina Knoll, *Why So Many Horses Have Died at Santa Anita*, N.Y. TIMES (June 26, 2019), https://www.nytimes.com/2019/06/26/sports/santa-anita-horse-deaths.html).

26. H.R. REP. NO. 116-554, at 18 (2020).

27. *See infra* Section II.C (discussing constitutional challenges to HISA's framework).

A. Constitutional Safeguards Against Private Administration of Federal Law

The Constitution, in vesting legislative power in Congress, executive power in the President, and judicial power in the Judiciary, not only bounds each branch to perform its own functions but also confines all federal government power to be exercised in only these three branches.[28] Accordingly, preserving the balance of power within the government precludes a private entity from exercising legislative, executive, or judicial powers on behalf of the federal government.[29] Yet the Constitution does not prohibit "the necessary resources of flexibility and practicality" that enable the government to carry out its duties.[30] Although executive power is vested in the President, the Framers of the Constitution understood that the President alone cannot execute all federal law but will do so with the assistance and reliance of subordinates.[31]

The Supreme Court has warned that when Congress delegates regulatory power to corporations and not agencies of the United States Government, special attention must be given to this designation because there is good reason to limit the federal authority of those that have not sworn an oath.[32] To preserve a clear and effective chain of command, two prominent control mechanisms help ensure that the delegation of regulatory power to private entities does not divest the President of his exclusive responsibility to execute the Nation's laws: the private nondelegation doctrine and the Appointments Clause.[33]

The private nondelegation doctrine flows logically from the three Vesting Clauses.[34] This doctrine, known as the "lesser-known cousin" of the nondelegation doctrine that prohibits Congress from delegating legislative functions to executive agencies, restricts the delegation of regulatory authority to private entities.[35] At a minimum, the statutory delegation of essential governmental power to unsupervised private parties violates core

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28. U.S. CONST. art. I, § 1 (Legislative Vesting Clause); *id.* art. II, § 1, cl. 1 (Executive Vesting Clause); *id.* art. III, § 1 (Judicial Vesting Clause).

29. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 87–88 (2015) (Thomas, J., concurring).

30. Pan. Refin. Co. v. Ryan, 293 U.S. 388, 421 (1935).

31. *See* Myers v. United States, 272 U.S. 52, 117 (1926); Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 203–04 (2020).

32. *See Ass'n of Am. R.Rs.*, 575 U.S. at 57 (citing Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 390 (1995)); *see also* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 740 (2003) (explaining that the Necessary and Proper Clause allows Congress to assist the President in structuring the administration of the law, but "does not grant Congress a license to reallocate or abridge powers already vested by the Constitution").

33. *Ass'n of Am. R.Rs.*, 575 U.S. at 88 (Thomas, J., concurring); U.S. CONST. art. II, § 2, cl. 2.

34. *Ass'n of Am. R.Rs.*, 575 U.S. at 87–88 (Thomas, J., concurring).

35. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated and remanded on other grounds sub nom.* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43 (2015).

separation of power principles.[36] Congress cannot empower private entities to perform government functions, such as setting wages and controlling the business of others, because this type of delegation is unconstitutional and amounts to an intolerable interference with personal liberty.[37]

However, delegation to private entities is permissible when private entities are subordinate, acting as an aid to a federal agency.[38] Generally, an entity is seen as acting in a subordinate role if it is carrying out ministerial, rather than executive, functions, and the federal agency has sufficient surveillance over its activities.[39] The line between a private entity acting as an advisor versus a regulator can turn on many factors, such as the entity's use of discretion and whether its actions are inconsequential.[40] Performing collections or referring violators to a federal agency is tolerated, while potent executive actions such as launching investigations, searching for evidence, sanctioning, and bringing civil suit—all of which impose coercive governmental power upon the interests of citizens—are forbidden.[41]

The Appointments Clause under Article II is a structural safeguard that the Framers designed to preserve political accountability and prevent congressional encroachment upon the Executive and Judicial Branches.[42] The Appointment Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[43]

The Appointments Clause inhibits the diffusion of power among the branches to ensure integrity within the operation of the government, providing only a limited number of publicly and readily discernable sources

36. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

37. Carter v. Carter Coal Co., 298 U.S. 238, 311–12 (1936).

38. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940).

39. *Id.*

40. Consumers' Rsch. v. Fed. Commc'ns Comm'n, 109 F.4th 743, 773 (5th Cir. 2024) (citing Gaines v. Thompson, 74 U.S. 347, 353 (1868) ("A ministerial duty . . . is one in respect to which nothing is left to discretion.")); Pittston Co. v. United States, 368 F.3d 385, 396–98 (4th Cir. 2004).

41. *See Pittston Co.*, 368 F.3d at 398; *see also* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 428 n.9 (5th Cir. 2024) (compiling a wide array of actions that the Supreme Court held to constitute the execution of the law).

42. Edmond v. United States, 520 U.S. 651, 659, 663 (1997).

43. U.S. CONST. art. II, § 2, cl. 2.

of appointing authority and subjecting officers to the threat of impeachment.[44]

To distinguish between mere employees and officers of the United States, the Supreme Court has employed a framework that defines officers requiring appointment as any delegatee that exercises significant authority pursuant to the laws of the United States on a continuing and permanent basis.[45] Significant authority pursuant to the laws of the United States emerges when the actor employs powers to bind the government or third parties for the benefit of the public, most notably through the administration, execution, or authoritative interpretation of federal laws.[46] And, in this capacity, employment on a continuing basis indicates ongoing statutory duties that depart from transient or incidental duties, such as being not so limited in nature that it would terminate "by the very fact of performance."[47] Officers are distinctly set apart from ordinary citizens because, by exercising substantial government power, they must adhere to special restraints.[48]

B. Statutory Delegation of Executive Power to the Horseracing Integrity and Safety Authority

HISA's legislative framework functions through the interaction of three groups: the Authority, the United States Anti-Doping Agency (USADA), and the Federal Trade Commission (FTC).[49]

The Authority is a "private, independent, self-regulatory, nonprofit corporation" recognized for the purpose of developing and enforcing the rules for the covered horses, persons, and horseraces.[50] Governing the Authority is a nine-member board of directors—five independent members selected from outside the equine industry and four industry members selected from among the various equine constituencies.[51] The Authority writes and submits for approval the rules governing racetrack safety, investigation and

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44. Steven G. Bradbury, *Officers of the United States Within the Meaning of the Appointments Clause*, U.S. DEP'T OF JUST., at 76 (Apr. 16, 2007), https://www.justice.gov/file/494641/dl?inline (citing U.S. CONST. art. II, § 4; *id.* art. I, § 3).

45. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (holding that any person exercising significant authority pursuant to the laws of the United States must be appointed under Art. II, § 2, cl. 2); United States v. Germaine, 99 U.S. 508, 511–12 (1878) (holding the nature of employment must be "continuing and permanent, not occasional or temporary" to constitute an Officer of the United States).

46. Bradbury, *supra* note 44, at 87 (citing Printz v. United States, 521 U.S. 898, 922–23 (1997) (explaining that the Constitution provides that those who "'administer the laws enacted by Congress' and 'execute its laws'" are the Officers appointed by the President)); Bowsher v. Synar, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.").

47. Bradbury, *supra* note 44, at 111.

48. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 58 (2015).

49. *See generally* 15 U.S.C. § 3054 (identifying the powers and responsibilities of each group).

50. *Id.* § 3052(a).

51. *Id.* § 3052(b)(1).

adjudication procedures, civil sanctions, and medication controls.[52] Further, the Authority enforces HISA through exercising subpoena and investigatory authority,[53] imposing civil sanctions,[54] and filing civil actions seeking a permanent or temporary injunction or restraining order without bond.[55]

The Authority is directed under 15 U.S.C. § 3054(e) to contract with USADA or, if USADA is unable to enter into agreement, with a nationally recognized medication regulation agency equal to that of USADA.[56] USADA (or other comparable anti-doping enforcement agency) serves as an independent enforcement organization that implements the "anti-doping and medication control program on behalf of the Authority."[57] The anti-doping and medication control program authorizes USADA to conduct independent investigations, charge and adjudicate potential medication control rule violations, and enforce any civil sanctions for such violations.[58] The Authority has the final decision or civil sanction on all USADA's decisions on the related matters that are then subject to de novo review by an administrative law judge (ALJ) and the FTC.[59]

The FTC oversees the Authority and must approve any proposed rule or rule modification before the rule takes effect.[60] All Authority or USADA enforcement decisions are subject to a de novo review by an ALJ and the FTC.[61]

C. The Circuit Split on the Horseracing Integrity and Safety Act of 2020

The enactment of HISA in 2020 immediately stirred constitutional challenges to the statute's framework, the first of which focused on Congress positioning a private corporation, the Authority, to have unsupervised legislative power over the rules promulgated by the Act.[62] In 2022, the Fifth Circuit held that the Authority's rulemaking power was not subordinate to the FTC and thus a constitutional violation of the private nondelegation doctrine.[63] The Fifth Circuit founded its reasoning upon the FTC's

52. *Id.* § 3057(a)(1), (c)(1) (power to establish substantive rules governing medication controls); *id.* § 3056(a)(1) (power to establish racetrack safety rules); *id.* §§ 3054(c)(1)(A), 3057(c) (power to "develop uniform procedures and rules" governing investigations and adjudications that afford due process); *id.* § 3057(d) (power to establish civil sanctions); *id.* § 3054(c), (h) (investigatory and subpoena powers).

53. *Id.* § 3054(h).

54. *Id.* §§ 3054(i), 3057.

55. *Id.* § 3054(j).

56. *Id.* § 3054(e)(1).

57. *Id.* § 3054(e)(1)(E)(i).

58. *Id.* §§ 3054(e)(1)(E)(i), (iii), (iv), 3055(c)(4)(B).

59. *Id.* § 3055(c)(4)(B), 3058.

60. *Id.* § 3053(a)–(b).

61. *Id.* §§ 3055(c)(4)(B), 3058.

62. Oklahoma v. United States, 62 F.4th 221, 225 (6th Cir. 2023).

63. *Id.* (citing Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 872, 888–89 (5th Cir. 2022)).

insufficient oversight because of its absence of power to modify the rules or question the Authority's policy choices.[64]

Yet "[s]ometimes government works," and Congress responded to the Fifth Circuit's ruling by amending § 3053 of HISA to explicitly grant the FTC the final say of the Authority's policy decisions.[65] The enactment of § 3053(e), however, did not cure the nondelegation challenge entirely because HISA's basic structure remained under question again with the principal assertion: a private entity still held "too much unsubordinated power."[66] Therefore, the Sixth Circuit and Fifth Circuit reevaluated HISA to ensure, this time, the integrity of representative government against alleged unchecked delegations of federal *executive* power.[67]

1. Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023)*

The Sixth Circuit held that the amendment of § 3053(e) to HISA provided the FTC with sufficient power to issue or amend rules that control the Authority's enforcement activities and protect the procedural rights of horseracing industry participants.[68] Reasoning that the FTC's new power to unilaterally create and modify rules establishes "a clear hierarchy" with the FTC holding the ultimate policy responsibility, the court held that the amendment also postured the Authority subordinate in its enforcement functions as well.[69]

Based on the amendment, the Sixth Circuit provided examples of steps the FTC could take to have the ultimate say of how HISA is enforced: (1) implementing rules to protect against overbroad subpoenas or onerous searches; (2) requiring the Authority to provide suspects with full adversary proceedings with free counsel; or (3) constraining the Authority to meet its burden of production or preclear its decisions with the FTC before being a lawsuit.[70] Moreover, the court emphasized that the Authority's enforcement action and adjudication decisions are not final because the FTC has full authority to conduct an independent review and may reverse the Authority's decision.[71] The court made clear that the Authority operates as an aid to the FTC, stating that "[w]hether the FTC becomes a demanding taskmaster or a

64. *Id.* at 227 (citing *Black*, 53 F.4th at 872–73, 886–87).

65. *See id.* at 225; *see also* 15 U.S.C. § 3053(e) ("The Commission . . . may abrogate, add to, and modify the rules of the Authority promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.").

66. *Oklahoma*, 62 F.4th at 227.

67. *Id.*

68. *Id.* at 231.

69. *Id.* at 229–31 (quoting *Black*, 53 F.4th at 888–89).

70. *Id.* at 231.

71. *Id.*; 15 U.S.C. § 3058(c)(1)–(3).

lenient one," the conclusion rests in that "the FTC *could* subordinate every aspect of the Authority's enforcement . . . ."[72] Lastly, the Sixth Circuit reaffirmed that the FTC retains the ultimate implementation authority of HISA because the FTC's review authority is parallel to the enforcement structure employed in securities law through the Securities and Exchange Commission (SEC) and its self-regulatory organizations under the Maloney Act.[73]

Further, the concurrence to the Sixth Circuit decision reframed the Authority's inferiority to the FTC under private nondelegation precedent regarding HISA's enforcement structure.[74] First noting that the Supreme Court has never suggested that subordination on its own is insufficient to withstand a private nondelegation challenge, it pointed out that the Supreme Court has never ruled on this precise issue.[75] Therefore, the concurrence looked to other circuit courts to provide the guidance on interpretation of Supreme Court precedent as it conforms to private enforcement constitutionality.[76]

With the Maloney Act being on point with HISA's statutory scheme, circuit courts' rulings on the Maloney Act's enforcement scheme, specifically where a private entity conducted disciplinary actions against covered entities, became very instructive.[77] The Second and Ninth Circuits, citing the Second and Third Circuits, unanimously held that a legislative or executive delegation of power is constitutional where the federal agency "retains de novo review of a private entity's enforcement proceedings"—even without review of the private entity's initial decision to bring the action.[78] Thus, this line of reasoning maintained that HISA is more constitutionally sound than the Maloney Act.[79] The Third Circuit held that although the SEC does not have the statutory authority to obtain additional evidence when reviewing the private entity disciplinary proceedings, the delegation of authority was still constitutional.[80] HISA contrasts from the Maloney Act in this way as HISA empowers the FTC to receive additional evidence not in the record when reviewing the Authority's enforcement actions.[81] Being "soundly in the company of previously upheld enforcement

72. *Oklahoma*, 62 F.4th at 231.

73. *See id.* at 229 (explaining that the SEC regulates the securities industry through the assistance of private self-regulatory organizations that propose and enforce rules for the industry); *see also id.* at 231–32 (comparing 15 U.S.C. § 78s(c) to 15 U.S.C. § 3053(e)).

74. *Id.* at 237–38 (Cole, J., concurring).

75. *Id.* at 239, 243.

76. *Id.* at 243.

77. *Id.* at 239, 243.

78. *Id.*

79. *Id.* at 239, 244.

80. *Id.* at 244.

81. *Id.*

mechanisms," the Sixth Circuit's concurrence reaffirmed HISA's constitutionality.[82]

2. National Horsemen's Benevolent and Protective Association v. Black*, 107 F.4th 415 (5th Cir. 2024)*

One year and four months after the Sixth Circuit's decision in *Oklahoma v. United States*, the Fifth Circuit also analyzed the constitutionality of HISA under its recent amendment.[83] The Fifth Circuit held that the amendment cured the nondelegation problem regarding the Authority's rulemaking power but still found that HISA unconstitutionally delegated executive power to a private entity under the reading that HISA squarely divides responsibilities between the Authority, USADA, and the FTC.[84] While the Fifth Circuit found important that HISA plainly designates the Authority to decide whether to investigate potential violations, issue subpoenas, levy sanctions, bring suit against violators, and contract with another private entity to implement doping and medication rules, the court considered equally as important HISA's silence: HISA does not empower the FTC to investigate, subpoena, sanction, or sue nor countermand any Authority enforcement activities.[85] The court underlined that the FTC is unambiguously separated from all enforcement actions as neither the Authority nor USADA is required to seek the FTC's approval.[86]

The Fifth Circuit was willing to assume that the Authority could be secondary to the FTC in that the FTC can review sanctions on the back end by asking an ALJ to review any sanction de novo and then reviewing the ALJ's decision de novo.[87] Yet the Fifth Circuit found no promise in this argument to overcome a private nondelegation violation.[88] The court focused on the fact that a sanction made by the Authority that can later be reversed by the FTC entirely ignores every unchecked action the Authority was able to impose up to that point.[89] Even more so, that court frowned upon the provision that penalties issued by the Authority immediately take effect and are not immediately stayed pending appeal unless the ALJ or FTC exercises discretion to do so.[90] The seemingly inconsequential FTC tail-end review—after the private entity already bound the individual with disciplinary

82. *Id.*
83. Nat'l Horseman's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 424 (5th Cir. 2024).
84. *Id.* at 421.
85. *Id.* at 429.
86. *Id.*
87. *Id.* at 429–30.
88. *Id.* at 430.
89. *Id.*
90. *Id.* (citing 15 U.S.C. § 3058(d)).

action—generated the inevitable pun from the Fifth Circuit: "the horse was already out of the barn."[91]

Further, the Fifth Circuit sharply departed from the Sixth Circuit's reasoning that the FTC's amended rulemaking power reins in and saves the Authority's enforcement powers.[92] The court rejected this rulemaking argument by spotlighting that Congress established a clear enforcement scheme between the three entities and that permitting the FTC to change the fundamental rules of HISA rewrites the statute entirely.[93] The Fifth Circuit cited the recent Supreme Court decision reiterating that permission to modify does not endorse authorization to change the basic and fundamental scheme designed by Congress.[94]

The Fifth Circuit also recognized that the FTC-Authority enforcement scheme is meaningfully different from the SEC and the Financial Industry Regulatory Authority (FINRA) relationship.[95] Congress granted the SEC potent oversight over FINRA's enforcement actions, including the ability to independently enforce FINRA rules, seek sanctions, issue subpoenas, revoke FINRA's enforcement abilities, derecognize FINRA's regulatory role entirely, and remove board members.[96] HISA does not grant the FTC any role in these executive functions.[97] The SEC also has the sole power to bring civil suits, yet HISA gives this power exclusively to the Authority—the ultimate remedy that the Constitution entrusts to the President, not a private entity.[98] The Fifth Circuit thus could not justify the Authority's enforcement powers against the FTC's overwhelming lack of oversight and control.[99]

III. CONSTITUTIONAL SOLUTIONS FOR PRIVATE ENFORCEMENT

The Fifth Circuit was right: HISA is unconstitutional because Congress directly granted a private entity broad Article II enforcement powers that divests the President of his ability to take care of the law's faithful execution and severs any measure of democratic accountability.[100] Therefore, this Comment proposes that to properly save HISA, the Authority's members must be appointed by the President as directed by the Appointments Clause.[101] Section III.A establishes that HISA is unconstitutional under its

91. *Id.*
92. *Id.* at 431.
93. *Id.* at 432.
94. *Id.* (citing Biden v. Nebraska, 600 U.S. 477 (2023)).
95. *Id.* at 433–34 (providing that FINRA is a private, self-regulatory organization that enforces securities laws on behalf of the SEC).
96. *Id.* at 434–35.
97. *Id.* at 432.
98. *Id.* at 434.
99. *Id.* at 435.
100. *Id.*; U.S. CONST. art. II, § 3.
101. *See infra* Section III.C.1 (demonstrating that members of the Authority are best recognized as officers of the United States).

current statutory delegation of enforcement responsibilities.[102] Section III.B identifies that courts and advocates have disagreed as to which method properly cures the constitutional infirmity.[103] Section III.C expounds upon the approach adopted by the minority of advocates and argues that appointing the Authority's members in accordance with the Appointment Clause most properly conforms HISA to separation of power principles.[104] Section III.D acknowledges that despite which theory the Supreme Court adopts, greater control mechanisms must be implemented to ensure that the President remains politically accountable to the people.[105]

A. The Horseracing Integrity and Safety Act of 2020 Is Unconstitutional as It Stands

The Constitution grants private entities no part in its design, and when Congress passed regulatory power to the Authority, bells immediately went off to the tune of Congress acting under "legislative delegation in its most obnoxious form."[106]

Under HISA, a private entity holds all the regulatory power to enforce federal law unto the thoroughbred horseracing industry.[107] The Authority may promulgate rules with the FTC to ensure proper enforcement functions, enforce HISA in perfect alignment with the President, or even choose not to enforce HISA at all—but that is of no consequence to HISA's constitutionality.[108] Congress narrowly divided the enforcement responsibilities of HISA, granting the Authority the function of carrying out the execution of the law, USADA with the duty of implementing the enforcement of doping and medication rules "on behalf of the Authority," and the FTC with the ability to task an ALJ to review any sanction by the Authority de novo then to which the FTC itself may review the ALJ decision

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102. *See infra* Section III.A (asserting that HISA is unconstitutional because Congress conferred investigatory, subpoena, and adjudication powers to the Authority without providing the FTC any meaningful role in the implementation of the law).

103. *See infra* Section III.B (discussing that the courts and a majority of advocates adopted the private nondelegation standard while a minority of advocates argue for adherence to the Appointment Clause).

104. *See infra* Section III.C (arguing that the Authority's members are best seen as officers of the United States, are not properly situated to receive their delegated power, and the private-public distinction cannot act to circumvent constitutional principles).

105. *See infra* Section III.D (explaining that whether the Supreme Court adopts the private nondelegation doctrine standard or the Appointments Clause approach, the Executive Branch must have greater control over Authority's enforcement powers to adhere to democratic principles).

106. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); *see also* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 62 (2015) (Alito, J., concurring) ("When it comes to private entities, however, there is not even a fig leaf of constitutional justification.").

107. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 429 (5th Cir. 2024).

108. *Id.*; *see generally* Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 674 (D.C. Cir. 2013), *vacated and remanded on other grounds sub nom.* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43 (2015) (discussing that even when a private entity does not use its unconstitutionally delegated authority it remains unconstitutional).

de novo.[109] A plain reading of the statute distinctly illustrates that the power to decide is in the Authority and the power to review is in the FTC.[110]

Under Congress's broad grant of investigatory powers, subpoena powers, and adjudication powers, the Authority also holds the power to impose penalties that are not automatically stayed pending appeal.[111] It is unprecedented that such a private entity can directly exert federal law on a private horseman absent any contemporaneous supervision of a governmental agency.[112] The public receives no protection during the private entity's enforcement process, but rather relies on the hope that the ALJ or FTC will exercise its discretion to implement a stay pending appeal.[113] This statutory design supplants core governmental responsibility onto a private entity.[114]

Congress did not grant the FTC any meaningful part in the execution of the HISA.[115] The Fifth Circuit illustrated a very likely hypothetical where the Authority can utilize its statutory ability to sidestep the President and undercut the government as the meaningful enforcer.[116] First, because the FTC only appears to face the horseracing industry at the very end review process, the scene starts with a sanctioned thoroughbred owner and the Authority.[117] The thoroughbred owner, under sanction by the Authority, considers two options: fight the process or settle for a lower fine.[118] If the sanctioned owner opts for the lower fine, then HISA goes unenforced completely.[119] If the FTC has no ability to step in under this scenario, then can the people blame the FTC as it holds no authority to even join into this situation?[120] This enforcement scenario blatantly highlights the unsupervised power that is designated to an unelected private entity.[121] The Authority, by Congress's design, fails to be subject to Presidential control, leaving the public unknowing as to whom to hold responsible.[122]

HISA cannot satisfy the Executive Vesting Clause of the Constitution merely by allowing actors subject to Article II to review the decisions of

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109. 15 U.S.C. § 3054(e)(1)(E); *see also* discussion *supra* Section II.B (discussing the statutory design of HISA and the split of responsibilities among the three entities).

110. *Black*, 107 F.4th at 429.

111. *Id.* at 430.

112. Virginia S. Fields, *I. Unique and Novel Aspects of HISA*, STATE BAR OF TEX. (2022).

113. *Black*, 107 F.4th at 430 (citing 15 U.S.C. § 3058(d)).

114. *Id.* at 430–31.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *See id.* at 435.

actors that are not.[123] Does an enforcement action that is later independently reviewed and vacated disqualify that action as a performance of an executive function?[124] Under this same principle, to answer this affirmatively would be to also state that the enactment of a law that is later repealed is not an act of Article I legislative power.[125] The power to reverse an action does not transform the Authority into an advisor to the FTC.[126] Although perhaps disguised by being subjected to de novo review, the Authority remains fundamentally an Article II regulator.[127] There is a distinct difference between taking action on behalf of the Executive and providing advice.[128] The difference is in the discretion of the actor and its direct influence on the public.[129]

To be sure, this same principle of de novo supervision does not work as applied under Article III.[130] The Supreme Court, in its consideration of the constitutionality of the Bankruptcy Reform Act of 1978 vesting bankruptcy judges with the power to enter final judgment on common-law claims, rejected the notion that Article III review of non-Article III courts subsequently validated the Act's provisions, declaring most notably: "[T]he constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal."[131] The Court did not focus on the distinction between trial-level judgment and appellate review but rather where Congress lodged the "essential attributes" of judicial power, that is, the distinction between entering and recommending judgment.[132] Unlike the President, who holds office for four years to remain accountable to the public, Article III judges receive life tenure to insulate them from the public.[133] The Framers of the Constitution purposefully composed Article II to function with public opposition and Article III to function against public opposition.[134] When Congress designs an act that places that power outside

123. Brief for the State of Ark. et al. as Amici Curiae Supporting Petitioners, Oklahoma v. United States, 62 F.4th 221 (6th Cir. 2023) (No. 23-402), 2023 WL 8112710, at *12 [hereinafter Brief for the State of Ark.].

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Consumers' Rsch. v. Fed. Commc'ns Comm'n, 109 F.4th 743, 773 (5th Cir. 2024).

130. Brief for the State of Ark., *supra* note 123, at *12–13.

131. *Id.* at *13 (citing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86 n.39 (1982)).

132. *Id.*; *N. Pipeline Constr. Co.*, 458 U.S. at 87.

133. *Compare* U.S. CONST. art. II, § 1 (providing the President with a four-year term), *with id.* art. III, § 1 (providing judges with a life tenure).

134. *See* THE FEDERALIST NO. 70, at 409 (Alexander Hamilton) (Am. Bar Ass'n ed., 2009) (explaining that a single executive will be "more narrowly watched and more readily suspected" by the people); *see also* THE FEDERALIST NO. 78, at 453 (Alexander Hamilton) (Am. Bar Ass'n ed., 2009) (arguing the importance of an independent judiciary and separation of federal courts from the control of the elected branches to preserve an "independent spirit in the judges which must be essential to the faithful performance of so arduous a duty").

of those branches, allowing for the branch to merely review that delegated power does not bring the power back into the branch.[135]

Further, the most recent amendment to HISA that grants the FTC the power to "abrogate, add to, and modify" the Authority's rules does not defeat the unconstitutionality of the statutory division of regulatory responsibilities among the Authority, USADA, and the FTC.[136] A federal agency cannot rewrite a statute nor interpret the statute in a way that is inconsistent with its structure.[137] HISA clearly instructs the jurisdiction of the Authority, USADA, and the FTC so that each entity acts "*within the scope* of their powers and responsibilities under this chapter" to implement and enforce the Act.[138] The idea that the FTC can use its rulemaking power to cure the Authority's unconstitutional delegation of power is internally contradictory and has no bearing on whether the actual statutory delegation is constitutional.[139] More so, citizens would essentially rely on mere hypothetical tools in the hope that the FTC utilizes its discretion to adhere to the Constitution and ensure that the Authority exercises its power properly.[140] Separation of powers principles are eroded under a veil of potential that the federal agency will use its discretion to subordinate a private entity that enforces the HISA under its own prerogative.[141]

President Truman's famously coined motto, "the buck stops here," frames the Executive within the American tripartite government: the President holds full responsibility for executive branch decisions.[142] It is not debated that the Constitution understands that the President alone cannot execute all laws but rather will utilize the aid of subordinates.[143] Yet when Congress passes government responsibilities to independent private entities, close attention should be given to this designation.[144] It is inherently suspect if political accountability dissolves as power is delegated.[145] Because the President represents an elective office, "the multiplication of the [E]xecutive" allows blame and accusation to be shifted among many "under such plausible appearances, that the public opinion is left in suspense about the real

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135. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 430–31 (5th Cir. 2024).

136. 15 U.S.C. § 3053(e); *Black*, 107 F.4th at 431.

137. *Black*, 107 F.4th at 431 (citing Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454, 460 (5th Cir. 2020)).

138. 15 U.S.C. § 3054(a) (emphasis added).

139. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001).

140. *Black*, 107 F.4th at 432–33 (explaining that HISA facially delegated unsupervised regulatory power to private actors, and if Congress wanted to ensure that the federal agency was in charge of enforcement, "it knew how").

141. *Id.*

142. *"The Buck Stops Here" Desk Sign*, HARRY S. TRUMAN LIBR. & MUSEUM, https://www.trumanlibrary.gov/education/trivia/buck-stops-here-sign (last visited Feb. 11, 2025).

143. Myers v. United States, 272 U.S. 52, 117 (1926).

144. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 57 (2015) (Alito, J., concurring).

145. *Id.*

author."[146] Insistently, to maintain political accountability, his subordinates must remain subordinate to him in such a manner that does not divest the President's executive power.[147] If the President cannot remove and derecognize the actions of his or her subordinates, "the buck would stop somewhere else."[148]

B. Courts and Advocates Have Identified Two Main Approaches to Curing the Constitutional Infirmity

The unprecedented executive power delegated to the Authority prompts two leading approaches to cure the constitutional infirmity: (1) subordinate the Authority to the FTC under the private nondelegation doctrine or (2) subject members of the Authority to the Appointments Clause.[149] The first theory focuses squarely on the scope of delegation while the latter focuses on the entity receiving the delegation.[150] The Fifth Circuit observed that challenging HISA based on private nondelegation, on the one hand, and the Appointments Clause, on the other, seemed contradictory as the two appear mutually exclusive, stating, "For constitutional purposes, an entity is either governmental or not."[151] Yet the court also noted that the mere labelling as private does not settle whether the entity is legally part of the federal government nor allow Congress to evade constitutional restrictions.[152]

The struggle between declaring an entity as private without conceding to the evasion of constitutional principles is the exact gateway that allows the Appointments Clause not to be foreclosed.[153] The majority adopts the first approach, relying on Supreme Court precedent that defines the Authority as a private entity and thus subject to the private nondelegation standard.[154] A minority of advocates adopt the second approach, disposing of the private-public label and challenging the structure of the Authority under the Appointments Clause of Article II.[155] Article II's structure, particularly the

146. THE FEDERALIST NO. 70, *supra* note 134, at 407.

147. Mishra, *supra* note 11, at 1523.

148. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010).

149. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 440 (5th Cir. 2024); Brief of Plaintiffs-Appellants Gulf Coast Racing, L.L.C. et al., Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415 (5th Cir. 2024) (No. 23-10520), 2023 WL 4542682, at *13–19 [hereinafter Brief of Plaintiffs-Appellants Gulf Coast Racing].

150. Volokh, *supra* note 14, at 208.

151. *Black*, 107 F.4th at 436–37.

152. *Id.* at 437.

153. Volokh, *supra* note 14, at 208.

154. *See Black*, 107 F.4th at 437–38; *see also* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 672 F. Supp. 3d 220, 234 (N.D. Tex. 2023), *aff'd in part, rev'd in part*, 107 F.4th 415 (5th Cir. 2024) (exemplifying further court application of the private nondelegation standard).

155. Brief of Plaintiffs-Appellants Gulf Coast Racing, *supra* note 149; Brief for Reason Found. et al. as Amici Curiae Supporting Appellants, Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415 (5th Cir. 2024) (No. 23-10520), 2023 WL 4679876, at *4–5 [hereinafter Brief for Reason Found.].

existence of the Appointments Clause, comprehends delegation of executive power to subordinates as long as those delegates remain subordinate.[156] Understanding that varying degrees of delegation of power require tradeoffs of oversight, the President must ultimately retain the sole responsibility for the law's faithful execution.[157] The President's appointment and removal powers, as the primacy devices of presidential control, are interwoven into the pathway to determine whether the Authority is adequately subject to presidential control.[158]

1. Majority Approach: Subordinating the Authority Under the Private Nondelegation Doctrine

The Fifth Circuit, Sixth Circuit, and many advocates find that the Authority is subject to the private nondelegation standard based on its status as a private entity.[159] The Supreme Court case *Lebron v. National Railroad Passenger Corporation*[160] guides the analysis to determine whether a corporation's participation in governmental functions qualifies it as, though nominally private, part of the federal government.[161] In *Lebron*, the Court held that the National Railroad Passenger Corporation, commonly known as Amtrak, is an agency or instrumentality of the United States subject to the constraints of the Constitution under a three-part framework.[162] The Fifth Circuit applied the *Lebron* test to discern the status of the Authority: first, whether the Authority was created by the federal government "by special law"; second, whether the Authority was created to further "governmental objectives"; and third, whether the federal government "retain[ed] for itself the permanent authority to appoint a majority of directors" of the Authority.[163]

The Fifth Circuit quickly dismissed the Appointments Clause challenge because Congress did not establish the Authority by special law, but rather, it was incorporated under Delaware law shortly before Congress passed HISA.[164] Additionally, the Authority does not further governmental objectives because it is designed to address doping, medication, and safety issues in the thoroughbred horseracing industry rather than goals Congress

156. Mishra, *supra* note 11, at 1557.

157. Mishra, *supra* note 11, at 1523–24.

158. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring).

159. *See, e.g.*, *Black*, 107 F.4th at 440; Oklahoma v. United States, 62 F.4th 221, 225 (6th Cir. 2023); *Black*, 672 F. Supp. 3d at 234; Lucy McAfee, *The Rise and Fall of the Horseracing Integrity and Safety Act: How Congress Could Save the "Sport of Kings*,*"* 25 VAND. J. ENT. & TECH. L. 783, 802–03 (2023) (all describing that the Authority's structure supports the Authority's status as a private entity).

160. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995).

161. *Black*, 107 F.4th at 437–38.

162. *Lebron*, 513 U.S. at 394.

163. *Black*, 107 F.4th at 437–38 (quoting *Lebron*, 513 U.S. at 399).

164. *Id.*

itself established.[165] Lastly, the government retains no control of the operation of the Authority because it has no role in appointing the Authority's Board.[166]

Despite arguments that the *Lebron* test is not the only way to determine whether a corporation is a governmental instrumentality, the Fifth Circuit declined to extend Supreme Court precedent.[167] Challengers asserted that the *Lebron* test then fundamentally allows the federal government to avoid constitutional restraints by vesting executive power in private corporations such as the Authority.[168] The Fifth Circuit discarded this contention as it explained that the private nondelegation doctrine is precisely the solution to restrict core governmental powers from being vested in unsupervised private entities.[169]

Leaving the private designation untouched, the solution to cure the constitutional infirmity grips onto the subordination standard set forth under *Sunshine Anthracite Coal Co. v. Adkins*.[170] Delegation to a private entity is constitutional if the private entity functions subordinately to the federal agency, acting as an aid to the agency that has authority and surveillance over it.[171] The analysis turns on determining how much involvement the Authority may have in HISA's enforcement before its "advisory role trespasses into an unconstitutional delegation" as well as the accompanying statutory and federal agency control mechanisms to limit the Authority to a subordinate role.[172]

2. Minority Approach: Appointing Members of the Authority Under the Appointments Clause

Other challengers of HISA take an alternative approach by finding that the regulatory power granted to the Authority violates the Appointments Clause under Article II.[173] To the extent that the private-public distinction is relevant in this case, this distinction can apply differently for the purpose of the nondelegation doctrine and the Appointments Clause and, therefore, cannot be adopted interchangeably.[174] Appointments Clause challengers

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165. *Id.*

166. *Id.*

167. *Id.* at 439.

168. *Id.* at 440.

169. *Id.* at 439.

170. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940).

171. *Black*, 107 F.4th at 427.

172. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 671–73 (D.C. Cir. 2013), *vacated and remanded on other grounds sub nom.* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43 (2015).

173. Brief of Plaintiffs-Appellants Gulf Coast Racing, *supra* note 149; Brief for Reason Found., *supra* note 155; *Black*, 107 F.4th at 436; U.S. CONST. art. II, § 2, cl. 2.

174. *Ass'n of Am. R.Rs.*, 721 F.3d at 676 ("But just because *Lebron* treated Amtrak as a government agency for purposes of the First Amendment does not dictate the same result with respect to all other constitutional provisions.").

argue that the *Lebron* test is not the only way to determine whether a corporation is a government instrumentality.[175] Rather, the guiding analysis to determine if members of the Authority are officers of the United States is to focus on the exercise of significant authority pursuant to federal laws and whether such authority is being exercised on a continuing and permanent basis.[176]

Under this standard, the private-public label is constitutionally irrelevant, and members of the Authority should be seen plainly as officers.[177] The Fifth Circuit refused to entertain this approach because it seemingly bypasses *Lebron*.[178] However, advocates find merit to argue beyond *Lebron* because despite the Authority's nontraditional labeling, the Authority executes core governmental powers—rulemaking, investigatory, and enforcement—that are binding and take preemptive effect over state law on a continuing and full-time basis.[179]

Advocates further rely on the opinion issued by the U.S. Department of Justice Office of Legal Counsel[180] that adopts the same view that the Appointments Clause applies to anyone exercising significant and continuing governmental authority, whether a public or private employee.[181] The opinion defines that the two essential elements for a position, however labeled, to classify as a federal office are that the position receives delegated sovereign authority of the federal government and is continuing and permanent.[182] The opinion further advances that additional criteria beyond these two elements, such as the method of appointment, whether the office is established by law, and whether the holder of an office receives a commission, are incidental.[183] Therefore, while *Lebron* is one method to determine the status of a government instrumentality, an officer subject to the Appointments Clause may nevertheless exist without those features.[184] Centering the analysis on the functioning of the Authority rather than its private-public classification demands that members of the Authority be subject to presidential appointment and removal powers.[185]

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175. *Black*, 107 F.4th at 439.

176. Brief for Reason Found., *supra* note 155, at *7–8.

177. *Id.* at *8–9.

178. *Black*, 107 F.4th at 439.

179. Brief for Reason Found., *supra* note 155, at *7 (citing 15 U.S.C. §§ 3054, 3057).

180. Steven G. Bradbury, *Officers of the United States Within the Meaning of the Appointments Clause*, U.S. DEP'T OF JUST. (Apr. 16, 2007), https://www.justice.gov/file/494641/dl?inline.

181. *Black*, 107 F.4th at 439 n.26; Brief for Reason Found., *supra* note 155, at *10.

182. Bradbury, *supra* note 44, at 73–74.

183. *Id.* at 115.

184. *Id.*

185. *Black*, 107 F.4th at 436.

C. The Minority Approach Better Aligns the Horseracing Integrity and Safety Act of 2020 with the Constitution

The distinct criteria to establish whether a corporation is a public entity subject to the Appointments Clause in *Lebron*, as relied upon by the Fifth Circuit, is not entirely conclusive of whether the Authority may nevertheless require presidential appointment.[186] The "private" status ebbs and flows through different analyses—where, for example, for-profit private status is relevant for a due process challenge, this same designation would be misplaced for an executive power nondelegation analysis.[187] Here, the focus is on the coercive governmental power in the hands of a private entity and the associated amount of presidential control of the actors.[188]

Executive power may be retained in the President provided that Congress, understanding certain tradeoffs among the directness of presidential oversight mechanisms, reserves him the authority to encourage the law's faithful execution—so long as he does not retain so little control as to disassociate himself from responsibility entirely.[189] By implication, this would include that the President retains the power to *select who* are to act by his direction.[190] Justice Thomas purports that the private nondelegation doctrine is "merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private," and the analytical framework turns not on the measure of control of the federal government, but rather how the Constitution says governmental power must be exercised and by whom.[191]

Once Congress vested power to an entity outside the Executive Branch, the private entity took its first steps outside the bounds of public accountability and subjected the President to the threat of divestment of power.[192] The people of the United States do not vote for the members of the Authority.[193] Nor do the people vote for the members of the FTC.[194] It is the federal agency's dependence on the President for guidance that grants the people the right to consolidate blame solely to the President, not those that are employed to carry out his functions.[195] Because of this dependence, it is

186. *See* Bradbury, *supra* note 44, at 76–78.
187. Mishra, *supra* note 11, at 1564–65.
188. *Id.*
189. *Id.* at 1523–24.
190. Myers v. United States, 272 U.S. 52, 117 (1926).
191. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 67, 88 (2015) (Thomas, J., concurring).
192. Mishra, *supra* note 11, at 1525.
193. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 434–35 (5th Cir. 2024); 15 U.S.C. § 3052(b).
194. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010) (citing U.S. CONST. art. II, § 2, cl. 2).
195. *Id.*

critical that there is an unambiguous accountability chain leading from the Authority to the President.[196]

The Authority's members should be subject to the Appointments Clause for three principal reasons: (1) the members of the Authority are best seen as officers of the United States; (2) properly identifying the type of nondelegation violation reveals the constitutional requirement for presidential appointment of the Authority's members; and (3) the private-public distinction cannot be used to evade inconvenient constitutional requirements.[197]

1. Members of the Authority Are Best Seen as Officers of the United States

HISA statutorily grants the Authority sovereign powers of the federal government to administer and execute federal law on a continuing and permanent basis, powers of which are to be employed only by officers of the United States.[198] The private-public distinction is immaterial because the compulsory power that the Authority imposes onto private actors in the horseracing industry to require exact compliance or punish noncompliance is the key distinction of the Authority's fulfilling, not supporting, executive branch powers.[199]

Principally, the Authority holds the statutory ability to develop the racetrack safety and medication control procedures and rules, access offices and racetrack facilities, issue subpoenas, initiate formal investigations, and commence civil action to enjoin past, present, or impending violations in district court.[200] A law enacted by Congress that requires this type of implementation of a legislative mandate is the "very essence of 'execution' of the law."[201] More so, the Authority's power extends far beyond any duties to be considered ministerial and mechanical in nature, undoubtedly crossing the line to be less like a *qui tam* relator and more like an Article II prosecutor.[202] The Authority can also issue severe civil sanctions such as

196. Mishra, *supra* note 11, at 1525.

197. *See* discussion *infra* Section III.C.1 (asserting that the Authority performs core governmental powers on a continuing and permanent basis); *see* discussion *infra* Section III.C.2 (explaining that the Authority is not properly situated to receive its delegated power because the President has not appointed its members); *see* discussion *infra* Section III.C.3 (advancing that separation of power principles require the President to select who assists him under his constitutionally vested power to execute federal law).

198. Buckley v. Valeo, 424 U.S. 1, 126 (1976); United States v. Germaine, 99 U.S. 508, 511–12 (1878).

199. Mishra, *supra* note 11, at 1545–46.

200. 15 U.S.C. §§ 3054(c), (h), (j), 3057(a)(1), (c).

201. Bowsher v. Synar, 478 U.S. 714, 732–33 (1986).

202. *See* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 431 (5th Cir. 2024) (citing *Buckley*, 424 U.S. at 138 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts [this] responsibility.")); *see also* Nitisha Baronia et al., *Private Enforcement at the Founding and Article II*, CALIF. L. REV. (forthcoming 2026), https://ssrn.com/abstract=4821934.

lifetime bans from horseracing and money penalties that are currently set at $50,000–$100,000 per violation.[203]

Although the FTC retains the ability to conduct a de novo review, focusing on the finality of the Authority's decisions erroneously dismisses the significance of the Authority's autonomous duties and discretion.[204] The express language of the Appointments Clause restricts Congress when defining who is to carry out the administration and enforcement of public law.[205] Such vindication of public rights in conducting civil litigation in court implicates the President's power to "take Care that the Laws be faithfully executed" and thus Appointment Clause requirements.[206]

The Authority also holds a public office because its members occupy a "continuing and permanent" position that is not "occasional or temporary."[207] HISA expressly recognizes the Authority for the "purpose[] of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program."[208] HISA also establishes that the Authority is to be governed by a board of directors and to engage in "their powers and responsibilities under [§ 3054]."[209] HISA only exists and operates under the Authority's performance of its statutory duties of enforcement.[210] Because HISA would cease if the Authority ceased, the Authority performs duties that are fundamentally embedded within the law's implementation.[211] Therefore, the Authority holds a continuing and permanent position as its duties are essential for HISA to function.[212]

An office subject to the Appointments Clause may exist without formal employment by the federal government.[213] The Supreme Court decision in *Buckley v. Valeo* would be inconsistent with per se rules that require formal employment by the government or establishment of the office by law because of its emphasis on the need for the President to select who acts under his discretion to perform core governmental powers.[214] Thus, Supreme Court precedent chisels the analysis down to depend on the nature of the position, not the formalities.[215]

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203. 15 U.S.C. § 3057(d)(3)(A); HISA Enforcement Rule 8200(b)(2), 55 Fed. Reg. 4025 (Jan. 26, 2022).

204. Lucia v. Sec. & Exch. Comm'n, 585 U.S. 237, 247 (2018) (citing Freytag v. Comm'r, 501 U.S. 868, 881–82 (1991)); 15 U.S.C. § 3058(b).

205. *Buckley*, 424 U.S. at 138–39.

206. *Id.* at 140; U.S. CONST. art. II, § 3; Mishra, *supra* note 11, at 1550.

207. United States v. Germaine, 99 U.S. 508, 511–12 (1878).

208. 15 U.S.C. § 3052(a).

209. *Id.* §§ 3052(b)(1), 3054(a).

210. *Id.* § 3054(a).

211. *Germaine*, 99 U.S. at 511–12.

212. *Id.*

213. Bradbury, *supra* note 44, at 115.

214. Mishra, *supra* note 11, at 1562–63; Buckley v. Valeo, 424 U.S. 1, 139 (1976).

215. Bradbury, *supra* note 44, at 115.

2. Identifying the Type of Nondelegation Violation Reveals the Appointments Clause as the Proper Solution

Because of the existence of the Appointments Clause under Article II, a delegate of significant regulatory power may not exercise that power until properly appointed.[216] Despite the understood principle that delegation of governmental power to private parties contravenes the structure of the Constitution, the nondelegation doctrine is considered "dead" to the courts and many scholars.[217] This seemingly paradoxical reality can exist because understanding the type of delegation allows the private nondelegation doctrine to facilitate privatization—when adhering to the right constitutional principles.[218] To help identify why particular delegations may be unconstitutional, Professor Alexander Volokh[219] created a taxonomy that dissects the nondelegation doctrine into three categories that pinpoints the necessary changes each type of delegation would need to cure its constitutional infirmity.[220]

The three categories of delegations are "*giver-based*" (Congress cannot give away its legislative power), "*recipient-based*" (those improperly situated cannot receive delegated federal authority), and "*application-based*" (allowing the delegated power would be unjust when applied).[221] As applied to the congressional delegation of federal power under HISA, the Authority fits under the "recipient-based" category because it receives significant federal executive power independent of a governmental agency and presidential appointment.[222]

Under the recipient-based doctrine, even if Congress can delegate the power, the Constitution prohibits the Authority, as the recipient, from exercising the power under Article II.[223] Outlining this nondelegation

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216. Volokh, *supra* note 14, at 217.

217. *See, e.g.*, United States v. Cooper, 750 F.3d 263, 270 (3d Cir. 2014) (recognizing that the Supreme Court has not invalidated a statute for violating the nondelegation doctrine since 1935); Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994) (discussing the death of the nondelegation doctrine); Recent Case, Alpine Securities Corp. v. Financial Industry Regulatory Authority, *No. 23-5128, 2023 WL 4703307 (D.C. Cir. July 5, 2023) (mem.) (per curiam)*, 137 HARV. L. REV. 1042 (2024) ("[T]he private nondelegation doctrine could be aptly described as dead to both academia and the courts.").

218. Volokh, *supra* note 14, at 207.

219. Alexander Volokh is an Associate Professor at Emory University School of Law and earned his B.S. from the University of California, Los Angeles and his J.D. and Ph.D. in economics from Harvard University.

220. Volokh, *supra* note 14, at 207–09.

221. *Id.* (explaining the three categories of nondelegation to be a "*giver-based*" doctrine stemming from Article I's Vesting Clause, a "*recipient-based*" doctrine derived from the Appointments Clause, and an "*application-based*" doctrine based on the Due Process Clauses).

222. *See id.* at 207, 211; *see also* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 435 (5th Cir. 2024) ("HISA's explicit division of enforcement responsibility empowers the Authority with quintessential executive functions and gives the FTC scant oversight until enforcement has already occurred.").

223. *See* Volokh, *supra* note 14, at 217.

violation reveals that HISA is unconstitutional, not for the FTC's lack of oversight of the Authority but because the Authority is not properly situated to receive that power under the Constitution.[224] This idea is grounded in the Vesting Clauses, for even a government-created and controlled entity that operates for government benefit but "not properly constituted to exercise a power under one of the Vesting Clauses" finds itself "no better qualified to be a delegatee of that power than is a purely private one."[225] Thus, any delegation of significant federal authority on a continuing and permanent basis must be brought to conformity with the Constitution through proper appointment.[226]

Requiring the appointment of actors that enforce federal law is more than "a 'frivolous' concern for 'etiquette or protocol'" because it reflects the limitation on who can perform specific kinds of governmental power.[227] Prohibiting the Authority from receiving power may be inefficient to the congressional scheme of HISA, but the Constitution is structured in such a way not to serve a single branch of government but to protect individual liberty.[228] Nor can the Authority cure the unconstitutional delegation it received by electing not to exercise its given power.[229] It is Congress's decision to delegate to an ineligible entity that is unconstitutional.[230] Congress is free to delegate power to the Authority, as much as it would an employee or contractor, so long as the recipient is appointed through the requisite Article II political accountability procedures.[231]

3. Mere Labels Cannot Evade Inconvenient Constitutional Requirements

The separation of powers doctrine impedes any congressional attempt to exempt the Authority from the Constitution's structural requirement of the Appointments Clause.[232] Although Congress structured HISA to empower the Authority alone with the full responsibility of carrying out the enforcement of its laws, it would still be a mistaken view to interpret the Authority as owning those powers, for those powers belong solely to the President under the Constitution.[233] Therefore, conceptualizing this inverse

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224. *Id.* at 211.

225. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 88 (2015) (Thomas, J., concurring).

226. Volokh, *supra* note 14, at 209.

227. Bradbury, *supra* note 44, at 74 (quoting Buckley v. Valeo, 424 U.S. 1, 125 (1976)).

228. Texas v. Rettig, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting).

229. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001).

230. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 674 (D.C. Cir. 2013), *vacated and remanded on other grounds sub nom.* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43 (2015).

231. Volokh, *supra* note 14, at 241.

232. Bradbury, *supra* note 44, at 75.

233. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 595–96 (1994) (explaining that it is a grave mistake to interpret that a President must have the power to act in the executive officer's stead, but rather executive officers only act in the President's stead).

perspective—that the President must have the ability to act in the delegate's stead—is gravely incorrect.[234] Because the President is uniquely empowered and responsible for executing the laws, the President must hold the power to appoint and delegate to those that assist in his or her duty.[235]

It would frustrate the President's ability to faithfully carry out the laws if he were responsible for officers that are fundamentally dissonant with his administrative philosophy.[236] Whether the Authority is in perfect alignment with the President's agenda is irrelevant; rather, the question to be asked is if the President has the ability to appoint and remove those who assist him in the execution of federal law.[237] Here, the President has no control over the members of the Authority.[238] Nor does the FTC have any say in the nomination or removal of the Authority's Board of Directors.[239] The Authority disciplines itself as only the Authority's Board can remove its directors by a two-thirds vote and committee members for any reason.[240]

The Authority's incorporation documents do not release the Authority from adhering to the Constitution.[241] Take a more obvious example: if the government empowered the long-established Yale School of the Environment to enact environmental regulations and adjudicate violations on private parties, this department of Yale University, to the extent it exercises those powers, would then be a government actor.[242] Even Justice Thomas observed in his concurrence in *Department of Transportation v. Association of American Railroads* that the Supreme Court has "overseen and sanctioned" the concentration of power that makes and enforces laws into the hands of those that "find[] no comfortable home" in the Constitution.[243] In this line of reasoning, the structural constitutional protections of individual liberty are now to be weighed against the desire for efficient private investigations and sanctions of veterinarians who administer illegal doping drugs to horses.[244] Making this determination inherently grows the concern that delegating power away from the people's elected leaders will then slip the power away from that of the people.[245]

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234. *Id.*

235. *Id.*

236. *Id.* at 598.

237. *Id.*

238. 15 U.S.C. §§ 41, 3052(b)(3)(D) (providing that the Authority's own bylaws shall govern the removal of members from the Board of the Authority).

239. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 434–35 (5th Cir. 2024).

240. *Id.* at 435.

241. Brief of Plaintiffs-Appellants Gulf Coast Racing, *supra* note 149, at *40–41.

242. *Id.* at *41.

243. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring).

244. *See id.*; *see also* In re Perez, 9420 F.T.C. 1, 3–6 (Mar. 18, 2024) (detailing that private Authority investigators searched a veterinarian's trailer, found two buckets of a newly banned substance that was inadvertently left two weeks after the effective date, fined him $5,000, and banned him from practice for fourteen months).

245. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010).

More so, recent private nondelegation challenges to similarly situated self-regulatory organizations reveal that attempting to subordinate the Authority by mere control mechanisms found in securities law is misplaced and an unstable justification of HISA's constitutionality.[246] Although circuit courts have upheld the SEC-FINRA relationship as constitutional, the question of the amount of federal executive power that is exercised fails to cease.[247] In a recent constitutional challenge to FINRA's enforcement power, the D.C. Circuit granted an emergency injunction to enjoin the private entity from continuing its expedited enforcement proceeding against a securities corporation.[248] The securities corporation contended that FINRA violates the Constitution because it wields executive power reserved only for the President and his officers, and the circuit court recognized a likelihood for this contention to win on the merits.[249] The concurrence pointed out that allowing Congress to vest significant executive power in a private company would create a constitutional loophole—avoiding the appointment of officers by shifting power outside the Executive Branch.[250] Focusing solely on federal agency supervision leaves the constitutional infirmity untouched: private actors still wield significant executive power that is out of the President's reach.[251] Ultimately, the President holds the responsibility of all Article II actions, and thus he, not Congress, must have the control of his subordinates' actions through appointment and removal decisions.[252]

D. Still, the Majority Approach Is Better Than Nothing

The Constitution anticipates and confers a reciprocal relationship between the Executive and Legislative Branches.[253] The structure of the Executive and its implementation of laws ultimately centers on whether the democratic accountability principle has been satisfied.[254] Currently, the members of the Authority enjoy a comfortable seat far away from any Article II control.[255] The President can only remove FTC commissioners for cause, and FTC commissioners cannot remove the Authority's directors at all.[256]

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246. Alpine Sec. Corp. v. Fin. Indus. Regul. Auth., No. 23-5129, 2023 WL 4703307, at *1 (D.C. Cir. July 5, 2023) (Walker, J., concurring).

247. Oklahoma v. United States, 62 F.4th 221, 232 (6th Cir. 2023); *Alpine Sec. Corp.*, 2023 WL 4703307, at *1.

248. *Alpine Sec. Corp.*, 2023 WL 4703307, at *1.

249. *Id.*

250. *Id.*

251. *Id.*

252. Mishra, *supra* note 11, at 1571–72.

253. *Id.* at 1525.

254. Bradbury, *supra* note 44.

255. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496–97 (2010) (holding that two layers of for-cause removal is unconstitutional).

256. 15 U.S.C. §§ 41, 3052(b)(3)(D) (providing that removal of members from the Board of the Authority shall be governed by the Authority's own bylaws).

This structure fully impairs the President's power to intervene in any event that the President disagrees with the enforcement of HISA.[257] Without the power to actively control his regulatory actors, Congress has delegated the President's ultimate responsibility for the actions of the Executive Branch.[258] Thus, HISA positions the Authority unaccountable to the President and the President unresponsible for the Authority.[259]

Because the President has not properly appointed the members of the Authority, they are only permitted to perform ministerial duties in aid to the FTC.[260] The Appointments Clause, unquestionably, only applies to officers of the United States.[261] If the Fifth Circuit's interpretation is adopted and the Supreme Court decides that the criteria is not met to deem the Authority's members as officers of the United States, the need for other control mechanisms remains necessary.[262] As the Authority stands, its power greatly exceeds the President's ability to supervise its tasks and therefore will require a diminution of power or a higher degree of oversight procedures.[263]

Whether the private nondelegation doctrine reforms the scope of the Authority's actions or the President appoints its members, the amount of enforcement power delegated to the Authority must conform to the constitutional safeguards that prevent the power to be delegated away from the President and thus that of the people.[264] Three members of the Supreme Court recognize the impending "need to clarify the private non-delegation doctrine" in future cases because questions about the federal government's limits on the delegation of regulatory authority to private entities presents serious separation of powers concerns.[265]

IV. CONCLUSION

The President holds the most democratically accountable position within the federal government.[266] Its solitary nature ensures a political watchfulness that levels the power with the people of the Nation.[267] Congress cannot delegate the President's ultimate responsibility of his constitutional entrustment with the law's faithful execution because doing so would decouple the President from the Executive Branch.[268] So, when thoroughbred

257. *Free Enter. Fund*, 561 U.S. at 496.
258. *Id.* at 496–97.
259. *Id.* at 495.
260. Buckley v. Valeo, 424 U.S. 1, 136–37 (1976).
261. Mishra, *supra* note 11, at 1561–62.
262. *Id.*
263. *Id.*
264. *Id.*
265. Texas v. Comm'r, 142 S. Ct. 1308, 1308 (2022) (mem.) (Statement of Justice Alito, joined by Justice Thomas and Justice Gorsuch, respecting the denial of certiorari).
266. Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 224 (2020).
267. *Id.*
268. Morrison v. Olson, 487 U.S. 654, 689–90 (1988).

owners and veterinarians within the horseracing industry experience a disagreeable strain with the enforcement of HISA, the delegation of regulatory power to the private entity leaves the President's hand tied and thus the wrong vessel to advocate for change.[269] HISA's statutory framework wholly diverges from the Framers' constitutional protections designed to balance power between the branches.[270] By exclusively recognizing the Authority to implement HISA upon the thoroughbred horseracing industry, Congress, not the President, decided who is enforcing the law and left the affected individuals in disarray of where to place blame.[271]

The Fifth Circuit correctly held that HISA is unconstitutional and wrongfully delegates Article II enforcement power to a private entity.[272] However, to restore political accountability back into the Executive Branch, the members of the Authority must be subject to the President's most powerful control mechanisms of his subordinates: his appointment and removal powers.[273] The Authority received an unparalleled delegation of Article II regulatory power in which it performs core governmental powers on a continuing and permanent basis.[274] Therefore, the Authority does not need to be subordinated to the FTC as held by the Fifth Circuit but rather appointed by the President.[275]

Under its current position, the Authority, by not being chosen by the President to perform executive branch functions, is not properly situated to receive its delegated power.[276] The Appointments Clause was specifically designed to prevent congressional encroachment unto the Executive Branch and keep the President accountable for those who assist him in the execution of federal law—a safeguard that cannot be avoided through statutory delegation to a private entity.[277] Yet if the Supreme Court determines that the Authority is not subjected to presidential appointment, the high degree of power the Authority performs still commands greater control mechanisms to be set in place to retain the sole responsibility of HISA's enforcement with the President.[278] Otherwise, those who have "no comfortable home" in the Constitution only continue to deepen their hooves into the infringement upon personal liberty.[279]

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269. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 429 (5th Cir. 2024).
270. *Id.* at 431.
271. *Id.*
272. *Id.* at 435.
273. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring).
274. Buckley v. Valeo, 424 U.S. 1, 138–39 (1976); United States v. Germaine, 99 U.S. 508, 511–12 (1878).
275. *Buckley*, 424 U.S. at 138–39.
276. Volokh, *supra* note 14.
277. Edmond v. United States, 520 U.S. 651, 659, 663 (1997).
278. Mishra, *supra* note 11, at 1561–62.
279. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring).