Off to the Races: The Horseracing Integrity and Safety Act Is Set to Run at SCOTUS Again

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Last month, the U.S. Court of Appeals for the Fifth Circuit weighed in again on an ongoing circuit split, striking down the enforcement provision of the Horseracing Integrity and Safety Act (HISA) as facially unconstitutional. The Fifth Circuit held HISA violated the Constitution by delegating executive power to a private entity, the Horseracing Integrity and Safety Authority (the "Authority"), without adequate federal oversight. The decision, *National Horsemen's Benevolent & Protective Association v. Black*, 178 F.4th 224 (5th Cir. 2026), is the Fifth Circuit's third opinion in this litigation, issued after the U.S. Supreme Court vacated the court's prior decision and remanded for reconsideration in light of its 2025 ruling in *FCC v. Consumers' Research*.

A quick roadmap for the uninitiated: The Fifth Circuit first held HISA unconstitutional in November 2022; Congress amended HISA in response; the Supreme Court then sent the case (and its companions) back to the circuits in June 2025; and the dispute now appears headed back to the Supreme Court. In other words, HISA is being loaded into the starting gate for another run at the high court.

While HISA has many moving parts, the central question is one the Supreme Court has struggled with for decades: when, if ever, may the federal government delegate its authority to a private entity?

The Starting Gate: How HISA Came to Be

HISA was passed with bipartisan support in 2020 in response to several high-profile controversies and years of calls for standardized regulation of horseracing. HISA's aims are to promote "the welfare of covered horses, the integrity of the sport, and the confidence of the betting public." To accomplish that, HISA created an independent, non-profit corporation — the Authority, based in Lexington, Kentucky — and charged it with writing and enforcing uniform rules for thoroughbred racing.

Before HISA, thoroughbred racing was regulated by individual states and their appointed commissions. In Kentucky, for example, the Kentucky Horse Racing Commission oversaw the most exciting two minutes in sports, along with every other race run in Kentucky. HISA replaced that patchwork of state regulation with a single national framework for thoroughbred races.

The Authority runs two programs. The Racetrack Safety Program, which took effect July 1, 2022, sets operational safety rules and national accreditation standards aimed at reducing injuries to horses and riders. The Anti-Doping and Medication Control (ADMC) Program, which took effect May 22, 2023, is administered through the U.S. Anti-Doping Agency, which created the Horseracing Integrity and Welfare Unit (HIWU) to run it. Arguably, the ADMC Program is the more controversial of the two programs. However, the Racetrack Safety Program, which collects fees to fund the Authority, is not without its own legal challenges.

HIWU acts as the Authority's enforcement arm, handling day-to-day enforcement. HIWU plans and conducts testing, collects blood and urine samples, and runs both in-competition and out-of-competition, no-advance-notice testing on covered horses. When a horse tests positive or another violation is suspected, HIWU handles the "independent investigations, charging and adjudication" of the case and imposes any civil sanction, such as a suspension or fine. These infractions are treated as strict liability, meaning a trainer can be held responsible for what shows up in a sample even if the substance is not a classic performance-enhancing "doping" drug, or even if there is no evidence the trainer was aware of the covered horse's exposure.

When charged with a violation, a covered person has two options: accept the charge or contest it at arbitration. The arbitrator is appointed by mutual agreement between the Authority and HIWU. Decisions reached in arbitration "shall be the final decision or civil sanction of the Authority." But critics argue the arbitration process does not meaningfully allow charged parties to conduct discovery, leaving them to contest a strict-liability charge with little ability to collect evidence in their defense. After arbitration, a horseman may seek de novo review before an administrative law judge, then discretionary review by the FTC. If a covered person is still unsatisfied, they may finally appeal to a federal court. Contesting a HIWU violation is a long and costly process during which suspensions and fines remain in effect, preventing a covered person from plying their trade and suffering potential lifelong reputational damage.

The Field: Who HISA Affects and Why It Matters

Thoroughbred racing is a significant economic engine, particularly in Kentucky, and it includes some of America's most beloved races, tracks, and horses. HISA's reach is national: it now applies across dozens of states, from the Northeast down the Eastern Seaboard to Florida, through the Midwest, and west into California, New Mexico, and Washington.

Its footprint is not uniform, however. Because of litigation, HISA is not currently being enforced everywhere, including in Louisiana and West Virginia. For the thoroughbred industry, the stakes are practical. Owners, trainers, jockeys, and tracks face both compliance obligations and enforcement exposure. Notably, much of the industry's frustration is less that HISA exists than that it is perceived to be unevenly or unfairly enforced, or that it violates core constitutional provisions as it stands.

Call to the Post: HISA's Legal Challenges, Broken Into Distinct 'Races'

The legal challenges to HISA could be divided into several races of their own, with new plaintiffs loaded into the gate as they test its legal limits — from constitutional attacks on the Authority's power to make and enforce doping rules, to disputes over how the fees that fund the Authority are collected. Here is HISA's legal challenge card.

Race 1: Private Nondelegation – Rulemaking

The first "race" concerned the Authority's rulemaking power. Congress may not hand off its legislative power to a private entity without specific safeguards, such as agency oversight, to ensure actions remain beholden to the public. The private nondelegation doctrine has roots dating back to the early 19th century. In November 2022, the Fifth Circuit held in its first decision that the Authority's rulemaking was not sufficiently subordinate to the Federal Trade Commission (FTC), and struck HISA down on that basis. Congress responded quickly, amending Section 3053(e) of HISA (through the Consolidated Appropriations Act, 2023) to give the FTC power to "abrogate, add to, and modify" the Authority's rules. The amendment was modeled after the Maloney Act, which established the relationship between the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA). Under the amendment's structure, all three circuits to consider the question — the Fifth, Sixth, and Eighth — have agreed that the Act's rulemaking structure is constitutional. That race, for now, appears run.

Race 2: Private Nondelegation – Enforcement

The feature race is the enforcement challenge, and it is where the circuit split currently stands. The question is whether the Authority's enforcement powers — investigating, issuing subpoenas, conducting searches, levying fines, and seeking injunctions — are adequately subordinate to the FTC, or whether they are wielded, in the Fifth Circuit's words, "all without the FTC's say-so."

The Sixth Circuit says the structure passes muster. In *Oklahoma v. United States* — a challenge led by the states of Oklahoma, West Virginia, and Louisiana — it reasoned that the FTC's broad rulemaking power lets the agency rein in and supervise the Authority's enforcement activity, and it reaffirmed that view on December 17, 2025, after the Supreme Court's remand. The Eighth Circuit reached the same result in 2024 in *Walmsley v. Federal Trade Commission* (a challenge brought by Arkansas and Iowa HBPA figures), though that decision came before the remand, and the Eighth Circuit has not yet issued a revised opinion.

The Fifth Circuit disagrees. In its June 11, 2026, decision, it held that the FTC's after-the-fact ability to review a sanction is not genuine oversight of the Authority's front-end enforcement powers — by the time the FTC can act, as the court put it, the horse is already out of the barn. The court also distinguished the SEC-FINRA analogy the Authority relied on, noting that the SEC has tools over FINRA that the FTC simply lacks over the Authority: the power to enforce the rules itself, to deregister the entity, and to remove its directors. On that reasoning, the Fifth Circuit declared HISA's enforcement provisions facially unconstitutional — parting ways with its sister circuits.

A word on *Consumers' Research*, the decision that prompted the remand: There, the Supreme Court upheld a scheme in which a private administrator helped the FCC run the Universal Service Fund, because the administrator remained advisory and subordinate — the FCC, not the private entity, was in control. The Fifth Circuit concluded that *Consumers' Research* did not change its analysis: unlike the FCC's administrator, the Authority is not subordinate to the FTC in the enforcement context.

After the ruling, the Authority's CEO signaled that it expected the decision and will continue to fight, petitioning the Supreme Court for review. Meanwhile, the losing states in the Sixth Circuit's *Oklahoma* case have already filed a cert petition of their own. This race is set for another run at the highest court. For now, though, the Fifth Circuit has stayed its own mandate, and HISA remains in effect throughout its jurisdiction (excluding Louisiana, which has separately barred HISA).

Race 3: The States – Anti-Commandeering

The next horses in the gate are the racetracks and the states themselves, advancing a Tenth Amendment anti-commandeering theory: that the federal government is impermissibly coercing states and commandeering their resources to achieve federal ends. So far, this argument has largely been scratched; courts have rejected or sidestepped it, in part on standing grounds and in part because states retain a choice about whether to collect and remit fees.

Race 4: Fees

The next set of legal challenges arise from fees collected to fund the Authority. Similar but distinct from the anti-commandeering challenge, these challenges focus on how fees are collected and allocated. Over significant industry objection, the Authority initially adopted a purse-weighted assessment. Churchill Downs, Inc. challenged that approach in the Western District of Kentucky and won: in an unpublished April 2026 opinion, the district court held that the purse-weighted formula was subject to the Administrative Procedure Act (APA) and was "arbitrary and capricious." (By way of scale, a federal agency had sent Churchill Downs a roughly $2 million bill for fees, prompting the suit.) The Authority has since moved to a per-start methodology, acknowledging, in effect, that the original approach did not hold up, but challenges arose during the years the purse-weighted system was in effect. Tellingly, in this opinion the district court's analysis questioned the Sixth Circuit's reasoning in *Oklahoma*, while ultimately recognizing its precedential weight. Still, it signals a legal community divided over the constitutionality of HISA.

The Last Race: As-Applied Challenges

Finally, a wave of as-applied challenges is emerging from individual doping and medication cases. Horsemen forced to arbitrate their violations through HIWU have raised Fifth and Seventh Amendment concerns — questioning what role due process, the right to a jury trial, and protections against unreasonable search and seizure play in this arbitration setting. Complicating matters, sanctions are not automatically stayed while an appeal proceeds. By participating in a covered race, each horseman agrees to follow the Authority's and HIWU's system — but a central open question is whether that waiver is truly knowing and voluntary. Courts have allowed several of these challenges to proceed, but the waiver question remains unresolved. The Sixth Circuit's opinion left the door open for these challenges as well.

Photo Finish: What Comes Next

With cert petitions taking shape from both the Fifth and Sixth Circuit cases, and the Eighth Circuit yet to issue its post-remand decision, HISA appears inevitably set for another lap around the judiciary and a return trip to the Supreme Court. For owners, trainers, jockeys, tracks, and racing commissions, the outcome will shape not only how the sport is policed, but also who pays for it and how disputes are resolved. This means the "track" may remain sloppy for a while longer as HISA continues to be ironed out.

If you have questions about HISA, its ongoing legal challenges, or how these issues may impact your business or participation in the thoroughbred racing industry, please contact the authors or any attorney with FBT Gibbons' Equine Law team.

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