

## Introducing the Horseracing Integrity and Safety Act and a New Era of Racing Regulation

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The traditionally sedentary world of horse racing regulation was changed in momentous ways at the end of 2020. Congress passed, and the president signed, the Horseracing Integrity and Safety Act (HISA) as part of the huge omnibus Consolidated Appropriations Act, 2021.<sup>1</sup> The HISA is Title XII of Division FF of that legislation.<sup>2</sup> The program effective date of the legislation is July 1, 2022.<sup>3</sup>

Senate Majority Leader Mitch McConnell helped shepherd the bill through the 2020 Congress. Senator McConnell in previous years had indicated his opposition to a variety of versions of horseracing integrity bills, citing the position of Churchill Downs, the largest track and a major employer in McConnell's home state of Kentucky.<sup>4</sup> In the summer of 2020, after Churchill Downs had agreed to support the legislation,<sup>5</sup> he reversed course and introduced his own "Horseracing Integrity and Safety Act to recognize a uniform national standard for thoroughbred racing",<sup>6</sup> because "in recent years, tragedies on the track, medication scandals, and an



horse racing is a major sport in the western United States<sup>28</sup>

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rulemaking to a non-government actor, there are bigger questions over the uncertainties of which of these non-governmental organizational rules will apply when there are conflicts between and among the rules. How does the non-governmental Authority pick and choose which rules to apply from the conflicting rules of various non-governmental actors? How can racing participants know which rules apply?

What becomes of the rules of the racing commission that appear to govern drug testing – not merely the substantive ones, but the procedural ones governing drug testing protocols? For example, a number of states mandate the drug testing of certain horses, including the winners of races. Does USADA’s jurisdiction nullify these non-substantive drug rules? Can we even tell whether these state rules on the time, place or manner of drug testing will apply to USADA’s drug testing procedures?

There will be anti-commandeering allegations akin to the violation of the anti-commandeering principle of 10<sup>th</sup> Amendment found in the Supreme Court decision invalidating the Professional and Amateur Sports Protection Act.<sup>58</sup> If the state racing commission elects to have another breed subject to HISA, it is commanded to provide a funding mechanism to cover the Authority’s costs.<sup>59</sup> If a state racing commission is to help enforce a component of an Authority program, it “may not implement such a component in a manner less restrictive than the rule, standard, or requirement established by the Authority.”<sup>60</sup> There are direct commands issued by the federal government to the states.

Additionally, there is the traditional constitutional argument th





stimulate or sedate horses. Trainers frequently have enemies, and those enemies might wish to





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<sup>51</sup> HISA §1206(g).

<sup>52</sup> *Id.*

<sup>53</sup> HISA §1204.

<sup>54</sup> HISA §1208.

<sup>55</sup> HISA §1209.

<sup>56</sup> HISA § 1211.

<sup>57</sup> *See generally* Emily S. Bremer, “Bureaucracy Unbound: Can Limited Government and the Administrative State Co-Exist?: Article: Incorporation By Reference In An Open-Government Age,” 36 HARV. J.L. & PUB. POL’Y 131

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<sup>78</sup> Federal Trade Commission Annual Performance Report for Fiscal Year 2020, *available at* <https://www.ftc.gov/system/files/documents/reports/annual-performance-report-fiscal-year-2020/p859900fy2020performanceplan.pdf>. [last viewed January 20, 2021].

<sup>79</sup> “Judges’ Lawsuit: Disability System ‘in Crisis,’” CHICAGO DAILY HERALD