IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY LEXINGTON DIVISION

STATE OF OKLAHOMA, et al., *Plaintiffs*, v. THE UNITED STATES OF AMERICA, et al., *Defendants*.	:	Case No. 5:21-cv-104-JMH District Judge Joseph M. Hood

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MOTION BY THE STATES OF OHIO, ALASKA, ARKANSAS, IDAHO, MISSISSIPPI, AND NEBRASKA FOR LEAVE TO FILE AMICUS BRIEF

The States of Ohio, Alaska, Arkansas, Idaho, Mississippi, and Nebraska respectfully move for leave to file an *amicus* brief in this matter. This case presents the question whether Congress unlawfully delegated governmental authority when it enacted the Horseracing Integrity and Safety Act of 2020, Pub. L. No. 116-260, §§1201–1212 (2020). The answer is "yes." Because the *amici* States have a significant interest in ensuring that Congress does not subject the States or their residents to unconstitutional laws and regulations, they have a substantial interest in this matter. Accordingly, the *amici* States move for leave to file an *amicus* brief supporting the plaintiffs.

Respectfully submitted,

TREG R. TAYLOR
Alaska Attorney General

LESLIE RUTLEDGE
Arkansas Attorney General

LAWRENCE G. WASDEN
Idaho Attorney General

LYNN FITCH
Mississippi Attorney General

DOUGLAS J. PETERSON
Nebraska Attorney General

DAVE YOST
Ohio Attorney General

/s/Amy Ruth Ita
AMY RUTH ITA
Section Chief – Employment Law
BENJAMIN M. FLOWERS
Solicitor General
MAY MAILMAN
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, OH 43215
(614) 466-8980
Amy.Ita@OhioAGO.gov

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021 a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

/s/Amy Ruth Ita
AMY RUTH IDA

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY LEXINGTON DIVISION

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BRIEF OF *AMICI CURIAE* OHIO, ALASKA, ARKANSAS, IDAHO, MISSISSIPPI, AND NEBRASKA IN SUPPORT OF THE PLAINTIFFS

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INTRODUCTION AND STATEMENT OF *AMICI* INTERESTS

The Constitution vests the legislative power in Congress and the executive power in the President. *See* Art. I, §1; Art. II, §1. It does not vest *any* governmental power in private entities. Therefore, when Congress empowers private entities to wield governmental power, it acts unconstitutionally. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). In light of those principles, the Horseracing Integrity and Safety Act of 2020 is unconstitutional. The Act establishes a private entity; it gives that entity Congress's legislative power to make rules that will bind the horseracing industry; it gives the same entity the power to enforce those rules; and it permits the private entity to do much of this free from government oversight. Because the Constitution's division of federal authority protects the States and their citizens, *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021), and because a ruling upholding the Act's unconstitutional delegations would seriously undermine that division of authority, the *amici* States urge this Court to hold the Act unconstitutional.

ARGUMENT

I. The Horse Act.

The Horseracing Integrity and Safety Act of 2020—call it the "Horse Act"—creates a nationwide regulatory regime for horseracing. Pub. L. No. 116-260, §§1201–1212 (2020). This section describes that system and lays bare its unconstitutionality.

The Regulating Entities. The Horse Act vests authority in three distinct entities. *First*, the Federal Trade Commission—a preexisting federal agency within the executive branch. Horse Act §1202(3). *Second*, the Horseracing Integrity and Safety Authority, which this brief calls the "Private Corporation." The Private Corporation is a "private, independent, self-regulatory, nonprofit corporation." *Id.*, §1203(a). It is governed by a board of directors, none of whom are

appointed by the President and confirmed by the Senate. It houses a few standing committees, too. *Id.*, §1203(b)–(e). *Finally*, the Horse Act vests authority in a third entity that this brief will call the "Private Consultant." The identity of the Private Consultant is not fixed. It can be the United States Anti-Doping Agency, an independent non-profit organization. *Id.*, §1205(e)(1)(A); *see* U.S. Anti-Doping Agency, *Independence & History*, https://perma.cc/UJX8-U5GC. Or it can be another "entity that is nationally recognized as being a medication regulation agency equal in qualification to the United States Anti-Doping Agency." Horse Act §1205(e)(1)(B).

The Regulated Parties. The Horse Act regulates just about anyone "engaged in the care, training, or racing" of horses. Horse Act §1202(6). While the Act focuses on thoroughbreds, *id.*, §1202(4), its reach can be expanded to regulate other breeds. Specifically, if a "State racing commission or a breed governing organization" asks the Private Corporation to regulate another breed of horses, and if the Private Corporation agrees, then persons "engaged in the care, training, or racing" of that breed become subject to the Horse Act. *Id.*, §1202(6); §1205(l)(1). The Horse Act gives the Private Corporation complete, unbounded discretion to approve or deny a request to regulate additional breeds.

The Regulatory Power. The Horse Act vests in the Private Corporation the "independent and exclusive national authority" to regulate "all … matters" relating to "horseracing safety, performance, and antidoping and medication control." Horse Act §1205(a)(2)(B). This includes the power to write the rules, *id.*, §1206; §1207, and to establish the "civil penalties" for any violation of those rules, *id.*, §1205(i). Moreover, the Private Corporation is equipped with the federal government's preemption power; whatever rules the Private Corporation adopts "shall preempt any provision of State law" that governs the same subject matter. *Id.*, §1205(b).

The Horse Act endows the Private Corporation with these regulatory powers so that it can operate two federal programs, one related to anti-doping and another related to racetrack safety. *Id.*, §1206; §1207. The anti-doping program is a joint venture of sorts. The Private Consultant and one of the Private Corporation's standing committees must work together to "recommend anti-doping and medication control rules." *Id.*, §1206(c)(4)(A). They also must develop a list of "permitted and prohibited medications, methods, and substances." *Id.*, §1206(c)(5). While the Horse Act establishes the baseline anti-doping rules, *id.*, §1206(g)(2), a standing committee within the Private Corporation, together with the Private Consultant, "may develop … proposed modifications to the baseline" rules, *id.*, §1206(g)(3)(A). They can even modify the rules to make them "less stringent" than the baseline. *Id.*, §1206(g)(3)(C). All rules and modifications must be approved by the Private Corporation. *See id.*, §1206(c)(4)(A); §1206(c)(5); §1206(g)(3)(B). In approving such rules, the Private Corporation must describe the elements needed to prove a violation. *See id.*, §1208(a).

The racetrack safety program is more one-sided. The Horse Act tasks only the Private Corporation and one of its standing committees with drafting the standards. *See id.*, §1207(c). As with the anti-doping program, the Private Corporation must describe the elements that make up a violation of the governing standards. *See id.*, §1208(a).

Federal Oversight of the Regulatory Power. The Horse Act does not give the Federal Trade Commission any power to *write* the rules governing horseracing, or to *modify* the rules that the Private Corporation adopts. Instead, the Commission is tasked with publishing the Private Corporation's rules in the Federal Register. Horse Act §1204(b)(1). Once the notice-and-comment period concludes, the Commission "shall approve" every rule that is "consistent with"

the Horse Act and the "applicable rules approved by the Commission." *Id.*, §1204(c)(2). If the Commission determines that a particular rule does not satisfy this standard of consistency, then it can disapprove the rule. It also "shall make recommendations" on how best to modify the rule. *Id.*, §1204(c). The Private Corporation can then go back to the drawing board, draft a new rule in light of the recommendations, adopt that new rule, and "resubmit for approval by the Commission." *Id.*, §1204(c)(3)(B).

Sometimes, there is no federal oversight at all. Here are two examples. *First*, the Horse Act empowers the Private Corporation to "issue guidance." *Id.*, §1205(g)(1). The Private Corporation can set forth its "interpretation of an existing rule," and it can clarify its "policy or practice with respect to the administration or enforcement of such an existing rule." *Id.*, §1205(g)(1)(A). When the Private Corporation acts pursuant to this authority, the Commission has *no power* to disapprove the guidance; it "shall take effect on the date on which the guidance is submitted to the Commission." *Id.*, §1205(g)(3). *Second*, when it comes to expanding the Horse Act to cover any breed other than thoroughbreds, the Private Corporation enjoys absolute discretion, free from any federal oversight. *Id.*, §1205(l)(1).

The Commission is not always required to publish the Private Corporation's rules in the Federal Register. Instead, the "Commission may adopt an interim final rule, to take effect immediately, … if the Commission finds that such a rule is necessary to protect (1) the health and safety of covered horses; or (2) the integrity of covered horses and wagering on those horseraces." *Id.*, §1204(e). This provision *does not* give the Commission power to write the rules; it creates only an exception to the notice-and-comment requirement.

II. The Horse Act unconstitutionally delegates governmental power to a private actor.

The Horse Act gives the Private Corporation the power to act as the federal government. The Private Corporation writes the rules governing horseracing, enforces those rules, and issues interpretive guidance at will. While a federal agency will oversee the Private Corporation in some instances, that oversight is more symbolic than substantive. Because the Constitution forbids allowing private entities to exercise governmental power, the Horse Act is unconstitutional.

A. The Constitution bars the delegation of governmental power to private entities.

1. The Constitution vests certain powers in distinct branches of government. "All legislative Powers … shall be vested in a Congress of the United States." Art. I, §1. "The executive Power shall be vested in a President of the United States." Art. II, §1. "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, §1. The Framers separated these powers for good reason. "The accumulation of all powers legislative, executive and judiciary in the same hands … may justly be pronounced the very definition of tyranny." The Federalist No. 47, p.324 (J. Madison) (Cooke ed. 1961). Where any two powers are united in a single person or governing body, "there can be no liberty." *Id.*, p.325 (quotation omitted).

The branches hold these powers exclusively. The Constitution "permits no delegation" of governmental power. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). No branch can authorize another branch, or itself, "to exercise power in a manner inconsistent with the Constitution." *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring in the judgment). This rule is known as the nondelegation doctrine. And it forbids the delegation of *any* governmental authority, be it legislative, executive, or judicial in nature. *Whitman*, 531 U.S. at 472 (legislative); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 496–97 (2010) (executive); *Stern v.*

Marshall, 564 U.S. 462, 482–83 (2011) (judicial).

Disputes over delegations arise most often when Congress tries to give away its power to legislate. *See, e.g.*, *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947, 950 (7th Cir. 2012). To legislate is to "prescribe the rules by which the duties and rights of every citizen are to be regulated." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 222 (1995) (alteration adopted; quotation omitted). The legislative power is, quite literally, the power to restrict liberty *en masse*. That is why the Framers considered Congress the most dangerous branch. *See* The Federalist No. 47, p.324 (J. Madison). It is also why lawmaking is difficult by design. For a bill to become law, it "must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting). These hurdles deter excessive legislation, promote deliberation, protect minority rights, and ensure accountability. When the power to make the law is given to an entity other than Congress—one that need not comply with Article I's detailed processes—these protections fall to the wayside.

Take accountability, for example. The whole point of vesting the legislative power in elected representatives is to allow the People to hold responsible those who seek to constrain their liberty. "Accountability for lawmakers constitutes the sine qua non of a representative democracy." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 374 (2002) (alteration accepted; quotation omitted)). Indeed, accountability was so important to the Framers that they drafted the House Journal Clause, *see* Art. I, §5, cl.3, the object of which "is to ensure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their re-

spective constituents," 2 J. Story, Commentaries on the Constitution of the United States §838 (1933). When Congress empowers some other entity to make law, the accountability shifts and members of Congress can easily "avoid or at least disguise their responsibility for the consequences of the decisions" made by others, usually unelected officials in the executive branch. Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1478 (2015) (quotation omitted). In that scenario, "citizens cannot readily identify the source of legislation or regulation that affects their lives." *Ass'n of Am. R.R.*, 575 U.S. at 57 (Alito, J., concurring). And if no one knows who is to blame, then the blameworthy will never be held to account and the People's liberty will wither.

All this gives rise to a bright-line rule: the powers vested by the Constitution in a distinct branch of government cannot be delegated.

2. Although the Constitution "permits no delegation" of power, *Whitman*, 531 U.S. at 472, the Supreme Court has created what amounts to an exception that allows Congress to delegate *its own* power. According to the Court, "our increasingly complex society" prevents Congress from doing its job in the manner prescribed by the Constitution. *Gundy*, 139 S. Ct. at 2123 (quotation omitted). In other words, Congress needs "an ability to delegate power under broad general directives." *Id.* (quotation omitted). So the Court cuts Congress some slack. Congress, if it empowers another government actor to regulate, will not be deemed to have delegated its power as long as it sets forth "an intelligible principle to which the person or body authorized to [promulgate regulations] is directed to conform." *Id.* (quotation omitted).

The Court first invoked this "intelligible principle" test in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). While the *words* of the test have generally remained the

same over the years, its *application* has become more and more deferential. *See Ass'n of Am. R.R.*, 575 U.S. at 77–86 (Thomas, J., concurring in the judgment). As a result, it is doubtful whether the test, at least in its current form, is long for this world. *See Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring in the judgment). It remains good law for now, however, meaning this Court is bound by it.

3. As the foregoing makes clear, the issue in most nondelegation cases is the proper division of power among the *branches of government*. And if *Gundy* tells us anything, it is that the Court is divided on that issue. This division disappears, however, when the question involves the division of power between the government and *private entities*. All agree that the Constitution vests no power in private entities. So, if a private entity were to exercise *any* governmental power, that would be just as unconstitutional as an Article III judge exercising the executive power, or the President exercising the legislative power. *Cf. Buckley v. Valeo*, 424 U.S. 1, 123 (1976) (*per curiam*). Logically, then, no branch of government can delegate its power to a private entity. This rule is known as the private-nondelegation doctrine.

The lodestar in this area is *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). That case considered a law in which Congress purported to empower private entities to regulate the poultry industry. *See id.* at 521–23. The Court struck down the law, emphatically rejecting the proposition that "Congress could delegate its legislative authority to trade or industrial associations." *Id.* at 537. "Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id.* The Court invalidated a similar law one year later, in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The law there gave certain private coal miners and producers the power to set wage-and-hour re-

quirements. *See id.* at 310–11. The Court held the law unconstitutional. It reasoned that giving a private entity the government's regulatory power "is legislative delegation in its most obnoxious form." *Id.* at 311. Nearly eighty years later, the Court stayed the course, confirming that *Carter* "prohibits any such delegation of [regulatory] authority." *Ass'n of Am. R.R.*, 575 U.S. at 51 (citation omitted). "When it comes to [delegating regulatory authority] to private entities … there is not even a fig leaf of constitutional justification." *Id.* at 62 (Alito, J., concurring).

In sum, the Constitution flatly forbids vesting governmental power in private entities. That does not mean, however, that the federal government and private entities may not interact. To the contrary, the government can, and often does, rely on private entities for certain things. *See, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 386–91 (1995). For example, Congress can recruit a private entity "to operate as an aid" to a federal agency. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). Such cooperation does not violate the private-nondelegation doctrine, provided Congress makes the federal agency the commanding regulator. The agency must be the one "making the regulation and … prescribing the conditions of its application." *Currin v. Wallace*, 306 U.S. 1, 16 (1939). A private entity can propose rules, of course, but the federal agency must not be constrained by such proposals. At the very least, Congress must make sure that the private entity's proposals are subject not only to approval and disapproval, but also to modification by the agency. *See Sunshine Anthracite*, 310 U.S. at 388. Only then can the private entity be said to "function subordinately" to the federal agency. *Id.* at 399. Thus, "Congress may employ private entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others." *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004).

B. The Horse Act delegates governmental power to a private entity.

The Horse Act unconstitutionally delegates legislative power. That follows from three insights. *First*, the Private Corporation is a private entity. *Second*, the Private Corporation wields governmental power. *Third*, the Private Corporation wields the power as a principal actor—it does not perform mere ministerial or advisory tasks for the federal government.

1. The first question is whether the Private Corporation is a private entity. It is, as the defendants concede. *See* U.S. Br.2. Congress classified the Private Corporation as a private entity. Horse Act §1203(a). The Corporation's features prove the label's accuracy: the federal government owns no stock in the Corporation; Congress did not reserve a single seat for a federal officer on the Corporation's board of directors; the President cannot appoint or remove directors; and Congress is not required to fund the Corporation. *See Ass'n of Am. R.R.*, 575 U.S. at 51–53.

2. The next question is whether the Private Corporation wields governmental power. It does. The Horse Act orders the Private Corporation to develop and implement the anti-doping and racetrack safety programs. *See* Horse Act §1203(a). The Private Corporation must also write and implement the rules governing these programs, sometimes on its own and sometimes with the Private Consultant's help. *See id.*, §1206; §1207. These rules, whatever they may be, pack a preemptive punch. Any "State law or regulation with respect to matters within the jurisdiction" of the Private Corporation "shall" give way. *Id.*, §1205(b). Given that the Corporation can write "the rules by which the duties and rights" of those engaged in horseracing "are to be regulated," *Plaut*, 514 U.S. at 222 (1995) (quotation omitted), it has regulatory—indeed, legislative—power.

The Private Corporation also possesses enforcement power. The Horse Act makes clear that the Private Corporation has the power to enforce the rules that it writes. *See, e.g.*, Horse Act

§1205(a)(1); §1205(e); §1205(j). The Private Corporation's "enforcement power" is "exemplified by its discretionary power to seek judicial relief." *Buckley*, 424 U.S. at 138. It "may commence a civil action" in federal court "to enjoin" unlawful conduct, "enforce any civil sanctions imposed," and seek "all other relief to which [it] may be entitled." Horse Act §1205(j)(1). The power to enforce the Horse Act thus rests with the Private Corporation.

The Horse Act gives the Private Corporation yet another power: the power to interpret the rules adopted under the Horse Act. The Private Corporation "may issue guidance that sets forth an interpretation of an existing rule." Horse Act §1205(g)(1)(A)(i). This is akin to the authority that administrative agencies possess under the doctrine of *Auer* deference. Like the "intelligible principle" test, the issue of *Auer* deference divides the Court. *See Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). As Justice Scalia noted: "For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean." *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part, dissenting in part). Here, Congress seems to have given the Private Corporation that same power—a quintessentially governmental power.

3. The last question relates to control: Which entity is really calling the shots, the Private Corporation or Federal Trade Commission? The answer is the Private Corporation.

The Private Corporation's role in this regulatory regime is extensive. It must design the regulatory programs; it must write the rules governing those programs; it must implement those rules; it must enforce those rules; and it must provide interpretive guidance to the industry. The Commission's role, on the other hand, is minimal. Its first involvement in the regulatory process occurs *after* the Private Corporation has already written the rules. The Commission is tasked with publishing those rules in the Federal Register. *See* Horse Act §1204(b)(1). Afterwards, the

Commission gets to "approve or disapprove" the Private Corporation's rules. *Id.*, §1204(b)(2). But that approval power is not what it seems. In fact, the Commission has *no discretion* to disapprove a rule drafted by the Private Corporation when that rule is "consistent with" the Horse Act and the rules that the Commission has already approved; in such a case, the Commission "shall approve" the rule. *Id.*, §1204(c)(2). Only when the standard of consistency is not satisfied may the Commission disapprove a rule. And only then may the Commission "make recommendations" to the Private Corporation as to a rule's substance. *Id.*, §1204(c)(3)(A).

When it comes to interpretive guidance, the Commission has no say at all. Any guidance issued by the Private Corporation takes effect the moment it is sent to the Federal Trade Commission. *Id.*, §1205(g). The Commission also has no role in deciding whether to regulate more breeds of horses—the Private Corporation does that by itself. *Id.*, §1205(l)(1). As for enforcement, the Commission can review civil sanctions that are imposed by the Private Corporation. *Id.*, §1209(b)–(c). But the Commission has no ability to review or stop the Private Corporation's decision to "commence a civil action" in federal court. *See id.*, §1205(j)(1).

The Horse Act creates an imbalance of power, and it gives the lion's share to the Private Corporation. This delegation of power undermines the Constitution. Remember the importance of accountability. Under the Horse Act, the People have *no power* to hold the Private Corporation to account. The People have no say, even indirectly, in who runs the Corporation: they cannot elect anyone to the Private Corporation's board of directors, and the People's elected representatives similarly have no authority to confirm, remove, or even manage those who sit on the board. It is thus the will of the Private Corporation that binds the People. The Constitution tolerates no such thing. In America, the People are sovereign, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779,

821 (1995), not Congress, not the President, and certainly not some private entity.

The Horse Act is also contrary to binding precedent. When Congress directs a private entity to assist a federal agency, Congress must make the federal agency the commanding regulator. Congress failed to do that here. The Commission is not the one "making the regulation and … prescribing the conditions of its application." *Currin*, 306 U.S. at 16. In terms of policymaking, then, the Private Corporation does not "function subordinately" to the Commission. *Sunshine Anthracite*, 310 U.S. at 399. The Private Corporation is chief policymaker, and that role far exceeds any ministerial or advisory duties. *See Pittston Co.*, 368 F.3d at 395.

C. The defendants' arguments to the contrary fail.

The defendants agree that the Private Corporation is a private entity. *See* U.S. Br.2. They also agree that the Private Corporation is tasked with developing and implementing the anti-doping and racetrack safety programs, and that this task includes *writing* the rules governing these programs. *See id.* at 16. But this, the defendants say, "does not raise legislative delegation concerns at all." *Id.* at 15. Their reasoning: the Commission gets to approve or disapprove the rules that the Private Corporation writes. *Id.* at 15–19; *see also* Private Corp.'s Br.18–24.

This argument fails. For one thing, it rests on a misrepresentation of the Horse Act. Remember, the statute *compels* the Commission to approve *every rule* written by the Private Corporation so long as each rule "is consistent with" the Horse Act and the "applicable rules approved by the Commission." Horse Act §1204(c)(2). When this standard of consistency is met, the Commission has *no discretion*; it "shall approve" the rule. *Id.* The word "shall," in this context at least, is mandatory rather than permissive. That is especially clear from the Horse Act's use of "may" in other provisions. *See, e.g.*, *id.*, §1204(c)(3)(B); §1204(e); *accord Lopez v. Davis*, 531 U.S.

230, 241 (2001). So it is simply not true that Congress gave the Commission "broad discretion to determine which rules to enact." U.S. Br.16. The opposite is true.

The defendants' argument also rests on a misunderstanding of precedent. There is no question that the federal government can rely on private entities when crafting a regulatory regime. That happens all the time. What the government cannot do, however, is pass the legislative power to a private entity. Supreme Court precedent makes this clear. In *Currin*, on which defendants rely, *see* U.S. Br.18, the Court held that Congress did not violate the private-nondelegation doctrine by granting private tobacco farmers the power to approve federal regulation by a two-thirds vote. 306 U.S. at 15–16. This was so, the Court explained, because Congress retained the power of the pen; Congress was the entity "making the regulation and … prescribing the conditions of its application." *Id.* at 16. In other words, the farmers were given the power to negate the law, not create it. While the ruling in *Currin* is dubious, *see Ass'n of Am. R.R.*, 575 U.S. at 89–90 (Thomas, J., concurring in the judgment), it does not hold that Congress can empower private entities to make law. And other Supreme Court decisions make clear that Congress may not delegate lawmaking power to private entities. *See, e.g.*, *Schechter Poultry*, 295 U.S. at 537; *Carter*, 298 U.S. at 311; *Ass'n of Am. R.R.*, 575 U.S. at 51.

Similar considerations distinguish the Sixth Circuit's decision in *Kentucky Division, Horsemen's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n*, 20 F.3d 1406 (6th Cir. 1994) ("*Kentucky Horsemen*"). The federal statute at issue there gave private entities the power to veto a federal prohibition against off-track betting. *See* 20 F.3d at 1416. In holding that the statute did not violate the private-nondelegation doctrine, the Sixth Circuit relied on *Currin*. *Id.* And it stressed that, similar to the statute in *Currin*, the statute before it just permitted private

parties to "waive a restriction created by Congress." *Id.* The statute did not, in other words, give private parties the power to *write* the restriction for Congress.

Unlike the statutes at issue in *Currin* and *Kentucky Horsemen*, the Horse Act gives the power of the pen to a private entity. Sections 1205 and 1206 of the Act set forth, in detail, the Private Corporation's duty to write the rules governing horseracing nationwide. And the Commission, for its part, has no authority to write the rules at all. Therefore, whatever rules are eventually enacted will reflect not the *Commission*'s policy decisions, but the *Private Corporation*'s.

The defendants have no real response to this. They concede, as they must, that the rules will "reflect" the Private Corporation's policy decisions. U.S. Br.18. But that is irrelevant, the defendants say, because the Commission gets to approve a rule before it can take effect. *Id.* at 18–19. The defendants, in other words, would have this Court find that Congress can avoid violating the private-nondelegation doctrine whenever a private entity lacks the *procedural* power to formally enact a regulation, notwithstanding its *substantive* power to create policy. This argument exalts form over substance. It is not supported by precedent. And it overlooks the "significant difference between actually delegating" regulatory power and "enacting a regulation that happens to be based on" a private entity's proposals. *Kiser v. Kamdar*, 831 F.3d 784, 792 (6th Cir. 2016).

Last, the defendants ignore the fact that the Horse Act authorizes the Private Corporation to issue guidance without *any* federal supervision. The Commission cannot approve or disapprove that guidance. *See* Horse Act §1205(g). The defendants' silence on this point is telling.

CONCLUSION

The Horse Act vests in the Private Corporation the power to regulate horseracing across the nation. That is unconstitutional, and this Court should say so.

Respectfully submitted,

TREG R. TAYLOR
Alaska Attorney General

LESLIE RUTLEDGE
Arkansas Attorney General

LAWRENCE G. WASDEN
Idaho Attorney General

LYNN FITCH
Mississippi Attorney General

DOUGLAS J. PETERSON
Nebraska Attorney General

DAVE YOST
Ohio Attorney General

/s/Amy Ruth Ita
AMY RUTH ITA
Section Chief – Employment Law
BENJAMIN M. FLOWERS
Solicitor General
MAY MAILMAN
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, OH 43215
(614) 466-8980
Amy.Ita@OhioAGO.gov

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I hereby certify that on September 20th, 2021 a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

/s/Amy Ruth Ita
AMY RUTH ITA
Section Chief – Employment Law

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STATE OF OKLAHOMA, et al., *Plaintiffs*, v. THE UNITED STATES OF AMERICA, et al., *Defendants*.	:	Case No. 5:21-cv-104-JMH District Judge Joseph M. Hood

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[PROPOSED] ORDER GRANTING MOTION BY THE STATES OF OHIO, ALASKA, ARKANSAS, IDAHO, MISSISSIPPI, AND NEBRASKA FOR LEAVE TO FILE AMICUS BRIEF

Upon consideration of the Motion by the States of Ohio, Alaska, Arkansas, Idaho, Mississippi, and Nebraska for Leave to File Amicus Brief, the Court GRANTS the motion.

SO ORDERED.

Dated: _____, 2021

_____
United States District Judge

_____
United States Magistrate Judge