



**Panel Discussion on HISA
Where Are We Now?**

**Presented To:
2022 HBPA CONVENTION**

Hot Springs, AR

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History and Status of Constitutional
Challenges Pending Before the U.S.
District Court, Northern District of Texas

History of National Legislation

- 2011: Interstate Horseracing Improvement Act is introduced by Senator Udall (D-NM).
- 2015: The First—HISA is introduced by Representative Joe Pitt (R PA). That same year Representatives Barr/Tonko introduce the Thoroughbred Horseracing Integrity Act of 2015.
- 2017: Representatives Barr & Tonko introduce The Horseracing Integrity and Safety Act of 2017
- 2020: Fast Forward to 2020: The Horseracing Integrity and Safety Act, introduced by Representatives Barr/Tonko, passed in the U.S. House of Representatives on September 29, 2020.
- The HISA introduced in the US Senate by Senator Mitch McConnell (R KY) on September 9, 2020.
- On December 28, 2020, President Trump signed into law the Consolidated Appropriations Act, 2021. Tucked away in this 2,000-page legislation is the Horseracing Integrity and Safety Act.

Constitutional Challenges In Their Entirety

- HISA violates the Non-Delegation Doctrine of the United States Constitution
 - The Non-Delegation Doctrine provides that Congress is prevented from delegating legislative authority to any other entity
- HISA violates the Appointment Clause of the U.S. Constitution
 - The Appointment Clause requires that appointments to public agencies be made only by the Executive Branch as set forth in Article II of the Constitution.
- HISA violates rules prohibiting Anti-Commandeering
 - The U.S. Supreme Court has held that Congress “may not issue direct orders to the governments of the states.” Congress may not commandeer the State’s offices or those of their political subdivisions to administer or enforce a federal regulatory program.
- HISA violates the Due Process Clause of the Constitution
 - The fourteenth amendment of the U.S. Constitution guarantees both procedural and substantive due process.
 - Procedural due process requires the right to reasonable notice and an opportunity to be heard at a meaningful time and in a meaningful manner
 - Substantive due process requires that there must be a rational relationship between a legitimate governmental purpose of a regulation (such as protecting the integrity of racing) and the means chosen for that desired end (the rules governing racing).
 - The licensee/protected person’s due process rights under HISA are truncated
 - The Due Process Clause of the Constitution prohibits an economically self-interested private actor from wielding regulatory power over private parties.

Constitutional Arguments Advanced By the National HBPA and Amicii on February 16, 2022

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Parties/Players to the Pending Constitutional Challenge in the U.S. District Court, Northern District of Texas

- PLAINTIFFS:

- National HBPA;
- Arizona HBPA;
- Arkansas HBPA;
- Indiana HBPA;
- Illinois HBPA;
- Louisiana HBPA;
- Mountaineer Park HBPA;
- Nebraska HBPA;
- Oklahoma HBPA;
- Oregon HBPA;
- Pennsylvania HBPA;
- Tampa Bay HBPA; and
- Washington HBPA
- State of Texas
- Texas Racing Commission

- AMICUS CURIAE

The North American Assoc. of Racetrack Vets;
American Quarter Horse Association

Parties/Players to the Pending Constitutional Challenge in the U.S. District Court, Northern District of Texas cont.

- DEFENDANTS:
 - Horseracing Integrity and Safety Authority, Inc.
 - Jerry Black, Katrina Adams, Leonard Coleman, Jr., Nancy Cox, Joseph Dunford, Frank Keating, and Kenneth Schanzer
 - Federal Trade Commission
 - Rebecca Kelly Slaughter, in her official capacity as Acting Chair of the Federal Trade Commission;
 - Rohit Chopra, in his official capacity as Commissioner of the Federal Trade Commission;
 - Noah Joshua Phillips, in his official capacity as Commissioner of the Federal Trade Commission; and
 - Christine S. Wilson, her official capacity as Commissioner of the Federal Trade Commission
- AMICUS CURIAE
 - Senator Mitch McConnell and Representatives Tonko and Barr

NORTH AMERICAN ASSOCIATION OF RACETRACK VETERINARIANS

- Established in 2015;
- 501(c)(6) organization;
- Members in every racing jurisdiction;
- Members caring for Thoroughbred horses at more than 75 tracks nationally;

NAARV'S Constitutional Challenges

- HISA violates and truncates NAARV members' due process rights;
 - It does so by:
 - Failure to guarantee a right for review;
 - Creates a financial barrier that its members cannot overcome to be heard in a neutral setting;
 - Creates paralleling systems of adjudication;
 - Creates a system where any violation is a federal violation and, upon reporting, brings into potential jeopardy, the members' ability to earn a livelihood and retain a professional license.

Violation of HBPA AND NAARV Members' Due Process Rights

- The violation of these due process rights is apparent when the disciplinary process under HISA is compared to the current state system.

Disciplinary Process Before Most State Regulators/Commissions

Step 1

(A) Stewards/Judges Hearing

Step 2

(B) Timely right to appeal for review hearing before an appointed Administrative Law Judge for a hearing on the merits (witnesses/evidence)

Step 3

(C) Timely right to Appeal the ALJ'S Recommended Ruling/Penalty to the State Regulatory Commission

Step 4

(D) Right to seek Judicial Review of Regulator's/Commission's final decision by a state court

Compare State Disciplinary Process with that of HISA

Step 1

- Right to a hearing before the Authority
 - HISA is unclear whether “the Authority” or to standing or sub-committee of the Authority will conduct initial hearings—this appears to replace the Stewards/Judges hearing.
 - Unclear is whether the hearing before the Authority is or is not a merits hearing necessitating the presentation of evidence and testimony of witnesses.
 - Note: the hearing before the Authority will be limited to alleged medication and safety violations. All other violations e.g., security, equipment, wagering, standard of behavior, etc., will be overseen by state officials and costs associated with the Authority will be over and above what is presently being paid to Stewards

Compare State Disciplinary Process with that of HISA cont.

Step 2

- If a timely appeal is taken, then the dispute is submitted to an Administrative Law Judge.
- The ALJ, pursuant to Section 8, is to be an “impartial hearing officer.”
- However, HISA is silent as to how these ALJs are to be selected and compensated.
- No consideration for mediation although ADR has been recommended.

Compare State Disciplinary Process with that of HISA cont.

Step 3

- The Authority and/or the Covered Person, if dissatisfied with the ALJ's decision, may then submit an Application for Review to the Federal Trade Commission.
- Key Point: The Federal Trade Commission may accept or deny the Application for Review.
- If the Federal Trade Commission refuses the application for review, then:
 - The ALJ decision shall constitute the final decision without further proceedings;
 - Unlike the current administrative/judicial process, HISA provides no right to judicial review;
 - As such, HISA represents a serious setback to licensees' due process rights.

Compare State Disciplinary Process with that of HISA cont.

- Here is where the horsemen's due process rights are truncated and violated.
- This is because the overseeing agency, the FTC, is not required to grant a request for review. In the event a request for review is not granted or acted upon, the covered persons' next stop is the U.S. Federal Court of Appeals.
- This lack of a guarantee of review of the agency is a violation of the covered person's due process rights.
- Example of Hipodromo Camarero in Puerto Rico to Boston where the U.S. Court of Appeals, First District, sits.
- Average cost of an appeal \$20,000 to \$50,000

Where Are We Now?

- On February 16, 2022, a hearing was conducted in the United States District Court, Northern District of Texas, located in Lubbock, Texas.
- The court heard oral argument on two (2) pending motions.
 - The HBPA's pending Motion for Partial Summary Judgment
 - This motion seeks to enjoin HISA and to find a determination that it is unconstitutional
 - The Motion for Partial Summary Judgment advances two (2) theories:
 - The first that HISA violates the Private Non-Delegation Doctrine
 - The second is that HISA violates the constitutionally guaranteed right of due process
 - The second motion that was heard earlier this month in Lubbock, Texas was the HISA Authority and FTC's Motions to Dismiss
 - The Authority and FTC's Motions to Dismiss is based on:
 - The claims are not justiciable because no rules have been promulgated and no regulations can affect horsemen until after effective date of the legislation;
 - Plaintiffs lack standing to bring the case;
 - Plaintiffs have misconstrued HISA and precedent set by prior court decisions in asserting their claim that congressional delegation of authority is unconstitutional; and
 - That Plaintiffs offer no evidence that HISA violates due process considerations by empowering industry actors to regulator their competitors.



EQUINE LAW

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