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December 8, 2022

Via Federal Express and Electronic Mail

Hon. Mitch McConnell
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

Senator McConnell:

The undersigned State Attorneys General write on matters of utmost importance and urgency—federal legislation that strikes at the very philosophical foundations of our Republic. That legislation is the Horseracing Integrity and Safety Act (“HISA”). A recent decision issued from the United States Court of Appeals for the Fifth Circuit held that HISA is unconstitutional. *See National Horsemen’s Benevolent & Protective Association v. Black*, --- F.4th ---, 2022 WL 17075011 (5th Cir. Nov. 18, 2022). The Court unanimously and correctly held that HISA facially violates the private nondelegation doctrine. Louisiana, Oklahoma, and West Virginia have a similar case pending before the United States Court of Appeals for the Sixth Circuit, with oral argument heard on December 7.

It has come to our attention that you are considering proposing language related to HISA in the Defense Spending Authorization Act or other end-of-year legislation. We urge you not to do so. HISA has already caused enormous upheaval in our States. A lame-duck session is not the time to slip new language into legislation amending HISA in response to *Black*. Indeed, language that attempts anything other than *repealing* this ill-advised legislation will only make a bad situation worse.

“[E]very schoolchild learns” that “our Constitution establishes a system of dual sovereignty between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). As enacted, HISA disrespects that system of dual sovereignty. HISA’s very purpose is to take away a regulatory power individual States have exercised since the Founding—to oversee and regulate horse racing within their borders—and give that power exclusively to a *private* agency (the Horseracing Integrity and Safety Authority or “Authority”). This private agency, exercising federal regulatory powers without any meaningful restraint, oversight, or

adequate time for notice and comment, rushed rules that displaced existing State laws governing horse racing and exposed jockeys and horses to unsafe conditions. Adding insult to injury, the Authority required all participants in the horse racing industry to pay assessments to cover the cost of enforcing HISA's dangerous and poorly thought out private rules. As a final blow, the Authority attempted to cannibalize existing State personnel to implement and enforce the rules it enacted.

So much for the Founders' efforts to allocate power in a way that "preserves the integrity, dignity, and residual sovereignty of the States," and to draft a Constitution that "ensure[s] that States function as political entities in their own right." *Bond v. United States*, 564 U.S. 211, 221 (2011). States have governed horse racing within their own borders for over two hundred years. Louisiana, for example, has regulated horse racing since before it attained statehood in 1812. From the beginning, States have worked closely with the industry and its individual participants. States have ongoing integrated systems of laws, rules, and regulations, including enforcement by our State Racing Commission, designed to ensure success *and* safety in this industry.

HISA runs roughshod over all of that. Take HISA's fee provision: HISA gave the Authority power to assess fees without any limits or oversight. For 2023, the Authority issued an initial fee assessment totaling over \$72,500,000 nationwide. The Louisiana assessment alone exceeds \$5.4 million. And among other things, the assessment would force States to pay for HISA's costs of litigating the cases that the States were forced to bring because of HISA's unconstitutionality. That money will have to be paid either by the State or, if a State declines to assume this fiscal burden, by all those individuals who participate in the horse racing industry. So, HISA forces States to choose to either tax their citizens to pay the Authority's bill (by voluntarily assuming responsibility for the assessment) or shift that burden to the industry participants. Either way, State regulatory powers are displaced by the Authority. Thus, *all* participants in horse racing pay the freight of a private entity with no representation. HISA initially was approved by Congress in late 2020 in an end-of-the-year funding continuation bill, with little notice to racing states. Since then, the Authority has turned a deaf ear to experts in the industry and made poor decisions that hurt horses and riders. Indeed, the Authority has demonstrated an inability to carry out its mandate and has largely failed to secure the assistance of States' Racing Commissions.

If you seek a resolution that settles controversy in the industry, then you should organize discussions between all industry participants that would identify and address everyone's concerns with HISA instead of making a surprise amendment to HISA now. Several of our states are engaged in litigation regarding problems with HISA beyond the private nondelegation issue, and amendments cannot avoid continuing, costly litigation unless they are carefully tailored to resolve all concerns. Enacting HISA in 2020 in vital national legislation that had nothing to do with horse racing is part of why it failed so miserably. Amending HISA in the Defense Spending Authorization Act with no notice to industry participants or States will merely repeat

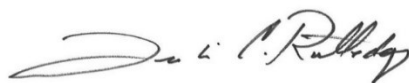
the same flawed approach. Any further legislation regarding HISA should proceed through the ordinary course of deliberative consideration by the Senate Commerce Committee and the House Energy and Commerce Committee. On the impossible timeline of the Defense Spending Authorization Act, due care cannot be given to ensuring any amendments to HISA respect the Founders' design and allow States to retain control over an industry they successfully developed and regulated for centuries. Make no mistake: pressing ahead with any amendments in the lame-duck session threatens a final blow to the horse racing industry that could cause many horsemen to abandon it entirely—an outcome detrimental not only to themselves, but to an *entire industry* in each State.

In short, we urge you to abandon attempts to amend HISA during the lame-duck session. Congress should likewise refuse to consider any amendment to HISA without soliciting and properly considering input from all affected stakeholders—including representatives from the undersigned States—to ensure that horse racing regulation in America comports with both the letter and the spirit of our founding charter.

Very truly yours,



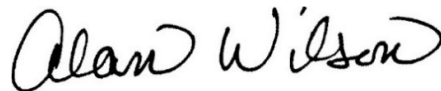
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