



Office of Commissioner  
Andrew N. Ferguson

UNITED STATES OF AMERICA  
**Federal Trade Commission**  
WASHINGTON, D.C. 20580

**Concurring Statement of Commissioner Andrew N. Ferguson**

In the Matter of Luis Jorge Perez  
Docket No. 9420  
August 7, 2024

I concur in the denial of Dr. Perez’s application for review, and in the Commission’s reasoning except with regard to Dr. Perez’s third reason for review.

Congress adopted the Horseracing Integrity and Safety Act to establish “nationwide rules governing doping, medication control, and racetrack safety in the thoroughbred horseracing industry.”<sup>1</sup> It conferred on the Horseracing Integrity and Safety Authority (HISA)—a private, self-regulatory, nonprofit organization—the power to promulgate rules regulating the horseracing industry, to investigate and adjudicate violations of the Act and regulations, and to sanction private individuals for violations.<sup>2</sup> Parties aggrieved by a HISA enforcement action are entitled to *de novo* review by a Commission administrative law judge (ALJ).<sup>3</sup> Both HISA and the subject of the enforcement action may apply to the Commission for review of the ALJ’s decision.<sup>4</sup> The decision whether to grant an application for review “is subject to the discretion of the Commission.”<sup>5</sup> Congress has instructed that in the exercise of our discretion, we should consider “whether the application makes a reasonable showing that ... a prejudicial error was committed in the conduct of the proceeding” or whether “the decision involved ... an exercise of discretion or a decision of law or policy that warrants review by the Commission.”<sup>6</sup>

Dr. Perez raises three “reasons” for review, and I concur in the Commission’s rationale for denying the first two.<sup>7</sup> His final reason is of constitutional dimension. His application states that “HISA’s regulatory scheme ... is vague as well as being arbitrary and capricious.”<sup>8</sup> He then says that “[t]he constitutionality of [the Act] is in serious question” and that the Fifth Circuit “held” in *National Horsemen’s Benevolent and Protective Association v. Black* (“*NHBPA I*”)<sup>9</sup> “that the statute is ‘facially unconstitutional.’”<sup>10</sup> He closes by “reserv[ing] the right to challenge the

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<sup>1</sup> *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black* (“*NHBPA II*”), 107 F.4th 415, \_\_\_, slip op. at 4\_ (5th Cir. 2024).

<sup>2</sup> 15 U.S.C. §§ 3053, 3054.

<sup>3</sup> *Id.* § 3058(b).

<sup>4</sup> *Id.* § 3058(c)(2)(A).

<sup>5</sup> *Id.* § 3058(c)(2)(B); see also 16 C.F.R. § 1.147(b)(4)(i) (“A decision whether to grant an application for review is subject to the sole discretion of the Commission.”).

<sup>6</sup> 15 U.S.C. § 3058(c)(2)(C)(ii).

<sup>7</sup> See Decision of the Commission on Application for Review Under 15 U.S.C. § 5058, *In the Matter of Luis Jorge Perez*, Docket No. 9420 (August 7, 2024).

<sup>8</sup> Perez App. at 3.

<sup>9</sup> 53 F.4th 869 (5th Cir. 2022).

<sup>10</sup> Perez App. at 3 (quoting *NHBPA I*, 53 F.4th at 872).

decision” of the ALJ “on the same grounds of facial unconstitutionality” as those articulated in *NHBPA I*.<sup>11</sup>

I do not think Dr. Perez’s constitutional objections warrant an exercise of our discretion to grant his application. For one thing, Dr. Perez does not explain his vagueness argument at all, nor did he raise it below. Because it appears in the same paragraph as his argument about constitutional invalidity, I assume he means that the Act is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment.<sup>12</sup> Although the Act has been the subject of substantial constitutional challenges, I am not aware of anyone having raised a vagueness challenge to the Act, much less a successful one. I do not think Dr. Perez’s unelaborated vagueness challenge warrants our review.

Similarly, Dr. Perez purports to “reserve[ ] the right” to challenge the Act “on the same grounds of facial unconstitutionality” as those raised in the Fifth Circuit’s 2022 *NHBPA I* decision. As with his vagueness challenge, Dr. Perez did not present this argument to the ALJ. Nor do those “grounds” any longer exist. *NHBPA I* held that the Act unconstitutionally delegated executive power to HISA by permitting a private organization to make rules independently of any control by an agency of the federal government.<sup>13</sup> More than a year before Dr. Perez filed his application, however, Congress amended the Act to correct the private-nondelegation problem the Fifth Circuit identified in *NHBPA I*.<sup>14</sup> Both courts of appeals to have reached the question agree that “the amendment cured the nondelegation defect identified in” *NHBPA I*.<sup>15</sup> One of those decisions predates Dr. Perez’s application by more than a year, but he failed to mention it.

That said, the courts of appeals have split on whether the Act’s delegation of enforcement authority (rather than rulemaking authority) to HISA is an unconstitutional delegation of the President’s “executive Power” to a private entity.<sup>16</sup> The Sixth Circuit has said that the grant is constitutional because HISA is subject to our authority.<sup>17</sup> The Fifth Circuit recently disagreed.<sup>18</sup> This issue may require our review in an appropriate case. But Dr. Perez’s case is not an appropriate case to address it because he did not present it to us. He instead raised an argument that had been mooted by Congress’s amendment well before he filed his application. I therefore concur in the denial of Dr. Perez’s application.

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<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., *Sessions v. Dimaya*, 584 U.S. 138, 155–56 (2018) (“The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have ‘fair notice’ of the conduct a statute proscribes.”).

<sup>13</sup> See *NHBPA I*, 53 F.4th at 882–90.

<sup>14</sup> See Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, § 701, 136 Stat. 4459, 5231–32 (2022) (amending § 1204(e) of the Act, 15 U.S.C. § 3053(e), to address the constitutional concerns raised in *NHBPA I*).

<sup>15</sup> See *NHBPA II*, 107 F.4th at \_\_\_, slip op. at 9; *Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023) (The amendment “ameliorated the concerns underlying the non-delegation challenge” in *NHBPA I*).

<sup>16</sup> U.S. Const. art. II, § 1, cl. 1.

<sup>17</sup> *Oklahoma*, 62 F.4th at 231–33.

<sup>18</sup> *NHPBA II*, 107 F.4th at \_\_\_, slip op. at 15–29.