No. 23-402

IN THE

# Supreme Court of the United States

STATE OF OKLAHOMA, ET AL.,

*Petitioners*,

v.

UNITED STATES OF AMERICA, ET AL.,

*Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## REPLY BRIEF FOR PETITIONERS


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## RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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## REPLY BRIEF FOR PETITIONERS

Eleven States, multiple state regulatory authorities, members of Congress, industry organizations, and numerous regulated parties have asked this Court to decide "a fundamental question about the limits on the Federal Government's authority to delegate its powers to private actors." *Texas* v. *Comm'r*, 142 S. Ct. 1308, 1308 (2022) (statement of Alito, J., joined by Thomas and Gorsuch, JJ.). That question has twice escaped this Court's review in recent years, leading three Members of this Court to highlight a "need to clarify the private non-delegation doctrine." *Ibid.* This case underscores that need. In the absence of clear guidance from this Court, the decision below blessed an unprecedented transfer of federal power into the hands of a private corporation, displacing state regulatory regimes nationwide.

Respondents do not contest the importance of this issue—either for the multi-billion-dollar U.S. horseracing industry in this case or the constitutional limits on private delegation more broadly. Instead, they defend this novel delegation on the merits. That defense fails: the federal power the Authority now wields has no historical analogue and no valid constitutional justification. And, in any event, respondents' merits arguments are no reason to deny review.

The Act's requirement that States fund this private regulatory regime, on pain of losing their longstanding power to tax horseracing activities, also warrants review. Respondents again argue the merits and again come up short: they identify no comparable "preemption" scheme forcing States to fund a federal program or surrender their own tax powers.

This Court should grant certiorari and reverse.

## ARGUMENT

### I. THE PRIVATE NON-DELEGATION QUESTION WARRANTS REVIEW.

The decision below approved an unprecedented transfer of power away from public entities accountable to the People and into the hands of a private, unaccountable corporation. This Court's review is warranted.

#### A. The Act's delegation of federal power to the private Authority is unprecedented and unconstitutional.

Tellingly, respondents primarily focus not on the certworthiness of this case, but on the merits, devoting the bulk of their briefs to defending the Act's delegation of federal power to the Authority. U.S. Br. 7–12; HISA Br. 20–31. Those merits arguments do not counsel against review of this important question. They are also wrong.

**1.** Respondents' efforts to locate historical support for the Authority come up empty: never before has a private party been given the power to make federal law over the government's policy objections.

**a.** Respondents compare this case to *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), where this Court approved a statute that allowed private parties to propose minimum prices for coal. U.S. Br. 7–9; HISA Br. 20–22, 25–26. In *Adkins*, however, the federal government (through the National Bituminous Coal Commission) retained the key policymaking power to "disapprov[e]" any proposed prices whenever those prices were, in the government's policy views, not "just and equitable"—so the government,

not the private parties, "determine[d] the prices." 310 U.S. at 388, 397, 399; Pub. L. No. 75-48, § 4, Part II(a), 50 Stat. 72, 78 (1937). Here, the FTC lacks that power. It *must* approve the Authority's proposed rules so long as those rules are "consistent with" the Act and other rules, *even if* the government disagrees as a matter of policy. 15 U.S.C. § 3053(c)(2). Thus, unlike in *Adkins*, it is the private party's policy views—not the government's—that become federal law.

**b.** For the same reason, respondents' reliance on "[t]he SEC-FINRA model" (U.S. Br. 9; HISA Br. 16–19) rings hollow. While both the SEC and the FTC review proposed rules for "consistency" with the underlying statute, the statutes themselves render this consistency review different in kind. Under the Maloney Act, the SEC's "consistency" review allows it to reject FINRA's proposals if, in the SEC's policy judgment, the rule is not in "the public interest" or does not "promote just and equitable principles of trade." 15 U.S.C. §§ 78f(b)(5), 78*o*-3(b)(6), 78s(b)(2)(C)(i). The FTC lacks that power. As the Fifth Circuit explained, "whatever 'consistency' review includes, we know one thing it *excludes*: the Authority's policy choices in formulating rules." *Nat'l Horsemen's Benevolent & Protective Ass'n* v. *Black*, 53 F.4th 869, 885 (5th Cir. 2022).

**c.** The Authority (but not the FTC itself) insists that the FTC's consistency review has "real 'teeth'" and allows the FTC to exercise some policy judgment after all. HISA Br. 24–27. That is not right, and it is not the basis on which this case was decided. In fact, the decision below assumed that the FTC's consistency review "does not pick up policy disagreements." Pet. App. 17a; *see also Nat'l Horsemen's*, 53

F.4th at 872 ("[T]he FTC concedes it cannot review the Authority's policy choices."). And in fact, the FTC has repeatedly rebuffed commenters' policy arguments as outside its purview and directed interested parties to "engag[e] with the Authority." Pet. App. 208a. Time after time, it is the Authority—not the FTC—that makes the critical and contested policy decisions, and the FTC disclaims responsibility for them. *See* Pet. 6–8 (collecting examples); Arkansas Amicus Br. 8–9. That upside-down arrangement allows the FTC to hide behind the Authority's policy judgments and escape political accountability.

**2.** Lacking any historical support, respondents—like the Sixth Circuit below—rely on Congress's 2022 amendment allowing the FTC to engage in rulemaking proceedings of its own. U.S. Br. 8, 10–11; HISA Br. 21–24, 27–29. For several reasons, that amendment does not cure the unconstitutional delegation.

Allowing a private party to dictate the content of federal law in the first instance is unconstitutional—full stop—because it lodges federal power in an entity constitutionally ineligible to wield that power. *See Dep't of Transp.* v. *Ass'n of Am. R.Rs.*, 575 U.S. 43, 88 (2015) ("*Amtrak*") (Thomas, J., concurring in judgment). The FTC's ability to engage in after-the-fact, corrective rulemaking to repeal an Authority regulation it was bound to promulgate does not change the fact that the Authority impermissibly wields federal power in the first place.

Nor does the hypothetical possibility of a blanket FTC rule delaying the effective date of Authority-proposed rules cure this violation. *Contra* Pet. App. 19a; U.S. Br. 10–11; HISA Br. 28–29. No such rule has

been passed, nor would such a rule be consistent with the Act's mandate that "the Commission shall approve or disapprove" the Authority's rules within "60 days" of publication in the Federal Register. 15 U.S.C. § 3053(c)(1). And even assuming such a rule were passed and were lawful, the FTC's ability to "claw back its delegated power by issuing a new rule" does not cure an unlawful private delegation; under "that logic, *any*" delegation "of rulemaking power is permissible" because an agency (or Congress) can *always* revoke a delegation by passing a new rule (or law). *Texas* v. *Rettig*, 993 F.3d 408, 416 (5th Cir. 2021) (Ho, J., dissenting from denial of reh'g en banc). Moreover, an agency cannot "cure an unlawful delegation . . . by adopting in its discretion a limiting construction of the statute." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

Respondents' reliance on the FTC's ability to undo the Authority's rules through its own rulemaking also subverts the Constitution's structural protections. Lawmaking is "difficult *by design*," which "favors the status quo and disfavors legislative output." John F. Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 191, 201–02 (2007). That puts a thumb on the scales favoring liberty over regulation: if an agency (or Congress) cannot muster the political will to regulate, the default is liberty. The Act, by contrast, allows the private Authority to propose rules that the FTC must promulgate as federal law—policy objections notwithstanding—and puts the onus on the FTC to *undo* those rules through a rulemaking of its own. If the FTC does not prioritize the issue or deem it sufficiently important to pick a fight, then the Authority's rule will stand, even though no official accountable to

the People would have passed it. The private non-delegation doctrine is meant to prevent that backward result.

**3.** Respondents' defenses of the Authority's enforcement powers and its ability to expand its own jurisdiction to encompass additional horse breeds (without *any* FTC involvement) also fail.

**a.** Respondents argue that there is no justiciable controversy over these provisions because the Authority has not yet brought a civil suit against petitioners or expanded its jurisdiction to other horse breeds. U.S. Br. 11–12; HISA Br. 29. But where, as here, a party "challeng[es] the legality of the regulating [entity] itself," it "would make little sense to force a regulated entity to violate a law (and thereby trigger an enforcement action against it) simply so that the regulated entity can challenge the constitutionality of the regulating agency." *State Nat'l Bank of Big Spring* v. *Lew*, 795 F.3d 48, 54 (D.C. Cir. 2015) (Kavanaugh, J.); *see also*, *e.g.*, *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490–91 (2010). Indeed, in *Buckley* v. *Valeo*, this Court entertained a similar pre-enforcement challenge to a provision giving the FEC the power to bring enforcement actions; the Court reached the merits and found the provision unconstitutional. 424 U.S. 1, 140 (1976) (per curiam).

**b.** On the merits, respondents argue that the FTC's "general rulemaking power" is a sufficient constraint on the Authority's enforcement and jurisdiction-expanding powers. U.S. Br. 11–12; HISA Br. 29–30. That functional argument is flawed in multiple respects.

For one thing, the FTC's ability to rein in *how* the private Authority exercises federal power does not make the Authority constitutionally eligible to exercise that power in the first place. As Justice Thomas has explained, the question is not "whether [a private party] is subject to an adequate measure of control by the Federal Government," but rather "how this authority must be exercised and by whom." *Amtrak*, 575 U.S. at 67; *see also United States ex rel. Polansky* v. *Exec. Health Res., Inc.*, 599 U.S. 419, 449 (2023) (Thomas, J., dissenting) (noting "substantial arguments" that "private relators may not represent the interests of the United States in litigation"); *id.* at 442 (Kavanaugh, J., joined by Barrett, J., concurring) (same).

In any event, the hypothetical prospect that the FTC "could" (U.S. Br. 11; HISA Br. 30) use its rulemaking power to limit how the Authority exercises its own power runs into all the same problems above: neither an agency's ability to claw back some measure of control nor its adoption of limiting constructions can cure the non-delegation problem. Nor should the regulated public have to rely on the FTC to take action to curb a private entity's abuse of the federal power it wields. *See supra* at 5–6.

**B. The question presented warrants review even in the absence of a split.**

As respondents note, constitutional challenges to the amended Act are pending before the Fifth and Eighth Circuits. U.S. Br. 14; HISA Br. 19. Respondents sought and received numerous extensions from this Court "[b]ecause the parties and the Court would benefit from consideration of the Fifth Circuit's ruling

in resolving the present petition." No. 23-402, Letter from P. Shah to S. Harris (Feb. 2, 2024). Yet now, without explanation, respondents proceeded to file their opposition briefs before the Fifth Circuit issued its decision, arguing that the Court should deny review because there is not yet a split on the *amended* version of the Act. U.S. Br. 7, 14–15; HISA Br. 14–19.

That argument should not dissuade review, and at the very least the Court should hold the petition pending the Fifth Circuit's decision. As three Members of this Court have acknowledged, there is a "need to clarify the private non-delegation doctrine." *Texas*, 142 S. Ct. at 1308 (statement of Alito, J.). That need existed before the litigation over the Horseracing Integrity and Safety Act. And far from ameliorating that need, litigation over the Act has only exacerbated it. The Fifth Circuit rejected Congress's first attempt, while the Sixth Circuit allowed an unprecedented transfer of power away from accountable political officials and into the hands of an unaccountable private corporation. The fact that there is not yet a split on the amended version of the Act does not detract from the importance of or need for guidance on this issue. Moreover, as discussed above, the 2022 amendment does not cure the unlawful delegation of federal power to the private Authority. *See supra* at 4–6.

At the very least, the Court should hold the petition pending the Fifth Circuit's decision on the constitutionality of the amended version of the Act. The Authority itself argued for this approach in multiple extension requests, and it makes perfect sense. The Court should not deny this petition without the benefit of seeing what the Fifth Circuit decides—especially because, if a split develops, there is no guarantee that

the Fifth Circuit case (or the Eighth Circuit case) will reach this Court or present a suitable vehicle.[1]

### C. The Authority's vehicle objections are meritless.

The Authority suggests "three reasons" why this case is not a suitable vehicle. HISA Br. 31–33. None has merit.

*First*, the Authority notes that petitioners argued the pre-amended version of the Act was unconstitutional because the FTC lacked its own rulemaking power, whereas the FTC now has that power under the amended Act. HISA Br. 31–32. But as the Authority does not contest, the parties filed supplemental briefs in the Sixth Circuit addressing the amendment; petitioners explained why the amendment did not cure the constitutional problem; and the Sixth Circuit squarely ruled on that issue, expressly declining to remand to the district court first. Pet. App. 9a–10a. The private non-delegation question is thus cleanly teed up for review.

*Second*, the Authority suggests that some of its powers—the "civil action, subpoena, and breed-expansion" ones—have not yet been exercised. HISA Br. 32–33. As discussed above, however, petitioners need not await an enforcement action or other exercise of the Authority's unconstitutionally delegated powers

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[1] For example, the Fifth Circuit case involves a threshold jurisdictional issue concerning the finality of the district court's decision. *See* No. 23-10520 (5th Cir.). And the Eighth Circuit case arises in an interlocutory posture on appeal from the denial of a preliminary injunction. *See* No. 23-2687 (8th Cir.). This case does not present either difficulty.

to challenge the constitutionality of the Authority itself. *See supra* at 6. In any event, even assuming *arguendo* that petitioners could not challenge those additional aspects of the Authority's power, no one disputes petitioners' ability to challenge the Authority's lawmaking power.

*Third*, the Authority argues that any constitutional problems with "the civil-action, subpoena, and breed-election provisions" would "implicate severability questions." HISA Br. 33. But this Court could remand any severability questions to the court of appeals after identifying a constitutional problem. And, again, this argument concerns only the Authority's enforcement and jurisdiction-expanding powers, not its lawmaking powers.

## II. THE ANTI-COMMANDEERING QUESTION WARRANTS REVIEW.

The Act's requirement that the States fund the Authority's activities or else lose their longstanding power to tax the horseracing industry likewise warrants review. Here again, respondents' merits defenses do not detract from this issue's certworthiness and, in any event, are wrong.

Respondents say the Act offers States "a choice, not a command," because States may decide whether to remit fees to the Authority. U.S. Br. 13; HISA Br. 34–35. But that "choice" comes armed with a penalty: if a State refuses to fund the Authority, that State is stripped of its power to impose any "fee or tax relating to anti-doping and medication control or racetrack

safety matters for covered horseraces." 15 U.S.C. § 3052(f)(3)(D).

That is no mere "typical preemption scheme." *Contra* HISA Br. 35. As this Court has explained, "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States." *Murphy* v. *NCAA*, 584 U.S. 453, 479 (2018). Not so here. The Act purports to regulate the States directly by forcing them to pay a ransom in exchange for keeping their traditional taxing power. A State that pays that ransom may tax whomever and however it likes, in whatever amount; a State that does not pay up may not tax at all, even if the Authority has not actually exercised its power to regulate the "anti-doping and medication control or racetrack safety matters" at issue. 15 U.S.C. § 3052(f)(3)(D).

That is why this scheme violates the anti-commandeering doctrine. As this Court made clear, the Constitution does not allow "Congress [to] shif[t] the costs of regulation to the States." *Murphy*, 584 U.S. at 474. But HISA does just that, by threatening States with the loss of their traditional taxing power if they refuse to fund a federal program.

Respondents do not identify any comparable preemption regime. The FTC cites (at 12–13) *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *FERC* v. *Mississippi*, 456 U.S. 742 (1982). But this Court already explained in *Murphy* why those cases are inapposite. In *Hodel*, a statute allowed States to choose between implementing a federal regulatory program for coal mining or yielding to a federally administered regulatory program—and if a State opted for the latter, "the 'full regulatory burden [would] be borne by the Federal Government.'"

*Murphy*, 584 U.S. at 476. In *FERC*, the federal statute merely required "state utility regulatory commissions to consider, but not necessarily to adopt," certain federal standards. *Ibid.* Neither case involved a requirement that States either fund a federal regulatory program or surrender powers that otherwise would not be preempted by any federal regulation.

Finally, the Authority contends that the challenged provision is severable. HISA Br. 37. But again, this Court could remand for the lower courts to assess severability after identifying a constitutional problem. And regardless, even if this provision is severable, invalidating it would vindicate States' sovereign power to tax the horseracing industry.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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