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

PETITION FOR REHEARING

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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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PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, Petitioners the State of Oklahoma; the Oklahoma Horse Racing Commission; the Tulsa County Public Facilities Authority d/b/a Fair Meadows Racing and Sports Bar; the State of West Virginia; the West Virginia Racing Commission; Hanover Shoe Farms, Inc.; the Oklahoma Quarter Horse Racing Association; Global Gaming RP, LLC, d/b/a Remington Park; Will Rogers Downs, LLC; the United States Trotting Association; and the State of Louisiana respectfully petition for rehearing of this Court's June 24, 2024 order denying certiorari in this case.

GROUNDS FOR REHEARING

This case presents the exceptionally rare situation in which a significant "intervening circumstanc[e]"—the opening of a circuit split on the constitutionality of a federal statute—has arisen within 25 days of this Court's denial of certiorari. Sup. Ct. R. 44.2. There is now a square, acknowledged conflict between the Sixth Circuit's decision below and a contrary decision from the Fifth Circuit, which has held that the Horseracing Integrity and Safety Act ("HISA") violates the Constitution's private non-delegation doctrine. Moreover, this case presents a uniquely clean vehicle for the Court to resolve that conflict. In light of this development, the Court should grant rehearing and certiorari in this case.

I. THERE IS NOW A SQUARE AND OPEN CONFLICT BETWEEN THE COURTS OF APPEALS ON THE CONSTITUTIONALITY OF HISA.

The development of a circuit split over the constitutionality of a federal statute presents a quintessential case for certiorari, and this Court has previously granted rehearing in similar circumstances, where a circuit split arises shortly after the denial of certiorari. This case thus presents the rare situation where rehearing should be granted. *See* Sup. Ct. R. 44.2.

1. This case presents an important question of federal law: whether HISA violates the Constitution's private non-delegation doctrine. Pet. 13. When the certiorari petition in this case was filed and decided, however, there was no square circuit conflict on that question. This Court denied the petition on June 24, 2024.

But 11 days later, the Fifth Circuit held that HISA violates the private non-delegation doctrine. *Nat'l Horsemen's Benevolent & Protective Ass'n* v. *Black* ("*NHBPA*"), 2024 WL 3311366 (5th Cir. July 5, 2024). That decision openly conflicts with the Sixth Circuit's decision below.

The decision below acknowledged that the private Horseracing Integrity and Safety Authority ("Authority") "implements the Act, investigates potential rule violations, and enforces the rules through internal adjudications and external civil lawsuits," but it held that this exercise of federal enforcement power was permissible because "the FTC's rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities." Pet. App. 16a.

The Fifth Circuit, by contrast, has now held that "HISA's enforcement provisions are facially unconstitutional" and recognized that "[i]n doing so, we part ways with our esteemed colleagues on the Sixth Circuit." *NHBPA*, 2024 WL 3311366, at *1. As the Fifth Circuit explained, "[t]he power to launch an investigation, to search for evidence, to sanction, [and] to sue" "are all quintessentially executive functions" and "have been considered so from our Nation's founding." *Id.* at *7. And under HISA, it is the private Authority, not the FTC, that wields these executive powers. "The Act's plain terms permit only one conclusion: HISA is enforced by a private entity, the Authority." *Id.* at *8. It is the Authority that "decides whether to investigate a covered entity for violating HISA's rules," that "decides whether to subpoena the entity's records or search its premises," that "decides whether to sanction it," and that "decides whether to sue the entity for an injunction or to enforce a sanction it has imposed." *Ibid.* Nor does HISA "empower the FTC to countermand any of the Authority's investigatory or charging decisions" or require the Authority "to seek the FTC's approval before investigating, searching, charging, sanctioning, or suing." *Ibid.*

The Fifth Circuit therefore concluded that HISA's delegation of unchecked enforcement power to the Authority "is not permitted under the private nondelegation doctrine" because "[a] private entity that can investigate potential violations, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the say-so of the agency—does not operate under that agency's 'authority and surveillance.'" *NHBPA*, 2024 WL 3311366, at *8. As the court held, "[t]he statute empowers the Authority to investigate, issue subpoenas, conduct searches, levy fines, and

seek injunctions—all without the FTC's say-so. That is forbidden by the Constitution." *Id.* at *1.

In reaching this conclusion, the Fifth Circuit expressly rejected the premises underlying the Sixth Circuit's decision below. *First*, the Sixth Circuit had held that Petitioners' facial challenge to the Authority's enforcement power could not succeed because "the FTC *could* subordinate every aspect of the Authority's enforcement" through its rulemaking power under 15 U.S.C. § 3053(e). Pet. App. 17a. The Fifth Circuit, in contrast, "[w]ith great respect to [its] colleagues on the Sixth Circuit," disagreed, holding that the FTC cannot "use its new rulemaking authority to rein in the Authority's enforcement actions" or "require the Authority to preclear lawsuits with the agency." *NHBPA*, 2024 WL 3311366, at *10. As the Fifth Circuit noted, "HISA empowers the Authority to file suit to enjoin violations, while saying nothing about FTC involvement in the process," "[t]he same goes for investigatory and subpoena power," "[a]nd the same goes for charging and adjudicating violations and levying sanctions." *Id.* at *11 (citing 15 U.S.C. §§ 3054(e)(1)(E)(iv), (h), (j), 3055(c)(4)).

Second, the Fifth Circuit explained, "the Sixth Circuit believed the FTC could supervise the Authority through a slightly different kind of rulemaking—that is, by issuing rules governing *how* the Authority enforces HISA." *NHBPA*, 2024 WL 3311366, at *11. The Fifth Circuit "again disagree[d] with [its] sister circuit." *Ibid.* It noted that the issue is not "*how* the Authority exercises its enforcement power" but "*where* the enforcement power is lodged: on its face, HISA empowers private entities to enforce it and permits agency oversight only after the enforcement process is

over and done with (and then only with respect to fines, not injunctions)." *Ibid.*

Third, the Sixth Circuit held that "the FTC has full authority to review the Horseracing Authority's enforcement actions" because "the FTC may reverse the Authority's decision" to impose a civil sanction. Pet. App. 17a (citing 15 U.S.C. § 3058(c)). But the Fifth Circuit rejected the argument that the FTC's power to "review sanctions at the back end" renders the Authority's "enforcement power . . . subordinate to the FTC." *NHBPA*, 2024 WL 3311366, at *9. It did so because, prior to FTC review of the ultimate sanction issued by the Authority, HISA permits the Authority to "launch an investigation into [a horse] owner, subpoena his records, search his facilities, charge him with a violation, adjudicate it, and fine him," each of which "is 'enforcement' of HISA" that "can occur under HISA *without any supervision* by the FTC." *Ibid.* (emphasis added). Furthermore, the Authority's enforcement power may pressure sanctioned parties to "settle for a lower fine" and "the settlement scenario—which will likely happen often—only underscores that it is the private entity that acts as HISA's enforcer in any meaningful sense." *Ibid.*

2. The emergence of a square and acknowledged circuit split over the constitutionality of a federal statute makes this case the paradigmatic candidate for rehearing and certiorari. Where, as here, the courts of appeals disagree over whether a federal statute violates the Constitution, "certiorari is usually granted because of the obvious importance of the case." Stephen M. Shapiro et al., *Supreme Court Practice* 4-35 (11th ed. 2019); *see also* Sup. Ct. R. 10(a).

Moreover, this Court has granted petitions for rehearing where a circuit split develops after the denial

of a petition for certiorari. For example, in *Kent Recycling Services, LLC* v. *U.S. Army Corps of Engineers*, the Court granted a petition for rehearing when a circuit split arose 18 days after the Court denied certiorari. 578 U.S. 1019 (2016). Similarly, in *United States* v. *Ohio Power Co.*, this Court granted a petition for rehearing when a conflict between the Second Circuit and the Court of Claims emerged after the denial of certiorari. 353 U.S. 98, 98-99 (1957) (per curiam). Again, the Court granted a petition for rehearing in *McGrath* v. *Manufacturers Trust Co.* when a circuit split emerged five months after the Court had denied certiorari. 338 U.S. 241, 245-46 (1949). And, in *Sanitary Refrigerator Co.* v. *Winters*, "the petition for the writ of certiorari was filed before" a conflicting Third Circuit decision "had been handed down; and was then denied." 280 U.S. 30, 34 n.1 (1929). "But after the handing down of that opinion showing the conflict . . . was brought to our attention by a petition for rehearing, the certiorari was granted." *Ibid.*

The emergence of a clear conflict on the important question whether HISA unconstitutionally violates the private non-delegation doctrine—a conflict that arose just 11 days after this Court denied certiorari—thus presents the exact extraordinary circumstance in which a petition for rehearing should be granted.

II. THIS CASE PRESENTS THE IDEAL VEHICLE TO RESOLVE THE CONFLICT.

The Court should grant this petition for rehearing, rather than waiting for a certiorari petition from the Fifth Circuit, for two reasons. First, the conflict between the Fifth and Sixth Circuits' decisions will result in significant regulatory disuniformity and uncertainty in the horseracing industry. This case offers the Court the opportunity to resolve that uncertainty

as early as possible. Second, this case presents the ideal vehicle in which to resolve the question presented.

1. Racetracks, horse owners, breeders, jockeys, and veterinarians urgently need to know who has the power to regulate the horseracing industry. As one Louisville, Kentucky, newspaper piece put it soon after the Fifth Circuit struck down HISA, "[t]he longer the horse racing industry, which desperately needs uniformity, remains trapped in a leadership purgatory of sorts, the worse off it will be." C.L. Brown, *Horse Racing Needs Unity, but Road to Getting There May Be Long as Battles Continue*, Louisville Courier Journal (July 9, 2024, 5:43 PM), https://tinyurl.com/4cb4t9jz. Until this Court resolves the uncertainty, members of the nationwide horseracing industry will be subject to the private Authority's investigations and enforcement actions in Kentucky, Michigan, Ohio, and Tennessee, but not in Texas, Louisiana, or Mississippi, where the industry will be subject only to the state racing commissions that have traditionally regulated horseracing.

This state of affairs sows chaos and undermines the plain objective of Congress in enacting HISA. As the FTC has noted, "[t]he bedrock principle of the Act is the need for uniformity." FTC, *Order Disapproving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority* 1-2 (Dec. 12, 2022), https://tinyurl.com/bdps3n2z (citing 15 U.S.C. §§ 3055(b)(3), 3056(b)(2)). Accordingly, after the Fifth Circuit held the pre-amendment version of HISA unconstitutional, the FTC disapproved the Authority's proposed Anti-Doping and Medication Control rule because approval "would not

result in uniformity" and "confusion could result for industry participants and regulators in the jurisdictions affected by the Fifth Circuit's decision." *Id.* at 2. Until this Court finally resolves "the legal uncertainty regarding the Act's constitutionality," *ibid.*, the horseracing industry will be subject to a patchwork of different state, private, and federal regulators, whose respective allocations of power will differ based on the jurisdictions in which covered parties operate. This Court should provide that urgently needed clarity as soon as possible by granting this petition. *See Comm'r* v. *Bilder*, 369 U.S. 499, 501 (1962) (certiorari granted because of "the need for a uniform rule on [a] point" on which the courts of appeals were divided).

2. This case also presents a clean vehicle to resolve the constitutional question. There is a threshold jurisdictional issue in the Fifth Circuit case concerning the finality of the district court's decision which could prevent this Court from reaching the merits. *See* Cert. Reply 9 n.1; *see also* Authority Response Brief 1-2, *NHBPA* v. *Black*, No. 23-10520 (5th Cir. Aug. 4, 2023), ECF No. 114 (contending that Fifth Circuit "lacks jurisdiction"); FTC Response Br. 13-16, *NHBPA* v. *Black*, No. 23-10520 (5th Cir. Aug. 4, 2023), ECF No. 113 (noting that the question whether the Fifth Circuit had appellate jurisdiction "is not free from doubt"). And a similar challenge to the constitutionality of HISA pending in the Eighth Circuit arises in an interlocutory posture. *See* Cert. Reply 9 n.1.

This case, by contrast, cleanly presents the constitutional question after a final judgment on the merits without any complicating vehicle issues.

Because this case is the most suitable vehicle for resolving the circuit conflict—and for providing urgently needed clarity on an important question of federal law—this Court should grant certiorari.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

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