

No. 23-402

In the Supreme Court of the United States

STATE OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS
IN RESPONSE TO THE PETITION FOR REHEARING**

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In the decision below, the Sixth Circuit rejected petitioners' contention that the enforcement provisions of the Horseracing Integrity and Safety Act of 2020 (Horseracing Act or Act), Pub. L. No. 116-260, Div. FF, Tit. XII, 134 Stat. 3252, violate the private nondelegation doctrine on their face. See Pet. App. 16a-17a. This Court denied a petition for a writ of certiorari seeking review of that decision. The Fifth Circuit subsequently held that the Act's enforcement provisions do violate the private nondelegation doctrine on their face, see *National Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 421 (2024), while the Eighth Circuit held that they do not, see *Walmsley v. FTC*, 117 F.4th 1032, 1039-1040 (2024). Petitioners now ask (Reh'g Pet. 1) the Court to reconsider the denial of certiorari in this case.

1. The government and the Horseracing Integrity and Safety Authority (Authority) have both filed petitions for writs of certiorari seeking review of the Fifth Circuit’s decision. See Pet., *FTC v. National Horsemen’s Benevolent & Protective Ass’n*, No. 24-429 (filed Oct. 16, 2024); Pet., *Horseracing Integrity & Safety Authority, Inc. v. National Horsemen’s Protective & Benevolent Ass’n*, No. 24-433 (filed Oct. 15, 2024). The question presented in those petitions—whether the Act’s enforcement provisions violate the private nondelegation doctrine on their face—warrants this Court’s review. That question is now the subject of a circuit conflict, and this Court ordinarily reviews court-of-appeals decisions holding Acts of Congress facially unconstitutional.

The petitions for writs of certiorari filed by the Authority and the government in *National Horsemen* provide the best vehicles for resolving that question. Granting those petitions would allow this Court to directly address the reasoning of the only court of appeals that has found a constitutional violation. The petition for rehearing in this case should be held pending the Court’s resolution of those cases and then disposed of as appropriate.

2. The petition for a writ of certiorari in this case raises additional issues as well. Petitioners contend (Pet. 17-20) that the Horseracing Act’s rulemaking provisions violate the private nondelegation doctrine. They also contend (Pet. 30-35) that the Act’s fee provisions violate the anticommandeering doctrine.

The Court’s denial of the petition for a writ of certiorari in this case reflected a determination that those additional questions did not warrant further review, and no intervening development casts doubt on that determination. Petitioners’ additional contentions lack merit, see

Gov't Br. in Opp. 8-9, 12-14, and they are not the subject of a circuit conflict. The Fifth and Eighth Circuits both agreed with the Sixth Circuit that the Act's rulemaking provisions comply with the Constitution. See *National Horsemen*, 107 F.4th at 423-426; *Walmsley*, 117 F.4th at 1038-1039. The Fifth Circuit dismissed an anti-commandeering claim for lack of standing, see *National Horsemen*, 107 F.4th at 440, and no anti-commandeering claim was raised in the Eighth Circuit.

3. Petitioners observe (Reh'g Pet. 8) that the parties in *National Horsemen* briefed a jurisdictional issue: whether the challengers intended to preserve claims that the district court had not resolved, thereby preventing the court's order from qualifying as a final judgment and depriving the Fifth Circuit of appellate jurisdiction. The district court in that case, however, found that the challengers had "voluntarily withdr[awn]" any such additional claims. Judgment at 1, *National Horsemen's Benevolent & Protective Ass'n v. Black*, No. 21-cv-71 (N.D. Tex. May 4, 2023). The challengers subsequently eliminated any uncertainty on that point by confirming on appeal that they had abandoned those claims. See Gulf Coast C.A. Reply Br. at 5-9, *National Horsemen*, *supra* (No. 23-10520).

If this Court remains concerned about jurisdiction in *National Horsemen*, it should grant the petition for a writ of certiorari in either *Walmsley* or this case. But the Court should limit the grant to the only question that warrants its review: whether the Horseracing Act's enforcement provisions violate the private non-delegation doctrine on their face.

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The petition for rehearing should be held pending this Court's resolution of *FTC v. National Horsemen's Benevolent & Protective Ass'n*, petition for cert. pending, No. 24-429 (filed Oct. 16, 2024), and *Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n*, petition for cert. pending, No. 24-433 (filed Oct. 15, 2024), and then disposed of as appropriate. Alternatively, the petition for rehearing should be granted, and the petition for a writ of certiorari should be granted limited to the question whether the Horseracing Act's enforcement provisions violate the private nondelegation doctrine on their face.

Respectfully submitted.

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