No. 23-402

In The
Supreme Court of the United States

OKLAHOMA, ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONSE OF HORSERACING INTEGRITY AND SAFETY AUTHORITY RESPONDENTS TO PETITION FOR REHEARING

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RULE 29.6 DISCLOSURE

Respondent Horseracing Integrity and Safety Authority, Inc. is a nonstock, nonprofit corporation organized under the General Corporation Law of the State of Delaware. The Horseracing Integrity and Safety Authority, Inc. has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it. No other Respondent is a nongovernmental corporation.

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INTRODUCTION

The Horseracing Integrity and Safety Authority (Authority) Respondents agree that this Court should review whether the enforcement provisions of the Horseracing Integrity and Safety Act (HISA) facially violate the private-nondelegation doctrine. After this Court denied certiorari in this case, the Fifth Circuit expressly contradicted the Sixth Circuit's decision on that important question (and that question alone), and both the Authority and the Solicitor General have filed certiorari petitions from the Fifth Circuit's judgment. Nos. 24-429, 24-433. The Court should grant those petitions and hold the petition here.

I. THE COURT SHOULD REVIEW WHETHER THE ACT'S ENFORCEMENT PROVISIONS FACIALLY VIOLATE THE PRIVATE-NONDELEGATION DOCTRINE

For the reasons the Authority has explained in its own certiorari petition for review of the Fifth Circuit's judgment in a parallel case, *see Horseracing Integrity and Safety Auth., Inc. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24-433 (U.S. Oct. 15, 2024), the question of whether HISA's enforcement provisions facially violate the private-nondelegation doctrine now warrants this Court's review.

A. There Is Now A Square Conflict Among The Courts Of Appeals

When this Court denied the Petition, every federal court that had resolved challenges to the amended Act had reached the same conclusion: HISA is constitutional. The Fifth Circuit subsequently contradicted that consensus in one important way: it

held that "HISA's enforcement provisions are facially unconstitutional" because "the Authority's enforcement power is not subordinate to FTC oversight." *National Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 421, 426 (5th Cir. 2024). The Eighth Circuit then confirmed the circuit split and joined the Sixth Circuit in rejecting a materially identical private-nondelegation claim: it held that "the statute's enforcement provisions are not unconstitutional on their face and in all of their applications" "[b]ecause the Commission has broad power to subordinate the Authority's enforcement activities." *Walmsley v. Federal Trade Comm'n*, 117 F.4th 1032, 1039-1040 (8th Cir. 2024). That undisputed circuit conflict now calls out for this Court's review.

Specifically, the Fifth Circuit's decision "part[s] ways" with the Sixth and Eighth Circuits' decisions in two key respects. *National Horsemen's*, 107 F.4th at 421.

1. The Fifth Circuit's decision contradicts the Sixth and Eighth Circuits' approach to identical facial constitutional challenges. The two latter circuits concluded that the "potential" that "the FTC *could* subordinate every aspect of the Authority's enforcement" through the plenary rulemaking power Congress conferred on the agency "suffices to defeat a facial challenge." Pet. App. 17a.; *Walmsley*, 117 F.4th at 1039-1040 ("Because the Commission has broad power to subordinate the Authority's enforcement activities, the statute is not unconstitutional in all its applications."). That conclusion followed from the circuits' understanding that, "[i]n evaluating a facial

challenge, [a court] must consider circumstances in which the statute is most likely to be constitutional, not hypothetical scenarios in which the statutory scheme might raise constitutional concerns." *Walmsley*, 117 F.4th at 1039; *see* Pet. App. 17a. Thus, to the extent there is any doubt about the "potent answer" that the FTC's independent rulemaking power offers for how the agency may superintend future enforcement activity, the courts reasoned that resolution of that doubt should await a case "when the Authority's actions and the FTC's oversight appear in concrete detail, presumably in the context of an actual enforcement action." Pet. App. 20a-21a.

By contrast, the Fifth Circuit brushed aside concern that resolution of the constitutionality of the enforcement provisions in their entirety is "premature." *National Horsemen's*, 107 F.4th at 426. It instead viewed the case as a "purely legal challenge" turning on "HISA's clear delineation of enforcement power." *Id.* at 426, 433 (citation omitted). The facial nature of the challenge had the opposite effect as in the Sixth and Eighth Circuits: identifying the plaintiffs' decision to forgo "as-applied challenges" as a virtue, the Fifth Circuit confined its analysis to determining "*where* the enforcement power is lodged" to avoid ever having to consider "*how* the Authority exercises its enforcement power" or how the FTC exercises its oversight in any particular circumstance. *Id.* at 433 (citing Pet. App. 16a-17a). In doing so, the Fifth Circuit relied on certain provisions of HISA that have never been invoked—like the one "empower[ing] the Authority to file suit to enjoin violations"—to determine that the FTC would "amend the

enforcement scheme delineated by statute" if it exercised its rulemaking power to control any enforcement activities. *Id.* at 432.

2. On the merits, the Fifth Circuit rejected several premises underlying the other circuits' conclusion that HISA's enforcement provisions are constitutional. The Fifth Circuit was "not convinced," for example, that the independent rulemaking power the congressional amendment conferred on the FTC in response to private-nondelegation concerns "can save the Authority's enforcement powers." *National Horsemen's*, 107 F.4th at 431 (citing Pet. App. 17a). "With great respect to [its] colleagues on the Sixth Circuit," the Fifth Circuit reasoned that allowing the FTC to "use its new rulemaking authority to rein in the Authority's enforcement actions" would "rewrite" the "statutory division of labor." *Id.* The Eighth Circuit subsequently rejected that reasoning and instead "agree[d] with the Sixth Circuit that the statute is not unconstitutional on its face because the Commission's rulemaking and revision power gives it 'pervasive oversight and control of the Authority's enforcement activities.'" *Walmsley*, 117 F.4th at 1039 (quoting Pet. App. 16a).

The Fifth Circuit also set aside the significance the Sixth and Eighth Circuits attached to the FTC's "full authority to review the Horseracing Authority's enforcement actions." Pet. App. 17a; *see Walmsley*, 117 F.4th at 1039 ("The Commission has power to review the Authority's enforcement actions and to reverse them."). Such *de novo* review and factfinding "is no answer," according to the Fifth Circuit, because it comes "at the tail-end" of the process after other

enforcement activities already occurred. *National Horsemen's*, 107 F.4th at 430. Relatedly, the Fifth Circuit took issue with "[t]he Sixth Circuit['s] reli[ance] on several cases upholding the constitutionality of FINRA" and other self-regulatory organizations that "enforc[e] securities laws" pursuant to the same review framework. *Id.* at 434 & n.18 (citing Pet. App. 13a).

B. The Facial Validity Of HISA's Enforcement Provisions Is An Issue Of Exceptional Importance

The constitutionality of HISA's enforcement provisions presents an important and unresolved legal question. Several members of this Court have observed the "need to clarify the private non-delegation doctrine." *Texas v. Commissioner*, 142 S. Ct. 1308 (2022) (Alito, J., joined by Thomas & Gorsuch, JJ., respecting denial of certiorari). Indeed, the Court granted certiorari to address application of the "so-called 'private nondelegation doctrine'" a decade ago, but the Court did not reach that issue because it disagreed with the premise that the entity in question was private. *Department of Transp. v. Association of Am. R.Rs.*, 575 U.S. 43, 87 (2015) (Thomas, J., concurring). Applying that precedent to HISA, courts of appeals on both sides of the circuit split squarely determined that "the Authority is a private entity." *National Horsemen's*, 107 F.4th at 440; *Walmsley*, 117 F.4th at 1041; *see also* Pet. App. 6a (explaining that Authority is a "private nonprofit corporation"). The courts' follow-on holdings regarding the constitutionality of HISA's enforcement provisions under the private-nondelegation doctrine present the

"appropriate" context for this Court to review the doctrine. *Texas*, 142 S. Ct. at 1308-1309.

As Petitioners attest (Reh'g Pet. 7-8), the issue has significant practical consequences as well. Congress enacted (and amended) HISA because it was "[a]larmed" by the "spate of doping scandals and racetrack fatalities" jeopardizing the sport and endangering equine and human lives. *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 873 (5th Cir. 2022); *see* Amici Br. of Sen. McConnell et al. in Support of Stay Appl. 5, *Horseracing Integrity & Safety Auth. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Sept. 24, 2024) ("McConnell Br.") ("Before HISA, horseracing was close to collapse."). "Whether it's the risk of pushing horses past their limits or the risks associated with unsafe tracks and doping, or other health and safety issues facing horses and jockeys, no one doubts the imperative for [the] oversight" that the Act brings and the prior state-by-state landscape impeded. Pet. App. 6a.

Even among those who believe the regime "has its flaws," "[t]here's no denying HISA's impact in making the industry safer." C.L. Brown, *Horse Racing Needs Unity, But Road To Getting There May Be Long As Battles Continue*, LOUISVILLE COURIER J. (July 9, 2024).[1] Over the past two-plus years of HISA's enforcement, the nationwide program has become "firmly embedded into the Thoroughbred industry and is already yielding substantial benefits—racetrack conditions are improving, equine fatality rates are

[1] https://perma.cc/KR9G-9A6E.

declining, and wagers from racing fans are increasing." Amici Br. of Thoroughbred Industry Participants in Support of Stay Appl. 2, *Horseracing Integrity & Safety Auth. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Sept. 25, 2024).

The "chaos" caused by the circuit split (Reh'g Pet. at 7) threatens to reverse that progress and jeopardize the sport. If the Authority cannot enforce HISA rules in certain jurisdictions or with respect to certain participants, it is unclear who (if anyone) will. *See* Stay Appl. 27-28, *Horseracing Integrity & Safety Auth. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Sept. 19, 2024). "[T]he need for a uniform rule" compels "grant[ing] certiorari to resolve the conflict," *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962)—particularly given that "[t]he bedrock principle of [HISA] 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).[2] Only this Court can provide the authoritative ruling and certainty the nationwide industry needs.

The answer to the question presented will also have broad ramifications aside from horseracing, as the "well-established model" on which HISA was based governs several "other important areas of our economy." McConnell Br. 4. Most obviously, Congress has repeatedly reaffirmed "its commitment" to a parallel agency-oversight framework in the financial sector based on "the SEC's review of disciplinary

[2] https://tinyurl.com/y76468ta.

actions" by self-regulatory organizations like FINRA and around two dozen national security exchanges like NASDAQ. *National Ass'n of Secs. Dealers v. SEC*, 431 F.3d 803, 807-808 (D.C. Cir. 2005) (citation omitted); *see, e.g.*, 15 U.S.C. § 78s(c)-(e). A similar model guides other industries, from the Commodity Futures Trading Commission's oversight of the private National Futures Association, 7 U.S.C. § 21(h)-(k), to the Federal Energy Regulatory Commission's oversight of the private North American Electric Reliability Corporation, 16 U.S.C. § 824*o*(d)-(f). While the decision below looked to the "securities law" model as an "illuminating example," Pet. App. 12a, the Fifth Circuit's contrary ruling calls into question all of these longstanding and effective governance relationships.

II. THE ACT'S RULEMAKING PROVISIONS DO NOT WARRANT REVIEW

The Court should limit its review to the facial constitutionality of HISA's enforcement provisions. Every court that has resolved a parallel challenge to the operative version of HISA (including the Fifth Circuit)—and every single judge sitting on those courts (without exception)—has concluded that "the Act's rulemaking structure does not violate the private nondelegation doctrine." *Walmsley*, 117 F.4th at 1038 ("agree[ing] with the Sixth and Fifth Circuits," the Eastern District of Arkansas, and the Northern District of Texas); *see National Horsemen's*, 107 F.4th at 423-426; Pet. App. 13a-16a. Even as the Fifth Circuit contradicted the decision below on the validity of HISA's enforcement provisions, it held that "the Sixth Circuit correctly observed[] [that] '§ 3053(e)'s amended text gives the FTC ultimate discretion over

the content of the rules,' which 'makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one.'" *National Horsemen's*, 107 F.4th at 424. The FTC's "authority to modify *any* rules for any reason at all, including policy disagreements, ensures that the FTC retains ultimate[] authority over the implementation of the Horseracing Act." *Id.* at 425 (alteration in original) (quoting Pet. App. 17a-18a).

The Authority explained previously that the constitutional consensus on HISA's rulemaking provisions follows from the agency-subordination standard Petitioners embraced below, comports with this Court's precedents, and fits alongside the unbroken line of appellate decisions upholding the materially identical Maloney Act. Authority's Br. in Opp. at 13-29. The rehearing petition does not disturb that conclusion. On the contrary, Petitioners argue that "the Court should grant rehearing and certiorari in this case" only "[i]n light of" the intervening "opening of a circuit split," which is cabined to the facial validity of HISA's *enforcement* proceedings. Reh'g Pet. 1.[3]

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[3] The rehearing petition does not even mention the anti-commandeering question raised in the original certiorari petition. For good reason: The Fifth Circuit shot down a similar "anti-commandeering challenge to HISA" on standing grounds, *National Horsemen's*, 107 F.4th at 440, joining every other court that has faced the issue and uniformly rejected it, *see* Authority Br. in Opp. at 33-37.

III. THE COURT SHOULD HOLD THE PETITION IN THIS CASE

Beside this rehearing petition, the Court now has before it certiorari petitions from the Fifth and Eighth Circuit cases presenting the same question regarding the facial constitutionality of HISA's enforcement provisions. *See Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24-433; *Federal Trade Comm'n* v. *National Horsemen's Benevolent & Protective Ass'n*, No. 24-429; *Walmsley v. Federal Trade Comm'n*, No. 24-420.[4]

Although the Authority welcomes consideration of that question presented through any of the three cases, the petitions filed by the Authority and the Solicitor General in *National Horsemen's* present the best vehicle for resolving it. Granting those petitions would allow for direct review of the reasoning of the only court of appeals that has held the Act facially unconstitutional. Moreover, because *National Horsemen's* was litigated on remand after the decision below, the Fifth Circuit engaged with the Sixth Circuit's reasoning on a full record following trial. The *Walmsley* decision arises in a preliminary-injunction context, where the district court did not issue a written opinion and the Eighth Circuit resolved only whether the challengers had "show[n] a fair chance of success on the merits." 117 F.4th at 1038.

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[4] The *National Horsemen's* plaintiffs agree that the Court should review that question, and they have filed certiorari petitions raising other questions. Nos. 24-465, 24-472, 24-489.

The Court should grant the petitions by the Authority and the Solicitor General in *National Horsemen's*, consolidate those two cases, and hold the petition in this case pending resolution of the merits in those cases. If the Court does grant certiorari in this case, it should reformulate the question presented to limit its review to the only issue on which the courts of appeals are divided: whether HISA's *enforcement* provisions are facially unconstitutional under the private-nondelegation doctrine.

CONCLUSION

The Court should hold the petition in this case pending resolution of the merits of the certiorari petitions filed by the Authority and the Solicitor General in *National Horsemen's*. If the Court grants certiorari in this case, it should limit its review to whether HISA's enforcement provisions are facially unconstitutional under the private-nondelegation doctrine.

Respectfully submitted.

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