No. _____

In the Supreme Court of the United States

BILL H. WALMSLEY; JON MOSS; IOWA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

BRETT D. WATSON
Brett D. Watson, Attorney at Law, PLLC
P.O. Box 707
Searcy, AR 72145
(501) 281-2468

AUSTIN L. RAYNOR
Counsel of Record
FRANK D. GARRISON
JOSHUA M. ROBBINS
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
(202) 888-6881
araynor@pacificlegal.org

Counsel for Petitioners

QUESTIONS PRESENTED

The Horseracing Integrity and Safety Act, 15 U.S.C. §§ 3051-3060, delegates broad enforcement powers over regulated parties in the horseracing industry to a private corporation, the Horseracing Integrity and Safety Authority. Among other things, the statute empowers the Authority to conduct investigations, impose sanctions, and sue in federal court. §§ 3054, 3057. In addition, the Act grants the Authority broad rulemaking power. The Act requires the Federal Trade Commission to approve rules proposed by the Authority even if it disagrees with those rules as a policy matter, so long as they are "consistent" with the Act and the FTC's own regulations, § 3053(c)(2), though the Act also grants the FTC the after-the-fact power to "abrogate, add to, and modify" Authority rules, § 3053(e).

The questions presented are:

1. Whether the Act unlawfully delegates enforcement power to the Authority.

2. Whether the Act unlawfully delegates rulemaking power to the Authority.[1]

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[1] Two other cases currently pending before the Court present substantially similar questions. *See Horseracing Integrity and Safety Auth., Inc. v. Nat'l Horsemen's Benevolent and Protective Ass'n*, No. 24A287 (stay app. filed Sept. 19, 2024); *Oklahoma v. United States*, No. 23-402 (pet. filed Oct. 13, 2023).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners were plaintiffs in the district court. They are Bill Walmsley, Jon Moss, and the Iowa Horsemen's Benevolent and Protective Association.

Respondents were defendants in the district court. They are the Federal Trade Commission; Lina M. Khan, Chair, Federal Trade Commission; Rebecca Kelly Slaughter, Commissioner, Federal Trade Commission; Melissa Holyoak, Commissioner, Federal Trade Commission; Alvaro Bedoya, Commissioner, Federal Trade Commission; the Horseracing Integrity and Safety Authority; Charles Scheeler; Steve Beshear; Adolpho Birch; Leonard Coleman; Joseph De Francis; Ellen McClain; Susan Stover; Bill Thomason; and D.G. Van Clief.[2]

Messrs. Walmsley and Moss are natural persons. The Iowa Horsemen's Benevolent and Protective Association does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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[2] Christine Wilson, former Commissioner of the Federal Trade Commission, was a defendant in the district court but has since been substituted.

STATEMENT OF RELATED CASES

These proceedings are directly related to the above-captioned case under Rule 14.1(b)(iii):

Walmsley v. Federal Trade Comm'n, No. 23-2687 (8th Cir. Sept. 20, 2024)

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PETITION FOR A WRIT OF CERTIORARI

The Constitution establishes three—and only three—branches of government. And it vests each with a distinctive form of sovereign power. The legislative power is vested in Congress. U.S. Const. art. I, § 1. The executive power is vested in the President. *Id.* art. II, § 1, cl. 1. And the judicial power is vested in this Court and whatever inferior courts Congress may establish. *Id.* art. III, § 1. Each vesting is permanent and cannot be altered by the branches themselves, either with or without the consent of the relevant branch. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

The Constitution's separation of powers exists to "safeguard[] liberty," *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting), by dispersing power and preventing its accumulation in a single body or individual, a state of affairs the Framers described as the "very definition of tyranny," *The Federalist Papers* No. 47 (Feb. 1, 1788) (J. Madison). Just as significantly, when a particular power is transplanted outside of its assigned branch, it escapes the democratic and institutional checks—such as bicameralism or appointment—that the Constitution imposes on its exercise as a safeguard against government overreach.

To be sure, modern government has been characterized by vast delegations of power to administrative agencies, the *de facto* "fourth branch." Those delegations have taxed the structure the Founders established. But this case involves a more extreme departure from that structure—a delegation of governmental power to a private entity. "This is legislative delegation in its most obnoxious form,"

Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936), for which "there is not even a fig leaf of constitutional justification," *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 62 (2015) (Alito, J., concurring). Because the Constitution vests private parties with *no* part of sovereign power, they may not exercise any of it.

The Horseracing Integrity and Safety Act flouts that bedrock principle. It delegates power to a private entity, the Horseracing Integrity and Safety Authority, to perform indisputably sovereign and coercive functions like conducting searches, issuing subpoenas, and making binding rules of private conduct. And it subjects the Authority only to limited, after-the-fact oversight by a federal agency. The Authority is not merely an "aid" to the government. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). From the perspective of its victims, it *is* the government. That is impermissible.

In concluding otherwise, the court of appeals contributed to a square circuit conflict over the constitutionality of a significant federal statute on a subject that multiple Justices have recognized cries out for this Court's clarification. *See Texas v. Comm'r of Internal Rev.*, 142 S. Ct. 1308, 1309 (2022) (statement of Alito, J., respecting the denial of certiorari, joined by Thomas and Gorsuch, JJ.); *cf. United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 442 (2023) (Kavanaugh, J., concurring, joined by Barrett, J.). This case presents an especially clean vehicle, free from threshold questions or other obstructions, for resolving this important question of law.

The Framers were right about many things. But one thing they misapprehended was the extent to which each branch would jealously guard its own prerogatives. *See The Federalist Papers* No. 51 (Feb. 8, 1788) ("Ambition must be made to counteract ambition."). Congress and the Executive Branch have proven all too willing to cede their authority when it is politically expedient to do so. This Court is the last bulwark against that consensual degradation of the Constitution's structure. It should intervene to ensure that the people are subject to exercises of sovereign authority only by government officials who are, in turn, subject to the people themselves.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-17a) is not yet reported but is available at 2024 WL 4248221. The order and accompanying transcript of the district court (App. 18a-58a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in the appendix to this petition. App. 60a-123a.

STATEMENT OF THE CASE

A. Congress adopts the Horseracing Integrity and Safety Act

For nearly 250 years, horseracing was subject predominantly to state and local regulation.[1] But in 2020, Congress effectively federalized the industry by enacting the Horseracing Integrity and Safety Act (HISA or Act). *See* Pub. L. No. 116-260, Div. FF, Tit. XII, §§ 1201-1212, 134 Stat. 1182, 3252-75 (2020) (codified at 15 U.S.C. §§ 3051-3060). HISA establishes a comprehensive regulatory and enforcement regime governing, among other things, doping, medication, and track safety. Rather than charge a federal agency with implementing the Act, Congress conferred principal authority on a private entity, the Horseracing Integrity and Safety Authority (Authority), nominally supervised by the Federal Trade Commission (FTC or Commission).

1. The Authority is a "private, independent, self-regulatory, nonprofit corporation" governed by a nine-member Board of Directors comprising five "independent" members and four "industry" members. § 3052(b).[2] The Board members are not appointed or removable by the President, the head of any department, or the courts, *see* U.S. Const. art. II, § 2, cl. 2, but instead are selected under the Authority's bylaws, § 3052(b)(3). The Authority also includes both an "anti-doping and medication control standing

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[1] Joan S. Howland, *Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 Marq. Sports L. Rev. 473, 488-506 (2004).

[2] Unless otherwise noted, all Code citations are to Title 15.

committee" and a "racetrack safety standing committee," which "provide advice and guidance to the Board on the development and maintenance of" the anti-doping and racetrack safety programs. § 3052(c).

The Authority's regulatory jurisdiction is vast. *See* § 3054(a). Congress granted it power over "any Thoroughbred horse . . . [and] any horserace involving covered horses that has a substantial relation to interstate commerce," § 3051(4)-(5), as well as the power to expand its own jurisdiction to encompass other horse breeds upon the election of a "State racing commission or a breed governing organization," § 3054(*l*)(1). The Authority also enjoys jurisdiction over, among others, "all trainers, owners, breeders, jockeys, racetracks, veterinarians," and "other horse support personnel who are engaged in the care, training, or racing of covered horses." § 3051(6).

The Act requires all "covered persons" to register with the Authority and comply with specified Authority rules as a "condition of participating in covered races and in the care, ownership, treatment, and training of covered horses." § 3054(d)(1)-(3). Covered persons who fail to do so are subject to civil sanctions as specified by the Authority. §§ 3054(d)(4), 3057(a)(2)(G), (d).

2. Congress delegated equally vast power to the Authority to make rules, issue guidance, and set fees within the scope of its jurisdiction. The Authority is broadly tasked with "developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces." § 3052(a). And it has the power to make rules covering everything from "permitted and prohibited

medications, substances, and methods," to "racetrack safety standards and protocols," to "a schedule of civil sanctions for violations" and "a process or procedures for disciplinary hearings." § 3053(d).

The Authority must submit proposed rules to the FTC, § 3053(a), which "shall" publish them in the Federal Register and provide an opportunity for public comment, § 3053(b)(1). The statute then mandates that, "[n]ot later than 60 days" after publication, the FTC "shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—(A) this chapter; and (B) applicable rules approved by the Commission." § 3053(c)(1)-(2). Under that limited consistency review, the FTC has no discretion to disapprove the Authority's rules on policy grounds. *See National Horsemen's Benevolent and Protective Association v. Black*, 53 F.4th 869, 885-86 (5th Cir. 2022) (*Black I*). Following FTC approval, the Authority's rules become federal law binding on all persons covered by HISA. *See* § 3054(b).

Nor is the Authority's legislative delegation limited to traditional rulemaking. The Authority may also issue guidance interpreting its own rules. § 3054(g). And it may set the fees that industry participants must pay to fund the Authority's own activities. § 3052(f)(1)(C), (2)-(4).

3. HISA delegates to the Authority the power not only to issue regulations, but to enforce the regulations that it adopts. The Act grants the Authority comprehensive "investigatory authority," including the power to conduct searches and issue subpoenas. § 3054(c)(1)(A), (h). It also empowers the Authority to create a scheme of civil penalties,

§ 3054(i), which may include "lifetime bans from horseracing, disgorgement of purses, monetary fines and penalties, and changes to the order of finish in covered races," § 3057(d)(3)(A). And it grants the Authority a menu of remedial options for imposing those penalties. The Authority may file civil lawsuits against alleged violators in federal court for penalties or injunctive relief. § 3054(j). Alternatively, the Authority may enforce compliance in an administrative proceeding, subject to review by the FTC. § 3058.

B. Congress amends HISA in an effort to cure a constitutional defect

1. In November 2022, the Fifth Circuit held the original version of HISA facially unconstitutional because it impermissibly delegated rulemaking power to the Authority, a private entity. *Black I*, 53 F.4th at 872. The court recognized that under the "private-nondelegation doctrine," "a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Id.* at 881 (footnote omitted); *see Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

The court concluded that HISA did not satisfy that test. It noted that the Act granted the Authority "'sweeping' power," allowing it "to craft entire industry 'programs'" through rulemaking. *Black I*, 53 F.4th at 882-83 (citation omitted). At the same time, the statute failed to provide the FTC with the requisite degree of oversight. In the court's view, the statute's "consistency review" was "too limited to ensure the Authority functions subordinately to the agency," *id.* at 884 (cleaned up), because it excluded

review of the Authority's "policy choices"—a constraint the FTC itself had acknowledged in prior rulemakings, *id.* at 885-86. Ultimately, the court concluded that "[a]n agency does not have meaningful oversight if it does not write the rules, cannot change them, and cannot second-guess their substance." *Id.* at 872.

2. Congress responded to *Black I* by amending HISA to grant the FTC additional authority over the rulemaking process. *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. O, Tit. VII, 136 Stat. 4459, 5231 (2022). Specifically, Congress revised Section 3053(e), which now states:

> The Commission, by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Authority promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.

§ 3053(e).

The amendment did not, however, change any other aspect of the rulemaking process, including Section 3053(c), which still requires the FTC to approve the Authority's rules if they are "consistent with" HISA and regulations thereunder. § 3053(c)(2). Nor did Congress grant the FTC any additional supervision over the Authority's enforcement actions.

C. Factual and procedural background

1. Petitioners Bill Walmsley, Jon Moss, and the Iowa Horsemen's Benevolent Protective Association (HBPA) are all involved in the horseracing industry. Mr. Walmsley is the head of the Arkansas chapter of the HBPA, a group dedicated to providing housing, meals, and other assistance to employees in the industry. Compl. 1. Mr. Moss is a member of the Iowa chapter of the HBPA, which counts as members over 900 horsemen in Iowa. Compl. 2, ¶ 6. Messrs. Walmsley and Moss, as well as many members of the Iowa HBPA, are "covered persons" under HISA, § 3051(6); *see* Compl. ¶¶ 4-6, who must register with the Authority and comply with its rules as a condition of participating in the thoroughbred horseracing industry, § 3054(d)(1)-(2); *see* App. 4a.

In 2023, following Congress's amendment to HISA, petitioners sued the Authority and its Board members, as well as the FTC and its commissioners, in district court, challenging the Act as facially unconstitutional. App. 4a. Petitioners alleged, as relevant here, that Congress's delegation of rulemaking and enforcement powers to the Authority violates the private nondelegation doctrine. App. 5a, 8a. Petitioners also alleged that Congress's delegation of power to the FTC under § 3053(e) violates the public nondelegation doctrine and that the Authority's board members are not properly appointed in conformity with the Appointments Clause. App. 10a, 12a. Petitioners immediately moved for a preliminary injunction. App. 2a.

2. The district court denied petitioners' motion in an oral order solely on the ground that their claims

are unlikely to succeed on the merits. App. 58a; *see* App. 18a.

3. A panel of the Eighth Circuit affirmed, over the dissent of Judge Gruender. App. 1a-17a.

a. The court of appeals first rejected petitioners' private nondelegation claim as to HISA's rulemaking provisions. App. 5a-8a. In reaching that conclusion, the court relied on the decisions of the Sixth and Fifth Circuits rejecting the same claim. *See Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024) (*Black II*). The court agreed with its sister circuits that "Section 3053(e) as amended gives the [FTC] 'ultimate discretion over the content of the rules that govern the horseracing industry.'" App. 6a (quoting *Oklahoma*, 62 F.4th at 230). The court reasoned that if the FTC "disagrees with policies reflected in the Authority's rules," then it "may change them under its power to 'abrogate, add to, and modify' the rules." *Ibid.*

Petitioners contended that Authority rules would, at the least, bind the public until the FTC could promulgate a repeal. But the court concluded that the FTC could theoretically avoid this outcome by "us[ing] its power to postpone the effective date of a proposed rule." App. 7a.

As for the Authority's enforcement powers, the panel majority recognized that the Sixth and Fifth Circuits had split over their constitutionality. App. 8a. The Sixth Circuit, for its part, had held in *Oklahoma* that the FTC's power to "abrogate, add to, or modify" the Authority's rules could be used to cure any potential problem by, for example, "requir[ing] the

Authority to obtain the Commission's approval" before filing suit. App. 9a (citing *Oklahoma*, 62 F.4th at 231). By contrast, the Fifth Circuit had held that the FTC's "power to modify and add to the rules of the Authority does not 'authorize basic and fundamental changes in the scheme designed by Congress,'" which vests enforcement power in the Authority. *Ibid.* (quoting *Black II*, 107 F.4th at 432). The panel majority agreed with the Sixth Circuit, citing the canon of constitutional avoidance and concluding that "[t]o subordinate the Authority's enforcement activity, . . . the Commission need only work within the structure of the Act as designed, not create a new statutory regime." App. 10a.

The panel rejected petitioners' remaining arguments too. App. 10a-12a. Petitioners asserted that if the FTC were permitted fundamentally to alter the statutory scheme through rulemaking, then HISA would violate the public nondelegation doctrine. But the panel reasoned that the Act's instruction for the FTC to "ensure fair administration of the Authority, conform rules to the requirements of the statute, and further the purposes of the statute," provides an intelligible principle. App. 10a (citing § 3053(e)). And the court rejected petitioners' Appointments Clause argument on the ground that the Authority is private, rather than part of the government, and the "requirements of the Clause apply only to officers of the United States." App. 12a.

b. Judge Gruender dissented in part, App. 13a-17, concluding that HISA unlawfully delegates enforcement power to the Authority. He agreed "with the Fifth Circuit that the plain text of HISA creates a clear delegation of enforcement power between the

FTC and the Authority," and the FTC "cannot impede upon the power granted to the Authority, nor can the FTC compel Authority enforcement action." App. 14a (cleaned up). As a result, the "Authority does not 'function subordinately'" to the agency, "in violation of the private nondelegation doctrine." *Ibid.* (quoting *Adkins*, 310 U.S. at 399). Judge Gruender observed that, "where Congress has avoided the limitations of the Appointments Clause by vesting in a private entity the wholesale power to regulate . . . nationwide, it is imperative that the private nondelegation doctrine carry force to prevent broad delegation of governmental powers to unsupervised private parties." App. 17a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's holding that HISA complies with the private nondelegation doctrine squarely conflicts with the Fifth Circuit's holding that the same statute is unconstitutional in significant part. The questions presented raise deep issues of constitutional structure that this Court has not meaningfully addressed in over eighty years and that multiple Justices have recognized cry out for clarification. And the Eighth Circuit answered those questions incorrectly, sanctioning a striking departure from bedrock rules guarding against arbitrary and unaccountable government. This case is an appropriate vehicle to correct that error. The Court should grant review.

I. The decision below deepens a circuit conflict over HISA's constitutionality

The Eighth Circuit's decision contributes to a square circuit conflict over whether HISA's delegation

of sovereign power to the Authority—even with the 2022 amendment—is facially unconstitutional. Like the court below, the Sixth Circuit sustained HISA against attack, while the Fifth Circuit invalidated many of its enforcement provisions. *Compare Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), *with Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024) (*Black II*). And while no circuit has invalidated the Authority's rulemaking power as amended, the courts have fully vetted the relevant arguments and their decisions sustaining that delegation are in tension with circuit decisions addressing similar claims in other contexts.

A. The Sixth Circuit was the first to address the constitutionality of the amended version of HISA. As in this case, the plaintiffs there argued that HISA's delegation of both rulemaking and enforcement power to the Authority is facially unconstitutional. *Oklahoma*, 62 F.4th at 227-28. The Sixth Circuit rejected the plaintiffs' challenge based on an expansive reading of HISA's newly added rulemaking provision, which authorizes the FTC to "abrogate, add to, and modify the rules" of the Authority. *Id.* at 230-31 (quoting § 3053(e)).

The plaintiffs contended that Section 3053(e) gives the FTC insufficient supervision over Authority rulemaking because Authority regulations govern until the FTC can act to displace them. Like the court below, the Sixth Circuit dismissed this "timing gap" problem on the ground that the FTC could, at least theoretically, "resolve it ahead of time" by adopting a regulation delaying the effectiveness of Authority rules. *Id.* at 232; *see* App. 7a (same).

The Sixth Circuit similarly concluded (again consistent with the decision below, *see* App. 8a) that Section 3053(e) grants the FTC "pervasive oversight and control of the Authority's enforcement activities." *Oklahoma*, 62 F.4th at 231 (cleaned up). In the court's view, the FTC could, if it chose, add conditions to the Authority's enforcement powers, such as requiring it to "preclear" enforcement "decision[s] with the FTC." *Ibid.*; *see* App. 9a (similar). But the court declined to resolve the plaintiffs' challenge to the Authority's power to bring suit in federal court, observing that "the parties simply have not engaged with this feature of the Act, including briefing with respect to founding-era or contemporary analogs showing the role private entities may, and may not, play in law enforcement." *Oklahoma*, 62 F.4th at 233.

After the Sixth Circuit decided *Oklahoma*, the Fifth Circuit also resolved a facial challenge to HISA. *Black II*, 107 F.4th at 420. It "agree[d] with . . . the Sixth Circuit that the amendment cured the nondelegation defect" with the Authority's rulemaking power. *Id.* at 424. But the Fifth Circuit "part[ed] ways" with the Sixth Circuit (and the Eighth Circuit's later decision in this case) as to HISA's enforcement provisions. *Id.* at 421; *see* App. 8a-9a (explicitly rejecting the Fifth Circuit's analysis and "agree[ing] with the Sixth Circuit").

The Fifth Circuit observed that HISA empowers the Authority to decide "whether to investigate a covered entity," "whether to subpoena the entity's records or search its premises," "whether to sanction it," and "whether to sue the entity for an injunction or to enforce a sanction it has imposed"—"all quintessentially executive functions" that cannot be

delegated to a private party. *Black II*, 107 F.4th at 428-29. And the Act grants the FTC the power neither to supersede nor "to countermand any of" those decisions. *Id.* at 429. The court explained that the FTC's ability to "review sanctions at the back end" does not fix the problem, given the multiple, unchecked enforcement actions the Authority is empowered to take "up to that point." *Id.* at 430.

The Fifth Circuit rejected the notion that "the FTC could use its new rulemaking authority to rein in the Authority's enforcement actions or even require the Authority to preclear lawsuits with the agency." *Id.* at 431. The court explained that "[i]n HISA, Congress set out a definite enforcement scheme, dividing responsibilities" between the FTC and the Authority, and the Sixth (and Eighth) Circuit's construction would impermissibly "let the agency rewrite the statute." *Ibid.*

B. Although the Fifth, Sixth, and Eighth Circuits have sustained HISA's delegation of rulemaking authority against attack, their decisions on that score are in serious tension with decisions from other courts of appeals addressing nondelegation challenges to other statutes. In rejecting petitioners' challenge, the Eighth Circuit did not deny that the Authority has the power to issue binding rules of private conduct. *See* App. 6a-7a. Even so, it reasoned that the statutory delegation was permissible because the FTC *could* displace the Authority's rules if it so chose. *Ibid.*

That logic is incompatible with the approach taken by other circuits. In *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), the Fourth Circuit rejected a constitutional challenge to a federal statute, reasoning that "Congress may employ private

entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others," *id.* at 395. That is precisely what HISA does: grant the Authority "power over others." Similarly, in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), the court upheld a statute against a private nondelegation challenge on the ground that the private entities "serve an advisory function, and in the case of collection of assessments, a ministerial one," *id.* at 1129; *see ibid.* (observing that "all budgets, plans or projects approved by the Board become effective only upon final approval by the Secretary"). Other decisions likewise depart from the permissive approach taken by the Eighth Circuit in this case. *See, e.g.*, *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 & n.5 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015).

II. The questions presented are exceptionally important

Determining a statute's constitutionality is "the gravest and most delicate duty that" a court "is called upon to perform." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). This Court thus typically grants review to resolve circuit conflicts over the constitutionality of federal statutes. *See, e.g.*, *Iancu v. Brunetti*, 588 U.S. 388, 392 (2019); *see also Siegel v. Fitzgerald*, 596 U.S. 464, 473 (2022) ("grant[ing] certiorari to resolve a split that had developed in the lower courts over the [statute's] constitutionality," even though the statute had been upheld below) (citation omitted). Review is warranted for that reason alone.

But the deeper issues at stake here—whether, and in what circumstances, Congress may confer

governmental authority on a private entity—independently warrant this Court's review. The Court has not meaningfully addressed the scope of the private nondelegation doctrine in over 80 years, since its decisions in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940), and *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). And those decisions addressed the issue in a grand total of two paragraphs. *See Adkins*, 310 U.S. at 399; *Carter Coal*, 298 U.S. at 311. That dearth of guidance has left lower courts adrift as to the proper standard and how to apply it. *See, e.g.*, *Oklahoma*, 62 F.4th at 229 (observing that "[w]hether subordination always suffices to withstand a challenge raises complex separation of powers questions," but noting that "the parties accept this framing of the appeal").

As multiple Justices of this Court have recognized, the scope of the private nondelegation doctrine "presents an important separation-of-powers question" that should be resolved "in an appropriate . . . case." *Texas v. Comm'r of Internal Rev.*, 142 S. Ct. 1308, 1308-09 (2022) (statement of Alito, J., joined by Thomas and Gorsuch, JJ., respecting the denial of certiorari); *cf. United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 442 (2023) (Kavanaugh, J., concurring, joined by Barrett, J.) (suggesting that the Court should consider the constitutionality of private relators under Article II "in an appropriate case"). The private nondelegation doctrine has twice come before the Court in the last decade, but in each case, review was thwarted by threshold issues. *See Texas*, 142 S. Ct. at 1308-09; *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 46 (2015). This case presents an appropriate vehicle for providing much-needed clarification.

The questions presented also carry significant practical implications. HISA displaced "38 state regulatory schemes," including an "array of protocols and safety requirements." *Oklahoma*, 62 F.4th at 225. Moreover, horseracing, and the equine industry in general, has a significant economic footprint. In Iowa alone, horseracing generated nearly $200 million in economic activity in 2017.[3] Nationally, the economic impact of the equine industry generally was estimated in 2023 at $177 billion.[4] And the state and local tax revenue from the horseracing industry can extend into the tens of millions of dollars.[5] The question whether an unaccountable private entity may constitutionally supplant state regulation of this important industry warrants this Court's attention.

In any event, the questions presented have broader significance beyond HISA. A host of statutes confer rulemaking and enforcement authority on private entities over a wide range of economic activity. As the courts in the HISA cases have discussed, *see, e.g.*, *Black II*, 107 F.4th at 424, 434, Congress has granted the private Financial Industry Regulatory Authority (FINRA) both enforcement and rulemaking authority over the securities laws. The D.C. Circuit

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[3] Community and Economic Development Initiative of Kentucky, *The Influence of the Race Horse Industry on Iowa's Economy*, at 22 (June 2019), https://tinyurl.com/5cfsb2ww.

[4] Press Release, American Horse Council, *Results from the 2023 National Equine Economic Impact Study Released* (Jan. 31, 2024), https://tinyurl.com/mv3v3bwe.

[5] *See, e.g.*, Purdue Extension, *Economic Impact of the Horse Racing and Breeding Industry to Indiana*, at 3 (May 2013), https://tinyurl.com/4m49s2jc (noting that state and local tax revenue from horseracing in Indiana was $45 million).

recently entered an injunction pending appeal of a FINRA adjudication, with Judge Walker concurring to observe that petitioner had "raised a serious argument that FINRA impermissibly exercises significant executive power." *Alpine Sec. Corp. v. FINRA*, No. 23-5129, 2023 WL 4703307, at *2 (D.C. Cir. July 5, 2023) (Walker, J., concurring). As another example, Congress has permitted private parties to revise legally binding safety standards for infant and toddler products without any action by the Consumer Product Safety Commission. 15 U.S.C. § 2056a(b)(4)(B). Other regulatory regimes raise similar issues. *See, e.g.*, *Texas*, 142 S. Ct. at 1308 (statement of Alito, J., respecting the denial of certiorari) (discussing Medicaid regulation).

Some of those statutes may pass constitutional muster. But the frequency of federal delegations to private entities and the variation in those delegations confirm the need for this Court's guidance on the "fundamental question" of when such delegations are permissible. *Ibid.*

III. The decision below is wrong

Review is especially warranted because the court of appeals erred in upholding HISA, sanctioning a dangerous departure from foundational constitutional norms.

The Constitution establishes three branches of government and vests each with a particular form of sovereign power: legislative, executive, and judicial. *See* U.S. Const. art. I, § 1; art. II, § 1, cl. 1; art. III, § 1. As this Court has long recognized, the text of the Constitution's Vesting Clauses "permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*,

531 U.S. 457, 472 (2001). That principle is critical to "safeguarding liberty." *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). The Constitution imposes numerous "accountability checkpoints" on the processes of making and enforcing the law, and "[i]t would dash the whole scheme if Congress could give . . . power away to an entity that is not constrained by those checkpoints." *Ass'n of Am. R.R.*, 575 U.S. at 61 (Alito, J., concurring).

Because there is some "overlap between the three categories of governmental power," "[c]ertain functions may be performed by two or more branches without either exceeding its enumerated powers under the Constitution." *Id.* at 69 (Thomas, J., concurring in the judgment). Under this Court's precedent, for example, rulemaking qualifies as a shared function: although ostensibly legislative, the Court also treats it as an exercise of "the 'executive Power,'" *City of Arlington*, 569 U.S. at 304 n.4, at least when the relevant statute establishes "'an intelligible principle'" to constrain executive discretion, *Whitman*, 531 U.S. at 472 (citation omitted). Congress may thus delegate rulemaking power to an Executive Branch agency without running afoul of the Constitution's separation of powers. *Ibid.*

But that same logic does not extend to private parties, vested with no part of sovereign power. The Court has accordingly recognized that a delegation of governmental power to a private entity "is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *see Ass'n of Am. R.R.*, 575 U.S. at 62 (Alito, J., concurring) ("When it comes to private

entities, . . . there is not even a fig leaf of constitutional justification" for delegation.).

The Court recognized this principle in its seminal decision *Carter Coal*. There, Congress had delegated the ability to set maximum labor hours and minimum wages to private groups of producers and miners. 298 U.S. at 310-11. The Court found that Congress had impermissibly authorized "one person . . . to regulate the business of another," conferring a "governmental function" on "private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* at 311. Because such a scheme creates "an intolerable and unconstitutional interference with personal liberty and private property," the Court invalidated it. *Ibid.*

Congress responded to *Carter Coal* by amending the statute, which came before the Court again in *Adkins*. The amended version similarly conferred authority on a federal agency acting in conjunction with private boards composed of industry members to regulate the sale and distribution of coal. 310 U.S. at 388. But this time the statute "specifie[d] in detail the methods of [the boards'] organization and operation, the scope of their functions, and the jurisdiction of the Commission over them." *Ibid.* Among other things, the boards were tasked with proposing minimum prices, which could be "approved, disapproved, or modified by the Commission." *Ibid.* The Court rejected a private nondelegation challenge to the statute on the ground that the private boards "function subordinately to the" agency. *Id.* at 399. Because the agency, "not the code authorities, determines the prices," "law-making is not entrusted to the industry." *Ibid.*

The analyses in *Carter Coal* and *Adkins* offer little guidance on the precise scope and contours of the private nondelegation doctrine. *See Oklahoma*, 62 F.4th at 229. Properly understood, however, those decisions stand for a simple principle: a private entity may act only as an "aid" in performing core sovereign functions and must be subject to the "pervasive surveillance and authority" of a federal agency. *Adkins*, 310 U.S. at 388. In those circumstances, the private entity does not exercise sovereign power at all—the agency does. *See Whitman*, 531 U.S. at 472 ("This text permits no delegation of those powers."). That understanding mirrors original practice, which "support[s] the use of outside actors to conduct ministerial tasks, not necessarily to engage in the exercise of delegated authority to bind third parties or the government." Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 Harv. J.L. & Pub. Pol'y 837, 925 (2022).

HISA flunks this test twice over. Even after the amendment, the Authority exercises both enforcement and rulemaking authority independent of the FTC's control. Because those powers are not "subordinate[]" to the Commission, *Adkins*, 310 U.S. at 399, the Act violates the private nondelegation doctrine.

A. HISA unlawfully delegates enforcement power to the Authority

1. On its face, HISA delegates significant enforcement power to the Authority free from the FTC's supervision. Among other things, the Act grants the Authority the power to investigate and subpoena covered entities, § 3054(h); to levy sanctions, §§ 3054(j)(1), 3057, 3058(a); and to sue

private parties in federal court for injunctive relief or to enforce sanctions, § 3054(j)(1)-(2).

These are all quintessentially executive powers belonging to the sovereign. *Black II*, 107 F.4th at 428 & n.9. As this Court has explained, the power "to enforce" laws is an "executive function[]," *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 202 (1928), and "[a] lawsuit is the ultimate remedy for a breach of the law," *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam). The Court has thus invalidated under Article II a scheme vesting the power to "set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties" in "a single individual accountable to no one." *Seila Law LLC v. CFPB*, 591 U.S. 197, 224-25 (2020).

HISA grants the Commission zero supervisory power over many of the Authority's key enforcement actions. Although the statute authorizes the FTC to review sanctions imposed by the Authority, § 3058, that back-end check still leaves unsupervised "everything the Authority was permitted to do up to that point: launch an investigation into the owner, subpoena his records, search his facilities, [and] charge him with a violation." *Black II*, 107 F.4th at 430; *see id.* at 430 n.12 (recounting Authority's abuse of these powers). In each context, the Authority—not the FTC—exercises sovereign power.

2. The Eighth Circuit panel majority held that HISA does not unlawfully delegate executive power to the Authority because Congress's amendment to Section 3053(e) grants the FTC "pervasive oversight and control of the Authority's enforcement activities." App. 8a-9a (citation omitted). On that theory, the FTC may even require preclearance before the Authority

takes enforcement action. App. 9a. The court of appeals is mistaken.

The Eighth Circuit's decision defies the plain text of the amendment, which allows the FTC only to "abrogate," "add to," or "modify" "*the rules of the Authority*." § 3053(e) (emphasis added); *see Gundy v. United States*, 588 U.S. 128, 173 (2019) (Gorsuch, J., dissenting) (criticizing plurality for "recasting" the statute to avoid nondelegation problems). Nothing in that language authorizes the agency to alter *the statute's* text or structure. But that is exactly what the panel majority contemplated. Although it argued that "the Commission need only work within the structure of the Act as designed," App. 10a, it offered no support for that *ipse dixit*. The statute establishes "a definite enforcement scheme, dividing responsibilities" between the agency and the Authority, and the panel's interpretation would allow the agency to "rewrite the statute." *Black II*, 107 F.4th at 431.

Although the panel majority justified its interpretation in part on constitutional avoidance grounds, App. 10a, that reliance was misplaced, since the court's interpretation itself raises serious *public* nondelegation problems. A "statutory delegation is constitutional" only insofar as "*Congress* lays down by *legislative act* an intelligible principle." *Gundy*, 588 U.S. at 135 (plurality) (emphasis added; cleaned up). A grant of authority authorizing an agency to rewrite the governing statute fails that test by definition. *Cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (rejecting on major questions grounds an interpretation that would grant the agency "virtually unlimited power to rewrite the Education Act").

In any event, the panel majority failed to grapple with this Court's decision in *Whitman*, which held that an agency cannot "cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." 531 U.S. at 472. "Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer." *Id.* at 473. Although *Whitman* involved the public nondelegation doctrine, a similar principle applies here. The question in this case is whether the *statute* is facially constitutional. Because it affirmatively confers sovereign authority on a private entity free from agency oversight, the answer is no. The agency's purported ability to flip that statutory default does not cure the defect.

B. HISA unlawfully delegates rulemaking power to the Authority

1. HISA grants the Authority power to adopt regulations, § 3053(a), (c)(2), set fees, § 3054(g), and issue interpretive guidance, § 3052(f)(1)(C), (2)-(4). This Court has described a statute that confers rulemaking power on a private entity as a "legislative delegation." *Carter Coal*, 298 U.S. at 311. At the same time, the Court has stated that agency rulemakings "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" *City of Arlington*, 569 U.S. at 304 n.4 (quoting U.S. Const. art. II, § 1, cl. 1). Regardless of which characterization applies here, rulemaking plainly represents an exercise of a *sovereign* power that a private entity does not possess.

The Act requires the FTC to approve the Authority's proposed rules if they are "consistent"

with the Act and its implementing regulations. § 3053(c)(2). Congress did not expand that limited scope of review after the Fifth Circuit decided *Black I*, 53 F.4th 872, declaring that the original statute violated the private nondelegation doctrine. Instead, Congress granted the FTC the power to "abrogate, add to, or modify" the Authority's rules *after* they have been "promulgated" and become binding on the public. § 3053(e).

The amendment does not solve the problem identified by the Fifth Circuit. Even if the Commission objects to a proposed rule on policy grounds, the rule will go into effect and bind the public in the interim period before the FTC can repeal it or adopt a replacement. HISA explicitly requires the Commission to comply with the Administrative Procedure Act in abrogating or modifying Authority rules, *see* § 3053(e), including by undertaking notice-and-comment procedures and explaining its reasons for overriding the Authority's policy choices, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The allocation of power between the FTC and the Authority thus differs significantly from that upheld in *Adkins*, where the private board's proposed prices had to be "approved, disapproved, or modified by the Commission" *before* going into effect. 310 U.S. at 388.

2. The Eighth Circuit again sought to avoid the nondelegation problem through an expansive construction of Section 3053(e). App. 6a-7a. On the court's reading, the FTC can deprive the Authority's rules of even temporary binding effect by using its Section 3053(e) "power to postpone the effective date

of a proposed rule or to delay the effective date of a rule." App. 7a.

That view suffers from the same flaws as the court's view of the FTC's enforcement authority: it would confer on the agency the power to rewrite the statute. HISA specifies that the FTC "shall" publish the Authority's proposed rules in the Federal Register and provide an opportunity for public comment. § 3053(b)(1). Then, "not later than 60 days" after publication, the FTC "shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—(A) this chapter; and (B) applicable rules approved by the Commission." § 3053(c)(1)-(2). An agency regulation "postponing the effective date" of a proposed rule would override those procedural requirements. Even if the Eighth Circuit's interpretation were textually plausible, though, it would still run into the same *Whitman* and public nondelegation problems discussed above. *See* pp. 24-25, *supra*.

IV. This case is an excellent vehicle

A. This case is a strong vehicle for resolving both questions presented. It presents both issues cleanly, without alternative holdings or the need to address preliminary questions. Moreover, this petition presents the Court with distinct circumstances in which the nondelegation question may arise: enforcement and rulemaking. Because the analyses may differ somewhat across the two contexts, it makes sense for the Court to consider them together.

Although the case arises in a preliminary injunction posture, the court of appeals definitively resolved the relevant legal questions. *See, e.g.*, App. 6a

(holding that "the Act's rulemaking structure does not violate the private nondelegation doctrine"); App. 10a (holding that "the statute's enforcement provisions are not unconstitutional on their face"). As to the private nondelegation claims, there is nothing left to do on remand. This Court regularly grants petitions for writs of certiorari in preliminary injunction cases, particularly when (as here) they raise pure questions of law. *See, e.g.*, *Ramirez v. Collier*, 595 U.S. 411 (2022) (reviewing denial of preliminary injunction); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (same); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) (same); *see also, e.g.*, *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024); *Murthy v. Missouri*, 144 S. Ct. 1972 (2024).

B. This petition offers the Court the cleanest, most complete opportunity for resolving the questions presented. The cases arising from the Fifth and Sixth Circuits both suffer from drawbacks not present here. *See Horseracing Integrity & Safety Auth., Inc. v. Nat'l Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (petitions forthcoming); *Oklahoma v. United States*, No. 23-402 (filed Oct. 13, 2023).

The Fifth Circuit case includes a contested jurisdictional issue regarding the finality of the district court's decision that this Court would need to resolve before reaching the merits. The Authority squarely took the position before the Fifth Circuit that "this Court lacks jurisdiction," Authority Br. 2, *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, Doc. 114, Dkt. 23-10520 (5th Cir. Aug. 4, 2023), and the FTC acknowledged that "the question is not free from doubt," while suggesting that the order under review was "likely final and appealable," FTC Br. 13,

Doc. 113 (Aug. 4, 2023). No similar hurdle attends disposition of this petition.

The Sixth Circuit case, for its part, omits two issues relevant to a full consideration of the questions presented. First, the court did not assess whether its broad reading of Section 3053(e) would violate the *public* nondelegation doctrine. But that reading raises obvious public nondelegation concerns that should inform the proper interpretation of the statute, including the role of constitutional avoidance. *See* p. 24, *supra*. Second, the Sixth Circuit declined to resolve the plaintiffs' challenge to the "Authority's ability to enforce the Act through civil lawsuits," acknowledging that "difficult and fundamental questions . . . arise when private entities enforce federal law," but observing that "the parties simply have not engaged with this feature of the Act." 62 F.4th at 233 (cleaned up).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRETT D. WATSON
Brett D. Watson, Attorney at Law, PLLC
P.O. Box 707
Searcy, AR 72145
(501) 281-2468

AUSTIN L. RAYNOR
Counsel of Record
FRANK D. GARRISON
JOSHUA M. ROBBINS
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
(202) 888-6881
araynor@pacificlegal.org

Counsel for Petitioners

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