

No. 24-420

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**In the Supreme Court of the United States**

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BILL H. WALMSLEY, ET AL., PETITIONERS

*v.*

FEDERAL TRADE COMMISSION, ET AL.

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

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**BRIEF FOR THE FEDERAL RESPONDENTS**

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## QUESTIONS PRESENTED

The Horseracing Integrity and Safety Act of 2020 (Act), 15 U.S.C. 3051 *et seq.*, allows the Horseracing Integrity and Safety Authority, a private entity, to assist the Federal Trade Commission in the enforcement of the statute. The questions presented are as follows:

1. Whether the Act's enforcement provisions violate the private nondelegation doctrine on their face.
2. Whether the Act's rulemaking provisions violate the private nondelegation doctrine.

**TABLE OF CONTENTS**

	Page
Opinion below.....	1
Jurisdiction.....	1
Statement .....	1
Argument.....	3
Conclusion .....	6

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-17a) is available at 2024 WL 4248221.

**JURISDICTION**

The judgment of the court of appeals was entered on September 20, 2024. The petition for a writ of certiorari was filed on October 10, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

This case concerns the constitutionality of the Horseracing Integrity and Safety Act of 2020 (Horseracing Act or Act), 15 U.S.C. 3051 *et seq.* The Act allows the Horseracing Integrity and Safety Authority (Authority), a private entity, to assist the Federal Trade Commission (FTC or Commission) in the enforcement of the statute.

Two other cases that are currently pending before this Court raise questions concerning the Act's constitutionality. See Pet. at I, *FTC v. National Horsemen's Benevolent & Protective Ass'n*, No. 24-429 (filed Oct. 16, 2024) (*National Horsemen Gov't Pet.*); Gov't Br. in Opp. at I, *Oklahoma v. United States*, No. 23-402 (filed May 17, 2024) (*Oklahoma Gov't Br. in Opp.*). The federal government's filings in those cases detail the relevant statutory background. See *National Horsemen Gov't Pet.* at 2-5; *Oklahoma Gov't Br. in Opp.* at 2-5. This brief does not repeat the information and arguments set forth in those filings, but instead focuses on the procedural history of this case.

1. In 2023, after Congress amended the Horseracing Act in response to the Fifth Circuit's holding that the original Act violated the private nondelegation doctrine, petitioners filed this suit in the U.S. District Court for the Eastern District of Arkansas. See Pet. App. 4a, 18a. Petitioners contended, as relevant here, that the amended Act's enforcement and rulemaking provisions violate the private nondelegation doctrine on their face. See *id.* at 5a, 8a.

Petitioners moved for a preliminary injunction to prohibit the enforcement of rules issued under the Act. See Pet. App. 4a. In an oral ruling, the district court denied the motion on the ground that petitioners had failed to establish a likelihood of success on the merits. See *id.* at 58a.

2. The Eighth Circuit affirmed. See Pet. App. 1a-13a. It agreed with the district court that petitioners "ha[d] not established a fair chance of success on the merits." *Id.* at 13a.

The court of appeals rejected petitioners' claim that the Horseracing Act's enforcement provisions violate

the private nondelegation doctrine on their face. See Pet. App. 8a-10a. The court explained that “the Commission’s rulemaking and revision power gives it ‘pervasive oversight and control of the Authority’s enforcement activities.’” *Id.* at 8a-9a (citation omitted). It also emphasized that the FTC “has power to review the Authority’s enforcement actions and to reverse them.” *Id.* at 9a.

The court of appeals likewise rejected petitioners’ contention that the Act’s rulemaking provisions violate the private nondelegation doctrine. See Pet. App. 5a-8a. The court explained that the amended Act “gives the Commission ‘ultimate discretion over the content of the rules that govern the horseracing industry.’” *Id.* at 6a (citation omitted). “If the Commission disagrees with policies reflected in the Authority’s rules,” the court noted, “then the Commission may change them under its power to ‘abrogate, add to, and modify’ the rules.” *Ibid.* (citation omitted).

Judge Gruender concurred in part and dissented in part. See Pet. App. 13a-17a. He agreed with the court of appeals’ rejection of petitioners’ challenge to the Horseracing Act’s rulemaking provisions, but would have held that the Act’s enforcement provisions violate the private nondelegation doctrine on their face. See *ibid.*

#### ARGUMENT

Petitioners argue (Pet. 12-29) that the Horseracing Act’s enforcement and rulemaking provisions violate the private nondelegation doctrine on their face. See Pet. 9 (stating that petitioners have “challeng[ed] the Act as facially unconstitutional”). The government’s filings in *FCC v. National Horsemen’s Benevolent & Protective Ass’n*, petition for cert. pending, No. 24-429

(filed Oct. 16, 2024), and *Oklahoma v. United States*, 144 S. Ct. 2679 (2024), address the merits of those claims. See *National Horsemen Gov't Pet.* at 7-12; *Oklahoma Gov't Br. in Opp.* at 7-14. This brief does not repeat those merits arguments, but instead responds to petitioners' contentions about which questions and which court of appeals decisions warrant this Court's review.

1. For the reasons discussed in the government's petition for a writ of certiorari in *National Horsemen*, the first question presented in this case, which concerns the Act's enforcement provisions, warrants this Court's review. See *National Horsemen Gov't Pet.* at 12-14. But the second question, which concerns the Act's rulemaking provisions, does not. The second question, unlike the first, is not the subject of a circuit conflict. The Fifth, Sixth, and Eighth Circuits have all held—in each case unanimously—that the amended Act's rulemaking provisions do not violate the Constitution. See *National Horsemen's Protective & Benevolent Ass'n v. Black*, 107 F.4th 415, 423-426 (5th 2024); *Oklahoma v. United States*, 62 F.4th 221, 229-231 (6th Cir. 2023); Pet. App. 5a-8a; *id.* at 13a (Gruender, J., concurring in part and dissenting in part).

Petitioners perceive (Pet. 13) “tension” between the decision below and the decisions of the Third, Fourth, and D.C. Circuits in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), and *Association of American Railroads v. United States Department of Transportation*, 721 F.3d 666 (D.C. Cir. 2013), vacated and remanded on other grounds, 575 U.S. 43 (2015). See Pet. 15-16. But those cases, which were decided long before Congress enacted the Horseracing Act, involved different federal statutes. Because the Third and Fourth Cir-

cuits upheld the challenged statutes against private nondelegation claims, those courts' statements about the circumstances in which such claims might succeed were dicta. See *Frame*, 885 F.2d at 1128-1129; *Pittston*, 368 F.3d at 393-398. And this Court vacated the D.C. Circuit's decision in *American Railroads* after determining that the entity at issue was not actually a private body. See *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 46 (2015).

2. The best vehicles for resolving the circuit conflict over the facial validity of the Horseracing Act's enforcement provisions are the petitions for writs of certiorari filed by the government and the Authority seeking review of the Fifth Circuit's judgment in *National Horsemen*. Granting those petitions would allow this Court to directly address the reasoning of the only court of appeals that has found a constitutional violation.

Petitioners observe (Pet. 28) 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 review in either



*Oklahoma* 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 nondelegation doctrine on their face (the first question presented here).

#### CONCLUSION

The petition for a writ of certiorari in this case should be held pending the 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 a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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