No. 24-420

In The
Supreme Court of the United States

BILL H. WALMSLEY, ET AL.,

Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.

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

RESPONSE OF THE HORSERACING INTEGRITY AND SAFETY AUTHORITY RESPONDENTS TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the enforcement provisions of the Horseracing Integrity and Safety Act are facially unconstitutional under the private-nondelegation doctrine.

II. Whether the rulemaking provisions of the Act are facially unconstitutional under the private-nondelegation doctrine.

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. The Fifth Circuit has expressly contradicted the Sixth and Eighth Circuits' decisions 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.

STATEMENT

A. Legal Background

1. "[A] beloved tradition in the United States since the early days of the Republic," horseracing is a fixture of American culture and a "major source of jobs and economic opportunity." 166 CONG. REC. H4981-4982 (Sept. 29, 2020) (Rep. Barr). Over the last decade, however, "the joy of the races [wa]s marred by accidents that endanger[ed] both the horses and the riders." *Id.* at H4980 (Rep. Pallone). In 2019 alone, 441 Thoroughbreds died from race-related injuries—a fatality rate two-to-five times greater than in Europe or Asia. H.R. REP. NO. 116-554, at 17 (2020). These casualties sparked investigations by officials, concern within the industry, and "even call[s] for this sport to be abolished altogether." 166 CONG. REC. S5514 (Sept. 9, 2020) (Sen. McConnell). At the heart of these troubles was a "patchwork system" of state-by-state regulatory schemes that led to "wide disparit[ies]" in

standards and enforcement and eroded the betting public's confidence. 166 CONG. REC. H4981 (Rep. Tonko).

The highly publicized equine fatalities and corruption scandals brought new urgency and support for action in Congress, which had considered various horseracing bills over the prior decade. *See* 166 CONG. REC. H4981-4982 (Rep. Barr). In 2020, a broad coalition of stakeholders rallied around "bipartisan, bicameral progress" toward finally remedying the "tragedies on the track." 166 CONG. REC. S5514-5515 (Sen. McConnell). The congressional effort was not only cheered by animal-welfare proponents, but also hailed by "limited government conservative[s]" who sought a framework for "smarter, more effective, and streamlined regulation for the industry"—sorely needed given that the "lack of uniformity ha[d] impeded interstate commerce." 166 CONG. REC. H4982 (Rep. Barr).

Passage of the "landmark" legislation, with "almost 300 cosponsors in the House and Senate" and "broad support" from across the industry, was celebrated on both sides of the aisle for "usher[ing] in a new era in the sport." Press Release, *McConnell Leads Senate Passage of Horseracing Integrity and Safety Act* (Dec. 21, 2020);[1] Press Release, *Gillibrand Announces Passage Of Her Horseracing Integrity And Safety Act* (Dec. 22, 2020).[2] President Trump signed HISA into law in December 2020.

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[1] http://tinyurl.com/59m9kywy.

[2] http://tinyurl.com/mry9t5pb.

2. HISA's rulemaking and enforcement frameworks were "model[ed]" on and are "materially indistinguishable from the Maloney Act," which has governed the SEC's relationship with FINRA and other self-regulatory organizations for over eight decades. Amici Br. of Sen. McConnell et al. in Support of Stay Appl. 5, 10, *Horseracing Integrity & Safety Auth. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Sept. 24, 2024) ("McConnell Br."). HISA recognizes the Authority as a "private, independent, self-regulatory, nonprofit corporation" that will help to develop and implement "a horseracing anti-doping and medication control program and a racetrack safety program," subject always to "Federal Trade Commission oversight." 15 U.S.C. §§ 3052(a), 3053.

The Authority may submit to the Federal Trade Commission (FTC) a "proposed rule, or proposed modification to a rule," relating to the content and implementation of the racetrack-safety, anti-doping, and medication-control programs. 15 U.S.C. §§ 3053(a), 3054(c), 3057. But the FTC alone may give those draft standards the force of law by independently approving them following notice-and-comment. *Id.* § 3053(b). To do so, the FTC must determine that each proposed standard is "consistent with" both the statute and the FTC's own rules. *Id.* § 3053(c). The agency must be satisfied, therefore, that any standard protects "the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces." *Id.* § 3054(a). Beyond that overall purpose, Congress directly prescribed the content of some rules, *e.g.*, *id.* § 3055(g)(1)-(2),

enumerated "[e]lements" and "[p]rohibition[s]" to be incorporated in others, *e.g., id.* §§ 3055(d), 3056(b), 3057(a)(2), (c)(2), and provided various "[c]onsiderations" to constrain the development and implementation of the anti-doping, medication-control, and racetrack-safety programs, *e.g., id.* §§ 3055(b), 3056(b), 3057(d).

The Authority may enforce HISA's programs, including by investigating and disciplining violations by covered persons who register under the Act, pursuant only to those "uniform procedures and rules" that are approved by the FTC. *See, e.g.*, 15 U.S.C. §§ 3054(c), 3057. Although HISA authorizes the Authority to issue and enforce "subpoenas" and to "commence a civil action" in federal court, *id.* §§ 3054(c)(1)(A)(ii), (h), (j)(1), those provisions have never been invoked against anyone.

Any sanction imposed for violation of an FTC-approved rule pursuant to FTC-approved penalties must be consistent with "adequate due process, including impartial hearing officers or tribunals," and other factors "designed to ensure fair[ness] and transparen[cy]." 15 U.S.C. § 3057(c)-(d). The Authority "shall promptly submit" to the FTC notice of any sanction, *id.* § 3058(a), which "shall be subject to de novo review" by an FTC-appointed administrative law judge, *id.* § 3058(b). The administrative law judge's decision is subject to yet further review by the Commissioners themselves. *Id.* § 3058(c). At both stages, the parties may submit additional evidence to the agency. *Id.* § 3058(c)(3)(C); *see also* 16 C.F.R. § 1.146(c). The FTC will apply a *de novo* standard to both "the factual findings and conclusions of law," may

"allow the consideration of additional evidence," may "affirm, reverse, modify, set aside, or remand for further proceedings," and may "make any finding or conclusion that, in the judgment of the [FTC], is proper and based on the record." 15 U.S.C. § 3058(c)(3). The administrative law judge or the Commissioners may stay any sanction pending review by the agency. *Id.* § 3058(d); 16 C.F.R. § 1.148(b).

3. Beyond those agency checks bookending any Authority action, an amendment Congress enacted during—and in response to—this litigation ensures additional, ongoing FTC oversight at all points along the process.

In November 2022, the Fifth Circuit held that HISA (as originally enacted) violated the private-nondelegation doctrine. *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022) (*National Horsemen's I*). Under the version of the Act then considered, only the Authority "wr[o]te[] the regulations and the FTC c[ould] not modify them." *Id.* at 887. Because the FTC lacked "the final word," the Fifth Circuit held, the Authority did not "function subordinately to the agency." *Id.*

"Not so anymore." *Oklahoma v. United States*, 62 F.3d 221, 231 (6th Cir. 2023). In direct response to the Fifth Circuit's ruling, in December 2022, Congress enacted (and President Biden signed into law) bipartisan legislation authorizing the FTC to "abrogate, add to, and modify" HISA rules as the FTC "finds necessary or appropriate" to (i) "ensure the fair administration of the Authority," (ii) "conform the rules of the Authority" to requirements of the Act and applicable rules, or (iii) otherwise "further[] *** the

purposes" of the Act. 15 U.S.C. § 3053(e). That language, drawn directly from the Maloney Act, "eliminates" "the 'key distinction'" the Fifth Circuit previously identified with the SEC-FINRA statute. *Oklahoma*, 62 F.3d at 232 (quoting *National Horsemen's I*, 53 F.4th at 887). Indeed, the Sixth Circuit had suggested this specific remedy at oral argument in a parallel challenge. Oral Arg. Rec. 33:00-33:13, *Oklahoma*, No. 22-5487 (6th Cir. Dec. 7, 2022) (Sutton, C.J.) ("Why not just say to [Congress,] this is easy, this was bipartisan, just put the modification power straight in, it'll be just like FINRA and the SEC, problem solved?").

The Sixth Circuit subsequently rejected the private-nondelegation challenge. The amendment Congress enacted "[i]n response" to the Fifth Circuit's decision made the Authority "subordinate to the agency." *Oklahoma*, 62 F.4th at 225, 229. The FTC's new "rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities just as it does in the rulemaking context." *Id.* at 231 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)). Accordingly, "[t]he Authority wields materially different power from the FTC, yields to FTC supervision, and lacks the final say over the content and enforcement of the law—all tried and true hallmarks of an inferior body." *Id.* at 229. Judge Cole "agree[d] in full" and wrote separately to emphasize his view that even "the original statute was

constitutional because the private Authority has always been subordinate to the FTC." *Id.* at 237, 239.[3]

B. Proceedings Below

1. HISA rules have been successfully implemented since July 2022, governing over 67,000 horses and 35,000 people competing across 19 states. "[T]he Thoroughbred industry overwhelmingly support[s]" HISA and "has adjusted to this regime." Amici Br. of Thoroughbred Industry Participants in Support of Stay Appl. 2, 9, *Horseracing Integrity & Safety Auth.*, No. 24A287 (U.S. Sept. 25, 2024) ("Thoroughbred Industry Br."). But a faction of the industry long opposed to any reforms has "leapfrog[ed] from one case to another in different district and circuit courts in the wake of unfavorable rulings," in a "deliberate strategy" of "shuffling of plaintiffs" in search of a forum to take down HISA. *Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, No. 6:22-cv-01934, 2023 WL 6063813, at *6 & n.7 (W.D. La. Sept. 13, 2023) (report & recommendation).

Petitioner Bill Walmsley is President of the Arkansas Horsemen's Benevolent and Protective Association (HBPA) and a member of "[t]he National HBPA's board of directors" who "has determined [the National HBPA's] legal course." Dick Downey, *Lazarus Says HBPA Determined To Put Industry In 'Chaos'*, BLOODHORSE (Oct. 7, 2024) (quoting

[3] This Court denied certiorari in the *Oklahoma* case on June 24, 2024. *Oklahoma v. United States*, No. 23-402 (U.S.). Petitioners in that case sought rehearing following issuance of the Fifth Circuit's decision, and on October 7, 2024, the Court requested a response by November 6, 2024. The Authority Respondents are filing that response concurrently with this response.

statement by Walmsley).[4] The Arkansas HBPA and the National HBPA sought a nationwide injunction in a Texas district court in early 2023, shortly after Congress amended HISA. *National Horsemen's Benevolent & Protective Ass'n v. Horseracing Integrity & Safety Auth.*, No. 5:21-cv-71-H (N.D. Tex. Mar. 8, 2023), Doc. 116. Petitioner Iowa HBPA—led by its executive director, Petitioner Jon Moss—also moved for a nationwide injunction in a Louisiana district court. *Louisiana*, *supra* (W.D. La. Feb. 6, 2023), Doc. 77. Apparently discontent with those courts' rulings, Petitioners brought this facial constitutional challenge to the amended version of HISA in April 2023 in the Eastern District of Arkansas, seeking a preliminary injunction primarily on the ground that the Act facially violates the private-nondelegation doctrine.[5]

2. In July 2023, the district court denied Petitioners' motion for a preliminary injunction. Pet. App. 18a. At the conclusion of a hearing on the motion, the court determined that it "just can't get pas[t] at this point in time the lack of probability of success on the merits." Pet. App. 58a. Rather than issue a written opinion "[o]n the preliminary issue," the district court invited the parties to "get together on when we need to set this for a final hearing." Pet. App. 58a.

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[4] https://tinyurl.com/4km53wbf.

[5] Petitioners' preliminary injunction motion also claimed that HISA violates the public-nondelegation doctrine and the Appointments Clause. The Eighth Circuit found that Petitioners had not established a fair chance of success on those claims, Pet. App. 10a-13a, and the Petition does not seek review of either one.

Petitioners appealed to the Eighth Circuit instead. While the appeal was pending, the Fifth Circuit issued a decision on the National and Arkansas HBPAs' challenge to the facial validity of the amended Act. The Fifth Circuit affirmed the district court's holding that Congress's amendment to HISA "solved the nondelegation problem with the Authority's rulemaking power." *National Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 420 (5th Cir. 2024) (*National Horsemen's II*). The Fifth Circuit "disagree[d] with the district court in one important respect, however: HISA's enforcement provisions violate the private nondelegation doctrine." *Id.* at 421[6]

3. The Eighth Circuit subsequently affirmed the district court's judgment in this case. First, the Eighth Circuit "agree[d] with the Sixth and Fifth Circuits that the Act's rulemaking structure does not violate the private nondelegation doctrine." Pet. App. 6a. Because the FTC "has the final say over the rules, there is no impermissible private delegation." Pet. App. 6a-7a (citing *Adkins*, 310 U.S. at 399).

Next, the Eighth Circuit acknowledged that its "two sister circuits reached differing conclusions" on

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[6] On October 28, 2024, this Court granted the Authority's stay of the Fifth Circuit's mandate. No. 24A287. The Solicitor General and the Authority have filed certiorari petitions seeking this Court's review of the Fifth Circuit's holding that HISA's enforcement provisions facially violate the private-nondelegation doctrine. Nos. 24-429, 24-433. The plaintiffs in the Fifth Circuit case agree that the Court should review that question, and they have filed certiorari petitions raising other questions. Nos. 24-465, 24-472, 24-489.

whether "the enforcement provisions of the statute [are] unconstitutional." Pet. App. 8a-9a. The Eighth Circuit "agree[d] with the Sixth Circuit that the statute is not unconstitutional on its face" because "the Commission has broad power to subordinate the Authority's enforcement activities." *Id.* In direct conflict with the Fifth Circuit, the Eighth Circuit was "satisfied that the statute's enforcement provisions are not unconstitutional on their face and in all of their applications." *Id.* at 10a.

Judge Gruender concurred in the majority's holding that HISA's rulemaking provisions are constitutional. Pet. App. 13a. But "[l]ike the Fifth Circuit, [he] conclude[d] that HISA's enforcement provisions facially violate the private nondelegation doctrine." *Id.* at 17a.

DISCUSSION

The Fifth Circuit's determination that HISA's enforcement provisions facially violate the private-nondelegation doctrine conflicts with the Sixth and Eighth Circuits' determinations on materially identical constitutional challenges that warrant this Court's review. By contrast, the constitutionality of the Act's rulemaking provisions—on which the courts of appeals are in complete agreement—is not cert-worthy. The Court should grant the Authority's and the Solicitor General's pending petitions seeking review of the Fifth Circuit's erroneous decision and hold the petition in this case.

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 petition for review of the Fifth Circuit's judgment in a parallel case, *see Horseracing Integrity & 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 warrants this Court's review.

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

The decision below deepens an acknowledged circuit split on the constitutionality of HISA's enforcement provisions. "[S]atisfied 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," the Eighth Circuit joined the Sixth Circuit in rejecting materially identical private-nondelegation claims. Pet. App. 9a-10a; *see Oklahoma*, 62 F.4th at 231-233 (same). In direct contrast, the Fifth Circuit held that "HISA's enforcement provisions are facially unconstitutional" because "the Authority's enforcement power is not subordinate to FTC oversight." *National Horsemen's II*, 107 F.4th at 421, 426. That square conflict calls out for this Court's review.

Specifically, the Fifth Circuit "part[ed] ways" with the Sixth and Eighth Circuits in two key respects. *National Horsemen's II*, 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." *Oklahoma*, 62 F.4th at 231; *see* Pet. App. 9a ("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." Pet. App. 9a; *see Oklahoma*, 62 F.4th at 231. 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." *Oklahoma*, 62 F.4th at 233.

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 II*, 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. 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 II*, 107 F.4th at 431 (citing *Oklahoma*, 62 F.4th at 231). "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.* at 431.

The Eighth Circuit subsequently rejected that reasoning: "To 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." Pet. App. 10a. The Eighth Circuit thus "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.'" Pet. App. 8a-9a (quoting *Oklahoma*, 62 F.4th at 231).

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." *Oklahoma*, 62 F.4th at 231; *see* Pet. App. 9a ("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 II*, 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 *Oklahoma*, 62 F.4th at 229, 232).

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 here squarely determined that "the Authority is a private entity." *National Horsemen's II*, 107 F.4th at 440; *see* Pet. App. 12a-13a. 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 (Pet. 18), 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 I*, 53 F.4th at 873; *see* McConnell Br., *supra*, at 5 ("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. *Oklahoma*, 62 F.4th at 226.

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).[7] 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 declining, and wagers from racing fans are increasing." Thoroughbred Industry Br., *supra*, at 2.

The chaos and confusion caused by the circuit split 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).[8] Only this

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

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

Court can provide the authoritative ruling and certainty the nationwide industry needs.

The answer to the first 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., *supra*, at 4; *see* Pet. 18 ("A host of statutes confer rulemaking and enforcement authority on private entities over a wide range of economic activity."). 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 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 this framework "has been widely approved as constitutional" by the courts of appeals, Pet. App. 7a, the Fifth Circuit's outlier decision calls into question 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.

While Petitioners include a second question presented concerning rulemaking under the amended HISA, every court that has resolved a materially identical challenge (including the Fifth Circuit)—and every single judge sitting on those courts (without exception)—has reached the same conclusion: "the Act's rulemaking structure does not violate the private nondelegation doctrine." Pet. App. 6a ("agree[ing] with the Sixth and Fifth Circuits," the Eastern District of Arkansas, and the Northern District of Texas); *National Horsemen's II*, 107 F.4th at 423-426; *Oklahoma*, 62 F.4th at 229-231. Even as the Fifth Circuit reached the opposite determination on the validity of HISA's enforcement provisions, it held 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 II*, 107 F.4th at 424 (quoting *Oklahoma*, 62 F.4th at 230). 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 *Oklahoma*, 62 F.4th at 231).

That consensus follows from the clear standard Petitioners embraced below: "there is no unconstitutional delegation" if a private entity's involvement in the regulatory scheme is "'subordinate' to a government body that is itself acting constitutionally." C.A. Opening Br. 28 (Oct. 13, 2023) (quoting *Adkins*, 310 U.S. at 388); *see also*, *e.g.*, Plfs'

Reply in Supp. of Prel. Inj. Mot. 3 (May 23, 2024), R. Doc. 34 ("The merits of this claim rise and fall on one issue: The extent to which the FTC oversees the Authority's operations."). It comports with this Court's precedents. *See National Horsemen's I*, 53 F.4th at 880-881 (explaining that *Carter v. Carter Coal*, 298 U.S. 238 (1936), and *Adkins*, 310 U.S. 381, are "[k]ey to applying the doctrine"); *see* Pet. App. 5a-6a. And it fits alongside the unbroken line of appellate decisions upholding the materially identical Maloney Act. *See* Pet. App. 7a ("Congress modeled [HISA] as amended on a regulatory scheme in the securities industry that has been widely approved as constitutional."); *see National Horsemen's II*, 107 F.4th at 425-426; *Oklahoma*, 62 F.4th at 229.

III. THE COURT SHOULD HOLD THE PETITION IN THIS CASE

Beside this petition, the Court now has before it certiorari petitions from the Fifth and Sixth 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; *Oklahoma v. United States*, No. 23-402. 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 Sixth Circuit's decision issued, the Fifth Circuit engaged with the Sixth Circuit's reasoning on a full record following trial. By contrast, the decision below 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." Pet. App. 5a, 13a.

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 limit its review to the first question presented—*i.e.*, 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 (the first question presented).

Respectfully submitted.

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November 6, 2024