No. 24-420

In the Supreme Court of the United States

BILL H. WALMSLEY; JON MOSS; IOWA HORSEMAN'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

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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November 14, 2024

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 21.2(b), the Cato Institute moves for leave to file the attached brief as *amicus curiae* supporting Petitioner. Petitioner inadvertently provided the parties with less than the 10 days of notice of its intent to file as required under Rule 37.2. After realizing this oversight, *amicus* contacted each party to request their consent. Petitioner's counsel consented to this filing. Respondent Federal Trade Commission has not responded to our request for consent to our motion. Respondent Horseracing Integrity and Safety Authority responded that it took no position on our motion.

The interest of *amicus* arises from its mission to advance and support the separation of powers, which is essential to the preservation of liberty.

The Cato Institute is a nonpartisan public policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was founded in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Cato's legal scholars have extensive experience filing briefs in cases concerning the separation of powers in this Court and lower courts across the country. This case concerns Cato because the decision of the Eighth Circuit contravenes Article II and

approves the use of private parties to perform core executive and sovereign functions without accountability to the President or his subordinates. We believe this brief will aid the Court in evaluating whether to grant the petition.

Amicus has no direct interest, financial or otherwise, in the outcome of this case, which concerns it only because the questions presented implicate structural protections for individual liberty. For the foregoing reasons, *amicus* respectfully requests that it be allowed to file the attached brief as *amicus curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Horseracing Integrity and Safety Act, 15 U.S.C. §§ 3051–3060, unlawfully delegates enforcement power to the Horseracing Integrity and Safety Authority.

2. Whether the Horseracing Integrity and Safety Act, 15 U.S.C. §§ 3051–3060, unlawfully delegates rulemaking power to the Horseracing Integrity and Safety Authority.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests Cato because the separation of powers is essential to the preservation of liberty. Taken to its logical conclusion, the holding of the Eighth Circuit would permit Congress to create private "mini-Executives" to regulate vast swaths of American life. Article II mandates an accountable Executive Branch answerable to the President, the only executive officer elected by the entire population of the United States. The Horseracing Integrity and Safety Act contravenes that basic command by empowering a private nonprofit to enforce its provisions without any measure of executive control, direction, or supervision on the frontend of the process. The exercise of such quintessential executive functions so remote from the President is foreign to the Framers' design and imperils the transparency and accountability of the Executive Branch.

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Framers of the Constitution contemplated a strong, transparent, and accountable executive. Envisioning the President as "the sword of the community," the Framers vested *the whole* executive power in his elected office. THE FEDERALIST NO. 78, at 499 (Alexander Hamilton) (Royal Classics ed. 2020); U.S. CONST. art. II, § 1. While multiple-member executive councils, burdened by "habitual feebleness and dilatoriness," tend to dilute democratic accountability, the President alone embodies the entire executive branch of government, providing "a single object for the jealousy and watchfulness of the people." THE FEDERALIST NO. 70, at 410, 412 (Alexander Hamilton) (Royal Classics ed. 2020).

The Appointments Clause is Article II's most potent accountability mechanism. U.S. CONST. art. II, § 2, cl. 2. While the Framers "assume[d] that lesser executive officers w[ould] assist the supreme Magistrate in discharging the duties of his trust," they also provided, under the Appointments Clause, that "these lesser officers must remain accountable to the President, whose authority they wield." *Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020) (cleaned up). Accordingly, individuals who "exercise significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), and "occupy a continuing position established by law" must be appointed by the President and confirmed by the Senate (unless they are "inferior" officers and Congress chooses one of three alternatives). *United States v. Germaine*, 99 U.S. 508, 511 (1879).

The Eighth Circuit dismissed the thrust of Article II's constraints and this Court's precedents in upholding the constitutionality of the Horseracing Integrity and Safety Act ("HISA"), 15 U.S.C. §§ 3051–3060. Pet. App. 10a. HISA directly challenges the Framers' careful design. It establishes a private nonprofit, remote from the President, to displace more than two centuries of self- and state regulation of horseracing. The law broadly federalizes horseracing regulation and authorizes a private body, the Horseracing Integrity and Safety Authority (Authority), to investigate and sanction—"quintessential executive functions"—anyone significantly involved in the horseracing industry without any *ex-ante* supervision or control by the President, his principal officers, or even his inferior officers. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 428 (5th Cir. 2024). Though nominally subject to oversight by the Federal Trade Commission, *see* § 3053,[2] the Authority's board members are selected and removed under the Authority's bylaws, not by the FTC. 15 U.S.C. § 3052(b)(3).

Quite simply, as the Eighth Circuit noted, "[t]he federal government plays no role in the selection or removal of officers of the Authority." Pet. App. 3a. Accordingly, the Fifth Circuit correctly held that HISA's enforcement provisions are facially unconstitutional. *Black*, 107 F.4th at 432. However, the court below, in sustaining HISA, enervated the Presidency, diluted the accountability mandated by

[2] Unless stated otherwise, all statutory citations are to Title 15 of the U.S. Code.

Article II and the Appointments Clause, and created a circuit split.

The private nondelegation doctrine forecloses congressional attempts, like HISA, to create Article II loopholes. By preventing private actors from exercising sovereign powers, the doctrine keeps Congress from creating headless fourth, fifth, or sixth branches of "government"—mini-Executives unconstrained by the Constitution—to regulate Americans' lives. As Judge Gruender warned below in dissent:

> [W]here Congress has avoided the limitations of the Appointments Clause by vesting in a private entity the wholesale power to regulate doping, medication, and safety issues in the horseracing industry nationwide, it is imperative that the private nondelegation doctrine carry force to prevent broad delegation of governmental powers to unsupervised private parties.

Pet. App. 17a.

This Court should heed that warning, grant the petition, and resolve the circuit split.

ARGUMENT

I. HISA IMPERMISSIBLY FREES THE AUTHORITY FROM THE CONSTRAINTS OF THE APPOINTMENTS AND VESTING CLAUSES.

Article II enshrines some of the Constitution's most potent accountability mechanisms. The President is the only federal officer (besides the Vice President) "elected by the entire Nation," *Trump v. United States*, 603 U.S. 593, 622 (2024), and only the President may

appoint principal officers to administer policy and enforce the law. U.S. CONST. art. II, §§ 1–2. In establishing a unitary executive under the supervision of a single democratically elected chief, the Framers enhanced accountable governance, shielding the presidency from the "complicated and indirect measures" employed by legislatures to disguise "the[ir] encroachments." THE FEDERALIST NO. 48, at 289 (James Madison) (Royal Classics ed. 2020); *see also* THE FEDERALIST NO. 70, at 410, 412 (Alexander Hamilton) (Royal Classics ed. 2020) (explaining how a unitary executive provides "a single object for the jealousy and watchfulness of the people").

The private nondelegation doctrine prevents Congress from attempting to create Article II loopholes. The doctrine confines private actors to advisory or subordinate functions, under the "pervasive oversight and authority" of government. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388–89 (1940); *see also Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Without meaningful limits on private delegations, Congress could empower private entities or "individual[s to] exercise significant governmental authority free from Article II constraints, so long as they served outside of an ongoing position." Jennifer Mascott, *Private Delegation Outside of Executive Supervision*, 45 HARV. L. REV. 837, 848 (2022) [hereinafter *Private Delegation*]. That is, Congress could create headless fourth, fifth, or sixth branches of "government" comprising private officials—a modern and secular "millet system"[3]—that undermine the Framers' design and dilute democratic accountability.

[3] In the Ottoman millet system, the Sultan and his state officials delegated significant autonomy and legal jurisdiction to leaders

HISA directly violates the private nondelegation doctrine. In the Act, Congress provides subpoena and investigative powers to the Authority with respect to civil violations committed under its jurisdiction and empowers it to commence a civil action against a covered person or racetrack. § 3054(h), (j). Despite granting substantial executive power, the statute leaves absolutely no role for the President in the selection, direction, supervision, or control of the Authority, its membership, its rulemaking, or its enforcement agenda. *See id.* § 3052(b)(3).

By creating a private regulatory body so remote from the President, HISA unconstitutionally frees the Authority from the constraints of the Appointments and Vesting Clauses. *See United States v. Arthrex*, 141 S. Ct. 1970 (2021); *Seila Law LLC*, 591 U.S. at 197. While the Constitution recognizes the necessity of "lesser executive officers" to "assist the supreme Magistrate in discharging the duties of his trust," "these lesser functionaries must remain accountable to the President." *Seila Law*, 591 U.S. at 213. Because HISA furnishes no such means of accountability, it contravenes Article II.

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of non-Muslim Ottoman subjects. Heads of millets had near-absolute secular and ecclesiastical power over their communities. *See*, *e.g.*, Karen Barkey & George Gavrilis, *The Ottoman* Millet *System: Non-Territorial Autonomy and its Contemporary Legacy*, 15 ETHNOPOLITICS 24 (2016). Whatever the merits of the millet system, it is foreign to our Constitution.

II. HISA IMPERMISSIBLY SUBORDINATES A PRIVATE REGULATORY BODY EXERCISING EXECUTIVE POWER TO THE FTC.

HISA grants the Authority executive powers and places the FTC as an intermediary and nominal overseer. § 3053. Subordinating a regulatory authority with executive powers to an agency like the FTC poses clear structural problems. The judiciary should not tolerate that diminishment of presidential powers. *Free Enter. Fund v. Pub. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) ("The diffusion of power carries with it a diffusion of accountability.").

To avoid accountability to the President, the FTC has maintained for decades that it does not exercise substantial executive powers.[4] This Court held in *Humphrey's Executor v. United States* that FTC commissioners' removal protections are constitutionally tolerable because the FTC in 1935 was not an executive agency at all, but rather "a legislative" and "judicial aid." 295 U.S. 602, 628 (1935). Whether *Humphrey's Executor* is viable or not,[5] HISA

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[4] *See, e.g.*, Opposition to Plaintiff's Motion for Preliminary Injunction & Defendant's Motion to Dismiss at 10–11, *Meta Platforms, Inc. v. FTC*, No. 23-3562 (RDM), 2024 U.S. Dist. LEXIS 45452 (D.D.C. Mar. 14, 2024) (arguing that *Humphrey's Executor* binds federal courts of appeals and that the Supreme Court "implicitly reaffirmed *Humphrey's Executor*" in *Seila Law*).

[5] *Amicus* disagrees with the FTC's longstanding position that it does not exercise executive power. The "conclusion that the FTC did not exercise executive power has not withstood the test of time," *Seila Law*, 591 U.S. at 216 n.2. As many of this Court's decisions make plain, many "independent agencies" are decidedly and necessarily executive; indeed, their constitutionality hinges on this formulation. *See, e.g.*, *City of Arlington v. FCC*, 569 U.S.

violates the separation of powers by introducing an additional layer of unaccountable—this time, private—bureaucrats over whom the President lacks any authority, supervision, or control.

HISA deputizes a private nonprofit, unrestrained by the strictures of Article II, with authority to investigate "all trainers, owners, breeders, jockeys, racetracks, veterinarians," and "other horse support personnel who are engaged in the care, training, or racing of covered horses" for statutory and regulatory violations. § 3051(6). But its members are not appointed through either of the means provided under the Appointments Clause. U.S. CONST. art. II, § 2, cl. 2. Rather, they are private citizens—five "independent" and four "industry" members—selected under the Authority's bylaws. § 3052(b)(3).

Without a shred of executive oversight or direction on the frontend of the process, the Authority may launch investigations, issue subpoenas, and seek penalties to "deter" covered persons from violating the statute. § 3057(d). The Authority can dole out sanctions for rules violations, including lifetime bans

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290, 304 n.4 (2013). The FTC cannot have it both ways: maintaining it is quasi-legislative and quasi-judicial to fight off attacks to its removal protections, but able to supervise the executive powers of the Authority. "No such powers or agencies exist," and "Congress [cannot] create agencies that straddle multiple branches of Government." *Seila Law*, 591 U.S. at 247 (opinion of Thomas, J.). If *Humphrey's Executor* no longer covers the FTC, this Court should say so. Holding that the FTC exercises substantial executive power would not fix HISA's constitutional problems—the President and his principal officers at the FTC would still lack the ability to remove Authority members—but the law would raise different problems than the Court below addressed.

from horseracing and changes to the order of finish in races. § 3057(d)(3). While FTC administrative law judges review these determinations *de novo*, §§ 3055(c)(4)(B), 3058, they cannot countermand the Authority's decision to launch an investigation, conduct a search, issue a subpoena, impose sanctions, or file a lawsuit, rendering them essentially "unqualified[]" exercises of "quintessential executive functions." *Black*, 107 F.4th at 429, 432, 435.[6]

Notably, HISA gives the President no role in the supervision or direction of the Authority or the FTC. Even if the Eighth Circuit were right that FTC oversight is sufficient to cure a violation of the private nondelegation doctrine with regards to its rulemaking

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[6] As the Fifth Circuit correctly observed, HISA sets forth a "clear delineation of enforcement power between the FTC [and] the Authority." *Black*, 107 F.4th at 433. Congress "empower[ed] the Authority to file suit to enjoin violations," to "charg[e] and adjudicate[e] potential . . . rule violations," and to "enforc[e] any civil sanctions." *Id.* at 432 (emphasis added) (internal quotation marks omitted); § 3054(j) (authority to file suit and impose sanctions); § 3054(h) (subpoena and investigation powers); §§ 3054(e)(1)(E)(iv), 3055(c)(4) (enforcement and investigation powers). As to these functions, the statute "say[s] nothing about FTC involvement," and "when Congress wanted to put the FTC in charge of enforcement, it knew how." *Black*, 107 F. 4th at 432–33 (discussing § 3054(c)(1)(B), which empowers the Authority to recommend to the FTC that it "commence an enforcement action"). Neither the courts nor the FTC can modify "this reticulated scheme." *Id.* at 432. Yet the Eighth and Sixth Circuits held that the FTC could commandeer the Authority's enforcement agenda. *See* Pet. App. 10a; *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023). While constitutional doubts should be avoided to the extent practicable, constitutional avoidance does not stretch so far as to permit the rewriting of statutes. *Cf. Bond v. United States*, 572 U.S. 844, 867 (2014) (Scalia, J., concurring in the judgment).

authority, *see* Pet. App. 10a, the law provides the President no means to hold Authority members accountable for their executive actions.

If this Court agrees with the FTC that *Humphrey's Executor* is still controlling law or does not wish to revisit that precedent in this case, HISA creates two structural problems. First, the statute provides the Authority two layers of removal protection, which this Court condemned in *Free Enterprise Fund*. 561 U.S. at 484 ("Such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President."). Second, this would mean Congress has impermissibly subordinated an executive branch body to a mere "legislative or . . . judicial aid." *Humphrey's Executor*, 295 U.S. at 628 (1935). If the decision below stands, it is unclear what prevents Congress from granting other legislative and judicial aids—like, for example, the Congressional Research Service or the U.S. Sentencing Commission—with the power to oversee executive branch agencies. *See Arthrex*, 141 S. Ct. at 2003 (reaffirming the Court's doctrine that "Congress may not mix duties and powers from different branches into one actor"); *Seila Law*, 591 U.S. at 247 (opinion of Thomas, J.) ("Congress [cannot] create agencies that straddle multiple branches of Government.").

HISA's constitutional deficiencies are thus graver than what the Fifth Circuit identified in *Black*. It is not merely that the FTC lacks oversight of the Authority; it is that the *President* lacks oversight of the FTC, which, in turn, *also* lacks oversight of the Authority. *See Black*,107 F.4th at 429. A headless fourth branch supervising a headless fifth is a scheme totally foreign to our constitutional design.

HISA aggrandizes independent agency power at the President's expense, diluting the democratic accountability mandated by Article II. "This is an open invitation for Congress to experiment" with private "mini-Executive[s]"—unelected and unaccountable to the People—to regulate an expanding sphere of American life. *Morrison v. Olson*, 487 U.S. 654, 726, 732 (1988) (Scalia, J., dissenting).

III. HISA'S DELEGATION OF GOVERNMENT POWER TO A PRIVATE BODY LACKS HISTORICAL PRECEDENT.

Congress's delegations of power to HISA are historically unprecedented.[7] As Professor Mascott establishes in her recent scholarship, there *is* historical pedigree for *certain* types of private delegations, and these arrangements "provid[e] a glimpse of the [original] understanding of the scope of tasks that Congress may constitutionally delegate to private actors." Mascott, *Private Delegation*, *supra*, at 858.

A review of Founding-era history suggests that while Congress may assign "ministerial tasks" to private parties, "the performance of those tasks [must] not constitute a portion of the delegated *sovereign authority* of the United States." *Id.* at 866 (emphasis added). Private parties exercise sovereign authority when their actions bind the legal rights of others "absent subsequent sanction" by the government. *Id.*

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[7] While early congressional practice is not dispositive as to a measure's constitutionality, *see, e.g.*, *Marbury v. Madison*, 5 U.S. 137 (1803), it is at least "probative." *Trump v. Anderson*, 601 U.S. 100, 122 (2024) (Barrett, J., concurring in part and concurring in the judgment).

at 914 n.296 (internal quotation marks omitted). Two examples from early American history illustrate what the founding generation and early American legislators considered permissible private delegations: (1) private boatman employed to enforce customs laws; and (2) private boards of experts established to review patent denials by the Commissioner of Patents. Neither example provides a historical analog to HISA nor suggests that Congress's delegations here are consistent with the original understanding of Article II.

A. CONGRESS HISTORICALLY DELEGATED ONLY MINISTERIAL TASKS TO PRIVATE ACTORS.

Historically, Congress has hired "non-governmental actors . . . for expert services in which they complete[] measurements or other types of empirical assessments." Mascott, *Private Delegation*, *supra*, at 916. But Congress has never vested "standard-creating" or prosecutorial powers in private actors, for these are inherently sovereign functions. *Id.* at 905.

Around the time of the founding, Congress employed private "boatmen" as "inspectors, weighers, measurers, and gaugers . . . to measure the quantity of goods on which the customs duties were to be assessed." *Id.* at 861 (internal quotation marks omitted) (quoting § 6, 1 Stat. 145, 154; § 53, 1 Stat. at 172).[8] The Framers considered these quintessential "ministerial tasks" because private customs inspectors "had very little discretion" given "the detailed nature

[8] *See also* Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2019).

of the customs rates . . . that Congress had developed and imposed." Mascott, *Private Delegation*, *supra*, at 861–62, 866.

Critically, "the sovereign act . . . occurred at the point that Congress *authorized and assigned weight* to the expert assessment," *not* during the "actual expert assessment" itself. *Id.* at 897 (emphasis added). It was for Congress, not the boatmen, to "bind the legal rights" of citizens. *Id.* at 914 n.296

The other prominent example of Congress delegating expert services to private parties occurred in 1836, when Congress created "nongovernmental boards of experts" to review the denial of patents by the Commissioner of Patents. *Id*. at 879. If the Commissioner determined that an applicant was not entitled to a patent, the applicant could appeal to the board, which consisted of "three disinterested persons" selected by the Secretary of State "for that purpose." *Id.* at 891 (quoting § 7, 5 Stat. 117, 120). Board members were "private experts" who served on a case-by-case basis, "not governmental officers of any kind." *Id.* at 858.

These boards were not as strictly ministerial as the private boatmen used in customs. They could "effectuat[e] *binding* reversal of prior Patent Commissioner assessments" and make "mixed fact-law determinations regarding threshold patentability findings on obviousness and interference." *Id.* at 856, 863, 882 (emphasis added).[9] However, the Executive

[9] "For example, the boards could reverse the 1836 Patent Commissioner's conclusions that an invention was *insufficiently novel* to warrant a patent or that an invention duplicated, or interfered with, an invention already submitted to the patent

Branch's role in evaluating patents was viewed as ministerial,[10] so this delegation to private actors was constitutionally unremarkable.

In short, the private expert assessment itself was not an exercise of sovereign authority, because the board, the Commissioner, and the Secretary had minimal discretion in carrying out their statutory duties. Boards "did not have binding sovereign authority to set the terms for future proceedings," and contemporary evidence suggests that their statutory mandate—to review patent denials—involved "purely ministerial responsibilities." Mascott, *Private Delegation*, *supra*, at 898–99.

In any case, courts never evaluated the constitutionality of these boards, and this governance experiment was short-lived, lasting from 1836 to 1839, when Congress "transferred the power of the 1836 boards to the [chief] district judge [of the District of Columbia.]" *Id.* at 903.

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office." *Id.* at 869 (emphasis added). The boards did not have the power to reverse the Commissioner's *grant* of a patent. *Id.* at 857.

[10] For instance, an 1812 letter from the U.S. Attorney General to the Secretary of State "concluded that the Secretary . . . lacked discretion to decline to issue a patent once the prospective patentee had complied with the congressionally mandated application process." *Id.* at 898 (citing Patents for Inventions, 1 Op. Att'y Gen. 170, 171 (1812)). Similarly, in 1831, the Attorney General confirmed that when granting patents, the Executive "acts ministerially," reasoning that satisfaction of statutory criteria removes "an[y] examination of the question of right." *Id.* (internal quotation marks omitted) (quoting Patents, Patent Office, and Clerks, 2 Op. Att'y Gen. 454, 454–55 (1831)). *See also Grant v. Raymond*, 6 Pet. 218, 241 (1832) (noting that the Secretary issued patents through a routine process "as a ministerial officer").

B. HISA FALLS FAR OUTSIDE THE HISTORICAL TRADITION OF PRIVATE DELEGATIONS.

HISA falls far outside this historical tradition of Congress employing private actors to administer expert services under federal law. Under HISA, the Authority has practically unfettered discretion "to file suit to enjoin violations," "charg[e] and adjudicate[e them]," and "enforc[e] any civil sanctions" that result. *Black*, 107 F.4th at 433 (internal quotation marks and citations omitted). The statute "say[s] nothing about FTC involvement" in such processes, nor the President's role. *Id.* at 432. The Authority is thus akin to a private prosecutor or Attorney General, not a ministerial aid of the sort embraced by the Founding generation. Indeed, it is more powerful than a typical prosecutor, who is often elected and depends on the legislature to amend the criminal law. The Authority appoints its own members and can make its own rules, which the FTC must rubberstamp if they are "consistent with" the statute. § 3053(c)(2).[11]

While the FTC can hold the Authority's proposed rules in abeyance to review them, the same cannot be said for the Authority's enforcement efforts. *See Black*, 107 F.4th at 420 (addressing § 3053(e) and FTC review of Authority actions). Without any oversight by the FTC, a principal officer, or the President, the Authority may launch expensive fishing expeditions

[11] *Amicus* does not agree with the lower court, or the Fifth or Sixth Circuits, that the Authority's rulemaking function is properly subordinated to the FTC. *See* Pet. App. 7a; *Black*, 107 F.4th at 426; *Oklahoma*, 62 F.4th at 231. Even if it *were*, that has no bearing on HISA's broader Article II deficiencies. *See* Section II, *supra*.

against jockeys, doctors, owners, and venue operators. It may subpoena their records and impose sanctions against them without so much as a governmental rubberstamp. Notably, the exercise of such powers entails a tremendous amount of discretion that this Court has called, in other contexts, "absolute." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

In short, the Authority does not resemble the private boatmen Congress employed as measurers and gaugers in 1789, nor the private boards created to review patentability findings in 1836. *See generally* Mascott, *Private Delegation*, *supra*. The Authority is a private nonprofit that makes rules, charges violations of those rules, and adjudicates those violations. It is a government unto itself, exercising an amalgamation of executive, legislative, and judicial functions over a small but important jurisdiction. "The accumulation of [such] powers, in the same hands, . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 280–81 (James Madison) (Royal Classics ed. 2020). The constitutional problems are immediate and far-reaching when those wielding such powers are private technocrats unaccountable to the President, and the sovereign he represents, the American People.

CONCLUSION

For the foregoing reasons, and those described by the Petitioners, this Court should grant the petition.

Respectfully submitted,

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