No. 24-420

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

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American People still enjoy the shell of their Republic, there has

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[1] No counsel for any party to this case authored this brief in whole or part, and no party or counsel other than *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus curiae* notified Petitioner of NCLA's intention to file this brief on October 25, 2024, and notified Respondents of its intention to file this brief on November 1 and 4, 2024.

developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by the Eighth Circuit's holding that Congress may constitutionally vest in private entities executive power to investigate and prosecute people alleged to have violated federal statutes and regulations. Such an arrangement violates the Constitution's requirement that all executive power be vested in the President, and it enables private entities to exercise executive power without constitutionally mandated accountability to the President.

INTRODUCTION AND SUMMARY OF ARGUMENT

Justice Alito warned nearly a decade ago: "One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress 'sponsor[s] corporations that it specifically designate[s] *not* to be agencies or establishments of the United States Government.'" *Dep't of Transp. v. Ass'n of Am. RRs.*, 575 U.S. 43, 57 (2015) (Alito, J., concurring) (quoting *Lebron v. Nat'l RR. Passenger Corp.,* 513 U.S. 374, 390 (1995)).

Close attention is warranted here. The Horseracing Integrity and Safety Act ("HISA") purports to vest extensive law enforcement powers in a "private,

independent, self-regulatory, nonprofit corporation, to be known as the 'Horseracing Integrity and Safety Authority'" ("Authority"), which is governed by a Board of Directors comprising five "independent" members and four "industry" members. 15 U.S.C. § 3052(b). Board members are neither appointed nor removable by the President, the head of any executive department, or the federal courts. *See* U.S. Const. art. II, § 2, cl. 2. Rather, they are selected by a nomination committee, whose membership is in turn filled by the Board. 15 U.S.C. § 3052(d).

Under HISA, the Authority writes and enforces nationwide rules governing doping, medication control, and racetrack safety in the horseracing industry. *See* 15 U.S.C. § 3054(a). The Act also directs the Authority to subcontract with yet another private non-profit entity, the U.S. Anti-Doping Agency ("USADA"), or a comparable entity, to enforce anti-doping rules and mediation rules. *Id.* § 3054(e)(1)(A), (B). The Act gives the Authority power to appoint "impartial hearing officers or tribunals" to decide in-house adjudications. 15 U.S.C. § 3057(c). The Authority has subcontracted to the Judicial Arbitration and Mediation Services ("JAMS"), a for-profit company, to perform that function.[2]

The Federal Trade Commission ("FTC") has power to review sanctions imposed by the Authority, and

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[2] *JAMS to Resolve Cases in the Horseracing Integrity and Safety Authority's Anti-Doping Program*, Mar. 22, 2023, available at: https://www.jamsadr.com/news/2023/jams-to-resolve-cases-in-the-horseracing-integrity-and-safety-authority-anti-doping-program (last visited Nov. 14, 2024).

Congress amended the Act in 2022 to provide greater FTC oversight over the Authority's rulemaking power. But the Authority and USADA retain unfettered enforcement power. They decide whether to investigate a regulated person for violating HISA's rules, whether to subpoena the person's records or search its premises, and whether to sanction it. *Id.* § 3054(e)(1)(E)(i), (iii), (iv); § 3055(c)(4)(B).

In upholding this grant of executive power to a private entity and its private subcontractor under the private nondelegation doctrine, the decision below deepens a circuit split. *Compare Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), *cert. denied*, No. 23-402 (June 24, 2024) *with Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024), No. 24A287 (stay granted Oct. 28, 2024). The nomenclature of "delegation," however, is misleading in this case because Congress lacks *any* executive power, and thus cannot delegate it to anyone, much less to private actors like the Authority and its unaccountable subcontractors. Rather, the law enforcement powers HISA grants the Authority are core executive powers that the Constitution states "shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. The question is therefore one of "vesting" rather than "delegation."

Congress may create entities and vest in them certain executive powers, even if such entities are labelled private. *See Ass'n of Am. RRs.*, 575 U.S. at 55. But Congress may not place executive power beyond the President's control. *Seila Law LLC v. CFPB*, 591 U.S. 197, 203–04 (2020). HISA violates Article II's Vesting Clause because it vests executive powers in

private entities—the Authority and its subcontractors USADA and JAMS—that not only elude the President's control but also any control by FTC. These multiple layers of private federal law enforcement power are incompatible with this Court's precedent regarding Article II's Appointments and Take Care Clause, which requires officials who exercise significant executive authority to be appointed by the President, a department head, or the courts and be removable by the President. *See Lucia v. SEC*, 585 U.S. 237, 243 (2018); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 511–513 (2010).

Contrary to the decision below, even a hypothetical FTC rule requiring FTC preclearance of the Authority's enforcement actions would not provide sufficient accountability to the President for at least three reasons. *See* App.9a. *First,* a hypothetical rule is just that: hypothetical. It therefore cannot be a substitute for mandatory accountability under the Appointments and Take Case Clauses. *Second*, even if FTC promulgated a preclearance rule, the Authority would still exercise unreviewable discretion *not* to enforce federal law, which is a core executive power. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). *Third,* a preclearance rule would leave intact the Authority's significant discretion to preside over in-house administrative adjudications, which this Court said is a power that may only be exercised by a duly appointed Officer of the United States. *Lucia*, 585 U.S. at 243.

In upholding HISA, the decision below permits the vesting of executive power in a private entity that falls outside of the Executive Branch's control. That cannot be right, and this Court's review is necessary to stop

this violation of Article II. The Court should grant the petition for certiorari. In the alternative, should the Court instead grant the unopposed petition in *Horseracing Integrity and Safety Authority, Inc. v. Nat'l Horsemen's Benevolent and Protective Ass'n*, No. 24A287, it should hold this petition pending the decision in *Horseracing Integrity and Safety Authority*, and then dispose of this petition as appropriate in light of that decision.

ARGUMENT

I. CONGRESS MAY NOT VEST EXECUTIVE POWER IN A PRIVATE ENTITY NOT CONTROLLED BY THE PRESIDENT

The decision below upheld HISA under the nomenclature of the "private nondelegation doctrine." App.9a. But that doctrine concerns Congress's ability to delegate *legislative—i.e.*, rulemaking—powers to private entities. The Authority's power to investigate and enforce the Act and regulations thereunder are *executive* powers that Congress does not have, and thus cannot delegate.

Article II of the Constitution provides that "the 'executive Power'—all of it—is 'vested in [the] President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law*, 591 U.S. at 203 (quoting U.S. Const. art. II, § 1, cl. 1; *id.* § 3). Not having executive power in the first place, Congress cannot lawfully delegate it. The decision below and the briefing of the parties have been framed in terms of congressional delegation of legislative power. Once the analysis focuses on the language of the Constitution—

as it must—it becomes clear that Congress cannot delegate a power it does not have. Therefore, the question must be decided in terms of *vesting*, not "delegation."

HISA violates the Vesting Clauses because it empowers the Authority, a private actor that the President does not control, and its private subcontractor USADA, to exercise quintessential executive power by conducting investigations and enforcement of federal law. The Supreme Court has long made clear that central to the executive power is the authority to "enforce" laws "or appoint the agents charged with the duty of such enforcement." *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928). The executive power to enforce the law includes the discretion not to bring an action at all. *See United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also Heckler*, 470 U.S. at 831. Such discretion also encompasses decisions on "what precise charge shall be made" and "whether to dismiss a proceeding once brought." *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

HISA's plain terms purport to vest executive power in the Authority and USADA, both private entities. 15 U.S.C. § 3054(a), (c). It vests the Authority with power to investigate covered entities for violating rules promulgated under the Act. *Id.* § 3054(h). It may subpoena records or search premises. *Id.* The Authority decides whether to sanction entities in internal adjudications. *Id.* §§ 3057, 3058(a). And it decides whether to sue the entity in federal court for civil sanctions, injunctions, or to enforce sanctions it has imposed. *Id.* § 3054(j).

HISA further requires the Authority to contract with USADA (or a comparable entity), which undertakes enforcement "on behalf of the Authority." *Id.* § 3054(e)(1)(E)(i). In this capacity, the Act vests USADA with power to conduct "independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations." § 3055(c)(4)(B); *see also* § 3054(e)(1)(E)(iv). FTC reviews the Authority's or USADA's sanctions. *Id.* § 3058(b)(1), (c). But the Act does not require FTC to pre-approve or otherwise supervise the Authority's and USADA's other enforcement activities, including investigating, subpoenaing, searching, charging, and litigating. *Black*, 107 F.4th at 428–30.

HISA thus allows private citizens who do not take an oath of office to conduct investigations, enforcement, and civil litigation in contravention of the Constitution's command that executive power be wielded only by the President, "personally and through officers whom he appoints." *Printz v. United States*, 521 U.S. 898, 922 (1997). HISA empowers private citizens and entities to litigate interests that are solely the Government's. *Cf. TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021) ("A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law … would infringe on the Executive Branch's Article II authority."). At bottom, HISA impermissibly authorizes a private entity, its subcontractors, and their private-citizen employees to litigate on the United States's behalf, whereas "[t]he Constitution requires that a President chosen by the entire Nation oversee the execution of the laws." *See Free Enter. Fund*, 561 U.S. at 499; *see also Ass'n of Am.*

RRs., 575 U.S. at 88 (Thomas, J., concurring in the judgment); *Printz*, 521 U.S. at 923.

II. VESTING OF EXECUTIVE POWER IN PRIVATE ENTITIES FATALLY UNDERMINES CONSTITUTIONAL ACCOUNTABILITY

Article II's vesting of all executive power in a single person, the President, is "unique in our constitutional structure," and is "necessary to secure the authority of the Executive so that he could carry out his unique responsibilities." *Seila Law*, 591 U.S. at 223–24. The Framers knew that "it would be 'impossib[le]' for 'one man' to 'perform all the great business of the State.'" *Id.* at 213 (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed. 1939)). Thus, "the Constitution assumes that lesser executive officers will 'assist the supreme Magistrate in discharging the duties of his trust.'" *Id.* (quoting 30 WRITINGS OF GEORGE WASHINGTON 334). To maintain the Executive Branch's unitary structure and prevent the abuse of power, "[t]hese lesser officers must remain accountable to the President, whose authority they wield." *Id.*

This Court recognizes that Article II contains two mechanisms relevant here to ensure accountability to the President. *First*, Officers of the United States who exercise executive power on the President's behalf must be appointed in accordance with the Appointments Clause. *Lucia*, 585 U.S. at 241. *Second*, the President is also charged with "oversee[ing] executive officers through removal." *Free Enter. Fund*, 561 U.S. at 492. The dual powers of appointment and removal are necessary for "legitimacy and accountability to the public" of the federal

administrative body by creating "'a clear and effective chain of command' down from the President, on whom all the people vote." *United States v. Arthrex, Inc.*, 594 U.S. 1, 11 (2021) (quoting *Free Enter. Fund*, 561 U.S. at 498). "Without such power, the President could not be held fully accountable ... [and] the buck would stop somewhere else." *Seila Law*, 591 U.S. at 204 (citation omitted). HISA prevents constitutional accountability by vesting executive power in the Authority, whose members are not appointed in accordance with the Appointments Clause and whom the President cannot remove directly or indirectly.

A. HISA VIOLATES THE APPOINTMENTS CLAUSE

The Appointments Clause maintains accountability to the President by creating a two-track system for appointing "Officers of the United States." "*Principal* officers," such as agency heads and other senior government officials, must be nominated by the President and confirmed by the Senate. *Arthrex*, 594 U.S. at 10. For "*inferior* Officers" who must be supervised by Principal officers, Congress may vest their appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

The Supreme Court deems an individual an officer of the United States if she "exercis[es] significant authority pursuant to the laws of the United States," *Lucia*, 585 U.S. at 245 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)), and "occup[ies] a 'continuing' position established by law," *id.* (quoting *United States v. Germaine*, 99 U.S. 508,

511 (1879)). If an individual satisfies both conditions, the Constitution requires that she be appointed consistent with the Appointments Clause. Individuals who are vested with authority to bring civil litigation to enforce federal laws are Officers, *Buckley*, 424 U.S. at 126, as are individuals vested with power to decide in-house adjudications to determine whether an accused should be penalized for violating federal laws, *Lucia*, 585 U.S. at 249–51; *see also Freytag v. Commissioner*, 501 U.S. 868, 882 (1991).

Under this test, the members of the Authority clearly are Officers of the United States. Their positions are established by law and are continuous with no term limits. 15 U.S.C. § 3052(b). They also exercise "significant authority pursuant to the laws of the United States" because HISA gives them investigatory enforcement powers that are not available to ordinary citizens. 15 U.S.C. §§ 3054, 3057; *Trump v. United States*, 603 U.S. 593, 620 (2024) ("Investigation and prosecution of crimes is a quintessentially executive function.") (cleaned up).

To begin, HISA grants the Authority unreviewable power to "conduct[] civil litigation in the courts of the United States." *See Buckley*, 424 U.S. at 126, 140. This Court explained in *Buckley* that "[a] lawsuit is the ultimate remedy for a breach of the law" and thus an executive function reserved to the President to whom "the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* at 138 (quoting U.S. CONST. art. II, § 3).

As in *Buckley*, the Authority may bring civil actions in federal court against persons whom it accuses of violating HISA. 15 U.S.C. § 3054(j). Unlike when it promulgates rules, the Authority has no need to obtain *ex ante* approval from FTC before it brings such an action, much less when it chooses to investigate a suspected wrongdoer. The Authority further has unreviewable discretion *not* to bring an enforcement action. Finally, HISA provides no way for FTC to interfere in the Authority's prosecution of a civil enforcement action after it is filed in federal court. The Authority's ability to bring and conduct litigation on behalf of the United States in court is textbook "significant authority," *Buckley*, 424 U.S. at 126, 138–39, that is intrinsically part the Executive Branch's "exclusive authority and absolute discretion to decide whether to prosecute a case," *Nixon*, 418 U.S. at 693 (citations omitted); *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1134 (11th Cir. 2021) (Newsom, J., concurring) ("Thus, at its core, the 'executive power' entailed the authority to bring legal actions on behalf of the community for remedies that accrued to the public generally.").

HISA requires neither FTC nor any other executive official to review the Authority's decision to bring (or not bring) civil enforcement cases. 15 U.S.C. § 3054(j). As such, the Authority's members are Principal Officers who must be appointed by Presidential nomination with the advice and consent of the Senate. *Arthrex*, 594 U.S. at 13 (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997) (holding that inferior officers' exercise of executive power must be "effectively supervised by a

combination of Presidentially nominated and Senate confirmed officers in the Executive Branch.")). They are not appointed in that manner but rather selected by a "nominating committee" that is in turn comprised of individuals selected by the Authority's members. 15 U.S.C. § 3052(d). That arrangement clearly violates the Appointments Clause. Even if the Authority's members were merely inferior officers, their selection would still violate the Appointments Clause because they are not appointed by "the President, a court of law, or a head of department." *Lucia*, 585 U.S. at 244.

Additionally, HISA vests the Authority with power to administer and decide in-house adjudications that determine whether an accused person violated the Act and typically impose sanctions. *See* 15 U.S.C. § 3057(c)–(d). This Court has repeatedly held that the power to preside over internal adjudications is "significant authority" that may be exercised only by an Officer of the United States. *See Arthrex*, 594 U.S. at 13, *Lucia*, 585 U.S. at 245; *Freytag,* 501 U.S. at 881. Here, HISA also grants the Authority power to appoint "impartial hearing officers or tribunals." 15 U.S.C. § 3057(c). As noted above, the Authority has subcontracted its adjudicative functions to JAMS, a private, for-profit company. *See supra* note 2. While FTC could theoretically modify rules that apply in the Authority's or JAMS's hearings, it has not done so. And in any event, the hearing officers have full discretion to apply those rules and decide whether to, for example, admit evidence, take testimony, and ultimately determine whether a violation occurred.

Like the tax court judge in *Freytag* and the ALJ in *Lucia*, the Authority's (or its subcontractors') hearing officers have all the authority needed to ensure fair and orderly adversarial hearings, and they make decisions on the merits. This is "significant authority" that qualifies hearing officers as inferior Officers whom the Constitution requires to be appointed by "the President, a court of law, or a head of department." *Lucia*, 585 U.S. at 244. The Authority's members are none of these. Nor are they themselves appointed by the President, a court, or department head. *See* 15 U.S.C. § 3052(a), (d).

B. THE AUTHORITY'S MEMBERS ARE UNCONSTITUTIONALLY PROTECTED FROM PRESIDENTIAL REMOVAL

HISA also violates Article II's Take Care Clause because it protects the Authority's members from being removed by the President. "Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483. The removal power is essential: "The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them," *id.* at 484, and remove "those for whom he can not continue to be responsible," *id.* at 493 (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)).

This Court has only once—in *Morrison v. Olson*, 487 U.S. 654 (1988)— upheld limited restrictions on the President's ability to remove and supervise those who conduct litigation on behalf of the United States.

There, the Ethics in Government Act insulated from presidential removal the independent counsel who is appointed "to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws." *Id.* at 660. The Court upheld that removal protection on the ground that the President retained "sufficient control over the independent counsel" in other ways. *Id.* at 696. "Most importantly," the Attorney General (who is directly accountable to the President) could remove the independent counsel for "good cause." *Id.* at 695–96. In addition, the Attorney General decided whether to authorize the appointment, defined the independent counsel's jurisdiction, and oversaw Department of Justice policy, which the independent counsel must follow. *Id.* at 694–96; *see also Free Enter. Fund*, 561 U.S. at 495 (observing that *Morrison* "sustained the statute" because the President had "several means of supervising or controlling the independent counsel" (cleaned up)). This level of removal protection represents "the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Seila Law*, 591 U.S. at 218 (citation and quotation marks omitted).

HISA far exceeds the outer bounds of restrictions on the President's Take Care authority recognized in *Morrison*. The President literally has no authority to remove the Authority's members for disobedience or misbehavior, much less the Authority's subcontractors at USADA and JAMS. Nor do FTC Commissioners—who themselves are insulated from Presidential accountability—have any way to remove or otherwise discipline the Authority's

members or subcontractors. Section 3053 provides all the ways in which FTC has oversight over the Authority. It does not include removal or disciplining of any of these people. *See* 15 U.S.C. § 3053. The Authority's members and subcontractors are therefore unconstitutionally insulated from accountability. *See Free Enter. Fund*, 561 U.S. at 483.

III. FTC OVERSIGHT DOES NOT CURE HISA'S CONSTITUTIONAL DEFECTS

The decision below held that Congress cured HISA's vesting of executive enforcement powers through a 2022 amendment that gives FTC "pervasive oversight and control of the Authority's enforcement activities." App.8a–9a (citation omitted). That amendment, however, merely states that FTC "may abrogate, add to, and modify *the rules* of the Authority[.]" 15 U.S.C. § 3053(e) (emphasis added). By its plain terms then, the 2022 amendment grants FTC oversight only over the Authority's *rulemaking* powers but not its investigative, enforcement, and adjudicatory powers.

The decision below nonetheless reasoned that oversight over rulemaking translates into oversight over investigation and enforcement because FTC may "create rules that require the Authority to obtain the Commission's approval before the Authority acts to commence a civil action" or issue a subpoena. App.9a. As the petition explains (at 24–25), this is wrong because any rule FTC promulgates must be consistent with the statute. *See* 15 U.S.C. § 3053(e) (FTC's rules and modifications must be "in furtherance of the purposes of this chapter"). Section 3054(j) plainly

gives the Authority power to file civil suits in federal court without restriction on the exercise of prosecutorial discretion, and an FTC preclearance rule would contravene statutory text. The whole point of HISA is to vest power to enforce the Act in the Authority and its nongovernmental subcontractors. New rules that force the Authority and its subcontractors to preclear enforcement activities with FTC would clearly violate the statute.

Preclearance rules for investigation and enforcement would also be impossible to administer. Rulemaking involves only a single decision to preclear: whether a proposed rule enters force. By contrast, investigation and enforcement involve countless decisions, including who to investigate, how and with what resources, whether to file a civil case, what litigation strategy to pursue, and whether to settle or dismiss a case. Preclearance rules for every significant investigative and enforcement decision would require micromanagement that effectively replaces the Authority with FTC, contravening HISA's explicit vesting of investigative and enforcement power in the Authority rather than FTC.

But even if HISA allowed for such rules, the 2022 amendment still would not cure the constitutional defects highlighted above for at least three reasons. *First*, the Appointments and Take Care Clauses establish *mandatory* constitutional requirements to ensure accountability for the exercise of prosecutorial discretion that cannot turn on the existence of hypothetical FTC rulemaking. FTC has not—as the decision below theorized—promulgated rules to

require preclearance of all the Authority's investigative and enforcement decisions. Nor is it required to create such rules. Thus, the statute permits the Authority's directors to exercise "significant authority" in enforcing federal law that marks them as Officers of the United States. *See Buckley*, 424 U.S. at 126, 138–139. Yet, they are not appointed in accordance with the Appointments Clause. Nor are they removable by the President.

Second, preclearance rules would not limit the Authority's absolute discretion *not* to investigate a person or *not* to bring an enforcement action. The executive power to enforce the law includes the discretion not to take enforcement action at all. *See Nixon*, 418 U.S. at 693; *see also Heckler*, 470 U.S. at 831. As then-Judge Kavanaugh explained, "[o]ne of the greatest unilateral powers a President possesses under the Constitution" is "the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior[.]" *In re Aiken Cnty.*, 725 F.3d 255, 264 (D.C. Cir. 2013) (Kavanaugh, J.). Preclearance rules for investigative and enforcement actions would do nothing to limit the Authority's exercise of executive power to under-enforce HISA and regulations promulgated thereunder.

Third, FTC would still lack oversight over the Authority's administrative investigation and adjudication functions. The decision below merely noted that FTC "has power to review the Authority's [administrative] enforcement actions and to reverse them." App.9a (citing 15 U.S.C. § 3058(c)). But *ex post*

review does not cure an Appointments or Take Care Clause violation. In *Freytag*, this court held that "special trial judges" at the U.S. Tax Court who merely "proposed findings and an opinion" in major cases for regular Tax Court Judges were Officers because they nonetheless exercise "significant authority" in presiding over adjudications. 501 U.S. at 873. Hearing officers at JAMS whom the Authority appoints under § 3057(c) exercise the same "significant discretion" when presiding over in-house adjudications. *Cf. Lucia*, 585 U.S. at 248–49 (comparing special trial judges with SEC ALJs). The exercise of such discretion falls outside of Article II because the President has no power to directly or indirectly appoint and remove the directors who subcontracted to JAMS hearing officers, much less the hearing officers themselves.

The reasoning below does not change the fact that HISA vests in the Authority executive investigative and enforcement powers—including the conduct of in-house adjudications—outside of the President's control. If left to stand, the decision below provides a blueprint for avoiding constitutional accountability. By its terms, Congress could vest vast law enforcement and punitive power in a private entity by merely giving an executive-branch government agency the *option* of promulgating rules to require preclearance of the exercise of enforcement discretion. Simply by not exercising that option, the President could avoid accountability for the executive power that must be vested in him. The private entity would have *carte blanche* to wield executive power, or worse, as here, subcontract to other unaccountable private

entities to wield such power. This Court's review is needed to prevent such an end-run around Article II.

CONCLUSION

The Court should grant the petition for a writ of certiorari. In the alternative, if the Court grants the petition in *Horseracing Integrity and Safety Authority,* No. 24A287, it should hold this petition pending the decision in that case, and then dispose of this petition as appropriate in light of that decision.

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