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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

All parties agree that the first question presented—whether HISA unlawfully delegates enforcement power to the Authority—warrants this Court's review. *See* Gov't Resp. Br. 4; Authority Resp. Br. 11-17. The courts of appeals are squarely divided on that question; multiple Justices of this Court have highlighted the need to clarify the scope of the private nondelegation doctrine; and the question of HISA's constitutionality carries substantial practical significance. Respondents dispute only two points.

First, they contend that the Court should not review the second question presented—whether HISA unlawfully delegates *rulemaking* power to the Authority. *See* Gov't Resp. Br. 4-5; Authority Resp. Br. 17-19. But the two questions are interrelated, and answering both is critical to provide much-needed guidance to the lower courts. Although the government contests the presence of a direct circuit split on the second question, it cannot deny that the courts are in disarray over the proper standard.

Second, respondents contend that the Court should grant their petitions arising out of the Fifth Circuit and hold this petition. *See* Gov't Resp. Br. 5; Authority Resp. Br. 19-20; *see also FTC v. Nat'l Horsemen's Benevolent & Prot. Ass'n*, No. 24-429 (filed Oct. 16, 2024); *Horseracing Integrity & Safety Auth., Inc. v. Nat'l Horsemen's Benevolent & Prot. Ass'n*, No. 24-433 (filed Oct. 15, 2024). Contrary to respondents' arguments, this case is the cleanest, most complete vehicle for review. Even if the Court were inclined to grant the Fifth Circuit petitions, it should also grant and consolidate this petition to ensure the

presentation of a wide range of perspectives on a significant constitutional question.

ARGUMENT

I. The Second Question Presented Warrants Review

This Court should decline respondents' invitation to segregate the validity of the Authority's rulemaking powers from its enforcement powers. Particularly where both questions are squarely presented, there is no persuasive reason to bifurcate them and resolve only one. And there are compelling reasons to grant both.

A. Most significantly, the merits of the two questions are intertwined. Respondents do not dispute that, were the Court to grant review on the first question presented and then reverse the decision below or clarify the relevant test, it would be appropriate for the lower courts on remand to reconsider their answer to the second question presented as well. Because the Eighth Circuit applied the same "subordination" test in resolving both questions, *see* Pet. App. 5a-6a, any clarification of the governing test (or its application) in resolving the first question would necessarily call into question the court of appeals' resolution of the second question. There is no reason for the Court not to resolve that question itself.

The two questions are intertwined at the statutory level, too. Respondents contend that the rulemaking power contained in 15 U.S.C. 3053(e) grants the FTC expansive power to revise the statute's allocation of responsibilities "to subordinate" the Authority to the FTC. Pet. App. 9a. The Fifth Circuit

rejected that argument as to enforcement powers on the ground that it "would let the agency rewrite the statute." *Nat'l Horsemen's Benevolent & Prot. Ass'n v. Black*, 107 F.4th 415, 431 (5th Cir. 2024). But the Fifth Circuit inexplicably *accepted* virtually the same argument as to rulemaking, agreeing that the FTC could impose extra-statutory limitations on the Authority's powers in that context. *See id.* at 425. Those twin holdings are in serious tension with each other, and the Court's construction of Section 3053(e) would likely impact both questions presented.

B. Although the two questions are related, they are sufficiently distinct that granting both would provide materially more guidance to the lower courts than granting the first question alone. In particular, the two questions likely implicate discrete historical traditions that could inform application of the governing test in different ways. As the Sixth Circuit explained, the lawfulness of enforcement delegation may turn on "founding-era or contemporary analogs showing the role private entities may, and may not, play in law enforcement." *Oklahoma v. United States*, 62 F.4th 221, 233 (6th Cir. 2023); *cf. United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 442 (2023) (Kavanaugh, J., concurring). The rulemaking delegation, by contrast, may implicate a different historical tradition.

The need for guidance is particularly acute here, given that the Court has not addressed the private nondelegation doctrine in over 80 years. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). As multiple Justices have recognized, the doctrine cries out for clarification. *See, e.g.*, *Texas v. Comm'r of Internal Rev.*, 142 S. Ct. 1308, 1308-09

(2022) (statement of Alito, J., respecting the denial of certiorari). Resolving both questions would provide a far clearer picture to the lower courts of the doctrine's scope and contours.

C. Regardless of its relationship to the first question presented, the constitutionality of the Authority's rulemaking power independently warrants review. That power is highly significant in its own right. *See* HISA, *Regulations*, https://hisaus.org/regulations (listing hundreds of pages of regulations). And the second question presented implicates several other statutes that similarly delegate rulemaking—not just enforcement—power to private entities. *See, e.g.*, Pet. 18-19; *see also* McConnell Amicus Br. 4, *Horseracing Integrity & Safety Authority, Inc. v. Nat'l Horsemen's Benevolent & Prot. Ass'n*, No. 24A287 (Sept. 24, 2024) (arguing that the "Act adheres to a well-established model of federal regulation associated with other important areas of our economy").

The circuits are divided over the proper standard for assessing delegations like this one. *See* Pet. 15-16 (discussing *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989); *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015)). The government contends (at 5) that the standards articulated in *Pittston* and *Frame* "were dicta" because both decisions "upheld the challenged statutes against private nondelegation claims," but it does not dispute that petitioners would have prevailed under those standards. *See Pittston*, 368 F.3d at 395 ("Congress may employ private entities for *ministerial* or

advisory roles, but it may not give these entities governmental power over others."); *Frame*, 885 F.2d at 1129 (similar). And although the government notes (at 5) that this Court vacated the D.C. Circuit's decision in *American Railroads* "after determining that the entity at issue was not actually a private body," it does not contest that the Court left untouched the D.C. Circuit's nondelegation logic.

Even if the Court were inclined to view the government's fine-grained distinctions as obviating a direct split, the courts of appeals are plainly in disarray about how to assess delegations of rulemaking authority to private entities. That confusion warrants this Court's intervention. *See, e.g.*, *Monasky v. Taglieri*, 589 U.S. 68, 76 (2020) (noting grant of certiorari "in view of differences in emphasis among the Courts of Appeals").

II. The Court Should Grant Review In This Case

A. This case is the best available vehicle for resolving both questions presented. *See* Pet. 27-29. The Eighth Circuit fully addressed the relevant issues and the questions are presented free from any threshold hindrance.

The Authority complains that the "decision below arises in a preliminary-injunction context" and "resolved only whether the challengers had 'show[n] a fair chance of success on the merits.'" Authority Resp. Br. 20 (quoting Pet. App. 5a, 13a). That characterization misapprehends the court of appeals' decision, which—despite arising in a preliminary posture—definitively resolved the questions presented. *See, e.g.*, Pet. App. 6a (holding that "the

Act's rulemaking structure does not violate the private nondelegation doctrine"); *id.* at 10a (similar for enforcement provisions). There is no further analysis for the lower courts to conduct on those questions.

Respondents also suggest that the Fifth Circuit case is a better vehicle because the Fifth Circuit is "the only court of appeals that has found a constitutional violation." Gov't Resp. Br. 5; *see* Authority Resp. Br. 19-20 (similar). But the court below had the benefit of the Fifth Circuit's decision and squarely addressed its reasoning (as well as that of the Sixth Circuit). *See* Pet. App. 6a, 9a.

Moreover, in at least one respect, the decision below presents a more complete suite of arguments than does the Fifth Circuit's opinion. As noted, respondents' defense of the statute depends on an aggressive reading of the rulemaking power contained in 15 U.S.C. 3053(e). Pet. App. 9a; *see id.* at 8a-10a (holding, for example, that the FTC may require the Authority to obtain agency preapproval before filing suit in court). But that interpretation lacks an intelligible principle and thus runs straight into the *public* nondelegation doctrine. An interpretation that *creates* a constitutional problem cannot be justified as a matter of constitutional avoidance, as respondents claim. *See, e.g.*, Pet. 24, *Horseracing Integrity & Safety Auth.*, No. 24-433, *supra*. Unlike the Fifth Circuit, the court below directly addressed the public nondelegation implications of respondents' construction. *See* Pet. App. 11a-12a.

The Authority further suggests (at 20) that the Fifth Circuit case is a superior vehicle because the court there ruled "on a full record following trial."

That distinction is irrelevant, as petitioners assert a facial challenge based on a pure question of law: whether HISA unlawfully confers sovereign power on the Authority, a private entity. Nothing about that question hinges on factual development. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 600 (1988) (observing that facial challenges enable courts to "consider[] the validity of statutes without . . . a record as to how the statute had actually been applied").

B. Even if the Court were inclined to grant the petitions arising from the Fifth Circuit, it should also grant this petition to facilitate a complete presentation of the available arguments. *See, e.g.*, *Relentless, Inc. v. Dep't of Com.*, 144 S. Ct. 325 (2023) (granting petition and ordering case to be argued in tandem with *Loper Bright Enters. v. Raimondo*, No. 22-451); *Jackson v. United States*, 143 S. Ct. 2457 (2023) (granting and consolidating cases from the Third and Eleventh Circuits); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022) (granting petitions from the First and Fourth Circuits); *Trump v. NAACP*, 139 S. Ct. 2779 (2019) (granting and consolidating cases from the Second, Ninth, and D.C. Circuits). The scope of the private nondelegation doctrine is an important question, and the Court's resolution of that question would benefit from a wide range of perspectives.

CONCLUSION

For all these reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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