Nos. 24-433 & 24-429

In the Supreme Court of the United States

HORSERACING INTEGRITY AND SAFETY AUTHORITY, INCORPORATED, ET AL., PETITIONERS
v.
NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, ET AL.

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS
v.
NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CONSOLIDATED MEMORANDUM FOR THE STATE OF TEXAS AND THE TEXAS RACING COMMISSION

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MEMORANDUM OF TEXAS RESPONDENTS

As the Horseracing Integrity and Safety Authority (the Authority) notes, Texas "could not agree more" that this case warrants the Court's attention. Auth. Pet. 13. But as Texas explained in its response to the Authority's motion to stay the mandate (No. 24A287), the Court should not limit its review to the narrow questions presented by the Authority and Federal Trade Commission (FTC) petitioners. Rather, the Court should also consider the logically antecedent question presented in Texas's petition, filed concurrently with this response: whether the Authority can *make* the rules that it enforces, or whether the Horseracing Integrity and Safety Act (HISA) unconstitutionally delegates legislative authority to a private entity, the "most obnoxious form" of delegation. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

A. HISA represents an attempt by the federal government to discover the absolute minimum governmental involvement needed to satisfy the Constitution's requirements that legislative and executive power be vested in Congress and the President, respectively. *See* U.S. Const. art. I, §1; *id.* art. II, §1. Under HISA, the Authority—a "private, independent, self-regulatory, nonprofit corporation," 15 U.S.C. §3052(a)—has the power to create rules to govern the horseracing industry, *id.* §§3053(a)-(b), 3055-56. Yet no one who runs the Authority is appointed or removable by the President or another federal official. *Id.* §3052(b), (d). Even the FTC, the Authority's nominal monitor, is powerless to disapprove rules based on policy disagreement. *Id.* §3053(c)(2). And even if the FTC could second guess the Authority's policy calls—the President can't. *See Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *but see Seila L. LLC*

v. CFPB, 591 U.S. 197, 216 & n.2, 219 & n.4 (2020) (suggesting that the FTC's removal restrictions are, and have always been, unconstitutional).

The Authority has the power to enforce HISA through investigations, sanctions, and lawsuits, *id.* §§3054(c)(1)(A), (h)-(j), 3057, while the FTC—acting first through an administrative law judge—is limited to administrative review of the Authority's sanctions decisions, *id.* §3058(b)-(c). *But see Jarkesy v. SEC*, 34 F.4th 446, 463-64 (5th Cir. 2022) (holding that removal protections for ALJs within independent agencies are unconstitutional under *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010)), *aff'd on different grounds*, 144 S.Ct. 2117 (2024).

Unwilling to submit to governance by an unaccountable private entity, Texas intervened in a lawsuit brought by industry participants, challenging whether HISA was an unconstitutional delegation of legislative and executive authority. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 875 (5th Cir. 2022). And as the Fifth Circuit correctly held the first time this case was before it, the Authority's ability to craft industry-wide programs that were functionally unreviewable by the FTC meant that "it is the Authority, not the FTC, that is in the saddle." *Id.* at 883.

Congress responded to the Fifth Circuit's holding not by delegating *less* authority but by delegating *more*. The FTC now has the discretion to "add to, abrogate, and modify" the Authority's rules through its own notice-and-comment rulemaking. 15 U.S.C. §3053(e). And this, despite the Court's admonition that "[e]nacting general rules through the required notice and comment procedures is obviously a poor means of micromanaging [an entity]'s affairs." *Free Enter. Fund*, 561 U.S. at 504.

Nevertheless, the Fifth Circuit concluded that Congress's decision to give the FTC the option (but not the obligation) to make rules sufficed to ensure that the Authority "'functions subordinately' to an agency with 'authority and surveillance' over it," satisfying that court's constitutional test. Auth. Pet.App. 9a-12a. Although erring in that ruling, the Fifth Circuit then correctly held that allowing the Authority to enforce its own rules—through investigations, prosecutions, and assessments of penalties—violates the private-nondelegation doctrine. Auth. Pet.App. 18a-34a. The latter holding is the subject of the Authority's and FTC's certiorari petitions.

B. Multiple members of this Court have already expressed interest in considering how much authority Congress can delegate and under what circumstances and with what conditions. *See, e.g.*, *Texas v. Comm'r for Internal Revenue*, 142 S.Ct. 1308, 1308 (2022) (Alito, J., concurring in denial of review); *Gundy v. United States*, 588 U.S. 128, 148-49 (2019) (Alito, J., concurring); *id.* at 149 (Gorsuch, J., dissenting). Thus, Texas does not oppose either the Authority's or the FTC's certiorari petition.

But, as it did in the stay briefing already filed with the Court, Texas urges the Court to consider *all* the power delegated to the Authority, including the Authority's rulemaking power. As explained in that briefing and in Texas's own certiorari petition, the circuits are attempting to derive a constitutional doctrine from two 80-year-old cases: *Carter Coal*, 298 U.S. 238 and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). Lack of more precedent from this Court has led to confusion and a variety of standards with uncertain meanings. *See, e.g.*, *Pittston Co. v. United States*, 368 F.3d 385, 396 (4th Cir. 2004) (limiting delegation to powers of an

"administrative or advisory nature"); *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670-71 (D.C. Cir. 2013) (limiting delegation to providing "help" or acting as "an aid"), *vacated on other grounds*, 575 U.S. 43 (2015).

Significantly here, the question of delegating legislative authority is logically antecedent to the Authority's question regarding enforcement of the resulting rules. The Authority itself (at 20) relies on the fact that the FTC has "affirmatively approved" the rules the Authority implements, suggesting this makes HISA's delegation of enforcement authority somehow more constitutionally permissible. But "there is not even a fig leaf of constitutional justification" for the delegation of legislative of executive powers to a private entity. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring). The Court cannot well decide whether the Authority's enforcement of its own rules is constitutional without considering the Authority's power to create those very rules. And as Texas explains in its certiorari petition, the Authority's power to issue guidance without any check by the FTC further confirms this point. *See* 15 U.S.C. §3054(g). After all, regulatory guidance and enforcement power are inextricably intertwined. *See, e.g.*, Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* at 11 & n.15, 187-88, Admin. Conf. of United States (Oct. 12, 2017). *Accord SEC v. Chenery Corp.*, 332 US 194 (1947) (regulators can make policy by rulemaking or adjudication).

This case is, accordingly, doubly worthy of the Court's attention. But the Court's analysis should not be limited to only the questions presented by the Authority and the FTC. Rather, the Court should consider the constitutionality of HISA as a whole—whether Congress

can delegate to a private entity the power to both make and enforce rules governing the horseracing industry.

Respectfully submitted.

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