No. 24-433

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.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

Petitioner 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 Petitioner is a nongovernmental corporation.

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REPLY BRIEF FOR PETITIONERS

The case for this Court's review is about as clear as it gets. Just after the Horseracing Integrity and Safety Authority (Authority) filed this petition, the Solicitor General submitted a parallel petition from the same decision below presenting the same question: whether the enforcement provisions of the federal Horseracing Integrity and Safety Act (HISA) facially violate the private-nondelegation doctrine. No. 24-429. The Court then granted the Authority's application to stay the mandate associated with the Fifth Circuit's outlier holding on that important issue. No. 24A287. And the lead respondents have confirmed their agreement that this Court should review it.

The only remaining point of dispute—raised in respondents' separate petitions referenced in their responses here—is whether to inject additional constitutional claims the lower courts have rejected uniformly. As the Authority will explain in a response to those separate petitions, there is no need to complicate this case by incorporating those peripheral issues. Instead, the Court should simply review the straightforward question presented by the Authority's and the Solicitor General's petitions—*i.e.*, the "one important respect" (and only one) in which the courts of appeals conflict (Pet. App. 4a) and which all parties acknowledge is cert-worthy.

The Court should grant the petition.

DISCUSSION

1. The Solicitor General and the lead respondents agree that this Court should review whether HISA's enforcement provisions on their face violate the private-nondelegation doctrine. *See* Pet. I, *Federal Trade Comm'n v. National Horsemen's Benevolent & Protective Ass'n*, No. 24-429 (U.S. Oct. 16, 2024); NHBPA Mem. 1 ("The Horsemen acquiesce in certiorari" on that question); Texas Mem. 3 ("Texas does not oppose either the Authority's or the FTC's certiorari petition.").

That consensus follows from the undisputed fact that "there is a clear circuit split" on the question. NHBPA Mem. 1; *see* Pet. 13-17. The Sixth and Eighth Circuits held that "the statute's enforcement provisions are not unconstitutional on their face" "[b]ecause the Commission has broad power to subordinate the Authority's enforcement activities." *Walmsley v. Federal Trade Comm'n*, 117 F.4th 1032, 1039-1040 (8th Cir. 2024); *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023) (same). The Fifth Circuit, by contrast, resolved a materially identical challenge by holding that "HISA's enforcement provisions are facially unconstitutional" because "the Authority does not 'function subordinately' to the FTC when enforcing HISA." Pet. App. 4a, 23a.

The parties' alignment also underscores the exceptional importance of the question presented. *See* Pet. 27-31. Respondents acknowledge, for example, that granting certiorari here would comport with "this Court's practice to review decisions that strike down acts of Congress." Pet. 20, *National Horsemen's*

Benevolent & Protective Ass'n v. Horseracing Integrity & Safety Auth., No. 24-472 (U.S. Oct. 22, 2024). It would allow the Court to resolve dispositive legal issues that "[m]ultiple members of this Court have already expressed interest in considering." Texas Mem. 3. And it would yield desperately "need[ed] certainty" for a nationwide industry that "employs tens of thousands and represents a major economic engine." NHBPA Mem. 2. Indeed, only an authoritative ruling from this Court can prevent the "lack of uniformity *** imped[ing] interstate commerce" that motivated Congress—acting "through a highly deliberative and bipartisan process"—to enact (and amend) HISA to protect the cherished national pastime. 166 CONG. REC. H4982 (Sept. 29, 2020) (Rep. Barr); *see* Amici Br. of Sen. McConnell et al. in Support of Stay Appl. 6-7, *Horseracing Integrity & Safety Auth. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Sept. 24, 2024) (explaining "Congress had to act" in "respon[se] to this crisis in the industry" to prevent "the sport [from] disintegrat[ing]").

The Gulf Coast respondents—Texas-based tracks that are not even subject to HISA rules, *see* Pet. 11—stand alone in opposing the petition despite filing one of their own. Gulf Coast Opp. 1-2. But that two-page "opposition" is nominal. The Gulf Coast respondents acknowledge "a circuit split on the question" presented; they "agree that certiorari is warranted" in this case; and they argue it is "an ideal vehicle." Pet. 32-33, *Gulf Coast Racing L.L.C. v. Horseracing Integrity & Safety Auth.*, No. 24-489 (U.S. Oct. 28, 2024). In fact, their petition asks the Court to review

"whether statutorily empowering a private nonprofit corporation to regulate an entire industry nationwide through *** enforcement violates the private nondelegation doctrine." *Id.* at i. So there is no real dispute that the Court should review that question.

2. The Gulf Coast respondents present an "alternative" question about the Appointments Clause. Pet. i, *Gulf Coast, supra.* The other respondents have recognized that the Appointments Clause claim—shot down by every single federal judge to confront it, based on settled precedent this Court "has repeatedly applied *** for three decades," Pet. App. 43a-44a—is "'fundamentally incompatible' with [the] private nondelegation challenge" the Fifth Circuit sustained, *id.* at 38a. But while the Horsemen's Association and Texas acquiesce in the grant of certiorari on the "mutually exclusive" (Pet. App. 38a) private-nondelegation question, they seek to broaden it to cover a separate constitutional challenge to HISA's rulemaking provisions that the lower courts have consistently rejected, too.

For the reasons the Authority explained in its stay briefing and will set forth in a response to respondents' separate certiorari petitions, the Court should limit its review to whether HISA's enforcement provisions facially violate the private-nondelegation doctrine. *See* Reply in Supp. of Stay Appl. 3-8, *Horseracing Integrity & Safety Auth. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (Oct. 2, 2024). That is the only question on which there is a circuit split and the only ground on which the federal statute has been held unconstitutional.

The court of appeals' conflicting answers to that question, despite their uniform rejection of respondents' other constitutional challenges, undermine the suggestion that those distinct claims are "inextricably intertwined" with resolution of the facial constitutionality of the Act's enforcement provisions. Texas Mem. 4; *see* Pet. App. 15a (explaining that respondents' argument that "the Authority's enforcement powers violate the private nondelegation doctrine" was raised "apart from" their argument about the constitutionality of "its rulemaking powers").

3. Respondents largely ignore the conflict between the decision below and this Court's precedents on the question presented. *See* Pet. 17-27. Instead, they repeat the Fifth Circuit's errors in painting the most dramatic caricature of the Authority's powers untethered to any specific enforcement action involving actual parties in this case. *See, e.g.*, NHBPA Mem. 3 (alleging generally that "investigators from the Authority are loose in the industry" imposing sanctions "without traditional due process"); *contra, e.g.*, 15 U.S.C. § 3057(c)(3) (mandating that, even before FTC and Article III review, the Authority must "provide for adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness" of an alleged rule violation and possible penalty). Like the Fifth Circuit, respondents also embrace worst-case assumptions about the FTC's oversight. *See, e.g.*, Texas Mem. 2 (arguing the FTC "is limited to administrative review of the Authority's sanctions decisions"); *contra, e.g.*, *Oklahoma*, 62 F.4th at 231

(explaining that, in addition to the FTC's "full authority to review the Horseracing Authority's enforcement actions" after a decision is rendered, "the FTC's rulemaking and rule revision power" allows the agency to "control the Authority's enforcement activities" at any point).

Those constrained assumptions about the FTC's oversight powers (reading the Act as narrowly as possible) and unconstrained conjectures about how the Authority may operate (reading the Act as broadly as possible) contradict this Court's approach to facial constitutional challenges. Respondents' soaring rhetoric aside, the only "democratic accountability" interests at stake arise not from any serious threat to "personal liberty," NHBPA Mem. 4, but from the Fifth Circuit's embrace of a facial challenge that "'short circuit[s] the democratic process' by preventing [a] duly enacted"—and amended—"law[] from being implemented in constitutional ways," *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008)). Congress passed (and the President signed) an amendment to HISA to promote "[a]ccountability considerations." *Oklahoma*, 62 F.4th at 230. Now, "the FTC bears ultimate responsibility" for the Act's enforcement. *Id.* at 231. Because the FTC has "'pervasive' oversight and control of the Authority's enforcement activities," *id.* (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)), "[t]he people may rightly blame or praise the FTC for how adroitly (or, let's hope not, ineptly) it 'ensure[s] the fair administration of the

Authority' and advances 'the purposes of [the] Act,'" *id.* (alterations in original) (quoting 15 U.S.C. § 3053(e)).

4. Beside the petitions by the Authority and the Solicitor General seeking review of the Fifth Circuit decision, the Court now has before it certiorari petitions from plaintiffs in the Sixth and Eighth Circuit cases that also present whether HISA's enforcement provisions facially violate the private-nondelegation doctrine. *See Walmsley v. Federal Trade Comm'n*, No. 24-420; *Oklahoma v. United States*, No. 23-402. Although the Authority welcomes consideration of that question through any of the three cases, the petitions by the Authority and the Solicitor General present the best vehicle for resolving it. Granting certiorari in this case would allow for direct review of the reasoning of the only court of appeals that has held the Act facially unconstitutional. Moreover, because this case 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. The *Walmsley* decision 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." 117 F.4th at 1038.

CONCLUSION

The Court should grant the petitions by the Authority and the Solicitor General and consolidate those two cases; deny the petitions by the Horsemen's Association, Texas, and Gulf Coast respondents raising separate questions that would needlessly complicate this case; and hold the petitions from the Sixth and Eighth Circuit cases pending resolution of the merits here.

Respectfully submitted.

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