Nos. 24-465, 24-472, 24-489

In The Supreme Court of the United States

TEXAS, ET AL.,
Petitioners,
v.
JERRY BLACK, ET AL.

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

GULF COAST RACING, L.L.C., ET AL.
Petitioners,
v.
HORSERACING INTEGRITY AND SAFETY AUTHORITY, INCORPORATED, ET AL.,

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the rulemaking provisions of the Horseracing Integrity and Safety Act facially violate the private-nondelegation doctrine.

II. Whether the Act facially violates the Constitution's Appointments Clause.

RULE 29.6 STATEMENT

Respondent 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 Respondent is a nongovernmental corporation.

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INTRODUCTION

Following a series of high-profile equine deaths and corruption scandals that threatened horseracing under the prior patchwork of state-by-state regulations, Congress enacted the Horseracing Integrity and Safety Act (HISA) to save the sport. The Act protects athletes (equine and human), the betting public, and the integrity of horseracing through the development and uniform enforcement of racetrack-safety, medication-control, and anti-doping rules. To effectuate that goal, HISA invokes the expertise of the Horseracing Integrity and Safety Authority (Authority), a private nonprofit organization, subject to the approval, oversight, and independent power of the Federal Trade Commission (FTC). That arrangement is modeled on the effective framework—uniformly upheld by the courts—that has governed the relationship between the Financial Industry Regulatory Authority (FINRA) and the Securities and Exchange Commission (SEC) for 85 years.

Two administrations have now supported HISA. Two bipartisan Congresses have embraced it—including through an amendment in late 2022 that fortified the FTC's oversight. And every single federal judge that has considered the two questions presented by the petitions—whether the amended HISA's rulemaking provisions facially violate the private-nondelegation doctrine and whether the Act violates the Appointments Clause—has rejected them uniformly.

The Court should deny review of those splitless questions and instead grant the petitions by the Authority and the Solicitor General presenting the

only question on which the courts of appeals conflict: whether HISA's enforcement provisions facially violate the private-nondelegation doctrine.

STATEMENT OF THE CASE

A. Legal Background

1. "[A] beloved tradition in the United States since the early days of the Republic," horseracing is a fixture of American culture and a "major source of jobs and economic opportunity." 166 CONG. REC. H4981-4982 (Sept. 29, 2020) (Rep. Barr). Over the last decade, however, "the joy of the races [wa]s marred by accidents that endanger[ed] both the horses and the riders." *Id.* at H4980 (Rep. Pallone). In 2019 alone, 441 Thoroughbreds died from race-related injuries—a fatality rate two-to-five times greater than in Europe or Asia. H.R. REP. NO. 116-554, at 17 (2020). These casualties sparked investigations by officials, concern within the industry, and "even call[s] for this sport to be abolished altogether." 166 CONG. REC. S5514 (Sept. 9, 2020) (Sen. McConnell). At the heart of these troubles was a "patchwork system" of state-by-state regulatory schemes that led to "wide disparit[ies]" in standards and enforcement and eroded the betting public's confidence. 166 CONG. REC. H4981 (Rep. Tonko).

Recognizing the need for reform, a broad coalition of stakeholders—including owners, breeders, trainers, racetracks, jockeys, and veterinarians—formed a "nonprofit business league," now known as the Authority, to develop uniform standards for horseracing, similar to self-regulating organizations in

other fields. Pet. App. 37a.[1] The Authority "was incorporated under Delaware law" in September 2020. Pet. App. 39a, 51a. Its bylaws are "replete with conflict-of-interest provisions" governing its privately appointed Board. Pet. App. 101a.

The highly publicized equine fatalities and corruption scandals also brought new urgency and support for action in Congress, which had considered various horseracing bills over the prior decade. *See* 166 CONG. REC. H4981-4982 (Rep. Barr). Following the Authority's incorporation, HISA was introduced to the full House and Senate as "bipartisan, bicameral progress" toward finally remedying the "tragedies on the track." 166 CONG. REC. S5514-5515 (Sen. McConnell). It was not only cheered by animal-welfare proponents, but also hailed by "limited government conservative[s]" who sought a framework for "smarter, more effective, and streamlined regulation for the industry"—sorely needed given that the "lack of uniformity ha[d] impeded interstate commerce." 166 CONG. REC. H4982 (Rep. Barr).

Passage of the "landmark" legislation, with "almost 300 cosponsors in the House and Senate" and "broad support" from across the industry, was celebrated on both sides of the aisle for "usher[ing] in a new era in the sport." Press Release, *McConnell Leads Senate Passage of Horseracing Integrity and Safety Act* (Dec. 21, 2020);[2] Press Release, *Gillibrand Announces Passage Of Her Horseracing Integrity And*

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[1] Citations are to the appendix filed in case no. 24-472.

[2] http://tinyurl.com/59m9kywy.

Safety Act (Dec. 22, 2020).[3] President Trump signed HISA into law in December 2020.

2. HISA was "model[ed]" on and is "materially indistinguishable from the Maloney Act," which has governed the SEC's relationship with FINRA and other self-regulatory organizations for over eight decades. Amici Br. of Sen. McConnell et al. in Support of Stay Appl. 5, 10, *Horseracing Integrity & Safety Auth. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Sept. 24, 2024). HISA recognizes the Authority as a "private, independent, self-regulatory, nonprofit corporation" that will help to develop and implement "a horseracing anti-doping and medication control program and a racetrack safety program," subject always to "Federal Trade Commission oversight." 15 U.S.C. §§ 3052(a), 3053.

The Authority may submit to the FTC a "proposed rule, or proposed modification to a rule," relating to the racetrack-safety, anti-doping, and medication-control programs. 15 U.S.C. §§ 3053(a), 3054(c), 3057. But the FTC alone may give those draft standards the force of law by independently approving them following notice-and-comment. *Id.* § 3053(b). To do so, the FTC must determine that each proposed standard is "consistent with" both the statute and the FTC's own rules. *Id.* § 3053(c). The agency must be satisfied, therefore, that any standard protects "the safety, welfare, and integrity of covered horses, covered persons, and covered horsesraces." *Id.* § 3054(a). Beyond that overall purpose, Congress

[3] http://tinyurl.com/mry9t5pb.

directly prescribed the content of some rules, *e.g.*, *id.* § 3055(g)(1)-(2), enumerated "[e]lements" and "[p]rohibition[s]" to be incorporated in others, *e.g.*, *id.* §§ 3055(d), 3056(b), 3057(a)(2), (c)(2), and provided various "[c]onsiderations" to constrain the anti-doping, medication-control, and racetrack-safety programs, *e.g.*, *id.* §§ 3055(b), 3056(b), 3057(d).

The Authority may enforce HISA's programs, including by investigating and disciplining violations by covered persons who register under the Act, pursuant only to those "uniform procedures and rules" that are approved by the FTC. *See, e.g.*, 15 U.S.C. §§ 3054(c), 3057. Any sanction imposed for violation of an FTC-approved rule pursuant to FTC-approved penalties must be consistent with "adequate due process, including impartial hearing officers or tribunals," and other factors "designed to ensure fair[ness] and transparen[cy]." *Id.* § 3057(c)-(d). The Authority "shall promptly submit" to the FTC notice of any sanction, *id.* § 3058(a), which "shall be subject to de novo review" by an FTC-appointed administrative law judge and by the Commissioners themselves, *id.* § 3058(b)-(c). The FTC may "affirm, reverse, modify, set aside, or remand for further proceedings," and may "make any finding or conclusion that, in the judgment of the [FTC], is proper and based on the record." *Id.* § 3058(c)(3).

3. Beyond those agency checks, an amendment Congress enacted during—and in response to—this litigation ensures additional, ongoing FTC oversight at all points.

In November 2022, in a precursor appeal, the Fifth Circuit held that HISA (as originally enacted) violated the private-nondelegation doctrine. Pet. App. 107a-146a. Under the version of the Act then considered, only the Authority "wr[o]te[] the regulations and the FTC c[ould] not modify them." *Id.* at 139a. Because the FTC lacked "the final word," the Fifth Circuit held, the Authority did not "function subordinately" to the agency. *Id.* at 139a-140a (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)).

"Not so anymore." *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023). In direct response to the Fifth Circuit's ruling, in December 2022, Congress enacted (and President Biden signed into law) bipartisan legislation authorizing the FTC to "abrogate, add to, and modify" HISA rules as the FTC "finds necessary or appropriate" to (i) "ensure the fair administration of the Authority," (ii) "conform the rules of the Authority" to requirements of the Act and applicable rules, or (iii) otherwise "further[] *** the purposes" of the Act. 15 U.S.C. § 3053(e). That language, drawn directly from the Maloney Act, "eliminates" "the 'key distinction'" the Fifth Circuit previously identified with the SEC-FINRA statute. *Oklahoma*, 62 F.4th at 232 (quoting Pet. App. 140a). Indeed, the Sixth Circuit had suggested this specific remedy at oral argument in a parallel challenge. Oral Arg. Rec. 33:00-33:13, *Oklahoma*, No. 22-5487 (6th Cir. Dec. 7, 2022) (Sutton, C.J.) ("Why not just say to [Congress,] this is easy, this was bipartisan, just put the modification power straight in, it'll be just like FINRA and the SEC, problem solved?").

The Sixth Circuit subsequently rejected the private-nondelegation challenge. The amendment Congress enacted "[i]n response" to the Fifth Circuit's decision made the Authority "subordinate to the agency." *Oklahoma*, 62 F.4th at 225, 229. The FTC's new "rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities" and the Authority's role "in the rulemaking context." *Id.* at 231 (quoting *Adkins*, 310 U.S. at 388). Accordingly, "[t]he Authority wields materially different power from the FTC, yields to FTC supervision, and lacks the final say over the content and enforcement of the law—all tried and true hallmarks of an inferior body." *Id.* at 229. Judge Cole "agree[d] in full" and wrote separately to emphasize his view that even "the original statute was constitutional because the private Authority has always been subordinate to the FTC." *Id.* at 237, 239.[4]

The Eighth Circuit subsequently "agree[d] with the Sixth Circuit that the statute is not unconstitutional on its face." *Walmsley v. Federal Trade Comm'n*, 117 F.4th 1032, 1039 (8th Cir. 2024). Because the FTC "has the final say over the rules, there is no impermissible private delegation" with respect to "the Act's rulemaking structure." *Id.* at 1038. And because the FTC "has broad power to

[4] This Court denied certiorari in the *Oklahoma* case on June 24, 2024. *Oklahoma v. United States*, No. 23-402 (U.S.). Following issuance of the Fifth Circuit's decision in this case, the *Oklahoma* petitioners filed a rehearing petition focused on the circuit split over the facial constitutionality of HISA's enforcement proceedings. The Authority and the Solicitor General filed responses on November 6, 2024.

subordinate the Authority's enforcement activities," "the statute's enforcement provisions are not unconstitutional on their face and in all of their applications." *Id.* at 1039-1040.[5]

B. Proceedings Below

1. Although "the Thoroughbred industry overwhelmingly supported" HISA and "has adjusted to this regime," Amici Br. of Thoroughbred Industry Participants in Support of Stay Appl. 2, 9, *Horseracing Integrity & Safety Auth.*, *supra*, No. 24A287 (U.S. Sept. 25, 2024), a faction long opposed to any reforms has brought a series of challenges to the Act.

Those challengers include the lead Petitioners, a national horsemen's association and several of its state chapters. In 2021, those Petitioners brought suit in the Northern District of Texas to challenge HISA's constitutionality. *See* Pet. App. 53a & n.2 (discussing "lead-case plaintiffs"). They named as defendants the Authority and its officials (Respondents here), as well as the FTC and its commissioners. *See id.* at 53a nn.5-6. The State of Texas and the Texas Racing Commission (collectively, "Texas") intervened to support the plaintiffs' challenge. *See id.* at 53a n.4. In 2022, the district court rejected plaintiffs' constitutional challenge, holding that HISA, as originally enacted, did not "facially violate[] the private-nondelegation doctrine" because the Authority

[5] The plaintiffs in the Eighth Circuit case filed a certiorari petition on October 10, 2024. *Walmsley v. Federal Trade Comm'n*, No. 24-420 (U.S.). The Authority and the Solicitor General filed responses on November 6, 2024.

"function[ed] subordinately to the FTC, guided by Congressional standards." *National Horsemen's Benevolent & Protective Ass'n v. Black*, 596 F. Supp. 3d 691, 696 (N.D. Tex. 2022).

While an appeal from that initial decision was pending at the Fifth Circuit, a collection of racetracks in Texas and a partnership of horsemen who race there (collectively, "Gulf Coast") filed another facial challenge in the Northern District of Texas. *See* Pet. App. 53a & n.3 (listing "member-case plaintiffs"). They raised the same private non-delegation claims as in the parallel case, but also a "mutually exclusive" Appointments Clause claim on the ground that the Authority was not private for constitutional purposes. *Id.* at 38a, 69a. The Texas racetracks have never been subject to HISA rules because Texas has essentially elected to avoid the Act's reach. Specifically, as its counsel explained at trial, Texas "opted to stop" the transmission of in-state racing for out-of-state wagering, thereby negating the statutory interstate-commerce element necessary to trigger application of HISA to horseracing in the State. ROA.3086-3087.

2. On remand from the Fifth Circuit's 2022 decision declaring the original version of HISA unconstitutional, the two cases were consolidated. *See* Pet. App. 59a. The horsemen's association, Texas, and Gulf Coast each filed amended complaints challenging the amended Act on several facial constitutional grounds. *See id.* at 59a-61a. Following full briefing and a bench trial on the merits, the district court rejected the consolidated challenges and granted final judgment in favor of the Authority and the FTC. *Id.*

at 45a-103a. The court concluded that "Congress answered the call" and "cured the constitutional issues." *Id.* at 81a, 89a.

On appeal, the Fifth Circuit affirmed in part and reversed in part. It agreed that "the amendment solved the nondelegation problem with the Authority's rulemaking power." Pet. App. 3a. "[T]he Authority's rulemaking power is subordinate to the FTC's," the court reasoned, "[b]ecause the FTC has ultimate say on what the rules are." *Id.* at 14a. HISA thus "give[s] the FTC the same general rulemaking authority that the SEC has with respect to FINRA." *Id.*

The Fifth Circuit also agreed with the district court that HISA does not violate the Appointments Clause. Pet. App. 35a-42a. "The basic premise of Gulf Coast's argument," the court explained, "is that the Authority is part of the federal government for Appointments Clause purposes." *Id.* at 37a. Applying this Court's "governing test to determine whether an entity is private or public" for constitutional purposes, the Fifth Circuit held that "the Authority is a private entity not subject to Article II's Appointments Clause." *Id.* at 42a.[6]

The Fifth Circuit disagreed with the district court in only "one important respect"—concluding, on a facial basis, that "apart from its rulemaking powers,

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[6] The Fifth Circuit also affirmed the district court's holdings that "HISA does not violate the Due Process Clause" and that "Gulf Coast lacks standing to raise" its claim "that HISA unconstitutionally commandeers state officials." Pet. App. 3a, 42a-43a. Petitioners do not seek review of those holdings.

the Authority's enforcement powers violate the private nondelegation doctrine." Pet. App. 4a, 14a.

The Fifth Circuit denied timely rehearing petitions limited to the constitutionality of the Act's enforcement provisions. Pet. App. 104a. Petitioners did not request rehearing on the rulemaking or Appointment Clause questions.

3. On October 28, 2024, this Court granted the Authority's emergency application to stay the Fifth Circuit's mandate pending the disposition of the Authority's certiorari petition seeking review of whether HISA's enforcement provisions facially violate the private-nondelegation doctrine. *Horseracing Integrity & Safety Auth.*, *supra*, No. 24A287; *see Horseracing Integrity & Safety Auth. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24-433 (U.S. Oct. 15, 2024). The Solicitor General has also filed a certiorari petition seeking review of (only) that question. *Federal Trade Comm'n v. National Horsemen's Benevolent & Protective Ass'n*, No. 24-429 (U.S. Oct. 16, 2024).

REASONS FOR DENYING THE PETITIONS

All eleven federal judges that have reviewed the operative version of HISA have concluded that its rulemaking scheme is constitutional under the private-nondelegation doctrine. That consensus follows from application of the established agency-subordination standard that Petitioners accepted below, that this Court's precedents set forth, and that courts of appeals have relied on uniformly to uphold the materially identical Maloney Act. Congress amended HISA to satisfy that standard by conferring

on the FTC the express oversight the Fifth Circuit said the prior version of the statute had omitted. Petitioners' worst-case assumptions on a facial challenge about how the FTC might exercise that supervision and control do not warrant this Court's review.

Nor does the "fundamentally incompatible" Appointments Clause question warrant review. As a threshold issue, the only parties pressing that claim are not even subject to HISA rules. Standing aside, no court has disagreed with the Fifth and Eighth Circuits' holdings that the Authority is a private entity not subject to the Appointments Clause. That conclusion flows directly from this Court's well-settled precedents.

The petitions should be denied.

I. HISA'S RULEMAKING PROVISIONS DO NOT WARRANT REVIEW

A. There Is No Conflict Among The Lower Courts

1. Every court that has resolved a materially identical challenge to HISA—and every single judge sitting on those courts (without exception)—has reached the same conclusion: "the Act's rulemaking structure does not violate the private nondelegation doctrine." *Walmsley*, 117 F.4th at 1038 ("agree[ing] with the Sixth and Fifth Circuits," the Eastern District of Arkansas, and the Northern District of Texas); *see Oklahoma*, 62 F.4th at 228-231; Pet. App. 9a-14a, 78a-94a. Even as the Fifth Circuit reached the opposite determination on the validity of HISA's enforcement

provisions, it held that the Act's "amended text gives the FTC ultimate discretion over the content of the rules,' which 'makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one.'" Pet. App. 11a (quoting *Oklahoma*, 62 F.4th at 230). Likewise, although Judge Gruender dissented from the Eighth Circuit's majority opinion based on his view that "HISA's enforcement provisions facially violate the private nondelegation doctrine," he "concur[red]" in the majority's rejection of the private-nondelegation challenge to HISA's rulemaking provisions. *Walmsley*, 117 F.4th at 1041-1044 (Gruender, J., concurring in part and dissenting in part).

That consensus refutes any suggestion that there is "confusion" over the framework governing the private-nondelegation challenge to HISA's rulemaking structure. NHBPA Pet. 19; Texas Pet. 28. Indeed, "all parties" and courts across every private-nondelegation challenge to HISA's rulemaking structure have expressly "agree[d] that the outcome turns on whether the private entity is subordinate to the agency." Pet. App. 128a n.23; *see, e.g.*, *Oklahoma*, 62 F.4th at 229 ("As the case comes to us, then, the determinative question is whether the Horseracing Authority is inferior to the FTC."); *id.* at 237 (Cole, J., concurring) (agreeing "that the main test for this issue is whether the private entity is subordinate to the federal agency"); *Walmsley*, 117 F.4th at 1039 ("join[ing] the other two circuits" in concluding that "the rulemaking structure of the Act does not violate the private nondelegation doctrine" because "the

Authority is subordinate to the Commission"); Pet. App. 9a (same).

No court has ever held that the Maloney Act's 85-year-old rulemaking framework—which undisputedly provided the "model[]" for HISA—violates the private-nondelegation doctrine either. Pet. App. 10a (citing *Oklahoma*, 62 F.4th at 231-232). On the contrary, "[i]n case after case," the courts of appeals "have upheld this arrangement" on the ground that the SEC's "ultimate control" makes FINRA and other self-regulatory organizations "permissible aides and advisors." *Oklahoma*, 62 F.4th at 229 (citing *Sorrell v. SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982); *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012-1013 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952)). That is the opposite of a "muddled and inconsistent" approach. Texas Pet. 28.

2. Unable to identify any conflict on the constitutionality of the rulemaking scheme in HISA or the parallel Maloney Act framework, Petitioners instead search for "general confusion" among decisions similarly rejecting private-nondelegation challenges to other regulatory schemes. Texas Pet. 28; *see also* NHBPA Pet. 9-19. Far from "stand[ing] contrary" to those decisions, Texas Pet. 30, however, the Fifth Circuit cited them (and others) as "teach[ing]" the private-nondelegation doctrine it applied in upholding HISA's rulemaking regime, Pet. App. 9 (citing, *e.g.*, *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128 (3d Cir. 1989)). As the Sixth Circuit explained,

Pittson and *Frame* "hold this line" "between impermissible delegation of unchecked lawmaking power to private entities and permissible participation by private entities in developing government standards and rules." *Oklahoma*, 62 F.4th at 228.

Similarly, although Petitioners repeatedly cite decisions "in the Universal Service Fee context" as reflecting purported "differences among the lower courts," NHBPA Pet. 8-9; *see also id.* at 11, 13, 18, those decisions drew on the HISA cases to adjudicate private-nondelegation challenges. For example, the Sixth Circuit quoted Chief Judge Sutton's earlier *Oklahoma* ruling in explaining that "[a] private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge." *Consumers' Rsch. v. FCC*, 67 F.4th 773, 795 (6th Cir. 2023) (quoting *Oklahoma*, 62 F.4th at 229). The Eleventh Circuit quoted the Fifth Circuit in explaining that "[i]f the private entity does not function subordinately to the supervising agency, the delegation of power is unconstitutional." *Consumers' Rsch., Cause Based Com., Inc. v. FCC*, 88 F.4th 917, 926 (11th Cir. 2023) (quoting Pet. App. 128a). If those decisions were "at odds" with the HISA cases they cite, NHBPA Pet. 9, it would be news to the judges who authored them.[7]

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[7] To be sure, the Universal Service Fee cases also raise *public*-nondelegation issues and distinct private-nondelegation issues concerning agency *sub*delegation, which are not at issue here. As Texas itself has previously recognized, those features materially distinguish the relevant constitutional inquiry. Pet. for Cert. 20, *Texas v. Commissioner*, No. 21-379 (U.S. Sept. 3, 2021) ("[I]n *Adkins*, 'it was Congress itself, not the agency, that

The only decision Petitioners cite that upheld a private non-delegation challenge to a rulemaking scheme is the D.C. Circuit's (since-vacated) decision concerning Amtrak. *See* Texas Pet. 28-29. The *Amtrak* line of cases only reinforces the conclusion courts have reached on HISA's and the Maloney Act's rulemaking scheme. *See Association of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 & n.5 (D.C. Cir. 2013) (finding private-nondelegation violation because agency could not "unilaterally change regulations proposed to it," contrary to Maloney Act cases that "resemble *Adkins*"), *vacated on other grounds*, 575 U.S. 43, 53 (2015). As the D.C. Circuit explained (in a remand decision Petitioners ignore), where a "government agency could 'hold the line'" against "private interests," such that "[n]o rule will go into effect without the approval and permission of a neutral federal agency," the framework "raise[s] no constitutional eyebrow." *Association of Am. R.Rs. v. U.S. Dep't of Transp.*, 896 F.3d 539, 541, 545-547 (D.C. Cir. 2018) (severing agency-constraining provision that "broke from [*Adkins*'] mold" brought statute "back into the constitutional fold"). And here, the Fifth Circuit made clear that it was applying the same standard that its "sister circuit" applied in *Amtrak*.

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enlisted the assistance of private parties in rulemaking.'"). In any event, to the extent pending certiorari petitions from the Universal Service Fee decisions (*see* Nos. 23-456, 23-743, 24-354) concern the legislative functions that Petitioners raise here, that is yet another reason to limit the Court's review of HISA to the delegation of enforcement power, which is not at issue in the Universal Service Fee petitions.

Pet. App. 9a (citing *Ass'n of Am. R.Rs.*, 721 F.3d at 671).

B. The Decisions Upholding HISA's Rulemaking Scheme Are Faithful To This Court's Precedents

1. The uniform decisions upholding HISA's rulemaking scheme follow this Court's precedents. In *Carter v. Carter Coal Company*, this Court invalidated a federal statute that directly conferred power on private entities to regulate an industry with zero governmental approval or oversight. 298 U.S. 238, 310-311 (1936). In response, Congress amended the law to "subordinate[] the private coal producers to a public body (the Coal Commission)," *Oklahoma*, 62 F.4th at 228, by granting the Commission the power to "approve, disapprove, or modify" the private boards' proposals "to conform to the requirements" of the statute, Bituminous Coal Act of 1937, § 4, pt. II(a), 50 stat. 72, 78. Reviewing that amended statute in *Adkins*, this Court blessed the scheme as "unquestionably valid." 310 U.S. at 399.

Based on those twin precedents, the Fifth Circuit (like every other court of appeals to consider HISA's rulemaking) explained that "a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." Pet App. 9a (quoting Pet. App. 127a-128a & n.21). As the horsemen's association has acknowledged, "[t]he Fifth Circuit followed established precedent from this Court and other circuits in asking whether the FTC exercises pervasive surveillance and control over the Authority." NHBPA

Resp. to Stay Appl. 17, *Horseracing Integrity & Safety Auth., supra*, No. 24A287 (U.S. Sept. 30, 2024). There is no "conflict[] with this Court's cases" on the governing framework. Texas Pet. 18.

To the extent there is any "misunderstanding[]," Texas Pet. 19, it is on Petitioners' part. Below, Texas urged that "the Authority must 'function subordinately' to the FTC" to meet the established private-nondelegation standard. Texas Opening Br. 2 (Jul. 5, 2023), C.A. Doc. 74. Yet in response to the Authority's stay application, Texas argued for the first time that the FTC's oversight was not "relevant" to the constitutional analysis because Congress cannot confer any power on private entities "*at all*—no matter how they are supervised." Texas Resp. to Stay Appl. 18, 21, *Horseracing Integrity & Safety Auth., supra*, No. 24A287 (U.S. Sept. 30, 2024). Now, Texas backtracks, contending (like the horsemen's association) merely that the degree of oversight the FTC issues is not "sufficient." Texas Pet. 21. All of Petitioners' objections to the appellate courts' private-nondelegation holdings—*i.e.*, that the FTC is a "busy agency," that the court of appeals construed the FTC's authority to be "more significant tha[n] it is," that the "the FTC *might* choose" not to act, and that it may "take time" for the agency to act, Texas Pet. 21, 23, 25—only reinforce that everyone agrees the relevant analysis "turns on whether the private entity is subordinate to the agency," Pet. App. 128a n.23.

2. The Fifth Circuit held that the original version of HISA failed that standard because "[t]he Authority, rather than the FTC, ha[d] been given final say over

HISA's programs." Pet. App. 109a. Following Congress's amendment—enacted in direct response to that holding—courts (including the Fifth Circuit) have concluded consistently that the version of HISA now in effect "gives the FTC the final say over implementation of the Act relative to the Horseracing Authority." *Oklahoma*, 62 F.4th at 225. "Now, the FTC may 'abrogate, add to, and modify" the Authority's rules," so if the FTC "disagrees with the policies reflected in the Authority's rules, it may change them." Pet App. 11a (quoting 15 U.S.C. § 3053(e)).

That is "the same general rulemaking authority that the SEC has with respect to FINRA." Pet. App. 14a (citing *Oklahoma*, 62 F.4th at 225). Indeed, FINRA itself urged affirmance of the district court judgment in this case. Br. of Financial Industry Regulatory, Inc. as *Amicus Curiae* in Supp. of Defs.-Appellees (Aug. 11, 2023), C.A. Doc. 123;[8] *see also* FINRA Opp'n to Mot. for Inj. Pending Appeal 19, *Alpine Sec. Corp. v. FINRA*, No. 23-5129 (D.C. Cir. June 15, 2023) (HISA "put[s] the [Authority] 'on equal footing to FINRA in its role "in aid of" the federal agency'" (quoting Pet. App. 89a)). "Because the FTC has ultimate say on what the rules are, the Authority's power to propose horseracing rules does not violate the private nondelegation doctrine." Pet. App. 14a.

3. Petitioners' caricature of the FTC's oversight rests on worst-case assumptions about how the agency might exercise that supervision and strained

[8] The Fifth Circuit struck FINRA's amicus brief without explanation. *See* C.A. Doc. 154 (Aug. 29, 2023).

interpretations of the Act seeking to create constitutional problems. Basic principles governing facial challenges and constitutional avoidance proscribe that approach. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("cardinal principle" that statute must be interpreted to avoid constitutional doubt where "fairly possible"); *United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("presumption of regularity attaches to the actions of Government agencies").

The Authority remains subordinate to the FTC's "policymaking discretion" (within Congress's clear guidelines) both "[w]hen the FTC decides to" exercise its new independent rulemaking power and "when the FTC decides *not* to act." *Oklahoma*, 62 F.4th at 230. Petitioners nevertheless fret that the FTC may decide it does not "wish[] to supervise the Authority" seriously and may shirk its oversight responsibilities. Texas Pet. 22; *see, e.g.*, *id.* at 23 (suggesting the FTC may not "even read" proposals submitted to it). But because HISA can be fairly construed to give the FTC "ultimate say on what the rules are," Pet. App. 14a, that is enough to reject Petitioners' facial challenge regardless of how the agency exercises its "ultimate discretion over the content of the rules" in any particular instance, *Oklahoma*, 62 F.4th at 230. All courts agree that "the FTC bears ultimate responsibility" for any rule promulgated under HISA:

"The People may rightly blame or praise the FTC for how adroitly (or, let's hope not, ineptly)" it carries out its oversight. *Id.* at 231.

None of Petitioners' specific criticisms displace that consensus following this Court's precedents.

a. Petitioners allege primarily that the FTC's oversight is insufficient because the Authority "writes the entire regulatory scheme to govern the horseracing industry," which "the FTC must approve so long as it falls within HISA's broad delegation." Texas Pet. 21. According to them, it does not matter that a standard the Authority proposes cannot "take effect unless" the FTC independently determines, following notice-and-comment review, that the proposal is "consistent with" the Act and the agency's own rules. 15 U.S.C. § 3053(b)-(c). Petitioners minimize that agency determination as "bare bones 'consistency' review" that gives the Authority "power to have [HISA] rules rubber-stamped into federal law." NHBPA Pet. 15.

Congress's amendment to HISA is "fatal to [Petitioners'] arguments regarding consistency review." Pet. App. 87a. The FTC's new power to "abrogate, add to, and modify" HISA rules renders "'irrelevant' that the FTC conducts an initial review for consistency with the statute and rules." *Id.* (quoting Pet. App. 141a n.35). As the Fifth Circuit explained, "[t]he problem was never that the private entity proposed the rules"; the original version of HISA violated the private-nondelegation doctrine, according to that court, because the FTC used to "lack[] power to second-guess them once they were proposed." Pet. App. 11a-12a. But under the

amendment Congress passed in direct response to that ruling, "the FTC has been given that power." Pet. App. 12a. Regardless of the Authority's ability to draft standards "in the first place," Texas Pet. 3, 19, 21, the FTC's "authority to modify [and abrogate] *any* rules for any reason at all, including policy disagreements, ensures that the FTC retains ultimate[] authority," Pet. App. 12a (second alteration in original) (quoting *Oklahoma*, 62 F.4th at 231); *see Walmsley*, 117 F.4th at 1038 ("If the Commission disagrees with policies reflected in the Authority's rules, then the Commission may change them[.]").

b. In any event, the FTC's front-end "consistency" review has real "bite." Pet. App. 12a. Petitioners are wrong that the FTC cannot disapprove proposed standards "on policy grounds." Texas Pet. 25. Evaluating whether proposals are "consistent with" the Act, 15 U.S.C. § 3053(c)(2), requires determining whether they "are consistent with 'the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces,'" *Oklahoma*, 62 F.4th at 240 (Cole, J., concurring) (quoting 15 U.S.C. § 3054(a)(2)(A)), pursuant to the many "[c]onsiderations" and "[e]lements" Congress provided, 15 U.S.C. §§ 3055, 3056, 3057. That broad standard empowers the FTC to disapprove, for example, a racetrack-safety proposal that the FTC determines as a matter of policy is not "consistent with the humane treatment of covered horses." *Id.* § 3056(b)(2).

In this context, that substantive determination is tantamount to the "public interest" determination the SEC makes under the Maloney Act pursuant to an

identical "consistent with the requirements of the Act" standard. *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 446-447 (D.C. Cir. 2017) (quoting 15 U.S.C. § 78s(b)(2)(C)). If anything, FINRA's powers are broader than the Authority's in relevant respects. *Compare, e.g.*, 15 U.S.C. § 78s(b)(2)(D) (FINRA rules "shall be deemed to have been approved" if SEC fails to act within prescribed period), *with id.* § 3053(b)(2) (Authority-proposed standards cannot take effect unless approved by FTC).

Section 3053(c) also mirrors the Coal Act standard this Court upheld as "unquestionably valid" in *Adkins*. 310 U.S. at 399. The relevant statutory text limited the agency to "'approv[ing], disapprov[ing], or modify[ing]' the private coal boards' 'proposed minimum prices [and related terms] *to conform to the requirements* of this subsection.'" *Oklahoma*, 62 F.4th at 241 (Cole, J., concurring). That language refutes Petitioners' suggestion of some material difference between the "affirmative act" required by the agency to give effect to a proposal in *Adkins*, and approval following "consistency review by the FTC" here. NHBPA Pet. 16 n.10; *see also* Texas Pet. 20-21 (implying distinction between approval standards). "[E]very court of appeals to address the validity of such delegations under the Maloney Act and the Coal Act, as noted, has upheld them." *Oklahoma*, 62 F.4th at 232.

Although that is enough to doom Petitioners' facial challenge, the FTC's actions remove any doubt. In December 2022, for example, the FTC construed the Act's consistency standard as warranting disapproval

of the initially proposed anti-doping and medication-control rules in the immediate wake of the Fifth Circuit's decision in the predecessor appeal. The agency based its determination on (i) the FTC's independent judgment that "[t]he bedrock principle of the Act is the need for uniformity," and (ii) the FTC's policy goal of avoiding potential "confusion *** for industry participants and regulators." FTC, *Order Disapproving The Anti-Doping And Medication Control Rule Proposed By The Horseracing Integrity And Safety Authority* 1-2 (Dec. 12, 2022).[9] The FTC also has not hesitated to condition its approval of a proposed standard on its own limiting interpretations. *See, e.g.*, FTC, *Order Approving The Enforcement Rule Modification Proposed By The Horseracing Integrity And Safety Authority* 14-16 (Sept. 23, 2022) (rejecting proposed provision as "unnecessary and overbroad" and directing Authority "not to rely" on it).[10]

c. Petitioners "overlook[] another reality," *Oklahoma*, 62 F.4th at 232, in arguing that "the Authority's rules necessarily govern for some periods of time," Texas Pet. 24, because the FTC's section 3053(e) power kicks in "only later," "once an Authority-drafted rule is in place," NHBPA Pet. 15-16. HISA's amended text undisputedly confers on the FTC not only "after-the-fact" (*id.*) power "to modify the Authority's rules," Texas Pet. 24-25, but also the independent ability to "create new rules" in the first place, *Oklahoma*, 62 F.4th at 230; *see Walmsley*, 117 F.4th at 1038 ("The power to 'add to *** the rules of

[9] https://tinyurl.com/rndfjr8b.

[10] http://tinyurl.com/3h5cb5fm.

the Authority' thus enables the Commission to adopt new rules."). "This language, borrowed from the Maloney Act, gives the agency 'broad authority to oversee and to regulate *** [as] it deems necessary.'" Pet. App. 12a n.5 (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233-234 (1987)).

Under that "broader rulemaking power," the FTC will "exercise its own policy choices whenever it determines that the Authority's proposals, even if consistent with the Act, are not the policies that the Commission thinks would be best for horseracing integrity or safety." FTC, *Order Ratifying Previous Commission Orders As To Horseracing Integrity and Safety Authority's Rules* 3 (Jan. 3, 2023).[11] The FTC has already done so, for example, with a rule requiring the agency's review and approval of the Authority's proposed budget to advance the Act's goals "in a prudent and cost-effective manner." 88 Fed. Reg. 18,034, 18,035 (Mar. 27, 2023).

This new "full-throated rulemaking power" is now baked into section 3053(c)'s approval/disapproval process. *Oklahoma*, 62 F.4th at 232; *see* Pet. App. 12a. "When the FTC reviews the Horseracing Authority's proposed rules, it asks not just whether they are 'consistent' with the Act; it also asks whether they are 'consistent' with other 'applicable rules approved by the Commission.'" *Oklahoma*, 62 F.4th at 232 (quoting 15 U.S.C. § 3053(c)(2)). Although HISA requires the FTC to approve or disapprove a proposal within 60 days of publication in the Federal Register, 15 U.S.C.

[11] https://tinyurl.com/msswvdrf.

§ 3053(c)(1), there is no deadline for the FTC to publish the proposal in the first instance, *see* 16 C.F.R. § 1.142(d) (requiring Authority to submit standards and accompanying documents "at least 90 days in advance" of proposed publication, absent waiver). If the FTC has concerns about an Authority proposal, the FTC may publish its own proposed rule on the same topic before publishing the Authority's proposal. The agency can then finalize its own rule before determining whether the Authority-proposed standard is consistent with it. The Authority's proposal "shall not take effect" in the interim—or ever, if the FTC disapproves it as inconsistent with the agency's own rule. 15 U.S.C. § 3053(b)(2).

All of this refutes Petitioners' argument that "the Authority serves as the FTC's equal in the rulemaking endeavor" or even as "the primary regulator." Texas Pet. 25. The FTC's "broad power to write and rewrite the rules" according to its "policymaking discretion" ensures "ultimate 'law-making is not entrusted to the Authority.'" *Oklahoma*, 62 F.4th at 230 (alteration omitted) (quoting *Adkins*, 310 U.S. at 399). Any hypothetical delay between approval of an Authority-proposed rule and a new FTC rule on the same subject is itself a "policy choice" by the agency. *Id.*

Moreover, the FTC may exercise its new rulemaking authority to delay the effective date of any approved rule. *See* Pet. App. 13a. Little imagination is needed to conceive of such a rule: the FTC already enacted one "delaying the date of effectiveness" of the approved anti-doping and medication-control program to mitigate risk of "inconsistent treatment of similarly

situated horses" and "uncertainty *** near[] [last year's] Triple Crown events." 88 Fed. Reg. 27,894, 27,894-27,895 (May 3, 2023) (finding "good cause" to forgo "notice and comment" under "section 553(b)(3)(B) of the APA," as incorporated in 15 U.S.C. § 3053(e)). That real-life example of the FTC exercising its rulemaking power on an expedited basis to protect its "policy concerns" and prevent time-sensitive "harms that could frustrate the purposes of the Act," *id.*, resolves any lingering worry that rulemaking "could take years," Texas Pet. 26.

d. Petitioners' ancillary examples about particular rulemaking functions only demonstrate the futility of their challenge. The budget rule the FTC promulgated over 18 months ago—confirming that the Authority must submit proposed budgets for FTC review and approval, and that the FTC may "modify any line item" in the proposals, 88 Fed. Reg. at 18,034-18,036—forecloses any suggestion that HISA necessarily "gives the Authority final say over the fees it charges," NHBPA Pet. 9. Petitioners acknowledge that the FTC rule constitutes "oversight of the Authority's budget, which is what leads to the fee that is set." *Id.* at 11 n.5. But brandishing the facial nature of their challenge as a shield, Petitioners argue that the Court must "limit its consideration to the statute on its face" and turn a blind eye to the federal regulation that "the FTC *sua sponte* adopted." *Id.* Petitioners are free to bring an as-applied challenge to the FTC's budget rule if they believe the agency has exercised *too much* control over the Authority, but they cannot leverage that same concern to claim facially that the FTC has *too little* control under the

Act. *See id.* at 9 (alleging HISA "provides *zero* oversight for the FTC in setting the Authority's budget").

Petitioners are also wrong that the Authority "exercise[s] final discretion" over HISA policy by "rewrit[ing] rules through sub-regulatory policy-making." NHBPA Pet. 17, 19; Texas Pet. 26-27. The FTC's own rules mandate that Authority guidance "does not have the force of law." 86 Fed. Reg. 54,819, 54,819 (Oct. 5, 2021) ("distinguish[ing] HISA Guidance from a proposed modification to a rule"). Moreover, the Authority must submit guidance to the FTC, 15 U.S.C. § 3054(g)(2), paving the way for the agency to override any guidance it dislikes through its plenary rulemaking authority, *id.* § 3053(e); *see* Pet. App. 13a. And if any guidance actually imposed a new legal obligation on industry participants—or established a concrete "prospect" that the Authority would "*act* on that guidance by bringing an enforcement action," Texas Pet. 27—it would exceed the Authority's power and would be ripe for an as-applied challenge.

II. THE APPOINTMENTS CLAUSE QUESTION DOES NOT WARRANT REVIEW

A. Gulf Coast Lacks Standing To Raise The Appointments Clause Claim

Gulf Coast is alone in pressing an Appointments Clause claim that even the other Petitioners have acknowledged is "'fundamentally incompatible' with their private nondelegation challenge." Pet. App. 36a. But no one disputes that the Texas-based racetracks have never been subject to HISA rules. *See* Stay Appl.

7, 24, *Horseracing Integrity & Safety Auth.*, *supra*, No. 24A287. As Texas explains, the State has "avoid[ed] application of HISA by surrendering the ability to simulcast Texas races to other States." Texas Pet. 12. That simulcast signal enables interstate betting; where no "interstate off-track" betting occurs and no advance deposit wagers are permitted (as was already the case in Texas pre-HISA), the horserace is not "covered" by the Act. 15 U.S.C. § 3051(5), (11).

Accordingly, Petitioners have confirmed throughout this litigation that "Texas is not running covered races." ROA.2768; *see also* ROA.3086-3087 (Texas's counsel). As a result of the State's deliberate "decision not to simulcast" or allow advance deposit wagering, Texas Pet. 12, Gulf Coast is not subject to HISA's rules—and thus has not suffered an injury-in-fact that is fairly traceable to the alleged Appointments Clause violation. That poses a threshold jurisdictional hurdle to the Appointments Clause claim that Gulf Coast (and "only" Gulf Coast) presents. Gulf Coast Pet. 2; *see TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (standing required "for each claim").

B. There Is No Conflict Among The Lower Courts

Standing and ripeness aside, the Appointments Clause challenge is not certworthy. Gulf Coast says "there is now a circuit split on the question of HISA's constitutionality." Gulf Coast Pet. 32. But the conflict is limited to the question of whether HISA's enforcement provisions facially violate the private-nondelegation doctrine. As Gulf Coast acknowledges,

that issue is "alternative" to the question of whether HISA violates the Appointments Clause. Pet. i. Indeed, the other Petitioners recognize that the two challenges are "mutually exclusive." Pet. App. 36a, 65a.

All courts faced with the academic argument that HISA is unconstitutional under the Appointment Clause have shot it down. *Walmsley*, 117 F.4th at 1041 ("We agree with the Fifth Circuit that the Act does not conflict with the Appointments Clause."); Pet. App. 35a-42a, 65a-78a. Both the Fifth and Eighth Circuits applied the same straightforward analysis: "[t]he requirements of the Clause apply only to officers of the United States"; under governing precedent from this Court, "[t]he members of the Board are *** not officers of the United States"; "so their appointments are not governed by the Appointments Clause." *Walmsley*, 117 F.4th at 1041 (citing *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995)); Pet. App. 42a ("In sum, *Lebon* is the governing test to determine whether an entity is private or public and, under that test, the Authority is a private entity not subject to Article II's Appointments Clause."). The *Oklahoma* plaintiffs rightly abandoned their Appointments Clause claim on appeal after the district court similarly held that "the Authority is a private entity," and "[t]herefore, the Court need not consider Plaintiffs' alternative arguments regarding the Authority as a public entity," "including that its structure violates the Appointments Clause." *Oklahoma v. United States*, 5:21-cv-104-JMH, 2022 WL 1913419, at *11 (E.D. Ky. June 3, 2022).

That consensus aligns with the uniform determinations "that FINRA, like its predecessor [the National Association of Securities Dealers], is a private entity." Pet. App. 75a (citing cases). Gulf Coast's attempts to distinguish the Maloney Act cases fail. Registering with the Authority to participate in a covered race is no more or less "voluntary" than "belong[ing]" to FINRA to "participat[e]" in the securities market (Gulf Coast Pet. 31-32): a securities dealer cannot do business without registering with FINRA. 15 U.S.C. § 78*o*(a)(1), (b)(1)(B); *see Aslin v. FINRA*, 704 F.3d 475, 476 (7th Cir. 2013). FINRA (or its predecessor) "has since 1939 been the only registered national securities association," and can "levy sanctions that carry the force of federal law." *Turbeville v. FINRA*, 874 F.3d 1268, 1270 & n.2 (11th Cir. 2017). That 85-year reality contradicts Gulf Coast's assertion that a purported "right of exit" is the "relevant distinction" that makes application of Article II to HISA "fundamentally different" from the long-upheld Maloney Act. Gulf Coast Pet. 15, 31-32. There is no "confus[ion]" and no need for "clarif[ication]." Gulf Coast Pet. 14, 31.[12]

[12] Gulf Coast points to one single-judge opinion concurring in the grant of an emergency injunction pending an appeal involving FINRA. Gulf Coast Pet. 31 (citing *Alpine Sec. Corp. v. FINRA*, No. 23-5129, 2023 WL 4703307 (D.C. Cir. July 5, 2023) (Walker, J., concurring)). That interlocutory non-precedential opinion, arising out of a "corporate death penalty" sanction, does not move the needle.

C. This Court's Precedents Do Not Support The Appointments Clause Challenge

1. The plain text of Article II and cases interpreting it confirm that if an entity's directors "are not officers of the United States, but instead are some other type of officer, the Appointments Clause says nothing about them." *Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. 448, 459 (2020); *see* U.S. CONST. art. II § 2 cl. 2 (prescribing appointments methods for "Officers of the United States" holding offices "established by Law"). That fundamental principle is fatal to Gulf Coast's claim because, as all courts and other parties recognize, the Authority's Board members are *private* officers.

This Court's settled precedent, *Lebron*, 513 U.S. 374, "set[s] out a detailed analysis to determine whether a particular corporation—despite its designation as 'private'—counts as a government instrument for constitutional purposes." Pet. App. 40a. That established test leaves no doubt on which side of the line the Authority lands. *See Walmsley*, 117 F.4th at 1041 ("A private corporation must be regarded as a governmental entity for constitutional purposes only in limited circumstances," and "[t]he *Lebron* standard is not satisfied here."). "First, the Authority was not created by the federal government 'by special law'"; it was "incorporated under Delaware law shortly before HISA's passage," when there was still uncertainty whether a majority of the (bipartisan and bicameral) Congress would enact the Act or President Trump would sign it. Pet. App. 39a.

"Second, the Authority was not created to further 'governmental objectives,' but instead as a private association to address doping, medication, and safety issues in the thoroughbred racing industry." *Id.* (citation omitted). Third, instead of having "retained for itself permanent authority to appoint a majority of the Authority's directors," the "government has no role in appointing the Authority's Board." *Id.* (alterations and citation omitted).

2. Rather than dispute those factual determinations (shared by every court to consider the question), Gulf Coast seeks to "displace [this] Court's governing framework" for answering "precisely the question" at the heart of the Appointments Clause challenge. Pet App. 40a-41a. Under Gulf Coast's novel theory, an entity qualifies as public if a federal statute "bestows" responsibilities by which the entity "exercise[s] significant authority." Gulf Coast Pet. 15-16. Gulf Coast draws its test from *Buckley v. Valeo*, 424 U.S. 1 (1976) (concerning Federal Election Commissioners), *Lucia v. SEC*, 585 U.S. 237 (2018) (concerning SEC administrative law judges), and other cases about federal agencies. Yet those cases concern officials who indisputably were federal "appointee[s]," *Buckley*, 424 U.S. at 126, so "[t]he sole question" was whether the officials were "'Officers of the United States' or simply employees of the Federal Government," *Lucia*, 585 U.S. at 244. *Buckley* and *Lucia* "do not *** set forth the critical legal test relevant" to determining whether an entity's officials are "federal" in the first place. *Financial Oversight & Mgmt. Bd.*, 590 U.S. at 468; *see* Pet. App. 41a (refusing to "extend *Buckley* and *Lucia* well beyond their facts").

Lebron itself brings to a "dead end" (Pet. App. 40a) Gulf Coast's contention that the precedent does not apply to any entity that "exercises regulatory authority." Pet. 14. Not only does *Lebron* "rel[y] on cases where Congress turned to private corporations to 'accomplish purely governmental purposes,'" but this Court and others have recognized that "the corporation actually addressed in *Lebron*—Amtrak—itself exercised regulatory power." Pet. App. 40a-41a (quoting *Lebron*, 513 U.S. at 395); *see, e.g.*, *Association of Am. R.Rs.*, 721 F.3d at 671.

Gulf Coast's new theory also contradicts other precedents that have "since used *Lebron*'s analysis to discern whether corporations are part of the government for constitutional purposes." Pet. App. 38a & n.24. For example, the Public Company Accounting Oversight Board (PCAOB) is subject to Article II not because it "exercise[s] 'significant executive power'" (which resolves the separate question whether its members are federal officers or federal employees), Gulf Coast Pet. 17 (quoting *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 514 (2010)), but because it was "Government-created" and "Government-appointed," and thus "part of the Government for constitutional purposes," *Free Enter. Fund*, 561 U.S. at 485-486 (quoting *Lebron*, 513 U.S. at 397). On that basis, the Court distinguished the PCAOB from "private self-regulatory organizations in the securities industry," such as FINRA, which are not subject to Article II. *Id.* at 484-485.

Gulf Coast worries that Congress may "circumvent[]" the Appointments Clause by handing

regulatory power to a private entity. Gulf Coast Pet. 1. But "[t]he private nondelegation doctrine *** corrals any attempts to evade *Lebron*" by requiring the private entity to act "subordinately to an agency with authority and surveillance over it." Pet. App. 42a. Gulf Coast's theory would rob the private-nondelegation doctrine of any continuing vitality: "[S]ubordination does not matter to [Gulf Coast's] analysis" because a private entity would lose its private nature whenever Congress directs it to act under federal law. Gulf Coast Pet. 19; *see id.* at 28-29. There is no reason for this Court to go out of its way to consider a never-accepted academic theory when the established private-nondelegation doctrine's agency-oversight analysis already protects the "[a]ccountability considerations" that motivate Petitioners' concerns. *Oklahoma*, 62 F.4th at 230.

III. THE COURT SHOULD GRANT THE AUTHORITY'S PETITION ON THE CONSTITUTIONALITY OF HISA'S ENFORCEMENT PROVISIONS

Rather than consider claims all lower courts have rejected, the Court should grant the petitions by the Authority and the Solicitor General (Nos. 24-429, 24-433) and limit its review to whether HISA's *enforcement provisions* facially violate the private-nondelegation doctrine. That is the only question on which the courts of appeals actually conflict. It is the sole basis on which any court has sustained a constitutional challenge to the operative version of HISA. *See* NHBPA Pet. 20 ("[I]t is this Court's practice to review decisions that strike down acts of

Congress, *** not those that uphold them."). And all parties agree the question is certworthy. *See* NHBPA Pet. 3; Texas Pet. 2; Gulf Coast Pet. i, 32.

"The Court's ability to effectively resolve" that question does not "hinge on its resolution" of the separate questions Petitioners present here. Texas Pet. 1, 31. The Appointments Clause question is "alternative" to the private-nondelegation questions. Gulf Coast Pet. i. And under the private-nondelegation doctrine, Petitioners challenged the constitutionality of "the Authority's enforcement powers" "apart from" their challenge to the constitutionality of "its rulemaking powers." Pet. App. 14a. The appellate courts' conflicting answers to the former question, despite their uniform rejection of the latter, undermine any suggestion that those distinct claims are inextricably intertwined.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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