No. 24-465

In the Supreme Court of the United States

STATE OF TEXAS AND TEXAS RACING COMMISSION,
PETITIONERS

v.

JERRY BLACK, ET AL.

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

REPLY IN SUPPORT OF PETITION

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Whether Congress can empower a private entity to enforce federal law created by that same private entity undoubtedly merits this Court's review. But so does the logically antecedent question: Can a private entity create federal law in the first place? First principles, precedent, and common sense all point the same direction: The sovereign power to regulate can be exercised only by Congress pursuant to its Article I lawmaking authority or at most a federal agency exercising the President's Article II authority to execute laws enacted by Congress. *See, e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013). Allowing a private entity to create legal obligations is thus "delegation in its most obnoxious form," *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), and lacks "even a fig leaf of constitutional justification," *Dep't of Transp. v. Ass'n of Am. R.Rs.* (*Amtrak II*), 575 U.S. 43, 62 (2015) (Alito, J., concurring).

Respondents cannot deny that the question in Texas's petition is antecedent to the question they want the Court to answer. Nor can they dispute that both questions are critical to the same multi-billion-dollar industry. Accordingly, if their petitions' significance justifies certiorari (which it does), then so does Texas's.

Respondents, however, urge the Court to blind itself to the full constitutional dispute by focusing solely on the Authority's power to enforce the law. The Court's review, however, should not be so myopic. The Authority cannot enforce federal law at all and certainly cannot enforce federal law it has no right to make.

Respondents' primary argument against certiorari is that no judge has yet concluded that the Authority's rulemaking authority is unconstitutional. But that almost a dozen judges believe this Court's precedent requires them to salute and stand down when Congress purports

to allow a private entity to make the law is a reason to grant review—not deny it. Judges writing on a blank slate surely would not conclude that the Constitution is satisfied whenever a federal agency may exercise some supervision after the fact. This Court should step in where doctrine has drifted so far from what should be a simple application of the first sentences of Articles I and II of the Constitution. Until this Court clarifies its precedent, however, such confusion will continue.

Regardless, Respondents are wrong that the question they would prefer this Court to answer is cleanly divisible from the one Texas raises. Not only does the Authority's ability to issue guidance implicate both its rulemaking *and* enforcement powers (one reason why guidance is so potent in a world governed by *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)), but separation-of-power principles condemn as "the very definition of tyranny" any effort to place "legislative, executive, and judicia[l]" powers "in the same hands," *City of Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting) (quoting The Federalist No. 47, at 324 (J. Madison) (J. Cooke ed. 1961)). Respondents should not be allowed to artificially narrow the issues before the Court to escape the reality that Congress here has done precisely that.

I. This Court Should Decide Whether Congress Can Delegate Rulemaking Power to Private Entities.

A. As Texas's petition explains, the Constitution empowers Congress to make federal law and the President to enforce it. Accordingly, were the Authority a governmental entity, its unaccountability to the President by itself would "'pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.'" *Seila L. LLC v. CFPB*, 591 U.S. 197, 240 (2020) (Thomas, J., concurring and

dissenting in part) (quoting *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)). Basic principles of federalism, moreover, confirm that private entities cannot create federal law; otherwise, people acting outside of constitutional checkpoints could use preemption to boss around the States. The States never agreed to such disrespect of their sovereignty.

Nevertheless, relying on a pair of this Court's cases from more than 80 years ago—*Carter Coal* and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940)—the Fifth, Sixth, and Eighth Circuits have determined that so long as a federal agency exercises enough supervision, Congress can delegate rulemaking authority to private entities, with the Sixth and Eighth Circuits separately holding that Congress additionally may delegate away the President's enforcement authority to private entities. *See* Pet.App. 9a-33a, 79a-80a; *Oklahoma v. United States*, 62 F.4th 221, 228-33 (6th Cir. 2023), *cert. denied*, 144 S.Ct. 2679 (2024) (rehearing pending); *Walmsley v. FTC*, 117 F.4th 1032, 1038-40 (8th Cir. 2024) *petition for cert. filed*, No. 24-420 (U.S. Oct. 10, 2024).

The Fifth Circuit rightly concluded that, even under such an elastic, constitutionally ungrounded standard, Congress's decision to delegate power to the Authority to enforce HISA and its associated rules offends the Constitution. Pet.App.17a-33a. But the Fifth Circuit erred regarding Congress's delegation of rulemaking authority when it concluded that the FTC's ability to "abrogate, add to, and modify" the Authority's rules sufficiently subordinates the Authority to the FTC. Pet.App.14a (discussing 15 U.S.C. §3053(e)).

This Court's cases, however, do not tolerate such a stark departure from the Constitution. *Carter Coal* holds that Congress cannot delegate power to create law to a

private entity, 298 U.S. at 311, and *Adkins* at most allows a private entity to make *recommendations* to a federal agency, 310 U.S. at 399—not to create rules that will go into effect unless a federal agency affirmatively prevents them from doing so. It is one thing to offer advice to help guide an agency's choices; it is something else to make real-world decisions. *Cf. Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976) (per curiam).

Here, the Authority does much more than offer advice to the FTC, as confirmed by the Authority's recent proposal to modify its rule regarding the assessment owed by each state racing commission. *See* Horseracing Integrity and Safety Authority Assessment Methodology Rule Modification, 89 Fed. Reg. 84,600 (Oct. 23, 2024). Fulfilling its ministerial duty to publish the Authority's proposed modification in the Federal Register, the FTC quotes §3053(c)(2) and explains it must approve the rule so long as it is consistent with HISA and the FTC's own rules. *Id.* at 84,605. Absent any inconsistency, the FTC can do nothing but approve the Authority's rule modification within 60 days, 15 U.S.C. §3053(c)(1), which modification will become effective 30 days later, 89 Fed. Reg. at 84,601—without any government "approval" other than a conclusion that the modification is not unlawful. In short, then, the amount of the assessment owed by each state racing commission will be set by a private entity with the FTC acting as little more than a printer.

Although the FTC also notes that it can engage in its own rulemaking pursuant to §3053(e) and invites members of the public to file petitions, *id.* at 84,605, the rule proposal reveals no effort by the FTC to impose its own policies on the Authority. *Contra* FTC Resp. 9-10. It is therefore unclear why the Authority believes (at 22) that

Texas is "wrong" to claim that the FTC cannot reject proposed rules on "policy grounds" when performing its consistency review. The FTC has repeatedly rejected comments to the Authority's proposed rules that raise "policy" concerns, rather than inconsistency with HISA, both before and after the amendment to HISA. *E.g.*, ROA.3288, 3326, 3418-19, 3436.

B. Although claiming that Congress satisfied this Court's precedent, Respondents share remarkably little about what that precedent says. More remarkably still, they say almost nothing about the Constitution's plain language, failing to even cite Article I and Article II's Vesting Clauses, which straightforwardly exclude private entities from creating or enforcing federal law.

Instead, Respondents double down on their theory that Congress can give that power away to private entities with minimal federal oversight. But the Constitution is not satisfied merely because an agency can undo a private entity's rulemaking: It precludes the private entity from making rules in the first place. The power to set the status quo—and thus to benefit from inertia—is too important to place in private hands, especially because (per elementary game theory) such a table-setting power allows a first mover to create policies that a second mover cannot realistically undo due to transaction costs.

The Authority's suggestion (at 18) that Texas agrees with the "supervision" test is false: *Any* exercise of rulemaking power by a private entity is unconstitutional, no matter how much supervision there is. Of course, a private entity can make recommendations to a federal agency about how that agency should act. But "nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it." *Amtrak II*, 575 U.S. at 64 (Alito, J., concurring). Here,

after undertaking its ministerial obligation to publish the Authority's proposed rules, the only "sign[] off" provided by the FTC is its conclusion that the rules do not otherwise violate the law. 15 U.S.C. §3053(b)-(c). The Authority accordingly does a great deal more than make recommendations; it can (and does) make rules.

In any event, even if supervision could satisfy this Court's caselaw, such supervision must at least be meaningful. That is not the case here. Respondents cannot dispute that the FTC is an extraordinarily busy agency—and not one with any special expertise regarding horses. It defies credulity that the FTC will be able to adequately control the Authority's lawmaking decisions, especially given the anchoring effect of the Authority's initial choices. *Cf. Gall v. United States*, 552 U.S. 38, 49 (2007). And even when the FTC does act, it will be impossible to tell whether it has exercised the plenary policymaking authority the Constitution demands. This is a structural flaw that dooms HISA.

C. Respondents also invoke the Maloney Act and the SEC/FINRA structure. But FINRA is not beyond constitutional question. The D.C. Circuit just held that FINRA's decision to expel a member for violating a cease-and-desist order (issued by FINRA) regarding alleged violations of rules (issued by FINRA) without effective review by the SEC likely violated the private-nondelegation doctrine. *Alpine Sec. Corp. v. FINRA*, No. 23-5129, 2024 WL 4863140, at *1 (D.C. Cir. Nov. 22, 2024). Another member of the panel would have gone further and held unconstitutional even more of FINRA. *See id.* at *20-25 (Walker, J., concurring and dissenting in part). *Alpine* confirms that FINRA is no talisman to ward off constitutional challenges. To the contrary, Respondents' reliance on FINRA—despite the significant

constitutional questions surrounding FINRA—underscores why this Court must provide guidance about the correct constitutional standard.

D. Finally, Respondents misunderstand facial challenges. This Court has emphasized that where an entity or person is ineligible to wield federal power, any exercise of federal power by that entity is per se unlawful. *See Collins v. Yellen*, 594 U.S. 220, 258 (2021) (collecting cases). That is the case here. Congress has created a structure by which everything the Authority does is unconstitutional because private entities categorically cannot exercise governmental authority. That the FTC can now amend or countermand the Authority's rules changes nothing because the Authority lacks the capacity to exercise governmental power to begin with. *Cf. Lucia v. SEC*, 585 U.S. 237, 251-52 (2018) (requiring a hearing before a new ALJ to remedy unconstitutional appointment).

II. The Circuits Disagree About the Test.

Certiorari is also warranted because—even apart from first principles or the fact that the rulemaking question is antecedent to the enforcement question—the circuits disagree about what standard to apply.

A. As the petition explains, the approach taken by the Fifth Circuit starkly departs from that used by the D.C. Circuit. Attempting to demonstrate otherwise, the Authority learns the wrong lesson from the *Amtrak* litigation. There, the Federal Railroad Administration and Amtrak were to "jointly" develop metrics and standards, and any impasse was to be resolved by an arbitrator. *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.* (*Amtrak IV*), 896 F.3d 539, 542 (D.C. Cir. 2018). Because the use of the arbitrator rendered the FRA "powerless" to keep Amtrak's "naked self-interest in check," the D.C. Circuit

held the arbitration provision unconstitutional. *Id.* at 545-46. That holding supports Texas here in multiple respects.

First, *Amtrak IV* confirms that the FTC's consistency review (15 U.S.C. §3053(c)(2)) does not remedy the unconstitutional delegation—as the Fifth Circuit originally held. Pet.App.134a-39a. Just as the use of an arbitrator rendered the FRA powerless to stop Amtrak from making the law, *Amtrak IV*, 896 F.3d at 545-46, HISA's consistency review renders the FTC powerless to stop the Authority from making rules within the scope of delegated authority, 15 U.S.C. §3053(c)(2).

Second, *Amtrak IV* confirms that Congress's purported fix—allowing the FTC to abrogate, add to, or modify the Authority's rules on the back end, *id.* §3053(e)—is insufficient. The mere possibility that an arbitrator would be used (cutting the government out of the rulemaking process) was enough to hold the statute unconstitutional in *Amtrak*. *See Amtrak IV*, 896 F.3d at 548. Here, the possibility that the FTC will decide not to "supervise" the Authority through §3053(e) (leaving the government out of the rulemaking process) is fatal. After all, as this Court has held (and Respondents have not addressed), "[w]hether the statute delegates legislative power is a question for the courts," and an agency's actions do not bear upon the answer. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001). Regardless, for the reasons explained in Texas's petition, Respondents overstate the FTC's power to create rules in this space.

Texas does not claim that the D.C. Circuit addressed HISA. Under that court's analysis, however, HISA's delegation of rulemaking authority would fail, contrary to

the conclusion of the Fifth Circuit. That significant division of authority warrants certiorari.

B. Despite misunderstanding *Amtrak*, Respondents' principal argument is that lower-court judges agree that the Authority's rulemaking authority does not offend the Constitution. But the Fifth, Sixth, and Eighth Circuits all borrowed from each other when it came to articulating the private-nondelegation test. Pet.App.10a-14a (citing the Sixth Circuit); *Oklahoma*, 62 F.4th at 230 (citing the original Fifth Circuit decision); *Walmsley*, 117 F.4th at 1038-39 (citing the Fifth and Sixth Circuits). It is thus hardly unsurprising that they reached similarly incorrect conclusions with respect to rulemaking.

What matters, however, is that the test these circuits used to judge HISA differs from tests other circuits used to judge other delegations to private entities. Circuits have defined the private-nondelegation test to require the government to retain ultimate authority over what becomes the law and have not blessed such far-reaching participation by a private entity. *See Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) (stating Congress may "employ private entities for *ministerial* or *advisory* roles" but "may not give these entities governmental power over others"); *United States v. Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989) (permitting "advisory" and "ministerial" functions); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) (allowing the Secretary to "seek advice from whatever sources he deems appropriate, so long as he or his delegate in the Department retains ultimate authority to issue the regulation"). Contrary to these cases, the Authority's role is not advisory or ministerial, and the FTC does not seek its advice. Instead, the Authority has created nationwide regulatory schemes out of whole cloth.

In response, the FTC observes (at 11-12) that these cases concern "other statutes." Of course they do—HISA has been around for less than four years, while this Court's cases setting forth the contours of the private-nondelegation doctrine have existed for over eighty. Few constitutional cases in this Court involve a split with respect to the same statute; instead, the question is what standard courts should use *across* statutes. *See, e.g.*, Pet. for Writ of Cert. at 30-32, *Free Speech Coal. v. Paxton*, No. 23-1122 (U.S. Apr. 12, 2024); Pet. for Writ of Cert. at 9-15, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, No. 20-843 (U.S. Dec. 17, 2020). Here, the question is what test governs delegation of rulemaking authority to a private entity. The Circuits have not uniformly answered that question. This Court should.

III. This Question Is Exceptionally Important.

The question presented here is also exceptionally important. Respondents cannot deny that this issue has profound implications for federalism—to say nothing of a multi-*billion*-dollar industry. Nor do they deny that Congress intends to use this model for other industries. Thus, absent clear direction from this Court, it is inevitable there will be more litigation regarding the correct analysis when Congress hands off rulemaking authority to a private entity. Accordingly, clarity from this Court is essential with respect to both the Authority's enforcement and rulemaking powers.[1]

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[1] The Court's recent grant of certiorari concerning the nondelegation doctrine underscores the need for certiorari here. *See Consumers' Rsch. v. FCC*, 109 F.4th 743 (5th Cir. 2024) (en banc), *cert. granted sub nom.* No. 24-354, 2024 WL 4864036 (U.S. Nov. 22, 2024). Not only does it confirm the importance of this issue, but the Court may not be able to reach the private-nondelegation question due to the presence of jurisdictional and public-nondelegation questions.

Furthermore, even if—contrary to fact—this question was not independently certworthy, Respondents' petitions concerning the same Fifth Circuit decision are. And when this Court grants certiorari on one part of a case, it "often also grant[s] certiorari on attendant questions that … are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration." *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 619-20 (2015) (Scalia, J. concurring in part). The Court accordingly should grant Texas's petition to ensure that the entire constitutional dispute is before the Court.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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See 2024 WL 4864036 (adding mootness question). So while certiorari should still be granted here, at a minimum, this petition should be held pending the Court's resolution of that case.