No. 24-472

In the Supreme Court of the United States

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

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

REPLY IN SUPPORT OF CERTIORARI

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The responses of the Federal Trade Commission (FTC) and the Horseracing Integrity and Safety Authority (the Authority) both highlight rather than obviate the need for serious constitutional thinking on all aspects of the private non-delegation doctrine. Though there is broad agreement among the circuits that the principle exists—government cannot willy-nilly delegate its responsibilities to private actors—there is deep confusion among the circuits about the contours of that principle. That confusion stems in large part from the fact that this Court has not addressed the doctrine in a majority opinion since 1940, and even then did so with a minimum of analysis. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398-99 (1940). Certiorari on both the legislative and executive delegations made by the Horseracing Integrity and Safety Act is needed to fully expound the scope of the non-delegation doctrine, given the confusion among the lower circuits on both its Article I and Article II application.

This Reply addresses five specific points raised by the Authority and FTC in their responses, explaining that (1) policymaking is a sovereign function exclusive to the government, (2) the FTC's current policy review of proposed rules lacks real bite, (3) there is a circuit split over private delegates' power to set fees, (4) there is similarly a circuit split over private delegates' power to issue guidance, and (5) the Court should hear this case this term.

1. Policymaking is a sovereign function that must rest in the FTC alone.

It is not true that "'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.'" Auth. Resp. 13.

The NHBPA Plaintiffs have made two arguments. The first is that under some existing precedent, particularly *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940), the question is one of subordination.

But the NHBPA Plaintiffs have also argued (Pet. 21) that under a second line of precedent, starting in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), and most recently reiterated in *Pittston Co. v. United States*, 368 F.3d 385, 397-98 (4th Cir. 2004), the question is not one of subordination but of sovereignty: is the function one uniquely vested in the government? In other words, some activities may be delegated across branches, but they cannot be delegated outside government at all. Policymaking, like law enforcement, is one such sovereign function. *Carter*, 298 U.S. at 311 ("The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function. . .").

Review of legislative delegation is needed to clarify these two conflicting frameworks. May a private entity enjoy a privileged and powerful position as the primary policymaker writing regulations for an

industry[1], or may a private entity only act as an "advisor" and "consultant" but not as the primary driver of policy? Pet. 13-14.

2. The Authority mischaracterizes the FTC's "consistency review."

According to the Authority, "the FTC's front-end 'consistency' review has real 'bite.' Petitioners are wrong that the FTC cannot disapprove proposed standards 'on policy grounds.'" Auth. Resp. 22.

Actually, the Fifth Circuit correctly concluded that consistency review is "high-altitude," "arms-length," "open-ended," and "next to nothing." Pet. App. 86a. That remains the standard even in the amended act. 15 U.S.C. § 3053(c)(2). And that is the standard the FTC still uses when reviewing rules. See, e.g., *Order Approving the Racetrack Safety Rule Modification Proposed by the Horseracing Integrity and Safety Authority*, FTC Order (June 7, 2024), at 3-4.

Consistency review precludes the FTC's exercise of its own policy preferences. Pet. App. 135a ("whatever 'consistency' review includes, we know one thing it *excludes*: the Authority's policy choices in formulating rules"). The only way the FTC can exercise its policy preferences concerning proposed rules under the amended act is by twisting itself in procedural knots: it can sit on the proposed rule without actually

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[1] *See* 15 U.S.C. § 3055(a)(1) ("the Authority shall establish a horseracing anti-doping and medication control program applicable to all covered horses, covered persons, and covered horseraces"); *id*. § 3056(a)(1) ("the Authority shall establish a racetrack safety program applicable to all covered horses, covered persons, and covered horseraces").

granting it consistency review, Auth. Resp. 36, or delay its effective date until the FTC completes its own separate rulemaking first. *Id*. *Accord* FTC Resp. 10. But the Act does not grant the FTC the two most obvious and effective powers: the power to amend a proposed rule to rewrite, remove, or add a particular section or subsection to the rule (it must approve or reject an Authority-proposed rule *in toto*) and the power to act in the first instance on its own policy preference regarding the proposed rule.

In all events, the "consistency" standard does not have "bite." It is cursory, a rubber-stamp, and not the same standard as the SEC's "public interest" standard. *Contra* Auth. Resp. 22. It does not permit the FTC to act as an independent, supervisory check on the Authority's proposed rules.

3. There is a circuit split over whether a private delegate may set fees without agency oversight.

Shortly after the Horsemen first began targeting the Act's delegation of fee-setting power to the Authority in their amended complaint, the FTC *sua sponte* (the more appropriate Latin is probably *mirabile dictu*) issued a rule giving itself supervision of the Authority's budget, even while acknowledging the budget was not one of the eleven items of supervisory authority enumerated in the statute, 88 Fed. Reg. 18034, 18035 (citing 15 U.S.C. § 3053(a)). That still does not grant the FTC power over the fee rates themselves, which are formulated and set by the Authority. Pet. 9-10. In all events, even the budget oversight rule does not grant the FTC power to approve or disprove the specific fees charged to

horsemen—the statute gives that power exclusively to the Authority. 15 U.S.C. § 3053(f)(1)(C)(iv)(I-II).

While arguing that the Horsemen should file an as-applied challenge to the rule if they think it is contrary to the statute, Auth. Resp. 27, FTC Resp. 10, the Authority and FTC never respond to the core point of the Petition: the Fifth Circuit decision allowing the Authority to set fees parts ways from the Third, Fourth, and Sixth Circuits, which have held that private delegates may collect fees but may not set fee rates. Pet. 9-12. That circuit split is real and requires resolution.

4. There is a circuit split over whether a private delegate may set policy through guidance without agency oversight.

The Authority and FTC also fail to refute the Petition about the circuit split over a private entity's guidance power. The Act grants the Authority the power to issue interpretive guidance. 15 U.S.C. § 3054(g)(1). By law, that guidance takes "immediate effect." *Id.* § 3054(g)(3). The Act also authorizes the Authority's anti-doping agency (a sub-delegate) to issue "rules, protocols, policies, and guidelines" not for approval by the FTC but "for approval by the Authority." *Id.* § 3055(c)(4)(A).

The Authority and FTC respond that such guidance "does not have the force of law." Auth. Resp. 28, FTC Resp. 11. But return to the example given in the Petition (Pet. 19): the Authority proposes, and the FTC finds consistent and promulgates, a rule limiting toe grabs in races (think cleats for horseshoes) (ROA. 3479). The Authority then issues "guidance" saying it

will not enforce the toe grabs rule (as indeed it has, ROA.3680). Has not the Authority made the final policy determination that has "the force of law"? *See Kisor v. Wilkie*, 588 U.S. 558, 607-08 (2019) (Gorsuch, J., concurring in the judgment) (noting that "a legal brief, press release, or guidance document" can be used by agencies as "a shortcut around the APA's required procedures for issuing and amending substantive rules").

The Fifth Circuit sanctioned giving the Authority this guidance power to rewrite the rules, Pet. App. 13a n.6, even when faced with a record containing over two dozen examples of the Authority rewriting rules through formal guidance and informal press releases and newsletters.

The Sixth Circuit, by contrast, upheld the Universal Service Administration Corporation against a private nondelegation challenge precisely because it could *not* "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." *Consumers' Rsch. v. FC*C, 67 F.4th 773, 796 (6th Cir. 2023).[2]

The Fifth Circuit permits the Authority to make policy and interpret statutes and rules via guidance.

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[2] The Government says that "[i]t is especially incongruous for petitioners to assert (National Horsemen Pet. 8) a conflict with the Sixth Circuit's decision in *Consumers' Research* when the Sixth Circuit has squarely rejected a private nondelegation challenge to the amended Act's rulemaking provisions." FTC Resp. 12. But the *Oklahoma* Court did not consider—because the parties did not raise—the nondelegation doctrine as applied to fee-setting or the guidance power, so it can hardly be said to have "squarely rejected" these arguments.

The Sixth Circuit does not permit that sort of thing. The Authority's response in no way addresses this divergence.

5. This case calls for certiorari this term.

The Horsemen are aware that this Court has already granted certiorari in *Federal Communications Commission v. Consumers' Research*, No. 24-354, also from the Fifth Circuit. The third question presented in that case touches on the private nondelegation doctrine. FCC Pet. I. However, it does not squarely present the private nondelegation question as the central issue of the case, as the litigation around the Horseracing Act does.

In some sense, the horseracing petitions are a necessary predicate to the *Consumers' Research* case. *Consumers' Research* calls for the Court to consider the admixture of public and private nondelegation principles. But this Court must first decide the appropriate private nondelegation principles before considering whether those concerns combined with public nondelegation concerns can together create a constitutional problem.

Moreover, the FCC case does not present the question of delegated enforcement authority, which may demand a different constitutional standard from administrative authority.[3] Thus, from a legal perspective, separate review of this case is needed.

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[3] *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, 2024 U.S. App. LEXIS 29728, *62-63 (D.C. Cir. Nov. 22, 2024) (Walker, J., concurring in part in the judgment and dissenting in part) (There is "a constitutionally significant difference between rulemaking

Prompt review is also needed from a practical perspective. The horseracing industry employs thousands of people and generates billions of dollars a year in economic activity. It needs clarity on the fundamental constitutionality of its national regulatory structure. All parties on both sides of the "v" agree that this clarity is necessary as soon as possible, and have respectfully requested that the Court hear this case this term. The Horsemen are ready to accept an accelerated briefing schedule if necessary to accomplish that goal.

CONCLUSION

The Court should grant this Petition, the petition of Texas, and the petitions of the Authority and FTC, for a comprehensive vehicle to clarify and apply the private non-delegation doctrine in both its Article I and Article II contexts.

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and enforcement. Rulemaking can sometimes be properly supervised by final-stage review if the review occurs *before* the rule takes effect. In contrast, enforcement actions cannot be properly supervised by final-stage review because severe restrictions on liberty can occur at every step. So, for an enforcement action, the issue of *when* oversight occurs is just as important as *how much* oversight occurs.").

Respectfully submitted,

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