No.

In The

Supreme Court of the United States

HORSERACING INTEGRITY AND SAFETY AUTHORITY, INCORPORATED, ET AL.,

Applicants.

v.

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, ET AL.

APPLICATION FOR A STAY OF THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE

Applicant 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 Applicant is a nongovernmental corporation.

PARTIES TO THE PROCEEDING

1. Applicants (Defendants-Appellees below) are the Horseracing Integrity and Safety Authority, Inc., Charles Scheeler, Steve Beshear, Adolpho Birch, Leonard Coleman, Joseph De Francis, Susan Stover, Bill Thomason, D.G. Van Clief, Nancy Cox, Katrina Adams, Jerry Black, Joseph Dunford, Frank Keating, Kenneth Schanzer, Ellen McClain, and Lisa Lazarus.

2. Respondents (Plaintiffs-Appellants below) include the National Horsemen's Benevolent and Protective Association (NHBPA), Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, Nebraska Horsemen's Benevolent and Protective Association, Oklahoma Horsemen's Benevolent and Protective Association, Oregon Horsemen's Benevolent and Protective Association, Pennsylvania Horsemen's Benevolent and Protective Association, Washington Horsemen's Benevolent and

Protective Association, Tampa Bay Horsemen's Benevolent and Protective Association, Gulf Coast Racing LLC, LRP Group Ltd., Valle de Los Tesoros Ltd., Global Gaming LSP LLC, and Texas Horsemen's Partnership LLP.

3. Respondents (Intervenor Plaintiffs-Appellants below) also include the State of Texas and the Texas Racing Commission.

4. Respondents (Defendants-Appellees below) further include the Federal Trade Commission, Chair Lina Khan, Commissioner Rebecca Kelly Slaughter, Commissioner Alvaro Bedoya, Commissioner Melissa Holyoak, and Commissioner Andrew N. Ferguson.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

National Horsemen's Benevolent & Protective Ass'n, Nos. 5:21-cv-071, 5:23-cv-77 (May 4, 2023) (rejecting facial constitutional challenge to Horseracing Integrity and Safety Act) (reproduced at App., *infra*, 40a-94a)

United States Court of Appeals (5th Cir.):

National Horsemen's Benevolent & Protective Ass'n, No. 23-10520 (July 5, 2024) (affirming in part and reversing in part) (reproduced at App., *infra*, 1a-39a)

National Horsemen's Benevolent & Protective Ass'n, No. 23-10520 (Sept. 9, 2024) (denying petitions for rehearing en banc) (reproduced at App., *infra*, 95a-97a)

National Horsemen's Benevolent & Protective Ass'n, No. 23-10520 (Sept. 17, 2024) (denying motion for stay of mandate) (reproduced at App., *infra*, 98a-99a)

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To the HONORABLE SAMUEL A. ALITO, JR., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to Rule 23 of the Rules of this Court and 28 U.S.C. §§ 1651, 2101(f), the Horseracing Integrity and Safety Authority respectfully applies for a stay of the mandate of the United States Court of Appeals for the Fifth Circuit associated with its July 5, 2024 judgment (App, *infra*, 1a-39a), pending the consideration and disposition of the forthcoming petition for a writ of certiorari and any further proceedings in this Court. The Federal Defendants agree that a stay should be granted and expect to file a response tomorrow. All other Respondents (plaintiffs-appellants below) oppose the stay request, but represent that they acquiesce in the request for a grant of certiorari.

INTRODUCTION

After high-profile equine deaths and corruption scandals threatened horseracing under the prior patchwork of state-by-state regulation, implementation of the federal Horseracing Integrity and Safety Act (HISA) since 2022 has cut the fatality rate in half and stabilized the sport. Two administrations have supported HISA and two bipartisan Congresses have embraced it—including through an amendment that fortified Federal Trade Commission (FTC) oversight of the private Horseracing Integrity and Safety Authority (Authority). The "constructive exchanges between Congress and the federal courts" giving rise to that amendment prompted Chief Judge Sutton to observe, on behalf of a unanimous Sixth Circuit, that "[s]ometimes government works." *Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023).

Three federal courts (including the Sixth Circuit) have now resolved materially identical challenges to the amended Act and reached the same conclusion: HISA is constitutional. But the Fifth Circuit recently contradicted that consensus, holding that HISA's enforcement provisions facially violate the private-nondelegation doctrine. That decision is wrong in two key respects: (i) it disregards this Court's caution against wiping out broad swaths of federal legislation on a facial basis; and (ii) it overlooks the many ways Congress purposefully subordinated the Authority's enforcement of HISA rules to the FTC's approval, control, and independent power.

The Fifth Circuit's outlier decision should not be permitted to trample other courts' considered judgments pending disposition of the Authority's forthcoming petition for a writ of certiorari. But Respondents—including a national association whose members race across the country—brazenly seek to leverage the Fifth Circuit's facial judgment to bar HISA's enforcement in other circuits nationwide. For that reason (among others), each factor that guides this Court's stay consideration is easily satisfied here.

First, given the acknowledged circuit split on a question of undisputed legal and practical importance, all agree that review by this Court is necessary and likely. In fact, Respondents have represented that they acquiesce in the request for certiorari.

Second, there is at least a "fair prospect" that a majority of this Court will concur with the Sixth Circuit's view that Congress's amendment to HISA permits the FTC to exercise adequate oversight in multiple (if not all) applications to overcome

this facial constitutional challenge. The FTC determines whether to approve (or not) all standards governing the Authority's implementation of the Act. The FTC also holds plenary rulemaking power to halt, compel, or otherwise direct any enforcement activity at any point. And every enforcement decision is ultimately subject to two layers of de novo FTC review (followed by Article III judicial review). That is the same 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.

Third, maintaining the status quo is necessary to prevent irreparable harm. Allowing the Fifth Circuit's decision to take effect nationwide (as Respondents openly seek), wherever Respondents' members race across the country, would inflict a serious blow to separation-of-powers and comity principles: not only would it run roughshod over Congress's deliberate amendment to the Act, but it also would effectively overrule the opposite holding of the Sixth Circuit (among other courts) on the same facial constitutional challenge. And it would plunge horseracing back into a confusing web of varying enforcement protocols, disrupt the entrenched expectations of a national industry that has adjusted to the federal reforms over two-plus years, and imperil the human and equine athletes who have been protected by the successful programs Congress directed. The data are clear: more horses would die and more cheaters would prosper.

The Court should stay the mandate pending disposition of the certiorari petition that the Authority will file forthwith. Given that the Fifth Circuit's mandate

is scheduled to issue on September 25, the Court may consider entering an administrative stay pending its resolution of this application. Alternatively, recalling and staying the mandate reasonably soon after that date would ensure that equine and human athletes are protected and avoid throwing the industry into complete turmoil. *See, e.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 5 (2018) (recalling and staying court of appeals' mandate pending the timely filing and disposition of a petition for a writ of certiorari).

In light of the nationwide benefits of prompt resolution of this case—and given Respondents' agreement that certiorari is proper and necessary—the Court may wish to construe this application as a petition for a writ of certiorari presenting the following question: whether the Horseracing Integrity and Safety Act's enforcement provisions facially violate the private-nondelegation doctrine. *See Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023) (treating stay application as petition for certiorari and granting it). Granting review of that question while also granting a stay would allow this Court to issue an authoritative merits decision this Term and prevent the conflicting lower court judgments from causing chaos and confusion in the meantime. Otherwise, the Authority will file a petition for a writ of certiorari—which is due on December 9, 2024—on or before October 11, 2024.

The Federal Defendants agree that a stay should be granted and expect to file a response tomorrow. The other Respondents oppose the stay request, but acquiesce to further review should the Court treat this application as a certiorari petition.

STATEMENT OF THE CASE

a. "[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).

The highly publicized equine fatalities and corruption scandals 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). In 2020, a broad coalition of stakeholders rallied around "bipartisan, bicameral progress" toward finally remedying the "tragedies on the track." 166 CONG. REC. S5514-5515 (Sen. McConnell). The congressional effort 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 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);[1] Press Release, *Gillibrand Announces Passage Of Her Horseracing Integrity And Safety Act* (Dec. 22, 2020).[2]

President Trump signed HISA into law in December 2020. The Act protects athletes (equine and human), the betting public, and the integrity of the sport through the development and uniform enforcement of racetrack-safety, medication-control, and anti-doping rules. To effectuate that goal, HISA invokes the expertise and experience of the Authority, a private standards-setting nonprofit organization, subject to the FTC's approval, oversight, and independent power.

As Senator McConnell and other bipartisan sponsors of HISA explained below, that framework purposefully “corresponds in every material respect to the Maloney Act,” which has governed the SEC's relationship with FINRA and other self-regulatory organizations for over eight decades. McConnell Amicus Br. 5 (Aug. 11, 2023), C.A. Doc. 120. Specifically, HISA vests in the FTC exclusive authority to promulgate (or not) rules under the Act, including all rules governing enforcement. 15 U.S.C. § 3053(a)-(d); *see, e.g.*, *id.* §§ 3054(c)(2), 3057(a), (c)-(d). HISA subjects any

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

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

sanction to two layers of de novo FTC review, followed by judicial review. *Id.* § 3058(b)-(c). And on top of those agency checks bookending any enforcement action, HISA confers on the FTC plenary rulemaking power to direct or limit any enforcement of the FTC-approved rules at any time. *Id.* § 3053(e).

b. HISA rules have been successfully implemented since July 2022, governing over 67,000 horses and 35,000 people competing across 19 states (all outside of the Fifth Circuit). Although most industry stakeholders have embraced HISA and have adjusted to its rules, a faction long opposed to any reforms has brought a series of challenges to the Act. That includes the lead Respondents, a national horsemen's association and several of its state chapters, whose members have competed under HISA rules for over two years. They are joined in this case by a collection of Texas-based racetracks that have never been subject to HISA rules, and by the State of Texas and its racing commission that have essentially elected to opt-out of HISA. Specifically, Texas has barred the transmission of in-state racing for out-of-state wagering, thereby avoiding the statutory interstate-commerce requirement so as to prevent application of HISA to any tracks in the State. *See* ROA.3086-3087; *see also* App., *infra*, 46a-47a (listing "lead-case plaintiffs," "member-case plaintiffs," and "intervenor-plaintiffs").

In November 2022, in a precursor appeal, the Fifth Circuit held that HISA violated the private-nondelegation doctrine. *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022). 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 887. Because the FTC lacked "the final word," the Authority did not "function subordinately to the agency." *Id.*

"Not so anymore." *Oklahoma*, 62 F.3d at 231. 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.3d at 232 (quoting *Black*, 53 F.4th at 887). 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, Chief Judge Sutton wrote, made the Authority "subordinate to the agency." *Oklahoma*, 62 F.4th at 225, 229. Under the revised Act, "[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" with Chief Judge Sutton's conclusion 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.[3]

c. The district court reached the same determination in this case. In May 2023, following trial, the district court issued a 55-page opinion concluding that "Congress answered [this Court's] call" and "cured the constitutional issues." App., *infra*, 73a, 81a.

On appeal, the Fifth Circuit agreed that "the amendment solved the nondelegation problem with the Authority's rulemaking power," and that HISA does not offend the Due Process Clause or the Appointments Clause. App., *infra*, 3a. But the Fifth Circuit concluded, on a facial basis, that "HISA's enforcement provisions violate the private nondelegation doctrine." *Id.*

On September 9, 2024, the Fifth Circuit denied timely rehearing petitions by the Federal Defendants and the Authority. On September 17, 2024, the Fifth Circuit denied the Authority's motion to stay the mandate, including the Authority's alternative request to stay the mandate as to operation of the judgment outside the Fifth Circuit.

[3] This Court denied certiorari in the *Oklahoma* case on June 24, 2024. Petitioners in that case have sought rehearing, and that petition has been distributed for the September 30 conference. *Oklahoma v. United States*, No. 23-402 (S. Ct.).

ARGUMENT

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must establish (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see id.* ("In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent."). Those requirements are readily satisfied here.

I. THIS COURT IS LIKELY TO GRANT CERTIORARI

Respondents' counsel agrees with "the obvious answer here": this case presents "natural circumstances for the Supreme Court to review" the Fifth Circuit's judgment and "issue a decision that governs the whole country." Tr. 33:30-34:30, Interview of Daniel Suhr, *At the Races with Steve Byk* (July 9, 2024) (Suhr Interview).[4] Indeed, Respondents have represented (in response to a request for their position on this application) that they acquiesce in the request for certiorari. For good reason.

a. The Fifth Circuit declared categorically that the enforcement provisions of a federal statute governing an entire industry are "facially unconstitutional." App., *infra*, 3a. That outcome alone triggers the "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa Cnty. v. Lopez-Valenzuela*, 574 U.S. 1006 (2014)

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[4] https://tinyurl.com/yw4ec7bf.

(Thomas, J., respecting denial); *see, e.g.*, *Allen v. Cooper*, 589 U.S. 248, 254 (2020) ("Because the Court of Appeals held a federal statute invalid, this Court granted certiorari."). The separation-of-powers interests motivating that presumption carry particular force here given the remarkable interplay among the branches—which prompted Chief Judge Sutton to observe that "[s]ometimes government works." *Oklahoma*, 62 F.4th at 225. In direct response to the Fifth Circuit's prior private-nondelegation ruling, a bipartisan Congress amended HISA by embracing the remedy a Sixth Circuit panel had recommended. "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)—and revised the statute accordingly.

b. The undisputed circuit conflict the decision below creates also supplies "[a] well-established ground for granting certiorari." STEPHEN M. SHAPIRO ET AL., SUPREME COUT PRACTICE § 4.3 (11th ed. 2019); *see* SUP. CT. R. 10(a). In two key respects, the Fifth Circuit expressly "part[ed] ways" with the Sixth Circuit. App., *infra*, 3a.[5]

First, the decision below contradicts the Sixth Circuit's approach to the facial constitutional challenge. Chief Judge Sutton concluded that the "potential" that "the

[5] In addition to contradicting the Sixth Circuit and disagreeing with the district court below, the Fifth Circuit decision conflicts with the decision of the Eastern District of Arkansas. Hr'g Tr. at 44, *Walmsley v. Federal Trade Comm'n*, No. 3:23-cv-81 (E.D. Ark. July 21, 2023), Doc. 47 (denying preliminary injunction on "lack of probability of success on the merits"). An appeal is pending in the Eighth Circuit, which heard oral argument in June 2024. *Walmsley v. Federal Trade Comm'n*, No. 23-2687 (8th Cir.).

FTC *could* subordinate every aspect of the Authority's enforcement" through the plenary rulemaking power Congress conferred "suffices to defeat a facial challenge." *Oklahoma*, 62 F.4th at 231. To the extent that "potent answer" leaves any doubt, the Sixth Circuit explained, its resolution should await a case "when the Authority's actions and the FTC's oversight appear in concrete detail, presumably in the context of an actual enforcement action." *Id.* at 233.

By contrast, the Fifth Circuit brushed aside concern that resolution of the constitutionality of the enforcement provisions is "premature," viewing the case as a "purely legal challenge" turning on "HISA's clear delineation of enforcement power." App., *infra*, 13a, 26a (citation omitted). The facial nature of the challenge had the opposite effect as in the Sixth Circuit: identifying Respondents' decision to forgo "as-applied challenges" as a virtue, the Fifth Circuit confined its analysis to determining "*where* the enforcement power is lodged" to avoid ever having to consider "*how* the Authority exercises its enforcement power" or how the FTC exercises its oversight in any particular circumstances. *Id.* at 25a-26a (citing *Oklahoma*, 62 F.4th at 231).

Second, the Fifth Circuit rejected several premises underlying the Sixth Circuit's conclusion that HISA's enforcement provisions are constitutional. The Fifth Circuit was "not convinced" by Chief Judge Sutton's reasoning that the FTC's independent rulemaking power "can save the Authority's enforcement powers." Op. 22 (citing *Oklahoma*, 62 F.4th at 231). The Fifth Circuit set aside the significance the Sixth Circuit attached to the FTC's "full authority to review the Horseracing Authority's enforcement actions," *Oklahoma*, 62 F.4th at 231, holding that such de

novo review and factfinding "is no answer," Op. 21. And the Fifth Circuit took issue with "[t]he Sixth Circuit['s] reli[ance] on several cases upholding the constitutionality of FINRA" and other self-regulatory organizations that "enforc[e] securities laws." Op. 26 & n.18 (citing *Oklahoma*, 62 F.4th at 229, 232).

c. The case presents "an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). In Respondents' own words, "[t]he question of the limits of private delegations is a live concern *** in the Supreme Court[.]" *NHBPA* Mot. 13-14, *Black*, No. 22-10387 (5th Cir. Apr. 20, 2022), Doc. 10. Indeed, several members of this Court have observed the "need to clarify the private non-delegation doctrine." *Texas v. Commissioner*, 142 S. Ct. 1308 (2022) (Alito, J., joined by Thomas & Gorsuch, JJ., respecting denial of certiorari).

The significance of that question is amplified here by "the dangers of bringing a facial challenge." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2409 (2024) (Barrett, J., concurring). While at least one member of this Court has signaled that it is "high time the Court reconsiders its facial challenge doctrine," *id.* at 2412 (Thomas, J., concurring), all agree that there are "a host of good reasons" to police a court's "facial analysis," *id.* at 2397-2398 (majority op.).

The practical implications, Respondents have acknowledged, stretch far "beyond just the immediate parties" and affect the horseracing industry nationwide. NHBPA Mot. 12, 14 (May 23, 2023), C.A. Doc. 25; *see* pp. 23-28, *infra* (discussing harms). "[T]he need for a uniform rule" is likely to compel this Court to "grant[] certiorari to resolve the conflict," *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962)—

particularly given that "[t]he bedrock principle of [HISA] is the need for uniformity," FTC, *Order Disapproving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority* 1-2 (Dec. 12, 2022).[6]

Moreover, the "well-established model" on which HISA was based governs several "important areas of our economy" aside from horseracing. McConnell Amicus Br. 4 (Aug. 11, 2023), C.A. Doc. 120. Most obviously, Congress has repeatedly reaffirmed "its commitment" to a parallel agency-oversight framework in the financial sector based on "the SEC's review of disciplinary actions" by self-regulatory organizations like FINRA and around two dozen national security exchanges like NASDAQ. *National Ass'n of Secs. Dealers v. SEC*, 431 F.3d 803, 807-808 (D.C. Cir. 2005) (citation omitted); *see, e.g.*, 15 U.S.C. § 78s(c)-(e). A similar model guides other industries, from the Commodity Futures Trading Commission's oversight of the private National Futures Association, 7 U.S.C. § 21(h)-(k), to the Federal Energy Regulatory Commission's oversight of the private North American Electric Reliability Corporation, 16 U.S.C. § 824*o*(d)-(f). The decision below calls into question these longstanding and effective governance relationships.

II. THERE IS A FAIR PROSPECT THAT THIS COURT WILL REVERSE THE JUDGMENT BELOW

"Given the conflict" with the unanimous Sixth Circuit and every other federal court that has resolved a constitutional challenge to HISA, there is at least a "fair

[6] https://tinyurl.com/y76468ta.

prospect" that this Court will reverse the judgment below. *California v. American Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers).

a. As a threshold matter, the Fifth Circuit's "maximalist approach" to categorically declaring invalid all HISA enforcement provisions—even "novel, never-before-enforced" ones—improperly extends its holding far beyond the concrete facts and parties actually before it. *NetChoice*, 144 S. Ct. at 2412-2418 (Thomas, J., concurring); *see id.* at 2428 (Alito, J., concurring, joined by Thomas & Gorsuch, J.J.) ("Facial challenges *** strain the limits of the federal courts' constitutional authority to decide only actual 'Cases' and 'Controversies.'").

To the extent invalidating "every application of a statute—including ones that have nothing to do with [a plaintiff's] injury"—is ever within "a federal court's constitutional authority," *NetChoice*, 144 S. Ct. at 2416 (Thomas, J.), "the Fifth Circuit *** did not correctly apply [this Court's] precedents governing facial challenges," *United States v. Rahimi*, 144 S. Ct. 1889, 1903 (2024). This Court has "made facial challenges hard to win." *NetChoice*, 144 S. Ct. at 2397. This case illustrates why: The panel's ruling about abstract enforcement activities "'rest[s] on speculation' about the law's coverage and its future enforcement" and "'short circuit[s] the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." *Id.* (citations omitted).

The record on this facial challenge—developed through trial—lacks evidence of specific enforcement activity against Respondents' members. Rather, the Fifth Circuit's conclusion that "the Authority does not 'function subordinately' to the FTC

when enforcing HISA" is based on a smattering of "hypothetical[s]" and "[s]uppos[itions]" about activities the Authority might conduct in some future circumstances. App., *infra*, 19a, 20-21a, 26a n.17 (citation omitted); *contra* *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-450 (2008) ("In determining whether a law is facially invalid, [courts] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

In forming that conjecture, the Fifth Circuit did not "consider the circumstances in which [HISA's enforcement] was most likely to be constitutional." *Rahimi*, 144 S. Ct. at 1903. For example, a straightforward application of the crop rule—the "vast majority" of infractions, ROA.3897—involves a steward's nondiscretionary assessment of the number of strikes to a horse in a public race, according to an FTC-approved limit and subject to the FTC's de novo review of the same video recording. Instead, the Fifth Circuit embraced the most dramatic assumptions about the Authority's potential actions and the most constrained reading of the FTC's oversight. *See, e.g.*, App., *infra*, 20a & n.12 (reciting "[c]ontested" allegations regarding "coercive interrogation" and "search" of facilities, and assuming FTC will not exercise "its discretion to implement a stay pending appeal"); *compare, e.g.*, *In re Calhoun*, No. 9430, 2024 WL 2724039, at *3 (F.T.C. May 21, 2024) (granting stay allowing challenge "to be fully considered before enforcement" under HISA).[7]

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[7] The panel's attempts to bolster its assumptions with discussions of activities outside the record are littered with factual mistakes, underscoring this Court's

Worse still, the Fifth Circuit relied heavily on HISA provisions that have *never* been invoked against anyone. The Authority has not, for example, filed a single "suit to enjoin violations" or issued a single "subpoena." App., *infra*, 23a-24a (citing 15 U.S.C. § 3054(h), (j)(1)). The Fifth Circuit's focus on these inoperative (and easily severable, if ever invoked) provisions "left [it] slaying a straw man" to declare all HISA enforcement provisions facially invalid. *Rahimi*, 144 S. Ct. at 1903.

b. The Fifth Circuit's failure to exercise the required judicial restraint contributed to its erroneous ruling on the merits.

All agree on the governing private-nondelegation test: Congress's decision to confer on the Authority a role in HISA's enforcement is constitutional if "the Authority 'functions subordinately' to an agency with 'authority and surveillance' over it." App., *infra*, 15a (quoting *Black*, 53 F.4th at 881); *see Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). HISA easily meets that standard in the three key ways the Authority-FTC relationship mirrors the FINRA-SEC relationship: (i) the Authority may implement standards and follow procedures only that the FTC has affirmatively approved, 15 U.S.C. §§ 3053(a)-(d), 3054(c)(2), 3057(a), (c)-(d); (ii)

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caution against facial challenges. To list just two: no "Horsemen's members" are racetracks, App., *infra*, 14a; and the Authority has not "barred *** racetracks in Texas from broadcasting races out of state," App., *infra*, 15a—the State Racing Commission made that policy election. Moreover, the panel's confused discussions of the U.S. Anti-Doping Agency (USADA) miss that USADA is not even involved with HISA. *See* Andrew Cohen, *Keeping Pace: Anti-HISA Forces Win, Racehorses And Honest Trainers And Owners Lose, At Fifth Circuit*, PAULICK REPORT (July 6, 2024), https://tinyurl.com/mw9em4sf (noting that the Fifth Circuit's "confusion" about USADA is "a profound factual error in this ruling" that "casts rightful doubt on the entirety of the legal argument").

the FTC wields plenary rulemaking power to steer or restrict any enforcement of the FTC-approved rules, *id.* § 3053(e); and (iii) all sanctions are subject to two layers of de novo FTC review, followed by judicial review, *id.* § 3058(b)-(c). Indeed, FINRA itself urged affirmance of the district court judgment in this case. Br. of Financial Industry Regulatory, Inc. as Amicus Curiae in Support of Defendants-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 App., *infra*, 81a)).

That comprehensive oversight refutes the Fifth Circuit's conclusion that "the FTC lacks *any* tools to ensure that the law is properly enforced." App., *infra*, 29a (emphasis added). Specifically, the FTC's power "to modify *any* rules for any reason at all" to "ensure[] that the FTC retains ultimate[] authority over the implementation of the Horseracing Act," App., *infra*, 11a (quoting *Oklahoma,* 62 F.4th at 231), necessarily encompasses the Act's enforcement. Thus, beyond requiring the FTC to approve every rule that dictates any investigatory and disciplinary activity on the front end, Congress's amendment to HISA confirms that the agency has "the tools to step in" at any point to further "control the Authority's enforcement activities." *Oklahoma,* 62 F.4th at 231 (citing 15 U.S.C. § 3053(e)). For example, in addition to a prospective rule "governing *how* the Authority" may exercise its (never utilized)

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

subpoena power, App., *infra*, 25a, the FTC could issue a rule *barring* unapproved subpoenas or *quashing* particular ones. Or the FTC could wield the rule it promulgated that controls the Authority's budget—including by "modify[ing] any line item" or withholding necessary "approval," 88 Fed. Reg. 18,034, 18034-18,036 (Mar. 27, 2023)—to prevent a civil action. *Contra* App., *infra*, 21a-22a ("[T]he Authority is demonstrably *not* subordinate when it comes to suing violators for injunctions.").

On a facial challenge, those examples (among others) "suffice[]" to show that HISA does not lack the potential for agency supervision in at least certain (if not all) applications. *Oklahoma*, 62 F.4th at 231; *see NetChoice*, 144 S. Ct. at 2397 (choice to litigate facially "comes at a cost"). Perhaps that is why even Respondent Texas suggested that section 3053(e) provides "oversight over the manner in which the Authority exercises its *enforcement* authority," and instead focused its private-nondelegation attack on whether the Authority "may make rules." Texas Opening Br. 28 (July 5, 2023), C.A. Doc. 74.

The Fifth Circuit dismissed that reality by saying such FTC supervision would interfere with "HISA's clear delineation of enforcement power." App., *infra*, 26a. But Congress amended HISA specifically to reinforce "Federal Trade Commission oversight" in response to private-nondelegation challenges. 15 U.S.C. § 3053(e); *see* App., *infra*, 76a ("Congress does not ordinarily write statutes to be unconstitutional, particularly in cases of an amendment in direct response to a successful constitutional challenge."). The amendment confers independent power on the FTC not only "to conform the rules of the Authority" to statutory requirements, but also to

"ensure the fair administration of the Authority" and take supervisory action "otherwise in furtherance of the [Act's] purposes" of "implement[ing] and enforc[ing] the horseracing anti-doping and medication control program and the racetrack safety program." 15 U.S.C. §§ 3053(e), 3054(a). In fact, the FTC recently exercised that power to promulgate new rules facilitating "effective Commission oversight over the Authority," including with respect to any "investigations conducted," "sanctions imposed," "subpoenas issued," and "actions commenced" in federal court. 89 Fed. Reg. 66,546, 66,547, 66,550-66,551 (Aug. 16, 2024).

The Fifth Circuit incorrectly assumed that by empowering the Authority, HISA impliedly strips the FTC of all enforcement powers. That negative inference contradicts Congress's clear instruction that "[n]othing [in HISA] shall be construed to limit the authority of the Commission under any other provision of law," 15 U.S.C. § 3054(b)—including laws authorizing the FTC to, for example, "investigate," issue "subpoenas," and "bring suit in a district court," *id.* §§ 43, 45-46, 49, 53, 57b. Moreover, the Fifth Circuit's reliance on "what HISA does not say" (App., *infra*, 19a) simply overlooks HISA provisions contemplating the FTC's direct involvement in enforcement activities. *E.g.,* 15 U.S.C. § 3054(d)(3) (covered person shall "cooperate with the Commission *** during any civil investigation" and "respond truthfully *** if questioned by the Commission"); *id.* § 3054(k)(2)(A) ("The Authority and the Commission may not investigate, prosecute, adjudicate, or penalize conduct in violation of [HISA program] that occurs before the program effective date."). After

all, preventing cheating in horseracing and the attendant consumer harms on the betting public "fit[s] neatly into the overall mission of the FTC." ROA.1535.

That statutory text, enactment history, and context underscore the best interpretation of HISA: "the FTC's rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities, just as it does in the rulemaking context." *Oklahoma*, 62 F.4th at 231. At a minimum, that construction—which the Sixth Circuit endorsed and which avoids the constitutional problems raised by the panel's strict "division of enforcement" view (App., *infra*, 29a)—is at least plausible. As this Court reiterated recently, "when legislation and the Constitution brush up against each other, a court's task is to seek harmony, not to manufacture conflict." *Rahimi*, 144 S. Ct. at 1903 (alterations and citation omitted).

Finally, the Fifth Circuit erred in disregarding the FTC's "full authority to review the Horseracing Authority's enforcement actions." *Oklahoma,* 62 F.4th at 231; *see id.* ("The Authority's adjudication decisions are not final until the FTC has the opportunity to review them."). Before any Authority decision has final legal effect, it is subject to two layers of de novo FTC review, whereby the agency 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." 15 U.S.C. § 3058. Indeed, the agency has exercised this power to overturn Authority decisions. *See In re Parram*, No. 9424 (F.T.C. May 1, 2024) ("review[ing] the record 'anew,' as though the issue had not been heard before, and no decision had

previously been rendered," and reversing sanction Authority had imposed under Void Claim Rule);[9] *In re Peacock & Ceballos*, No. 9415 (F.T.C. Sept. 11, 2023) (reversing Authority crop-violation decision based on de novo determination that "the evidence fails to prove that Ceballos struck Sheriff Brown more than the 6 times on the hindquarters that are permitted under HISA Rule 2280(b)(1)").[10] Those examples also illustrate that the FTC may stay any sanction pending the agency's review. *See* Order Granting Appellants' Request for Stay Pending Appeal, *In re Parram*, No. 9424, 2024 WL 168059 (F.T.C. Jan. 9, 2024); Order Granting Stay Application, *In re Peacock & Ceballos*, No. 9415 (F.T.C. July 3, 2023);[11] *see also* 15 U.S.C. § 3058(d); 16 C.F.R. § 1.148(b).

That review framework "ensures that HISA is soundly in the company of previously upheld enforcement mechanisms" under the Maloney Act. *Oklahoma,* 62 F.4th at 244 (Cole, J., concurring); *see* 15 U.S.C. § 78s(d)-(e). If anything, the FTC's independent review of Authority decisions "is even more substantial than the SEC's review of FINRA decisions," ROA.1547, as "HISA, unlike the Maloney Act, unambiguously empowers the FTC to obtain additional evidence not in the record below," *Oklahoma,* 62 F.4th at 244 (Cole, J., concurring). "In case after case, the courts have upheld this arrangement" under the Maloney Act, "reasoning that the SEC's ultimate control over the rules and their enforcement makes [FINRA and other self-regulatory organizations] permissible aides and advisors." *Id.* at 229 (majority

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[9] https://tinyurl.com/f9afmxk3.

[10] https://tinyurl.com/zfy7xe4n.

[11] https://tinyurl.com/2yvb2t4k.

op.) (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., Inc. 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)); *see also Association of Am. R.Rs. v. United States Dep't of Transp.*, 721 F.3d 666, 671 n.5 (D.C. Cir. 2013) (describing self-regulatory organizations' role as "purely advisory" such that they do not "stand on equal footing with [the] government agency"), *vacated on other grounds*, 575 U.S. 43 (2015). This Court is likely to uphold the "remarkably similar" HISA, too. *Oklahoma,* 62 F.4th at 240 (Cole, J., concurring).[12]

III. SIGNIFICANT IRREPARABLE HARM WILL RESULT ABSENT A STAY OF THE MANDATE

The equities overwhelmingly favor a stay of the mandate.

a. Congress enacted (and amended) HISA because it was "[a]larmed" by the "spate of doping scandals and racetrack fatalities" jeopardizing the sport and endangering equine and human lives. *Black*, 53 F.4th at 873; *see* McConnell Amicus

[12] The Fifth Circuit is wrong that "none" of the circuit decisions uniformly "upholding the constitutionality of FINRA" addresses "executive power." App., *infra*, 26 n.18; *see, e.g.*, *Todd & Co.*, 557 F.2d at 1012-1013 (rejecting private-nondelegation challenge because FINRA's predecessor's "rules a*nd its disciplinary actions* were subject to full review by the S.E.C., a wholly public body" (emphasis added)); *R. H. Johnson & Co.*, 198 F.2d at 695 (holding there is "no merit in the contention that the Act unconstitutionally delegates power" to FINRA's predecessor because of "the [SEC's] *review of any disciplinary action*," in addition to the SEC's power to approve/disapprove rules (emphasis added)). "The unanimous principle from the circuit decisions—which [this Court] has not disturbed despite repeated opportunities to do so—is that so long as the agency retains de novo review of a private entity's enforcement proceedings, there is no unconstitutional delegation of legislative or enforcement power." *Oklahoma*, 62 F.4th at 243 (Cole, J., concurring).

Br. 6-7 (Aug. 11, 2023), C.A. Doc. 120 ("Before HISA, horseracing verged on collapse."). "Whether it's the risk of pushing horses past their limits or the risks associated with unsafe tracks and doping, or other health and safety issues facing horses and jockeys, no one doubts the imperative for [the] oversight" the Act brings. *Oklahoma*, 62 F.4th at 226.

HISA's successful implementation over the last two-plus years—governing over 100,000 industry participants (horses and people)—has already yielded "significant improvement." Natalie Voss, *Second Quarter Statistics Reinforce Reality That Thoroughbred Racing Fatalities Are Rare – And They're Rarer At Tracks Regulated By HISA*, PAULICK REPORT (July 25, 2024).[13] Specifically, racing-related equine fatality rates are "50 percent lower" than pre-HISA numbers—and substantially "lower than [the rate] at any non-HISA track." *Id.* For example, in the first half of 2024, the overall rate of racing-related equine fatalities at Thoroughbred tracks in HISA-covered jurisdictions was less than a third of the rate in West Virginia, where the law is enjoined based on a stayed APA suit, and in Texas, which (as its counsel explained at trial) has "opted to stop *** the simulcast export" that triggers HISA's applicability. ROA.3086-3087; *see* Stay Mot., Exh. 1 ¶ 8 (Sept. 16, 2024), C.A. Doc. 214 (Lazarus Declaration). These dramatic advances reflect "the safest *** period on record since the inception" of nationwide data-keeping. ROA.3918.

[13] https://tinyurl.com/5cshp2tb.

It is thus little surprise that, notwithstanding some initial "[t]repidation and apprehension" prior to HISA's implementation, many "horsemen have embraced it, as it levels the playing field" and makes enforcement across jurisdictions "predictable now" that it has become the settled status quo. Joe Perez, *Panelists Discuss Impact of HISA on Veterinarians*, BLOODHORSE (June 25, 2024);[14] *see* Amicus Br. of Thoroughbred Industry Participants 8-11 (Aug. 11, 2023), C.A. Doc. 119 (explaining HISA has experienced "widespread success" and "enjoy[ed] widespread industry support," including because it has "dramatically improve[d] the due process protections afforded to regulated parties" and "eliminate[d] much of the unfairness and unpredictability inherent in the state-by-state regulatory approach"). Horse owners, trainers, and veterinarians have found that, in addition to having "made our horses safer," Perez, *supra*, HISA's uniform enforcement has made participation in horseracing across states more "fair, transparent, efficient and economically sound," *Thoroughbred Industry Reiterates Support of HISA*, PAST THE WIRE (July 13, 2023);[15] *see, e.g.*, Alicia Hughes, *HISA Claiming Rules Bring Horses Consistent Protection*, BLOODHORSE (Mar. 11, 2024) (contrasting "arbitrariness of enforcement" that bred "confus[ion]" pre-HISA with HISA's "consistent nationwide standards" that ensure vital practices "like the transfer of information with recordkeeping is taking place");[16] ROA.3935-3941.

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[14] https://tinyurl.com/2b99pp48.

[15] https://tinyurl.com/nhkxhn6u.

[16] https://tinyurl.com/3t8a878s.

In turn, HISA's reforms have increased "confidence in the sport among industry participants and [their] customers whose wagering dollars fuel every aspect" of horseracing. PAST THE WIRE, *supra*. Paid purse amounts have risen in almost all States in which covered horseraces were held from 2021 to 2023—reversing the downward trend from prior years. ROA.3918-3919, 3924; Lazarus Declaration, *supra*, ¶ 10. Overall, in States in which HISA rules applied to horseraces last year, the total purse amount paid in 2023 was more than 20% greater than the total purse amount paid in 2021. Lazarus Declaration, *supra*, ¶ 10.

The Authority and its partners have dedicated immense time and resources to complete the transition to this enforcement regime since HISA was enacted nearly four years ago—including by hiring and training staff, educating the industry, developing a budget for FTC consideration and approval, establishing extensive new technological infrastructure, entering into contracts with drug-testing laboratories and States, and collecting and responding to participants' feedback. Lazarus Declaration, *supra*, ¶ 3; *see, e.g.*, ROA.3895-3897, 3903-3905. So too has the industry. *See, e.g.*, Perez, *supra* (quoting veterinarians explaining "it's been a process" that was "long overdue"). Virtually all national horseracing participants have, after more than two years of racing under HISA rules, adjusted fully to the effective reforms. Lazarus Declaration, *supra*, ¶ 4.

b. The decision below threatens to reverse that progress and upend the industry's entrenched reliance interests. In Respondents' counsel's words, "the enforcement infrastructure is essential" to HISA as "a key pillar of the overall

scheme" Congress intended. Tr. 38:00-39:00, Suhr Interview, *supra*. According to him, "this scheme simply won't work under the [Fifth Circuit's] decision." *Id.* If Respondents are right, the ramifications would be massively disruptive and dangerous: wiping out the effective federal program even for some period of time would not only threaten the Authority's existence, but also (and more importantly) imperil horses, the human athletes who ride them, and the many other stakeholders that cherish them. Lazarus Declaration, *supra*, ¶¶ 11-16. In fact, the entire industry's viability would be placed at serious risk. *See* Amicus Br. of Thoroughbred Industry Participants 7, *supra* ("Ultimately, without uniform regulation, the sport of Thoroughbred horseracing—a centuries-old tradition enjoyed by equine enthusiasts across the country—face[s] an 'existential threat.'").

At a minimum, not staying the mandate would sow chaos and confusion as State racing commissions (or the FTC) scramble to step in to enforce the governing HISA rules while racing involving Respondents' members occurs across the country. In transitioning to the long-anticipated rollout of the now-two-year-old federal regime, many States underwent substantial operational (and legal) changes—*e.g.*, reducing their staff who worked on racetrack-safety and anti-doping issues; eliminating contracts with drug-testing laboratories; and reallocating funding. Lazarus Declaration, *supra*, ¶¶ 12-13. The Authority and its partners absorbed many of these duties and personnel. *Id.* Accordingly, multiple States simply would not be in a position to take over enforcement of the critical HISA rules—or, even if able, would likely refuse. *Id.* The resulting "Wild West" vacuum would communicate a

perilous reality to would-be cheaters: "nobody can enforce the rules, so go dope your horses to your heart's content," at least until the States undergo massive transformations to fill the gap. Dan Ross, *Lucinda Finley Q&A on the Fifth Circuit Bombshell*, THOROUGHBRED DAILY NEWS (July 7, 2024).[17]

Blowing up the status quo would harm not just the Authority and the federal government, but also over a hundred thousand racing participants and the public interest at large. Basically every day, races operate across the country under HISA rules subject to the Act's enforcement provisions. Lazarus Declaration, *supra*, ¶ 14. That is why regulated parties themselves have warned that the decision below (if not stayed) will plunge horseracing back into an unsafe "patchwork of different state, private, and federal regulators, whose respective allocations of power will differ based on the jurisdictions in which covered parties operate." Rehearing Pet. 8, *Oklahoma*. The industry could even face the untenable prospect that rules may be enforced only as to certain participants *in the same race* depending on whether the trainers, owners, or jockeys claim membership in the Respondent associations. Lazarus Declaration, *supra*, ¶ 15. Unleashing this turmoil now, just a few weeks ahead of the Breeders' Cup World Championships (one of the sport's most significant events), would inflict havoc and severely injure America's stature in global racing. Lazarus Declaration, *supra*, ¶ 16.

c. Staying the Fifth Circuit's mandate is also necessary to protect important comity concerns. Respondents have made clear, in prior filings in this and other

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[17] https://tinyurl.com/rzusy7y3.

cases, that they seek to bring down HISA *nationwide*. *See, e.g.*, ROA.2773; Memo. in Supp. of Plfs' Mot. for Prel. Inj. 3-4, *Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, No. 6:22-cv-01934 (W.D. La. Feb. 6, 2023), Doc. 78-1. As Respondents have confirmed, it is already the case that *HISA rules do not govern horseracing in any state within the Fifth Circuit*. ROA.2768 ("Mississippi does not have a racetrack" that runs covered Thoroughbred races; "Texas is not running covered races"; and Louisiana races are "already exempted by federal court order" based on a stayed APA challenge). Instead, Respondents seek to leverage the Fifth Circuit's judgment to halt implementation of the regulatory program in all *other* circuits—including in the Sixth Circuit, where a unanimous panel has rejected the same constitutional challenge, and in other circuits where the same claims are pending.

Respondents' endgame, which they have committed to pursuing on remand if the mandate is not stayed, implicates the growing warnings that nationwide relief "prevent[s] legal questions from percolating through the federal courts, encourag[es] forum shopping, and mak[es] every case a national emergency for the courts and for the Executive Branch." *Trump v. Hawaii*, 585 U.S. 667, 713 (2018) (Thomas, J., concurring). Allowing the Fifth Circuit's opinion to effectively veto the Sixth Circuit's (and any other courts') contrary ruling would work the very "asymmetr[y]" this Court has cautioned against. *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring in stay). And it would bless the "gamesmanship" that has fueled Respondents' strategy. *Id.; see Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, No. 6:22-cv-01934, 2023 WL 6063813, at *6 & n.7 (W.D. La. Sept.

13, 2023) (report & recommendation) (Respondents have "leapfrog[ed] from one case to another in different district and circuit courts in the wake of unfavorable rulings," in a "deliberate strategy" of "shuffling of plaintiffs" in search of a forum to take down HISA nationwide.).

The Fifth Circuit denied the Authority's request to stay its mandate even as to operation of the judgment outside the Fifth Circuit. This Court should step in to prevent that single court from jeopardizing enforcement of critical HISA rules across the nation, including in key horseracing States like Kentucky and Arkansas—especially after the Sixth Circuit rejected an identical facial challenge and while the Eighth Circuit is presently considering a parallel challenge after the Arkansas district court also rejected it.

d. Finally, denying a stay of the mandate would not only neuter other courts' considered judgments; it also would denigrate Congress's role as "a coequal branch of government whose Members take the same oath *** to uphold the Constitution of the United States." *Rostker*, 453 U.S. at 64. That public injury is particularly acute here because, as explained, the Fifth Circuit's invalidation of HISA's enforcement provisions displaces the "productive dialogue" that occurred between the courts and Congress, and thwarts the "'interdependence' and 'reciprocity' [that] should characterize the relationship between the[m]." *Oklahoma*, 62 F.4th at 225 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). The "presumption of constitutionality" resulting from that exchange "is not merely a factor to be considered in evaluating success on the merits, but an equity

to be considered in favor of [the government] in balancing hardships." *Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); *see Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (the government "suffers a form of irreparable harm" when a court prevents it from "effectuating [a] statute[] enacted by representatives of its people").

e. In sharp contrast to those cascading harms, no injury would arise from maintaining the status quo. Respondents initiated this facial challenge in March 2021. Nowhere in the record, developed over years all the way through a trial on the merits, did Respondents present evidence of a specific enforcement activity taken against them or their members. In fact, as explained above, the Authority has never even exercised the subpoena and civil-action provisions on which the Fifth Circuit's decision improperly focuses to invalidate *all other* enforcement provisions (which are indisputably essential to HISA's safety and anti-doping programs).

Every court to consider the constitutionality of HISA's rulemaking provisions under the amended Act—including now the Fifth Circuit—has confirmed that the binding rules underlying the successful racetrack-safety, anti-doping, and medication-control programs are constitutional. Respondents' members face no irreparable harm from participating in races that are subject to those valid HISA standards. If Respondents' members were to flout that federal law, and if they were to face some corresponding enforcement action for which they believe the FTC's oversight is constitutionally inadequate, they could petition the agency to step in—similar to how Respondent National Horsemen's Benevolent and Protective

Association recently requested that the FTC implement "a laboratory testing detection level below which no owner or trainer will be punished." *HBPA Petitions for No-Effect Testing Thresholds*, THOROUGHBRED DAILY NEWS (July 1, 2024) (discussing petition NHBPA filed with FTC).[18]

Moreover, if any of Respondents' members were sanctioned for a future violation of HISA rules, they could challenge such enforcement through the orderly process Congress mandated. 15 U.S.C. §§ 3057-3058; *see* 16 C.F.R. §§ 1.145-1.148. That established system guarantees "adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness" of the allegations, 15 U.S.C. § 3057(c)(3), followed by two layers of de novo agency review and Article III review, *id.* § 3058(b)-(c). Moreover, as discussed, the covered person facing a disciplinary measure could request a stay from the Authority or from the FTC pending her challenge. *Id.* § 3058(d); 16 C.F.R. § 1.148. Any inconvenience that might flow from following the path Congress provided for an as-applied challenge to any actual enforcement action does not come close to outweighing the serious irreparable harms that would result from categorically barring implementation of the Act altogether.

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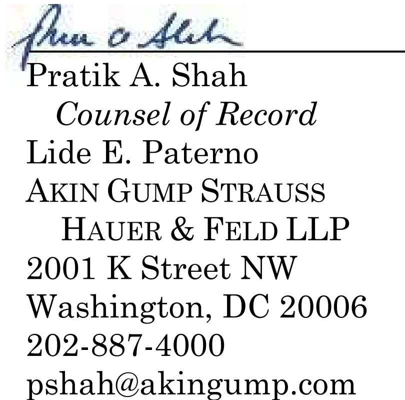
[18] https://tinyurl.com/3ffpwzhp.

CONCLUSION

The Court should stay the Fifth Circuit's mandate (or recall and stay that mandate, if necessary) pending the consideration and disposition of the forthcoming petition for a writ of certiorari and any further proceedings in this Court. In addition, the Court may wish to construe this application as a petition for a writ of certiorari and grant certiorari, particularly given that Respondents acquiesce in that request.

September 19, 2024

Respectfully submitted,



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