No. 24A287

In the Supreme Court of the United States

HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC., ET AL., APPLICANTS

v.

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASS'N, ET AL.

RESPONSE OF FEDERAL RESPONDENTS IN SUPPORT OF APPLICATION FOR A STAY OF THE MANDATE

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The Solicitor General—on behalf of the Federal Trade Commission, Chair Lina Khan, and Commissioners Rebecca Kelly Slaughter, Alvaro Bedoya, Melissa Holyoak, and Andrew N. Ferguson—respectfully submits this response in support of the application for a stay of the mandate.

In 2020, Congress enacted new legislation to improve safety in the horseracing industry. In the decision below, the Fifth Circuit held key provisions of that statute facially unconstitutional. The government agrees with applicants that this Court should stay the issuance of the Fifth Circuit's mandate. The government submits this response to emphasize three points. First, this Court has long applied a strong presumption in favor of allowing a challenged federal statute to remain in effect pending the completion of judicial review. Second, a stay is particularly warranted here because the Fifth Circuit invalidated important provisions of the challenged statute on their face. Third, a stay is also particularly warranted here because two other courts of appeals, the Sixth and Eighth Circuits, have rejected similar facial challenges to the same provisions and the Fifth Circuit's ruling will nevertheless prevent

the Act's implementation in those circuits and elsewhere.

STATEMENT

1. Congress enacted and President Trump signed the Horseracing Integrity and Safety Act of 2020 (Horseracing Act or Act), Pub. L. No. 116-260, Div. FF, Tit. XII, 134 Stat. 3252, in order to prevent doping and improve safety in the horseracing industry. Congress modeled the Act's framework on the longstanding regulatory scheme used in the securities industry, in which industry participants are subject to rules proposed by self-regulatory entities, which in turn are overseen by the Securities and Exchange Commission (SEC). See *Oklahoma* v. *United States*, 62 F.4th 221, 229 (6th Cir. 2023), cert. denied, 144 S. Ct. 2679 (2024). The Act "recognized" the Horseracing Integrity and Safety Authority (Authority)—a "private, independent, self-regulatory, nonprofit corporation"—"for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program." 15 U.S.C. 3052(a). The Authority operates under the oversight of the Federal Trade Commission (FTC or Commission). See 15 U.S.C. 3053.

The Horseracing Act directs the Authority to propose rules concerning doping, racetrack safety, and other subjects. See 15 U.S.C. 3055-3057. The Authority must submit a proposal to the FTC "in accordance with such rules as the Commission may prescribe." 15 U.S.C. 3053(a). The Commission must publish the proposal, provide an opportunity for public comment, and then determine whether to approve the proposal. See 15 U.S.C. 3053(b)(1). The FTC must approve a proposed rule if the Commission determines that the rule "is consistent with" the Act and with the Commission's regulations. 15 U.S.C. 3053(c)(2). A proposal takes effect only if the Commission approves it. See 15 U.S.C. 3053(b)(2).

The Act requires various "covered persons"—*i.e.*, owners, breeders, trainers,

jockeys, and other persons involved in the horseracing industry—to register with the Authority and to comply with the rules approved by the Commission. See 15 U.S.C. 3051(4), 3054(d)(1) and (2). The Authority may investigate violations of the rules. See 15 U.S.C. 3054(h). The Authority also may conduct disciplinary proceedings and impose civil sanctions upon violators. See 15 U.S.C. 3057(c) and (d). A final decision by the Authority to impose discipline is subject to de novo review by an FTC administrative law judge (ALJ). See 15 U.S.C. 3058(b). The ALJ's decision is in turn subject to de novo review by the Commission. See 15 U.S.C. 3058(c).

2. In 2021, a trade association and other organizations brought this suit in federal district court to challenge the Act's constitutionality. See 53 F.4th 869, 875. The State of Texas and the Texas Racing Commission intervened to support the plaintiffs' challenge. See *ibid.* The plaintiffs named as defendants the Authority and its officials (applicants here), as well as the Commission and its members. See *ibid.*

In an earlier phase of this litigation, the Fifth Circuit held that the Act, as originally enacted, violated a constitutional principle that is sometimes known as the "private nondelegation doctrine." See 53 F.4th at 880. The court explained that, under that doctrine, a private entity may aid a governmental agency in implementing a federal regulatory scheme, but only if the private entity "functions subordinately" to the agency and is subject to the agency's "authority and surveillance." *Id.* at 881 (citation omitted). The court determined that the FTC lacked constitutionally sufficient control over the Authority's activities. See *id.* at 880-890. The court emphasized that the Act, in its original form, did not empower the FTC to abrogate or modify the Authority's rules, thereby denying the Commission the "final word on the substance of the rules." *Id.* at 887.

Congress responded by amending the Horseracing Act to empower the FTC to

"abrogate, add to, or modify the rules" promulgated under the Act "as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act." 15 U.S.C. 3053(e); see Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. O, Tit. VII, § 701, 136 Stat. 5231-5232. That language is substantially identical to the language used in the statutes that empower the SEC to oversee self-regulatory organizations in the securities industry. See 15 U.S.C. 78s(c).

3. The district court rejected the nondelegation challenge to the amended Act. See Appl. App. 40a-94a. The court determined that the amendment had "cured the unconstitutional aspects of [the Act's] original approach." *Id.* at 43a.

The Fifth Circuit affirmed in part and reversed in part. See Appl. App. 1a-39a. The court of appeals agreed with the district court that, by amending the statute, Congress had "cured the private nondelegation flaw in the Authority's rulemaking power." *Id.* at 38a-39a. The court concluded, however, that "the FTC lacks adequate oversight and control over the Authority's enforcement power." *Id.* at 29a. The court determined that "the Authority," "not the agency," decides "whether to investigate a covered entity," "whether to subpoena the entity's records or search its premises," "whether to sanction it," and "whether to sue the entity for an injunction or to enforce a sanction it has imposed." *Id.* at 18a-19a. The court noted the argument that the FTC possesses sufficient control because it "can review sanctions at the back end" and can adopt rules "to rein in the Authority's enforcement actions." *Id.* at 19a, 22a. The court rejected that possible defense of the Act's enforcement provisions, however, concluding that the Authority can still exercise substantial enforcement powers "without any supervision by the FTC." *Id.* at 20a. The court accordingly declared

that the Act's "enforcement provisions are facially unconstitutional." *Id.* at 3a.

The Fifth Circuit denied petitions for rehearing filed by the government and by applicants. See Appl. App. 95a-97a. The court subsequently denied applicants' motion for a stay of the mandate, including applicants' alternative request to stay the operation of the judgment outside the Fifth Circuit. See *id.* at 98a-99a.

ARGUMENT

A. This Court Should Stay The Fifth Circuit's Mandate

To obtain a stay of a court of appeals' mandate pending the disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that this Court would grant certiorari, (2) a likelihood of success on the merits, and (3) a likelihood of irreparable harm in the absence of a stay. See *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). In "close cases," the Court "will balance the equities and weigh the relative harms." *Ibid.*

Applicants have satisfied that standard here. Because the court of appeals held important aspects of a federal statute facially unconstitutional and created a circuit conflict, there is a reasonable probability that this Court will grant certiorari. See Appl. 10-14. Because the bar for bringing a facial challenge is high and the Authority operates subordinately to the Commission, applicants are likely to succeed on the merits. See *id.* at 14-23; see also Gov't Br. in Opp. at 7-12, *Oklahoma* v. *United States*, 144 S. Ct. 2679 (No. 23-402). Finally, as applicants detail, allowing the Fifth Circuit's judgment to take effect would cause applicants irreparable harm, and the equities otherwise support granting a stay. See Appl. 23-32.

The application fully covers those issues, and the government does not repeat the application's arguments here. The government instead emphasizes three considerations that weigh strongly in favor of granting a stay: (1) the presumption of con-

stitutionality owed to Acts of Congress, (2) the Fifth Circuit's disregard of the limits on facial challenges, and (3) the conflict between the decision below and the Sixth and Eighth Circuits' decisions rejecting similar facial challenges to the same Horseracing Act provisions.

1. This Court has traditionally applied a strong presumption in favor of allowing challenged Acts of Congress to remain in force pending final review in this Court

In reviewing emergency applications, this Court has traditionally applied a strong presumption that "Acts of Congress * * * 'should remain in effect pending a final decision on the merits by this Court.'" *Turner Broadcasting System, Inc.* v. *FCC*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., in chambers) (citation omitted); see *Wisconsin Right to Life, Inc.* v. *FEC*, 542 U.S. 1305, 1305-1306 (2004) (Rehnquist, C.J., in chambers); *Doe* v. *Gonzales*, 546 U.S. 1301, 1308-1309 (2005) (Ginsburg, J., in chambers); *Heart of Atlanta Motel, Inc.* v. *United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers). In "virtually all" cases where a lower court has held a federal statute unconstitutional, the Court has "granted a stay if requested to do so by the Government." *Bowen* v. *Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, C.J., in chambers); see, *e.g.*, *United States* v. *Comstock*, No. 08A863, 2009 WL 10801016 (Apr. 3, 2009) (Roberts, C.J., in chambers); *Walters* v. *National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); *Schweiker* v. *McClure*, 452 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers); *Rostker* v. *Goldberg*, 448 U.S. 1306, 1311 (1980) (Brennan, J., in chambers); *Marshall* v. *Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers).

That practice reflects the "presumption of constitutionality which attaches to every Act of Congress." *Kendrick*, 483 U.S. at 1304 (Rehnquist, C.J., in chambers). Judging the constitutionality of an Act of Congress is "the gravest and most delicate

duty that this Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). In performing that duty, the Court usually accords "great weight" to the judgments of the Congress that enacted the statute and the President who signed it into law. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). The "presumption is in favour of every legislative act," and "the whole burthen of proof lies on him who denies its constitutionality." *Brown* v. *Maryland*, 12 Wheat. 419, 436 (1827) (Marshall, C.J.); see, *e.g.*, *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878) ("Every possible presumption is in favor of the validity of a statute.").

The presumption of constitutionality shapes the analysis of each of the stay factors. First, whenever a court of appeals holds a federal statute unconstitutional, there is at least a reasonable probability that this Court will grant certiorari. This Court almost invariably grants review "when a lower court has invalidated a federal statute." *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019). Second, the presumption of constitutionality is "a factor to be considered in evaluating success on the merits." *Walters*, 468 U.S. at 1324 (Rehnquist, J., in chambers). "Due respect" for Congress requires that a court find a federal statute unconstitutional "only upon a plain showing that Congress has exceeded its constitutional bounds." *United States* v. *Morrison*, 529 U.S. 598, 607 (2000). Finally, the presumption of constitutionality is "an equity to be considered in favor of applicants." *Walters*, 468 U.S. at 1324 (Rehnquist, J., in chambers). Whenever a sovereign is prevented "from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

The practical realities of this Court's emergency docket underscore the importance of adhering to that traditional approach. Emergency applications usually require the Court to address issues "on a short fuse without benefit of full briefing

and oral argument." *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief). When the Court operates under such constraints, it should be especially respectful of the judgment of Congress and the President that a federal statute complies with the Constitution. "'Given the presumption of constitutionality granted to all Acts of Congress,'" it is therefore "appropriate that the statute remain in effect pending [this Court's] review." *Kendrick*, 483 U.S. at 1304 (Rehnquist, C.J., in chambers) (citation omitted).

2. A stay is especially appropriate in this case because the Fifth Circuit contravened this Court's precedents limiting facial challenges

The plaintiffs have chosen to litigate this case as a facial challenge, see Appl. App. 3a, and "that decision comes at a cost," *Moody* v. *NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024). "For a host of good reasons, courts usually handle constitutional claims case by case, not en masse." *Ibid.* "'Claims of facial invalidity often rest on speculation' about the law's coverage and its future enforcement." *Ibid.* (citation omitted). "And 'facial challenges threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." *Ibid.* (citation omitted).

"This Court has therefore made facial challenges hard to win." *NetChoice*, 144 S. Ct. at 2397. Indeed, a facial challenge to a federal statute is the "most difficult challenge to mount successfully." *United States* v. *Rahimi*, 144 S. Ct. 1889, 1898 (2024) (citation omitted). The challenger must "establish that no set of circumstances exists under which the Act would be valid." *Ibid.* (citation omitted). If the government can show that the Act complies with the Constitution in even "some of its applications," the facial challenge fails. *Ibid.*

In this case, the Act's enforcement provisions have at least "some" valid appli-

cations. *Rahimi*, 144 S. Ct. at 1898. Applicants provide (Appl. 16) a simple example: The Authority could seek to enforce its crop rule (which limits how often a jockey may strike a horse with a riding crop during a horse race) by reviewing a video of the race, and the Commission or an ALJ could then review the Authority's decision de novo by rewatching the same video. In that scenario, the Authority would not exercise any independent governmental power; rather, it would "function subordinately to the Commission," consistent with this Court's private nondelegation precedents. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 399 (1940).

"Rather than consider the circumstances in which [the Act] was most likely to be constitutional," however, the Fifth Circuit focused on "scenarios in which [the Act] might raise constitutional concerns." *Rahimi*, 144 S. Ct. at 1903. For example, the court credited contested allegations that, in one case, the Authority's investigators had subjected an individual to "a coercive interrogation in a small room." Appl. App. 20a n.12 (citation omitted). The court also envisioned cases in which the Authority's investigators "subpoena [an] entity's records" or "sue the entity for an injunction," *id.* at 18a—even though applicants explain (Appl. 17) that the Authority has never issued a subpoena or filed a suit. That approach is inconsistent with this Court's precedents on facial challenges. "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *United States* v. *Raines*, 362 U.S. 17, 22 (1960).

3. The Sixth and Eighth Circuits' decisions rejecting similar facial challenges to the Act's enforcement provisions underscore the propriety of a stay

Last year the Sixth Circuit rejected a similar facial challenge to the same Horseracing Act provisions that the Fifth Circuit invalidated on their face. See *Oklahoma* v. *United States*, 62 F.4th 221, 231 (6th Cir. 2023), cert. denied, 144 S. Ct.

2679 (2024). The Sixth Circuit explained that the "FTC's rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities." *Ibid.* (citation omitted). The court also observed that "the FTC has full authority to review the Horseracing Authority's enforcement actions." *Ibid.* The court determined that the Commission's oversight powers "suffice[d] to defeat a facial challenge," leaving further issues to be resolved in "as-applied challenge[s]" to "individual enforcement action[s]." *Id.* at 231, 233.

On September 20, 2024, the day after the application was filed, the Eighth Circuit joined the Sixth Circuit. See *Walmsley* v. *FTC*, No. 23-2687, slip op. (8th Cir.). In affirming the denial of a preliminary injunction against the enforcement of the Act, the Eighth Circuit rejected a facial private-nondelegation challenge to the Act's enforcement provisions, "agree[ing] with the Sixth Circuit that the statute is not unconstitutional on its face." *Id.* at 7. "Because the Commission has broad power to subordinate the Authority's enforcement activities," the Eighth Circuit determined that "the statute is not unconstitutional in all of its applications." *Id.* at 8.

The Sixth and Eighth Circuits' decisions confirm that this Court should grant a stay. The circuit conflict makes it even more probable that this Court will grant certiorari, and the Sixth and Eighth Circuits' analysis underscores the likelihood that applicants will prevail on the merits of the facial challenge.

The circuit conflict takes on added importance given the geographic scope of the Fifth Circuit's decision. As applicants explain (Appl. 29), the Authority's rules do not currently govern horseracing activities in any jurisdiction within the Fifth Circuit. "'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 different challenge]." *Ibid.* (citation omitted). Yet the

plaintiffs brought this suit in the Fifth Circuit in order to prevent the Act's implementation in other parts of the country, including in the Sixth and Eighth Circuits. Countenancing that forum shopping, the Fifth Circuit denied applicants' alternative request to stay the operation of the court's judgment outside the Fifth Circuit. See p. 5, *supra*. That equitable consideration, too, weighs in favor of granting a stay.

B. This Court Should Allow Applicants To File A Petition For A Writ Of Certiorari In The Ordinary Course

Applicants request (Appl. 33), in the alternative, that this Court treat the application as a petition for a writ of certiorari and grant the petition. Although the government does not oppose that request, the better approach would be to grant a stay and allow applicants to file a petition for a writ of certiorari in the ordinary course. That approach would be consistent with this Court's past practice in cases where Acts of Congress have been held unconstitutional. See, *e.g.*, *Comstock*, 2009 WL 10801016.

That approach also makes sense here. The plaintiffs in *Oklahoma*, the case in which the Sixth Circuit rejected a similar facial challenge to the Act's enforcement provisions, have filed a petition for rehearing asking this Court to reconsider its denial of the petition for a writ of certiorari in that case. See Pet. for Reh'g, *Oklahoma*, *supra* (No. 23-402). In addition, the government plans to file, by September 30, 2024, a petition for a writ of certiorari in *Consumers' Research* v. *FCC*, 109 F.4th 743 (2024), a case in which the en banc Fifth Circuit relied on the private nondelegation doctrine in holding a different federal statute unconstitutional. The Court may wish to consider a petition for a writ of certiorari in the present case in tandem with its consideration of those filings. Because applicants have expressed (Appl. 4) their readiness to file a petition for a writ of certiorari by October 11, 2024, that approach would still

leave ample time to hear and resolve the case this Term.

CONCLUSION

The application for a stay of the mandate should be granted.

Respectfully submitted.

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