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.*,

Respondents.

On 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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BRIEF *AMICI CURIAE* OF SENATOR MITCH MCCONNELL AND REPRESENTATIVES PAUL TONKO AND ANDY BARR IN SUPPORT OF APPLICANTS

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INTEREST OF AMICI CURIAE[1]

Mitch McConnell is the senior Senator from Kentucky and Republican Leader in that chamber. He was Majority Leader when Congress enacted the Horseracing Integrity and Safety Act (HISA) in 2020 and Minority Leader when Congress amended it in 2022. As Kentucky's Senator for almost forty years, he is attuned to the many challenges facing the horseracing industry. His strong interest in the sport led him to introduce HISA in the Senate on September 9, 2020. *See* S. 4547, 116th Cong. (2020). His role in HISA's enactment and amendment and his interest in the sport enable him to offer this Court an important perspective on this matter.

Paul Tonko is a Democrat who represents New York's Twentieth District in the House of Representatives. Horseracing is a key industry in his district and his state. He therefore has a strong interest in maintaining the integrity and vitality of the sport. The same day that Leader McConnell introduced HISA in the Senate, he introduced an identical amendment in the House during committee debate. In addition to introducing an earlier bill that became HISA, H.R. 1754, 116th Cong. (2019), he co-sponsored precursor bills in 2015 and 2017, H.R. 3084, 114th Cong. (2015) (first co-sponsor); H.R. 2651, 115th Cong. (2017) (first co-sponsor).

Andy Barr is a Republican who represents Kentucky's Sixth District in the

[1] In accordance with this Court's Rule 37.6, counsel for *amici curiae* state that no counsel for a party wrote this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to pay for the preparation or submission of this brief. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

House of Representatives. Horseracing is a signature industry of his district. This makes him keenly aware of the many issues facing the industry. His years of experience on the House Financial Services Committee contributed significantly to HISA's use of the Financial Industry Regulatory Authority (FINRA) model, as discussed below. In addition to being a co-sponsor of HISA, H.R. 1754, 116th Cong. (2019) (first co-sponsor), he introduced precursor bills in 2015 and 2017, H.R. 3084, 114th Cong. (2015) (sponsor); H.R. 2651, 115th Cong. (2017) (sponsor).

SUMMARY OF THE ARGUMENT

The Authority easily satisfies this Court's standard for a stay of the court of appeals' mandate. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). First, there is a "reasonable probability" that four members of this Court will deem the issue presented — whether HISA's enforcement provisions facially violate the private non-delegation doctrine — "sufficiently meritorious" for a grant of certiorari, given that the decision below ***both*** invalidates important federal legislation ***and*** creates a split with the Sixth and Eighth Circuits. *Id.* Second, there is a "fair prospect" that a majority of this Court will vote to reverse, given the Fifth Circuit's failure to heed this Court's instructions about the difficulty of a facial challenge to an Act of Congress, and given as well HISA's many procedural safeguards. *Id.* Third, it is "likel[y] that irreparable harm will result from the denial of a stay," given the dangerous patchwork of regulatory regimes — or, even worse, regulatory voids if states were not prepared to step in immediately or state rules remained preempted by HISA's still-valid rules — that would ensue for horseracing if HISA were rendered

unenforceable by the Authority. *Id.*

ARGUMENT

Thoroughbred racing has made great strides since 2019, when a series of equine fatalities threatened one of America's oldest and most storied sports. The reason for these advances is HISA — bipartisan legislation, the work of many Congresses and of two Administrations, one of each party. The federal judiciary played an important role in this process, because HISA was amended to further solidify its constitutional footing in December 2022 in direct response to the Fifth Circuit's initial decision in *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022) (*Black*). *See also Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023) (*Oklahoma*), Oral Argument in No. 22-5487, at 33:00–33:13 (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?"); *Walmsley v. FTC,* No. 23-2687, 2024 U.S. App. LEXIS 24004, at *4 (8th Cir. Sept. 20, 2024) (*Walmsley)* (noting with approval Congress's 2022 amendment of HISA in holding HISA constitutional on private nondelegation grounds).[2]

This work has not been in vain. In just over two years,[3] the Horseracing

[2] Audio of the Sixth Circuit's oral arguments can be found at https://bit.ly/44iKQKB (last visited Sept. 20, 2024).

[3] The Authority launched its safety program July 1, 2022, and implemented its anti-doping and controlled medication program on May 22, 2023. *See* note 4.

Integrity and Safety Authority (Authority) has proposed — and the Federal Trade Commission (FTC) has published for comment, scrutinized, adopted, modified, and added — comprehensive safety and medication rules, ushering in a new era of safety. For example, during the second quarter of 2024, HISA-regulated racetracks reported a 49% decrease in racing-related equine fatalities year-over-year, a direct effect of the Act's implementation that will continue only if HISA continues to be enforced.[4] Horseracing in America is safer, fairer, and more transparent under HISA than it was before the statute's implementation.

Not only is HISA better for equine and human athletes; it is also constitutional — a conclusion reached by both the Sixth Circuit and, just days ago (immediately after the Authority filed its stay application in this Court), the Eighth Circuit. *Oklahoma*, 62 F.4th 221; *Walmsley,* 2024 U.S. App. LEXIS 24004. The Act adheres to a well-established model of federal regulation associated with other important areas of our economy, such as the purchase and sale of securities. It does so by authorizing a private entity, the Authority, to propose regulations that the government — here, the FTC — approves or rejects. Importantly, the Act as amended also further empowers the FTC to promulgate regulations of its own as it sees fit. This includes the express power to supersede existing rules and otherwise direct the Authority's implementation of HISA's programs. New 15 U.S.C. § 3053(e), added in December 2022, provides:

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[4] HISA, *2024 Q2 Metrics Report*, July 26, 2024, https://hisaus.org/news/2024-q2-metrics-report (last visited Sept. 20, 2024).

> The Commission, by rule in accordance with section 553 of title 5, United States Code, ***may abrogate, add to, and modify the rules of the Authority*** promulgated in accordance with this 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.

See also App. 104a to Applicants' Application, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. O, tit. VII, § 701, 136 Stat. 4459, 5231-5232 (2022) (emphasis added).

With its current structure, HISA corresponds in every material respect with the Maloney Act, which has governed the securities industry since 1938. That Act authorizes a private entity, FINRA, to propose rules that the Securities and Exchange Commission (SEC) decides whether or not to promulgate into law, and it authorizes FINRA to enforce those rules subject to SEC review. The Bituminous Coal Act of 1937, which this Court blessed as "unquestionably valid" in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940), similarly authorized private entities to participate in the regulation of the coal industry subject to oversight by the federal National Bituminous Coal Commission. This legal reality distinguishes HISA from other private-delegation regimes currently ensnared in federal litigation.

I. HISA is important and timely legislation necessary to redress serious harms in the national horseracing industry.

Before HISA, horseracing was close to collapse. Major papers had called for its termination. In March 2020, the *Washington Post* called horseracing "a sport that has

outlived its time."[5] In January 2020, after many equine fatalities at Santa Anita Park, the *Los Angeles Times* similarly wrote: "If things don't change for the better . . . , the question that will loom large is whether the sport should continue at all."[6] Horseracing could evolve, or it could disappear.

Four aspects of the sport explain why Congress had to act. First, horses are athletes, in a manner of speaking. They put everything they have into the race. As a result, they (and jockeys) are exceedingly vulnerable to grave injury. Second, unlike jockeys, horses cannot refuse medicine or complain about conditions. One can see distress in a horse via symptoms, but symptoms can be masked. Third, at least some people in the industry have an incentive to push horses past their limits. Fourth, unlike many sports, horseracing is not dominated by a single league that can enforce uniform national standards. Without HISA, horseracing would be governed by as many enforcement regimes as there are states that allow racing, each with its own permitted dosages and protocols for testing.

These same acute concerns would reemerge if the mandate were to issue and thereby free Plaintiffs' members to race nationwide free of the Authority's enforcement of HISA rules. This was (or would be again) fertile ground for honest mistakes. It also was (or would be again) fertile ground for strategic behavior, with disastrous results for horses, jockeys, and the industry. Collectively, these points

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[5] Opinion, *Horse racing has outlived its time*, WASH. POST, Mar. 13, 2020, https://wapo.st/3PGXhsN (last visited Sept. 20, 2024).

[6] *Editorial: Will horses finally stop dying at Santa Anita in 2020?*, L.A. TIMES, Jan. 2, 2020, https://lat.ms/3S6bz86 (last visited Sept. 20, 2024).

explain why Congress faced the stark choice of enacting HISA (and amending it to ensure its constitutionality) or watching the sport disintegrate.

In addition, each of the horseracing community's prior well-meaning attempts to create uniform safety rules through state-by-state compacts and other agreements failed, including the 2009-2010 National Interstate Racing and Wagering Compact Law. That attempt became law in only one state (Kentucky) and died for want of a second. The so-called Mid-Atlantic Compact was ineffective, as by its terms it permitted states to "opt-out" of rules or to withdraw from the compact for any (or no) reason. Finally, the National Uniform Medication Program included only four rules and was passed only in part in a handful of racing states.

HISA responded to this crisis in the industry by mandating national standards and enforcement for equine health and safety. The decision below threatens to send horseracing back into the above-documented crisis.

II. HISA satisfies the private non-delegation doctrine in every respect relevant to a facial challenge.

The court below held, on a facial basis, that HISA's enforcement provisions violate the private non-delegation doctrine because the Act does not sufficiently enable the FTC to supervise the Authority's enforcement activities. That holding suffers from two fundamental flaws. First, it overlooks that this is a facial challenge. Second, it misapprehends the operation of the statute.

As this Court has recognized, facial challenges are "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). And rightly

so. For one thing, such challenges threaten the democratic process, because they seek to foreclose the work of a co-equal branch of government in its entirety. In addition, they run a serious risk of plunging courts into "speculat[ion] about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Rather than indulging the conjecture of the court below, this Court should instead rely on the presumption that HISA is constitutional and refuse to strike it down on a facial basis unless there is "no set of circumstances . . . under which [it] would be valid," *Salerno*, 481 U.S. at 745, which is obviously not the case. *See also Gomez v. United States*, 490 U.S. 858, 864 (1989) (holding that in considering a facial challenge, courts should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question").

At a facial level, HISA readily satisfies the private non-delegation doctrine. The test, as this Court recognized in *Adkins*, is whether the Authority "function[s] subordinately" to the FTC. 310 U.S. at 399. That is undoubtedly true.

Beginning with the text of the statute, HISA gives clear and complete authority to the FTC to supervise and even micromanage the Authority's enforcement activities. Under 15 U.S.C. § 3054(c)(2), for example, all of the Authority's investigatory powers are made subject to the FTC's approval. Thus, the FTC has more than ample power to superintend the manner in which the Authority enforces the Act.

Even more significantly, Congress amended HISA for the specific purpose of

reinforcing the FTC's oversight in all respects, including enforcement. HISA as amended in § 3053(e) authorizes the FTC to "'abrogate, ***add to***, and modify'" all Authority rules to "subordinate ***every aspect*** of the Authority's enforcement '***to ensure the fair administration of the Authority*** . . . or otherwise ***in furtherance of the purposes of [the] Act***.'" *Oklahoma*, 62 F.4th at 227 (emphasis added); *see also Walmsley,* 2024 U.S. App. LEXIS 24004 at *7 ("We agree with the Sixth Circuit that the statute is not unconstitutional on its face because the Commission's rulemaking and revision power gives it 'pervasive oversight and control of the Authority's enforcement activities.'" (citations and internal quotations omitted)). There is no reason to suppose that "fair administration" and furthering "the purposes" of HISA do not embrace enforcement. In fact, the FTC could even use § 3053(e) to require the Authority to clear enforcement actions with the FTC in advance. The FTC could also use its authority under this subsection, by way of example, to issue prophylactic rules about searches and seizures, access to documents, investigatory techniques, issuance and enforcement of subpoenas, and the mechanics of enforcement. Exercise of this power could also include, again by way of example, a rule precluding the Authority from ever seeking injunctive relief on its own (leaving to the side the fact that a party subject to such an action could defend itself on an as-applied basis).

This Court should also bear in mind the many levels of adjudicative review that HISA ordains. For example, any decision by the Authority to impose a final sanction is subject to de novo review by an administrative law judge (ALJ). *See* 15 U.S.C. § 3058(b)(1). The ALJ's decision is then subject to de novo review by the

FTC. *See id.* § 3058(c)(3)(B). In fact, HISA authorizes the FTC, on its own motion or motion of a party, to consider evidence not in the record. *See id.* § 3058(c)(3)(C). It is not so with the SEC and FINRA. *See* 15 U.S.C. § 78s(e)(1). Finally, any determination by the FTC under HISA is final agency action for purposes of judicial review by Article III courts. *See id.* § 3058(b)(3)(B). *See also id.* § 3057(c)(3) (requiring the Authority to "provide for adequate due process, including impartial hearing officers," pursuant to rules proposed to FTC).

Indeed, apart from the ways in which HISA provides *more* agency review than the SEC exercises with respect to FINRA, the statute is materially indistinguishable from the Maloney Act, the model for HISA, which several courts have held satisfies the private non-delegation doctrine. HISA therefore contemplates exactly the type of "pervasive oversight" of the Authority's enforcement decisions that the Constitution requires, as recognized by the Sixth and Eighth Circuits and the trial court in this appeal.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully ask this Court to grant the application for a stay of the mandate of the Fifth Circuit, pending the filing and disposition of a petition for a writ of certiorari.

Respectfully submitted,

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