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 Association, et al.

RESPONSE OF THE NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION IN OPPOSITION TO A STAY OF THE MANDATE

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RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6, respondents National Horsemen's Benevolent and Protective Association, et al., disclose the following:

A. National Horsemen's Benevolent and Protective Association (HBPA) has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
B. Arizona HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
C. Arkansas HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
D. Indiana HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
E. Illinois HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
F. Louisiana HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
G. Mountaineer Park HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
H. Nebraska HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
I. Oklahoma HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
J. Oregon HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
K. Pennsylvania HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
L. Tampa Bay HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
M. Washington HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

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INTRODUCTION

In our system of government, "checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U. S. 714, 722 (1986). They are also "frequently inconvenient, particularly on the person or the institution being checked and balanced."[1] To get around these annoying checks-and-balances, Congress has employed "novel policy inventions and corresponding structures" that have resulted in a "fifth branch of federal government," with private or quasi-public corporations exercising governmental powers. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 700 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). Such private "delegations threaten liberty and thwart accountability by empowering entities that lack the structural protections the Framers carefully devised." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 701 (2015) (Roberts, C.J., dissenting).

Yet delegation of government power to a private corporation is what Congress did in the Horseracing Integrity and Safety Act. It designated a pre-existing entity, the Horseracing Integrity and Safety Authority, Inc., to regulate horseracing nationwide—thereby avoiding the inconveniences of accountability, transparency, due process, and democratic control that would have come with a traditional government agency. The Act charges the Authority to "implement and enforce the horseracing anti-doping and medication control program and the racetrack safety program" and to "exercise independent and exclusive national authority over the

[1] *State v. Williams*, 198 Wis. 2d 516, 541 (1996) (Bablitch, J., concurring).

safety, welfare, and integrity of covered horses, covered persons, and covered horseraces." 15 U.S.C. § 3054(a)(2)(A). Indeed, the Act grants the Authority "safety, performance, and anti-doping and medication control authority over covered persons similar to such authority of the State racing commissions" (15 U.S.C. § 3054(a)(2)(B)), making the Act's purpose clear: to strip the states of their historic role regulating horseracing and give the powers of the state regulatory commissions over to one national regulator. But this regulator—the Authority—is a "private, independent, self-regulatory, nonprofit corporation," not a government agency. 15 U.S.C. § 3052(a). As a result, the Authority does not have to respect any of the "the structural protections the Framers carefully devised," like the warrants clause, the due process clause, or the right to counsel.

The Fifth Circuit held this contrivance unconstitutional. Under the Act, the 30,000 members of the National Horsemen's Benevolent and Protective Association and its state and local affiliates (hereinafter "the Horsemen") are subject to searches without warrants or and blood draws without consent—all by order of a private entity. If the Federal Trade Commission thought that a group of horsemen were engaged in an antitrust conspiracy, the FTC would need to provide sufficient evidence to convince a neutral Article III magistrate to issue a warrant before it could search a horseman's office or barn. *See generally Camara v. Municipal Court*, 387 U.S. 523 (1967). But the Horseracing Authority doesn't even need to check with the Commission, little less a judge, before showing up unannounced and undertaking a search. *See* 15 U.S.C. § 3054(h).

After the Authority's private police department has completed its investigation, the matter is referred to the Authority's private prosecutions department, which brings a case before the Authority's private administrative law judges. Auth. R. §§ 7020-7430. Just being charged with certain violations results in automatic suspensions before any neutral officer has looked at a case. Auth. R. §§ 3229, 3247. At no point must the Authority pre-clear any of this with the Commission. And the Commission lacks any tools to review or discipline the Authority outside of appeals brought to it from convictions in the Authority's kangaroo courts.

The Fifth Circuit correctly concluded that level of private delegation violates Article II, which vests "[t]he executive Power" in the President. U.S. Const. art. II, § 1, cl. 1. When asked to review this decision en banc, not a single judge requested a poll. And the Fifth Circuit also rejected a request to stay the mandate.

Now, the Authority comes to this Court and asks permission to continue trampling on the Horsemen's constitutional rights while the Court considers this case. While the case deserves this Court's consideration, the Authority fails to justify its demand for a stay for the mandate. Most obviously, that demand is premature: the Authority's imagined harms all stem from hypothetical injunctive relief that has not been granted—or even sought. The simple issuance of the mandate will not lead to those alleged harms. As the Authority itself explains, HISA already did not govern racing within the Fifth Circuit. And if the Authority desires a stay of some future relief, it can return to the Court then.

A stay is unwarranted in any event. The Horsemen won below for a good reason—

what the Authority is doing here is unconstitutional. And letting the Authority exercise government enforcement power irreparably harms the *Horsemen's* constitutional rights. The Authority hardly tries to identify any irreparable harms facing itself, instead painting a generalized and unjustified picture of chaos if regulation returns to the states, which had regulated horseracing for over a century.

Thus, while the Court should consider this case on an expedited basis—including implications of both legislative and executive delegation doctrines—it should decline the Authority's demand for an immediate stay of the mandate.

LEGISLATIVE & PROCEDURAL HISTORY

For the convenience of the Court, the Horsemen adopt Texas's thoughtful and thorough account of the legislative and procedural history. They would only add that in the district court's first decision upholding HISA, the court nevertheless acknowledged the Act was "novel," "unconventional," "uncommon," "unique," "breaks new ground," and "pushes the boundaries." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 596 F. Supp. 3d 691, 695, 696, 719, 723, 728 (N.D. Tex. 2022). In an understatement, the court also recognized that as a private corporation, "the Authority avoids some of the strictures of governmental entities." *Id.* at 696. The second time around, the court upheld the law again while noting that "the Authority retains its generous grant of authority to craft and propose rules." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 672 F. Supp. 3d 220, 242 (N.D. Tex. 2024).

ARGUMENT

I. The Horsemen acquiesce to certiorari and respectfully request a ruling this term.

The Horsemen recognize that acquiescence to certiorari is rare; the normal course is to defend one's favorable judgment below from further review. In this instance, however, certiorari just makes sense. There is a clear circuit split: the Fifth Circuit held that an act of Congress is unconstitutional, while the Sixth and Eighth Circuits disagreed (with one judge on the Eighth Circuit panel dissenting in relevant part). Numerous states have raised concerns with the law's constitutionality.[2] And the private non-delegation doctrine needs more than simply clarification. App. 13 (quoting *Texas v. Comm'r*, 142 S. Ct. 1308, 1308 (2022) (statement of Alito, J.)). It needs vigorous enforcement to serve its purpose of protecting individual liberty.

This Court's primary private delegation case was decided nearly a century ago. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). There, the Court struck down a

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[2] In total, the attorneys general of 16 states have joined litigation, amicus briefs, or a letter to Congress all opposing the Act on federalism grounds. *Oklahoma v. United States*, S. Ct. No. 23-402, Amicus Brief of Arkansas, et al. ("Amici are States with significant thoroughbred horseracing industries. Each regulates horseracing under state law. The Horseracing Integrity and Safety Act, or HISA, displaces that regulation. It entrusts regulation of horseracing to a purely private entity…"); *Oklahoma v. United States*, 6th Cir. No. 22-5487, ECF Doc. 45 (Amicus Brief of Arkansas, et al.); Letter to Senator Mitch McConnell, Dec. 8, 2022, https://ustrottingnews.com/wp-content/uploads/2022/12/12-08-22-Attorney-Generals-HISA-McConnell-Letter.pdf ("HISA's very purpose is to take away a regulatory power individual States have exercised since the Founding—to oversee and regulate horse racing within their borders—and give that power exclusively to a private agency.").

To be clear, the Horsemen do not argue here that federal preemption is unconstitutional, only that preemption cannot be executed in this way.

legislative delegation "to private persons whose interests may be and often are adverse to the interests of others in the same business," calling it "legislative delegation in its most obnoxious form." *Id.* at 311. As Congress continues to try "novel policy inventions and corresponding structures," *Free Enter. Fund*, 537 F.3d at 700 (Kavanaugh, J., dissenting), the Court must again enforce the Constitution's limits by setting forth these principles in light of modern precedent, particularly on the separation of powers and vesting clauses.

In the past decade, this Court has returned time and again to the importance of the separation of powers and the fundamental structural features of our Constitution. *See, e.g., Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244 (2024); *Biden v. Nebraska,* 600 U.S. 477 (2023); *West Virginia v. EPA,* 597 U.S. 697 (2022); *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA,* 595 U.S. 109 (2022); *Ala. Ass'n of Realtors v. HHS,* 594 U.S. 758 (2021); *Collins v. Yellen,* 594 U.S. 220 (2021); *Seila Law LLC v. CFPB,* 591 U.S. 197 (2020). The private non-delegation doctrine is another doctrine that safeguards liberty through constitutional structure. *See U.S. Dep't of Transp. v. Ass'n of Am. R.R. (Amtrak II),* 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty."); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 125 (1978) (Stevens, J., dissenting) ("It is [ ] fundamental that the State's power to deprive any person of liberty or property may not be exercised except at the behest of an official decisionmaker . . . 'a statute which attempts to confer [government] power [on a private regulator]

undertakes an intolerable and unconstitutional interference with personal liberty and private property.'" (quoting *Carter Coal*, 298 U.S. at 311)).

As the Fifth Circuit recognized below, "if people outside government could wield the government's power—then the government's promised accountability to the people would be an illusion." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 880 (5th Cir. 2022) (*NHBPA I*). This Court should not take this case simply because of a circuit split or a determination of facial invalidity, or because several states or the Solicitor General asks. This Court should take this case because fundamental principles of personal liberty and democratic accountability are at stake.

The Court should also hear and decide this case this term. As the Horsemen explain below, the Act imposes significant and irreparable harms on the industry generally and horsemen individually. The district court and the Fifth Circuit both granted requests to expedite the case given these economic and constitutional harms, and this Court should decide it this term.

II. The Court should not stay the mandate below.

Though the Court is likely to grant certiorari, an equitable stay of the mandate—relief already denied by the Court of Appeals—is unwarranted. "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (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). "In close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

The Horsemen have a high likelihood of success on the merits of the question presented by the Authority. And the equities support the Horsemen, not the Authority—especially at this stage. The Authority casts its stay demand as an emergency because of supposed nationwide relief, but there is currently no injunctive relief below at all—much less relief running in favor of horsemen nationwide. Rather than prematurely entertain those fears, this Court should allow the mandate to issue, leaving the lower courts (and eventually this Court) to consider the scope of any injunctive relief in due course.

In the meantime, it is *the Horsemen* who will suffer irreparable harms to their constitutional rights and professional endeavors if the mandate is stayed. A crisis in horseracing will not result from a return to state regulation. The Court should deny the motion.

A. The Authority's demand that this Court stay the mandate to stop a hypothetical injunction is premature.

According to the Authority, "HISA rules do not govern horseracing in any state within the Fifth Circuit." App. 29. So it is hard to see how the mere issuance of the Fifth Circuit's mandate below could cause the Authority irreparable harm. Presumably that's why the Authority spends pages vaguely gesturing toward "chaos and confusion" supposedly facing third parties—teed off of a forecast of potential relief given in a generalized news interview by the Horsemen's counsel—instead of articulating how the issuance of the mandate itself could possibly cause *the Authority*

irreparable harm. App. 25–27. Eventually, the Authority all but concedes that it won't, explaining its real concern: that the Horsemen might "pursu[e] on remand" injunctive relief that has effect nationwide. App. 29; *see also* App. 3 (introduction summarizing the Authority's claimed irreparable harm as entirely based on "[a]llowing the Fifth Circuit's decision to take effect nationwide (as Respondents openly seek)"). Invoking these hypothetical harms, the Authority demands that this Court "step in to prevent [the lower courts] from jeopardizing enforcement of critical HISA rules across the nation." App. 30.

But the administrative issuance of the mandate below will not enjoin anyone from doing anything, much less immediately implement an imaginary injunction nationwide. The Authority has taken a maximalist version of what could possibly happen below, treated it like reality, and demanded that this Court prevent its nightmares from unfolding. If the lower courts here eventually determine some injunctive relief is appropriate, and the Authority feels that it needs a stay of that decision, there is a process for that—and this Court can review the issue then. *See* Fed. R. App. P. 8. But it is premature for them to rush into this Court based on their fear of potential injunctive relief that has not even been issued. Indeed, it makes this Court's job difficult when asked to rule on the propriety of an order that has not even been formulated or issued. To quote the Authority's argument made in another context, this Court should wait until an injunction "appear[s] in concrete detail, presumably in the context of an actual" order, before deciding on it. App. 11.

This Court should be cautious to allow its motions docket to be used in this way. Justices are rightly wary about rushing adjudication of important merits issues through the motions docket. *Labrador v. Poe*, 144 S. Ct. 921, 930 (2024) (Kavanaugh, J., concurring) ("Th[is] scenario is not always optimal for orderly judicial decisionmaking."); *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (noting that the emergency docket can "force the Court to give a merits preview" "on a short fuse without benefit of full briefing and oral argument"). Though that may be necessary in some instances, this is not one of them—this request is for a stay of the mandate, not a stay of an injunction. No injunction has been issued, and there is no need for a shotgun decision without full merits briefing.

For now, the Authority's supposed irreparable harms—to the extent it even articulates any of its own harms—are illusory. Indeed, the Authority's supposed harms just highlight the merits of the Horsemen's argument. A private, non-profit corporation claims it will be irreparably harmed if it is prevented from enforcing federal law, i.e., continuing to investigate, suspend, prosecute, and adjudicate the guilt of everyday horsemen who it believes break its rules. App. 27. It will not lose any money from a potential future injunction. Its constitutional rights will not be impaired. Rather, the Authority's entire argument is that if a broad injunction is issued, it won't be able to continue operating as a private police department, private district attorney's office, and private administrative law judge. *Id*. That, of course, is precisely the problem: a private corporation should not perform those functions enforcing federal law in the first place.

B. The Horsemen have a high likelihood of success on the merits.

The Authority does not have a fair prospect of success on the merits, for the Fifth Circuit correctly declared the Act unconstitutional. The private non-delegation doctrine vindicates the Vesting Clauses. And it prevents Congress from empowering a private delegate to evade every other constitutional principle: the Taxing Clause, Appropriations Clause, the Appointments and Confirmation Clauses, and the Fourth, Fifth, Sixth, and Seventh Amendments, among others. But the Act is structured to give a private entity—the Authority—powers vested by the Constitution in the federal government. At a minimum, the Act's delegation of enforcement powers to the Authority is unconstitutional, as the Fifth Circuit held.

1. The Act's enforcement provisions are unconstitutional.

This Court "has set its face against giving public power to private bodies. 'Such a delegation of legislative power,' the Court thundered nearly a century ago, 'is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.'" *NHBPA I*, 53 F.4th at 880 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935)). Indeed, "[w]hen it comes to private entities," "there is not even a fig leaf of constitutional justification." *Amtrak II*, 575 U.S. at 62 (Alito, J., concurring). "Not content merely to reject the idea, the Court has also called it insulting names. *See Carter Coal Co.*, 298 U.S. at 311 (conferring power on private persons is 'legislative delegation in its most obnoxious form')." *NHBPA I*, 53 F.4th at 880.

Despite this Court's admonition against delegating governmental power to private persons, Congress did so anyway in the Horseracing Act. As even the Sixth Circuit

acknowledged, "[t]he Horseracing Authority's enforcement duties are extensive." *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023). "The statute empowers the Authority to investigate, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the FTC's say-so." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 421 (5th Cir. 2024) (*NHBPA II*).

The Authority has the power to search and inspect "offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses,"[3] to issue subpoenas,[4] to compel truthful and complete answers to inquiries,[5] to undertake urine and blood tests without advance notice,[6] and to exercise "other investigatory powers of the nature and scope exercised by State racing commissions,"[7] which the Authority has defined to include the power to seize evidence.[8] It may initiate civil actions in federal district court to enforce the law, including against potential violations.[9] The Authority also has the power to hold administrative hearings, weigh evidence, decide guilt, and issue civil penalties.[10]

"[B]y the plain text of the statute, the FTC cannot impede upon the power granted to the Authority, nor can the FTC compel Authority enforcement action. In this

[3] 15 U.S.C. § 3054(c)(1)(A)(i).
[4] 15 U.S.C. § 3054(c)(1)(A)(ii).
[5] 15 U.S.C. §§ 3054(c)(3)(B), 3057(a)(2)(F)-(I).
[6] 15 U.S.C. § 3055(c)(4)(C).
[7] 15 U.S.C. § 3054(c)(1)(A)(iii).
[8] Auth. R. §§ 3040(a)(2)(iii)(D), 5730(b)(2)-(3).
[9] 15 U.S.C. §§ 3054(i), 3057 (sanctions) § 3054(j) (civil actions).
[10] 15 U.S.C. §§ 3055(c)(4)(B), 3056(b)(7)-(9), 3057(c).

fashion, the Authority does not 'function subordinately' to an agency with 'authority and surveillance' over it, in violation of the private nondelegation doctrine." *Walmsley v. FTC*, 2024 U.S. App. LEXIS 24004, *16 (8th Cir. Sept. 20, 2024) (Gruender, J., dissenting in part).

The Sixth and Eighth Circuit's—and the Authority's and FTC's—answer is to speculate that the FTC could adopt a rule giving itself some role in enforcement oversight, like preclearance before searches. The statute as written does not let the FTC oversee the Authority's enforcement. Thus, the Fifth Circuit's retort is simple and right: "The Authority's rulemaking argument would let the agency rewrite the statute." *NHBPA II*, 107 F.4th at 431. That it cannot do.

Summarizing this dispute, Judge Gruender explained that the Sixth Circuit and his colleagues on the Eighth Circuit panel read the amended act's language authorizing the FTC to "add to" the rules of the Authority as "allow[ing] the FTC to make basic and fundamental changes to the statute." *Walmsley*, 2024 U.S. App. LEXIS 24004, at *18 (Gruender, J., dissenting in part). But, as Judge Gruender also explained, an agency may not use its rule-making powers to make basic and fundamental changes to a statute. The statute governs the agency, not vice versa. "[T]he plain text of HISA empowers the Authority, and not the FTC, with broad enforcement power. The FTC cannot rewrite the statutory scheme that Congress enacted." *Id*. at *20. The Act explicitly gives the Authority and its sub-delegate anti-doping agency exclusive responsibly for enforcement, which the Commission may not rewrite, as the Fifth Circuit held. *NHBPA VI*, 107 F.4th at 431.

Confirming that the FTC cannot tell the Authority how to enforce the rules, the Act gives a limited list of eleven topics on which the FTC may exercise "oversight" through rulemaking. 15 U.S.C. § 3053(a)(1)-(11). These include laboratory standards, racetrack standards, and a schedule of civil sanctions. None of the eleven enumerated topics touches on enforcement in any way. "[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 328 (2014). So it is not only that the Act explicitly gives enforcement powers only to the Authority—it also denies any oversight of these powers to the FTC.

The Authority and the FTC dwell on the difficulties of winning a facial challenge. As a predicate, the Fifth, Sixth, and Eighth Circuits all agreed that the Horsemen have standing to bring a pre-enforcement facial challenge; they need not violate the law to challenge its constitutionality. *See Walmsley*, 2024 U.S. App. LEXIS 24004, *9.

Second, the Act *is* facially unconstitutional because a private delegation of powers vested by the Constitution in the legislative or executive branch is a structural defect. The structural defect infects every enforcement of the Act. *See Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law"). *All* inspections of documents or places or persons and *all* seizures of materials are undertaken without prior review by the FTC or another magistrate. 15 U.S.C. § 3054(c)(1)(a). *All* Authority board members and officers are selected without presidential, Senate, or FTC involvement. 15 U.S.C. § 3052(d). The law is

unconstitutional in *all* of its applications because it is flawed in its structure. *See generally Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S. 175 (2023).

Third, the Authority, relying on the Sixth and Eighth Circuits, wants the amended Act's "add to" authority to act as a silver bullet for every ill. App. 18-19; *Oklahoma*, 62 F.4th at 243; *Walmsley*, 2024 U.S. App. LEXIS 24004, *11. That single sentence in the act cannot bear the weight placed on it. The rest of the Act remains unchanged, such as the exclusive investigative authority for the Authority and the sub-delegate anti-doping agency or the enumerated list of the FTC's oversight topics. As discussed, the FTC cannot use its power to "add to" the rules of the Authority to rewrite the statute when the Act has specific provisions that govern these topics. *Util. Air Regulatory Group*, 573 U.S. at 328. An agency can no more cure an unlawful delegation of power by adopting in its discretion rules contrary to the statute than it can by adopting a limiting construction of the statute. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-73 (2001). The Fifth Circuit's decision was correct.

Fourth, the Authority says that this Court 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.'" App. 12 (*quoting Oklahoma*, 62 F.4th at 233). This Court has said quite clearly, however, that when challenging the constitutionality of an agency's regulatory superstructure, plaintiffs need not wait and go through the time, expense, and punishments before coming to a federal court to bring their constitutional challenge. *Axon Enterprise*, 598 U.S. 175.

Plus, that Horsemen may appeal their convictions by the Authority to the FTC, 15 U.S.C. § 3058(b); *Oklahoma,* 62 F.4th at 243-44, is not a sufficient answer. In many instances, horsemen do not even have the option of seeking FTC review—if no charges are filed, if the ALJ finds against the Authority, if the Authority delays on filing charges, or if the Authority imposes informal discipline. The lack of oversight for agency "inaction" can be just as problematic from a non-delegation perspective. *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 9 (D.D.C. 1999).

In many other instances, the horsemen will never challenge the Authority's sanction because the fine costs less than an appeal. Horsemen "face a daunting and expensive task if they wish to challenge" the Authority's adjudication. *See Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2482 (2018). Horsemen "must still pay for the attorneys and experts needed to mount a serious challenge" to the Authority's judgment. *Id.* "And the attorney's fees incurred in such a proceeding can be substantial." *Id.* On top of their own lawyers, the Horsemen must also pay half the costs of the ALJ hearing their case. Auth. R. § 7420(b). Practically, the expense of litigating a riding crop sanction, for instance, far exceeds the value of the sanction ($250 for 1 to 3 strikes over the 6-strike cap for a first-time offender, Auth. R. § 282(b)(1)(i)), such that very few will appeal to the FTC.

Finally, the Fifth Circuit right noted that the Authority holds the power to select and remove its own board. *NHBPA II*, 107 F.4th at 435. The power to appoint officials is also an executive power. This is not to say that HISA violates the Appointments Clause, but rather than HISA evades the Appointments Clause by using a private

nonprofit corporation to do the government's dirty work. In other words, HISA violates the vesting of executive power in the President by allowing someone to wield executive power without executive appointment or removal. The Third Circuit rightly recognized that part of the Secretary of Agriculture's pervasive authority over the Cattleman's Board was his appointment power over board members. *United States v. Frame*, 885 F.2d 1119, 1129 (3rd Cir. 1989); *accord Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973) (secretary appoints committee members); *cf.* 47 C.F.R. §§ 54.703(b); 54.703(c)(3); 54.704(a)(2)-(3) (the Federal Communications Commission chair approves all nominees to the board of the Universal Service Administration Corporation and the USAC CEO). A private delegate is not subject to pervasive control when there is no stick of removal or derecognition for the overseeing agency.

2. History confirms the correctness of the Fifth Circuit's decision.

The Fifth Circuit followed established precedent from this Court and other circuits in asking whether the FTC exercises pervasive surveillance and control over the Authority in its enforcement powers, correctly holding that it does not. Other private non-delegation cases from this Court and the Fourth Circuit approach the same question from a different angle: asking about the *quality* of the powers delegated rather than the *quantity* of supervision authorized. The Fourth Circuit called this "the central inquiry" to determine "whether the function of the" delegated entity "is governmental in nature." *Pittston Co. v. United States*, 368 F.3d 385, 398 (4th Cir. 2004). The Fourth Circuit echoed this Court's decision in *Carter Coal*, which disproved delegation of a "governmental function" to "private persons." 298 U.S. at

311. See *Wellness Int'l Network*, 575 U.S. at 700-01 (Roberts, C.J., dissenting) ("It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions."). Viewed through this lens of what type of power the Authority wields, what type of function it fulfills, the Fifth Circuit's decision is also correct.[11]

Others have drawn "the familiar distinction between discretionary, managerial, and policy-making tasks, which clearly cannot be delegated, and ministerial tasks, involving little or no exercise of discretionary judgment, which just as clearly can be delegated."[12] Private non-delegation cases frequently distinguish between ministerial tasks like fact gathering or fee collection, and non-ministerial tasks like policy-making and rule enforcement. *See Frame*, 885 F.2d at 1128-29 (no violation because tasks are "advisory" or "ministerial."); *Pittston Co.*, 368 F.3d at 396 (tasks "administrative or advisory"); *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 n.5 (D.C. Cir. 2013), *vacated and remanded on other grounds, Amtrak II,* 575 U.S. 43 ("advisory or ministerial functions"); *United States v. Garcia*, 690 Fed. App'x 575, 587 (10th Cir. 2017) ("ministerial acts or support services").

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[11] A functionalist or originalist/historical lens are both perspectives that the Sixth Circuit explicitly declined to consider because the parties there did not brief them. *See Oklahoma*, 62 F.4th at 233 (the parties did not provide "briefing with respect to founding-era or contemporary analogs showing the role private entities may, and may not, play in law enforcement." Oklahoma did not litigate the case "as a categorical Article II inquiry or as a question of historical meaning."); *id.* at 229 ("Whether subordination always suffices to withstand a challenge raises complex separation of powers questions. Simplifying matters for today, if not for a future day, the parties accept this framing of the appeal.").

[12] *Yaretsky v. Blum*, 592 F.2d 65, 69 (2d Cir. 1979) (Lumbard, J., dissenting).

In asking about the type of power exercised, the Fourth Circuit asked the same question that scholars suggest occupied the Founding Fathers. Recent research by Professors Jennifer Mascott and Aditya Bamzai shows that in the founding era, private actors were contracted "to perform outside empirical services, such as weighing imported goods, evaluating the technical similarity of patent claims, or completing expert medical exams." These private parties could "conduct ministerial tasks" but not "engage in the exercise of delegated authority to bind third parties" or exercise "sovereign authority." Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 Harv. J.L. & Pub. Pol'y 837, 925 (2022); *see* Aditya Bamzai, *Tenure of Office and the Treasury*, 87 Geo. Wash. L. Rev. 1299, 1346 (2019).

Their conclusion accords with Justice Scalia's comprehensive review of other private corporations created or recognized by Congress or executive agencies—all of which filled proprietary roles, primarily making or guaranteeing loans or building or running infrastructure. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 387-91 (1995). None of them exercised "sovereign authority" like regulation, investigation, prosecution, and administrative adjudication.

Yet sovereign authority is exactly what the Authority exercises—authority to investigate and enforce rules, or to decide when to exercise enforcement discretion.[13]

[13] Asked about a press release that delayed the effective date of a provision of the ADMC by 30 days, counsel for the Authority explained to the district court, "[T]hat's an exercise of enforcement discretion. . . What the Authority is saying is, . . . we're going to exercise enforcement discretion. . . we're not going to prosecute. We're not going to enforce that limitation for 30 days. Agencies do that all the time." 5th Cir. ROA 3142-43.

It exercises that authority without FTC oversight. Thus, HISA is contrary to the historical understanding of private delegation. Ultimately the corporation is named the Horseracing Integrity and Safety *Authority*, not Advisors or Administrators, because its purpose is not to advise the FTC or perform ministerial tasks. Its purpose is to exercise sovereign authority over everyone in the thoroughbred horseracing industry. That the Constitution does not permit.

3. The FTC-Authority relationship is meaningfully different from the SEC-FINRA.

The Authority leans hard on the comparison between HISA and FINRA, the Financial Industry Regulatory Authority, trying to scare this Court with the possible implications of a decision in favor of the Horsemen. App. 22-23. But numerous elements distinguish this case from FINRA, and the Court need not decide every possible private non-delegation scenario at once (and certainly not on an emergency application for a stay of a mandate).

Below, the Fifth Circuit comprehensively explained why "HISA gives the Authority an enforcement role meaningfully different from FINRA's." *NHBPA II*, 107 F.4th 434. "HISA diverges radically from the Maloney Act" when it comes to executive powers. *Id*. HISA does not allow the FTC oversight tools the SEC possesses, such as "the power to enforce HISA itself, deregister the Authority as the enforcing entity, or remove its directors." *Id*. Judge Gruender provided additional detail: "the Maloney Act empowers the SEC with, among other things, investigatory authority, 15 U.S.C. § 78u(a)(1), the power to seek criminal sanctions, injunctive relief, or disgorgement, *id.* § 78u(c), (d), and the ability to step in and enforce any written rule

itself, *id.* § 78o(b)(4). 'HISA gives the FTC none of these tools.'" *Walmsley*, 2024 U.S. App. LEXIS 24004, *17 (dissenting op.). The decision below detailed these distinctions, 107 F.4th at 434-35, which show that the SEC has significantly more tools to exercise "pervasive surveillance and authority" over FINRA than the FTC can exercise over the Authority.[14]

For all these reasons, the Authority is unlikely to succeed in obtaining reversal of the Fifth Circuit's holding.

C. The equities disfavor a stay.

In all events, if the Court does proceed to weigh the equities, it should consider this: the Authority does not articulate any irreparable harms of its own; the United States' demand for total deference falls flat; and the Horsemen do face irreparable harms from a stay.

1. The Authority does not articulate any irreparable harms of its own.

The Authority does not suggest any irreparable harms to itself as a private corporation. Indeed, it cannot, because it will not suffer one whit if a broad-scope injunction were issued below in the future—much less from the mandate's mere issuance. The Authority does not have a serious monetary injury—it can continue to collect the assessments which provide 98 percent of its budget.[15] The Authority is not

[14] Plus, FINRA's members are guaranteed a representative role in its governance, and always retain the right to exit FINRA and start a competitor association. 15 U.S.C. §§ 78o-3(b)(4), (a). So not only the SEC, but the members of the industry themselves can exercise surveillance and authority over FINRA. That's not possible under HISA, whose role is guaranteed in statute and whose board is self-governing.
[15] Assessments provide $80.4 million dollars to its budget; enforcement fines provide less than $1 million. HISA 2025 Summary Budget (July 11, 2024),

prevented from exercising its free speech rights or made to pay for a non-recoverable compliance burden or put in danger of going out of business. It only predicts generalized harms to third parties, which are not the same as harm to the Authority. *See Walsh v. Ahern Rentals, Inc.*, 2022 U.S. App. LEXIS 896, *4 n.2 (9th Cir. Jan. 12, 2022) ("The irreparable-harm analysis focuses on the moving party, not the nonmoving party or some third party.").

The only way in which the Authority will "suffer" is that it will be restrained in its mission to enforce its rules on horsemen without regard for their constitutional rights. Even then, the Authority misrepresents the factual record to predict "complete turmoil" if the district court enters an order that prevents them from running roughshod over the Horsemen's constitutional rights for the next year. App. 4. Quite the contrary, it has been regulation by the Authority that has proven to be problematic for the horse-racing industry for the last two years.

For over 125 years, state racing commissions ably governed the horse-racing industry. *See, e.g.,* Percy-Gray Racing Law, 1895 N.Y. Laws, Ch. 570. During this time, their regulations became highly developed, and their methods were tested and refined over many years of practice. If the Horsemen eventually secure injunctive relief below, state racing commissions will have no difficulty regulating the industry again, if that even proves necessary for the injunctive relief that the Horsemen will seek. Indeed, as demonstrated by the sixteen state attorneys general who have filed

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https://bphisaweb.wpengine.com/wp-content/uploads/2024/07/HISA-2025-Proposed-Budget.pdf.

supporting the Horsemen's arguments, *supra* n.2, many states are anxious for the return of their historic regulatory authority over this industry.

By contrast, the Authority upended the industry with its inept beginning. When the Authority's rules were fully implemented in 2022, tragically, twelve horses died in only six weeks of racing at Churchill Downs Racetrack, home of the Kentucky Derby.[16] Unfortunately, the crisis in the industry did not end there. As the horse-racing season continued, more high-profile racing fatalities occurred at Triple Crown racetracks in Maryland and New York.[17] The Authority was created not only to prevent such tragedies but also to diagnose their causes. Yet despite spending $66.5 million, the Authority failed to identify a singular or direct cause of the problem.[18] In its first big test of implementation, it fell flat on its face.

This followed a series of failures prior to implementation of its medication control rules. First, as part of the implementation of its racetrack safety rules, the Authority prohibited toe grabs, or cleats, on horseshoes.[19] It made this decision despite

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[16] Brooks Holton, *Churchill Downs horse deaths: KHRC releases first 10 reports, including Parents Pride*, Louisville Courier J. (June 5, 2023), https://www.courier-journal.com/story/sports/horses/horse-racing/2023/06/05/churchill-downs-horse-deaths-morality-reviews-kentucky-racing-commission/70288920007/.

[17] Jimmy Golen, *Horse euthanized after 13th at Belmont, 1 race after final leg of Triple Crown*, NBC 4 New York (June 11, 2023), https://www.nbcnewyork.com/news/sports/triple-crown/horse-euthanized-after-13th-at-belmont-1-race-after-final-leg-of-triple-crown/4412091/.

[18] Spring 2023 Churchill Downs Equine Fatalities: HISA Findings (Sept. 12, 2023), https://bphisaweb.wpengine.com/wp-content/uploads/2023/09/Spring-2023-Churchill-Downs-Equine-Fatalities-HISA-Findings.pdf.

[19] *Announcement Concerning Enforcement of HISA Racetrack Safety Rules and Registration Requirements*, Horseracing Integrity and Safety Authority (June 28, 2022), https://hisaus.org/news/announcement-concerning-enforcement-of-hisa-racetrack-safety-rules-and-registration-requirements.

veterinary recommendations to the contrary from the North American Association of Racetrack Veterinarians (NAARV).[20] This rule caused horsemen to throw out all their old horseshoes, only to find that the Authority had created a supply shortage of the new horseshoes.[21] The rule had to be delayed twice,[22] and finally it was partially reversed for toe grabs on hind legs on dirt tracks—exactly the veterinary recommendation that the Authority had rejected months earlier.[23] Tragically, before it was reversed, this unscientific rule caused multiple equine deaths at tracks in Iowa.[24] For this and other reasons, NAARV has been a consistent and vocal supporter of the Horsemen's lawsuit as an amicus based on their assessment of the significant damage done to the health of horses by the Authority.[25] Similarly, the Authority's

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[20] *Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity and Safety Authority*, Federal Trade Commission (March 3, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_racetrack_safety_2022-3-3_for_publication.pdf.

[21] Jeff Cota, *HISA Clarifies Shoeing Rules, Confirms Delay*, Am. Farriers J. (May 12, 2022), https://www.americanfarriers.com/articles/13382-hisa-confirms-delay-of-shoeing-rules-enforcement.

[22] *HISA Confirms Delay And Clarification Of Racetrack Shoeing Rules*, Paulick Report (May 14, 2022), https://paulickreport.com/horse-care-category/hisa-confirms-delay-and-clarification-of-racetrack-shoeing-rules.

[23] *Announcement Concerning Enforcement of HISA Rule 2276 (HORSESHOES) as It Pertains to Full Outer Rim Shoes and Toe Grabs*, Horseracing Integrity and Safety Authority (July 29, 2022), https://hisaus.org/news/announcement-concerning-enforcement-of-hisa-rule-2276-horseshoes-as-it-pertains-to-full-outer-rim-shoes-and-toe-grabs.

[24] Letter To The Editor: *Iowa HBPA Takes Exception To HISA CEO's Comments On Toe Grabs*, Paulick Report (March 19, 2024), https://paulickreport.com/news/ray-s-paddock/letter-to-the-editor-iowa-hbpa-takes-exception-to-hisa-ceos-comments-on-toe-grabs.

[25] *NHBPA v. Black*, N.D. Tex. No. 5:21-cv-00071-H, ECF Doc. 41, Motion of NAARV; *Oklahoma v. United States*, S.Ct. No. 23-402, Amicus Brief of NAARV.

racetrack safety rules forced jockeys to buy new riding crops. But this rule, too, had to be delayed and partially reversed.[26]

Third, HISA specifically directed the Authority to contract with the United States Anti-Doping Agency to implement its medication control rules. 15 U.S.C. § 3054(e)(1)(A). But the Authority failed to do so.[27] Instead, it was forced to contract with another private corporation to implement its medication control program.[28] This decision received criticism across the spectrum, including from animal rights advocates.[29]

Fourth, the Defendants themselves have voluntarily delayed implementation of the Anti-Doping and Medication Control (ADMC) program three times. First, the Authority was unable to secure a contract with the U.S. Anti-Doping Agency or an alternative sub-delegate by the deadline set by Congress, so the Authority submitted the first proposed ADMC with an effective date six months after the statutory

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[26] *Announcement Concerning Enforcement of HISA Racetrack Safety Rules and Registration Requirements*, Horseracing Integrity and Safety Authority (June 28, 2022), https://hisaus.org/news/announcement-concerning-enforcement-of-hisa-racetrack-safety-rules-and-registration-requirements.

[27] *Statement from USADA CEO Travis T. Tygart on Equine Anti-Doping and Medication Control Program Negotiations*, U.S. Anti-Doping Agency (Dec. 23, 2021), https://www.usada.org/statement/equine-negotiations/.

[28] *HISA Announces Selection of Drug Free Sport International as Partner to Build Independent Anti-Doping and Medication Control Enforcement Agency*, Horseracing Integrity and Safety Authority (May 3, 2022), https://hisaus.org/news/hisa-announces-selection-of-drug-free-sport-international-as-partner-to-build-independent-anti-doping-and-medication-control-enforcement-agency.

[29] *Statement on Horseracing Integrity and Safety Authority's Announcement to Contract with Drug Free Sport International Instead of the U.S. Anti-Doping Agency*, Animal Wellness Action (May 3, 2022), https://animalwellnessaction.org/horseracing-integrity-and-safety-authoritys-announcement-to-contract-with-drug-free-sport-international.

deadline. 87 Fed. Reg. 65292, 65292. Second, the FTC declined that rule, delaying it until the "legal uncertainly" was resolved. F.T.C., *Order* (Dec. 12, 2022), at 2. After Congress amended the law, the FTC decided the legal uncertainly was over but still delayed the ADMC's implementation date another three weeks, until after the first two legs of the Triple Crown, because the Authority's implementation was not ready for prime time. *Horseracing Integrity and Safety Act: Anti-Doping and Medication Control Rule*, 88 Fed. Reg. 27894, 27895 (May 3, 2023) ("implementing new testing requirements just days before the start of the Triple Crown creates an appreciable risk of errors, confusion, and inconsistent treatment of similarly situated horses"). And even to this very day, the Authority still chooses to exclude Louisiana and West Virginia from the ADMC even though no court order protects them from it (the states' APA challenge in Louisiana district court is specific to the racetrack safety rule).[30]

This is all atop the multiple instances where the Authority has voluntarily chosen to exercise its "prosecutorial discretion" to delay or entirely forgo enforcement of a plentitude of provisions of both the ADMC and the racetrack safety rule. *See* NHBPA 5th Cir. Merits Brief 36-39; NHBPA 5th Cir. Reply Brief 8-9; NHBPA 5th Cir. Motion to Supplement the Record 4-5 (in total listing 19 examples).

Thus, the Defendants' pattern of behavior belies any assertion that continued universal enforcement of the Authority's regulatory regime is an absolute imperative.

[30] *Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, 617 F. Supp. 3d 478, 487 (W.D. La. 2022).

No wonder, then, that it is incorrect to imply the entire industry is on board with the Act or the Authority. *See* App. 25-26. The National Horsemen's Benevolent and Protective Association is the nation's largest association of owners and trainers, representing over 30,000 horsemen nationwide. The Gulf Coast Plaintiffs include the Texas Horsemen's Partnership, another large group of owners and trainers. In addition to the racetrack veterinarians, the trade associations for two other breeds have filed opposing HISA because of the fear of what it could bring if expanded beyond thoroughbreds.[31] Numerous state racing commissions and racetracks are also participants in litigation against HISA.[32] This is an industry deeply divided over the Act, a reality obscured by the fact that Congress shoved the bill and the fix into must-pass omnibus legislation instead of having a full and fair hearing on it.

And opposition has only grown with the Authority's unconstitutional enforcement efforts under its Horseracing Integrity and Welfare Unit (HIWU) (the name given to Drug Free Sport International's enforcement unit). The Fifth Circuit noted how HIWU showed up unannounced at one horsemen's residence and subjected her to a "coercive interrogation" before searching her barn and her mother's car. *NHBPA II*, 107 F.4th at 430 n.12. The court also criticized HIWU for banning a veterinarian from

[31] The *Oklahoma* case includes the United States Trotting Association (standard-bred racing) and the Oklahoma Quarter-Horse Racing Association. The American Quarter Horse Association filed an amicus brief in the Northern District of Texas in this case.
[32] State racing commissions include the Texas Racing Commission in this case, the Oklahoma and West Virginia commissions in *Oklahoma v. United States*, and the Louisiana and West Virginia commissions in *Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, 617 F. Supp. 3d 478, 485 (W.D. La. 2022). Racetracks in the Oklahoma case include Remington Park, Fair Meadows Racing, and Will Rogers Downs. The Gulf Coast Plaintiffs in this case include several racetracks as well.

practice for 14 months for possessing a banned substance in his trailer, even though it was undisputed that he had "purchased the substance long before it was banned, forgot it was in his trailer, and did not even attempt to use it on a horse." *Id*.

Far from being "on board," over 1,000 horsemen recently signed a petition[33] urging the FTC to issue its own rule forcing the Authority to establish no-effect thresholds, containing a similar harmless error threshold for illicit substances as that established by the U.S. Department of Health and Human Services for federal government drug testing. *See* 88 Fed. Reg. 70768. These hundreds of horsemen are speaking out because HIWU has unfairly punished—and ruined the careers—of many horsemen for infinitesimally small amounts of banned substances that are the result of natural environmental contamination.

Most disturbingly, the thoroughbred death rate per thousand racing starts decreased every year over the last decade—until in the first full year of HISA implementation in 2023, it increased.[34] In short, the effectiveness of HISA at protecting the health of horses is a topic of hot dispute. Though the Court must weigh the equities when deciding a stay, it need not take sides in such a contested question

[33] *FTC Seek Comments on Petition for Rulemaking from the National HBPA, Inc.*, Regulations.gov Docket FTC-2024-0030, 1,114 comments received as of 9.30.24, https://www.regulations.gov/docket/FTC-2024-0030.

[34] Equine Injury Database, The Jockey Club, https://jockeyclub.com/default.asp?section=Advocacy&area=10.

Rate of Racing-Related Fatality per Thousand Starts (Thoroughbred Only)															
Calendar Year	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**	**2023**
Rate	2.00	1.88	1.88	1.92	1.90	1.89	1.62	1.54	1.61	1.68	1.53	1.41	1.39	1.25	1.32

with evidence on both sides. Instead, it should trust the Fifth Circuit panel, which has a deep familiarity with this case and promptly denied the stay motion.

2. The United States' demand for total deference falls flat.

Citing several decades-old single Justice decisions—many involving a request for an injunction denied by lower courts against a federal statute—the United States argues for "a strong presumption in favor of allowing challenged Acts of Congress to remain in force pending final review in this Court." Resp. 6. The United States bases this presumption on the generalized "presumption of constitutionality which attaches to every Act of Congress." *Id.* (quoting *Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, C.J., in chambers)). The United States claims that this presumption "shapes" "each of the stay factors," so that this Court must enter a stay in "virtually all" cases "if requested to do so by the Government." Resp. 6–7. This Court should not adopt the United States' proposed *per se* rule requiring the Court to defer to all congressional acts, a rule that is inconsistent with the limited presumption of constitutionality at its root.

Start with that underlying presumption of constitutionality. This Court sometimes articulates the "almost formulary caution" that statutes are presumed constitutional. *Morrison*, 487 U.S. at 704 (Scalia, J., dissenting). The scope of this presumption is limited, especially in separation-of-powers cases like this one. *See, e.g.*, *Seila Law LLC,* 591 U.S. at 231–32. After all, "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001) (Rehnquist, C.J.).

This Court does not "'defer' to the judgment of the Congress" "on a constitutional question," and it does not "hesitate to invoke the Constitution should [it] determine that Congress has overstepped the bounds of its constitutional power." *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980) (plurality op.). "[T]he courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *see United States v. Nixon*, 418 U.S. 683, 704 (1974) ("Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." (cleaned up)).

The United States' invocation of the presumption is particularly misplaced here. After the Fifth Circuit initially invalidated the statute, Congress appeared to acquiescence in that finding of unconstitutionality, hastily passing an amendment. *See Oklahoma*, 62 F.4th at 225 (noting "the reality that" the Act made "the Horseracing Authority" the "primary rule-maker," leaving it "not subordinate to the relevant public agency, the Federal Trade Commission, in critical ways"). Given Congress's demonstrated failure to properly consider its constitutional obligations on this very issue, it is hard to take seriously the United States' demand now to "be especially respectful of the judgment of Congress." Resp. 8. As Justice Scalia noted, Congress has "increasingly abdicat[ed] its independent responsibility to be sure that

it is being faithful to the Constitution," making the "presumption of constitutionality" "perhaps . . . unwarranted."[35]

In all events, any presumption of constitutionality would have limited force within the stay factors here. First, on the likelihood of granting certiorari, Respondents agree that the Court is likely to grant certiorari here, but not based on a presumption of constitutionality. *Contra* the United States, the Court does not "almost invariably" review invalidations of federal statutes. Resp. 7.[36] Review here makes sense because of a division in the courts of appeal on an important legal question.

Second, on likelihood of success on the merits, invoking the presumption does little to prove whether "Congress has exceeded its authority under the Constitution. *City of Boerne*, 521 U.S. at 536. Even if "Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one," "the Judiciary, in light of that determination, proceeds to its own independent judgment on the constitutional question." *Boumediene v. Bush*, 553 U.S. 723, 738 (2008). What the United States must prove—but what its response

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[35] Editorial, *A Shot from Justice Scalia*, Wash. Post (May 2, 2000), https://www.washingtonpost.com/archive/opinions/2000/05/02/a-shot-from-justice-scalia/32a0c03c-9967-4d64-8a74-0e5c0f587c0a/.

[36] *See, e.g.*, *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016), *cert. denied sub nom. Sessions v. Binderup*, 582 U.S. 943 (2017); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1003 (2010); *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009). Indeed, in 1988, Congress eliminated a provision for non-discretionary appellate jurisdiction in cases declaring federal statutes unconstitutional. *See United States v. Sperry Corp.*, 493 U.S. 52, 59 & n.5 (1989); H.R. Rep. No. 100-660, at 2, 9 (1988).

neglects—is whether it is likely to prevail on the constitutional issue. It is not, as explained above and as the Fifth Circuit held.

Third, on the equities, the presumption again does little—especially in the context of a law already found invalid by a lower court. The United States does not argue that the presumption would justify ignoring the harms caused by allowing the provisions to remain in effect pending appeal. And whether the government suffers cognizable harm when a law does not take effect (Resp. 7) "largely depend[s]" on whether the statute is unconstitutional—the very merits inquiry glossed over by the United States. *Bays v. City of Fairborn*, 668 F.3d 814, 825 (6th Cir. 2012); *cf. Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 627 n.8 (2020) (plurality op.) ("'[A] legislative act contrary to the constitution is not law' at all." (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

Last, "although some injunctions against government action may implicate the presumption, the notion that *all* such injunctions do so radically overstates—and overenforces—the presumption." S. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 161 n.60 (2019). Here, Respondents do not seek an injunction against enforcement of a federal law—unlike in the United States' lead cases.[37] Instead, a lower court invalidated the law *and* already considered and

[37] *See, e.g.*, *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., in chambers) ("Equally important is the fact that applicants are not merely seeking a stay of a lower court's order, but an injunction against the enforcement of a presumptively valid Act of Congress."); *Wisconsin Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1305–06 (2004) (Rehnquist, C.J., in chambers) ("An injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held BCRA facially

rejected equitable arguments for staying the mandate. In these circumstances, the deference due is to the lower court's stay determination. *See, e.g.*, *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers) ("Certainly the judgment of the lower court, which has considered the matter at length and close at hand, and has found against the applicant both on the merits and on the need for a stay is presumptively correct."); Stephen M. Shapiro et al., *Supreme Court Practice* § 17.13.(C) (10th ed. 2013) ("[A] heavy burden rests on the applicant to demonstrate the need for a stay despite the adverse action below.").

This Court routinely rejects the government's emergency demands to implement unlawful *executive* policies, notwithstanding that the executive's "interpretation of its powers" is also "due great respect." *Nixon*, 418 U.S. at 703; *see, e.g.*, *Biden v. Missouri*, No. 24A173, 2024 WL 3958856, at *1 (U.S. Aug. 28, 2024); *Dep't of Educ. v. Louisiana*, 144 S. Ct. 2507 (2024). The United States does not explain why the Court should shrink from its judicial role in challenges to *legislative* policies and substitute a federal-government-always-wins rule. Letting unlawful policies take effect simply because the government asks would not only favor the (federal) government over other litigants, *see Loper Bright Enters.,* 144 S. Ct. at 2285 (Gorsuch, J., concurring), but also invert our constitutional order. *See Marbury*, 1 Cranch at 177.

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constitutional"); *Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers) ("[A] single member of the Court is asked to delay the will of Congress to put its policies into effect at the time it desires.").

3. The Horsemen face irreparable harm from a stay.

When considering the stay application, this Court must balance the equities, which includes irreparable harm to the Horsemen as well. "It is always in the public interest to prevent the violation of a party's constitutional rights.'" *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (*quoting Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)). In particular, the prospective invasion of their fundamental right against searches without warrants and other criminal procedure rights is an irreparable harm that demands immediate and not delayed relief. *Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009) (on facial challenge to NYPD policy of breathalyzer searches of officers, court finds a preliminary injunction would be appropriate because of irreparable harm from violation of a fundamental constitutional right). *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996) (similar).

Moreover, in the particular context of sporting events, irreparable harm results when horsemen are subject to suspensions, scratches, and other orders barring them and their horses from participating in races. It is impossible in the context of sports to make up a race that is only run once, or to provide financial compensation after-the-fact when there is no way to know where a horse would have placed if allowed to run. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991).[38] A court can no more

[38] *Accord Jackson v. NFL*, 802 F.Supp. 226, 231-35 (D. Minn. 1992); *O.M. by & through Moultrie v. Nat'l Women's Soccer League, LLC*, 544 F.Supp.3d 1063, 1077 (D. Or. 2021); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1057 (C.D. Cal. 1971); *Linseman v. World Hockey Ass'n*, 439 F.Supp. 1315, 1319-20 (D. Conn. 1977).

order a replay of the Super Bowl with a banned player allowed back in than the rerunning of the Belmont Stakes. *Reynolds v. Int'l Amateur Athletic Fed'n*, 112 S. Ct. 2512, 2513 (1992) (Stevens, J., in chambers) (irreparable harm to athlete for exclusion from Olympic trials).

Finally, the Horsemen do not intend to seek the sweeping nationwide injunction that the Authority fears. Fifth Circuit precedent may preclude such an injunction. *See Louisiana v. Becerra*, 20 F.4th 260, 263-64 (5th Cir. 2021). Instead, the Horsemen intend to seek below an injunction that would cover only their members. And to the extent that it has "members nationwide," relief for those members is entirely justified under existing precedent. *Texas v. Becerra*, 623 F. Supp. 3d 696, 738 (N.D. Tex. 2022). Alongside a final judgment, the injunction should provide relief "to the parties before [the court]." *Id*. *C.f. Labrador*, 144 S. Ct. at, 932 (Kavanaugh, J., concurring) ("widespread" relief can be proper when the plaintiff is "an association that has many members").

This is not a case where a district court would unilaterally issue a nationwide injunction; it comes after a decision by a court of appeals. It would also not be a rushed decision like a preliminary injunction; it is a final decision on the merits following a bench trial. And to the extent that the National Horsemen's Association has members in the Sixth and Eighth Circuits, that should not prevent relief. The Horsemen made different arguments than the plaintiffs in those other cases; one cannot say how those courts may have reacted if they heard the case argued differently. *See supra* n.11. When the mandate issues, the district court can consider all these arguments as it

crafts an injunctive order as part of its final decision in this matter, and then the Authority and FTC can appeal an actual order at that point, rather than fighting phantoms now. The Court should deny a stay.

III. If the Court grants certiorari, it should consider a second question presented.

If this Court decides to treat the Authority's emergency application as a concurrent petition for certiorari, App. 4, then the Horsemen ask that the Court take up a second, closely related question: May Congress delegate to a private organization the legislative powers to set fees, write rules, and rewrite rules through guidance?[39]

Just as the executive power of enforcement is invested in the President and the executive agencies responsible to him by Article II, so the legislative power is invested in Congress by Article I. Congress may delegate that power to agencies subject to an intelligible principle. In the same way, this Court held nearly a century ago that Congress or agencies may delegate legislative roles to private organizations, so long as they "operate as an aid to the [agency] but subject to its pervasive surveillance and authority." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). But in the earlier *Carter Coal* case, the Court focused on functions rather than surveillance.

[39] The Horsemen present this argument in response to the Authority's request to treat their emergency application as a cert petition. If the Court decides to decline that request, the Horsemen reserve the right to file a petition or cross-petition in the normal course, recognizing that all parties desire to act promptly to achieve review this term.

Confusion persists in the lower courts on how to interpret and apply these principles in three areas of legislative power: fee-setting, rule-making, and sub-regulatory guidance.

A. The panel decision permits the private delegate the policy discretion to set fees levied on industry participants, which parts ways with other circuit court decisions limiting private delegates to only fee collection.

The Fifth Circuit panel in this case has parted ways with the Sixth and Eleventh Circuits, and even others on the Fifth Circuit, on the power of private delegates to set fees on those they regulate. The setting of taxes, including fees, is a classic exercise of legislative power. *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974).[40]

HISA gives the Authority final say over the fees it sets. Under the Act, the Authority calculates its own initial budget, which must be approved by 2/3rds of the Authority Board. 15 U.S.C. § 3052(f)(1)(C)(iii)(I). In subsequent years, the Authority calculates its own budget, and any budget that goes up by more than five percent over the previous year must be approved by 2/3rds of the Authority Board. *Id.* § 3052(f)(1)(C)(iii)(II). The Act provides *zero* oversight for the FTC in setting the Authority's budget.

Based on that budget, the Authority then divides the revenue burden among the states based on the number of horses running races in each state ("covered starts."). *Id.* § 3052(f)(1)(C). That results in the annual assessment, *i.e.*, fee, levied upon the

[40] Because these fees "do not bestow a benefit on the regulated party not shared by other members of society," they are appropriately labeled taxes, not fees. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223-24 (1989).

state racing commission. *Id.* § 3052(f)(2). The racing commissions may elect to decline to pay the assessment, in which case the Authority assesses the fee directly onto the horsemen and racetracks in the state. *Id.* § 3052(f)(3). When the fee burden increases, the Authority must submit that fact to the FTC, and the FTC must publish a notice in the Federal Register and accept public comment on it, but again the FTC has zero power to do anything substantive under the Act. *Id.* § 3052(f)(1)(C)(iv).

The district court rejected this concern, noting: "On fees—the Authority 'shall' report to the FTC any 'proposed increase' in fees. The proposed increase must then undergo a notice-and-comment period. FTC rules govern how fees are determined and allocated." *Black*, 672 F. Supp. 3d at 247. The court skipped over the most important part: the Authority still sets the actual fees. Yes, the fees are reported to the FTC, and the FTC must approve rules governing how fees are determined and allocated, but the actual decision setting the fee amount is made by the Authority with zero FTC oversight. What each horsemen must pay each year for the privilege of being compelled to associate with the Authority is determined by the Authority alone.[41]

[41] Two weeks after the Horsemen first made this argument, the FTC *sua sponte* adopted a rule claiming oversight of the Authority's budget, which is what leads to the fee that is set. *Procedures for Oversight of the Horseracing Integrity and Safety Authority's Annual Budget*, 88 Fed. Reg. 18034 (March 27, 2023). However, that rule is contrary to the statute's plain text. Indeed, the FTC even admits in the rule preamble that the Authority's budget is not among the eleven enumerated items Congress has empowered it to supervise. 88 Fed. Reg. at 18035 (citing 15 U.S.C. § 3053(a)). A rule that was adopted without notice-and-comment during litigation, can be repealed without notice-and-comment, and is clearly contrary to the text of the statute, cannot save the statute. *See Whitman*, 531 U.S. at 472. This is a facial challenge, and so this Court should limit its consideration to the statute on its face. The FTC's manufactured rule just highlights how unconstitutional the statute is.

The Fifth Circuit did not address this holding by the district court on appeal, yet by affirming the legislative delegation holding, adopted this as well. And that holding is in conflict with the other circuits. Every other circuit to have addressed this question has stated that the private delegate may collect fees, but that the responsible governmental policy-maker must set the fees that are levied on the citizenry.

The Sixth Circuit, considering the Universal Service Fee, found no violation of the private non-delegation doctrine where the private delegate "undertake[s] ministerial functions, such as fee collection." *Consumers' Rsch. v. FCC*, 67 F.4th 773, 795 (6th Cir. 2023). In making this finding, the *Consumers Research* panel quoted from the earlier Sixth Circuit decision upholding HISA. *Oklahoma*, 62 F.4th at 229.[42] Similarly, the Third Circuit upheld allowing a private delegate the "ministerial" function of collecting assessments. *Frame*, 885 F.2d at 1128-29. The Fourth Circuit turned aside a non-delegation challenge where the private entity "has no power to determine the premium payments owed by each coal operator," but only collects the premiums. *Pittston Co.*, 368 F.3d at 396. The SEC also exercises significant control over FINRA's fees. *Bloomberg L.P. v. SEC*, 45 F.4th 462, 471 (D.C. Cir. 2022). Congress itself set the fees for agricultural producers which are turned over to private delegates for marketing purposes. *Goetz v. Glickman*, 920 F. Supp. 1173, 1181 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998) ("Congress has set the amount of the assessments and the Secretary ultimately decides how the funds will be spent.").

[42] The *Oklahoma* Court did not find or even consider that HISA engages in fee setting or fee collection; it was merely summarizing existing principles of law from elsewhere.

In its consideration of the Universal Service Fee, the en banc Fifth Circuit struck down the Act as violative of the private nondelegation doctrine where "FCC regulations provide that USAC's [budget and fee] projections take legal effect without formal FCC approval. FCC has, in effect, given private entities the final say with respect to the size of the USF Tax." *Consumers' Rsch.*, 109 F.4th at 771. In other words, all the other circuit decisions on fees for private delegates permit fee collection but deny the power of fee setting. The Fifth Circuit diverged from these other courts in upholding HISA's legislative delegation, which permits the Authority to set fees.

B. The circuits agree that private delegates may advise on, recommend, and propose rules. The HISA cases split from this standard by upholding a law authorizing the private delegate to write rules and compelling the agency to approve them.

Setting aside the holdings of the HISA cases, the circuits agree on what role a private organization can constitutionally play in rule development. A private organization may "serve as advisors that propose regulations." *Oklahoma*, 62 F.4th at 229 (summarizing earlier decisions). It may "advise on or make policy recommendations to the agency." *Id.*; *see Consumers' Rsch. v. FCC*, 88 F.4th 917, 926 (11th Cir. 2023) (adopting this formula). A private organization may provide "outside party input into agency decision-making processes," such as "fact-gathering" and "advice giving." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004). It may "serve an advisory function." *Frame*, 885 F.2d at 1128-29. Congress can go so far as to "formalize the role of private parties in proposing regulations so long as that role is merely as an aid to a government agency that retains the discretion to

approve, disapprove, or modify" the proposal. *Ass'n of Am. R.R.*, 721 F.3d at 671.[43] What the private delegate may not do is exercise "any authority to make actual decisions or establish or define standards." *Consumer' Rsch.*, 67 F.4th at 796.

These holdings are in sharp contrast with the post-amendment HISA decisions from the Fifth, Sixth, and Eighth Circuits. Under the Act, the Authority "shall establish a horseracing anti-doping and medication control program" (15 U.S.C. § 3055(a)(1)) and the Authority "shall establish a racetrack safety program" (*id.* § 3056(a)(1)). Under the Act, the Authority "shall submit to the Commission. . . any proposed rule, or proposed modification to a rule." *Id.* § 3053(a). The Commission then *shall* approve the proposed rule or modification *in toto* if it "finds that the proposed rule or modification is consistent with this chapter; and applicable rules approved by the Commission." *Id.* § 3053(c)(2). This consistency review is no review at all; it is "arms-length," "high-altitude," "open-ended," and "next to nothing." *NHBPA I*, 53 F.4th at 885. And this is by design: "it is the Authority, not the agency, that is tasked with weighing policies that go into formulating rules." *Id.* at 883.

Even after the amendment, the FTC's review of rules proposed to it remains limited to this rubber-stamp "consistency" review. *See, e.g.*, F.T.C., Order on Anti-Doping and Medication Control Program (March 27, 2023). The three HISA decisions all uphold this consistency review because after-the-fact, once an Authority-drafted

[43]*See, e.g.,* FAA REAUTHORIZATION ACT OF 2018, 115 P.L. 254, 132 Stat. 3186 ("In establishing the database under subsection (a), the Administrator shall consult and collaborate with appropriate stakeholders, including labor organizations (including those representing aviation workers, FAA aviation safety engineers and FAA aviation safety inspectors) and aviation industry stakeholders.").

rule is in place, the FTC can "abrogate, modify, or add to" that rule on its own initiative. *NHBPA II*, 107 F.4th at 425; *Oklahoma*, 62 F.4th at 230; *Wamsley*, 2024 U.S. App. LEXIS 24004, *6. Such an arrangement exceeds what the courts have otherwise countenanced. The exclusive, guaranteed power to have one's rules rubber-stamped into federal law is far more than "advice giving" or a "policy recommendation." It is the power to "establish or define standards" that the Commission must adopt and can only later change. The D.C. Circuit's railroad case approved a privileged position for a private party in rule development as long as the agency "retains the discretion to approve, disapprove, or modify" the proposal. *Ass'n of Am. R.R.*, 721 F.3d at 671. *See NHBPA I*, 53 F.4th at 889 ("the agency in *Adkins* could 'unilaterally change' proposed rules[.]"). But the FTC may not disapprove or modify an Authority proposal. It must either approve or disprove the rule as a whole—after a consistency review—and only later can it run a separate rule-making to abrogate, modify, or add to that which it has been forced to adopt. The three HISA cases part ways with the standard set by numerous other circuits by approving a statute that practically empowers the private delegate to write the rules governing an entire industry.

C. The Fifth and Sixth Circuits are split on whether to permit sub-regulatory guidance from private delegates.

In horseracing as in other regulated industries, what it says in the Federal Register is not the actual extent of "the rules." Rather, agencies use sub-regulatory guidance to rewrite the rules. The same is true with private delegates: they can rewrite the rules through sub-regulatory policy-making, just like an agency would.

This is exactly what HISA authorizes. HISA allows the Authority to submit "guidance" to the Commission, 15 U.S.C. § 3054(g), and such guidance "'shall take effect' upon submission." *NHBPA I*, 53 F.4th at 874, quoting *id*. The Authority also sets policy through even more informal means such as press releases and industry newsletters, which are not formally submitted to the Commission. Similarly, HISA charges the Authority's anti-doping agency to "develop and recommend anti-doping and medication control rules, protocols, policies, and guidelines for approval by the Authority." 15 U.S.C. § 3055(c)(4)(a). In other words, HISA authorizes sub-rule "protocols, policies, and guidelines" that are drafted by a private sub-delegate (the anti-doping agency) and approved not by the FTC, but by the Authority. And indeed, the Authority's rules provide for "technical documents" that give "guidance" as a "supplement" to the FTC-approved anti-doping rule. Authority R. §§ 3110(c), 3112.

The Fifth Circuit upheld HISA's guidance provisions, stating that "[t]he Authority admits such guidance would not have the force of law and, even if it did, the FTC has authority to review guidance documents, § 3054(g)(2), and to promulgate a rule overruling guidance it disagrees with." *NHBPA II*, 107 F.4th at 425 n.6. First off, such guidance does have the practical effect of the rule of law when it governs the Authority's own actions. *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019); *Fort Bend Cnty. v. U.S. Army Corps of Eng'rs*, 59 F.4th 180, 200 (5th Cir. 2023). Second, a contrary rule-making completed two years hence does no good against guidance that, by law, "shall take effect" immediately. 15 U.S.C. § 3054(g)(3). But third, of greatest concern to this Court, the Fifth Circuit has ratified HISA's provisions allowing the

Authority to issue guidance, protocols, policies, guidelines, and technical documents, which is in conflict with the Sixth Circuit's *Consumers Research* decision.

In the Universal Service Fee context, the Sixth Circuit found that the delegation to the Universal Service Administration Corporation does not violate the non-delegation doctrine because USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." *Consumers' Rsch*, 67 F.4th at 796 (quoting *Consumers' Rsch. v. FCC,* 63 F.4th 441, 451-52 (5th Cir. 2023), *vacated for en banc*, 72 F.4th 107) (quoting 47 C.F.R. § 54.702(b)). "[I]f a private entity . . . retains full discretion over any regulations, *Carter Coal* and *Schechter* tell us the answer: that it is an unconstitutional exercise of federal power." *Oklahoma*, 62 F.4th at 229.

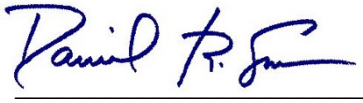
Yet that is precisely what HISA permits: sub-regulatory guidance that makes policy and interprets unclear provisions of the statute and of the rules. Imagine two horsemen. One goes to the Federal Register and reads that toe-grabs (cleats for racehorses) are universally banned in all races. 5th Cir. ROA.3479. *See* 87 Fed. Reg. 435, 444. That is the rule written by the Authority and promulgated by the FTC as "consistent" with the Act. The other horsemen goes to the Authority's website and sees that the Authority has bound its staff via guidance not to enforce the toe-grab rule (Announcement, July 29, 2022, 5th Circuit ROA.3680), and so runs a horse with toe grabs and wins. Has the Authority not exercised final discretion over the regulation and made policy? The Fifth Circuit's ratification of that power is in conflict with the Sixth Circuit's holding disproving such a power for a private delegate.

In sum, if the Court grants the question presented by the Authority and FTC concerning the delegation of executive powers, it should grant a second question presented to resolve the confusion among the circuits on private delegates' exercise of legislative powers as well.

CONCLUSION

For these reasons, the Court should deny a stay. Either now or in due course, it should grant certiorari, including on a second question presented on legislative delegation, and set the case for argument this Term.

Respectfully submitted,



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Dated: September 30, 2024