No. 24A287

In The

Supreme Court of the United States

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

Applicants.

v.

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

REPLY OF HORSERACING INTEGRITY AND SAFETY AUTHORITY ET AL. IN SUPPORT OF APPLICATION FOR A STAY OF THE MANDATE PENDING THE FILING AND DISPOSITION OF A CERTIORARI PETITION

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RULE 29.6 DISCLOSURE

Applicant Horseracing Integrity and Safety Authority, Inc. is a nonstock, nonprofit corporation organized under the General Corporation Law of the State of Delaware. The Horseracing Integrity and Safety Authority, Inc. has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it. No other Applicant is a nongovernmental corporation.

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INTRODUCTION

The case for a stay of the mandate is even stronger now than when the application was filed two weeks ago. In that short time, the Eighth Circuit (Colloton, C.J.) joined the Sixth Circuit (Sutton, C.J.) in affirming the constitutionality of HISA—and in expressly rejecting the Fifth Circuit's outlier ruling that HISA's enforcement provisions facially violate the private-nondelegation doctrine. The Solicitor General immediately filed in support of the stay, and amici (including the bipartisan congressional sponsors of HISA and industry participants) wrote to emphasize the irreparable harms from denial that would "plunge the Thoroughbred industry into regulatory chaos" with "potentially deadly" consequences. And all other respondents have now confirmed that they agree that this Court should grant certiorari. Because this Court can provide a definitive answer governing horseracing nationwide, it should preserve the status quo and avoid massive disruption pending its review this Term. However high the bar for stay relief, the stars have aligned to surmount it here.

Application of this Court's three-factor test confirms that conclusion. First, all parties agree that the Court should grant certiorari (with respondents seeking only to broaden the question presented). Second, despite respondents' mischaracterization of the statutory scheme (as amended to obviate the asserted concerns), there is at least a "fair prospect" that this Court will reverse the Fifth Circuit's facial constitutional ruling contradicting the Sixth and Eighth Circuits' opposite conclusion. Third, respondents offer no good reason to subject the industry and the public to grave health-and-safety risks and regulatory upheaval by allowing

the Fifth Circuit's ruling to displace enforcement of HISA in all *other* circuits pending this Court's review.

Rather than seriously dispute that HISA's implementation has made horses and the humans who ride them safer over the two-plus years that the programs have been in force, respondents argue that stay relief is premature because no nationwide injunction is currently in effect. But in the next breath, respondents admit that immediately upon issuance of the mandate they plan to seek such relief for their 30,000 members nationwide—including in key racing states within the Sixth and Eighth Circuits, even though those circuits have rejected the same facial constitutional challenge. Indeed, given the undisputed fact that HISA does not govern any racing in the Fifth Circuit, the harms respondents speculate they would suffer if the mandate were stayed could arise only *outside* the Fifth Circuit (where their members have been racing for over two years under HISA rules). Based on nationwide relief that respondents say "existing precedent" requires if the mandate were not stayed, different horseracing participants would be subject to different enforcement protocols (or none at all) *in the same races* depending on whether they claim membership in respondents' associations. That scenario is untenable and unworkable—and would lead to chaos, danger, and further legal skirmishes. It is totally unnecessary and unreasonable for this Court and the parties to have to deal with more emergency petitions while the Court reviews a case that all parties agree warrants a grant of certiorari. Instead, the Court should simply maintain the status quo.

The Court should stay the mandate—in full or at least as to operation of the judgment below outside the Fifth Circuit—and either grant review now or await the filing of a certiorari petition forthwith.

ARGUMENT

I. ALL PARTIES AGREE THAT THE COURT SHOULD GRANT CERTIORARI

Respondents' filings confirm the absence of any dispute on the first stay factor: the parties "could not agree more" (Texas Resp. 16) that this Court should and likely will grant certiorari to review the Fifth Circuit's holding that HISA's enforcement provisions facially violate the private-nondelegation clause. Given the intractable conflict between that holding and the Sixth and Eighth Circuits' contrary conclusion, only this Court can provide an authoritative ruling on the nationwide issue of legal and practical importance. Moreover, as the Solicitor General explains (at 7), granting certiorari on the facial constitutionality of HISA's enforcement provisions comports with this Court's "usual" practice where "a lower court has invalidated a federal statute." *Iancu v. Brunetti*, 588 U.S. 388, 392 (2019).

Should the Court treat this application as a petition for certiorari, however, respondents want to complicate things by expanding the question presented to accommodate two more constitutional challenges that every other court has rejected uniformly: (i) whether the Authority's power to propose HISA rules violates the private-nondelegation doctrine; and (ii) whether HISA violates the Appointments Clause. There are good reasons to keep this case simple by declining respondents' "cross-petition" requests.

First, every court that has resolved a parallel challenge to the operative version of HISA—and every single judge sitting on those courts (without exception)—has concluded that "the Act's rulemaking structure does not violate the private nondelegation doctrine." *Walmsley v. Federal Trade Comm'n*, No. 23-2687, --- F.4th ----, 2024 WL 4248221, at *2 (8th Cir. Sept. 20, 2024) ("agree[ing] with the Sixth and Fifth Circuits," the Eastern District of Arkansas, and the Northern District of Texas); *see Oklahoma v. United States*, 62 F.4th 221, 228-231 (6th Cir. 2023); Appl. App. 8a-12a, 71a-85a. That consensus follows from the straightforward application of the established agency-subordination standard that respondents embraced below. *See, e.g.*, Texas Opening Br. 2 (Jul. 5, 2023), C.A. Doc. 74 (explaining "the Authority must 'function subordinately' to the FTC" to meet the private-nondelegation standard). It comports with this Court's precedent. *See* Appl. App. 71a (explaining that *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), "lay the foundation for our modern nondelegation doctrine"). And it fits alongside the unbroken line of decisions by the courts of appeals upholding the materially identical Maloney Act. *See Oklahoma*, 62 F.4th at 229; Appl. App. 12a.

Second, respondents Gulf Coast Racing LLC and other Texas-based racetracks are alone in requesting that the Court consider an extreme Appointments Clause claim that even the other respondents have acknowledged is "'fundamentally incompatible' with [the] private nondelegation challenge." Appl. App. 32a. But no one disputes that those racetracks have never been subject to HISA rules given Texas's decision to bar the out-of-state transmission of races. *See* Appl. 7, 24. Even

setting aside potential standing and ripeness problems, all courts faced with the same academic argument about the Appointments Clause have shot it down. *Walmsley*, 2024 WL 4248221, at *5 ("We agree with the Fifth Circuit that the Act does not conflict with the Appointments Clause."); Appl. App. 31a-37a, 58a-71a; *Oklahoma v. United States*, No. 5:21-cv-104-JMH, 2022 WL 1913419, at *11 (E.D. Ky. June 3, 2022). Gulf Coast's unilateral attempt to "bypass" this Court's well-established precedent is "a dead end" that plainly does not warrant this Court's review. Appl. App. 35a.

To the extent the Court treats this application as a certiorari petition, it should grant certiorari on the straightforward question that everyone agrees requires review: whether HISA's enforcement provisions facially violate the private-nondelegation doctrine. Any uncertainty about the proper scope of the question presented, however, only underscores the need for a stay of the mandate while the parties brief certiorari in the normal course. A stay would keep the status quo in place nationwide and allow the Court to consider those petitions in tandem with the rehearing petition filed by the Sixth Circuit challengers in *Oklahoma v. United States*, No. 23-402 (U.S. July 18, 2024).[1]

[1] The Eighth Circuit challengers may file a certiorari petition forthwith in *Walmsley*, too, but that case arises in a preliminary-injunction context. As the Solicitor General notes (at 11), the government has also filed a certiorari petition in *FCC v. Consumers' Research*, No. 24-354 (U.S. Sept. 30, 2024). But that case, which raises *public*-nondelegation issues and distinct private-nondelegation issues concerning agency *sub*delegation, does not affect the need for certiorari that all parties (including the Solicitor General) agree is warranted in this case. Granting a stay of the mandate would allow the Court to sort out these overlapping matters with time to resolve the granted case(s) this Term.

II. TWO CIRCUITS HAVE NOW EXPRESSLY DISAGREED WITH THE FIFTH CIRCUIT'S HOLDING AND DEMONSTRATE AT LEAST A "FAIR CHANCE" OF SUCCESS ON THE MERITS

Respondents concede that they are asking this Court to embrace a facial constitutional challenge to a federal statute that both the Sixth Circuit and now the Eighth Circuit have squarely rejected. "[G]iven the considered analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision below." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). As Chief Judge Sutton and Chief Judge Colloton explained, HISA—as amended in direct response to private-nondelegation concerns—"gives [the FTC] 'pervasive oversight and control of the Authority's enforcement activities,'" and thus its "enforcement provisions are not unconstitutional on their face and in all of their applications." *Walmsley*, 2024 WL 4248221, at *4 (quoting *Oklahoma*, 62 F.4th at 231).

a. Largely ignoring the Sixth and Eighth Circuits' holdings, respondents try to defend the one outlier holding of the Fifth Circuit's decision in their favor—including by urging this Court to adopt novel constitutional tests no court has ever applied. The Court is unlikely to do so.

Below, Texas argued that "[t]he Authority must function as a subordinate aid to the FTC to satisfy the constitutional test" under the private-nondelegation doctrine. Texas Opening Br. 22 (Jul. 5, 2023), C.A. Doc. 74; *see id.* at 2 ("Because the Authority continues not to serve as the FTC's subordinate, the district court erred in concluding that Congress fixed HISA's constitutional problem."). Now, Texas says that "ask[ing] whether the Authority 'functions subordinately to an agency with

authority and surveillance over it'" is an "imperfect" and "wrong[]" test. Texas Resp. 17-18, 33. Under its newfound view, the FTC's oversight is not "relevant" because Congress cannot confer any power, whether with respect to enforcement or rulemaking, on private entities "*at all*—no matter how they are supervised." *Id.* at 18, 21.

Texas was right before. As the Horsemen acknowledge, "[t]he Fifth Circuit followed established precedent from this Court and other circuits in asking whether the FTC exercises pervasive surveillance and control over the Authority." NHBPA Resp. 17. There is no "widespread confusion" on that point. Texas Resp. 33. While courts and commentators may "differ over the locus of the constitutional violation" animating private-nondelegation claims in other contexts, *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 881 n.23 (5th Cir. 2022), all parties and courts across every such challenge to HISA have "agree[d] that the outcome turns on whether the private entity is subordinate to the agency," *id.*; *see* Appl. App. 8a-10a, 15a; *Walmsley*, 2024 WL 4248221, at *2 ("Where a private entity is subordinate to a governmental body, *** Congress may assign certain tasks to the entity."); *Oklahoma*, 62 F.4th at 229 ("As the case comes to us, then, the determinative question is whether the Horseracing Authority is inferior to the FTC."). In light of that consensus on the governing standard, not to mention the "principle of party presentation," *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020), it is

likely that this Court will apply the subordination test rather than accept Texas's novel theory.[2]

b. To the extent respondents confront the Sixth and Eighth Circuits' holdings that HISA gives the FTC "broad power to subordinate the Authority's enforcement activities," *Walmsley*, 2024 WL 4248221, at *4, respondents fail to justify the facial nature of their claim—and instead criticize Applicants and the Solicitor General for "dwell[ing]" on that point, NHBPA Resp. 14. But just last Term, Texas successfully advocated for a "demanding standard" under which a categorical pre-enforcement attack must fail unless the statute is shown to be necessarily unconstitutional in "all of its applications." Br. for Resp't 11-12, *NetChoice, LLC v. Paxton*, No. 22-555 (U.S. Jan. 16, 2024). Now, respondents substitute that appropriately stringent standard for a nose-counting test where "just 13 cases" of acknowledged FTC *de novo* review are deemed numerically inadequate and where real-world examples are brushed aside as "micro-level." Texas Resp. 22.

Respondents rationalize that approach by saying the "problem is with HISA's *structure*," so that "[w]hat the Authority does" is "beside the point." Texas Resp. 25; *see* NHBPA Resp. 14. But respondents are not harmed in any concrete way by certain

[2] Respondent Gulf Coast advocates for an even more radical "alternative" approach whereby any private organization that exercises "significant authority" under federal law triggers the Constitution's Appointments Clause—no matter whether its activities are comprehensively overseen and approved by a federal agency. Gulf Coast Resp. 2; *see id.* at 14 ("Subordination does not matter to this analysis."). For reasons already explained (pp. 4-5, *supra*), the Court should not entertain that unprecedented argument rejected by every judge to have considered it.

activities the Authority (or FTC) has *never* undertaken (or even threatened). Inviting a judicial pronouncement on idle statutory powers stretches beyond "the limits of the federal courts' constitutional authority to decide only actual 'Cases' and 'Controversies.'" *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2428 (2024) (Alito, J., concurring in the judgment).

That flawed approach causes respondents to repeat the Fifth Circuit's errors in focusing on hypothetical concerns over isolated provisions never invoked—like those relating to "issuing subpoenas" (Texas Resp. 19) and "initiat[ing] civil actions in federal district court to enforce the law" (NHBPA Resp. 12)—to declare *all* enforcement provisions (including perfectly mundane yet critical ones) facially invalid. Respondents also rely on generalized fears about potential activities that are untethered to any HISA provision (*e.g.*, unexplained "informal discipline," *id.* at 15) or that the Authority may *decline* to exercise (*e.g.*, "if no charges are filed," *id.*). That respondents' kitchen-sink conjecture sweeps in uncertain "inaction" by the Authority to somehow prove a "lack of oversight" by the FTC over enforcement actions the Authority does take, *id.*, only underscores that the Fifth Circuit's decision left respondents "slaying a straw man." *United States v. Rahimi*, 144 S. Ct. 1889, 1903 (2024); *see Walmsley*, 2024 WL 4248221, at *4 ("In evaluating a facial challenge, we must consider circumstances in which the statute is most likely to be constitutional, not hypothetical scenarios in which the statutory scheme might raise constitutional concerns.").

Worse yet, respondents brandish the facial nature of their challenge as a shield. For example, unable to refute the reality that the FTC can wield its power over the Authority's budget to steer or restrict enforcement decisions, *see* Appl. 19, the Horsemen argue that the Court must "limit its consideration to the statute on its face" and turn a blind eye to the federal regulation that "the FTC *sua sponte* adopted." NHBPA Resp. 38 n.41. Of course, the Horsemen are free to bring an as-applied challenge to the FTC's budget rule if they believe the agency has exercised *too much* control over the Authority, but they cannot leverage that same concern to claim facially that the FTC has *too little* control under the Act. *See id.* at 37 (alleging HISA "provides *zero* oversight for the FTC in setting the Authority's budget").

c. Like the Fifth Circuit, respondents' improper approach to the facial challenge infects their treatment of the merits.

The Eighth Circuit "agree[d] 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.'" *Walmsley*, 2024 WL 4248221, at *4 (quoting *Oklahoma*, 62 F.4th at 231). Respondents resist that conclusion by arguing that any such FTC rule would improperly "expand [the FTC's] supervisory role by administrative fiat." Texas Resp. 24; *see* NHBPA Resp. 13 (arguing that "an agency may not use its rule-making powers to make basic and fundamental changes to a statute"). But the FTC need not "rewrite the statute" (NHBPA Resp. 15): As Chief Judge Colloton explained just a few days ago, "[t]o subordinate the Authority's enforcement activity, *** the Commission need

only work within the structure of the Act as designed, not create a new statutory regime." *Walmsley*, 2024 WL 4248221, at *4. After all, in an amendment specifically designed to obviate private-nondelegation concerns (McConnell Br. 8-9), Congress conferred plenary rulemaking power on the FTC to strengthen "Federal Trade Commission oversight" over the "fair administration of the Authority" and the Act's "purposes"—and those purposes include "implement[ing] and enforc[ing] the horseracing anti-doping and medication control program and the racetrack safety program." 15 U.S.C. §§ 3053(e), 3054(a).

Although "[t]hat potential suffices to defeat [this] facial challenge," *Oklahoma*, 62 F.4th at 231, one need not "speculate that the FTC could adopt a rule giving itself some role in enforcement oversight," NHBPA Resp. 13. The FTC already has promulgated such rules. *E.g.*, 89 Fed. Reg. 66,546 (Aug. 16, 2024) (facilitating oversight with respect to, for example, "investigations conducted" and "sanctions imposed"); 88 Fed. Reg. 18,034 (Mar. 27, 2023) (providing that the FTC may modify and must approve the Authority's budget, roughly half of which directs enforcement). Respondents simply disregard those real-world illustrations. There is more than a "fair chance" that a majority of this Court will follow the Sixth and Eighth Circuits in refusing to trample the presumption of regularity, ignore the constitutional-avoidance canon, and blow past the facial-challenge constraints. *See Walmsley*, 2024 WL 4248221, at *4 ("In considering this facial challenge, we should 'avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.'" (quoting *Gomez v.*

United States, 490 U.S. 858, 864 (1989)); *see also United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("presumption of regularity attaches to the actions of Government agencies").

Beyond that central defect, respondents' briefs are littered with mistaken assumptions that Applicants can address in merits briefing. To take just one example: respondents minimize the significance of the FTC's review of Authority decisions by speculating that (hypothetical) parties will "buckle" before agency review occurs or that sanctions will be enforced "*in the interim*." Texas Resp. 23; *see also* NHBPA Resp. 16. But that bald conjecture ignores the concrete instances Applicants cited showing precisely the opposite. *See* Appl. 16, 21-22 (discussing enforcement decisions that were stayed pending FTC review, including with respect to alleged crop violation). That the FTC has already exercised its "power to review the Authority's enforcement actions and to reverse them," *Walmsley*, 2024 WL 4248221, at *4—including the power to stay Authority decisions to prevent them from taking effect—is fatal to this facial challenge.

III. THE EQUITIES OVERWHELMINGLY FAVOR A STAY OF THE MANDATE

a. As the application explains, a stay of the mandate is necessary to prevent the serious health-and-safety risks and regulatory upheaval that would result from allowing the Fifth Circuit's judgment to displace enforcement of HISA in all other circuits pending this Court's review. *See* Appl. 23-32. The judgment's facial nature makes those harms imminent because the immediate "effect of the Fifth Circuit's decision is 'akin to a universal injunction.'" Thoroughbred Industry Br. 10 (quoting

NetChoice, LLC, 144 S. Ct. at 2416 (Thomas, J., concurring in the judgment)). The Horsemen stand alone in arguing that those harms are "imagined." NHBPA Resp. 3; *contra* Texas Resp. 4 (acknowledging "very weighty" harms from allowing mandate to issue (citation omitted)). According to the Horsemen, any harm "stem[s] from hypothetical injunctive relief" and should be ignored (for now) because "this request is for a stay of the mandate, not a stay of an injunction." NHBPA Resp. 3, 10.

To be sure, the Horsemen are correct on the technical point that the Fifth Circuit did not itself impose an injunction. But their characterization of "hypothetical harms," NHBPA Resp. 9, is undermined by their subsequent acknowledgment that they "intend to seek below an injunction that would cover *** their members" who race across the country, *id.* at 35. They insist that nationwide relief "for those members is entirely justified under existing precedent." *Id.* (citing *Texas v. Becerra*, 623 F. Supp. 3d 696, 738 (N.D. Tex. 2022)). And lest there were any doubt, the Horsemen confirm that "to the extent that the National Horsemen's Association has members in the Sixth and Eighth Circuits, that should not prevent relief" there, *id.*—even though those circuits have rejected the same facial constitutional challenges.

Given that the National Horsemen's Association boasts "30,000 members" "nationwide," NHBPA Resp. 2, 27, their plan (announced publicly to the industry) brings into sharp focus that issuance of the Fifth Circuit's mandate would undermine virtually every HISA-covered race nationwide. As other racing participants warn, "the blast radius of the Fifth Circuit's decision is as broad as possible—it will destabilize Thoroughbred horseracing nationwide" without a stay. Thoroughbred

Industry Br. 10. At a minimum, it would mean that the rules governing HISA races may be enforced only as to certain horses but not others *in the same race* depending on whether the trainers, owners, or jockeys claim membership in the NHBPA. Those members could, without any fear of repercussions, cheat or dope. That is no more tenable than if the NFL enforced rules against helmet-to-helmet hits or use of performance-enhancing substances only with respect to one team and not the other, or if NBA officials called fouls on only half the players. "That scenario would wreak havoc on the sport," "undermine the integrity of racing in several respects," and "necessarily lead to a decrease in betting by the public, which is the economic driver of the entire thoroughbred horseracing industry." Stay Mot., Exh. 1 ¶ 15 (Sept. 16, 2024), C.A. Doc. 214 (Lazarus Declaration).

Alternatively, as the industry press has warned, issuance of the Fifth Circuit mandate would result in a complete regulatory vacuum where there is no enforcement of horseracing rules in any covered races for any participants. *See* Dan Ross, *Lucinda Finley Q&A on the Fifth Circuit Bombshell*, THOROUGHBRED DAILY NEWS (July 7, 2024) (predicting "Wild West" where "nobody can enforce the rules").[3] Although respondents claim "many states are anxious for the return for their historic regulatory authority over this industry," NHBPA Resp. 23, the States will not be "enforcing their own laws" even if the Fifth Circuit's mandate issues, Texas Resp. 30. Rather, as amici explain, the Fifth Circuit (and every other court) "held that HISA's rulemaking provisions are constitutional, *** and HISA-promulgated rules preempt

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

state rules governing racetrack safety and medication control." Thoroughbred Industry Br. 11.

Accordingly, even if State racing commissions could suddenly overcome tremendous operational challenges, *contra* Appl. 27-28, respondents' assertions that "many" States "have sought to have HISA declared unconstitutional," Texas Resp. 30; *see* NHBPA Resp. 5 n.2, gives lie to any suggestion that every State would be willing to enforce the still-preempting HISA rules. *See* Texas Resp. 30 (arguing that States "can determine 'what is best for them'" (citation omitted)). All of this confirms what the industry already knows: "leaving the enforcement of federal rules solely in the hands of state racing commissions is not a viable alternative"—particularly given that "Congress passed HISA in part because state racing commissions could not fairly and uniformly enforce horseracing regulations on their own." Thoroughbred Industry Br. 11; *see* McConnell Br. 6-7 (observing that patchwork of state regulation "was (or would be again) fertile ground for strategic behavior, with disastrous results for horses, jockeys, and the industry").

Respondents' position only portends that the industry will be engulfed in paralyzing uncertainty and emergency motions—all while barreling toward the Breeders' Cup, one of horseracing's most significant events. *See* Lazarus Declaration, *supra*, ¶ 16. If respondents truly do not seek to leverage the Fifth Circuit judgment into nationwide relief, including in prominent racing states within the Sixth and Eighth Circuits, then they would suffer no harm from a stay of the mandate as to operation of the judgment outside the Fifth Circuit (the only places where HISA

currently operates). The Court should grant at least that limited but critical relief to ensure the status quo pending this Court's further resolution of the case. There is no point to wasting more judicial resources to continue litigating fraught issues over the scope of the Fifth Circuit's judgment—leaving a cloud of turmoil hanging over the industry—when the Court (after nearly 200 pages of emergency briefing) can grant a limited stay pending its review of a question that all parties agree merits immediate attention.

b. The HISA regime is "firmly embedded into the Thoroughbred industry and is already yielding substantial benefits—racetrack conditions are improving, equine fatality rates are declining, and wagers from racing fans are increasing." Thoroughbred Industry Br. 2; *see* Lazarus Declaration, *supra*, ¶¶ 4, 7-10. Attempting to manufacture a "hot dispute" over those objective facts, the Horsemen play fast and loose with statistics. NHBPA Resp. 28. In 2023, "the first full year of HISA implementation," *id.*, the racing-related equine fatality rate at *HISA-covered* tracks was 1.23 per 1,000 starts—*below the overall rate in any prior year*. Press Release, *HISA Releases 2023 Annual Metrics Report* (Apr. 3, 2024).[4] The higher number the Horsemen cite (1.32) is the overall rate at *all* tracks nationwide—which increased in 2023 because the rate at *non-HISA* tracks rose to 1.63 deaths per 1,000 starts that year. *Id.* Respondents do not (and cannot) dispute that the divergence between fatality rates at covered and non-covered racetracks has grown even more substantial this year—showing a nearly 50% reduction in fatality rates at covered tracks since

[4] https://hisaus.org/news/hisa-releases-2023-annual-metrics-report.

HISA's implementation. *See* Press Release, *HISA Publishes 2024 Second Quarter Metrics Report* (July 26, 2024) (announcing equine racing-related fatality rate of 0.76 deaths per 1,000 starts at covered tracks in latest quarter);[5] Appl. 24 (explaining equine racing-related fatality rate at HISA-covered tracks is less than one-third the rate at non-covered tracks in Texas and West Virginia in first half of 2024). Even among those who believe the regime "has its flaws," "[t]here's no denying HISA's impact in making the industry safer." C.L. Brown, *Horse Racing Needs Unity, But Road To Getting There May Be Long As Battles Continue*, LOUISVILLE COURIER J. (July 9, 2024).[6]

Faced with that reality, respondents seek to inject confusion about the harms the Authority and the FTC will suffer. For example, Texas uses the fact that the Authority has never issued a subpoena or filed a civil lawsuit to suggest that "Applicants have no intention of exercising" any of HISA's enforcement provisions. Texas Resp. 28. So, according to Texas, "there can be no irreparable harm in preventing them." *Id.* That could not be more wrong. Although the Fifth Circuit improperly focused on two statutory provisions that the Authority and the FTC have never invoked (and that could be easily severed), the Court facially invalidated *all* of HISA's enforcement provisions—including uncontroversial ones that are core to the Authority's congressionally mandated mission. Allowing the mandate to issue would devastate the Authority's ability to carry out its central responsibilities and imperil

[5] https://hisaus.org/news/hisa-publishes-2024-second-quarter-metrics-report.

[6] https://perma.cc/KR9G-9A6E.

the programs it has dedicated countless time and resources to establishing. *See, e.g.*, Lazarus Declaration, *supra*, ¶¶ 3, 11.

The Horsemen include (at 23-26) a belabored discussion of a supposed "pattern of behavior" by the Authority and the FTC to suggest that arresting enforcement of the Act would not be significant. For example, they highlight a decision in 2022 to "partially reverse[]" a rule in response to respondents' expressed concerns, NHBPA Resp. 24, and a decision in May 2023 to delay the rollout of the anti-doping program ahead of the Triple Crown races, *id.* at 26. Those deliberate actions at the inception of HISA's regulatory programs—taken in different circumstances to minimize the "risk of errors, confusion, and inconsistent treatment of similarly situated horses," 88 Fed. Reg. 27,894, 27,895 (May 3, 2023)—hardly justify abruptly displacing the "reliance on HISA's implementation" that is now firmly settled after more than two years of the Act's enforcement, Thoroughbred Industry Br. 13.

Finally, while the Solicitor General explains that the "presumption of constitutionality" is "an equity to be considered in favor of applicants," Fed. Resp. 7 (citation omitted), respondents turn that principle on its head. Texas claims "that rule favors *Texas* *** because HISA purports to strip Texas of its ability" to effectuate State law. Texas Resp. 28. But as explained, assuming Texas elects to broadcast its racing signal inter-state so as to trigger HISA's operation, State law will be preempted regardless of whether the mandate issues or is stayed—the only question is whether to stop enforcement of the still-valid federal rules. Meanwhile, the Horsemen claim that "invocation of the presumption is particularly misplaced here"

because Congress amended HISA in response to private-nondelegation concerns. NHBPA Resp. 30. That is an odd takeaway from the remarkably "constructive exchanges between Congress and the federal courts" that led the Sixth Circuit to observe that "[s]ometimes government works." *Oklahoma*, 62 F.4th at 225; *see Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality.").

c. The serious harms flowing from issuance of the mandate are not outweighed by any of the concerns offered on the other side of the balance. For starters, Texas does not assert *any* harms to the State from a stay of the mandate. *See* Texas Resp. 28-31. That is unsurprising: HISA does not currently govern races in Texas (or anywhere else in the Fifth Circuit).

Gulf Coast and the Horsemen, for their part, pitch (verbatim) the possibility of being "subject to suspensions, scratches, and other orders barring them and their horses from participating in races." Gulf Coast Resp. 26; NHBPA Resp. 34. Tellingly, though, they (still) do not point to any specific enforcement action actually threatened against them or their members. *See* NHBPA Resp. 27-28 (relying instead on generalized fears and same contested allegations involving nonparties on which the Fifth Circuit improperly relied). Nor do respondents confront the reality that, if they or their members face a sanction for a future violation of HISA rules, they could challenge such enforcement through the orderly process Congress mandated—including by requesting a stay (from the Authority or from the FTC) to prevent any

sanction from taking effect, as other horseracing participants have successfully done. *See* Appl. 32.

Respondents' concern that they may be forced to comply with rules found to be unconstitutional is doubly misplaced. *See* NHBPA Resp. 34; Gulf Coast Resp. 26-27. First, as discussed, every court to consider HISA's rulemaking provisions has confirmed that the federal rules are constitutional. The substantive validity of individual rules on "searches," "interrogations," and "blood draws" (Gulf Coast Resp. 27) is not in question; a stay of the mandate will only dictate whether those rules may be enforced. Second, and more importantly, it is undisputed that respondents are not subject to HISA rules in the Fifth Circuit—*i.e.*, the only circuit that has found HISA's enforcement provisions unconstitutional. Respondents' claimed harms confirm their expectation that the judgment below would extend outside the Fifth Circuit—displacing the constitutional rulings of the Sixth and Eighth Circuits in key horseracing states like Kentucky and Arkansas.

Gulf Coast alone asserts harm from "compliance costs." Gulf Coast Resp. 27-28. But again, the Texas-based tracks and Texas Horsemen's Partnership are not (and have not been) subject to HISA, which does not govern races in Texas. That may be why Gulf Coast wrote the exact same paragraph, word for word, about purportedly imminent and irreparable harm *over eighteen months ago*. ROA.5600. The truth is that the industry members who actually participate in races covered by HISA "adjusted to this regime" long ago. Thoroughbred Industry Br. 9. Gulf Coast further argues that they and other racetracks in Texas "suffer at the hands of the Authority's

bar on the out-of-state export of racing simulcast signals." Gulf Coast Resp. 28. Not so: Any such harm is "due to the decision not to simulcast" that Texas voluntarily made, not any action by the Authority. Texas Resp. 11. Every other State that hosts Thoroughbred racing faced the same "cho[ic]e" and decided to allow the transmission of an interstate signal to enable out-of-state wagering; Texas "opted" not to do so. *Id.* In any event, as with all of respondents' other alleged harms, the simulcast issue in Texas provides no basis for opposing a stay of the mandate at least as to operation of the judgment outside the Fifth Circuit.

CONCLUSION

The Court should stay the Fifth Circuit's mandate, at least as to operation of the judgment outside the Fifth Circuit, pending the consideration and disposition of the forthcoming petition for a writ of certiorari and any further proceedings in this Court. In addition, the Court may wish to construe this application as a petition for a writ of certiorari and grant certiorari on whether HISA's enforcement provisions facially violate the private-nondelegation doctrine.

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