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 STATE OF TEXAS AND THE TEXAS RACING COMMISSION IN OPPOSITION TO APPLICATION TO STAY THE MANDATE

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INTRODUCTION

Applicants proclaim (at 1) that the Horseracing Integrity and Safety Act ("HISA"), which empowers the Horseracing Integrity and Safety Authority (the "Authority") to create, enforce, and adjudicate federal horseracing regulations, is proof that "government works." But the Authority is not a federal agency at all—it is *private*. If empowering a private entity operating outside of constitutional safeguards to exercise sovereign authority counts as a success story, it is hard to imagine what failure looks like.

Horseracing has a long and colorful history.[1] And for almost as long as professionals have done it, there have been debates about the conditions under which horseracing should be allowed.[2] For more than two centuries, the States alone have regulated this industry.[3] At the end of 2020, however, Congress enacted HISA, 15 U.S.C. §§3051-60, to nationalize standards regarding track conditions and the use of certain medications in the Thoroughbred horseracing industry. Unable to reach consensus about what those federal standards should be, Congress instead merely created a rough blueprint for regulation. And rather than giving authority to "fill up the details" to a federal agency, *Gundy v. United States*, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting) (citation omitted), Congress entrusted that awesome power to a private entity: the Authority.

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[1] Joan S. Howland, *Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 Marq. Sports L. Rev. 473, 485 (2004); *see also, e.g.*, Samuel Eliot Morison, The Oxford History of the American People 70, 148-49, 471, 669, 786-87 (1965).

[2] *See, e.g.*, W.G.S., *Racing in Colonial Virginia*, 2, no. 3, Va. Mag. Hist. & Bio. 293, 293-94 (1895) (tracing disputes over the fairness for horseracing back to at least 1677).

[3] *See, e.g.*, Howland, *supra*, at 491 & n.137 (citing 1 John Hervey, *Racing in America, 1665-1865*, at 227 (1944)).

Newly created, that Authority had no history of regulating horseracing, and with members privately selected, the Authority lacks the Constitution's "checkpoints" designed "[t]o ensure the Government remains accountable to the public." *Texas v. Comm'r for Internal Revenue* (*CIR*), 142 S.Ct. 1308, 1309 (2022) (Alito, J., concurring in denial of review). No wonder the Fifth Circuit has twice declared that HISA flunks the private-nondelegation doctrine. *See* App.29a; *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* (*NHBPA I*), 53 F.4th 869, 890 (5th Cir. 2022). After all, "handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'" *Dep't of Transp. v. Ass'n of Am. Railroads* (*Amtrak II*), 575 U.S. 43, 62 (2015) (Alito, J., concurring) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)).

The basis of the private-nondelegation doctrine is straightforward. When "the People"—"the fountainhead of all government power"—ratified the Constitution in 1789 and thereby "delegated some of that power to the federal government so that it would protect rights and promote the common good," *Jarkesy v. SEC*, 34 F.4th 446, 459 (5th Cir. 2022), *aff'd on other grounds*, 144 S.Ct. 2117 (2024), they insisted that "[a]ll legislative Powers [t]herein granted shall be vested in a Congress," U.S. Const. art. I, § 1, and that "[t]he executive Power shall be vested in a President," *id.* art. II, §1; *see also Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020). By handing off sovereign authority to set and enforce rules governing private conduct, Congress violated both Vesting Clauses.

After the Fifth Circuit concluded that HISA's grant of rulemaking power to the Authority violates the Constitution, Congress amended HISA to give the FTC additional power to oversee the Authority's rulemaking process. Bound by circuit precedent, the Fifth Circuit concluded that that amendment cured HISA's unconstitutionality with respect to

rulemaking. The Fifth Circuit, however, also concluded that nothing about that amendment salvages HISA's grant of enforcement power to the Authority. After all, because Article II's "executive Power"—*all of it*—belongs to the President alone, Congress cannot vest power to enforce federal law in a private entity that the President cannot control.

The State of Texas and the Texas Racing Commission (collectively, "Texas") agree "that this case presents an important separation-of-powers question," *CIR*, 142 S.Ct. at 1309 (Alito, J., concurring in denial of review)—indeed, *two* such questions[4]—and thus merits this Court's prompt attention without requiring the ordinarily months-long certiorari process, *cf. Labrador v. Poe ex rel. Poe*, 144 S.Ct. 921, 932 (2024) (Kavanaugh, J., concurring) (listing an expedited certiorari process as one of the tools available to quickly resolve the lawfulness of significant federal statutes). The Court, however, should deny the Authority's application insofar as it seeks a stay of the Fifth Circuit's mandate. The Fifth Circuit did not err by upholding the bedrock separation-of-powers rule that the President alone can execute the law. The Fifth Circuit's only error was not going further and concluding that even more of HISA is unconstitutional.

As is often the case with this Court's emergency docket, the "State[] and other parties" present—which collectively represent every major constituency with respect to horseracing—"seek to [halt] the enforcement of a federal regulation against them." *Ohio v.*

[4] To the extent Applicants suggest (at 1, 4) that Texas has "acquiesce[d]" in their request for certiorari on *only* the question of the Authority's *enforcement* authority, that is inaccurate. Counsel for Applicants opted to conference with only a subset of Respondents. Had they put this question directly to Texas, counsel would have been informed that Texas would "acquiesce" to their preferred question only if they agreed that the constitutionality of the Authority's *rulemaking* authority should be heard at the same time.

EPA, 144 S.Ct. 2040, 2052 (2024) (quoting *Labrador*, 144 S.Ct. at 929)). And "the harms [are] … very weighty on both sides," *id.*, involving question ranging from the safety of horses to the livelihoods of their riders to the ability of not one but two sovereigns to enforce their laws. Under such circumstances, the Court's "resolution of [this] stay request[] ultimately turns on the merits." *Id.* at 2053. As Respondents are "likely to likely to prevail at the end of this litigation," *id.*, the Court should grant certiorari on both significant constitutional questions presented by this litigation while denying a stay.

STATEMENT OF THE CASE

I. Horseracing Integrity and Safety Act

A. The Authority

Bucking more than 200 years of history, Congress in 2020 decided for the first time that horseracing should be regulated at the national level, despite a significant decline in fatal equine injuries over the previous decade.[5] Specifically, Congress enacted HISA as part of the must-pass Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, §§1201-12, 134 Stat. 1182, 3252-75 (2020) (codified at 15 U.S.C. §§3051-60). HISA is intended to broadly regulate every aspect of the horseracing industry, encompassing:

- "all trainers, owners, breeders, jockeys, racetracks, veterinarians, persons (legal and natural) licensed by a State racing commission and the agents, assigns, and employees of such persons and other horse support personnel who are engaged in the care, training, or racing of covered horses," 15 U.S.C. §3051(6);

[5] *See* Supplemental Tables of Equine Injury Database Statistics for Thoroughbreds, https://jockeyclub.com/pdfs/eid_11_year_tables.pdf (cited in H.R. Rep. No. 116-554, at 17 n.1 (2020)).

- "any Thoroughbred horse, or any other horse made subject to this chapter by election of the applicable State racing commission or the breed governing organization for such horse," *id.* §3051(4); and
- "any horserace involving covered horses that has a substantial relation to interstate commerce, including any Thoroughbred horserace that is the subject of interstate off-track or advance deposit wagers," *id.* §3051(5).

Although currently limited to Thoroughbreds, moreover, HISA can be extended further: A state racing commission and other such entities may ask to have another breed covered by HISA, without any input from Congress and subject only to the Authority's approval. *Id.* §3054(l). As Applicants have noted (at 7), though this latter option has not yet been invoked, HISA's jurisdiction extends to over 67,000 horses and 35,000 individuals.

Unfortunately, although Congress concluded that there should be nationwide standards, it bypassed the Constitution's "careful design … for making law," neither setting those standards itself in HISA nor even requiring a federal agency to do so. *CIR*, 142 S.Ct. at 1309 (Alito, J., concurring in denial of review). Instead, Congress gave that "sweeping" power, *NHBPA I*, 53 F.4th at 882, to the Authority, a "private, independent, self-regulatory, nonprofit corporation," 15 U.S.C. §3052(a), that was incorporated in anticipation of HISA's passage, ROA.4223-28 (incorporation), 4229-51 (bylaws).[6] The Authority is governed by a nine-member Board of Directors, none of whom is appointed or removable by the President or any other federal official. *See* 15 U.S.C. §3052(b), (d); ROA.4236 (removal process).

Nor is the Authority funded by appropriations from Congress. *See* 15 U.S.C. §3052(f)(5). Instead, it charges fees allocated against each State. *See id.* §3052(f)(2). At the

[6] "ROA" refers to the paginated record on appeal on file with the Fifth Circuit.

State's putative option, a state racing commission—state entities that traditionally have been tasked with overseeing horseracing—may collect and remit the required fees to the Authority or, if the state racing commission declines, the Authority will collect the fees directly from covered persons within the State. *Id.* §3052(f)(2), (3). If a state racing commission refuses to remit fees to the Authority, however, HISA may strip it of the power to "impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack[-]safety matters for covered horseraces," *id.* §3052(f)(3)(D)—effectively neutering most such commissions' ability to perform the functions traditionally assigned to them by their States' respective legislatures, *see* Petition for a Writ of Certiorari at 28-29, *Oklahoma v. United States*, No. 23-402 (U.S. Oct. 13, 2023).

B. The Authority's Rulemaking Powers

1. In HISA, Congress empowered the Authority to create an entire regulatory regime to govern an industry that has been an "integral part of Texas culture"—as well as that of other States—"since before the first settlers arrived." Caroline McLeod, *Down to the Wire: The Desperate Need for the Texas Racing Industry to Catch Up to Other States*, 50 Tex. Tech L. Rev. 307, 310 (2018). For example, Congress delegated power to the Authority to "develop[] and implement[]" by rule a horseracing anti-doping and medication-control program, 15 U.S.C. §3052(a), including imposing federal restrictions on the administration of medication to horses, creating standards for "laboratory testing accreditation and protocols," and determining which medications and substances will be permitted and at what levels, *id.* §3055. Congress also handed off power to the Authority to develop and implement a racetrack-safety program and establish by rule training and racing-safety standards, lists of permitted and prohibited practices, a racing-surface

quality-maintenance system, and programs for injury- and fatality-data analysis. *Id.* §3056. The rules of the Authority preempt any conflicting state laws. *Id.* §3054(b).

This delegation of federal power to a private entity has prompted extensive litigation. As relevant here, by the time this case reached the Fifth Circuit (for the second time, *infra* pp.14-15), the Authority had already created rules on racetrack safety, ROA.3246-93, enforcement, ROA.3294-329; the assessment methodology for determining each State's share of fees, ROA.3330-54; registration of covered persons, ROA.3355-59; and anti-doping and medication control, ROA.3388-454. It also has proposed "new set[s] of supplemental rules relating to topics such as cleanliness and security of receiving barns, the number and location of restrooms on the backside, disclosure of consumption of Prohibited Substances, and entering a horse on the Veterinarian's List."[7] The Authority's now nearly 250 pages of rules are not in the Code of Federal Regulations but rather are found on a private website: www.hisaus.org. *See* HISA, *Regulations*, https://perma.cc/8CTH-M75U.

2. Applicants' claim (at 6) that "HISA vests in the FTC exclusive authority to promulgate (or not) rules under the Act" stretches the definition of "promulgate" too far. When the Authority submits proposed rules to the FTC, 15 U.S.C. §3053(a), the FTC is obligated only to (1) publish them in the Federal Register for notice and comment, *id.* §3053(b); and (2) approve them if they are "consistent" with HISA and applicable FTC rules, *id.* §3053(c)(2)—what the Fifth Circuit called "consistency review," *NHBPA I*, 53

[7] HISA, Press Release, *Proposed Supplemental Rule Series* (Sept. 18, 2024), https://perma.cc/7AJN-B9WS; *see also, e.g.*, HISA, Press Release, *HISA Releases Request for Proposals on Furosemide* (July 30, 2024), https://perma.cc/7XP3-S9PV; HISA, Operational Bulletin, *New Treatment Record Type: Mandatory Attending Veterinarian Inspection* (June 25, 2024), https://perma.cc/M39L-22R9.

F.4th at 886. Given that HISA broadly defines the Authority's power to create "standards," "programs," and "procedures," such consistency review has few, if any, teeth.

Indeed, as recognized by the FTC itself on multiple occasions, consistency review does not permit it to alter or reject the policy choices of the Authority. *E.g.*, ROA.3288 (noting the Authority's proposed rule was consistent with HISA and that commenters raised only policy disagreements); 3319 (explaining that the FTC does not review "general policy"); 3326 (noting that policy differences do not demonstrate inconsistency with HISA). Thus, unless the Authority outright violates federal law, HISA allows the Authority to make the policy choices inherent in rules governing the horseracing industry.

3. After the Fifth Circuit held that Congress unconstitutionally delegated legislative power to the Authority, *NHBPA I*, 53 F.4th at 872, Congress amended one subsection of HISA by, again, including it in a must-pass consolidated appropriations act. *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, §701, 136 Stat. 4459, 5231-32 (2022). Specifically, the FTC—itself an independent agency—may now:

> by rule in accordance with section 553 of title 5 … abrogate, add to, and modify the rules of the Authority promulgated in accordance with [HISA] as the [FTC] finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of [HISA] and applicable rules approved by the [FTC], or otherwise in furtherance of the purposes of [HISA].

15 U.S.C. §3053(e).

To date, the FTC has used this new power to adopt rules (1) requiring the Authority to submit its budget for approval 16 C.F.R. §§1.150-.152, and (2) requiring strategic plans, year-end reports, risk management, and transparency, 16 C.F.R. §§1.153-.156.

C. The Authority's Enforcement Powers

1. In addition to making the rules, the Authority also enforces (and adjudicates) them—again, without meaningful governmental oversight. Congress gave the Authority the ability to determine what conduct is sanctionable and to set the penalties for rule violations. *See* 15 U.S.C. §3057. Congress also empowered the Authority to issue rules "authorizing" "access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons," "issuance and enforcement of subpoenas and subpoenas duces tecum," and "other investigative powers." *Id.* §3054(c)(1)(A). Unsurprisingly, the Authority has issued a rule giving itself wide-ranging investigative authority. *See* HISA Rule 8400.

Congress obligated the Authority to contract with another entity to act as the "anti-doping and medication[-]control enforcement agency." 15 U.S.C. §3054(e)(1)(A). Accordingly, the Authority has contracted with Drug Free Sport International ("DFSI"), another independent, private entity.[8] In that contractual role, DFSI is to, among other duties, implement the anti-doping and medication-control program on behalf of the Authority, as well as "testing, compliance and adjudication programs." *Id.* §3054(e)(1)(E).

Sanctions issued by the Authority may include "lifetime bans from horseracing, disgorgement of purses, monetary fines and penalties, and changes to the order of finish in covered races." *Id.* §3057(d)(3)(A). In the last two years, the Authority has assessed $1.6 million in fines.[9] The Authority has also empowered itself to provisionally suspend

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[8] *See* HISA, Press Release, *HISA Announces Selection of Drug Free Sport International as Partner to Build Independent Anti-Doping and Medication Control Enforcement Agency* (May 3, 2022), https://perma.cc/MW6Y-GNPF.

[9] *See* HISA, *2024 Q2 Metrics Report* at 6, https://perma.cc/37TF-HG6P.

individuals for certain violations prior to their final adjudication. HISA Rule 3247. The Authority may also bring suit in federal court to obtain injunctive relief to stop rule violations and to enforce civil sanctions. 15 U.S.C. §3054(j).

2. Any civil sanctions imposed by the Authority may be reviewed by an administrative law judge within the FTC. *Id.* §3058(b). While ALJ review of claimed violations of the Authority's rules is *de novo*, review of any sanctions the Authority chooses to assess is limited to whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* §3058(b)(2)(A). The FTC may review *de novo* the ALJ's decision, *id.* §3058(c), and the Authority may recommend that the FTC should commence an action for unfair or deceptive acts, *id.* §3054(c)(1)(B).

II. Procedural History

A. Texas's Complaint

1. Although Texans have always loved horses, the development of *horseracing* in Texas has been uneven due to its longstanding associations with gambling. *See* McLeod, *supra*, at 310-14. Gambling within Texas has generally been banned "[f]or as long as the State of Texas has been the State of Texas." *City of Fort Worth v. Rylie*, 602 S.W.3d 459, 460 (Tex. 2020). Indeed, parimutuel wagering on horseracing is only constitutionally permissible in Texas because it depends not on chance but on the speed of the horse and the skill of the jockey. *Cf. Panas v. Tex. Breeders & Racing Ass'n*, 80 S.W.2d 1020, 1024 (Tex. App.—Galveston 1935, writ dism'd); Tex. Att'y Gen. Op. DM-302, at 5-6, 6 n.6 (1994).

For nearly four decades, the Texas Racing Commission has been tasked in Texas with regulating horseracing and associated wagering. *See* Tex. Occ. Code §2021.002. The nine-member Commission—comprised of seven members appointed by the Governor and two ex

officio members, *id.* §2022.001(a)—has done so by adopting rules covering racetrack licenses, 16 Tex. Admin. Code §§309.1-.53; licenses for owners, trainers, and jockeys, among others, *id.* §§311.101-.112; racetrack operations, *id.* §§309.101-.299; the rules of horseracing, *id.* §§313.1-.450; the medical treatment of horses, *id.* §§319.1-.112; and testing for prohibited substances, *id.* §§319.301-.364. The Commission may also pursue administrative penalties for violations of the Act, as well as suspend, revoke, or refuse to renew a license issued under the Act. Tex. Occ. Code §§2023.051, .151. The Commission has licensed over 14,000 individuals in Texas as part of its comprehensive operations. ROA.6117.

2. To protect its sovereign interests, Texas and the Commission intervened as plaintiffs in a suit brought by a group of Horsemen's Benevolent and Protective Associations (collectively, the "NHBPA Plaintiffs") challenging the constitutionality of HISA. ROA.1328-38. As relevant here, Texas asserts that HISA's delegation of legislative and executive power to a private entity—the Authority—violates the private-nondelegation doctrine. ROA.2529-32. Following summary-judgment motions, the district court rejected such claims, ROA.1494-1553, and all plaintiffs appealed. ROA.1562-65.

Unable to obtain relief before the statute went into effect, Texas was forced to choose: be subject to HISA and surrender control over horseracing and its associated gambling activities or avoid application of HISA by surrendering the ability to simulcast Texas races to other States and abroad. ROA.3083, 3086-87, 6123. Because the former created complications under state law that the Commission deemed untenable, the Commission has opted for the latter. ROA.3086-87. This places Texas racetracks "at a 'competitive disadvantage' to their … peers." *Ohio*, 144 S.Ct. at 2053; *see also* ROA.4594, 6124 (describing industry losses in Texas due to the decision not to simulcast). Moreover, as the

private Respondents have explained, horseracing participants incur costs to comply with HISA. *See* GulfCoast.Resp.27-28; ROA.3837-38. Needless to say, "[t]hose costs … are 'nonrecoverable.'" *Ohio*, 144 S.Ct. at 2053 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring)).

B. Texas's First Appeal

The first time the case was before the Fifth Circuit, that court focused on the Authority's rulemaking authority. *See NHBPA I*, 53 F.4th at 873. Surveying the handful of cases to address the private-nondelegation doctrine, the court held that "a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Id.* at 881. It then held that the Authority was *not* subordinate to the FTC: Congress granted the Authority "'sweeping' power," *id.* at 882, that permitted it "to craft entire industry 'programs,'" which "strongly suggests it is the Authority, not the FTC, that is in the saddle," *id.* at 883. The Fifth Circuit rejected the defendants' argument that the FTC provided the necessary oversight because consistency review is "too limited to ensure the Authority 'function[s] subordinately' to the agency." *Id.* at 884.

The Fifth Circuit then distinguished the relationship that HISA creates between the Authority and FTC from that which the Maloney Act creates between the Financial Industry Regulatory Authority ("FINRA") and the Securities Exchange Commission. *See id.* at 887-88. The court explained that Congress gave the SEC authority to "abrogate, add to, and delete from" FINRA rules as the SEC deemed "necessary or appropriate." 15 U.S.C. §78s(c). Because the FTC lacked such power, the court concluded that the FTC

served as an advisor to the Authority rather than a supervisor. *NHBPA I*, 53 F.4th at 887-88.[10]

Instead, the Fifth Circuit focused on litigation concerning Amtrak, which Congress has tasked with "jointly" developing railroad performance standards with the Federal Railroad Administration ("FRA"). *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.* (*Amtrak I*), 721 F.3d 666, 669 (D.C. Cir. 2013). The D.C. Circuit concluded that "Amtrak enjoys authority equal to the FRA," *id.* at 671, which "vitiates the principle that private parties must be limited to an advisory or subordinate role in the regulatory process," *id.* at 673. Although this Court reversed the D.C. Circuit's judgment because Amtrak (for entity-specific reasons) is a public, not private, entity, *see Amtrak II*, 575 U.S. at 46, the Fifth Circuit found the D.C. Circuit's analysis persuasive with respect to the Authority, *NHBPA I*, 53 F.4th at 881 & n.22. The Fifth Circuit accordingly concluded that HISA delegated "unsupervised government power to a private entity" and was therefore unconstitutional. *Id.* at 890.

That conclusion never reached this Court because, as noted above, *see supra* p.8, Congress amended HISA to give the FTC the power to "abrogate, add to, and modify the rules of the Authority." 15 U.S.C. §3053(e). The Fifth Circuit remanded the case for consideration of the impact of that statutory amendment. *See* Order, *NHBPA v. Black*, No. 22-10387 (5th Cir. Jan. 31, 2023).

[10] For similar reasons, the Fifth Circuit also distinguished *Texas v. Rettig*, in which it had upheld a subdelegation by the Department of Health and Human Services to a private board to certify that certain rates in Medicaid contracts were "actuarially sound." 987 F.3d 518, 526 (5th Cir. 2021). *See NHBPA I*, 53 F.4th at 888-89.

C. Subsequent Proceedings

1. On remand, a separate case raising similar (but not identical) challenges, brought by a group of racetrack owners and other interested parties (collectively, the "Gulf Coast Plaintiffs"), was consolidated with this case. ROA.2213-18. The Gulf Coast Plaintiffs agreed to drop certain of their claims, ROA.2544-55, and the case was submitted following a bench trial, ROA.3028-205. The district court again found no constitutional infirmity. App.58a-94a.

Regarding Texas's only claim—private nondelegation—the district court concluded that the FTC's new authority to abrogate, add to, and modify the Authority's rules empowered the FTC to make its own policy choices, thus supposedly curing any constitutional problem. App.78a-80a. The court also submitted that HISA now paralleled FINRA's relationship with the SEC, App.80a-81a, and leaned heavily on the Sixth Circuit ruling upholding the constitutionality of HISA as amended, App.81a-82a (discussing *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023)). With respect to the Authority's enforcement powers, the district court found no constitutional violation due, in large part, to the FTC's ability to review sanctions *de novo*. App.85a-87a.

2. All plaintiffs again appealed. ROA.2825-31. This time, the Fifth Circuit affirmed in part and reversed in part.

First, bound by the analysis in its first decision in this litigation, the Fifth Circuit agreed with the Sixth Circuit that the amendment to the FTC's authority cured the private-nondelegation problem with respect to the Authority's rulemaking powers. App.9a-10a. Concluding that the FTC could, if it so desired, override the Authority's rules with its own rules, the court held that the FTC now has the final word. App.12a.

Second, the Fifth Circuit held that the Authority's largely unsupervised ability to enforce HISA violated the private-nondelegation doctrine with respect to executive power. App.15a-19a. After all, the power to investigate, sanction, and sue—all of which the Authority can do—are "quintessentially executive functions." App.16a. And recognizing that Article II has its own Vesting Clause, the court asked whether the Authority "functions subordinately to an agency with authority and surveillance over it." App.15a (cleaned up). The court rejected that the FTC's general (and limited) back-end review gave it adequate supervisory control over the Authority, emphasizing that the Authority can and does perform significant enforcement functions before the FTC even gets involved. App.19a-22a. The Fifth Circuit also disagreed that the FTC could further subordinate the Authority's enforcement powers by exercising its rulemaking authority. App.22a-26a.[11]

ARGUMENT

I. The Court Should Deny the Request to Stay the Mandate.

To obtain a stay of the mandate pending a petition for a writ of certiorari, Applicants must establish (1) a "reasonable probability" that the Court will grant certiorari, (2) a "fair prospect" that the Court will reverse the Fifth Circuit's decision, and (3) a likelihood of irreparable harm if the decision is not stayed. *See, e.g.*, *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers). "Denial of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers); *see Philip Morris USA,*

[11] The Fifth Circuit also rejected the private Respondents' remaining constitutional claims based on the Due Process Clause, Appointments Clause, and anticommandeering doctrine. App.29a-38a. As Texas raised no such claims, it does not discuss them here.

Inc. v. Scott, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers) (applicants bear a "heavy burden"). Texas agrees that there is far more than a "reasonable probability" that the Court will grant certiorari. *Teva Pharm.*, 572 U.S. at 1301. But the remaining factors overwhelmingly favor Respondents. The Court therefore should deny the application.

A. There is a reasonable probability the Court will grant certiorari to resolve the delegation of both legislative and enforcement powers to the Authority.

Texas could not agree more that this Court can, should, and likely will grant review. After all, this litigation presents foundational questions of constitutional law: whether Congress may delegate to a private party the power to regulate the relationships among the federal government, the States, and an industry the States have regulated since before there was a federal government. This Court has previously granted certiorari to determine whether a provision of federal law "effect[ed] an unconstitutional delegation of legislative power to a private entity." Petition for a Writ of Certiorari at I, *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43 (2015) (No. 13-1080); *see Dep't of Transp. v. Ass'n of Am. R.Rs.*, 573 U.S. 930 (2014) (granting cert.). But the Court could not answer the question because the delegatee in that case—Amtrak—is public. Justice Alito, however, explained using both precedent and first principles why enforcing the private nondelegation doctrine is essential. Indeed, "[e]ven the United States accepts that Congress cannot delegate regulatory authority to a private entity." *Amtrak II*, 575 U.S. at 61 (quotation omitted).

Since *Amtrak II*, at least five members of the Court have called for reexamination of the standards applicable to the nondelegation doctrine. *See Gundy*, 588 U.S. at 148-49 (Alito, J., concurring); *id.* at 149 (Gorsuch, J., dissenting, joined by Roberts, C.J. and Thomas, J.); *Paul v. United States*, 140 S.Ct. 342, 342 (2019) (Kavanaugh, J., statement

respecting the denial of certiorari). And as Applicants note (at 13), at least three Justices have also specifically recognized "the need to clarify the private non-delegation doctrine in an appropriate future case." *CIR*, 142 S.Ct. at 1308 (Alito, J., concurring in denial of review).

This is such a case: The Fifth, Sixth, and now Eighth Circuits have weighed in on HISA's constitutionality, so there is little to be gained from waiting for this issue to further percolate. *See* App. 15a-26a; *Oklahoma*, 62 F.4th at 231; *Walmsley v. FTC*, No. 23-2687, 2024 WL 4248221, at *4 (8th Cir. Sept. 20, 2024). All the while, Congress now trumpets the Authority's structure as a model to be replicated. *See* Amicus Br. of Sen. McConnell, et al. at 4. There is thus little to gain in terms of judicial efficiency and much to lose in terms of constitutional accountability by allowing this dispute to percolate. Because the Fifth Circuit's decision "conflicts with decisions of the U.S. Courts of Appeals for the [Sixth and Eighth] Circuits" on an important issue of constitutional law, this case meets the first requirement to stay the mandate: "[T]here is a reasonable probability this Court will grant certiorari." *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers).

B. Applicants have not established a fair prospect that the Court will reverse the Fifth Circuit's finding of a nondelegation violation.

There is, however, no fair prospect that the Court will reverse the Fifth Circuit on the only issue raised in the application: whether HISA unconstitutionally delegates enforcement powers to the Authority subject only to rulemaking and post-sanctions review. App.15a-26a.[12] True, the Fifth Circuit's analysis is imperfect because it asks whether the Authority "functions subordinately to an agency with authority and surveillance over it"

[12] As will be discussed below, the Court *is* likely to reverse the Fifth Circuit's holding that the Authority can engage in rulemaking. *Infra* Part II.C.

with respect to its enforcement powers. App.15a (cleaned up). Under the Constitution, private parties cannot exercise federal government power *at all*—no matter how they are supervised. "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." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 700-01 (2015) (Roberts, C.J., dissenting). Because "[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), delegation of federal authority to private parties fails no matter who oversees them.

Yet this Court "review[s] judgments of the lower courts, not statements in their opinions." *Amgen, Inc. v. Sanofi*, 598 U.S. 594, 615 (2023) (citing *Black v. Cutter Labs*, 351 U.S. 292, 297 (1956)). And the Fifth Circuit's judgment is plainly correct on this point. There is thus not a "fair prospect that this Court will reverse the decision below" and so no grounds to stay the Fifth Circuit's mandate. *Maryland*, 567 U.S. at 1303.

1. The Fifth Circuit should have found a violation of the private-nondelegation doctrine regardless of the FTC's level of oversight.

Although reaching the correct conclusion, the Fifth Circuit should have addressed a threshold issue—whether enforcement authority can ever be delegated to a private entity. Analogous to Article I, Article II begins by specifying that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, §1, cl. 1. Unlike cases indicating that "legislative authority" can be delegated to private entities in limited circumstances, *e.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940), this Court has held that "[t]he entire 'executive Power' belongs to the President alone," *Seila Law*, 591 U.S. at 213. To assist him in carrying out his duties, he may rely on lesser

executive officials who remain accountable to him. *Id.* Private entities, however, are not and cannot be "vested with … executive Power, which belongs to the President." *Amtrak II*, 575 U.S. at 62 (Alito, J., concurring) (quotation omitted). HISA's structure violates this principle because the statute gives (1) core executive power, to (2) private individuals who are neither appointed nor removable by any federal official, much less the President.

First, the enforcement powers exercised by the Authority are plainly executive. To begin, "in deciding what it must do, what it cannot do, and the standards that govern its work, the [Authority] must interpret [HISA], and 'interpreting a law enacted by Congress to implement the legislative mandate is the very essence of execution of the law.'" *Collins v. Yellen*, 594 U.S. 220, 254 (2021) (quoting *Bowsher v. Synar*, 478 U.S. 714, 733 (1986)) (cleaned up). Furthermore, the Authority's powers include investigating potential rule violations by issuing subpoenas and searching offices and records, 15 U.S.C. §3054(c)(1)(A); initiating proceedings and imposing sanctions, *id.* §3058(a); and bringing civil lawsuits to enforce aspects of HISA, *id.* §3054(j). The Court has squarely held that "the executive Power" includes such activities, including initiating investigations, *Morrison v. Olson*, 487 U.S. 654, 696 (1988); performing searches, *United States v. Grubbs*, 547 U.S. 90, 98 (2006); issuing subpoenas, *Collins*, 594 U.S. at 254; setting enforcement priorities, initiating prosecutions, and determining what penalties to impose, *Seila Law*, 591 U.S. at 225; and seeking monetary penalties, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 504 (2010).

Likewise, because "[a] lawsuit is the ultimate remedy for a breach of the law, ... it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam). Indeed, multiple members of this Court have questioned whether citizen suits

are impermissible delegations of executive authority. *See United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 442 (2023) (Kavanaugh, J., with Barrett, J., concurring); *id.* at 449-51 (Thomas, J., dissenting); *Amtrak II*, 575 U.S. at 62 (Alito, J., concurring). Yet the Authority's *exclusive* power to enforce HISA—an enforcement power not shared with any agency—is essentially a citizen suit on steroids.

Second, there is also no question that the Authority's board members are neither appointed nor removable by any federal official, let alone the President. Members of the Authority's Board of Directors are chosen by the Nominating Committee, *id.* §3052(d)(3), which is comprised of private individuals listed in the Authority's incorporation documents, *id.* §3052(d)(1)(B). And under the Authority's bylaws, a Director can be removed only for cause and only by a vote of all other Directors. ROA.4236. The FTC—which itself is removed from the President under *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)—therefore lacks the ability to appoint or remove the Directors. Yet "the framers took pains to ensure" that anyone who exercises federal executive power must "always remain responsible to the President and thus, ultimately, to the people." *United States v. Arthrex*, 594 U.S. 1, 28 (2021) (Gorsuch, J., concurring in part).

As the Gulf Coast Plaintiffs have argued, were the Authority a public agency, this arrangement would undoubtedly violate the Constitution, which vests all executive power in the President. *Free Enter. Fund*, 561 U.S. at 498. The fact that the Authority is a private entity thus makes it unconstitutional twice over: Rather than merely creating "multilevel protection from removal [that] is contrary to Article II's vesting of the executive power in the President," *id.* at 484, Congress granted executive authority to a private entity over which the President can exercise no control at all. As James Madison told the First

Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834) (quoted in *Free Enter. Fund*, 561 U.S. at 492). Allowing a private party, wholly unaccountable to the nation's Chief Executive, to police an entire industry of its peers on behalf of the federal government is no less "obnoxious" to the Constitution than allowing it to create the rules that will be policed. *Carter Coal*, 298 U.S at 311.

2. Even if the FTC's level of oversight were relevant, HISA violates Article II.

Even assuming that Congress could ever give away the President's enforcement power, the Fifth Circuit was correct that the Authority is unconstitutional because it does not "function[] subordinately to an agency with authority and surveillance over it" with respect to enforcement. App.15a (cleaned up); *see also* App.16a-19a. Without any supervision by the FTC, the Authority may investigate potential rule violations by demanding access to offices, facilities, books, records, and personal property and by issuing subpoenas. 15 U.S.C. §3054(c)(1); *see also id.* §3054(h) (granting "subpoena and investigatory authority"). The Authority also first develops the list of civil penalties, *id.* §3054(i), and then may levy sanctions for violations, up to and including lifetime bans, *id.* §§3057(d)(3), 3058(a). And it may also bring lawsuits to enjoin violations of HISA and to enforce civil sanctions. *Id.* §3054(j)(1).

DFSI—another private "enforcement agency" with which the Authority has contracted—"implement[s] anti-doping education, research, testing, compliance and adjudication programs." *Id.* §3054(e)(1)(E)(iii). To that end it "conduct[s] and oversee[s] ... independent investigations, charging and adjudication of potential medication[-]control

rule violations, and the enforcement of any civil sanctions for such violations." *Id.* §3055(c)(4)(B).

By contrast, the FTC can only (1) review sanctions decisions, *id.* §3058(b)-(c), and (2) commence enforcement actions regarding unfair and deceptive practices, *id.* §3054(c)(1)(B).

The unequal power dynamics between these entities has been amply confirmed during the 27 months that the Authority's rules have been in effect. Since July 2022, the Authority has issued over 2,000 enforcement rulings regarding racetrack safety and taken over 375 enforcement actions regarding anti-doping and medication-control rules. *See* Auth. Defs. Mot. to Stay Mandate Ex. 1 ¶ 5, *NHBPA v. Black*, No. 23-10520 (5th Cir. Sept. 16, 2024). The FTC's website, however, indicates that an ALJ has reviewed sanctions in just 13 cases under HISA.[13] The Authority can hardly be said to be "function[ing] subordinately" to the FTC when it acts independently of its supposed supervisor 99.35% of the time.

The micro-level example the Applicants offer (at 16) only underscores the point. According to the record, the Authority routinely imposes riding-crop violations on jockeys to the tune of a $250 fine or 10% of the purse as well as a minimum 1one-day suspension. ROA.3897-98. Applicants (at 16) and the federal defendants (at 9) suggest this private enforcement is permissible because a jockey can request that the penalty be stayed while he appeals to the FTC. Leaving aside the absurdity of paying a lawyer to appeal a $250 fine, the availability of an appeal is irrelevant to the critical point: the Authority has "enforced" the law—that is to say, "compel[ed]," "constrain[ed]," "cause[d] to take effect" or

[13] *See* FTC, *Legal Library: Cases and Proceedings*, https://www.ftc.gov/legal-library/browse/cases-proceedings (filtered for the Horseracing industry).

"requ[ired] operation [or] observance" of, *Enforce*, Webster's Third International Dictionary (2002 ed.)—*in the interim*. The annual racing season is very short.[14] The imposition of a $250 fine and a one-day suspension is likely to compel or constrain both the jockey and his peers to follow HISA's rules even if a fine might be found unlawful down the road. Furthermore, the threat of such sanctions in the middle of the racing season itself necessarily changes behavior. Yet forcing parties to buckle under and do what they would rather not is *itself* a violation of the separation of powers. *See, e.g.*, *Amtrak II*, 575 U.S. at 60 (Alito, J., concurring) (citing *Free Enter. Fund*, 561 U.S. at 512 n.12; *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264-65 (1991)). As the Fifth Circuit correctly held, back-end review does not even begin to show that the Authority "functions subordinately" to the FTC with respect to enforcement. App.19a-21a.

3. Applicants' "defense" of their own enforcement authority would itself violate the separation of powers.

Notably, Applicants spend little time defending the constitutionality of HISA's delegation of enforcement authority. Rather, Applicants (at 10-13) and the federal defendants (at 8-9) argue instead about facial challenges and what the FTC *could* do to exercise supervision over the Authority's enforcement activities through rulemaking. But "[e]nacting general rules through the required notice and comment procedures is obviously a poor means of micromanaging [an entity]'s affairs." *Free Enter. Fund*, 561 U.S. at 504.

[14] For example, the Commission has authorized Lone Star Park to host approximately 70 racing days in a year. *See* Tex. Racing Comm'n, 2024 Live Race Dates, https://perma.cc/XM5H-UHGD.

Indeed, suggesting that the Authority can "indirectly" satisfy Article II through FTC "machinations" is part of "the problem," "not the solution." *Arthrex*, 594 U.S. at 16. Regardless, such arguments fail for additional reasons: (1) the FTC cannot rewrite HISA to seize enforcement responsibilities that Congress gave to the Authority, and (2) the structure of HISA is flawed, regardless of any rulemaking authority the FTC wields.

a. To start, the Fifth Circuit wisely rejected the position advocated by the Sixth and Eighth Circuits that the FTC could expand its supervisory role by administrative fiat. *See, e.g.*, *Walmsley*, 2024 WL 4248221, at *4. For example, the Sixth Circuit suggests that the FTC could require preclearance of any civil suit filed by the Authority, *Oklahoma*, 62 F.4th at 231, or prohibit "overbroad subpoenas or onerous searches," *id.* Doing such things may in some sense make one constitutional violation less egregious, but only by creating a separate constitutional problem: Congress never provided such power to the FTC.

"[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014).[15] Instead, "[a]gencies have only those powers given to them by Congress." *W. Virginia v. EPA*, 597 U.S. 697, 723 (2022). Because Congress specifically delineated enforcement responsibilities in HISA, *see supra* pp.8-10, any changes to that statutory division of authority must come through bicameralism and presentment, *INS v. Chadha*, 462 U.S. 919, 959 (1983).

[15] Applicants note (at 19) Texas's prior argument that the FTC may be able to use its rulemaking power to provide oversight into how the Authority exercises its enforcement power. That was an attempt to define the scope of the FTC's rulemaking power, not a concession that any resulting rules would render HISA constitutional.

To be sure, Congress granted the FTC authority to "abrogate, add to, and modify" the Authority's rules, 15 U.S.C. §3053(e). But giving the FTC authority to alter the *Authority's* rules did not authorize the FTC to rewrite *Congress*'s detailed instructions in HISA regarding the Authority's extensive enforcement powers and duties. By definition, "statutory permission to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress." *Biden v. Nebraska*, 143 S.Ct. 2355, 2368 (2023) (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994)). Congress designed HISA's enforcement scheme and gave the Authority, not the FTC, the primary role. It thus is up to Congress, not the FTC, to change that enforcement scheme.

b. Applicants (at 15-19) and the federal defendants (at 8-9) cannot avoid the problem by arguing that the Fifth Circuit's ruling violates this Court's precedent regarding facial challenges. Specifically, they rely on the Court's recent decision in *United States v. Rahimi* to assert that the Fifth Circuit erred by not focusing on hypothetical situations in which HISA would be constitutional. 144 S.Ct. 1889, 1903 (2024). But the separation-of-powers problem is with HISA's *structure*, not any particular application. What the Authority does with the power that Congress unconstitutionally purported to give it is beside the point because every application of that power is (and can only be) a constitutional violation. Indeed, this Court has already held that violations of the Appointments Clause—which are here in spades—are structural errors. *See Collins*. 594 U.S. at 258 (discussing, *inter alia*, *Lucia v. SEC*, 585 U.S. 237 (2018)). By definition, an entity can never validly exercise federal power that under the Constitution it lacks capacity to "lawfully possess." *Id.*

Unlike the application of the Second Amendment in *Rahimi*, the nondelegation question here is fundamentally a facial inquiry. That is, whether a delegation of authority

is unconstitutional is based on "the terms of Congress' delegation"—in this instance HISA—"*not* on the terms of the agency's subsequent exercise of the delegated authority." *United States v. Martinez-Flores*, 428 F.3d 22, 27 (1st Cir. 2005) (emphasis added) (following *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-73 (2001)); *see also United States v. Palazzo*, 558 F.3d 400, 404 n.4 (5th Cir. 2009) (change in the underlying regulations did not impact the delegation analysis). As this Court has explained, because "adopting in its discretion a limiting construction of the statute" *itself* requires exercising delegated authority, "an agency's voluntary self-denial" will not cure the violation. *Whitman*, 531 U.S. at 472-73.

This Court is unlikely to disturb the Fifth Circuit's application of these principles, which is entirely in line with that of its sister circuits and this Court. The D.C. Circuit, for example, applied similar reasoning in the *Amtrak* litigation. *See Amtrak I*, 721 F.3d at 669. Finding that the statute permitted the use of a private arbitrator, the court concluded that it was possible for Amtrak's standards to take effect without the approval of a single government official, violating the private-nondelegation doctrine. *Id.* at 673-74. Even though a private arbitrator had not been used, "that the recipients of illicitly delegated authority opted not to make use of it is no antidote. It is *Congress's* decision to delegate that is unconstitutional." *Id.* at 674. Justice Alito agreed in *Amtrak II*, explaining that "even the *possibility* of a private arbitrator" would violate the Constitution. 575 U.S. at 62 (Alito, J., concurring). In other words, the violation is complete upon the unlawful delegation. Other circuits are in accord.[16] Suffice it to say, nothing in *Moody v. NetChoice, LLC*, 144 S.Ct.

[16] *See also, e.g.*, *W.V. ex rel. Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1140 (11th Cir. 2023) (applying *Whitman* to hold a challenge is not mooted when the agency "had

2383 (2024), remotely suggests that this Court is preparing to toss out *Whitman* and other longstanding precedent that is rooted in basic separation-of-powers principles.

4. Reference to the Maloney Act will not save HISA.

Finally, Applicants again try (at 17-18) to defend HISA by analogizing its enforcement scheme to the Maloney Act. But the lower courts that have upheld the SEC/FINRA relationship have largely followed a single unreasoned sentence from a Second Circuit decision that predates this Court's modern separation-of-powers cases by more than five decades. *See R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952); *see also Sorrell v. SEC*, 679 F.2d 1323, 1325 (9th Cir. 1982); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977). That these cases exist and continue to create confusion further underscores why the Court's review is warranted, but nothing about those cases establishes a "fair prospect," *Teva Pharm.*, 572 U.S. at 1301, that this Court will reverse the Fifth Circuit's decision here.

Moreover, as the Fifth Circuit explained, there is substantial daylight between HISA and the Maloney Act. App.26a-29a. The SEC can control FINRA's officers and members: it can suspend or revoke FINRA's registration, suspend or expel its members, bar people from being associated with FINRA, and remove or censure FINRA's officers or directors. 15 U.S.C. §78s(h). The SEC can even strip FINRA's ability to enforce its rules. *Id.* §78s(g)(2). And the SEC can conduct its own investigations and enforcement proceedings and bring civil lawsuits itself. *Id.* §78u-1(a). None of that is true for the FTC and the

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disclaimed an intention to enforce the alleged unconstitutional provision at all"); *Martinez-Flores*, 428 F.3d at 27 (holding that, under *Whitman*, a memorandum from the U.S. Attorney General is "irrelevant to the nondelegation question").

Authority. The SEC thus has "means of micromanaging [FINRA]'s affairs" that are of constitutional significance and that the FTC lacks. *Free Enter. Fund*, 561 U.S. at 504.

* * *

Even though the Court is likely to grant certiorari in this case, it is *unlikely* to reverse the Fifth Circuit's judgment that allowing a private entity like the Authority to enforce federal law violates the private-nondelegation doctrine. Absent such a likelihood of success on the merits, the equitable relief of a stay of the mandate pending resolution of the Authority's certiorari petition is unjustified—particularly if the Court accepts the federal defendants' suggestion (at 11) to delay that assessment for a period of months, which may delay this case's resolution on the merits until next Term.

C. The balance of harms does not favor Applicants.

Applicants also have not shown that preventing the Authority from enforcing HISA (and the Authority's associated rules) against Respondents would irreparably harm Applicants. Indeed, Applicants' theory is irreconcilable with their own arguments that (1) there is no evidence the Authority has tried to enforce HISA against Respondents (at 31), and (2) the Authority has never issued a subpoena or filed a civil lawsuit (at 17). If Applicants have no intention of exercising the Authority's enforcement powers, there can be no irreparable harm in preventing them from doing so.

Similar flaws undermine the federal defendants' claim (at 7) that whenever a sovereign is prohibited "from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland*, 567 U.S. at 1303 (Roberts, C.J., in chambers). To start, that rule favors *Texas*, which has brought this case precisely because HISA purports to strip Texas of *its* ability to "effectuate statutes enacted by representatives of its people."

Id.; *see also supra* p.10 (discussing the constitutional implications for Texas with respect to wagering). By contrast, the FTC has no lawful interest in enforcing an unconstitutional statute, all the more so because HISA empowers only the Authority to enforce its provisions. As a private entity, the Authority cannot claim the injury of a sovereign.[17]

Because the remainder of Applicants' arguments go more directly to issues raised by the other Respondents, Texas will not offer duplicative briefing here. But Texas does offer three observations why such arguments do not merit a stay.

First, much of Applicants' theory rests on injuries that are not theirs to assert. For example, they claim (at 25) that "horsemen have embraced" HISA. But the NHBPA is here on behalf of its 30,000 members asking to have HISA declared unconstitutional. ROA.2444. And that doesn't count the other horsemen who have sought to have it declared unlawful in other litigation. *E.g.*, *Oklahoma*, 62 F.4th 221; *Walmsley*, 2024 WL 4248221, at *4; *Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, 617 F. Supp. 3d 478 (W.D. La. 2022). It is hard to see how the Authority has standing to assert an injury on behalf of the horsemen—let alone to decry as "brazen[]" their efforts to avoid being subjected to a brazenly unconstitutional law. Application 2.

Second, many of Applicants' contentions are based on cherrypicked statistics. For example, they claim (at 26) that racing purses have increased from 2021. But that is hardly surprising given that the country was just then emerging from a global pandemic. *See. e.g.*,

[17] Applicants suggest (at 20) that the FTC could use its general enforcement powers to enforce HISA. *See* 15 U.S.C. §§43, 45-46, 49, 53, 57b. Given that the federal defendants agree (at 5) with Applicants' assertion of irreparable harm, and the dearth of actions by the FTC since HISA was passed, *supra* p.22, it does not appear that the FTC shares this understanding.

Frank Angst, *COVID-19 Impact Costing Racing Millions of Dollars*, Blood Horse Magazine (Mar. 26, 2020), https://perma.cc/R5JZ-T7A9. And the suggestion (at 24) that equine deaths have decreased at HISA tracks concerns time periods too short to determine HISA's actual impact. It takes very little time to skew any statistic.[18]

Third Applicants vaguely suggest (at 27) that "multiple States" have cut back their horseracing administration due to HISA and might have difficulty bringing back the necessary personnel and testing. Again, this ignores that States—perhaps more than any other party—can determine "what is best for them." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). Instead of acquiescing in the Authority's actions, many of those States have sought to have HISA declared unconstitutional, with all its rules declared unlawful. *See Oklahoma*, 62 F.4th 221; *Walmsley*, 2024 WL 4248221, at *4; *Louisiana*, 617 F. Supp. 3d 478. If anything, Applicants' argument rings particularly hollow given that there is no injunction in place (the Fifth Circuit just awarded declaratory relief), let alone an injunction that would affect States outside the Fifth Circuit. And two of the three States affected by the Fifth Circuit's mandate are among those asking courts to allow them to continue enforcing their own laws—something they have done since before joining the Union.

At bottom, "[t]he Constitution's deliberative process was viewed by the Framers as a valuable feature, not something to be lamented and evaded." *Amtrak II*, 575 U.S. at 61 (Alito, J., concurring) (citation omitted). If Congress believes that horseracing should be

[18] *See, e.g.*, HISA, Press Release, *HISA Releases Findings of Churchill Downs Investigation and Announces Critical Initiatives to Reduce Equine Fatalities* (Sept. 12, 2023), https://perma.cc/9EBS-2CZ8 (noting twelve equine fatalities in one month at a single track).

federally regulated, then Congress must ensure that it is the federal government, not a private party, that does so. *See* U.S. Const. art. I, §1; *id.* art. II, §1. Staying the mandate would allow a private entity to execute public law, flatly contrary to the Constitution's "many accountability checkpoints." *Amtrak II*, 575 U.S. at 61 (Alito, J., concurring).

II. If the Court Construes the Application as a Petition, It Should Construe This Response as a Cross-Petition Regarding the Delegation of Legislative Authority.

Texas agrees the Court should grant the Applicants' request (at 4, 33) to treat their application as a petition for writ of certiorari and thereby avoid delaying resolution of an issue of constitutional significance, the pendency of which is causing everyone involved harm. *But see* Fed.Resp.11-12 (expressing a preference for proceeding with traditional petitions). If the Court chooses to treat the application as a petition, however, it should also consider this response as a cross-petition on the question whether Congress unlawfully delegated legislative power to the Authority in HISA. The question of legislative authority is an important federal question that should be decided by this Court, has set the circuits against each other, and has been incorrectly addressed by the Fifth, Sixth, and Eighth Circuits based on precedent that only this Court can clarify.

A. Delegation of legislative power to a private entity is an important question of federal law that should be decided by this Court.

Because "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U.S. Const. art. I, §1, it follows that "the lawmaking function belongs to Congress and may not be conveyed to another branch or entity," *Loving v. United States*, 517 U.S. 748, 758 (1996) (citation omitted). Delegating such authority to a private entity is "unknown to our law" and "utterly inconsistent with the constitutional prerogatives and

duties of Congress." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).[19] Any delegation of rulemaking authority to a private entity is thus noxious.

Applicants cannot deny that the questions of whether and under what circumstances Congress may delegate legislative authority to a private entity is a significant federal question that requires the Court's attention. As noted above, multiple members of this Court have already recognized it as such. *Supra* pp.16-17. Indeed, if anything, delegating legislative authority is even more problematic than delegating enforcement authority because a "suit to enforce existing law ... is nothing compared to delegated power to create new law.'" *Amtrak II*, 575 U.S. at 62 (Alito, J., concurring). The rulemaking question is also antecedent to the enforcement question. In fact, all but conceding the unconstitutionality of delegating rulemaking authority to a private entity, a key part of the Authority's argument here is that the rules it enforces should be deemed the FTC's rules, not its own. *See* Application 18 (referring to the Authority's "enforcement of the FTC-approved rules").

That HISA falls on the wrong side of the constitutional line has not been apparent to the Circuits, however. Guidance from this Court is necessary, all the more so because Congress appears to see this type of rulemaking delegation as a model for other industries. *See* Amicus Br. of Sen. McConnell, et al. at 4. The Court should grant review before delegation of rulemaking power to private entities becomes further entrenched.

[19] Texas bases its argument on the understanding that the Authority is, in fact, a *private* corporation. 15 U.S.C. §3052(a). Should the Court disagree, HISA would be unconstitutional under the Appointments and Vesting Clauses for the reasons explained by the Gulf Coast Plaintiffs. Either way, HISA cannot stand.

B. The Fifth Circuit, like other circuits, wrongly held that Congress could cure an improper delegation by making the Authority nominally subordinate to the FTC.

The Fifth Circuit's decisions in this case illustrate widespread confusion regarding how to address delegations of rulemaking power to private entities, despite this Court's condemnation of them as "delegation in its most obnoxious form," *Carter Coal*, 298 U.S. at 311, "unknown to our law," and "utterly inconsistent with the constitutional prerogatives and duties of Congress," *A.L.A. Schechter Poultry*, 295 U.S. at 537; *see also Amtrak II*, 575 U.S. at 62 (Alito, J., concurring). The People have agreed to submit to the laws enacted by Congress, U.S. Const. art. I, §1—not "laws" adopted by private entities. Yet for far too long courts have been applying a private-nondelegation doctrine derived, not from what the Constitution says, but from misunderstandings about a pair of 80-year-old cases.

1. In *Carter Coal*, Congress delegated the ability to set maximum labor hours and minimum wages to private groups of producers and miners. 298 U.S. at 310-11. Because this allowed "one person … to regulate the business of another," the Court declared the law unconstitutional. As the Court put it, the law created "an intolerable and unconstitutional interference with personal liberty and private property." *Id.* at 311.

As it did here, Congress then rewrote the law. In *Adkins*, the Court examined the revised statute, the Bituminous Coal Act of 1937, which provided for the creation of twenty "district boards" that were to "operate as an aid to the [National Bituminous Coal] Commission but subject to its pervasive surveillance and authority." 310 U.S. at 388. The Act provided that the number of members of each district board was subject to approval by the Commission; the Commission could remove board members in certain circumstances, the board's bylaws and rules of procedure were subject to approval of the Commission; and

the Commission had some authority to approve, disapprove, or modify proposed rules of each board regarding the sale of coal. *See* Bituminous Coal Act of 1937, Pub. L. No. 75-48, §4(I)(a), (II)(a)-(c), 50 Stat. 72, 76-80 (1937). The boards were also given the authority to propose minimum coal prices that could be approved, disapproved, or modified by the Commission. *Id.* §4(II)(a), 50 Stat. at 78. This time around, the Court rejected a claim that the minimum prices had been impermissibly set by private parties because the Commission, not the district boards, determined the prices, so the boards had not been entrusted with "law-making" authority. *Adkins*, 310 U.S. at 399.

Unfortunately, trying to derive a coherent doctrine from such sparse and dated data points has turned the question in private-nondelegation challenges into "precisely how much involvement may a private entity have in the administrative process before its advisory role trespasses into an unconstitutional delegation?" *Amtrak I*, 721 F.3d at 671; *see also NHBPA I*, 53 F.4th at 880. But that question has no basis in the Constitution and provides little practical guidance in the real world. The time has come for something better.

2. This case, moreover, is the perfect vehicle for the Court to provide that much-needed clarity because the Authority's power exceeds anything previously approved.

For example, the D.C. Circuit in *Amtrak I* explained that private entities may "help a government agency make its regulatory decisions." 721 F.3d at 670-71. In concluding that Amtrak did not function subordinately to the FRA, that court reiterated this Court's holding that a private entity can be "an aid" to a federal agency as long as the agency retains the discretion to "approve[], disapprove[], or modif[y]" any proposed rule. *Id.* at 671. But unlike the situation in *Adkins*, in which the agency could "unilaterally change regulations

proposed to it by private parties," Amtrak "enjoy[ed] authority equal to the FRA," making the delegation of authority unconstitutional if Amtrak were private. *Id.*

Here, by contrast, the Authority's role certainly cannot be described as "helping" the FTC make its decisions, because the only decision the FTC is required to make is whether the Authority's rules are contrary to statute—not whether they are good policy, much less policy that the President can defend to voters. 15 U.S.C. §3053(e). For similar reasons, the Authority is not "an aid" to the FTC. The FTC must approve any proposed rule that is consistent with HISA and, again, can counter them only with its own rulemaking. So even if the FTC believes one of the Authority's rules is outright harmful, it is still uncertain whether the FTC will fix it, rather than using its resources elsewhere. By any measure, the Authority has been unconstitutionally delegated legislative authority.

Other Circuits applying the private-nondelegation doctrine have allowed private entities to perform only limited, advisory roles, unlike the power given to the Authority. The Fourth Circuit has said that the doctrine permits agencies to "employ private entities for *ministerial* or *advisory* roles, but [agencies] may not give these entities governmental power over others." *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004). And the Third Circuit permitted a private entity to serve "advisory" and "ministerial" functions. *United States v. Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989). The Authority's role here is far from "ministerial" or "advisory," given that it was tasked with creating an elaborate (and still growing) regulatory program from scratch. 15 U.S.C. §3052(a). The Ninth Circuit rejected a challenge to the Secretary of Agriculture's reliance on the Navel Orange Administrative Committee, explaining that "the Secretary is free to seek advice from whatever sources he deems appropriate, so long as he or his delegate in the Department

retains ultimate authority to issue the regulation." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) (citing *Adkins*, 310 U.S. at 399). But the FTC has not sought the Authority's "advice." Instead, the Authority is effectively equal to the FTC in some respects—and superior in others. The Authority can make rules and issue guidance that the FTC can check only through its own rulemaking. 15 U.S.C. §3053(e).

3. The Fifth Circuit thus was correct the first time around, when it held that the Authority did not function subordinately to the FTC. *NHBPA I*, 53 F.4th at 884. Looking solely to this Court's cases: In *Adkins*, the private board (1) had members subject to removal by the Commission, (2) proposed only a small piece of a regulatory scheme, which (3) could be approved, disapproved, or modified by the Commission. 310 U.S. at 388, 399. Here, the Authority (1) has members who cannot be appointed or removed by the FTC, (2) wrote the entire regulatory scheme to govern the entire industry, that (3) the FTC had to approve if it fell within HISA's broad guidelines. 15 U.S.C. §§3052(b), 3053(a), (c)(2). In other words, as in *Carter Coal*, there has been a delegation of legislative authority to a private party, "legislative delegation in its most obnoxious form." 298 U.S. at 311.

Or in the words of the Fifth Circuit's sister circuits, the Authority is not a "help" or an "aid" or a source of "advice," nor is it performing "ministerial" or "advisory" functions. *Amtrak I*, 721 F.3d at 670-71; *Riverbend Farms*, 958 F.2d at 1488; *Pittston Co.*, 368 F.3d at 395. It is writing rules to govern an industry, and the FTC is generally required to approve them. The FTC's ability to make its own rules to counteract those of the Authority merely demonstrates (at most) its equality with the Authority, not its supervision. The Fifth Circuit (along with the Sixth and Eighth) stands contrary to the Third, Fourth, Ninth, and D.C.

Circuits in concluding that this type of delegation is constitutionally permissible. The Court's intervention is warranted.

4. The Fifth Circuit erred in concluding that the amendment to HISA cured the constitutional problem, App.10a. As explained above, *see supra* pp.25-27, because an agency cannot "cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute," *Whitman*, 531 U.S. at 472, giving the FTC the authority to exercise a measure of supervisory authority if it wants to supervise (but not otherwise) doesn't cure the fundamental structural problems.

At most, the Authority serves as the FTC's equal in the rulemaking endeavor which, under the D.C. Circuit's rule in *Amtrak I*, is constitutionally insufficient. The Authority submits proposed rules and proposed modifications of rules to the FTC for publication and a limited consistency review, 15 U.S.C. § 3053(a). Now, the FTC can also "abrogate, add to, and modify the rules of the Authority promulgated in accordance with" HISA. *Id.* §3053(e). In other words, both can propose and modify rules in accordance with HISA.

Further exemplifying this unconstitutional equality, if the FTC disagrees with a rule proposed by the Authority, it cannot disapprove the rule but must either allow it to become law and then engage in notice-and-comment rulemaking to modify it or attempt to quickly out-maneuver the Authority, again by its own notice-and-comment rulemaking—as if they were adversaries. As the Fifth Circuit hypothesized, if the FTC did not want a proposed rule to take effect, if could adopt its own rule postponing the effective date of the Authority's rule or engage in emergency rulemaking. App.11a. But the notice-and-comment process could take years—all the while private parties and the States are subject to a rule promulgated by an entity without constitutional authority to take any action whatsoever.

More to the point, whether the FTC chooses act upon any disagreement at all is entirely optional; it can passively allow the Authority to make the rules. And, again, the mere possibility that a private entity might make the law is enough to find HISA unconstitutional. *Amtrak II*, 575 U.S. at 62 (Alito, J., concurring) (noting that "even the *possibility* of a private arbitrator" would violate the Constitution).

5. Examining the rest of HISA demonstrates just how illusory the tweak Congress made in response to the Fifth Circuit's original decision really was—and why it should make no difference to the constitutional question. The only non-ministerial legal *obligation* the FTC has is to review the proposed rules for compliance with HISA, 15 U.S.C. §3053(c)(2)—not unlike what a district court might do in an APA challenge, 5 U.S.C. §706. But no one would claim that a district court is exercising surveillance and authority over an agency. Indeed, Congress could perform the same function as the FTC by overriding rules with which it disagrees. But "Congress could not say: 'The defense budget is whatever Lockheed Martin wants it to be, unless Congress intervenes to revise it.'" *Consumers' Rsch. v. FCC*, 109 F.4th 743, 771 (5th Cir. 2024) (en banc).

Adding to the lack of supervision, the FTC has no power at all to review—let alone reject—any interpretive rules the Authority might issue as "guidance." 15 U.S.C. §3054(g)(2). Although the Authority must submit any guidance to the FTC, *id.* §3054(g)(2), the guidance "take[s] effect on the date on which the guidance is submitted," regardless of what the FTC might think of it, *id.* §3054(g)(3). Such guidance is often used as a shortcut to change the law without going through notice-and-comment rulemaking. And it can have so great an impact on private parties that an agency may sometimes be forced to maintain it even if it was not properly adopted at the outset. *See DHS v. Regents of the Univ. of Cal.*,

591 U.S. 1, 33 (2020). HISA provides no apparent statutory mechanism for the FTC to prevent the Authority from using its statutory authority to issue sub-regulatory diktats to evade any limitations the FTC might seek to adopt by rulemaking.

When all of these points are put together, the truth emerges: the Authority now governs the horseracing industry—both *de facto* and *de jure*. The Fifth Circuit should not have changed its conclusion about whether Congress constitutionally delegated legislative power to the Authority merely because the words "abrogate," "add," and "modify" were added to the list of verbs describing the FTC's authority. 15 U.S.C. §3053(e). Accordingly, if the Court chooses to treat Applicants' request as a petition for writ of certiorari regarding the Authority's enforcement powers, it should also treat this response as a cross-petition regarding the Authority's rulemaking powers and grant both.

CONCLUSION

The Court should deny the application for stay of the mandate. Additionally, if the Court construes the application as a certiorari petition, it should similarly construe this response as a cross-petition and grant both.

Respectfully submitted.

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