

No. A-\_\_\_\_\_

IN THE  
*Supreme Court of the United States*

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STATE OF OKLAHOMA, ET AL.,

*Applicants,*

v.

UNITED STATES OF AMERICA, ET AL.,

*Respondents.*

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**APPLICATION FOR AN EXTENSION OF TIME  
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

Pursuant to Rules 13.5 and 30.2 of this Court, Applicants the State of Oklahoma, the Oklahoma Horse Racing Commission, the Tulsa County Public Facilities Authority, dba Fair Meadows Racing and Sports Bar, the State of West Virginia, the West Virginia Racing Commission, Hanover Shoe Farms, Inc., the Oklahoma Quarter Horse Racing Association, Global Gaming RP, LLC, dba Remington Park, Will Rogers Downs, LLC, the United States Trotting Association, and the State of Louisiana (collectively “Applicants”) respectfully apply for a 60-day extension of time, to and including October 16, 2023, within which to file any petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. The court of appeals denied Applicants’ petition for rehearing en banc on May 18, 2023. App. 33a. Unless extended, the time for filing any petition for a writ of certiorari will expire on August 16, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case presents an important question regarding the limits on Congress’s ability to delegate governmental power to private entities, and to commandeer the States in an effort to evade funding its federal programs. In 2020, Congress federalized horseracing anti-doping, medication control, and racetrack safety by enacting the Horseracing Integrity and Safety Act of 2020 (“HISA”). *See* 15 U.S.C. § 3051 *et seq.* Congress gave the principal role in creating and enforcing federal regulations under HISA to a private, nonprofit corporation known as the Horseracing

Integrity and Safety Authority (the “Authority”). *Id.* §§ 3052(a), 3053(a), 3057(d)(3)(A). This private corporation drafts the federal regulations governing horseracing safety, and the Federal Trade Commission (“FTC”) is required to “approve” any and all of the Authority’s rules as binding federal law so long as they are not inconsistent with the statute—even if the government disagrees with them for policy reasons. *Id.* § 3053(c)(2). And Congress gave the private Authority the exclusive power to bring civil actions in federal court to enjoin violations of its rules and enforce its civil sanctions. *Id.* § 3054(j)(1).

Congress did not appropriate the funds necessary to administer the program, instead creating a scheme in which state racing commissions collect the Authority’s fees. 15 U.S.C. § 3052(f)(2). If a State refuses, HISA punishes the State by preventing it from “impos[ing] or collect[ing] from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters,” even matters that are not preempted by an applicable HISA rule. *Id.* § 3052(f)(3)(D).

The Fifth Circuit found HISA unconstitutional, concluding that the scheme violated the private non-delegation doctrine, given that “[t]he FTC’s limited review of proposed rules falls short of the ‘pervasive surveillance and authority’ an agency must exercise over a private entity.” *NHBPA v. Black*, 53 F.4th 869, 884 (5th Cir. 2022).

The next month, Congress amended the statute to give the FTC the back-end ability to undergo notice-and-comment rulemaking if it wishes to add to, abrogate, or modify the Authority’s rules that the FTC previously was statutorily bound to promulgate. But that amendment addressed only one of HISA’s many constitutional

problems. Most glaringly, the FTC still lacks the front-end power to veto the Authority’s proposals, and thus maintain control over what regulations become federal law—the crucial governmental power that all other federal agencies possess.

2. On April 26, 2021, Applicants filed this lawsuit, arguing that HISA violates the Constitution’s private nondelegation and anti-commandeering doctrines. The district court dismissed the case on the merits, ruling that HISA did not violate the Constitution. App. 34a–66a, 67a.

3. Applicants timely appealed. On March 3, 2023, the Sixth Circuit affirmed the district court’s order, App. 1a–19a, 32a, and on May 18, 2023, the Sixth Circuit denied Applicants’ petition for rehearing en banc, App. 33a.

4. “For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days.” Sup. Ct. R. 13.5. Good cause exists here for multiple reasons. *First*, counsel for Applicants have significant professional obligations during the period in which the petition would otherwise need to be prepared, including a July 25 oral argument in *Poe v. Drummond*, No. 23-cv-00177-JFH-SH (N.D. Okla.); merits-stage amicus briefing in *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S.); and several filings in state and federal appellate courts. *Second*, additional time is necessary here to allow counsel to address these important and complex questions of federal constitutional law, and also to coordinate among the numerous petitioning parties, which include three States, two state racing commissions, three racetracks, two horseracing associations, and a horse-breeding farm. *Third*, a similar constitutional challenge to HISA as amended is currently pending before the Fifth

Circuit, and the Fifth Circuit has expedited that appeal. *See* Order, *NHBPA v. Black*, No. 23-10520 (5th Cir. May 26, 2023), Dkt. 54. Because the Fifth Circuit’s decision may conflict with the Sixth Circuit’s decision below, an extension would “permit[] both the Court and the parties to consider the certiorari possibilities of the case in the light of that new event.” Stephen M. Shapiro et al., *Supreme Court Practice* 6-36–37 (11th ed. 2019). Applicants are not aware of any party that would be prejudiced by a 60-day extension.

Accordingly, Applicants respectfully request that the time to file any petition for a writ of certiorari be extended by 60 days, to and including October 16, 2023.

July 12, 2023

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