No. 23-402

In The
Supreme Court of the United States

OKLAHOMA, ET AL.

Petitioners,

v.

UNITED STATES, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* STANDARDBRED OWNERS ASSOCIATION OF NEW YORK, AND UNITED STATES REPRESENTATIVES LANCE GOODEN, CLAY HIGGINS, AND ALEXANDER MOONEY IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Standardbred Owners Association of New York, United States Representative Lance Gooden, United States Representative Clay Higgins, and United States Representative Alexander Mooney respectfully submit this brief of *amici curiae* in support of the Petitioners.[1]

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The Standardbred Owners Association of New York ("SOANY") is a non-profit organization based in Yonkers, New York, that, among other things, represents the interests of Standardbred horses engaged in the sport of harness racing at Yonkers Raceway in Yonkers, New York, as well as their owners, trainers, drivers and grooms. Established in 1951, SOANY represents more than 900 members and provides a range of benefits to qualified trainers,

[1] In accordance with Supreme Court Rule 37.6, *Amici* state that no counsel for any party authored this brief, either in whole or in part, and no entity or person aside from the *Amici*, their members or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *Amici* state that counsel of record for all parties received timely notice of *Amici*'s intent to file this brief.

drivers and grooms, including medical insurance and pension benefits.

SOANY and its members have a substantial interest with respect to the issue of the constitutionality of the Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051-3060 ("HISA" or the "Act"). At present, the Act covers Thoroughbred horses and Thoroughbred horseracing (15 U.S.C. § 3051(4)). However, the Act includes a provision enabling the Horseracing Integrity and Safety Authority (the "Authority") to expand its jurisdiction to include other breeds of horses, including Standardbred horses,[2] on a state-by-state basis at the election of a State racing commission or breed governing organization. *Id.*

In the event that the Authority's jurisdiction is so expanded, the detrimental impact on Standardbred horses and the harness racing industry would be substantial. For example – as demonstrated by the

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[2] Standardbred horses differ physically from Thoroughbred horses in several material respects. Whereas Thoroughbred horses are known for flat races, galloping at high speeds with a jockey mounted on a saddle, Standardbred horses are uniquely suited to harness racing, trotting or pacing, and driven by a "driver" in a two-wheeled cart, known as a "sulky," behind the horse. The SOANY believes that many of the rules adopted and implemented by HISA would be very detrimental to the harness racing industry.

fateful HISA experience to date[3] – costs and fees assessed by the Authority would likely be so high as to drive participants out of the industry. This would lead to a reduction in breeding and racing, and would otherwise substantially diminish an industry that directly or indirectly employs tens of thousands of Americans. A private entity exercising inadequately supervised and effectively unchecked regulatory power – which includes the ability to issue lifetime bans – could have devasting consequences for the harness racing participants, including the SOANY members. Critically, misapplication of medication rules from one breed to another could have a harmful impact on our horses, the true stars of our sport, by denying them therapeutic medications proven to be important to their health and well-being. For all of these reasons, SOANY, along with similarly situated harness racing associations, has an interest in ensuring that any regulations covering its members, and the horses they care for, are constitutionally sound, and are not written and implemented by an unelected and unaccountable private entity, which

[3] The Authority released its assessments for fiscal year 2024 on November 6, 2023, with total assessments of $77,522,500. *See* Horseracing Integrity and Safety Authority, *List of 2024 Assessments by Track* (available at https://bphisaweb.wpengine.com/wp-content/uploads/2023/10/2024-Assessments-by-Track.pdf) (last visited Nov. 14, 2023).

may be comprised, in part, of competing industry participants.

Representative Lance Gooden is a member of the United State House of Representatives, who represents the Fifth District of Texas. He is a member of the House Committee on the Judiciary and the Committee on Transportation and Infrastructure. Representative Gooden opposes the Act, and spoke out on the floor of House of Representatives in opposition to the December 2022 amendment to the Act, noting that the language intended to "fix" the Act, "had been hastily put together and failed to address the underlying issues" raised by the Fifth Circuit Court of Appeals, and that the Act "still did not allow the FTC to make policy decisions." 169 Cong. Rec. E47 (daily ed. Jan. 24, 2023) (statement of Rep. Gooden).

Representative Clay Higgins is the United States Representative from the Third District of Louisiana. Representative Higgins serves on the House of Representatives Homeland Security Committee and Oversight and Accountability Committee. Representative Higgins has opposed the Act, and in the current Congress, he has introduced H.R. 5693, 118th Cong., § 1 (2023), a bill to establish the Racehorse Health and Safety Act of 2023. Among other things the Racehorse Health and Safety Act would repeal the Horseracing Integrity and Safety Act of 2020 and replace it with a constitutionally sound model of regulation that authorizes States to enter

into an interstate compact to develop and enforce scientific medication control rules and racetrack safety rules.

Representative Alex Mooney is the United States Congressman representing the Second Congressional District in the State of West Virginia. Representative Mooney sits on the House Financial Services Committee. Representative Mooney opposes the Act, and along with Representative Higgins is a co-sponsor of H.R. 5693 (the Racehorse Health and Safety Act of 2023).

As Members of Congress sworn to uphold the Constitution, Representatives Gooden, Higgins and Mooney have a unique interest in this Court's clarification of the Constitutional status of the regulatory model embodied in the Act – the granting of unprecedented power to a private Authority to regulate their constituents and the animals under their care. It is vital that the constitutional overreach of HISA be addressed and, in turn, that the legislature is provided with critical guidance from this Court which would prevent future constitutional breaches.

SUMMARY OF THE ARGUMENT

The Petition in this matter has been filed by a variety of interested parties, ranging from three sovereign States, to State racing commissions, to a number of disparate participants in the horse racing

industry concerned about the profound and harmful impact that the Act will have on that industry. The substantive concerns articulated by the Petitioners in the proceedings below and in the Petition highlight the critical importance of ensuring that the Act fully adheres to fundamental constitutional principles.

Amici file their Brief from different vantage points. SOANY, as an organization representing potentially impacted stakeholders in the harness racing industry, seeks to remedy the damage already caused by HISA and to prevent further harm to equine and human participants alike. The Congressional *Amici*, as legislators sworn to uphold the Constitution, respectfully urge this Court to examine the issues raised by the Petition and to review the unique structure created by the Act which grants extensive powers to a private entity to engage in wholesale regulation of the horse racing industry. Under the Act's dubious regime, that power is wielded alongside demonstrable constraints on the Federal Trade Commission's ability to practically and effectively prevent the inappropriate exercise of power by a private entity, power that is rightly conferred by the Constitution's Vesting Clauses only to the legislature and to the executive branch.

Supreme Court clarification of the pair of constitutional issues that are the focus of the Petition would greatly benefit legislators such as the Congressional *Amici* as they confront these issues,

which are implicated in numerous matters that they address in the course of their ongoing legislative activities. Judicial guidance and clarification as to the parameters of the private non-delegation doctrine and the anti-commandeering doctrine would potentially correct the constitutional missteps embedded in the Act and also allow legislators to avoid such missteps in their future legislative efforts. Indeed, three Members of the Court have specifically recognized the "need to clarify the private non-delegation doctrine." *Texas v. Comm'r*, 142 S. Ct. 1308, 1308 (2022) (statement of Alito, J., joined by Thomas and Gorsuch, JJ.).

With respect to the private non-delegation doctrine concerns raised in the Petition, *Amici* respectfully submit that, in many ways, the regulatory scheme represents Congress going a wayward step further than it has gone before in delegating its legislative powers to a private authority. This is an authority whose members are not elected by – or otherwise accountable to – the people in any way, and who, in many cases, are in fact "private persons whose interests may be and often are adverse to the interests of others in the same business." *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Indeed, this is "legislative delegation in its most obnoxious form." *Id.* This delegation will undoubtedly have profound impacts on the equine and human participants in the horse racing industry, all by the hands of a private entity inappropriately

exercising legislative and executive powers. Accordingly, *Amici* respectfully submit that the Court should grant the Petition in order to bring clarity to the issue and establish clear guardrails for Congress in order to prevent further evasion of accountability by authorizing private parties to engage in the legislative function in a manner which crosses the line into constitutionally infirm private delegation.

Moreover, the Act's brazen wholesale takeover of the States' long-established regulatory structure for horse racing simultaneously fails to provide the requisite funding to sustain and perpetuate HISA's scheme and the extensive regulatory activities of HISA. Instead, it imposes a coercive regime which forces the States to act as HISA's bill collector at the risk of the threatened loss of the States' power to regulate the industry. This troubling structure is a blatant violation of fundamental principles of federalism and a violation of the anti-commandeering doctrine. *Amici* respectfully submit that the Court should grant the Petition to address this overreach and to provide necessary clarification for lawmakers with respect to the scope of the anti-commandeering doctrine.

ARGUMENT

I. The Court Should Grant the Petition Because *Amici* Require Clarity on the Scope of the Private Non-Delegation Doctrine

a. HISA Unconstitutionally Permits Unelected, Non-Governmental Officials to Create and Determine the Substance of Federal Law

In 2020, Congress passed HISA, which recognized the Authority, a private, non-profit corporation, incorporated in Delaware, for purposes of developing and implementing rules to govern a horseracing anti-doping and medication control program and a racetrack safety program for Thoroughbred horses. 15 U.S.C. § 3052(a).

The Act assigned the Federal Trade Commission ("FTC" or the "Commission") responsibility for overseeing the Authority. 15 U.S.C. § 3053. However, the oversight provided for in the Act is limited in critical ways, and the FTC does not exercise the "pervasive surveillance and authority" over the Authority necessary to avoid application of the private non-delegation doctrine. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). In other words, HISA's structural infirmities (both before and after the amendment to the Act

discussed below), cede such powers to the Authority that it is not "limited to an advisory or subordinate role in the regulatory process." *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013), *vacated and remanded on other grounds*, 575 U.S. 43 (2015). The Authority – not the FTC – remains firmly in the driver's seat when it comes both to the development and implementation of the regulations required by the Act, as well as the enforcement of the sweeping punitive actions taken by the private entity against the affected members of the industry.

Specifically, pursuant to 15 U.S.C. § 3053(c)(2), the Act mandates that the FTC "shall approve" a proposed rule of the Authority if it finds that the rule is consistent with the Act and other applicable rules approved by the FTC. The FTC has no power to veto a proposed rule at the outset if the proposed rule is merely "consistent" with the Act. Indeed, when approving such rules, the FTC has repeatedly stated that its review is limited to consistency, and that it cannot replace the Authority's policy judgments with its own. *See*, *e.g.*, FTC, *Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority* (Mar. 25, 2022) ("Under the Act, the Commission reviews the Authority's proposals for their consistency with the Act and the Commission's rule, not for general policy."); FTC, *Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority* (Mar. 27, 2023) ("Refinements to

the rule suggested by the National Horsemen and other commenters might be considered for future proposed rule modifications, but for purposes of the Commission's current review these constitute mere policy disagreements with the Authority and not any inconsistency with the Act.")

Moreover, the Act enables the Authority – an entity that all parties concede is a private actor – to wield additional powers, including the power: (1) to pursue civil actions in federal court to obtain injunctive and other relief against covered individuals, 15 U.S.C. § 3054(j); (2) to issue subpoenas and to conduct investigations previously undertaken by State racing commissions, 15 U.S.C. § 3054(h); (3) to calculate and assess, either on the State racing commissions, or directly on the regulated parties, the fees required to fund their regulatory program, 15 U.S.C. §§ 3052(f)(2) and (3); (4) to develop a list of civil penalties, 15 U.S.C. § 3054(i), and to impose potentially crippling civil sanctions, including monetary fines and penalties and lifetime bans from horseracing, 15 U.S.C. § 3057(d)(3); (5) to issue guidance regarding the interpretation, administration or enforcement of its rules, which are effective immediately upon their submission to the FTC, 15 U.S.C. § 3054(g); and, critically from SOANY's perspective, (6) to expand its own jurisdiction to include not just Thoroughbred horses and Thoroughbred horseracing, but other breeds as well, including, for example, Standardbred horses and

Quarter Horses (sprinters known for racing quarter mile distances). 15 U.S.C. § 3054(l).

In November 2022, the Fifth Circuit Court of Appeals held that the Act was facially unconstitutional because it violated the private non-delegation doctrine. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022). Shortly thereafter, in December 2022, Congress, as part of an extensive and voluminous year-end legislative package dealing with numerous issues, purported to "fix" the problem by replacing a then-existing provision that authorized the FTC to adopt interim final rules, when necessary for the health and safety of covered horses or the integrity of covered horseraces and wagering on those horseraces, with a provision enabling the FTC to:

> "… abrogate, add to, and modify the rules of the Authority promulgated in accordance with this Act as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to confirm the rules of the Authority to requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act."

15 U.S.C. § 3053(e).

However, this limited and actually minimalist amendment buried in a hastily passed omnibus bill

did not solve the myriad constitutional issues that infect HISA. Even after the amendment, the Authority, an unelected body, remains the primary driving force behind the rules. Once submitted by the Authority, the FTC has no ability to reject a proposed rule, even if the FTC disagrees as a matter of policy, so long as the proposed rule numbers among the nearly infinite variety of potential rules on a given subject that can be considered "consistent" with the Act. *See Black*, 53 F.4th at 885 (saying that a rule is or is not "consistent" with "open-ended" principles "says next to nothing. Such high-altitude oversight … 'largely gives the Authority the power to 'fill up the details' of the Act in places with less specific directives,' and '[f]illing up the details has long been recognized as the very business of regulating.) citing *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 596 F.Supp.3d 691, 723 (N.D. Tex. 2022); *Gundy v. United States*, 139 S.Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

b. The Sixth Circuit Applied an Incorrect Standard in Holding that the Authority was "Subordinate" to the FTC

In ruling against the Petitioners in this case, the Sixth Circuit Court of Appeals,[4] applying what

[4] Whatever the outcome in the pending Fifth Circuit proceeding, the disparate conclusions already reached by the Fifth and Sixth

Amici respectfully submit is the incorrect standard, disagreed, ruling that the amended Act did not violate the private non-delegation doctrine because the Authority was subordinate to the Commission. *Oklahoma et al. v. United States of America, et al.,* 62 F.4th 221, 229 (6th Cir. 2023) *reh'g en banc denied*, 2023 U.S. App. LEXIS 12274, 2023 WL 3185095 (May 18, 2023).

Among other things, the Sixth Circuit argued that the Authority was subordinate to the FTC after the December 2022 amendment because following the amendment the FTC *could* implement certain prophylactic procedural rules to prevent the temporary implementation of Authority rules with which the FTC disagreed. *Id.* at 230-32. However, this assertion suffers from at least two infirmities.

First, it is speculative and disregards the present reality. It is of little moment to people (and animals) adversely impacted in the here and now, perhaps irreparably, by an Authority regulation that the FTC *might* undo at some indeterminate point in the future following a lengthy notice-and-comment rulemaking process. Simply put, the horse will have left the barn before belated action by the FTC, and the damage to both equine (who may be denied commonsense and critical therapeutic medications)

Circuits illustrate both the need and utility of review of this matter by this Court.

and human participants (who may suffer crippling financial sanctions and potential banishment from their livelihoods) will have been irreparably harmed by unelected non-governmental officials. Indeed, as noted above, the Authority has already imposed massive financial assessments on the industry, assessments which have gone unchecked by the passive FTC, functioning as, at best, a disinterested bystander. *See* FTC, *Order Approving the Assessment Methodology Rule Proposed by the Horseracing Integrity and Safety Authority* (Apr. 1, 2022) ("While the Commission concludes that the interstate methodology proposed by the Authority is consistent with the Act, it is worth noting that there are likely multiple methodologies that the Authority could have proposed that would be consistent with the Act.")

Second, as the Petitioners point out, taken to its logical extreme, this amounts to an argument that there is no such thing as improper delegation, private or otherwise, because Congress can always pass a law overruling regulations issued by a private authority or executive agency. *See Texas v. Rettig*, 993 F.3d 408, 416-17 (5th Cir. 2021) (Ho, J., dissenting from denial of reh'g *en banc*) (an agency's ability to issue a new rule does not cure a non-delegation problem because, this "would render the nondelegation doctrine a dead letter. We might as well say that Congress can never violate the nondelegation doctrine, because the American people can always petition Congress to pass

a new law and claw back its lawmaking power from an agency.").

The constitutionally correct course of action is simple: the initial operative and very much controlling regulations should not be imposed by the unaccountable private entity in the first place without the sanction of an entity that is constitutionally vested with the power to do so.

c. Notwithstanding Superficial Similarities, HISA Goes Beyond the Maloney Act in Delegating the Substance of Federal Law to a Private Entity

The Sixth Circuit also analogized to the Maloney Act, the 1938 amendment to the Securities and Exchange Act of 1934 (15 U.S.C. §§ 78a *et seq*.), which provided for the creation of self-regulatory organizations ("SROs") such as the Financial Industry Regulatory Authority ("FINRA").

Following the December 2022 amendment to HISA, the two laws share only superficial structural similarities with respect to the relationship between the private authority and the government agency with oversight responsibility (in FINRA's case, the Securities and Exchange Commission ("SEC")). In HISA's case, the FTC may "abrogate, add to, and modify" the rules of the Authority. 15 U.S.C. § 3053(e). Under the Maloney Act, the SEC may "abrogate, add

to, and delete from" the rules of an SRO such as FINRA. 15 U.S.C. § 78s(c).

In both cases, the government agency is bound to promulgate the rules if they are consistent with the Act and agency regulations. 15 U.S.C. § 3053(c) (the FTC); 15 U.S.C. §§ 78f(b)(5), 78o-3(b)(6), 78s(b)(2)(C) (the SEC). But these similarities are only skin deep.

In practice, the SEC's consistency review entails agency engagement on a policy level. Specifically, the SEC must evaluate whether, among other things, the SRO's rules are:

> "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest." 15 U.S.C. § 78*o*-3(b)(6).

This framework, and in particular the fact that the SEC must consider the public interest, requires an evaluation of the policy behind the rule absent in the FTC's limited review of the Authority's proposed rules. *See*, *e.g.*, SEC, *Order Disapproving Proposed*

Rule Change to Amend FINRA Rule 6140 (Other Trading Practices), 76 Fed. Reg. 9062 (Feb. 16, 2011) (disapproving a proposed rule change relating to the handling of certain stop orders on the grounds that it was not designed to "prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade … and, in general, to protect investors and the public interest.")

By contrast, the Act does not give the FTC similar discretion on the front end. Indeed, the FTC, hamstrung by the unconstitutional delegation of power to the private entity and the simultaneous restriction on its own power to review potentially harmful regulations fabricated by the private entity, has demonstrated its mandated subservience to the private entity by continuing to disregard comments that it perceives as relating to policy. *See* FTC, *Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority* (Mar. 27, 2023) ("Refinements to the rule suggested by the National Horsemen and other commenters might be considered for future proposed rule modifications, but for purposes of the Commission's current review these constitute mere policy disagreements with the Authority and not any inconsistency with the Act.")

d. This Court Should Grant Review to Establish a Clear Standard That Will Prevent the Proliferation of a Model that Permits Regulation Without Accountability

The regulatory model described above creates an efficient vehicle for multiple layers of "buck passing": from Congress to the executive agency (in this case the FTC), and from the executive agency to the unelected and ultimately unaccountable Authority and its members.

i. The HISA Regulatory Model Permits Congress to Escape Accountability

Delegations of legislative power such as this one violate constitutional principles arising from the Vesting Clauses and permit legislators to evade accountability. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) ("Such a delegation of legislative power … is utterly inconsistent with the constitutional prerogatives and duties of Congress.").

As Justice Gorsuch has written:

> "If Congress could pass off its legislative power to the executive branch … [a]ccountability would suffer…. Legislators might seek to take credit for addressing a pressing social problem by sending it to the

> executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue."

Gundy v. United States, 139 S.Ct. 2116, 2134-2135 (2019) (Gorsuch, J., dissenting)

Here, the delegation is to a private entity; that is, "legislative delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). In this case, the delegation is substantial. As noted above, the Authority has the ability to enact sweeping regulations to deny horses demonstrably beneficial therapeutic medications, to pursue potentially devastating civil actions against covered individuals, to conduct investigations, to issue subpoenas, to expand its own jurisdiction to cover additional breeds of horses with different physical characteristics engaged in distinctive types of racing activities, to assess fees directly or indirectly on industry participants which in many cases may dwarf the fees to which they were previously subject under existing State regulation, and potentially to impose crippling monetary and other sanctions, up to and including lifetime bans from the sport.

This scheme allows an unelected, unaccountable entity to implement an aggressive regulatory scheme that has tremendous impacts on horses, as well as people, including SOANY's constituents and the Congressional *Amici's*

constituents. It is one thing for *Amici* and their constituents to bear the brunt of mandates imposed on them by duly authorized legislative or executive action. It is quite another thing for them to bear the brunt of the force of actions taken by an unaccountable private entity. Our Constitution forbids this.

ii. The HISA Regulatory Model Permits the FTC to Escape Accountability

Not only does the HISA model permit Congress to "pass the buck," it permits the FTC to do so as well. For example, imagine that agency officials agree with the Authority on the merits of a given regulation. Imagine further that the regulation in question is extremely unpopular and that the agency and the broader administration might face political blowback if it were to attempt to adopt the regulation itself. Under this model, the agency – and the current Administration it serves (or any subsequent administration) – could have its cake and eat it too. They would publish the regulation, arguing that their hands are tied by the consistency standard, thereby shifting the blame to the unelected and unaccountable private Authority. The agency could then delay or skip altogether the time-consuming process of notice and comment rulemaking that would be necessary to abrogate or amend the rule, not unrealistically hoping that the public would move on from the issue in the

meantime. This is precisely the kind of accountability-shifting that the private non-delegation doctrine is meant to prevent. As Justice Alito expressed in his concurrence in *Amtrak*:

> "[L]iberty requires accountability. When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences. One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern."

Dep't of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 57 (2015) (Alito, J., concurring)

The opportunity that the Act gives the FTC to engage in this kind of fingerprint-resistant, unaccountable rulemaking is apparent, as described above, from the Commission's steadfast refusal to engage with public comments that it deems to be related to policy, a refusal that effectively leaves the participants with no constitutional avenue of redress. *Amici* respectfully submit that this Act cannot be allowed to become a model for future legislation that might permit this kind of accountability-shifting in other regulatory arenas. The Petition provides this Court with the ideal opportunity to prevent such future unconstitutional delegation of power.

II. The Court Should Grant the Petition Because the Act Violates Bedrock Principles of Federalism

Not only does the Act unconstitutionally delegate power to an unaccountable private entity, the Act allows that entity to escape fundamental responsibility for approaching Congress to fund its regulatory regime. Instead, the Act unabashedly creates an unfunded mandate and provides for the unconstitutional coercion of the sovereign States into funding the private authority – and that authority's expansive regulatory scheme – in violation of the anti-commandeering doctrine. The Act, if allowed to stand, enables Congress and the private entity created by the Act to impose financial costs on the States' citizens and potential restrictions on the States' sovereign powers, all while avoiding both political and fiscal accountability.

As noted above, the Act appropriates no money for its implementation. Instead, the Act authorizes the Authority to assess and collect fees from the States, or, at the States' election, directly from industry participants. 15 U.S.C. § 3052(f). If a State chooses not to remit such fees itself, instead permitting the Authority to directly assess industry participants, the Act provides that such State may not impose or collect "from any person a fee or tax relating to anti-doping and medication control or racetrack

safety matters for covered horseraces." 15 U.S.C. § 3052(f)(3)(D).

This Court has held that the federal government "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997).

As this Court has made clear, adherence to this anti-commandeering principle is important for several reasons. Among other things, it "prevents Congress from shifting the costs of regulation to the States." *Murphy v. NCAA*, 138 S.Ct. 1461, 1477 (2018).

> "If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis."

Id.

The kind of cost-shifting and accountability-shifting that the anti-commandeering doctrine, as pronounced by this Court, is intended to prevent is precisely what has happened here. As this Court's

precedents make clear, while the federal government may regulate the conduct of private actors, it may not command the States to enforce a federal regulatory regime. *Id.* at 1481. However, by threatening an imposition on the States' taxing power should they choose not to collect the Authority's fees, even in areas potentially unrelated to the areas regulated by the Act, the scheme outlined above effectively coerces the States into enforcing a federal regulatory regime.

As the Court explained in *Printz*,

> "We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."

Printz, 521 U.S. at 935 (citing *New York v. United States*, 505 U.S. 144 (1992)).

Under the strictures of the Constitution, the States are not meant to be subservient to the federal government, much less a private entity created by misguided legislation. Unfortunately, the HISA scheme is fatally designed to commandeer the long-

existing state regulatory structure for horse racing by compelling the States to cede power – and collect and remit revenues – to a private authority which lacks the constitutional authority to act in this capacity.

CONCLUSION

Congress has enacted a novel and dangerous regulatory scheme that: (1) enables multiple layers of undemocratic accountability shifting, in both political and fiscal terms; (2) displaces State authority in an industry traditionally regulated by the States while improperly coercing the States to enforce the scheme; (3) empowers a private Authority consisting principally of unelected and unaccountable industry insiders with a bevy of governmental powers, including the powers to impose crippling fines and lifetime bans on industry members, and (4) creates an unfunded mandate that alternatively requires States to cede their power to a private entity and to forego existing revenue streams to pay for a private entity's fabricated wishlist. This scheme violates a series of constitutional principles, and the Court should grant the Petition so that Congress – which unfortunately is often tempted to seek novel means of achieving accountability-free regulation, economically and otherwise – may have clear guidance on the boundaries of the private non-delegation and anti-commandeering doctrines.

For the foregoing reasons, *Amici* respectfully submit that the Court should grant the Petition for a writ of certiorari.

Respectfully submitted,

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