No. 23-402

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

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BRIEF FOR THE STATES OF ARKANSAS, IDAHO, IOWA, MISSISSIPPI, MONTANA, NEBRASKA, OHIO AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici are the States of Arkansas, Idaho, Iowa, Mississippi, Montana, Nebraska Ohio and Texas. Amici are States with significant thoroughbred horseracing industries. Each regulates horseracing under state law. The Horseracing Integrity and Safety Act, or HISA, displaces that regulation. It entrusts regulation of horseracing to a purely private entity, the Horseracing Integrity and Safety Authority, which can make rules with the force of law, in violation of the private nondelegation doctrine. Compounding that unconstitutional structure, HISA further provides that "[t]he rules of the Authority . . . shall preempt any provision of State law or regulation with respect to matters within the jurisdiction of the Authority." 15 U.S.C. 3054(b). *Privately* authored rules preempt duly enacted state laws. Yet the court of appeals upheld HISA, concluding it passed muster because a post-suit amendment gave the Federal Trade Commission the power to repeal the Authority's rules after they had already been adopted. Amici States have a strong interest in this Court's reviewing that erroneous holding and clarifying that private entities may not serve as federal regulators, even if their rules are subject to purely post-hoc oversight.

SUMMARY OF THE ARGUMENT

I. The private nondelegation doctrine is a basic principle of constitutional law: the powers the Constitution vests in the federal government cannot be delegated outside the government. While the more well-known nondelegation doctrine can raise difficult line-drawing questions between legislative and executive power, the question the private nondelegation doctrine asks is much simpler: has Congress delegated federal power of any sort to a private entity? Federal regulation is

federal power, whether executive or legislative. So while private entities may advise the government on regulation, they may not regulate on the government's behalf.

II. HISA flouts that principle. It assigns the Authority, a wholly private entity, a series of regulatory tasks, such as writing lists of prohibited drugs and prohibited racing practices. It then commands the FTC to approve the Authority's proposed rules so long as they are "consistent" with HISA. Since HISA is little more than a laundry list of regulatory tasks, all that leaves the FTC to do is make sure that the Authority's rules fall within that list. All the policy choices about which drugs and practices to prohibit are left to the Authority, as the FTC has repeatedly confirmed. That violates the private nondelegation doctrine. Congress may authorize private entities to write proposed regulations if it allows agencies to make a policy choice about whether to accept them, but it cannot force agencies to rubberstamp whatever policy choices a private regulator makes.

III. The court of appeals agreed that that structure would ordinarily be unconstitutional, but it held that HISA was saved by a post-suit amendment that authorized the FTC to amend the Authority's rules through notice-and-comment rulemaking after approving them. That change, it reasoned, made the Authority the FTC's subordinate.

That amendment did not save HISA. The private nondelegation doctrine does not turn on whether the private delegate is the government's subordinate, but on whether it exercises power that the Constitution vests in the federal government. The power to regulate is governmental power, even if the private delegate's regulations may later be repealed, as all regulations may. Just as this Court has held that

appellate review in an Article III court does not save an otherwise unconstitutional assignment of jurisdiction to non-Article III courts, the possibility of post-hoc executive-branch review does not save an otherwise unconstitutional assignment of regulatory authority to private actors.

ARGUMENT

I. Private Regulation Violates the Nondelegation Doctrine.

The private nondelegation doctrine is a fancy name for a simple concept. The Vesting Clauses of the Constitution vest all of the federal government's power in the three branches of government. Article I vests the legislative power "exclusively in Congress." *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (citing U.S. Const., Art. I, sec. 1). Article II vests "the 'executive Power'—all of it"—in the President, as assisted by "subordinate officers" he appoints under Article II. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const., Art. II, sec. 1, cl. 1). And Article III vests all of "the Government's 'Judicial Power'" in Article III courts. *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting U.S. Const., Art. III, sec. 1). In sum, all of the federal government's power is vested in the federal government. So whichever branch may exercise a particular power, the government cannot delegate any of its powers outside the government altogether.

Regulation—promulgating rules governing private conduct that carry the force of law—is governmental power. Often, it is executive-branch power. At a minimum, "fill[ing] up the details" of congressionally enacted policy is a form of executive, or, in the case of statutes that concern judicial administration, judicial

power. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. 1, 43 (1825) (Marshall, C.J.)). Indeed, "[f]rom the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations . . . for administering the laws which did govern." *United States v. Grimaud*, 220 U.S. 506, 517 (1911). Those rules *executing* the law "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" *City of Arlington*, 569 U.S. at 304 n.4.

To be sure, just how far this detail-filling power goes is controversial. Current doctrine holds that regulation is within the executive or judicial branch's prerogative "as long as Congress 'lays down by legislative act an intelligible principle'" to guide their exercise of discretion. *Gundy*, 139 S. Ct. at 2123 (plurality opinion) (alterations omitted) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). Other approaches take the concept of detail-filling more literally. *See id.* at 2143 (Gorsuch, J., dissenting) (allowing for non-legislative regulation of "highly consequential details," but no more). But whether a regulation is a permissible exercise of executive or judicial power or may only be enacted by Congress, under the Constitution regulation is always an exercise of *governmental* power of some kind. So the power to regulate may never be delegated outside the government to private entities.

Thus, unlike an ordinary nondelegation challenge, the question in a private nondelegation challenge is simple: has Congress authorized a private entity to regulate or not? If Congress has, that authorization is invalid. If it has merely authorized a private entity

to advise the government on how to regulate, that authorization is valid.

The Court's two leading private nondelegation cases illustrate the distinction. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court reviewed a New Deal-era statute that authorized a majority of coal producers and miners to set minimum wages and hour caps for the industry. The Court rejected that scheme in a paragraph. "The difference," it explained, "between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function." *Id.* at 311.

In response, Congress enacted a new coal price control law (its previous coal price control efforts having been struck down as inseverable from the wage and hour caps in *Carter Coal*). Under that new law, coal producers served "as an aid to the [National Bituminous Coal] Commission," merely "propos[ing] minimum prices" that could "be approved, disapproved, or modified by the Commission" in its discretion. *Sunshine Anthracite Coal Co. v Adkins*, 310 U.S. 381, 388 (1940). The Court easily upheld that scheme. "Since law-making is not entrusted to the industry," it reasoned, "this statutory scheme is unquestionably valid." *Id.* at 399.

The same dichotomy between advice and decision-making delineates how private actors may serve the government in other contexts. For example, in upholding aspects of the magistrate system in *United States v. Raddatz*, this Court likened it to the Court's use of private special masters in original cases. Even though this Court "regularly acts on the basis of the master's report," its use of private special masters is permissible, the Court explained, because their "recommendations are advisory only." 447 U.S. 667,

683 n.11 (1980). By contrast, officials who lack Article III's tenure and salary protections may not even enter trial-level judgments on common-law claims, even if that judgment is subject to appeal and de novo review in an Article III court. *Stern v. Marshall*, 564 U.S. 462, 494 (2011). For Article III's Vesting Clause exclusively vests "the mundane as well as the glamorous" aspects of the judicial power in Article III judges. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.39 (1982).

II. The Authority Exercises Regulatory Power in Violation of the Nondelegation Doctrine.

HISA patently flouts the private nondelegation doctrine. The private corporation it created does not act as the government's adviser in regulating horse-racing, but as the government's horseracing regulator. Its rules formally must be approved by the FTC, but the regulatory decisions are all the Authority's. For so long as its rules fall within the broad checklist of powers Congress gave the Authority, the FTC must approve its rules.

HISA vests nationwide regulatory authority over the horseracing industry in a private entity. It created a "private, independent . . . nonprofit corporation," the Authority, to develop two regulatory "programs" addressing racetrack safety and anti-doping and medication control.[1] 15 U.S.C. 3052(a). It then gives the Authority

[1] In addition to Congress's classification of the Authority as a private entity, which it and the FTC have never disputed, the Authority has all the earmarks of a private entity. *Cf. Dep't of Transp. v. Ass'n. of Am. R.R.*, 575 U.S. 43, 51-53 (2015) (holding that Amtrak was not a private entity despite Congress's designating it as one). None of its board members are government officials, 15 U.S.C. 3052(b)(1), or are selected by the

a laundry list of regulatory tasks. The Authority must, for example, "issue, by rule . . . a list of permitted and prohibited medications, substances, and methods" of administering them. *Id.*, 3055(c)(1)(B). On the horseracing safety side, the Authority must issue, among other rules, "a uniform set of training and racing safety standards and protocols . . . which may"—or may not—"include lists of permitted and prohibited practices and or methods"; "a racing surface quality maintenance system that . . . may"—or may not—"include requirements for track surface design"; and rules concerning "injury and fatality data analysis, that may"—or may not—"include . . . race inspections, use of a veterinarian's list, and concussion protocols." *Id.*, 3056(b)(2), (3)(B), (5).

As the discretion embedded in that list suggests, HISA gives the Authority very little guidance for how it must complete those tasks. Instead, it merely gives the Authority certain "considerations" to consider. 15 U.S.C. 3055(b), 3056(a)(2). On the anti-doping and medication control side, these considerations take the form of highly abstract, aspirational principles. For example, the Authority is instructed to consider the precept that "[c]overed horses should compete only when they are free from the influence of medications . . . and methods that affect their performance," or that the use of "medications . . . should be based upon an examination and diagnosis that identifies an issue requiring treatment for which the medication or method represents an appropriate component of treatment." *Id.*, 3055(b)(1), (5). On the racetrack safety side, the Authority is given even less to consider; there it is instructed only to "take into consideration existing

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government, *id.* The government owns no stock in the Authority, and it does not fund the Authority. *Id.*, 3052(f).

safety standards" of private horseracing regulators in other countries. *Id.*, 3056(a)(2).

After the Authority writes those rules, it submits them to the FTC. The FTC, in turn, must approve the rules within sixty days of their publication in the Federal Register so long as it finds they are "consistent with" HISA and other approved Authority rules. 15 U.S.C. 3053(c)(2). That requirement does not make the FTC the ultimate author of the Authority's rules, as the Coal Commission was of the industry proposals in *Adkins*. Instead, the FTC merely plays the same role a reviewing court would, ensuring the Authority's rules are not contrary to law. All the choices between the myriad of regulatory options that are consistent with HISA—the filling up of its details that current doctrine deems executive-branch power—are left to the Authority. Accordingly, HISA makes no pretense of suggesting the Authority's rules are ultimately the FTC's; instead, it refers throughout to "the rules of the Authority" or "Authority rules." *Id.*, 3053(e), 3054(b), (d)(2), (e)(1)(F)(ii)(I), (f)(1)(B), 3057(b)(2), 3058(a).

Not only does the FTC's consistency review leave all the policy choices to the Authority, it is not even a meaningful legal constraint. Because HISA merely provides a list of broad regulatory tasks, overlaid with vague "considerations" that any regulatory effort in the area would necessarily consider, all the FTC can do is verify that the Authority's proposed rules fall within some category on HISA's list.

For example, when the Authority issued its proposed list of prohibited substances and medication methods, commenters lodged a series of objections to the list with the FTC, claiming, for instance, that many of the substances "would be expected to be present at some level" in all horses. Pet. App. 252a. A normal admin-

istrative agency would have to respond to such comments. But the FTC, bound to approve any rule that is "consistent" with HISA, did not. Instead, it simply responded that HISA "require[d] the Authority to issue 'a list of permitted and prohibited medications'" and that the Authority's list was one. Pet. App. 257a. Likewise, when the Authority proposed banning certain types of horseshoes, commenters objected to the types they banned. The FTC responded that whatever "policy disagreements" commenters had with the Authority's ban, that ban was consistent with HISA because HISA permits the Authority to "prohibit[] practices or methods" of horseracing.[2] *Which* practices or methods the Authority chose to prohibit was not for the FTC to second-guess.

That structure is unconstitutional. HISA consigns the FTC to the ministerial role of ensuring that the Authority's proposed list of prohibited drugs is in fact a list of prohibited drugs, or that its list of prohibited racing practices is a list of prohibited racing practices. Which drugs or practices go on those lists is entirely within the discretion of the private Authority. That grant of regulatory power violates the Vesting Clauses. Under current doctrine, it violates Article II's Vesting Clause. In filling out the details of which drugs and racing methods the HISA scheme prohibits, the Authority exercises what modern doctrine deems executive-branch power. Under a pre-New Deal understanding of the public nondelegation doctrine, it violates Article I's Vesting Clause. On that view, by constructing lists of proscribed conduct and substances from scratch, with only "considerations" to guide it, the

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[2] FTC, *Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity and Safety Authority* 43 (March 3, 2022), available at https://tinyurl.com/2c8h8ep8.

Authority is exercising power solely vested in Congress. But on either view, the Authority exercises power vested solely in the federal government—of which it is not a part.

The government and the private Authority below countered that the FTC's consistency review was no different from the SEC's review of private self-regulatory organizations' proposed rules under the Maloney Act, *see* 15 U.S.C. 78s(b)(2)(C)(i), which courts of appeals have consistently upheld. The critical difference is that the Maloney Act requires SROs' rules to meet a series of policy-laden standards, such as protecting the public interest and not imposing unnecessary burdens on competition. *See Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 445 (D.C. Cir. 2017) (Garland, C.J.). So to find their rules consistent with the Act, the SEC must make a series of independent policy judgments and ultimately decide for itself that the SROs' proposed rules are good policy, much like the Coal Commission in *Adkins*. *See id.* at 446. That makes the SROs' role "purely advisory." *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 n.5 (D.C. Cir. 2013). HISA, by contrast, contains no such standards, but only a series of regulatory powers, leaving the FTC with nothing to do but confirm the Authority has not exceeded its jurisdiction.

III. The FTC's Power to Repeal the Authority's Rules After Approving Them Doesn't Save HISA.

The court of appeals disagreed with none of this; indeed, it "opin[ed] in dicta that the original statute was unconstitutional." Pet. App. 28a (Cole, J., concurring). But it held the amendment to HISA that authorized the FTC to amend or abrogate the Authority's rules after approving them saved the

statute. That amendment, it reasoned, made the authority "subordinate to the agency." Pet. App. 13a. But whether the Authority is the FTC's subordinate isn't the question. All executive-branch officials are ultimately subordinate to the President, as all Article III judges are ultimately subordinate to this Court, but that does not mean their powers can be assigned to private parties. Instead, the question in a private-nondelegation case is whether a private entity is exercising governmental power. Federal regulation is governmental power, so it may not be exercised by private entities, even if their regulations may later be countermanded by other regulations.

The court of appeals held the FTC's amendment power saved HISA on the theory that HISA was constitutional so long as the "Authority [wa]s inferior to the FTC." Pet. App. 13a. But whether a private delegate is an agency's inferior can't be the test of its constitutionality. The Constitution speaks directly on who may serve in an inferior role to executive-branch officials. It calls them inferior officers, an "inferior officer" being an officer who is inferior to "some higher ranking officer or officers below the President," *Edmond v. United States*, 520 U.S. 651, 662 (1997), including an agency's leadership, *see Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510-13 (2010). And the Appointments Clause provides that Congress may either vest the appointment of "inferior Officers . . . in the President" without advice and consent, "or in the Heads of Departments." U.S. Const., Art. II, sec. 2, cl. 2. But that's not how the Authority is appointed. So on the court of appeals' logic, any inferior officer could be replaced by a private entity, circumventing the Appointments Clause. That cannot be correct.

The better way to understand the private nondelegation doctrine is through the Vesting Clauses. Article II vests all executive power in the executive branch, *Seila L.*, 140 S. Ct. at 2191, not just the parts exercised by the President and principal officers. So the moment the Authority's rules are rubberstamped by the FTC and become law, it has unconstitutionally exercised executive power. The FTC's power to repeal or amend those rules after going through notice and comment years later doesn't change that. *All* agency rules can be repealed or modified, but that hardly means they aren't exercises of executive power, any more than a law isn't an exercise of Article I power because it could always be repealed.[3] The distinction the private nondelegation doctrine draws isn't between reversible exercises of executive power and irreversible ones, but between exercising the executive power at all and giving the executive branch advice. And even after HISA's amendment, the Authority is still a regulator, not an adviser.

The Court's Article III Vesting Clause cases confirm that the Vesting Clauses aren't satisfied by merely allowing actors within those clauses' grants of authority to review the decisions of actors who aren't. When this Court considered the constitutionality of bankruptcy judges' entering final judgment on common-law claims, the government argued that was constitutional because litigants could appeal to an Article III court. *See*

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[3] Not only can agencies repeal their own rules, the President may effectively force their repeal by directive. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2290-99, 2303-09 (2001). So if the power of some executive-branch official to repeal a private regulator's rule is all it takes to make private regulation constitutional, the tasks of any agency could be reassigned to private regulators.

N. Pipeline, 458 U.S. at 86 n.39. This Court disagreed that mere Article III review of a non-Article III court's judgment could save an invalid assignment in the first place. Noting that Article III provides life tenure to the judges "*both* of the supreme and inferior Courts," *id.* (quoting U.S. Const. Art. III, sec. 1), the Court held that "the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal," *id.*[4]

Rather than draw the line between trial-level judgment and appellate review, the Court drew the line between entering judgment and recommending one. The reason the non-Article III magistrate system was constitutional but certain aspects of the bankruptcy court system were not is that magistrates made recommendations, *see id.* at 79, while "the bankruptcy courts issue[d] final judgments," *id.* at 85. That "prototypical exercise of judicial power," *Stern*, 564 U.S. at 494, could not be delegated outside the Article III courts, even if Article III courts reviewed its exercise.

If appellate review of non-Article III court decisions wasn't good enough for Article III, post-hoc executive-branch review of private regulation isn't good enough for Article II. Indeed, the latter is a far more serious

[4] *Northern Pipeline* did advert at points to the concern that Article III courts would defer to bankruptcy courts' findings of fact on appeal, as well as the concern that their judgments would be enforceable absent an appeal, *see id.* at 85-86, which may seem disanalogous from the FTC's power to repeal the Authority's rules of its own accord. But the Court's decision didn't turn on either concern. *Northern Pipeline* involved a bankruptcy court's denial of a motion to dismiss, *id.* at 57, which was reviewed de novo. As for the concern that bankruptcy-court judgments could be enforced without appellate review, in both *Northern Pipeline* and *Stern*, there were obviously appeals, and the Court still held the bankruptcy court's entry of judgment violated Article III.

violation of Article II than bankruptcy courts' deciding common-law claims was of Article III. *Northern Pipeline* held, and *Stern* reaffirmed, that a non-Article III court's entry of judgment on a single contract or tort claim violated Article III, even though that judgment only bound the parties and was reviewable on appeal, and the bankruptcy judges were government officials who by the time of *Stern* were "appointed by the Article III courts" themselves. 564 U.S. at 501. Here, by contrast, the Authority's rules are the law of the nation, it isn't a part of the government at all, and its leadership isn't even appointed by the government. If Article III review could not redeem bankruptcy courts' one-off decisions of tort suits, the FTC's after-the-fact review cannot save the Authority.

Recognizing that even after HISA's amendment the "Authority's rules could govern . . . until the FTC undoes rules it dislikes," Pet. App. 18a, the court of appeals speculated that the FTC could eliminate that "timing gap" by, "for example, adopt[ing] a rule that all newly enacted rules do not take effect for 180 days," Pet. App. 19a. That speculation, which hasn't materialized, does not save the statute either.

In the first place, even after the amendment, the FTC may only "abrogate, add to, and modify the rules of the Authority." 15 U.S.C. 3053(e). Nothing in HISA gives it the power to adopt its own freestanding procedural rules. Second, such a rule would likely violate HISA's timing requirements, which obligate the FTC to approve or disapprove the Authority's proposed rules within 60 days of publication. *Id.*, 3053(c)(1). A rule indefinitely staying all approved Authority rules would drain that requirement of any meaning. Third, as this Court held in *Whitman v. American*

Trucking Ass'n, an agency cannot "cure an unlawful delegation . . . by adopting in its discretion a limiting construction of the statute." 531 U.S. 457, 472 (2001). What HISA says controls, and what HISA says is that the Authority's rules, once "promulgated," are the law of the land until such time as the FTC completes notice-and-comment rulemaking to modify them. 15 U.S.C. 3054(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

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