No.

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 A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051–3060, delegates federal rulemaking power to a private corporation—the Horseracing Integrity and Safety Authority (the "Authority")—to govern the horseracing industry. The Federal Trade Commission *must* promulgate the private Authority's rules as federal law, even if it disagrees with them as a policy matter, so long as they are "consistent" with the Act. The Act also gives the Authority the power to enforce its rules against regulated parties in federal court. And the Authority possesses numerous other federal powers, including the power to impose sanctions, issue subpoenas, and conduct investigations. Congress did not appropriate any federal money to fund this program; instead, the Act requires the States either to remit fees to the Authority or else lose their longstanding power to tax the horseracing industry.

After the Fifth Circuit held that the Act violated the private non-delegation doctrine, Congress amended the law to allow the Federal Trade Commission to undertake its own after-the-fact notice-and-comment rulemaking process if it wished to try to amend the Authority's rules. Congress otherwise left the law—and all the Authority's powers—in place. The Sixth Circuit then upheld the amended law.

The questions presented are:

1. Does the Act violate the private non-delegation doctrine?

2. Does the Act violate the anti-commandeering doctrine by coercing States into funding a federal regulatory program?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. Petitioners are the State of Oklahoma; the Oklahoma Horse Racing Commission; the Tulsa County Public Facilities Authority d/b/a 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, d/b/a Remington Park; Will Rogers Downs, LLC; the United States Trotting Association; and the State of Louisiana. Each Petitioner was an appellant below.

Respondents are the United States of America; the Horseracing Integrity and Safety Authority, Inc.; Leonard S. Coleman, Jr.; Nancy M. Cox; the Federal Trade Commission; Lina Khan, in her capacity as Chair of the Federal Trade Commission; Rebecca Kelly Slaughter, in her official capacity as Commissioner of the Federal Trade Commission; Noah Joshua Phillips, in his official capacity as Commissioner of the Federal Trade Commission; Christine S. Wilson, in her official capacity as Commissioner of the Federal Trade Commission; Alvaro Bedoya, in his official capacity as Commissioner of the Federal Trade Commission; Steve Beshear; Adolpho A. Birch, Jr.; Ellen McClain; Charles P. Scheeler; Joseph DeFrancis; Susan Stover; Bill Thomason; and D.G. Van Clief. Each Respondent was an appellee below.

2. No Petitioner has a parent corporation, and no publicly held corporation owns 10% or more of any Petitioner's stock.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *Oklahoma* v. *United States*, No. 22-5487 (6th Cir.) (judgment entered March 3, 2023); and
- *Oklahoma* v. *United States*, No. 5:21-cv-00104-JMH (E.D. Ky.) (judgment entered June 3, 2022).

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Petitioners the State of Oklahoma; the Oklahoma Horse Racing Commission; the Tulsa County Public Facilities Authority d/b/a 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, d/b/a Remington Park; Will Rogers Downs, LLC; the United States Trotting Association; and the State of Louisiana respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 62 F.4th 221. Pet. App. 1a–43a. The opinion of the district court is unreported but is available at 2022 WL 1913419. Pet. App. 44a–70a.

JURISDICTION

The court of appeals entered judgment on March 3, 2023. Pet. App. 2a. The court of appeals denied Petitioners' petition for rehearing en banc on May 18, 2023. Pet. App. 71a–72a. On July 18, 2023, Justice Kavanaugh granted an extension of time to file the petition for a writ of certiorari until October 15, 2023. *See* No. 23A34. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix at Pet. App. 73a–131a.

INTRODUCTION

When the People of the United States delegated sovereign powers to the federal government, they vested those powers in three branches: the legislative power in Congress, U.S. Const. art. I, § 1, the executive power in the President, *id.* art. II, § 1, cl. 1, and the judicial power in the courts, *id.* art. III, § 1. The Vesting Clauses' limits on who may exercise federal governmental power are crucial to the Constitution's structure. They ensure that federal power can be exercised only by those who are "accountable to political force and the will of the people." *Freytag* v. *Comm'r*, 501 U.S. 868, 884 (1991).

That is why this Court has long enforced the private non-delegation doctrine. Private delegation is "delegation in its most obnoxious form," *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311 (1936), and is "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).

The Horseracing Integrity and Safety Act of 2020 (the "Act") ignores this bedrock constitutional principle, delegating an unprecedented amount of federal power to a private corporation. Under the Act, the Horseracing Integrity and Safety Authority (the "Authority")—a "private, independent, self-regulatory, nonprofit corporation," 15 U.S.C. § 3052(a)—is given the power to govern the horseracing industry. The Authority is tasked with "developing and implementing" an expansive, nationwide "horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces." *Ibid.*; *see also id.* §§ 3055, 3056. The Federal Trade Commission ("FTC") then

must promulgate the Authority's new industry-defining rules as federal law—even if it disagrees with them as a policy matter—so long as they are "consistent" with the Act and other rules. *Id.* § 3053(c)(2). The Authority also wields an array of other governmental powers, including the power to enforce its rules through civil actions in federal court, *id.* § 3054(j); the power to impose civil sanctions of its own, including monetary fines and lifetime bans from horseracing, *id.* § 3057(d); the power to expand its own jurisdiction to encompass different breeds of horses, *id.* § 3054(*l*)(1); and the power to issue subpoenas and conduct investigations, *id.* § 3054(h).

Congress did not appropriate any federal money to fund this new regulatory program. Instead, it requires the States to "remit fees" to the Authority on pain of losing their longstanding power to tax horseracing industry participants. 15 U.S.C. § 3052(f). States are thereby "conscript[ed]" into acting as tax collectors for their new private overseers. *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1477 (2018).

The Fifth Circuit held that the Act violated the private non-delegation doctrine, concluding that the Act's grant of federal power to a private corporation violated the "cardinal constitutional principle . . . that federal power can be wielded only by the federal government." *Nat'l Horsemen's Benevolent & Protective Ass'n* v. *Black*, 53 F.4th 869, 872 (5th Cir. 2022). Congress thereafter tweaked the law to grant the FTC a back-end ability to undertake its own notice-and-comment rulemaking process if it disagrees with the Authority's rules (that it was bound to promulgate). But it otherwise left the Act unchanged. The Sixth Circuit then rejected a challenge brought by Petitioners, a

group of States and horseracing industry participants subject to the Authority's immense regulatory power.

This Court should grant certiorari to review the Act's unprecedented transfer of federal power to a private corporation. As three Members of this Court recently recognized, there is a "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., respecting the denial of certiorari). The issue is fundamental and practically important (both in this case and more broadly). But this Court's precedents leave the doctrine underdeveloped, and the issue has escaped this Court's review twice in recent years.

In the meantime, the lower courts have not settled on any consistent analytical framework to determine whether Congress has unconstitutionally vested federal power in a private entity. The lower courts' inconsistent and uncertain approach is evident from this case, in which the Sixth Circuit assumed that it was bound to uphold the Act's blatant transfer of federal power from the government to a private corporation. And beyond that, the Act's "your money or your sovereignty" threat to the States constitutes commandeering in its purest sense. This anti-commandeering question likewise implicates important federalism and practical concerns that warrant this Court's attention.

This case presents the ideal vehicle to decide both questions. Each issue was cleanly presented and ruled on and is outcome-dispositive here. The Court should grant the petition and reverse.

STATEMENT

1. Regulating the sport of horseracing has long been a matter of state and local concern. *See* 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, 492 (2004). For decades, numerous "state regulatory schemes have supplied an array of protocols and safety requirements." Pet. App. 5a.

That all changed in 2020, when Congress nationalized regulation of horseracing in an "unconventional way[]": by "us[ing] a private nonprofit corporation—the Horseracing Integrity and Safety Authority." Pet. App. 6a.

a. The Authority is a "private, independent, self-regulatory, nonprofit corporation." 15 U.S.C. § 3052(a). It is governed by a nine-member board of directors: five "independent members selected from outside the equine industry," and four "industry members selected from among the various equine constituencies." *Id.* § 3052(b)(1).

The Act "recognize[s]" the Authority "for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces." 15 U.S.C. § 3052(a). The Authority has the power to draft and submit to the FTC "any proposed rule, or proposed modification to a rule," relating to a list of regulated activities. *Id.* § 3053(a); *see also ibid.* (Authority issues rules regarding "a list of permitted and prohibited medications, substances, and methods," "racetrack safety standards and protocols," "a schedule of civil sanctions for

violations," "a process or procedures for disciplinary hearings," and other subjects); *id.* § 3053(d).

Whenever the Authority sends its proposed rules to the FTC, the Act mandates that the FTC "*shall*" publish them in the Federal Register and provide an opportunity for public comment. 15 U.S.C. § 3053(b)(1) (emphasis added). Within sixty days of publication, the FTC then "*shall* approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—(A) this chapter; and (B) applicable rules approved by the Commission." *Id.* § 3053(c)(2) (emphasis added). The FTC has no discretion to disapprove the Authority's rules if it disagrees with them as a policy matter. Instead, it must promulgate the Authority's rules, which then become binding federal law.[1]

Accordingly, the FTC consistently refuses to consider public comments involving the wisdom of the Authority's rules, noting that it lacks the power to question the Authority's policy choices. The FTC has been clear: it will not consider "comments [that] offer[] policy recommendations" because it "reviews the Authority's proposals for their consistency with the Act" alone, "not for general policy." Pet. App. 168a (FTC, *Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority* (Mar.

[1] If the FTC disapproves a proposed rule or modification based on inconsistency with the Act or other rules, then it "shall make recommendations to the Authority" for any changes, and the Authority "may" accept the FTC's recommendations, if it wishes, and resubmit the rule or modification. 15 U.S.C. § 3053(c)(3).

25, 2022))[2]; *see also* Pet. App. 137a–138a (FTC explaining that its "statutory mandate to approve or disapprove a proposed Authority rule is limited to considering only whether the proposed rule 'is consistent with' the Act and the Commission's procedural rule," and that comments unrelated to consistency "have little bearing on the [FTC's] determination"); FTC, *Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity and Safety Authority* 43 (Mar. 3, 2022) (FTC rejecting comment that "challenge[d] certain details in the Authority's choice of permitted horseshoes" because "these are essentially policy disagreements").[3]

As the FTC repeatedly makes plain, the Authority alone has the discretion to choose among the range of regulatory options that are consistent with the Act. The FTC will not second-guess those policy decisions because "there are likely multiple methodologies that the Authority could have proposed that would be consistent with the Act," and the FTC does not have the power to engage in "policy disagreement with the Authority." Pet. App. 208a (FTC, *Order Approving the Assessment Methodology Rule Proposed by the Horseracing Integrity and Safety Authority* (Apr. 1, 2022))[4]; Pet. App. 280a (FTC, *Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority* (Mar. 27, 2023)).[5]

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[2] https://tinyurl.com/2mbyr99r.

[3] https://tinyurl.com/2c8h8ep8.

[4] https://tinyurl.com/4mszfa9d.

[5] https://tinyurl.com/5383fnyv.

So, for example, when the Authority proposed a list of prohibited substances for horses, commenters submitted arguments about what should and should not be on the list (and the associated penalties). Pet. App. 251a–255a. But the FTC approved the rule simply because "[t]he statute requires the Authority to issue 'a list of permitted and prohibited medications, substances, and methods,'" the Authority had issued such a list, and "[r]efinements to the rule suggested by [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." Pet. App. 257a (quoting 15 U.S.C. § 3055(c)(1)(B)).

In November 2022, the Fifth Circuit held that the Act violated the private non-delegation doctrine. As that court explained, "[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." *Nat'l Horsemen's Benevolent & Protective Ass'n*, 53 F.4th at 884. "[W]hatever 'consistency' review includes, we know one thing it *excludes*: the Authority's policy choices in formulating rules." *Id.* at 885; *see also id.* at 886 ("[T]he FTC's consistency review does not include reviewing the substance of the rules themselves."). Accordingly, the Fifth Circuit concluded, the Act "defies th[e] [Vesting Clauses'] basic safeguard by vesting government power in a private entity not accountable to the people." *Id.* at 872–73.

The next month, Congress amended the Act to give the FTC a back-end power to adopt rules that "abrogate, add to, and modify the rules of the

Authority promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter." Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 701, 136 Stat. 4459, 5231–32 (2022) (codified at 15 U.S.C. § 3053(e)). But the 2022 amendment left the rest of the Act—including the Authority's front-end primary rulemaking power (and the FTC's obligation to promulgate those rules)—unchanged. As a result, even after the amendment, the FTC still refuses to engage with comments that "constitute mere policy disagreements with the Authority." Pet. App. 257a.

The Act also grants the Authority an array of other governmental powers. It holds the power to enforce its rules in federal court by "commenc[ing] a civil action against a covered person or racetrack that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter." 15 U.S.C. § 3054(j). It can "impos[e] civil sanctions" of its own under the rules it establishes—including "lifetime bans from horseracing," "disgorgement," and other "monetary fines and penalties"—subject to review by an administrative law judge and the FTC. *Id.* §§ 3057(d), 3058(b), (c). It wields "subpoena and investigatory authority with respect to civil violations committed under its jurisdiction." *Id.* § 3054(h). If a state racing commission or a breed-governing organization asks, then the Authority may expand its own

jurisdiction beyond Thoroughbreds to include other horse breeds—without the FTC's participation or approval. *Id.* § 3054(*l*)(1). It develops "uniform procedures and rules authorizing . . . issuance and enforcement of subpoenas and subpoenas duces tecum" and "other investigatory powers of the nature and scope exercised by State racing commissions before the program effective date." *Id.* § 3054(c). It "shall seek to enter into an agreement with the United States Anti-Doping Agency"—another private organization—"under which the Agency acts as the anti-doping and medication control enforcement agency under this chapter." *Id.* § 3054(e)(1)(A). And it may "issue guidance" setting forth its interpretations of its rules and enforcement policies. *Id.* § 3054(g)(1).

b. Congress did not appropriate any federal funds to administer this regime. Instead, the Act instructs the Authority to "determine and provide to each State racing commission the estimated amount required from the State . . . to fund the State's proportionate share" of the Authority's regulatory programs for each year. 15 U.S.C. § 3052(f)(1)(C)(i)(I). Each State's racing commission must either "remit fees" to the Authority or be stripped of its ability 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)(2), (3).

2. Petitioners are three States, state racing commissions, and other entities involved in Thoroughbred and non-Thoroughbred horseracing. They brought suit in the U.S. District Court for the Eastern District of Kentucky against the United States, the FTC, and the Authority to prevent enforcement of the Act's regulatory regime. Pet. App. 44a–45a. As relevant here,

Petitioners alleged that the Act (1) violated the private non-delegation doctrine, and (2) violated the anti-commandeering doctrine by requiring States to fund the Act's regulatory regime (on pain of losing their longstanding power to tax horseracing activities). Pet. App. 54a–69a.

The district court dismissed for failure to state a claim, holding that the Authority "'function[ed] subordinately' to the FTC." Pet. App. 63a. The district court also rejected the anti-commandeering challenge because it concluded that the Act's funding mechanism was "nothing more than a typical preemption scheme." Pet. App. 68a.

3. Relying on the 2022 statutory amendment, the Sixth Circuit affirmed, holding that the Act did not violate the private non-delegation doctrine or the anti-commandeering doctrine.[6]

a. With respect to private non-delegation, the Sixth Circuit acknowledged that "the Vesting Clauses . . . bar unchecked reassignments of power to a non-federal entity," and that doing so "undercuts representative government at every turn." Pet. App. 10a. It further acknowledged that private entities "may not be the principal decisionmaker in the use of federal power," "may not create federal law," and "may not wield equal power with a federal agency." Pet. App. 12a. And it even acknowledged that under the

[6] Judge Cole concurred and stated that he would have held that the statute was constitutional even without the amendment. Pet. App. 28a–29a (Cole, J., concurring). He "disagree[d]" with the court's "dicta that the original statute was unconstitutional," and "depart[ed] slightly from [the court's] framing of the issue and its analysis of the private nondelegation doctrine." *Ibid.*

Act, "the Horseracing Authority drafts rules on racetrack safety and anti-doping matters, and the FTC must approve those proposals if they are consistent with the Act." Pet. App. 13a–14a; *see also* Pet. App. 17a (assuming that "the FTC has power only to review proposed rules by the Authority for 'consistency' with the Act, a standard of review that . . . does not pick up policy disagreements").

But the Sixth Circuit nevertheless upheld this scheme. It concluded that the FTC's back-end ability to initiate notice-and-comment rulemaking in an effort to change the Authority's rules creates "a clear hierarchy." Pet. App. 14a. As for the Authority's enforcement powers, while conceding that they are "extensive," the Sixth Circuit opined that "the FTC's rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities." Pet. App. 16a.

b. With respect to anti-commandeering, the Sixth Circuit held that the Act's funding mechanism was a permissible use of "conditional preemption": States could "collect fees from the industry and remit the money to the Horseracing Authority," or they could refuse to do so and have their "taxing power . . . preempted." Pet. App. 23a–25a.

REASONS FOR GRANTING THE PETITION

As three Members of this Court recently highlighted, there is a "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., respecting the denial of certiorari). This case presents an ideal opportunity to do so. The Court should grant the petition to resolve the important, unsettled question of how to determine whether Congress has unconstitutionally vested federal power in a private entity; to provide clarity to Congress and the courts of appeals, which have failed to coalesce around any one analytical framework for private non-delegation cases; and to review the Act's unprecedented delegation of extensive federal power to a private corporation.

The Court should also grant review of the anti-commandeering question because the Act unconstitutionally coerces States into funding its unprecedented regulatory regime. "[T]here is nothing 'cooperative'"—or constitutional—"about a federal program that compels state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority." *FERC* v. *Mississippi*, 456 U.S. 742, 783 (1982) (O'Connor, J., concurring in part and dissenting in part).

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE PRIVATE NON-DELEGATION DOCTRINE.

A. The Act's unprecedented delegation of federal power to the private Authority violates the Constitution.

1. The U.S. Constitution distributes federal power among the three branches of the federal government: legislative power in Congress, executive power in the President, and judicial power in the Judiciary. *See* U.S. Const. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1. The Vesting Clauses do more than merely demarcate the separation of powers among the three branches. They also make clear that *all* federal governmental power is vested in, and *only* in, the three branches.

Accordingly, this Court has long enforced the private non-delegation doctrine. The Court has stated that it is "obvious" that "a delegation of legislative power" to private groups "so as to empower them to enact the laws they deem to be wise and beneficent" 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). Private entities are not vested with any power of the United States, whether legislative, executive, or judicial. As a result, "[w]hen it comes to private entities[,] . . . there is not even a fig leaf of constitutional justification." *Dep't of Transp.* v. *Ass'n of Am. R.Rs.*, 575 U.S. 43, 62 (2015) ("*Amtrak*") (Alito, J., concurring); *see also id.* at 88 (Thomas, J., concurring in the judgment).

The Court has been compelled to enforce these limits before. In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the Court struck down a statute granting certain coal producers and miners the power to issue rules setting maximum labor hours and minimum wages. The Court explained that a delegation of rulemaking authority to a private party is "delegation in its most obnoxious form." *Id.* at 311. Congress responded to this Court's instructions in *Carter Coal* by enacting a revised statute, which the Court upheld because the National Bituminous Coal Commission retained the power to "approve[]" or "disapprove[]" the proposed rules in its discretion. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 388 (1940).

Thus, the federal government's power to disapprove a private entity's proposed regulations is a key feature of the regimes that courts have upheld as constitutional. The Coal Commission in *Adkins* could "disapprove[]" proposed prices *before* they took effect, 310 U.S. at 388, whenever it decided that they were not "just and equitable," Pub. L. No. 75-48, § 4, Part II(a), 50 Stat. 72, 78 (1937); *see also Adkins*, 310 U.S. at 399 (the Coal Commission alone "determines the prices"); *Ass'n of Am. R.Rs.* v. *U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013) ("the agency in *Adkins* could unilaterally change regulations proposed to it by private parties"), *vacated and remanded on other grounds*, 575 U.S. 43.

The Court's cases also indicate that "conducting civil litigation in the courts of the United States for vindicating public rights" is another governmental "function[]" that "may be discharged only by persons who are 'Officers of the United States.'" *Buckley* v. *Valeo*, 424 U.S. 1, 140 (1976) (per curiam) (quoting

U.S. Const. art. II, § 2, cl. 2); *see also Printz* v. *United States*, 521 U.S. 898, 922–23 (1997) (Congress may not "transfer[]" responsibility for enforcing federal law outside "the Federal Executive"); *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 576–77 (1992) (Congress may not allow private enforcement of federal law absent concrete injury because that would infringe on "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3").

As several Justices have emphasized, outsourcing enforcement of federal law to private parties raises "[d]ifficult and fundamental questions." *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring); *see also Amtrak*, 575 U.S. at 62 (Alito, J., concurring) ("Private entities are not vested with . . . the 'executive Power,' Art. II, § 1, cl. 1, which belongs to the President."). Indeed, just last Term, three Members of the Court observed that there are "substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation." *United States ex rel. Polansky* v. *Exec. Health Res., Inc.*, 599 U.S. 419, 449 (2023) (Thomas, J., dissenting); *see also id.* at 442 (Kavanaugh, J., joined by Barrett, J., concurring).

These cases all embody one crucial constitutional principle: the government cannot abandon its discretionary powers to make and enforce the law to a private entity. Congress writes statutes, and the Executive Branch then has the power to enforce them and to use its discretion to "fill up the details" of the Act in places with less specific directives. *Gundy* v. *United*

States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting). At root, the private non-delegation doctrine vindicates the fundamental rule that "policy choices should be left to" governmental officials because they are "directly accountable to the people." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018) (internal quotation marks omitted); *see also Freytag* v. *Comm'r*, 501 U.S. 868, 884 (1991) (federal power can be exercised only by those who are "accountable to political force and the will of the people"); *City of Arlington* v. *FCC,* 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) (noting that "policymaking [is] properly left, under the separation of powers, to the Executive"). "To ensure the Government remains accountable to the public, it cannot delegate regulatory authority to a private entity." *Texas*, 142 S. Ct. at 1309 (statement of Alito, J., respecting the denial of certiorari) (internal quotation marks omitted).

2. The Act turns this principle on its head, granting *the private Authority* the ability to wield significant federal governmental power up front and relegating *the FTC* to a merely ministerial back-end role.

a. *First*, the Act empowers the Authority to "develop[] and implement[]" two horseracing-related federal regulatory programs. 15 U.S.C. § 3052(a). The Authority may fashion prospective rules governing private conduct according to its own policy views about how best to implement the Act. And the FTC *must* promulgate those rules as binding federal law—even if it disagrees with them as a policy matter—so long as they are "consistent" with the Act and other rules. *Id.* § 3053(a)–(c). That is federal power. *See City of Arlington*, 569 U.S. at 304 n.4 (agencies' power

to "make rules" is an "exercise[] of . . . the 'executive Power'").

The Sixth Circuit held that the statutory adjustment to the Act—which gave the FTC the after-the-fact ability to undergo notice-and-comment rulemaking if it wishes to add to, abrogate, or modify the Authority's rules that the Commission was statutorily bound to promulgate—rectified these defects. *See* Pet. App. 4a–5a (citing Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 701, 136 Stat. 4459, 5231–32 (2022)). But the FTC's ability to amend already-existing rules at some point down the road does nothing to prevent the Authority from determining the content of federal law in the first place, even over policy objections from the FTC. The "power to make the law . . . necessarily involves a discretion as to what it shall be." *Loving* v. *United States*, 517 U.S. 748, 758–59 (1996). But here that discretion (at least in the first instance) is exercised by the Authority—not the FTC. The FTC lacks the constitutionally mandated discretion to "disapprove[]" the Authority's rules up front. *Adkins*, 310 U.S. at 388.

Indeed, the Sixth Circuit did not dispute that, even after the amendment, "the FTC has power only to review proposed rules by the Authority for 'consistency' with the Act," which "does not pick up policy disagreements." Pet. App. 17a. And the FTC still refuses to engage with comments that "constitute mere policy disagreements with the Authority" because the FTC remains powerless to assert the government's policy preferences over those of the private Authority. Pet. App. 257a. Even if it prefers a different rule, the FTC must promulgate the private Authority's rule as

binding federal law unless it is inconsistent with the Act and existing rules. 15 U.S.C. § 3053(c)(2).

It is thus no answer that the FTC might wrest some governmental discretion back by undertaking a rulemaking of its own at an unknown later date. Under "that logic, *any*" delegation "of rulemaking power is permissible" because the government "can always claw back its delegated power by issuing a new rule." *Texas* v. *Rettig*, 993 F.3d 408, 416 (5th Cir. 2021) (Ho, J., dissenting from denial of reh'g en banc). Such a conclusion "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." *Id.* at 416–17.

Moreover, the notice-and-comment rulemaking process is a time-consuming one. On average, notice-and-comment rulemaking takes *years* to complete. *See* GAO, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews* 5 (Apr. 2009) (noting an average of "about 4 years")[7]; Admin. Off. of the U.S. Courts, *About the Rulemaking Process* ("The federal rulemaking process usually takes two to three years").[8] While the FTC is conducting this lengthy rulemaking process, the horseracing industry will be bound by a regulation with which the FTC disagrees and which no governmental officer approved. And by the time the FTC gets around to making its own rule, the Authority's

[7] https://tinyurl.com/f6bns9v4.

[8] https://tinyurl.com/46ndbkf4.

rule—which will have governed in the meantime—may have generated reliance interests that the FTC would need to overcome, thus further constricting the scope of the FTC's discretion to implement its own policy choices. *See FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Forcing the FTC to take affirmative steps to correct a private entity's rulemaking also subverts the constitutional principle that lawmaking is constrained by checks and balances. A deadlock or other failure by the government to act should result in *no* governing rule. But under the Act's regime, the FTC's failure to act would result in a governing rule established by a private party. *Cf.* John F. Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 191, 201–02 (2007) (lawmaking is "difficult *by design*," which "favors the status quo and disfavors legislative output"). Under our Constitution, it should take federal action to *make* law, not to *unmake* law.

b. *Second*, even after the statutory amendment, the Authority continues to wield other governmental powers *without any FTC oversight at all*. The Act grants the private Authority the sole power to "commence a civil action against a covered person or racetrack that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of" the Act or any of the Authority's rules, "to enjoin such acts or practices, to enforce any civil sanctions imposed under [the Act], and for all other relief to which the Authority may be entitled." 15 U.S.C. § 3054(j)(1).

This power to bring enforcement actions in federal court is far more extensive than a *qui tam* relator's: while a *qui tam* relator wields federal enforcement

power only occasionally and temporarily, the Authority does so on a continuing and permanent basis. Moreover, the Authority does not sue for money damages, as a *qui tam* relator does. *See* 31 U.S.C. § 3730(d)(1)–(2). Rather, it sues to impose "[i]nj[unctions]," to enforce "civil sanctions," "and for all other relief to which the Authority may be entitled." 15 U.S.C. § 3054(j)(1). This is a delegation of prosecutorial power to a private entity, and it violates this Court's holding that "conducting civil litigation . . . for vindicating public rights" of the United States is an "executive functio[n]" that "may be discharged only by persons who are 'Officers of the United States.'" *Buckley*, 424 U.S. at 138–140.

The Authority also wields other enforcement and adjudicatory powers without FTC supervision. The Act grants the Authority "subpoena and investigatory authority with respect to civil violations committed under its jurisdiction," 15 U.S.C. § 3054(h), and the Authority may "impos[e] civil sanctions" on regulated entities for violations of its rules (including "monetary fines and penalties" and "lifetime bans from horseracing"), *id.* § 3057(d). These, too, are powers that are reserved for "Officers of the United States." *Lucia* v. *SEC*, 138 S. Ct. 2044, 2051–53 (2018) (listing similar powers).

Finally, the Authority may expand its own jurisdiction to include horse breeds other than Thoroughbreds, without any involvement from the FTC. 15 U.S.C. § 3054(*l*)(1). Extending the Act to new breeds of horses, too, is an exercise of federal legislative power, as it has "the purpose and effect of altering the legal rights, duties and relations of persons." *INS* v. *Chadha*, 462 U.S. 919, 952 (1983).

The Sixth Circuit's decision dismissing these constitutional violations and upholding the Act is emblematic of a larger confusion among the lower courts about how to apply the private non-delegation doctrine—a confusion that calls out for this Court's resolution.

B. This case squarely presents the important, unsettled question of what limits the private non-delegation doctrine places on Congress.

This case presents the Court with an ideal opportunity to address a fundamental—but unresolved—separation-of-powers question: What limits exist on Congress's ability to vest federal power in a private entity? As three Justices have observed, the private non-delegation doctrine needs "clarif[ication]" from this Court. *Texas*, 142 S. Ct. at 1308 (statement of Alito, J., respecting the denial of certiorari). Without that clarification, several competing analytical frameworks have emerged and led to split results.

The Court granted review of this question in *Amtrak*, but it ultimately did not answer it. In that case, Congress had "granted Amtrak and the Federal Railroad Administration . . . joint authority to issue 'metrics and standards' that address the performance and scheduling of passenger railroad services." 575 U.S. at 45. The American Association of Railroads challenged the metrics and standards, arguing that "Amtrak is a private entity and it was therefore unconstitutional for Congress to allow and direct it to exercise joint authority in their issuance." *Id.* at 45–46. This Court granted certiorari to consider the private non-delegation question, but it never reached that

question because it concluded that "Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented." *Id.* at 55.

The different courts to consider the private nondelegation issue in *Amtrak*, however, applied different analyses and came to inconsistent conclusions. The district court perceived no constitutional problem with the Federal Railroad Administration's power-sharing arrangement with Amtrak because it concluded that "the government retains ultimate control" over rulemaking authority based on a multi-factor analysis. 865 F. Supp. 2d 22, 33–34 (D.D.C. 2012). The D.C. Circuit disagreed with both the analytical framework and the outcome: it rejected the notion that "the government's 'active oversight, participation, and assent' in its private partner's rulemaking decisions" could cure the delegation, stating that "private parties must be limited to an advisory or subordinate role in the regulatory process," and it held the delegation to Amtrak unconstitutional. 721 F.3d at 673 (citation omitted). And when this Court reviewed the case, Justice Thomas concluded that *both* courts' (and both parties') analytical frameworks were wrong: the right question, he explained, was not to ask "whether [a private entity] is subject to an adequate measure of control by the Federal Government," but rather to classify the nature of the power at issue—legislative, executive, or judicial—and ask whether Congress "allocate[d] [that] power to an ineligible entity, whether governmental or private." 575 U.S. at 67, 88 (Thomas, J., concurring in the judgment); *see also id.* at 62 (Alito, J., concurring) ("By any measure,

handing off regulatory power to a private entity is legislative delegation in its most obnoxious form." (internal quotation marks omitted)).

Two Terms ago, the question again reached this Court, but again the case was not a suitable vehicle. *See Texas*, 142 S. Ct. at 1308. In that case, several States challenged the role of the Actuarial Standards Board—a private entity—in defining the term "actuarial soundness" as used in the Medicaid statute. Three Members of this Court acknowledged that the case presented a "fundamental" and "important" question "about the limits on the Federal Government's authority to delegate its powers to private actors," and stated that "the statutory scheme at issue . . . points up the need to clarify the private non-delegation doctrine in an appropriate future case." *Id.* at 1308–09 (statement of Alito, J., joined by Thomas and Gorsuch, JJ., respecting the denial of certiorari). But the case presented "threshold questions" that could have "complicate[d]" this Court's review: while the litigation was pending, Congress had repealed the tax affected by the Actuarial Standards Board's definition of "actuarial soundness," so "the delegation w[ould] not cause the States any future injury." *Ibid*. Additionally, the government argued that the challenge was time-barred. *Ibid.* Given these vehicle problems, three Members of the Court "reluctantly concur[red] in the denial of certiorari." *Ibid*.

Nevertheless, just like in *Amtrak*, the *Texas* case engendered a disparate range of inconsistent analyses. The district court reasoned that "two distinct and essential legislative functions"—"the power to establish prospective, generally applicable rules of conduct, and the power to veto executive action that does

not comply with those rules"—had been delegated to a private entity, and "[e]ach delegation violates Article I's exclusive vesting of 'all' legislative power in Congress." 300 F. Supp. 3d 810, 844 (N.D. Tex. 2018). The Fifth Circuit reversed, concluding that there was no delegation—just "reasonable conditions" for approval of certain Medicaid contracts that incorporated private standards—and that the "private/public distinction is not relevant to [this] analysis." 987 F.3d 518, 531 & n.10 (5th Cir. 2021). Five judges voted to rehear the case en banc, and they would have held the delegation unconstitutional because (among other reasons) "the only 'final reviewing authority' HHS retains is the ability to issue a new rule." 993 F.3d at 416 (Ho, J., dissenting from denial of reh'g en banc). And three Justices of this Court concluded that an "essentially . . . legislative determination . . . was made not by Congress or even by the Executive Branch but by a private group," raising "an important separation-of-powers question." 142 S. Ct. at 1309 (statement of Alito, J., respecting the denial of certiorari).

The Act at issue in this case, too, has split lower courts and judges. Two district courts upheld the Act's delegation of rulemaking power to the Authority because they concluded that the Authority "functions subordinately" to the FTC. Pet. App. 63a; *Nat'l Horsemen's Benevolent & Protective Ass'n* v. *Black*, 596 F. Supp. 3d 691, 724 (N.D. Tex. 2022). One judge on the panel below agreed with that analysis, calling subordination "the beginning and end of the inquiry as to whether a statute is constitutional under the private nondelegation doctrine." Pet. App. 33a (Cole, J., concurring). The Fifth Circuit accepted the "functions subordinately" analytical framework, as well. But it

reached the opposite conclusion and found the delegation unconstitutional because, among other reasons, "[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"—a consideration that remains central to the case even after the Act's amendment. *Nat'l Horsemen's Benevolent & Protective Ass'n* v. *Black*, 53 F.4th 869, 872, 884 (5th Cir. 2022); *see also id.* at 885 ("[W]hatever 'consistency' review includes, we know one thing it *excludes*: the Authority's policy choices in formulating rules."); *id.* at 886 ("[T]he FTC's consistency review does not include reviewing the substance of the rules themselves."). Yet two judges on the Sixth Circuit concluded that the Authority "is subordinate" to the FTC after the 2022 amendment—but they also simultaneously questioned "[w]hether subordination always suffices to withstand a challenge," leaving those "complex separation of powers questions" for "a future day." Pet. App. 13a.

Meanwhile, an appeal to the Fifth Circuit to reconsider the question post-amendment is currently pending, and that process might produce yet another approach. No. 23-10520 (5th Cir. May 19, 2023).

Misplaced analogies to existing entities have only further muddied the analysis. For example, the Sixth Circuit sustained the Act in large part by analogizing the Authority's powers to those of the Financial Industry Regulatory Authority ("FINRA"). Pet. App. 18a. But the Sixth Circuit's approach underscores the need for this Court's guidance. In the first place, the Authority's powers far exceed FINRA's. While both the FTC and the SEC assess proposed rules for "consistency" with their respective statutes, the SEC's

"consistency" review is different in kind. Unlike the FTC, the SEC makes a discretionary policy-based assessment of whether FINRA's proposed rule is in "the public interest" and "promote[s] just and equitable principles of trade," 15 U.S.C. §§ 78f(b)(5), 78*o*-3(b)(6), 78s(b)(2)(C)(i). The FTC's "consistency" review, by contrast, does not allow the FTC to reject the Authority's rules based on policy disagreements. To the contrary, the FTC consistently disclaims any power to second-guess the private Authority's policy decisions, even after the Act's amendment. *See supra* at 6–8. The lower courts' use of FINRA to bless private delegations that go far beyond that model underscores the need for guidance from this Court: without a clear analytical framework in place, courts are relying on misplaced analogies to allow unprecedented transfers of federal power into private hands.

Additionally, in a recent constitutional challenge to FINRA, the D.C. Circuit granted an injunction pending appeal to prevent FINRA from "continuing the expedited enforcement proceeding" it had initiated against a securities broker. *Alpine Sec. Corp.* v. *FINRA*, 2023 WL 4703307, at *1 (D.C. Cir. July 5, 2023) (per curiam). The D.C. Circuit's order notes that the challenge "satisfied the stringent requirements for an injunction pending appeal," *ibid.* (citing *Winter* v. *Natural Resources Defense Council, Inc.*, which requires a "likel[ihood] [of] succe[ss] on the merits," 555 U.S. 7, 20 (2008)); *see also id.* at *2 (Walker, J., concurring) (arguing that there is "a serious argument that FINRA impermissibly exercises significant executive power"). The D.C. Circuit's order involving a regime far less extensive than the one at issue here further highlights that the circuit courts

are grasping in the dark in the absence of any clear analytical framework.

This case presents the same private non-delegation questions left unanswered in *Amtrak* and *Texas*, but without any obstacles to review. Like in the D.C. Circuit's *Amtrak* case, both the private and the public entity here may "exercise regulatory power," which "vitiates" the private non-delegation doctrine. 721 F.3d at 673. And like the agency in *Texas*, the FTC has a back-end modification power, but that does not change the fact that the scheme is an unconstitutional "delegat[ion] [of] regulatory authority to a private entity." *Texas*, 142 S. Ct. at 1309 (statement of Alito, J., respecting the denial of certiorari); *see also Texas*, 993 F.3d at 415–16 (Ho, J., dissenting from denial of reh'g en banc) (scheme violated private non-delegation doctrine because the standards were "reviewable only in the sense that the agency can amend or repeal the [private rule] altogether," and this back-end ability "emphatically does not leave HHS free to 'disapprove'" the private standards). But *unlike* in *Amtrak*, all parties (and both courts below) agree that the Authority is a private entity. Pet. App. 6a, 69a–70a; *see also* 15 U.S.C. § 3052(a). And unlike in *Texas*, there is no question that the Act continues to have future effect or that Petitioners' challenge is timely. Both courts below issued reasoned opinions on the merits, and the private non-delegation question is teed up for this Court's review.

In addition to its legal significance, the issue also carries significant practical consequences. The law reshapes the entire regulatory structure for horseracing, an enormous industry in the United States. A 2017 study found that horseracing added $36.6 billion

and 472,000 jobs to the U.S. economy. *See* Equine Bus. Ass'n, *The 2017 Economic Impact Study of the U.S. Horse Industry* (Mar. 16, 2018).[9] Horseracing produces millions in state tax revenues. And beyond these economic impacts, the Act effects a vast transfer of regulatory power over this industry away from the States and into the hands of a private entity. Up to this point, "Congress [had] explicitly recognize[d] the vested interests of the states in horseracing." *Sterling Suffolk Racecourse Ltd. P'ship* v. *Burrillville Racing Ass'n, Inc.*, 802 F. Supp. 662, 669 (D.R.I. 1992) (citing 15 U.S.C. § 3001(a)(1)). Yet if the Act is allowed to stand, the *private* Authority's rules would displace the rules of scores of state *government* agencies. *See* Pet. App. 5a (noting that "38 state regulatory schemes have supplied an array of protocols and safety requirements"). That radical transformation of an important and longstanding industry should not be permitted to take place through an unconstitutional delegation of power.

The analytical confusion and disparate results in these private non-delegation cases call out for this Court's review. Nor is further percolation warranted: the question presented in this case has twice escaped this Court's review due to vehicle problems, and in the meantime, the lower courts have failed to coalesce around any consistent or predictable framework. Congress itself has likewise struggled to legislate against this uncertain backdrop—its first attempt to nationalize regulation of horseracing in 2020 was rejected by the Fifth Circuit (and in dicta by two members of the Sixth Circuit panel below), and its 2022

[9] https://tinyurl.com/ydcwsby4.

adjustment still fails to cure the constitutional problem. Additionally, this is a cross-cutting issue that raises fundamental separation-of-powers problems in a variety of different contexts—extending the legal and practical significance of this case beyond even the substantial consequences for the horseracing industry. The private non-delegation question deserves this Court's attention now.

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE ACT VIOLATES THE ANTI-COMMANDEERING DOCTRINE.

The Act also suffers from a second defect: it violates the anti-commandeering doctrine by coercing States into funding the Act's unprecedented regulatory regime. Given the important federalism concerns involved and the practical consequences for the States' longstanding authority over the horseracing industry, this question also warrants review.

The anti-commandeering doctrine is "the expression of a fundamental structural decision incorporated into the Constitution"—that Congress has no "power to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475. When the federal government wishes to accomplish some federal goal, it must undertake the task itself or persuade States to *voluntarily* partner with it. That rule advances three constitutional principles: (1) it maintains the "structural protection[] of liberty" by keeping a "healthy balance of power between the States and the Federal Government"; (2) it "promotes political accountability" by ensuring that "[v]oters who like or dislike the effects of the regulation know who to credit or blame"; and (3) it "prevents Congress from shifting the costs of regulation to the

States." *Id.* at 1477 (internal quotation marks omitted).

The Act undermines each of these principles by coercing States into funding the Act's regulatory regime on pain of losing their traditional state tax and regulatory powers. Congress did not appropriate any money to pay for its new horseracing regulatory program. Instead, the Act provides that the Authority "shall determine and provide to each State racing commission the estimated amount required from the State . . . to fund the State's proportionate share" of the cost to fund the Authority's operations. 15 U.S.C. § 3052(f)(1)(C)(i). State racing commissions are then expected to "remit fees pursuant to this subsection"; the Act contemplates that these fees will be passed through to "covered persons" and collected by the States, but "the method by which" the States come up with "the requisite amount of fees" is ultimately up to each State. *Id.* § 3052(f)(2). If a State declines to pay the Authority, then the Act imposes a punishment: the State "shall 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." *Id.* § 3052(f)(3)(D).

That arrangement violates the anti-commandeering doctrine: Congress may not "shift[] the costs of regulation to the States," *Murphy*, 138 S. Ct. at 1477, by threatening States with the loss of their traditional taxing power if they refuse to fund a federal program. Such an arrangement blurs political accountability by divorcing the costs of regulation from the political body that imposes it, freeing Congress from the burden of accountability for the costs of its own initiatives. It also lets the agency run wild. Freed from the constraints of having to go to Congress for funding,

the agency can expand its mandate at will. *See U.S. Dep't of Navy* v. *Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) ("The Appropriations Clause is thus a bulwark of the Constitution's separation of powers . . . [and] is particularly important as a restraint on Executive Branch officers."). And it treats the States as mere cost-sharing subunits of the federal government. *See Printz*, 521 U.S. at 930 ("By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes.").

The Sixth Circuit nevertheless upheld the Act's funding mechanism as a permissible exercise of "conditional preemption." The court reasoned that "States may elect to collect fees from the industry and remit the money to the Horseracing Authority or States may refuse," and "[i]f a State refuses, the Authority collects the fees itself." Pet. App. 23a–24a. But as this Court has made clear, permissible preemption schemes all "work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Murphy*, 138 S. Ct. at 1480. In other words, "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States." *Id.* at 1481. Not so here. A State that agrees to pay for the Authority's regulatory program retains its power to collect whatever fees it wants from the horseracing industry—none at all, or just enough to cover the Authority's costs, or enough to cover the Authority's costs plus whatever additional amount the State wishes to keep for its own coffers. *See* 15

U.S.C. § 3052(f)(2). But a State that refuses to pay the Authority loses its ability to collect *any* fees "relat[ed] to anti-doping and medication control or racetrack safety matters for covered horseraces," regardless of whether any regulations have been passed that would otherwise preempt state law. *Id.* § 3052(f)(3)(D). Unlike a permissible preemption regime, that punishment does not "regulate[] the conduct of private actors"; it regulates "the States." *Murphy*, 138 S. Ct. at 1481.

By revoking States' ability to collect any fees "relat[ed] to anti-doping and medication control or racetrack safety matters," 15 U.S.C. § 3052(f)(3)(D)—whether or not the fees are tied to matters that are actually preempted by any particular rule—the Act's punishment also threatens States' powers beyond the scope of the federal program itself. Congress may not secure States' compliance in one context by threatening to cut off state power in another, broader context. *Cf. Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 585 (2012) ("*NFIB*") (opinion of Roberts, C.J.) (Congress may not "penalize States that choose not to participate in [a] new program by taking away their existing Medicaid funding"); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) ("conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs" (internal quotation marks omitted)); *see also Petersburg Cellular P'ship* v. *Bd. of Supervisors of Nottoway Cnty.*, 205 F.3d 688, 704 (4th Cir. 2000) (opinion of Niemeyer, J.) (finding anti-commandeer-

ing violation where "Congress mandated either application of federal standards or the abdication of all zoning authority over communications facilities").

Congress may not use preemption as a cudgel to coerce compliance even where no federal regulation otherwise displaces state law. The Act presents States with a coercive choice: either carry out the Act's federal scheme by serving as the Authority's fee-collection agents, or be punished by losing the power to collect similar taxes or fees to fund their own horseracing integrity and safety regulatory programs. 15 U.S.C. § 3052(f)(2)–(3). This punitive arrangement is no choice at all. Rather, HISA deploys the threat of preemption as a "gun to the head" of the States in order to "dragoon[]" them into implementing a federal regulatory program. *NFIB*, 567 U.S. at 581–82 (opinion of Roberts, C.J.).

The federal government cannot threaten to preempt state laws when the "threat serves no purpose other than to force unwilling States" to enforce a federal program. *NFIB*, 567 U.S. at 580 (opinion of Roberts, C.J.). In the Spending Clause context, when "conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes." *Ibid.* Here, the threat to terminate the States' independent ability to collect fees for matters that the Authority isn't even regulating serves only to coerce States.

The Court should grant review to examine this unprecedented attempt to coopt States' existing administrative structures and impress them into federal service, all with the aim of evading Congress's duty to fund and to take responsibility for this private regula-

tory program. This unfunded federal program is precisely the invalid attempt by Congress to "shift[] the costs of regulation to the States" that the anti-commandeering doctrine protects against. *Murphy*, 138 S. Ct. at 1477.

CONCLUSION

The petition for a writ of certiorari should be granted.

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