No. 23-402

In The
Supreme Court of the United States

OKLAHOMA, ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Horseracing Integrity and Safety Act, as amended by Congress in direct response to private-nondelegation concerns, fails to confer on the Federal Trade Commission constitutionally adequate supervision and control over a private organization's participation in the federal regulatory scheme.

II. Whether the Act unconstitutionally commandeers the States in violation of the Tenth Amendment.

RULE 29.6 DISCLOSURE

Respondent Horseracing Integrity and Safety Authority, Inc. is a nonstock, nonprofit corporation organized under the General Corporation Law of the State of Delaware. The Horseracing Integrity and Safety Authority, Inc. has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it. No other Respondent is a nongovernmental corporation.

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INTRODUCTION

"While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' it is equally—and emphatically—the exclusive province of the Congress *** to formulate legislative policies and mandate programs and projects[.]" *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). In this case, "constructive exchanges between Congress and the federal courts" occurred in real time both to advance the legislature's pressing policy goals *and* to address the judiciary's asserted constitutional concerns. Pet. App. 4a. As Chief Judge Sutton observed, "[s]ometimes government works." *Id.*

Following a series of high-profile equine deaths and corruption scandals that threatened horseracing under the prior patchwork of state-by-state regulations, Congress enacted the Horseracing Integrity and Safety Act ("HISA") to save the sport. HISA vests in the Federal Trade Commission ("FTC") exclusive authority to promulgate (or not) certain horseracing rules following public notice-and-comment, based primarily on standards proposed by the Horseracing Integrity and Safety Authority ("Authority"), a private nonprofit standards-setting organization. That arrangement is modeled on the effective framework—uniformly upheld by the courts—that has governed the relationship between the Financial Industry Regulatory Authority ("FINRA") and the Securities and Exchange Commission ("SEC") for 85 years.

Two administrations have now supported HISA and two bipartisan Congresses have embraced it—including through an amendment in late 2022 that fortified the FTC's oversight. All three federal courts that have resolved challenges to the amended Act have reached the same conclusion: HISA is constitutional.

In seeking to manufacture a conflict, Petitioners rely on a Fifth Circuit decision holding that HISA *as originally enacted* violated the private-nondelegation doctrine. Under the version of the Act then considered, the FTC lacked "the final word" because only the Authority "wr[o]te[] the regulations and the FTC c[ould] not modify them." *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 887 (5th Cir. 2022) ("*Black II*"). "Not so anymore." Pet. App. 16a. In direct response to the Fifth Circuit's ruling, Congress enacted bipartisan legislation expressly authorizing the FTC to "abrogate, add to, and modify" HISA rules as the FTC "finds necessary or appropriate." 15 U.S.C. § 3053(e). Because that amendment removes any doubt that the Authority is "subordinate to the agency," thereby resolving the question Petitioners had "accept[ed]" was "determinative" of their facial claim, the Sixth Circuit unanimously upheld the Act. Pet. App. 13a.

The Sixth Circuit reached that conclusion—confirmed so far by every federal judge to consider the now-operative version of HISA, including the district court on remand from the Fifth Circuit—"not because it disagreed with the Fifth Circuit's private-nondelegation jurisprudence but because it agreed." *National Horsemen's Benevolent & Protective Ass'n v. Black*, 672 F. Supp. 3d 220, 246 (N.D. Tex. 2023)

("*Black III*"), *appeal pending*, No. 23-10520 (5th Cir.) ("*Black IV*"). There is no reason for this Court to disturb that consensus, particularly when other courts of appeals are presently evaluating the same question presented.

Nor is review warranted on Petitioners' splitless and meritless anti-commandeering challenge to HISA's fee-collection scheme. What Petitioners mischaracterize as a coercive threat is no more than a "conditional preemption" regime that "fits comfortably" within this Court's case law: States have a choice to collect and remit fees under HISA, or be preempted from collecting duplicate fees for their own regulation of the same matters that HISA rules govern. Pet. App. 23a-24a. Petitioners' counterarguments misunderstand the statutory scheme, violate basic principles of constitutional avoidance, and "run[] aground on contrary precedent" from this Court. Pet. App. 25a. That is why no court has disagreed with the Sixth Circuit's holding.

The Petition should be denied.

STATEMENT

1. "[A] beloved tradition in the United States since the early days of the Republic," horseracing is a fixture of American culture and a "major source of jobs and economic opportunity." 166 CONG. REC. H4981-4982 (Sept. 29, 2020) (Rep. Barr). Over the last decade, however, "the joy of the races was marred by accidents that endanger[ed] both the horses and the riders." *Id.* at H4980 (Rep. Pallone). In 2019 alone, 441 Thoroughbreds died from race-related injuries—a fatality rate two-to-five times greater than in Europe

or Asia. H.R. REP. NO. 116-554, at 17 (2020). These casualties sparked investigations by officials, concern within the industry, and "even call[s] for this sport to be abolished altogether." 166 CONG. REC. S5514 (Sept. 9, 2020) (Sen. McConnell). At the heart of these troubles was a "patchwork system" of state-by-state regulations that led to "wide disparit[ies]" in standards and enforcement and eroded the betting public's confidence. 166 CONG. REC. H4981 (Rep. Tonko).

Recognizing the need for reform, a broad coalition of stakeholders—including owners, breeders, trainers, racetracks, jockeys, and veterinarians—formed a "nonprofit business league," now known as the Authority, in September 2020 to develop uniform standards for horseracing, similar to self-regulating organizations in other fields. Pet. App. 306a. The Authority's bylaws ensure participation from a range of constituents and are "replete with conflict-of-interest provisions" to "protect[] against self-interest[.]" *Black III*, 672 F. Supp. 3d at 252.

The highly publicized equine fatalities also lent new urgency and support for action in Congress, which had considered various horseracing bills over the prior decade. *See* 166 CONG. REC. H4981-4982 (Rep. Barr). Following the Authority's incorporation, HISA was introduced to the full House and Senate as "bipartisan, bicameral progress" toward finally remedying the "tragedies on the track." 166 CONG. REC. S5514-5515 (Sen. McConnell). It was not only cheered by animal-welfare proponents, but also hailed by "limited government conservative[s]" for creating the framework for "a single, nationwide set of rules that

will result in smarter, more effective, and streamlined regulation for the industry"—sorely needed given that the "lack of uniformity ha[d] impeded interstate commerce." 166 CONG. REC. H4982 (Rep. Barr).

Passage of the "landmark" legislation, with "almost 300 cosponsors in the House and Senate" and "broad support" from the industry, was celebrated on both sides of the aisle for "usher[ing] in a new era in the sport." Press Release, *McConnell Leads Senate Passage of Horseracing Integrity and Safety Act* (Dec. 21, 2020); [1] Press Release, *Gillibrand Announces Passage Of Her Horseracing Integrity And Safety Act* (Dec. 22, 2020).[2] President Trump signed HISA into law in December 2020.

As a practical matter, HISA covers only those races (and their participants) that have already been regulated federally for decades. *See* 15 U.S.C. §§ 3001-3007; *id.* § 3051(4)-(6), (11). Although rules promulgated under HISA preempt State laws covering the same racetrack-safety, anti-doping, and medication-control matters, *id.* § 3054(b), States may elect to participate in the regulatory regime, including by collecting fees from covered persons, *id.* §§ 3052(f)(2), 3054(e)(2), 3060(a). All federal and State laws governing breeding, broadcasting, and criminal conduct—and any other matters on which a HISA rule has not been promulgated—remain "unaffected." *Id.* § 3054(b), (k)(3).

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[1] http://tinyurl.com/59m9kywy.

[2] http://tinyurl.com/mry9t5pb.

2. As Senator McConnell and other legislative sponsors have explained, HISA was "modeled squarely on the Maloney Act," which has governed the SEC's relationship with FINRA and other self-regulatory organizations ("SROs") for over eight decades. Amicus Br. of Sen. McConnell et al. at 11, Doc. 62. The Act recognizes the Authority as a "private, independent, self-regulatory, nonprofit corporation" that will help to develop and implement "a horseracing anti-doping and medication control program and a racetrack safety program," subject always to "Federal Trade Commission oversight." 15 U.S.C. §§ 3052(a), 3053.

The Authority may submit to the FTC a "proposed rule, or proposed modification to a rule," relating to specified issues. 15 U.S.C. § 3053(a). But the FTC alone may give those draft standards the force of law by independently approving them following notice-and-comment. *Id.* § 3053(b). To do so, the FTC must determine that each proposed standard is "consistent with" both the statute and the FTC's rules. *Id.* § 3053(c). The agency must be satisfied, therefore, that any standard protects "the safety, welfare, and integrity of covered horses, covered persons, and covered horsesraces." *Id.* § 3054(a). Beyond that overall purpose, Congress directly prescribed the content of some rules, *e.g.*, *id.* § 3055(g)(1)-(2), enumerated "[e]lements" and "[p]rohibition[s]" to be incorporated in others, *e.g.*, *id.* §§ 3055(d), 3056(b), 3057(a)(2), and provided various "[c]onsiderations" to constrain the anti-doping, medication-control, and racetrack-safety programs, *e.g.*, *id.* §§ 3055(b), 3056(b).

Congress also specified contours for enforcement of the program pursuant to "uniform procedures" approved by the FTC, 15 U.S.C. §§ 3054(c), 3057(c)-(d), and subject to strict fair-governance and conflict-of-interest parameters, *id.* § 3052(b)-(e). Sanctions for violation of an approved rule may be imposed only consistent with "adequate due process, including impartial hearing officers or tribunals," and other factors "designed to ensure fair[ness] and transparen[cy]." *Id.* § 3057(c)-(d). The Authority "shall promptly submit" to the FTC notice of any sanction, *id.* § 3058(a), which "shall be subject to de novo review" by an FTC-appointed administrative law judge, *id.* § 3058(b). The administrative law judge's decision is subject to yet further review by the FTC itself. *Id.* § 3058(c). The FTC will apply a de novo standard to both "the factual findings and conclusions of law," may "allow the consideration of additional evidence," may "affirm, reverse, modify, set aside, or remand for further proceedings," and may "make any finding or conclusion that, in the judgment of the [FTC], is proper and based on the record." *Id.*

3. In addition to those agency checks bookending any Authority action, an amendment Congress enacted during—and in response to—this litigation ensures additional FTC oversight at all points along the self-regulatory process.

Under the original version of HISA, the FTC could recommend rule modifications but initiate its own rulemaking only on an interim basis "if it had 'good cause' to do so and if the rule was 'necessary to protect' the welfare of horses or the integrity of the sport.'" Pet. App. 7a. Petitioners—three racetracks,

three associations/breeders of non-Thoroughbred horses, and three states and their racing commissions—brought a facial private-nondelegation challenge to HISA on that basis. Petitioners acknowledged that "Congress may give private entities a role in rulemaking so long as they 'function subordinately' to the federal government," CA6 Opening Br. 22 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). They also conceded that "under the Maloney Act, the SEC has ultimate power over and responsibility for the content of federal law" and that "the Maloney Act, like HISA, gives the SEC the power to ensure that a 'proposed rule change is consistent with the requirements of the [Exchange Act].'" *Id.* at 44-45 (alterations in original) (quoting 15 U.S.C. § 78s(b)(2)(C)(i)). "The difference," Petitioners argued as the linchpin of their case, was that "the SEC—unlike the FTC—*also* retains the governmental 'power, on its own initiative, to "abrogate, add to, and delete from" any [SRO] rule if it finds such changes necessary or appropriate to further the objectives of the Act.'" *Id.* at 45 (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233-234 (1987)).

The district court dismissed Petitioners' claim. Pet. App. 63a-64a. Although the FTC's power (under the original version of HISA) "to approve, disapprove, or recommend modification subject to continued rejection" was "not the equivalent of drafting the rule itself," the court found that it "ensure[d] that the Authority still 'functions subordinately' to the FTC such that the FTC 'determines' the binding rules." Pet. App. 63a (quoting *Adkins*, 310 U.S. at 399). That

holding replicated the conclusion reached by the Northern District of Texas in a parallel challenge. *National Horsemen's Benevolent & Protective Ass'n v. Black*, 596 F. Supp. 3d 691, 724 (N.D. Tex. 2022) ("*Black I*").

The Fifth Circuit disagreed. *Black II*, 53 F.4th 869. Congress's decision to "withh[o]ld" independent rulemaking power from the FTC outside a "break-glass-in-case-of-an-emergency basis," the Fifth Circuit reasoned in November 2022, "meaningfully distinguishe[d] the SEC-FINRA relationship from the FTC-Authority relationship." *Id.* at 881, 883, 887. That omission made "all the difference," the Fifth Circuit held, under the "settled" private-nondelegation "principle that a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Id.* at 873, 881, 888.

At oral argument in this case a few weeks later, the Sixth Circuit suggested that a congressional amendment conferring independent rulemaking power on the FTC would remedy the constitutional defect found by the Fifth Circuit. Oral Arg. Rec. 33:00-33:13 (Dec. 7, 2022) (Sutton, C.J.) ("Why not just say to [Congress,] this is easy, this was bipartisan, just put the modification power straight in, it'll be just like FINRA and the SEC, problem solved?").

Congress heard the judiciary's concern and acted swiftly to resolve it. At the end of December 2022, Congress enacted and President Biden signed bipartisan legislation amending the operative language of HISA to provide the FTC with full independent rulemaking authority:

> The Commission, by rule in accordance with section 553 of Title 5, may 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.

15 U.S.C. § 3053(e). That language is drawn directly from the parallel provision of the SEC-FINRA statute. *Id.* § 78s(c).

The FTC ratified its prior rule approval decisions, making clear that under the "broader rulemaking power" Congress had conferred, it would "exercise its own policy choices whenever it determines that the Authority's proposals, even if consistent with the Act, are not the policies that the Commission thinks would be best for horseracing integrity or safety." FTC, *Order Ratifying Previous Commission Orders As To Horseracing Integrity and Safety Authority's Rules* 3 (Jan. 3, 2023) ("Ratification Order").[3]

4. a. "Sometimes government works," Chief Judge Sutton observed on behalf of a unanimous Sixth Circuit upholding the amended Act. Pet. App. 4a. The "productive dialogue" among the branches "ameliorated the concerns underlying the non-delegation challenge"—which "the parties accept[ed]" turned on one "determinative question": "whether the

[3] https://tinyurl.com/msswvdrf.

Horseracing Authority is inferior to the FTC." Pet. App. 5a, 13a. By conferring on the FTC "new discretion to adopt and modify rules," the amendment Congress enacted "[i]n response" to the courts "eliminate[d]" the "'key distinction' the Fifth Circuit [had] identified" between HISA and the SEC-FINRA statute that courts have blessed uniformly "[i]n case after case." Pet. App. 4a, 13a, 18a. HISA now "correctly places the private Horseracing Authority in a subordinate position to the public FTC," which maintains "'the last word' on federal law." Pet. App. 4a (quoting *Black II*, 53 F.4th at 872), 18a.

That was enough to reject the facial challenge, which Petitioners always presented "as one turning on 'governmental oversight' of and 'accountability' for the Horseracing Authority's activities." Pet. App. 20a. To the extent any doubts remain about enforcement powers conferred in the Act—but never exercised by Respondents—the Sixth Circuit noted the "reality" that Petitioners had not raised "a categorical Article II inquiry," delved into "historical meaning," or otherwise briefed "the role private entities may, and may not, play in law enforcement." *Id.* The Court "save[d] resolution of such questions, if such questions there be, for a day when the Authority's actions and the FTC's oversight appear in concrete detail, presumably in the context of an actual enforcement action." Pet. App. 13a, 20a-21a.

Judge Cole "agree[d] in full" with the majority's discussion of the amended Act and wrote separately to emphasize his view that even "the original statute was constitutional because the private Authority has always been subordinate to the FTC." Pet. App. 29a,

34a. "HISA is remarkably similar to the constitutional Maloney Act" and "matches" the agency-oversight model "the Supreme Court upheld as 'unquestionably valid'" in *Adkins*. Pet. App. 36a-38a (quoting 310 U.S. at 399).

b. The Sixth Circuit also affirmed the district court's rejection of Petitioners' anti-commandeering challenge to HISA's fee-collection provision. Pet. App. 22a-27a. The Act "presents States with a choice, not a command": "States may elect to collect fees from the industry and remit the money to the Horseracing Authority," in which case the States "gain[] discretion over how the fees are collected"; "or States may refuse," in which case "the Authority collects the fees itself" from private parties and the States are preempted from imposing their own fees for the same matters. Pet. App. 23a-24a. "This scheme fits comfortably within the conditional preemption framework," the Sixth Circuit held, "[e]liminating 'double taxation' and fostering uniformity." Pet. App. 24a, 26a. Petitioners' counterarguments "run[] aground on contrary precedent," "[l]egally [are] bereft of support," and "[f]actually *** falter[]." Pet. App. 25a-26a.

5. Petitioners filed a petition for rehearing en banc on both their private-nondelegation and anti-commandeering claims. The Sixth Circuit denied the petition. Pet. App. 72a. No judge requested a vote.

REASONS FOR DENYING THE PETITION

All five federal judges that have reviewed the operative version of HISA have concluded that it is constitutional under the private-nondelegation doctrine. That consensus follows from application of the established agency-subordination standard that Petitioners accepted below, that this Court's precedents set forth, and that courts of appeals have relied on uniformly to uphold the materially identical Maloney Act. Congress amended HISA to satisfy that standard by conferring on the FTC the express oversight the Fifth Circuit said the prior version of the statute had omitted. Petitioners' worst-case assumptions about how the FTC might exercise that oversight, including their new focus on ancillary and unripe features of the Act that have never materialized, do not warrant this Court's review.

Nor has any court disagreed with the Sixth Circuit's holding that HISA's fee-collection scheme does not commandeer the States. Contrary to the premise of the question presented, the Act does not "coerc[e] States into funding" anything. Rather, States are given the choice to collect and remit fees from "covered persons." If a State declines, the Authority steps in and ordinary preemption principles prevent the State from collecting duplicate fees for its own regulation of the same matters HISA rules govern. That scheme "fits comfortably" within this Court's "conditional preemption" jurisprudence.

This Court should deny further review.

I. THE PRIVATE-NONDELEGATION QUESTION DOES NOT WARRANT REVIEW

A. There Is No Conflict Among The Courts Of Appeals

1. Petitioners are wrong that "[t]he Act at issue in this case *** has split lower courts and judges"—at least to the extent Petitioners are talking about the Act *now in effect* (*i.e.*, the only Act that matters). Pet. 25. No court has disagreed with the Sixth Circuit's holding that the operative version of HISA (as amended) is constitutional. The Fifth Circuit ruled that a *prior* version offended private-nondelegation principles. But all five federal judges that have resolved private-nondelegation challenges to the *amended* Act have "conclud[ed] that Congress cured" the alleged defects the Fifth Circuit identified in "HISA's original approach." *Black III*, 672 F. Supp. 3d at 226; *see* Pet. App. 4a-5a (amendment Congress passed "[i]n response" to *Black II* "ameliorated the concerns underlying the [private] non-delegation challenge"); Pet. App. 29a, 34a (Cole, J., concurring) ("agree[ing] in full with the majority's discussion of section 3053(e)'s amended text," even while "believ[ing] the original statute was constitutional"); Hr'g Tr. at 44, *Walmsley v. Federal Trade Comm'n*, No. 3:23-cv-81 (E.D. Ark. July 21, 2023), Doc. 47 (denying preliminary injunction on "lack of probability of success on the merits" of private-nondelegation claim based on "the Sixth Circuit opinion" and "*Black* one, two, [and] three"), *appeal pending*, No. 23-2687 (8th Cir.).

2. Nor is there "confusion" over the governing framework. Pet. 22. "[T]he Sixth Circuit held the

amended HISA constitutional not because it disagreed with the Fifth Circuit's private-nondelegation jurisprudence but because it agreed." *Black III*, 672 F. Supp. 3d at 246. Both courts adopted the same standard drawn from this Court's longstanding precedent: "a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Black II*, 53 F.4th at 881 (quoting *Adkins*, 310 U.S. at 399); *see* Pet. App. 11a ("*Adkins* shows that a private entity may aid a public federal entity that retains authority over the implementation of federal law").

While courts and commentators may "differ over the locus of the constitutional violation" animating private-nondelegation claims in other contexts, *Black II*, 53 F.4th at 881 n.23; *see* Pet. 23-25, all parties and courts across every such challenge to HISA (before and after the amendment) have expressly "agree[d] that the outcome turns on whether the private entity is subordinate to the agency," *Black II*, 53 F.4th at 881 n.23; *see* Pet. App. 13a ("As the case comes to us, then, the determinative question is whether the Horseracing Authority is inferior to the FTC."); Pet. App. at 30a (Cole, J., concurring) (agreeing "that the main test for this issue is whether the private entity is subordinate to the federal agency"); *Black III*, 672 F. Supp. 3d at 240 ("The Constitution requires a private entity wielding government power to function subordinately to a federal agency's authority and surveillance."). That is the opposite of a "fail[ure] to coalesce." Pet. 29.

The Fifth Circuit held that the original HISA failed this "functions subordinately" standard (Pet. 25)

because "[t]he Authority, rather than the FTC, ha[d] been given final say over HISA's programs." *Black II*, 53 F.4th at 872. Following Congress's amendment—enacted in direct response to that holding—courts have concluded consistently that the version of HISA now in effect "gives the FTC the final say over implementation of the Act relative to the Horseracing Authority." Pet. App. 5a. As the Northern District of Texas explained when upholding the amended Act on remand from the Fifth Circuit, the Sixth Circuit tracked the "one-to-one match between the issues identified in [the Fifth Circuit's] opinion and the solutions passed by Congress." *Black III*, 672 F. Supp. 3d at 246. Those holdings underscore the judicial and legislative (and executive) agreement around "the Constitution's limits as defined by the Fifth Circuit"—and around the shared understanding that Congress's amendment "brought the law within the Fifth Circuit's stated requirements." *Id.* at 224-225.

3. No court has ever held that the 85-year-old Maloney Act—"which governs the SEC's relationship with FINRA" and undisputedly provided the "model[]" for HISA—violates the private-nondelegation doctrine. Pet. App. 61a (citing Amicus Br. of Sen. McConnell et al. at 1, 10-11, No. 21-cv-0071 (N.D. Tex. May 17, 2021), Doc. 53). On the contrary, "[i]n case after case, the courts have upheld this arrangement, reasoning that the SEC's ultimate control over the rules and their enforcement makes [FINRA and other SROs] permissible aides and advisors." Pet. App. 13a (citing *Sorrell v. SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982); *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Todd & Co. v. SEC*, 557 F.2d

1008, 1012-1013 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952)); *see Black II*, 53 F.4th at 877 ("The SEC-FINRA model, which inspired the FTC-Authority relationship, *** has been uniformly upheld against private-nondelegation challenges." (internal quotation marks and alterations omitted)).

Against this unbroken line of circuit court authority, Petitioners point to one single-judge opinion concurring in the grant of an emergency injunction pending appeal. Pet. 27-28 (citing *Alpine Sec. Corp. v. FINRA*, No. 23-5129, 2023 WL 4703307 (D.C. Cir. July 5, 2023) (Walker, J., concurring)). The "enforcement proceeding" (*id.*) that precipitated that interlocutory opinion is conspicuously absent here, where Petitioners do not allege even a threat of enforcement. *See* pp. 32-33, *infra*. More critically, the outlier opinion relies on the Constitution's Appointments Clause—an alternative claim that Petitioners in this case abandoned on appeal after the district court rejected it. Pet. App. 69a-70a.

Petitioners' counsel's own words in *Alpine* undermine their feeble argument here that the Authority's powers "far exceed" those of FINRA. Pet. 26. As they told the D.C. Circuit—on behalf of FINRA itself—HISA "put[s] the [Authority] on 'equal footing to FINRA in its role "in aid of" the federal agency that retains ultimate rulemaking authority.'" Opp. to Stay Mot. 19, No. 23-5129 (D.C. Cir. June 15, 2023) (quoting *Black III*, 672 F. Supp. 3d at 245). But one need not simply trust Petitioners' counsel; a comparison of the parallel language of the Maloney Act and HISA dispels any doubt. *Compare, e.g.*, 15 U.S.C. § 78s(b)

("consisten[cy]" approval standard) *with id.* § 3053(c) (same); *id.* § 78s(c) (SEC's plenary rulemaking power) *with id.* § 3053(e) (FTC's plenary rulemaking power).[4]

4. Unable to identify a split on HISA or the Maloney Act, Petitioners search for "inconsistent analyses" in fragments of opinions concerning unrelated regulatory regimes. Pet. 22-25. Petitioners omit that in *Texas v. Rettig*, 987 F.3d 518 (5th Cir. 2021), unlike here, the assignment of private-party function was "authorized by an administrative agency, rather than by Congress." 993 F.3d 408, 410 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). That distinction was critical to the judges who dissented from the denial of rehearing and to the (denied) certiorari petition. *Id.* at 415 ("[I]t is one thing to bless a Congressional decision to involve private parties in the rulemaking process. It is quite another to allow an agency—already acting pursuant to delegated power—to re-delegate that power out to a private entity."); Pet. for Cert. 20, *Texas v. Commissioner of Internal Revenue*, No. 21-379 (U.S. Sept. 3, 2021) ("[I]n *Adkins*, 'it was Congress itself, not the agency, that enlisted the assistance of private parties in rulemaking.'").

The *Amtrak* line of cases only reinforces the subordination test consistently applied to HISA and FINRA. *See Association of Am. R.Rs. v. U.S. Dep't of*

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[4] If anything, FINRA's powers are broader than the Authority's in relevant respects. *Compare*, *e.g.*, 15 U.S.C. § 78s(b)(2)(D) (FINRA rules "shall be deemed to have been approved" if SEC fails to act within prescribed period), *with id.* § 3053(b)(2) (Authority-proposed standards cannot take effect unless approved by FTC).

Transp., 721 F.3d 666, 671 & n.5 (D.C. Cir. 2013) (finding private-nondelegation violation because agency could not "unilaterally change regulations proposed to it," contrary to SEC-FINRA cases that "resemble *Adkins*"), *vacated on other grounds*, 575 U.S. 43, 53 (2015). As the D.C. Circuit explained (in a remand decision Petitioners ignore), where a "government agency could 'hold the line'" against "private interests," such that "[n]o rule will go into effect without the approval and permission of a neutral federal agency," the framework "raise[s] no constitutional eyebrow." *Association of Am. R.Rs. v U.S. Dep't of Transp.*, 896 F.3d 539, 541, 545-547 (D.C. Cir. 2018) (severing agency-constraining provision that "broke from [*Adkins'*] mold" brought statute "back into the constitutional fold").

5. To the extent there is any concern that the private-nondelegation doctrine is "underdeveloped" (Pet. 4), the answer is to allow for further percolation rather than to short-circuit decision-making among the federal courts of appeals. The Fifth Circuit and Eighth Circuit are currently reviewing district court decisions rejecting identical private-nondelegation challenges to HISA. *Black IV*, No. 23-10520 (5th Cir.); *Walmsley*, No. 23-2687 (8th Cir.). And alongside the Appointments Clause challenge to FINRA that Petitioners highlight (at 27-28), the D.C. Circuit is presently reviewing a private-nondelegation claim against FINRA as well. *Alpine*, No. 23-5129 (D.C. Cir.).

B. The Sixth Circuit's Decision Is Faithful To This Court's Precedents

1. The Sixth Circuit's decision follows this Court's precedents. In *Carter v. Carter Coal Company*, this Court invalidated a federal statute that directly conferred power on private entities to regulate an industry with zero governmental approval or oversight. 298 U.S. 238, 310-311 (1936). In response, Congress amended the law to "subordinate[] the private coal producers to a public body (the Coal Commission)," Pet. App. 11a, by granting the Commission the power to "approve, disapprove, or modify" the private boards' proposals "to conform to the requirements" of the statute, Bituminous Coal Act of 1937, § 4, pt. II(a), 50 stat. 72, 78. Reviewing that amended statute in *Adkins*, this Court blessed the scheme as "unquestionably valid." 310 U.S. at 399.

Based on those twin decisions and the parties' "accept[ed] *** framing of the appeal," the Sixth Circuit joined the Fifth Circuit's understanding that the "determinative question is whether the Horseracing Authority is inferior to the FTC." Pet. App. 13a; *see Black II*, 53 F.4th at 881 ("If the private entity does not function subordinately to the supervising agency, the delegation of power in unconstitutional."). The long-upheld SEC-FINRA model provided an "illuminating" backdrop (Pet. App. 12a) in light of Petitioners' acknowledgment (before Congress's amendment to HISA) that the Maloney Act "subject[s]" SROs like FINRA "to the ultimate authority" of an agency with "ultimate power over and responsibility" for the regulatory scheme. CA6 Opening Br. 44; *see Shearson/Am. Express,* 482 U.S.

at 233-234 (SEC "has broad authority to oversee and to regulate the rules adopted by the SROs").

Congress conformed HISA to that standard in three critical respects. *First*, no HISA rule may take on binding legal effect absent FTC approval. 15 U.S.C. § 3053(b). Like FINRA, the Authority merely proposes standards and the FTC must independently determine, following notice-and-comment, whether each proposal is consistent with the statute and applicable rules, *id.* § 3053(c); *see id.* § 78s(b). *Second*, the FTC (post-amendment) retains plenary rulemaking power of its own: Congress drew directly from the Maloney Act in affording the FTC the authority to "abrogate, add to, and modify" HISA rules as the agency "finds necessary or appropriate" to "ensure the fair administration of the Authority," "conform the rules" to the requirements of the statute and applicable rules, or otherwise further "the purposes" of the Act. *Id.* § 3053(e); *see id.* § 78s(c). *Third*, mirroring the SEC-FINRA model, any enforcement decision with final effect under HISA is subject to two layers of de novo FTC review (followed by Article III judicial review). *Id.* § 3058; *see id.* § 78s(d)-(e).

Given these "tried and true hallmarks of an inferior body," the Sixth Circuit hardly erred in finding that the Authority—like FINRA under the Maloney Act and the private coal boards in *Adkins*—"is 'subject to [the agency's] pervasive surveillance and authority.'" Pet. App. 13a, 17a (quoting *Adkins*, 310 U.S. at 388). As Chief Judge Sutton explained, the FTC holds "ultimate discretion over the content of the rules that govern the horseracing industry and the

Horseracing Authority's implementation of those rules"—"leav[ing] the Authority as the secondary, the inferior, the subordinate" body, and "nothing more." Pet. App. 15a, 17a.

2. Petitioners' caricature of the FTC's oversight as "a merely ministerial back-end role" (Pet. 17) rests on worst-case assumptions about how the agency may exercise that supervision, cherrypicked examples of actions the agency has taken (all of which postdate the complaint and most of which predate Congress's amendment), and strained interpretations that search for constitutional problems. Basic principles governing facial challenges and constitutional avoidance proscribe that approach. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("cardinal principle" that statute must be interpreted to avoid constitutional doubt where "fairly possible"); *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("presumption of regularity attaches to the actions of Government agencies").

Because HISA can be fairly construed to "give[] the FTC the final say over implementation of the Act relative to the Horseracing Authority," that was enough for the Sixth Circuit to reject Petitioners' facial challenge—even if "[t]he People may rightly blame or praise the FTC for how adroitly (or, let's hope not, ineptly)" the agency exercises its oversight in any particular instance. Pet. App. 5a, 16a. None of

Petitioners' criticisms provides any reason to invalidate a regulatory regime two bipartisan Congresses enacted and two different Administrations have embraced.

a. Petitioners allege primarily that the FTC's oversight is insufficient because "the FTC must promulgate" Authority-proposed standards "so long as they are 'consistent' with the Act and other rules." Pet. 17 (quoting 15 U.S.C. § 3053(a)-(c)). But as all courts to consider the question have agreed, Congress's amendment to HISA is "fatal to [Petitioners'] arguments regarding consistency review." *Black III*, 672 F. Supp. 3d at 245. The FTC's new power to "abrogate, add to, and modify" HISA rules renders "'irrelevant' that the FTC conducts an initial review for consistency with the statute and rules." *Id.* (quoting *Black II*, 53 F.4th at 888 n.35).

That conclusion flows directly from the Fifth Circuit's decision. The Fifth Circuit held that the original Act violated the private-nondelegation doctrine because limits on the FTC's ability to "itself *** make changes" to HISA rules meant the Authority "ha[d] the final word on what those rules are." *Black II*, 53 F.4th at 887-888. "Not so anymore." Pet. App. 16a. By expressly conferring on the FTC the previously withheld power to "abrogate, add to, and modify" rules as the FTC finds "necessary or appropriate," HISA's "amended text grants the FTC a comprehensive oversight role." Pet. App. 14a. Because HISA rules are subject to the FTC's "policymaking discretion" within Congress's clear guidelines, both "[w]hen the FTC decides to" exercise its new independent rulemaking power *and* "when the

FTC decides *not* to act," Congress's amendment cured the alleged constitutional infirmity. Pet. App. 15a.

Indeed, Congress's amendment "eliminates" the "'key distinction' the Fifth Circuit"—and Petitioners—"identified between the Maloney and Horseracing Acts." Pet. App. 18a (quoting *Black II*, 53 F.4th at 887). "Before the amendment, [Petitioners] observed that the SEC's modification power gives the SEC 'largely unbounded authority to craft the private [SROs'] regulations as it sees fit." *Id.* (alterations omitted). The absence of such "unilateral authority to modify the regulations" under the old version of HISA, Petitioners argued, was "dispositive" in the Fifth Circuit case and "equally dispositive" here. CA6 Oral Arg. Rec. 8:19-8:44. Thus, by the terms of Petitioners' own theory, negating "that distinction makes all the difference" to "whether the private entity is subordinate to the agency." *Black II*, 53 F.4th at 888. Regardless of the Authority's ability to draft standards "in the first instance," Pet. 18, the FTC's "authority to modify [and abrogate] *any* rules for any reason at all, including policy disagreements, ensures that the FTC retains ultimate[] authority over the implementation of the Horseracing Act," Pet. App. 17a-18a.

b. In any event, the FTC's "consistency" review has real "teeth." *Black III*, 672 F. Supp. 3d at 245. Petitioners are wrong that this approval standard excludes "policy objections from the FTC." Pet. 18. Evaluating whether proposals are "consistent with" the Act, 15 U.S.C. § 3053(c)(2), requires determining whether they "are consistent with 'the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces,'" Pet. App. 35a (Cole, J.,

concurring) (quoting 15 U.S.C. § 3054(a)(2)(A)), pursuant to the many "[c]onsiderations" and "[e]lements" Congress provided, 15 U.S.C. §§ 3055, 3056, 3057. That broad standard empowers the FTC to disapprove, for example, a racetrack-safety proposal that the FTC determines as a matter of policy is not "consistent with the humane treatment of covered horses." *Id.* § 3056(b)(2).

In this context, that substantive determination is tantamount to the "public interest" and "equitable principles of trade" determination the SEC makes under the Maloney Act—not as part of a "different in kind" authority to wield the agency's own freestanding policy preferences, Pet. 26-27, but pursuant to the agency's parallel duty to review proposed rules under an identical "consistent with the requirements of the Act" standard, *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 446-447 (D.C. Cir. 2017) (quoting 15 U.S.C. § 78s(b)(2)(C)).

Section 3053(c) also mirrors the Coal Act standard this Court upheld as "unquestionably valid" in *Adkins*. 310 U.S. at 399. Petitioners misleadingly describe that statute as empowering the Coal Commission to approve or disapprove proposed rules "in its discretion." Pet. 15. The relevant statutory text limited the agency to "'approv[ing], disapprov[ing], or modify[ing]' the private coal boards' 'proposed minimum prices [and related terms] *to conform to the requirements* of this subsection.'" Pet. App. 38a (Cole, J., concurring). "[E]very court of appeals to address the validity of such delegations under the Maloney Act

and the Coal Act, as noted, has upheld them." Pet. App. 18a.[5]

Although that is enough to doom this facial challenge, the FTC's actions remove any doubt. In December 2022, for example, the FTC construed the Act's consistency standard as warranting disapproval of the initially proposed anti-doping and medication-control rules in the immediate wake of the Fifth Circuit's decision. The agency based its determination on (i) the FTC's independent judgment that "[t]he bedrock principle of the Act is the need for uniformity," and (ii) the FTC's policy goal of avoiding potential "confusion *** for industry participants and regulators." FTC, *Order Disapproving The Anti-Doping And Medication Control Rule Proposed By The Horseracing Integrity And Safety Authority* 1-2 (Dec. 12, 2022) ("Anti-Doping Disapproval Order).[6] Nothing in HISA's text dictated that outcome. The FTC also has not hesitated to condition its approval of a proposed standard on its own limiting interpretations. *See, e.g.*, FTC, *Order Approving The Enforcement Rule Modification Proposed By The Horseracing Integrity And Safety Authority* 14-16 (Sept. 23, 2022) (rejecting

[5] The amended HISA now gives the FTC more power than the reviewing agency in *Adkins*, which lacked the ability to initiate rulemaking or later modify rules with respect to the minimum-price determination at issue. *See* 310 U.S. at 388, 397 (although agency could "fix maximum prices when in the public interest it deems it necessary," agency could only "direct[]" private entities to submit proposals on minimum prices).

[6] https://tinyurl.com/rndfjr8b.

proposed provision as "unnecessary and overbroad" and directing Authority "not to rely" on it).[7]

c. Petitioners "overlook[] another reality," Pet. App. 19a, in arguing that Congress's amendment to HISA merely gives the FTC an "ability to amend already-existing rules at some point down the road" from the approval of proposed standards, Pet. 18. Section 3053(e)'s new text undisputedly confers on the FTC not only "after-the-fact" power to modify rules, *id.*, but also the independent ability to "create new rules" in the first place, Pet. App. 14a-15a; *see Black III*, 672 F. Supp. 3d at 242 ("When the FTC promulgates a new rule, it 'add[s] to' the rules of the Authority." (alteration in original)).

Under that additional power, the FTC will "exercise its own policy choices whenever it determines that the Authority's proposals, even if consistent with the Act, are not the policies that the [FTC] thinks would be best for horseracing integrity." Ratification Order 3. The FTC has already done so, for example, with a rule requiring its review of the Authority's proposed budget to advance the Act's goals "in a prudent and cost-effective manner." 88 Fed. Reg. 18,034, 18,035 (Mar. 27, 2023).

This new "full-throated rulemaking power" is baked into section 3053(c)'s approval/disapproval process. Pet. App. 19a. "When the FTC reviews the Horseracing Authority's proposed rules, it asks not just whether they are 'consistent' with the Act; it also asks whether they are 'consistent' with other 'applicable rules approved by the Commission.'" *Id.*

[7] http://tinyurl.com/3h5cb5fm.

(quoting 15 U.S.C. § 3053(c)(2)). Although HISA requires the FTC to approve or disapprove a proposal within 60 days of publication in the Federal Register, *id.* § 3053(c)(1), there is no deadline for the FTC to publish the proposal in the first instance, *see* 16 C.F.R. § 1.142(d) (requiring Authority to submit standards and accompanying documents "at least 90 days in advance" of proposed publication, absent waiver). If the FTC has concerns about an Authority proposal, the FTC may publish its own proposed rule on the same topic before publishing the Authority's proposal. The agency can then finalize its own rule before determining whether the Authority-proposed standard is consistent with it. The Authority's proposal "shall not take effect" in the interim—or ever, if the FTC disapproves it as inconsistent with the agency's own rule. 15 U.S.C. § 3053(b)(2); *contra* Pet. 19 (claiming incorrectly that industry will be "bound by a regulation with which the FTC disagrees and which no governmental officer approved").

So there will never be a "deadlock" (Pet. 20): the FTC's "broad power to write and rewrite the rules" according to its "policymaking discretion" ensures "ultimate 'law-making is not entrusted to the [Authority].'" Pet. App. 15a (alteration in original) (quoting *Adkins*, 310 U.S. at 399). Any hypothetical delay between approval of an Authority-proposed rule and a new FTC rule on the same subject is itself a "policy choice" by the agency. *Id.*

Moreover, the FTC may exercise its new rulemaking authority to delay the effective date of any approved rule. *See* Pet. App. 19a. Little imagination is needed to conceive of such a rule: the FTC already

enacted one "delaying the date of effectiveness" of the approved anti-doping and medication-control program by a few weeks to mitigate risk of "inconsistent treatment of similarly situated horses" and "uncertainty *** near[] [last year's] Triple Crown events." 88 Fed. Reg. 27,894, 27,894-27,895 (May 3, 2023) (finding "good cause" to forgo "notice and comment" under "section 553(b)(3)(B) of the APA," as incorporated in 15 U.S.C. § 3053(e)). That real-life example of the FTC exercising its rulemaking power on an expedited basis to protect its "policy concerns" and prevent time-sensitive "harms that could frustrate the purposes of the Act," *id.*, resolves any lingering worry that rulemaking "[o]n average *** takes *years* to complete," Pet. 19.

d. Finally, Petitioners are wrong that the Authority could wield other "governmental powers *without any FTC oversight at all*." Pet. 20. As a threshold matter, Petitioners' hyperbole is not justiciable: Respondents have never even threatened to carry out many of the hypothetical enforcement activities Petitioners attack. *See* pp. 32-33, *infra*.

Even setting aside serious standing and ripeness problems, the FTC would have "'pervasive' oversight and control of the Authority's enforcement activities" to the extent they materialize. Pet. App. 16a (quoting *Adkins*, 310 U.S. at 388). HISA limits the Authority to acting "according to 'uniform procedures' reviewed and approved by the FTC." Pet. App. 64a. And the FTC has "full authority to review the Horseracing Authority's enforcement actions." Pet. App. 17a. No challenged enforcement decision could have ultimate legal effect unless the FTC, exercising independent

judgment and de novo review, "affirm[ed]" it. 15 U.S.C. §§ 3055(c)(4)(B), 3058(b)(3), (c)(3).

Such review "is even more substantial than the SEC's review of FINRA decisions." *Black III*, 672 F. Supp. 3d at 248; *see* Pet. App. 43a (Cole, J., concurring) ("HISA, unlike the Maloney Act, unambiguously empowers the FTC to obtain additional evidence not in the record below[.]"). "All circuits that have ruled on the issue have held that the Maloney Act's enforcement scheme is constitutional" because "the agency retains de novo review of a private entity's enforcement proceedings." Pet. App. 41a-42a (Cole, J., concurring).

Section 3053(e) now also "gives the FTC the tools to step in" at any point to ensure that "the FTC, not the Authority, ultimately decides how the Act is enforced." Pet. App. 16a-17a. That resolves every specific (hypothetical) concern Petitioners raise. For example, the FTC could "issue rules protecting covered persons from overbroad subpoenas or onerous searches." *Id.*; *contra* Pet. 21. Similarly, the Act empowers the FTC to "require that the Authority meet a burden of production before bringing a lawsuit or preclear the decision with the FTC." Pet. App. 16a; *contra* Pet. 20-21. And on top of the fact that "[e]xtending the Act to new breeds" (Pet. 21) is conditioned on a funding prerequisite "subject to approval by the Commission," 15 U.S.C. § 3054(*l*)(3), section 3053(e) permits the FTC to "revoke" any breed-expanding decision or place additional "procedural and substantive conditions" on it, Pet. App. 20a; *contra* Pet. 21.

"Whether the FTC becomes a demanding taskmaster or a lenient one, the FTC *could* subordinate every aspect of the Authority's enforcement." Pet. App. 17a. "That potential suffices to defeat [this] facial challenge," particularly given that Petitioners "litigated this claim as one turning on 'governmental oversight' of and 'accountability' for the Horseracing Authority's activities" and "not as a categorical Article II inquiry." Pet. App. 17a, 20a.[8]

C. This Case Is A Poor Vehicle Because Several Of Petitioners' Arguments Are Forfeited, Unripe, And Ancillary To The Act's Operation

This case is a poor vehicle to review the private-nondelegation issue for at least three reasons.

First, Petitioners' "accept[ance] [of] th[e] framing of the appeal," Pet. App. 13a, forecloses after-the-fact arguments about "competing analytical frameworks," Pet. 22; *see United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) (solidifying "principle of party presentation"). Before Congress's amendment, Petitioners argued that "HISA's core constitutional defect" was that it "stripp[ed] the federal government of the ability to disapprove, modify, or abrogate [Authority] rules in its discretion." CA6 Reply Br. 4; *see* First Am. Compl. ¶ 147, Dkt. 53 ("The Commission has no authority to draft, revise, or modify the rules

[8] In fact, the FTC recently issued proposed rules to facilitate "effective Commission oversight over the Authority," including with respect to any "investigations conducted," "sanctions imposed," "subpoenas issued," and "actions commenced" in federal court. 89 Fed. Reg. 8,578, 8,578-8,580 (Feb. 8, 2024).

under HISA in any way; it may issue only those rules prepared by the Authority."). Congress then conferred on the FTC that "core power," which Petitioners had acknowledged the SEC retains under the Maloney Act but claimed the FTC lacked under the original version of HISA. CA6 Reply Br. 6. The Sixth Circuit's subsequent decision, issued after supplemental briefing addressing Congress's amendment, simply recognized what Petitioners' counsel had argued: the independent rulemaking power Congress expressly afforded the FTC in direct response to this case and the Fifth Circuit's decision is "dispositive" of the private-nondelegation claim as presented. CA6 Oral Arg. Rec. 8:19-8:44. Petitioners cannot seek certiorari to re-litigate a case differently than how "it c[a]me[] to" the courts below. Pet. App. 20a.

Second, Petitioners' new focus (at 20-22) on the discrete civil action, subpoena, and breed-expansion provisions is misplaced many times over. Petitioners have never alleged that they have been, or imminently will be, "aggrieved" by any purported "exercise of executive power" they speculate the Authority may one day exercise. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 212 (2020). In fact, the Authority has *never* issued a subpoena or filed a court action against *any* covered person—let alone Petitioners. And the challenged breed-expansion provision applies only when "State racing commission[s] or [non-Thoroughbred] breed governing organization[s]"—*e.g.*, Petitioners themselves—"elect" to invoke it. 15 U.S.C. § 3054(*l*). No such entity has made that triggering election or indicated any desire.

Petitioners' abstract challenge to these never-exercised provisions reflects "the kind of undifferentiated, generalized grievance" that is not redressable. *Lance v. Coffman*, 549 U.S. 437, 442 (2007); *see Bond v. United States*, 564 U.S. 211, 222, 225 (2011) (constitutional structural challenges remain "subject to the Article III requirements, as well as prudential rules"). Perhaps for that reason, Petitioners never "engaged with th[e]s[e] features of the Act" in any serious manner below. Pet. App. 20a. To the extent there are any concerns about a particular enforcement activity Respondents may (or may never) conduct, they should be resolved "when the Authority's actions and the FTC's oversight appear in concrete detail, presumably in the context of an actual enforcement action." Pet. App. 21a.

Third, even if Petitioners' complaints were properly presented and justiciable (and meritorious), a ruling in their favor would implicate severability questions never adjudicated below. The reality that the civil-action, subpoena, and breed-election provisions Petitioners emphasize have never been exercised underscores that they are ancillary to the Act's operation. That is yet another reason why review of the private-nondelegation issue should await an as-applied challenge when—or if—these provisions actually threaten harm to a plaintiff.

II. THE ANTI-COMMANDEERING QUESTION DOES NOT WARRANT REVIEW

1. The second question presented rests on Petitioners' (repeated) mischaracterization of the statutory scheme. The Act does not require "States to fund" HISA's regulatory scheme. Pet. 11; *see* Pet. i, 13,

30, 31 (framing Question Presented on contention that Act coerces "States into funding" program). Rather, HISA places the funding obligation on "covered persons." 15 U.S.C. § 3052(f)(2)(D), (3)(B). That term includes racetracks, trainers, owners, and so on, but excludes States. *Id.* § 3051(6); *see* Pet. App. 27a ("Private parties pay for the Authority's operations."). Should a State elect to participate, it need only "remit fees" collected from covered persons (under whatever method the State prefers), 15 U.S.C. § 3052(f)(2), not contribute State dollars to "pay for the Authority[]," Pet. 32-33; *see* Pet. App. 67a (explaining States' voluntary participation would only involve remitting "money owed to the federal government, as opposed to State funds").

2. Factual misstatements aside, every court to have resolved this anti-commandeering claim has rejected it. Pet. App. 22a-27a; Pet. App. 66a-68a; *Black III*, 672 F. Supp. 3d at 225 (private party lacked standing because "HISA allows states to 'elect[]' to assess and collect fees on covered persons," and "if the state does not make such an election, then the Authority steps in" (alteration in original)). For good reason: HISA's funding scheme "fits comfortably within the conditional preemption framework" permitted by this Court's established precedents. Pet. App. 24a; *see Murphy v. National Collegiate Athletic Ass'n*, 584 U.S. 453, 476 (2018) (discussing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288-289 (1981)).

Far from "unconstitutionally coerc[ing]" the States, Pet. 13, HISA "presents States with a choice, not a command," Pet. App. 23a. "States may elect to

collect fees from the industry and remit the money to the Horseracing Authority," in which case the States "gain[] discretion over how the fees are collected." *Id.* (citing 15 U.S.C. § 3052(f)(2)(D)). Or "States may refuse," in which case "the Authority collects the fees itself" and the States may not collect their own fees to regulate the same "'anti-doping and medication control or racetrack safety matters.'" *Id.* at 23a-24a (quoting 15 U.S.C. § 3052(f)(3)(D)).

Petitioners' contrary view depends on at least three misunderstandings of HISA and this Court's case law. *First*, the Act does not "impose[] a punishment" on a State that elects not to participate in the fee-collection regime. Pet. 31. What Petitioners strain to characterize as a "threat" to State sovereignty, Pet. 4, 33-34, is "nothing more than a typical preemption scheme," Pet. App. 68a. In regulating covered persons, HISA also "confers on [the] private entities (*i.e.*, covered [persons]) a federal right to engage in certain conduct subject only to certain (federal) constraints." *Murphy*, 584 U.S. at 478-479; *see, e.g.*, *id.* § 3054(a), (b). "There is nothing unconstitutional about Congress 'offer[ing] States the choice of regulating that activity according to [those] federal standards or having state law pre-empted.'" Pet. App. 24a (quoting *New York v. United States*, 505 U.S. 144, 173-174 (1992)).

Second, Petitioners are wrong that such conditional preemption extends "beyond the scope of the federal program itself" to preclude States from taxing matters on which no HISA "regulations have been passed." Pet. 33. HISA's general preemption scheme makes clear that States are precluded only

from regulating and collecting fees "with respect to matters" covered by rules "promulgated" under the Act. 15 U.S.C. § 3054(b); *see New York*, 505 U.S. at 170 (preemption provisions should be viewed not "alone," but in context of statute "[c]onstrued as a whole"). As Petitioner States' own experience confirms, if no HISA rule is in effect with respect to a particular matter, States are free to continue regulating it—and to impose fees for that non-preempted activity regardless of whether the States have chosen to collect HISA fees. *See* Anti-Doping Disapproval Order 2 ("State law will continue to regulate the matters that the proposed rule would have covered."). Were there any doubt, the canon of constitutional avoidance precludes reading the statute, contrary to how Respondents and Petitioners apply it themselves, to create a constitutional problem.

Third, Petitioners say this conditional preemption "'serves no purpose other than to force unwilling States' to enforce a federal program." Pet. 34 (quoting *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (opinion of Roberts, C.J.).[9] Wrong again. As the Sixth Circuit explained (and Petitioners ignore), "ensur[ing] that a single entity[,] whether a State or the Authority[,] imposes fees" on the same covered persons for the same matters helps

[9] Petitioners' heavy reliance on financial-incentive cases to support their related argument that this conditional preemption scheme represents "a 'gun to the[ir] head,'" Pet. 34 (quoting *National Fed'n*, 567 U.S. at 581-582), is "bereft of support" "[l]egally" and raises "factual problems" given Petitioners' failure to "quantify [their] expected loss," Pet. App. 26a.

"[e]liminat[e] 'double taxation' and foster[] uniformity"—more than "adequate grounds to preempt parallel collection regimes." Pet. App. 26a. Moreover, the funding provision is part of a regulatory scheme that allows for (but does not require) broader State implementation and enforcement of HISA programs "in accordance with" federal standards. 15 U.S.C. §§ 3054(e)(2), 3060(a).

3. In any event, the question presented is hardly "outcome-dispositive here." Pet. 4. Even if there were any merit to Petitioners' claim, the challenged provision would be easily severable. It is clear "Congress had known that States would be free" to reject the fee-collection option. *Murphy*, 584 U.S. at 482. That is why HISA empowers the Authority to collect those fees from covered persons. 15 U.S.C. § 3052(f)(3). Excising the double-taxation prohibition would fully remedy any purported harm while leaving the rest of the Act intact.

But no court has reached that severability question, which would be bound up with resolution of the merits in Petitioners' favor. This Court should not be the first—particularly when the Fifth Circuit is presently considering a parallel anti-commandeering claim. *Black IV*, No. 23-10520 (5th Cir.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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