No. 23-402

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR REHEARING

GENTNER DRUMMOND
Attorney General
ZACH WEST
OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
313 NE 21st St.
Oklahoma City, OK 73105
(405) 522-4392
Zach.west@oag.ok.gov

Counsel for Petitioners State of Oklahoma, Oklahoma Horse Racing Commission, and Fair Meadows

MATTHEW D. MCGILL
Counsel of Record
LOCHLAN F. SHELFER
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, DC 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Petitioners Hanover Shoe Farms, Inc. and United States Trotting Association

[additional counsel listed at end]

RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

REPLY IN SUPPORT OF PETITION FOR REHEARING

All parties agree that there is a square, acknowledged conflict between the decision below and the Fifth Circuit's decision in *National Horsemen's Benevolent & Protective Association* v. *Black*, 107 F.4th 415 (5th Cir. 2024) ("*NHBPA*"), on the constitutionality of the Horseracing Integrity and Safety Act (the "Act"). *See* U.S. Br. 2; HISA Br. 1. And all parties agree that the conflict warrants this Court's review. *See* U.S. Br. 2; HISA Br. 1. This case presents the best vehicle for doing so.

Respondents say that their first choice would be to litigate topside solely against the plaintiffs in the Fifth Circuit case. But Respondents give no sound reason for preferring that case. They contend that reviewing the Fifth Circuit case "would allow this Court to directly address the reasoning of the only court of appeals that has found a constitutional violation." U.S. Br. 2; *see also* HISA Br. 10 (similar). But the Court "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). No matter which case it grants, the Court can consider all the decisions that have addressed the issue. Indeed, Respondents recognize that this petition presents the "identical" question as the Fifth Circuit case in which they affirmatively seek certiorari. HISA Br. 2; *see also* No. 24-429, U.S. Pet. 12–13. And Respondents do not contest that this is a clean vehicle to resolve that question, without any of the problems plaguing the other petitions.

For example, the Federal Respondents acknowledge that the parties in *NHBPA* briefed a

threshold question of appellate jurisdiction below, U.S. Br. 3—one that could impede this Court's ability to reach the merits. The Federal Respondents suggest that the plaintiffs' reply brief in the Fifth Circuit resolved the jurisdictional issue by noting "that they had abandoned [their] claims." *Ibid.* But the plaintiffs' opening Fifth Circuit brief had already confirmed that they had "abandoned" their claims. Gulf Coast Br. 1–2, *NHBPA* v. *Black*, No. 23-10520 (5th Cir. July 5, 2023), ECF No. 72. Yet in response, the Federal Respondents still conceded that the jurisdictional issue was "not free from doubt." FTC Response Br. 13–16, *NHBPA*, No. 23-10520 (5th Cir. Aug. 4, 2023), ECF No. 113. And the Authority affirmatively argued that jurisdiction was lacking. Authority Response Br. 1–2, *NHBPA*, No. 23-10520 (5th Cir. Aug. 4, 2023), ECF No. 114. Thus, if the Court were to grant only the Fifth Circuit case, it would have to confront the jurisdictional question—and without the benefit of adversarial briefing. This raises the danger that the Court might not be able to reach the merits of the case, thus prolonging the uncertainty and instability across the national horseracing industry.[1]

Therefore, the Federal Respondents urge the Court—to the extent it has "concern[s]" about this jurisdictional issue—to grant this petition. U.S. Br. 3. Petitioners agree. This case squarely presents the constitutional question and does so in a clean vehicle. Additionally, this case presents the broadest array of

[1] The Eighth Circuit case, meanwhile, arises in the interlocutory posture of a denial of a motion for a preliminary injunction, *see Walmsley* v. *FTC*, No. 24-420, which necessarily injects ancillary issues that could distract from the merits analysis, *see* HISA Br. 10.

perspectives spanning the horseracing industry: Petitioners include States; state regulatory bodies; horse breeders; associations representing horse owners, breeders, drivers, trainers, and officials; and racetracks, including a track owned and operated by a federally recognized Indian tribe. And granting certiorari in this case now would allow the Court to turn to the merits of this issue as soon as possible, without the need to wait for more cert-stage briefing.

Respondents further request that, if the Court grants review in this case, the question presented be limited to whether the Act's enforcement provisions violate the private non-delegation doctrine. If the Court is inclined to so limit its review, Petitioners agree that it could reformulate the question presented to focus exclusively on that issue. Or, if it wishes, the Court could also consider the other constitutional issues that this petition raises: namely, the legislative private non-delegation question, Pet. 14–30, and the anti-commandeering question, *id.* at 30–35. Indeed, Petitioners respectfully maintain that addressing the Act's constitutionality *in toto* rather than through piecemeal adjudications would provide needed clarity and stability to the national horseracing industry. But whatever the Court's preference, this petition offers maximum optionality.

At a minimum, the Court should grant review here and in the Fifth Circuit case and consolidate them. This Court routinely consolidates cases where two or more courts of appeals have reached conflicting conclusions on the same question. *See*, *e.g.*, *Campos-Chaves* v. *Garland*, 144 S. Ct. 1637, 1643 (2024); *ZF Auto. US, Inc.* v. *Luxshare, Ltd.*, 596 U.S. 619, 623 (2022); *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 654

(2020). Here, consolidation would allow the Court to "directly" review the Fifth Circuit's decision—as Respondents urge—while ensuring that the Court is able to reach the merits.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

GENTNER DRUMMOND
Attorney General
ZACH WEST
OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
313 NE 21st St.
Oklahoma City, OK 73105
(405) 522-4392
Zach.west@oag.ok.gov

Counsel for Petitioners State of Oklahoma, Oklahoma Horse Racing Commission, and Fair Meadows

MATTHEW D. MCGILL
Counsel of Record
LOCHLAN F. SHELFER
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, DC 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Petitioners Hanover Shoe Farms, Inc. and United States Trotting Association

November 18, 2024

ADDITIONAL COUNSEL

PATRICK MORRISEY
Attorney General
MICHAEL R. WILLIAMS
OFFICE OF THE WEST VIRGINIA
ATTORNEY GENERAL
1900 Kanawha Blvd. East
Building 1, Room E-26
Charleston, WV 25305
(304) 558-2021
Michael.R.Williams@wvago.gov

Counsel for Petitioners State of West Virginia and the West Virginia Racing Commission

JOSEPH BOCOCK
BOCOCK LAW PLLC
119 N. Robinson Ave.
Suite 630
Oklahoma City, OK 73102
(405) 605-0218
Joe@bococklaw.com

Counsel for Petitioner Oklahoma Quarter Horse Racing Association

TODD HEMBREE
CHEROKEE NATION
BUSINESSES
777 W. Cherokee St.
Catoosa, OK 74015
(918) 384-7474
Todd.hembree@cn-bus.com

Counsel for Petitioner Will Rogers Downs LLC

MICHAEL J. GARTLAND
DELCOTTO LAW GROUP PLLC
200 North Upper Street
Lexington, KY 40507
(895) 231-5800
Mgartland@dlgfirm.com

Counsel for Petitioner Hanover Shoe Farms, Inc.

ELIZABETH B. MURRILL
Attorney General
J. BENJAMIN AGUIÑAGA
LOUISIANA DEPARTMENT OF
JUSTICE
1885 N. Third Street
Baton Rouge, LA 70804
(225) 326-6766
AguinagaB@ag.louisiana.gov

Counsel for Petitioner State of Louisiana

MICHAEL BURRAGE
WHITTEN BURRAGE
512 N. Broadway Ave.
Ste. 300
Oklahoma City, OK 73102
(405) 516-7800
Mburrage@
whittenburragelaw.com

JARED C. EASTERLING
GREEN LAW FIRM PC
301 E Main St.
Ada, OK 74820
(580) 436-1946
Je@greenlawfirmpc.net

Counsel for Petitioner Global Gaming RP, LLC, d/b/a Remington Park

CERTIFICATE OF COUNSEL

I hereby certify that this reply in support of the petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

Matthew D. McGill