

No. 24-429 & No. 24-433

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**In the Supreme Court of the United States**

FEDERAL TRADE COMMISSION, ET AL.

v.

NATIONAL HORSEMEN'S BENEVOLENT  
AND PROTECTIVE ASSOCIATION, ET AL.

HORSERACING INTEGRITY AND  
SAFETY AUTHORITY, INC., ET AL.

v.

NATIONAL HORSEMEN'S BENEVOLENT  
AND PROTECTIVE ASSOCIATION, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**CONSOLIDATED MEMORANDUM FOR THE  
NATIONAL HBPA AND ITS AFFILIATES**

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**The Horsemen acquiesce in certiorari on Question Presented 1, concerning the nondelegation of executive power, but urge in a separate petition of their own that the Court grant Question Presented 2, on the nondelegation of legislative power.**

The Horsemen recognize that acquiescence to certiorari is rare; the normal course is to defend one's favorable judgment below from further review. In this instance, however, certiorari just makes sense. *See, e.g., Beard v. Comm'r*, S. Ct. No. 10-1553, Br. for Respondent 8 (the U.S. Solicitor General acquiesces: "In light of the square circuit conflict, and the importance of the uniform administration of federal tax law, the petition for a writ of certiorari should be granted.").

Here there is a clear circuit split: the Fifth Circuit held that an act of Congress is unconstitutional, while the Sixth and Eighth Circuits disagreed (with one judge on the Eighth Circuit panel dissenting in relevant part). *See Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023); *Walmsley v. Federal Trade Comm'n*, No. 23-2687, --- F.4th ----, 2024 WL 4248221 (8th Cir. Sept. 20, 2024). Numerous states have raised concerns with the law's constitutionality.<sup>1</sup> The

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<sup>1</sup> In total, the attorneys general of over a dozen states have joined litigation, amicus briefs, or a letter to Congress all opposing the Act on federalism grounds. *Oklahoma v. United States*, S. Ct. No. 23-402, Amicus Brief of Arkansas, et al. ("Amici are States with significant thoroughbred horseracing industries. Each regulates horseracing under state law. The Horseracing Integrity and Safety Act, or HISA, displaces that regulation. It entrusts regulation of horseracing to a purely private entity...");

horseracing industry, which employs tens of thousands and represents a major economic engine in many communities, needs certainty as to its regulatory structure. And the private non-delegation doctrine needs more than simply clarification. *See* S.Ct. No. 24-433, Auth. Pet. 28 (quoting *Texas v. Comm’r*, 142 S.Ct. 1308, 1308 (2022) (statement respecting denial of certiorari of Alito, J.)). It needs vigorous enforcement to serve its purpose of protecting individual liberty.

This Court’s primary private delegation case was decided nearly a century ago. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). There, the Court struck down a legislative delegation “to private persons whose interests may be and often are adverse to the interests of others in the same business,” calling it “legislative delegation in its most obnoxious form.” *Id.* at 311. As Congress continues to try “novel policy inventions and corresponding structures,” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 700 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), the Court must again enforce the Constitution’s limits by setting forth these principles in light of modern precedent, particularly on the separation of powers and vesting clauses.

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*Oklahoma v. United States*, 6th Cir. No. 22-5487, ECF Doc. 45 (Amicus Brief of Arkansas, et al.); Letter to Senator Mitch McConnell, Dec. 8, 2022, <https://ustrottingnews.com/wp-content/uploads/2022/12/12-08-22-Attorney-Generals-HISA-McConnell-Letter.pdf> (“HISA’s very purpose is to take away a regulatory power individual States have exercised since the Founding—to oversee and regulate horse racing within their borders—and give that power exclusively to a *private* agency.”).

In the past decade, this Court has returned time and again to the importance of the separation of powers and the fundamental structural features of our Constitution. *See, e.g., Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); *Biden v. Nebraska*, 600 U.S. 477 (2023); *West Virginia v. EPA*, 597 U.S. 697 (2022); *Nat’l Fed’n of Indep. Bus. v. DOL, OSHA*, 595 U.S. 109 (2022); *Ala. Ass’n of Realtors v. HHS*, 594 U.S. 758 (2021); *Collins v. Yellen*, 594 U.S. 220 (2021); *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020).

The private non-delegation doctrine is another doctrine that safeguards liberty through constitutional structure. *See Dep’t of Transp. v. Ass’n of Am. R.Rs. (Amtrak II)*, 575 U.S. 43, 61 (2015) (Alito, J., concurring) (“The principle that Congress cannot delegate away its vested powers exists to protect liberty.”); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 125 (1978) (Stevens, J., dissenting) (“It is [ ] fundamental that the State’s power to deprive any person of liberty or property may not be exercised except at the behest of an official decisionmaker . . . ‘a statute which attempts to confer [government] power [on a private regulator] undertakes an intolerable and unconstitutional interference with personal liberty and private property.’” (quoting *Carter Coal*, 298 U.S. at 311)).

Here, that interference with personal liberty and private property is all too real—investigators from the Authority are loose in the industry right now searching private property without warrants, taking blood or urine samples without warrants, conducting coercive interrogations without the presence of counsel, and levying civil penalties without traditional

due process. NHBPA Pet. App. 22a n.12 (*NHBPA II*). As the Fifth Circuit recognized in its first opinion striking down the Act, “if people outside government could wield the government’s power—then the government’s promised accountability to the people would be an illusion.” NHBPA Pet. App. 125a (*NHBPA I*). This Court should not take this case simply because of a circuit split or a determination of invalidity, or because several states or the Solicitor General asks. This Court should take this case because fundamental principles of personal liberty and democratic accountability are at stake.

This Court should also grant the petition filed concurrently by the Horsemen and the petition filed by the State of Texas on a second question presented by the same case. In addition to enforcing the rules, the Authority has the power in the first instance under the Act to write the rules that govern horseracing. As is explained in the Horsemen’s petition, this topic too cries out for the Court’s attention.

Moreover, as is set forth in the Horsemen’s concurrent petition, the Fifth Circuit case is the best vehicle among those pending before the Court for a variety of reasons. *See* S.Ct. No. 24-429, United States Pet. 14 (“The petitions filed by the Authority and the government in this case provide better vehicles for resolving the question presented than do the petitions in *Oklahoma* and *Walmsley*.”).

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