No.

In The
Supreme Court of the United States

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

Petitioners,

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the enforcement provisions of the Horseracing Integrity and Safety Act are facially unconstitutional under the private-nondelegation doctrine.

PARTIES TO THE PROCEEDINGS

1. Petitioners (Defendants-Appellees below) are the Horseracing Integrity and Safety Authority, Inc., Charles Scheeler, Steve Beshear, Adolpho Birch, Leonard Coleman, Joseph De Francis, Susan Stover, Bill Thomason, D.G. Van Clief, Nancy Cox, Katrina Adams, Jerry Black, Joseph Dunford, Frank Keating, Kenneth Schanzer, Ellen McClain, and Lisa Lazarus.

2. Respondents (Plaintiffs-Appellants below) include the National Horsemen's Benevolent and Protective Association (NHBPA), Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, Nebraska Horsemen's Benevolent and Protective Association, Oklahoma Horsemen's Benevolent and Protective Association, Oregon Horsemen's Benevolent and Protective Association, Pennsylvania Horsemen's Benevolent and Protective Association, Washington Horsemen's Benevolent and Protective Association, Tampa Bay Horsemen's Benevolent and Protective Association, Gulf Coast Racing LLC, LRP Group Ltd., Valle de Los Tesoros Ltd.**,** Global Gaming LSP LLC, and Texas Horsemen's Partnership LLP.

3. Respondents (Intervenor Plaintiffs-Appellants below) also include the State of Texas and the Texas Racing Commission.

4. Respondents (Defendants-Appellees below) further include the Federal Trade Commission, Chair Lina Khan, Commissioner Rebecca Kelly Slaughter, Commissioner Alvaro Bedoya, Commissioner Melissa Holyoak, and Commissioner Andrew N. Ferguson.

RULE 29.6 STATEMENT

Petitioner 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 Petitioner is a nongovernmental corporation.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

National Horsemen's Benevolent & Protective Ass'n, Nos. 5:21-cv-071, 5:23-cv-77 (May 4, 2023) (rejecting facial constitutional challenge to Horseracing Integrity and Safety Act) (reproduced at App., *infra*, 47a-110a)

United States Court of Appeals (5th Cir.):

National Horsemen's Benevolent & Protective Ass'n, No. 23-10520 (July 5, 2024) (affirming in part and reversing in part) (reproduced at App., *infra*, 1a-46a)

National Horsemen's Benevolent & Protective Ass'n, No. 23-10520 (Sept. 9, 2024) (denying petitions for rehearing en banc) (reproduced at App., *infra*, 111a-113a)

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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. *Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023). As Chief Judge Sutton observed in rejecting a parallel challenge to the amended statute, "[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. The Act protects athletes (equine and human), the betting public, and the integrity of horseracing through the development and uniform enforcement of racetrack-safety, medication-control, and anti-doping rules. To effectuate that goal, HISA invokes the expertise and experience of the Horseracing Integrity and Safety Authority ("Authority"), a private nonprofit organization, subject to the approval, oversight, and independent power of the Federal Trade Commission ("FTC"). 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. Two bipartisan Congresses have embraced it—including through an amendment in late 2022 that fortified the FTC's oversight. And two federal appellate courts, the Sixth and Eighth Circuits, have resolved identical challenges to the amended statute by reaching the same conclusion: HISA is constitutional.

The Fifth Circuit contradicted that consensus, holding that HISA's enforcement provisions facially violate the private-nondelegation doctrine. That decision—embracing the most extreme assumptions about the HISA regime, including hypothetical applications of provisions that have *never* been exercised—ignores this Court's caution against wiping out broad swaths of federal legislation on a facial basis. And it disregards the many ways Congress purposefully subordinated the Authority's enforcement of HISA rules to the FTC's pervasive oversight (including in direct response to private-nondelegation concerns).

All parties agree that the Fifth Circuit's outlier judgment warrants review. Given the intractable conflict over the facial constitutionality of HISA's enforcement provisions, only this Court can provide an authoritative nationwide ruling on that issue of legal and practical importance.

The Court should grant the petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 107 F.4th 415 (5th Cir. 2024) and reproduced at App., *infra*, 1a-46a. The opinion of the district court is reported at 672 F. Supp. 3d 220 (N.D. Tex. 2023) and reproduced at App., *infra*, 47a-110a. The unreported order of the court of appeals denying petitions for rehearing is reproduced at App., *infra*, 111a-113a.

JURISDICTION

The court of appeals entered judgment on July 5, 2024. App., *infra*, 1a-46a. The court of appeals denied Petitioners' petition for rehearing en banc on September 9, 2024. App., *infra*, 111a-113a.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at App., *infra*, 114a-171a.

STATEMENT OF THE CASE

A. Legal Background

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 [wa]s 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 regulatory schemes that led to "wide disparit[ies]" in standards and enforcement and eroded the betting public's confidence. 166 CONG. REC. H4981 (Rep. Tonko).

The highly publicized equine fatalities and corruption scandals brought 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). In 2020, a broad coalition of stakeholders rallied around "bipartisan, bicameral progress" toward finally remedying the "tragedies on the track." 166 CONG. REC. S5514-5515 (Sen. McConnell). The congressional effort was not only cheered by animal-welfare proponents, but also hailed by "limited government conservative[s]" who sought a framework for "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 across 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.

2. HISA's rulemaking and enforcement frameworks were "model[ed]" on and are "materially indistinguishable from the Maloney Act," which has governed the SEC's relationship with FINRA and other self-regulatory organizations for over eight decades. Amici Br. of Sen. McConnell et al. in Support of Stay Appl. 5, 10, *Horseracing Integrity & Safety Auth. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Sept. 24, 2024) ("McConnell Br."). HISA 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 the content and implementation of the racetrack-safety, anti-doping, and medication-control programs. 15 U.S.C. §§ 3053(a), 3054(c), 3057. 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

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

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

"consistent with" both the statute and the FTC's own 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), (c)(2), and provided various "[c]onsiderations" to constrain the development and implementation of the anti-doping, medication-control, and racetrack-safety programs, *e.g., id.* §§ 3055(b), 3056(b), 3057(d).

The Authority may enforce HISA's programs, including by investigating and disciplining violations by covered persons who register under the Act, pursuant only to those "uniform procedures and rules" that are approved by the FTC. *See, e.g.*, 15 U.S.C. §§ 3054(c), 3057. Although HISA authorizes the Authority to issue and enforce "subpoenas" and to "commence a civil action" in federal court, *id.* §§ 3054(c)(1)(A)(ii), (h), (j)(1), those provisions have never been invoked against anyone.

Any sanction imposed for violation of an FTC-approved rule pursuant to FTC-approved penalties must be consistent with "adequate due process, including impartial hearing officers or tribunals," and other factors "designed to ensure fair[ness] and transparen[cy]." 15 U.S.C. § 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 Commissioners themselves. *Id.* § 3058(c). At both stages, the parties may submit additional evidence to the agency. *Id.* § 3058(c)(3)(C); *see also* 16 C.F.R. § 1.146(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." 15 U.S.C. § 3058(c)(3). The administrative law judge or the Commissioners may stay any sanction pending review by the agency. *Id.* § 3058(d); 16 C.F.R. § 1.148(b).

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

In November 2022, in a precursor appeal, the Fifth Circuit held that HISA (as originally enacted) violated the private-nondelegation doctrine. *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022). Under the version of the Act then considered, only the Authority "wr[o]te[] the regulations and the FTC c[ould] not modify them." *Id.* at 887. Because the FTC lacked "the final word," the Fifth Circuit held, the Authority did not "function subordinately to the agency." *Id.*

"Not so anymore." *Oklahoma*, 62 F.3d at 231. In direct response to the Fifth Circuit's ruling, in December 2022, Congress enacted (and President Biden signed into law) bipartisan legislation authorizing the FTC to "abrogate, add to, and modify" HISA rules as the FTC "finds necessary or appropriate" to (i) "ensure the fair administration of the Authority," (ii) "conform the rules of the Authority" to requirements of the Act and applicable rules, or (iii) otherwise "further[] *** the purposes" of the Act. 15 U.S.C. § 3053(e). That language, drawn directly from the Maloney Act, "eliminates" "the 'key distinction'" the Fifth Circuit previously identified with the SEC-FINRA statute. *Oklahoma*, 62 F.3d at 232 (quoting *Black*, 53 F.4th at 887). Indeed, the Sixth Circuit had suggested this specific remedy at oral argument in a parallel challenge. Oral Arg. Rec. 33:00-33:13, *Oklahoma*, No. 22-5487 (6th Cir. 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?").

The Sixth Circuit subsequently rejected the private-nondelegation challenge. The amendment Congress enacted "[i]n response" to the Fifth Circuit's decision made the Authority "subordinate to the agency." *Oklahoma*, 62 F.4th at 225, 229. The FTC's new "rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities just as it does in the rulemaking context." *Id.* at 231. Accordingly, "[t]he Authority wields materially different power from the FTC, yields to FTC supervision, and lacks the final say

over the content and enforcement of the law—all tried and true hallmarks of an inferior body." *Id.* at 229. Judge Cole "agree[d] in full" 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." *Id.* at 237, 239.[3]

The Eighth Circuit subsequently "agree[d] with the Sixth Circuit that the statute is not unconstitutional on its face." *Walmsley v. Federal Trade Comm'n*, No. 23-2687, --- F.4th ----, 2024 WL 4248221, at *4 (8th Cir. Sept. 20, 2024). Because the FTC "has the final say over the rules, there is no impermissible private delegation" with respect to "the Act's rulemaking structure." *Id.* at *2-3. And because the FTC "has broad power to subordinate the Authority's enforcement activities," Chief Judge Colloton explained for the majority, "the statute's enforcement provisions are not unconstitutional on their face and in all of their applications." *Id.* at *4.[4]

B. Proceedings Below

1. HISA rules have been successfully implemented since July 2022, governing over 67,000 horses and 35,000 people competing across 19 states (all outside of the Fifth Circuit). Although "the

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[3] This Court denied certiorari in the *Oklahoma* case on June 24, 2024. *Oklahoma v. United States*, No. 23-402 (U.S.). Petitioners in that case sought rehearing following issuance of the Fifth Circuit's decision in this case, and on October 7, 2024, the Court requested a response by November 6, 2024.

[4] The plaintiffs in the Eighth Circuit case filed a petition for a writ of certiorari on October 10, 2024. That petition had not yet been docketed at the time of this filing.

Thoroughbred industry overwhelmingly supported" HISA and "has adjusted to this regime," Amici Br. of Thoroughbred Industry Participants in Support of Stay Appl. 2, 9, *Horseracing Integrity & Safety Auth.*, No. 24A287 (U.S. Sept. 25, 2024) ("Thoroughbred Industry Br."), a faction long opposed to any reforms has brought a series of challenges to the Act.

Those challengers include the lead Respondents, a national horsemen's association and several of its state chapters, whose members have competed under HISA rules for over two years. In 2021, those Respondents brought suit in the Northern District of Texas to challenge HISA's constitutionality. *See Black*, 53 F.4th at 875; *see also* App., *infra*, 55a & n.2 (discussing "lead-case plaintiffs"). They named as defendants the Authority and its officials (Petitioners here), as well as the FTC and its commissioners. *See Black*, 53 F.4th at 875; *see also* App., *infra*, 56a nn.5-6. The State of Texas and the Texas Racing Commission (collectively, "Texas") intervened to support the plaintiffs' challenge. *See Black*, 53 F.4th at 875; *see* App., *infra*, 56a n.4. In 2022, the district court rejected plaintiffs' constitutional challenge, holding that HISA, as originally enacted, did not "facially violate[] the private-nondelegation doctrine" because the Authority "function[ed] subordinately to the FTC, guided by Congressional standards." *National Horsemen's Benevolent & Protective Ass'n v. Black*, 596 F. Supp. 3d 691, 696 (N.D. Tex. 2022).

While an appeal from that initial decision was pending at the Fifth Circuit, a collection of racetracks in Texas and a partnership of horsemen who race

there filed another facial challenge in the Northern District of Texas. *See* App., *infra*, 55a & n.3 (listing "member-case plaintiffs"). They raised the same private non-delegation claims as in the parallel cases, but also a "mutually exclusive" Appointments Clause claim on the ground that the Authority was not private for constitutional purposes. *Id.* at 38a, 69a. The Texas racetracks have never been subject to HISA rules because Texas has essentially elected to avoid the Act's reach. Specifically, as its counsel explained at trial, Texas "opted to stop" the transmission of in-state racing for out-of-state wagering, thereby negating the statutory interstate-commerce element necessary to trigger application of HISA to horseracing in the State. ROA.3086-3087.

2. On remand from the Fifth Circuit's 2022 decision declaring the original version of HISA unconstitutional, the two cases were consolidated. *See* App., *infra*, 62a. The horsemen's association, Texas, and the Texas-based racetracks each filed amended complaints challenging the amended Act on several facial constitutional grounds. *See id.* at 63a-65a. Following full briefing and a bench trial on the merits, the district court rejected the consolidated challenges and granted final judgment in favor of the Authority and the FTC. *Id.* at 47a-110a. In a 55-page opinion, the court concluded that "Congress answered [this Court's] call" and "cured the constitutional issues." *Id.* at 85a, 95a.

On appeal, the Fifth Circuit affirmed in part and reversed in part. It agreed that "the amendment solved the nondelegation problem with the Authority's

rulemaking power," and that HISA does not offend the Due Process Clause or the Appointments Clause. App., *infra*, 3a. But the Fifth Circuit concluded, on a facial basis, that "HISA's enforcement provisions violate the private nondelegation doctrine." *Id.* at 4a. According to the Fifth Circuit, "backend review by the FTC" of any disciplinary decision "does not subordinate the Authority" because "enforcement has already occurred" at that point. *Id.* at 35a. "And the FTC's general rulemaking power provides no answer because executive rulemaking cannot amend the plain division of enforcement power laid out in HISA's text." *Id.*

The Fifth Circuit denied timely rehearing petitions and a request to stay its mandate. App., *infra*, 111a-113a.

3. On September 19, 2024, Petitioners filed an emergency application to stay the mandate in this Court. In response to that application, Respondents confirmed that they acquiesce in the request for a grant of certiorari. The stay application, which Petitioners invited the Court to treat as a certiorari petition, remains pending at the time of this filing. No. 24A287.[5]

[5] In the event the Court does not grant review outright in the course of deciding the stay application, Petitioners file this petition to facilitate the Court's expeditious consideration of this case along with the petition for rehearing of the denial of certiorari from the Sixth Circuit's decision, *Oklahoma*, No. 23-402, and the recently filed petition seeking review of the Eighth Circuit's decision in *Walmsley*.

REASONS FOR GRANTING THE WRIT

The parties "could not agree more" that this Court should grant certiorari and review the judgment below. Texas Resp. to Stay Appl. 16, *Horseracing Integrity & Safety Auth.*, No. 24A287 (U.S. Sept. 30, 2024). The Fifth Circuit's holding that HISA's enforcement provisions facially violate the private-nondelegation doctrine squarely conflicts with the Sixth and Eighth Circuits' contrary holdings on materially identical constitutional challenges. The Fifth Circuit's outlier decision is wrong for at least two reasons. First, the facial ruling—resting on dramatic "[s]uppos[itions]," "hypothetical[s]," and "[c]ontested" allegations involving nonparties and nonoperative provisions, App., *infra*, 23a-25a—contradicts this Court's precedents eschewing such unmoored broadsides on federal legislation in favor of as-applied challenges. Second, it discounts the meaningful ways Congress subordinated the Authority's enforcement activities to the FTC's approval, oversight, and independent power. Given the exceptional legal and practical importance of the case, the Court should grant review.

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT

The decision below creates an acknowledged and entrenched circuit split on the constitutionality of HISA's enforcement provisions. "[S]atisfied that the statute's enforcement provisions are not unconstitutional on their face and in all of their applications" "[b]ecause the Commission has broad power to subordinate the Authority's enforcement

activities," the Sixth and Eighth Circuits rejected materially identical private-nondelegation claims. *Walmsley*, 2024 WL 4248221, at *4; *see Oklahoma*, 62 F.4th at 231-233 (same). The Fifth Circuit stands alone in holding that "HISA's enforcement provisions are facially unconstitutional" because "the Authority's enforcement power is not subordinate to FTC oversight." App., *infra*, 4a, 15a. That square conflict calls out for this Court's review.

Specifically, the Fifth Circuit "part[ed] ways" with the Sixth and Eighth Circuits in two key respects. App., *infra*, 4a.

1. The decision below contradicts the Sixth and Eighth Circuits' approach to parallel facial constitutional challenges. The two latter circuits concluded that the "potential" that "the FTC *could* subordinate every aspect of the Authority's enforcement" through the plenary rulemaking power Congress conferred on the agency "suffices to defeat a facial challenge." *Oklahoma*, 62 F.4th at 231; *Walmsley*, 2024 WL 4248221, at *4 ("Because the Commission has broad power to subordinate the Authority's enforcement activities, the statute is not unconstitutional in all its applications."). That conclusion followed from the circuits' understanding that, "[i]n evaluating a facial challenge, [a court] must consider circumstances in which the statute is most likely to be constitutional, not hypothetical scenarios in which the statutory scheme might raise constitutional concerns." *Walmsley*, 2024 WL 4248221, at *4; *see Oklahoma*, 62 F.4th at 231. Thus, to the extent there is any doubt about the "potent

answer" that the FTC's independent rulemaking power offers for how the agency may superintend future enforcement activity, the courts reasoned that resolution of that doubt should await a case "when the Authority's actions and the FTC's oversight appear in concrete detail, presumably in the context of an actual enforcement action." *Oklahoma*, 62 F.4th at 233.

By contrast, the Fifth Circuit brushed aside concern that resolution of the constitutionality of the enforcement provisions in their entirety is "premature." It instead viewed the case as a "purely legal challenge" turning on "HISA's clear delineation of enforcement power." App., *infra*, 16a, 31a (citation omitted). The facial nature of the challenge had the opposite effect as in the Sixth and Eighth Circuits: identifying Respondents' decision to forgo "as-applied challenges" as a virtue, the Fifth Circuit confined its analysis to determining "*where* the enforcement power is lodged" to avoid ever having to consider "*how* the Authority exercises its enforcement power" or how the FTC exercises its oversight in any particular circumstance. *Id.* at 30a-31a (citing *Oklahoma*, 62 F.4th at 231). In doing so, the Fifth Circuit relied on certain provisions of HISA that have never been invoked—like the one "empower[ing] the Authority to file suit to enjoin violations"—to determine that the FTC would "amend the enforcement scheme delineated by statute" if it exercised its rulemaking power to control *any* enforcement activities. *Id.* at 28a.

2. On the merits, the Fifth Circuit also rejected several premises underlying the other circuits' conclusion that HISA's enforcement provisions are

constitutional. The Fifth Circuit was "not convinced," for example, that the independent rulemaking power the congressional amendment conferred on the FTC in response to private-nondelegation concerns "can save the Authority's enforcement powers." App., *infra*, 27a (citing *Oklahoma*, 62 F.4th at 231). "With great respect to [its] colleagues on the Sixth Circuit," the Fifth Circuit reasoned that allowing the FTC to "use its new rulemaking authority to rein in the Authority's enforcement actions" would "rewrite" the "statutory division of labor." *Id.* at 26a-27a. The Eighth Circuit subsequently rejected that reasoning and instead "agree[d] with the Sixth Circuit that the statute is not unconstitutional on its face because the Commission's rulemaking and revision power gives it 'pervasive oversight and control of the Authority's enforcement activities.'" *Walmsley*, 2024 WL 4248221, at *4 (quoting *Oklahoma*, 62 F.4th at 231).

The Fifth Circuit also set aside the significance the Sixth and Eighth Circuits attached to the FTC's "full authority to review the Horseracing Authority's enforcement actions." *Oklahoma*, 62 F.4th at 231; *see Walmsley*, 2024 WL 4248221, at *4 ("The Commission has power to review the Authority's enforcement actions and to reverse them."). Such *de novo* review and factfinding "is no answer," according to the Fifth Circuit, because it comes "at the tail-end" of the process after other enforcement activities already occurred. App., *infra*, 25a. Relatedly, the Fifth Circuit took issue with "[t]he Sixth Circuit['s] reli[ance] on several cases upholding the constitutionality of FINRA" and other self-regulatory organizations that "enforc[e] securities laws" pursuant to the same

review framework. *Id.* at 31a & n.18 (citing *Oklahoma*, 62 F.4th at 229, 232).

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

A. The Fifth Circuit Contradicted This Court's Precedents On Facial Challenges

As a threshold matter, the Fifth Circuit's "maximalist approach" to declaring invalid all HISA enforcement provisions—even "novel, never-before-enforced" ones—improperly extends its holding far beyond the concrete facts and parties actually before it. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2412-2418 (2024) (Thomas, J., concurring); *see id.* at 2428 (Alito, J., concurring, joined by Thomas & Gorsuch, JJ.) ("Facial challenges *** strain the limits of the federal courts' constitutional authority to decide only actual 'Cases' and 'Controversies.'").

To the extent invalidating "every application of a statute—including ones that have nothing to do with [a plaintiff's] injury"—is ever within "a federal court's constitutional authority," *NetChoice*, 144 S. Ct. at 2416 (Thomas, J., concurring), "the Fifth Circuit *** did not correctly apply [this Court's] precedents governing facial challenges," *United States v. Rahimi*, 144 S. Ct. 1889, 1903 (2024). This Court has "made facial challenges hard to win." *NetChoice*, 144 S. Ct. at 2397. This case illustrates why: The Fifth Circuit's ruling about abstract enforcement activities "'rest[s] on speculation' about the law's coverage and its future enforcement" and "'short circuit[s] the democratic process' by preventing duly enacted laws from being

implemented in constitutional ways." *Id.* (citations omitted).

The record on this facial challenge—developed through multiple rounds of briefing and trial—lacks evidence of specific enforcement activity against Respondents' members. Rather, the Fifth Circuit's conclusion that "the Authority does not 'function subordinately' to the FTC when enforcing HISA" is based on a smattering of "hypothetical[s]" and "[s]uppos[itions]" about activities the Authority might conduct in some future circumstances. App., *infra*, 23a-25a, 31a n.17 (citation omitted); *contra Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-450 (2008) ("In determining whether a law is facially invalid, [courts] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

In forming that conjecture, the Fifth Circuit did not "consider the circumstances in which [HISA's enforcement] was most likely to be constitutional." *Rahimi*, 144 S. Ct. at 1903. For example, a straightforward application of the FTC-approved crop rule—the "vast majority" of infractions since HISA's inception, ROA.3897—involves a steward's nondiscretionary assessment of the number of strikes to a horse in a public race, according to an FTC-approved limit and subject to the FTC's *de novo* review of the same video recording. Instead, the Fifth Circuit embraced the most dramatic assumptions about the Authority's potential actions and the most constrained reading of the FTC's oversight. *See, e.g.*, App., *infra*,

24a & n.12 (reciting "[c]ontested" allegations by nonparty regarding "coercive interrogation" and "search" of facilities, and assuming FTC will not exercise "its discretion to implement a stay pending appeal"); *compare, e.g.*, Order, *In re Calhoun*, No. 9430, 2024 WL 2724039, at *3 (F.T.C. May 21, 2024) (granting stay allowing challenge "to be fully considered before enforcement" under HISA).

Worse still, the Fifth Circuit relied heavily on HISA enforcement provisions that have *never* been invoked against anyone. *See, e.g.*, App., *infra*, 25a-26a (concluding that even if the FTC's review of sanctions "makes the Authority subordinate," HISA is nevertheless unconstitutional because "the Authority is demonstrably *not* subordinate when it comes to suing violators for injunctions"); *id.* at 33a ("HISA diverges radically from the Maloney Act in empowering the Authority to sue" and in conferring on the Authority the "power to issue subpoenas"). The Authority has not filed a single "suit to enjoin violations," nor has it issued a single "subpoena." *Id.* at 28a-29a (citing 15 U.S.C. § 3054(h), (j)(1)). The Fifth Circuit's focus on these inoperative (and easily severable, if ever invoked) provisions "left [it] slaying a straw man" to declare *all* HISA enforcement provisions—including perfectly mundane yet critical ones—facially invalid. *Rahimi*, 144 S. Ct. at 1903.

B. The Fifth Circuit Disregarded The Pervasive Oversight Congress Purposefully Conferred On The FTC To Subordinate The Authority's Enforcement Activities

The Fifth Circuit's failure to exercise the required judicial restraint contributed to its erroneous ruling on the merits.

All agreed below on the governing private-nondelegation test: Congress's decision to confer on the Authority a role in HISA's enforcement is constitutional if "the Authority 'functions subordinately' to an agency with 'authority and surveillance' over it." App., *infra*, 18a (quoting *Black*, 53 F.4th at 881); *see Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). HISA easily meets that standard in the three key ways the Authority-FTC relationship mirrors the FINRA-SEC relationship: (i) the Authority may implement the Act only according to rules that the FTC has affirmatively approved, 15 U.S.C. §§ 3053(a)-(d), 3054(c)(2), 3057(a), (c)-(d); (ii) the FTC wields plenary rulemaking power to steer or restrict any enforcement of the FTC-approved rules, *id.* § 3053(e); and (iii) all sanctions are subject to two layers of *de novo* FTC review, followed by judicial review, *id.* § 3058(b)-(c). Indeed, FINRA itself urged affirmance of the district court judgment in this case. Br. of Financial Industry Regulatory, Inc. as Amicus Curiae in Support of Defendants-Appellees (Aug. 11, 2023), C.A. Doc. 123;[6] *see also* FINRA Opp'n

[6] The Fifth Circuit struck FINRA's amicus brief without explanation. *See* C.A. Doc. 154 (Aug. 29, 2023).

to Mot. for Inj. Pending Appeal 19, *Alpine Sec. Corp. v. FINRA*, No. 23-5129 (D.C. Cir. June 15, 2023) (HISA "put[s] the [Authority] on 'equal footing to FINRA in its role "in aid of" the federal agency'" (quoting App., *infra*, 95a)).

That comprehensive oversight refutes the Fifth Circuit's conclusion that "the FTC lacks *any* tools to ensure that the law is properly enforced." App., *infra*, 35a (emphasis added). Every single federal court (including the Fifth Circuit)—and every single federal judge on those courts (without exception)—has held that HISA validly confers on the FTC power to "modify *any* rules for any reason at all" to "ensure[] that the FTC retains ultimate[] authority over the implementation of the Horseracing Act." *Id.* at 13a (second alteration in original) (quoting *Oklahoma,* 62 F.4th at 231). Such power necessarily encompasses oversight over enforcement of the Act.

Thus, beyond the requirement for the FTC to determine whether to approve (or not) every rule that dictates any investigatory and disciplinary activity on the front end, Congress's amendment to HISA confirms that the agency has "the tools to step in" at any point to further "control the Authority's enforcement activities." *Oklahoma,* 62 F.4th at 231 (citing 15 U.S.C. § 3053(e)); *see Walmsley*, 2024 WL 4248221, at *4 (same). For example, in addition to a prospective rule "governing *how* the Authority" may exercise its (never utilized) subpoena power, App., *infra*, 30a, the FTC could issue a rule *barring* unapproved subpoenas or *quashing* particular ones. Or the FTC could wield the rule it promulgated that

controls the Authority's budget—including by "modify[ing] any line item" or withholding necessary "approval," 88 Fed. Reg. 18,034, 18034-18,036 (Mar. 27, 2023)—to prevent a civil action. *Contra* App., *infra*, 25a-26a ("[T]he Authority is demonstrably *not* subordinate when it comes to suing violators for injunctions.").

On a facial challenge, those examples (among others) "suffice[]" to show that HISA does not lack the potential for agency supervision over enforcement in at least certain (if not all) applications. *Oklahoma*, 62 F.4th at 231; *see NetChoice*, 144 S. Ct. at 2397 (choice to litigate facially "comes at a cost"). Perhaps that is why even Respondent Texas suggested that section 3053(e) provides "oversight over the manner in which the Authority exercises its *enforcement* authority," and instead focused its private-nondelegation attack on whether the Authority "may make rules." Texas Opening Br. 28 (July 5, 2023), C.A. Doc. 74.

The Fifth Circuit dismissed that reality by saying such FTC supervision would interfere with "HISA's clear delineation of enforcement power." App., *infra*, 31a. But as the Eighth Circuit explained, "[t]o subordinate the Authority's enforcement activity, *** the [FTC] need only work within the structure of the Act as designed, not create a new statutory regime." *Walmsley*, 2024 WL 4248221, at *4. After all, in the amendment specifically meant to obviate private-nondelegation concerns (McConnell Br. 8-9), Congress reinforced "Federal Trade Commission oversight" over the Authority, 15 U.S.C. § 3053(e); *see* App., *infra*, 76a ("Congress does not ordinarily write statutes to be

unconstitutional, particularly in cases of an amendment in direct response to a successful constitutional challenge.").

The amendment confers plenary rulemaking power on the FTC not only "to conform the rules of the Authority" to statutory requirements, but also to "ensure the fair administration of the Authority" and take supervisory action "otherwise in furtherance of the [Act's] purposes." 15 U.S.C. § 3053(e). Those clear purposes include "implement[ing] and enforc[ing] the horseracing anti-doping and medication control program and the racetrack safety program." *Id.* § 3054(a). In fact, the FTC recently exercised that power to promulgate new rules facilitating "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. 66,546, 66,547, 66,550-66,551 (Aug. 16, 2024).

The Fifth Circuit incorrectly assumed that by empowering the Authority, HISA impliedly strips the FTC of all enforcement powers. That negative inference contradicts Congress's clear instruction that "[n]othing [in HISA] shall be construed to limit the authority of the Commission under any other provision of law," 15 U.S.C. § 3054(b)—including laws authorizing the FTC to, for example, "investigate," issue "subpoenas," and "bring suit in a district court," *id.* §§ 43, 45-46, 49, 53, 57b. Moreover, the Fifth Circuit's reliance on "what HISA does not say" (App., *infra*, 22a) simply overlooks HISA provisions contemplating the FTC's direct involvement in

enforcement activities. *E.g.*, 15 U.S.C. § 3054(d)(3) (covered person shall "cooperate with the Commission *** during any civil investigation" and "respond truthfully *** if questioned by the Commission"); *id.* § 3054(k)(2)(A) ("The Authority and the Commission may not investigate, prosecute, adjudicate, or penalize conduct in violation of [HISA program] that occurs before the program effective date."). No one disputes that preventing cheating in horseracing and the attendant consumer harms on the betting public "fit[s] neatly into the overall mission of the FTC." *Black*, 596 F. Supp. 3d at 719.

That statutory text, enactment history, and context underscore the best interpretation of HISA: "the FTC's rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities, just as it does in the rulemaking context." *Oklahoma*, 62 F.4th at 231 (quoting *Adkins*, 310 U.S. at 388). At a minimum, that construction—which the Sixth and Eighth Circuits endorsed and which avoids the constitutional problems raised by the Fifth Circuit's strict "division of enforcement" view (App., *infra*, 34a-35a)—is at least plausible. As this Court reiterated recently, "when legislation and the Constitution brush up against each other, a court's task is to seek harmony, not to manufacture conflict." *Rahimi*, 144 S. Ct. at 1903 (alterations and citation omitted); *see Walmsley*, 2024 WL 4248221, at *4 ("avoid[ing] an interpretation of [the] federal statute that engenders constitutional issues" because "a reasonable alternative interpretation poses no constitutional question" (citation omitted)).

Finally, the Fifth Circuit erred in disregarding the FTC's "full authority to review the Horseracing Authority's enforcement actions." *Oklahoma,* 62 F.4th at 231; *see id.* ("The Authority's adjudication decisions are not final until the FTC has the opportunity to review them."). Before any Authority decision has final legal effect, it is subject to two layers of *de novo* FTC review, whereby the agency 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." 15 U.S.C. § 3058. Indeed, the agency has exercised this power to overturn Authority decisions. *See* Order, *In re Parram*, No. 9424 (F.T.C. May 1, 2024) ("review[ing] the record 'anew,' as though the issue had not been heard before, and no decision had previously been rendered," and reversing sanction Authority had imposed under Void Claim Rule); [7] Order, *In re Peacock & Ceballos*, No. 9415 (F.T.C. Sept. 11, 2023) (reversing Authority's crop-violation decision based on *de novo* determination that "the evidence fails to prove that Ceballos struck Sheriff Brown more than the 6 times on the hindquarters that are permitted under HISA Rule 2280(b)(1)").[8] Those examples also illustrate that the FTC may stay any sanction pending the agency's review. *See* Order Granting Appellant's Request for Stay Pending Appeal, *In re Parram*, No. 9424, 2024 WL 168059 (F.T.C. Jan. 9, 2024); Order Granting Stay Application, *In re Peacock & Ceballos*, No. 9415 (F.T.C.

[7] https://tinyurl.com/f9afmxk3.

[8] https://tinyurl.com/zfy7xe4n.

July 3, 2023);[9] *see also* 15 U.S.C. § 3058(d); 16 C.F.R. § 1.148(b).

That review framework "ensures that HISA is soundly in the company of previously upheld enforcement mechanisms" under the Maloney Act. *Oklahoma,* 62 F.4th at 244 (Cole, J., concurring); *see* 15 U.S.C. § 78s(d)-(e). If anything, the FTC's independent review of Authority decisions "is even more substantial than the SEC's review of FINRA decisions," *Black*, 596 F. Supp. 3d at 726, as "HISA, unlike the Maloney Act, unambiguously empowers the FTC to obtain additional evidence not in the record below," *Oklahoma,* 62 F.4th at 244 (Cole, J., concurring). "In case after case, the courts have upheld this arrangement" under the Maloney Act, "reasoning that the SEC's ultimate control over the rules and their enforcement makes [FINRA and other self-regulatory organizations] permissible aides and advisors." *Id.* at 229 (majority op.) (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., Inc. 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 also Association of Am. R.Rs. v. United States Dep't of Transp.*, 721 F.3d 666, 671 n.5 (D.C. Cir. 2013) (describing self-regulatory organizations' role as "purely advisory" such that they do not "stand on equal footing with [the] government agency"), *vacated on other grounds*, 575 U.S. 43 (2015). This Court should grant review to

[9] https://tinyurl.com/2yvb2t4k.

uphold the "remarkably similar" HISA, too. *Oklahoma,* 62 F.4th at 240 (Cole, J., concurring).[10]

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

1. The judgment below declares that all the enforcement provisions of a federal statute governing a national industry are "facially unconstitutional." App., *infra*, 4a. That outcome alone triggers the "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa Cnty. v. Lopez-Valenzuela*, 574 U.S. 1006 (2014) (Thomas, J., respecting denial); *see, e.g.*, *Allen v. Cooper*, 589 U.S. 248, 254 (2020) ("Because the Court of Appeals held a federal statute invalid, this Court granted certiorari.").

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[10] The Fifth Circuit is wrong that "none" of the circuit decisions uniformly "upholding the constitutionality of FINRA" addresses "executive power." App., *infra*, 31a n.18; *see, e.g.*, *Todd & Co.*, 557 F.2d at 1012-1013 (rejecting private-nondelegation challenge because FINRA's predecessor's "rules a*nd its disciplinary actions* were subject to full review by the S.E.C., a wholly public body" (emphasis added)); *R. H. Johnson & Co.*, 198 F.2d at 695 (holding there is "no merit in the contention that the Act unconstitutionally delegates power" to FINRA's predecessor because of "the [SEC's] *review of any disciplinary action*," in addition to the SEC's power to approve/disapprove rules (emphasis added)). "The unanimous principle from the circuit decisions—which [this Court] has not disturbed despite repeated opportunities to do so—is that so long as the agency retains de novo review of a private entity's enforcement proceedings, there is no unconstitutional delegation of legislative or enforcement power." *Oklahoma*, 62 F.4th at 243 (Cole, J., concurring).

That presumption carries particular force here given the remarkable interplay among the branches—which prompted the unanimous Sixth Circuit to observe that "[s]ometimes government works." *Oklahoma*, 62 F.4th at 225. In direct response to the Fifth Circuit's prior private-nondelegation ruling, a bipartisan Congress amended HISA by embracing the remedy a Sixth Circuit panel had recommended. "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)—and revised the statute accordingly. Yet the Fifth Circuit's invalidation of HISA's enforcement provisions displaces the "productive dialogue" that occurred between the courts and Congress, and thwarts the "'interdependence' and 'reciprocity' [that] should characterize the relationship between the[m]." *Oklahoma*, 62 F.4th at 225 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

2. Alongside those separation-of-powers concerns, the case presents an important and unresolved legal question. Several members of this Court have observed the "need to clarify the private non-delegation doctrine." *Texas v. Commissioner*, 142 S. Ct. 1308 (2022) (Alito, J., joined by Thomas & Gorsuch, JJ., respecting denial of certiorari). Indeed, the Court granted certiorari to address application of the "so-called 'private nondelegation doctrine'" a decade ago, but the Court did not reach that issue because it disagreed with the premise that the entity in question was private. *Association of Am. R.Rs.*, 575

U.S. at 87 (Thomas, J., concurring). Applying that precedent here, the courts below squarely determined that "the Authority is a private entity." App., *infra*, 45a, 69a. The Fifth Circuit's follow-on holding that HISA's enforcement provisions are unconstitutional under the private-nondelegation doctrine makes this an "appropriate *** case" to resolve the question presented. *Texas*, 142 S. Ct. at 1308-1309.

The answer will have broad ramifications as the "well-established model" on which HISA was based governs several "other important areas of our economy" aside from horseracing. McConnell Br. 4. Most obviously, Congress has repeatedly reaffirmed "its commitment" to a parallel agency-oversight framework in the financial sector based on "the SEC's review of disciplinary actions" by self-regulatory organizations like FINRA and around two dozen national security exchanges like NASDAQ. *National Ass'n of Secs. Dealers v. SEC*, 431 F.3d 803, 807-808 (D.C. Cir. 2005) (citation omitted); *see, e.g.*, 15 U.S.C. § 78s(c)-(e). A similar model guides other industries, from the Commodity Futures Trading Commission's oversight of the private National Futures Association, 7 U.S.C. § 21(h)-(k), to the Federal Energy Regulatory Commission's oversight of the private North American Electric Reliability Corporation, 16 U.S.C. § 824*o*(d)-(f). The decision below calls into question these longstanding and effective governance relationships.

3. If allowed to stand, the Fifth Circuit's decision will also have devastating practical consequences on horseracing. Congress enacted (and amended) HISA because it was "[a]larmed" by the "spate of doping

scandals and racetrack fatalities" jeopardizing the sport and endangering equine and human lives. *Black*, 53 F.4th at 873; *see* McConnell Br. 5 ("Before HISA, horseracing was close to collapse."). "Whether it's the risk of pushing horses past their limits or the risks associated with unsafe tracks and doping, or other health and safety issues facing horses and jockeys, no one doubts the imperative for [the] oversight" that the Act brings and the prior state-by-state landscape impeded. *Oklahoma*, 62 F.4th at 226.

Even among those who believe the regime "has its flaws," "[t]here's no denying HISA's impact in making the industry safer." C.L. Brown, *Horse Racing Needs Unity, But Road To Getting There May Be Long As Battles Continue*, LOUISVILLE COURIER J. (July 9, 2024).[11] Over the past two-plus years of HISA's enforcement, the nationwide program has become "firmly embedded into the Thoroughbred industry and is already yielding substantial benefits—racetrack conditions are improving, equine fatality rates are declining, and wagers from racing fans are increasing." Thoroughbred Industry Br. 2.

The chaos and confusion caused by the judgment below, and the circuit split it created, threaten to reverse that progress and jeopardize the sport. If the Authority cannot enforce HISA rules in certain jurisdictions or with respect to certain participants, it is unclear who (if anyone) will. *See* Stay Appl. 27-28. "[T]he need for a uniform rule" compels "grant[ing] certiorari to resolve the conflict," *Commissioner v.*

[11] https://perma.cc/KR9G-9A6E.

Bilder, 369 U.S. 499, 501 (1962)—particularly given that "[t]he bedrock principle of [HISA] is the need for uniformity," FTC, *Order Disapproving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority* 1-2 (Dec. 12, 2022). [12] Only this Court can provide the authoritative ruling and certainty the nationwide industry needs.

4. Assuming the Court considers this petition in conjunction with the request for rehearing of denial of certiorari in the Sixth Circuit case and the recently filed petition from the Eighth Circuit case, this Court should grant certiorari in one case and hold the others. There are no obstacles to granting this petition, which properly limits the question presented to the only issue on which the courts of appeals are divided: whether HISA's *enforcement* provisions are facially unconstitutional under the private-nondelegation doctrine.[13]

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[12] https://tinyurl.com/y76468ta.

[13] Petitioners in the parallel cases have noted that the Fifth Circuit briefing discussed a potential jurisdictional issue, but Respondents' reply below (confirming that they had in fact abandoned remaining claims before entry of judgment) obviated that issue. That is why the Fifth Circuit did not address it and why nobody in this case raises it any longer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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