No.

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051-3060, delegates federal law-enforcement and rulemaking power to a private corporation—the Horseracing Integrity and Safety Authority (the "Authority")—to govern the horseracing industry. The Act gives the Authority the exclusive power to enforce both the Act and the rules against regulated parties in federal court, as well as the powers to issue subpoenas, search the businesses and property of regulated persons, and impose sanctions that include fines, penalties, disgorgement, and lifetime bans from horseracing. The Act also requires the Federal Trade Commission to promulgate the private Authority's rules as federal law, even if it disagrees with them as a policy matter, so long as they are "consistent" with the Act. 15 U.S.C. § 3053(c)(2).

The Sixth Circuit below previously held that the Act does not violate the private non-delegation doctrine—the principle that Congress cannot delegate governmental power to private entities. The Fifth Circuit, however, declared the Act unconstitutional, and a divided panel of the Eighth Circuit agreed with the Sixth Circuit. This Court vacated all three decisions and remanded for reconsideration in light of *FCC* v. *Consumers' Research*, 606 U.S. 656 (2025). On remand, the Sixth Circuit again upheld the Act.

The question presented is whether the Act's delegation of law-enforcement and rulemaking power to the private Authority violates the Constitution's private non-delegation doctrine.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. Petitioners are the State of Oklahoma; the Oklahoma Horse Racing Commission; the Tulsa County Public Facilities Authority d/b/a Fair Meadows Racing and Sports Bar; the State of West Virginia; the West Virginia Racing Commission; Hanover Shoe Farms, Inc.; the Oklahoma Quarter Horse Racing Association; Global Gaming RP, LLC, d/b/a Remington Park; Will Rogers Downs, LLC; the United States Trotting Association; and the State of Louisiana. Each Petitioner was an appellant below.

Respondents are the United States of America; the Horseracing Integrity and Safety Authority, Inc.; Leonard S. Coleman, Jr.; Nancy M. Cox; the Federal Trade Commission; Andrew N. Ferguson, in his capacity as Chairman of the Federal Trade Commission; Mark R. Meador, in his official capacity as Commissioner of the Federal Trade Commission; Steve Beshear; Adolpho A. Birch, Jr.; Ellen McClain; Charles P. Scheeler; Joseph DeFrancis; Susan Stover; Bill Thomason; and D.G. Van Clief. Each Respondent was an appellee below.

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

STATEMENT OF RELATED PROCEEDINGS

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

- *Oklahoma* v. *United States*, No. 22-5487 (6th Cir.) (judgment entered December 17, 2025);
- *Oklahoma* v. *United States*, No. 23-402 (U.S.) judgment entered June 30, 2025);
- *Oklahoma* v. *United States*, No. 22-5487 (6th Cir.) (judgment entered March 3, 2023); and
- *Oklahoma* v. *United States*, No. 5:21-cv-00104-JMH (E.D. Ky.) (judgment entered June 3, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 163 F.4th 294. Pet. App. 1a-43a. The opinion of the district court is unreported but is available at 2022 WL 1913419. Pet. App. 92a-119a.

JURISDICTION

The court of appeals entered judgment on December 17, 2025. Pet. App. 2a. On February 27, 2026, Justice Kavanaugh granted an extension of time to file the petition for a writ of certiorari until May 16, 2026. See No. 25A958. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix at Pet. App. 122a-178a.

INTRODUCTION

When the People of the United States delegated sovereign powers to the federal government, they vested those powers in the legislative, executive, and judicial branches. The Vesting Clauses' limits on who may wield federal governmental power are crucial to the Constitution's structure, which ensures that the powers the people delegated to the federal government can be exercised only by those who are accountable to the will of the people.

The Horseracing Integrity and Safety Act of 2020 (the "Act") turns this bedrock constitutional principle on its head, delegating unprecedented federal power to a private corporation, the Horseracing Integrity and Safety Authority (the "Authority"). The Act bestows on the private Authority an array of executive governmental powers, including the *exclusive* power to enforce the Act and rules in federal court. The Act also gives the Authority the power to launch investigations, issue subpoenas, and conduct searches; and to charge regulated persons with rule violations, adjudicate those charges, and impose civil sanctions. These are all quintessentially federal law-enforcement powers that the Act allows the private Authority to exercise without involvement by the federal government.

The Act also empowers the Authority to draft federal regulations governing, among other things, permitted medications for horses, racetrack-safety standards, and a description of rule violations and civil sanctions for those violations. The Federal Trade Commission ("FTC") then *must* promulgate the private Authority's regulations *as federal law* so long as they are "consistent" with the Act and other rules—even if the FTC disagrees with them as a policy matter. If the FTC has a policy objection to an Authority rule, the Act requires the FTC to undertake a separate notice-and-comment rulemaking to rescind the rule after it has already gone into effect.

This unprecedented transfer of federal power to a private corporation previously split the Courts of Appeals: the Fifth Circuit held the Act facially unconstitutional, while the Sixth Circuit and the Eighth Circuit (over a dissent by Judge Gruender) upheld it.

After this Court applied the private non-delegation doctrine in *FCC* v. *Consumers' Research*, 606 U.S. 656 (2025), the Court granted certiorari in all three cases, vacated the judgments, and remanded for further consideration in light of *Consumers' Research*.

Consistent with this Court's prior private non-delegation doctrine cases, *Consumers' Research* made clear that a private entity may "pla[y] an advisory role" and make "recommendations" to a federal agency, but the agency must have the power to "decid[e] whether or how to use" those recommendations. 606 U.S. at 693-94. A private entity "may not make policy" and its recommendations "cannot go into effect without an agency's say-so" because the government "alone" must retain "decision-making authority." *Id.* at 693, 695.

The Act's delegation of governmental power to the Authority subverts this principle. It gives the private Authority—not the FTC—the quintessential law-enforcement responsibilities of bringing a civil enforcement action, investigating a suspected rule violator, issuing a subpoena, searching a person's property, charging a person with a rule violation, or issuing a civil sanction. The Act gives the FTC no role in supervising the Authority's decisions to investigate, charge, or sue regulated entities and limits the agency's role to reviewing final civil sanctions issued by the Authority after they have already gone into effect. And it permits the Authority to control governmental policymaking because the Authority's rules go into legal effect even if the FTC disagrees with them: if the FTC objects to an Authority rule on policy grounds, the Act requires it to devote agency resources to a separate notice-and-comment rulemaking to rescind the Authority's rule after it has already gone into effect and legally bound the horseracing industry. Because the Act gives the private Authority the power to decide how to enforce federal law against regulated persons, it unconstitutionally "allows [a] non-governmental entit[y] to govern." *Consumers' Research*, 606 U.S. at 697.

Yet the Sixth Circuit on remand again upheld the constitutionality of the Act. Even though the Act permits the private Authority to wield governmental powers over the horseracing industry, the Sixth Circuit nevertheless held the Act constitutional based on its conjecture that the FTC might have the power to rescind or undo some—though not all—of the Authority's exercises of law-enforcement or rulemaking powers sometime in the future, after they have already taken effect on regulated persons.

This Court should grant certiorari to definitively resolve the question of the Act's constitutionality. The proper application of the private non-delegation doctrine to the Act divided the circuits before, and the Sixth Circuit misapplied the holdings of *Consumers' Research* on remand. The Sixth Circuit has twice upheld the Act's unheard-of delegation of governmental power to the private Authority, assuming each time that it was bound to uphold the Act's transfer of federal power from the government to a private corporation. The Fifth Circuit, by contrast, has twice held the Act unconstitutional. And the Eighth Circuit, when confronted with the question, previously divided on the Act's constitutionality. There is nothing in *Consumers' Research* that casts doubt on the Fifth Circuit's prior decisions or suggests that it should reach a different result on remand; to the contrary, *Consumers' Research* affirmatively supports the Fifth Circuit's prior rationales for holding the Act unconstitutional.

Resolving the question presented would provide much-needed guidance to lower courts on how to apply the private non-delegation doctrine, and this case is an ideal vehicle to provide that necessary clarification. The Court should grant the petition and reverse.

STATEMENT

1. For nearly a century, regulation of horseracing was a matter of state and local concern. That changed in 2020 when Congress enacted the Horseracing Integrity and Safety Act (the "Act"), which regulates horseracing in an "unconventional wa[y]": by empowering "a private nonprofit corporation—the Horseracing Integrity and Safety Authority"—to "regulat[e] and enforc[e] the Act." Pet. App. 7a.

The Authority is a "private, independent, self-regulatory, nonprofit corporation." 15 U.S.C. § 3052(a). It is governed by a nine-member board of directors: five "independent members selected from outside the equine industry," and four "industry members selected from among the various equine constituencies." *Id.* § 3052(b)(1). The Authority's Board members are selected by a "nominating committee," whose initial members are listed in the Authority's "governing corporate documents," with vacancies to be "filled by the Board." *Id.* § 3052(d). The Act "recognize[s]" the Authority "for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces." *Id.* § 3052(a).

The Act grants the Authority an array of law-enforcement powers. The Act gives the Authority the exclusive power to enforce its rules in federal court by "commenc[ing] a civil action against a covered person or racetrack that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter." 15 U.S.C. § 3054(j).

Additionally, the private Authority can "impos[e] civil sanctions" of its own under the rules it establishes—including "lifetime bans from horseracing," "disgorgement," and other "monetary fines and penalties"—which are subject to review by an administrative law judge and the FTC. 15 U.S.C. §§ 3057(d), 3058(b), (c). The Authority's sanctions take effect immediately and, under the Authority's enforcement rules, the FTC is powerless to stay a sanction until after the sanctioned party has exhausted an intra-Authority appeal of the sanction before the Authority's Board of Directors. *Id.* § 3058(d); 90 Fed. Reg. 43,431, 43,441-44 (Sept. 9, 2025). And the private Authority wields "subpoena and investigatory authority with respect to civil violations committed under its jurisdiction." 15 U.S.C. § 3054(h). The Act empowers the Authority to access "offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses" and to exercise "other investigatory powers of the nature and scope exercised by State racing commissions before the program effective date." *Id.* § 3054(c).

The Act also gives the Authority the power to craft "proposed rule[s]" governing a broad range of matters, such as "a list of permitted and prohibited medications, substances, and methods," "racetrack safety standards and protocols," "a schedule of civil sanctions for violations," and "a process or procedures for disciplinary hearings." 15 U.S.C. § 3053(a); see *id.* § 3053(d).

Whenever the Authority proposes a rule to the FTC, the Act mandates that the FTC "*shall*" publish it in the Federal Register and provide an opportunity for public comment. 15 U.S.C. § 3053(b)(1) (emphasis added). Within sixty days of publication, the FTC then "*shall* approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—(A) this chapter; and (B) applicable rules approved by the Commission." *Id.* § 3053(c)(2) (emphasis added). The FTC has no discretion to reject the Authority's rules if it disagrees with them as a policy matter. Instead, the private Authority's policy preferences trump the FTC's, and the FTC must approve the Authority's rules, which then become binding federal law that preempts any provision of state law "with respect to matters within the jurisdiction of the Authority." 15 U.S.C. § 3054(b).

That is exactly how things have played out in the real world: the FTC consistently refuses to consider public comments addressing whether the Authority's rules would be sound policy and explains that it lacks the power to question the Authority's policy choices. When the Authority proposed its original enforcement rules, the FTC did not consider "most comments" because they "offered policy recommendations" and the

FTC "reviews the Authority's proposals for their consistency with the Act" alone, "not for general policy." FTC, *Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority* at 26, (Mar. 25, 2022);[1] see also *id.* at 4 (FTC explaining that its "statutory mandate to approve or disapprove a proposed Authority rule is limited to considering only whether the proposed rule 'is consistent with' the Act and the Commission's procedural rule," and that comments unrelated to consistency "have little bearing on the [FTC's] determination").

When commenters objected to the Authority's proposed rules regulating traction devices, the FTC refused to engage with any comments challenging "details in the Authority's choice of permitted horseshoes" because "these are essentially policy disagreements." FTC, *Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity and Safety Authority* at 43 (Mar. 3, 2022).[2] And when commenters objected to the Authority's proposed inclusion of each state's share of purses paid in its methodology for allocating fees among states to fund its operations, the FTC declined to engage with those comments because "there are likely multiple [policy choices] that the Authority could have proposed that would be consistent with the Act." FTC, *Order Approving the Assessment Methodology Rule Proposed by the Horseracing Integrity and Safety Authority* at 20 (Apr. 1, 2022).[3]

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

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

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

In November 2022, the Fifth Circuit held that the Act's consistency-review requirement violated the private non-delegation doctrine. As that court explained, "[t]he FTC's limited review of proposed rules falls short of the 'pervasive surveillance and authority' an agency must exercise over a private entity." *National Horsemen's Benevolent & Protective Association* v. *Black*, 53 F.4th 869, 884 (5th Cir. 2022) ("*NHBPA I*"). "[W]hatever 'consistency' review includes, we know one thing it *excludes*: the Authority's policy choices in formulating rules." *Id.* at 885. Accordingly, the Fifth Circuit concluded, the Act "defies th[e] [Vesting Clauses'] basic safeguard by vesting government power in a private entity not accountable to the people." *Id.* at 872-73.

Congress then amended the Act to give the FTC the power to adopt rules in accordance with the Administrative Procedure Act, 5 U.S.C. § 553, that "abrogate, add to, and modify the rules of the Authority promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter." 15 U.S.C. § 3053(e).

But the amendment did not alter the Act's requirement that the FTC must approve any rule proposed by the Authority that is consistent with the Act and other rules, so the FTC still refuses to engage with comments that "constitute mere policy disagreements with the Authority." FTC, *Order Approving the Anti-Doping and Medication Control*

Rule Proposed by the Horseracing Integrity and Safety Authority at 31 (Mar. 27, 2023) (dismissing comments on Authority's proposed list of prohibited substances for horses on that basis);[4] see also FTC, *Order Approving the Enforcement Rule Modification Proposed by the Horseracing Integrity and Safety Authority* at 15 (Dec. 19, 2025) (dismissing comment on proposed changes to the Authority's enforcement rules that "offered policy recommendations but did not identify any inconsistency between the proposed rule modifications and the Act").[5]

2. Petitioners are three States, state racing commissions, and other entities involved in horseracing. They brought suit in the U.S. District Court for the Eastern District of Kentucky against the United States, the FTC, and the Authority to prevent enforcement of the Act's regulatory regime on the ground that it violates the Constitution's private non-delegation doctrine. Pet. App. 92a-119a. The district court dismissed for failure to state a claim, holding that the Authority "'function[ed] subordinately' to the FTC." Pet. App. 112a.

Petitioners appealed, and the Sixth Circuit affirmed. The Sixth Circuit concluded that the FTC's ability to exercise its own rulemaking power under the 2022 amendment rendered the Act's delegation of rulemaking power to the Authority constitutional under the private non-delegation doctrine. Pet. App. 59a-62a. The Sixth Circuit also held that the FTC's separate rulemaking power made the Act's delegation

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[4] https://tinyurl.com/mr4tnhmk.

[5] https://tinyurl.com/ycycaktt.

of law-enforcement power to the Authority constitutional because "the FTC *could* subordinate every aspect of the Authority's enforcement 'to ensure the fair administration of the Authority * * * or otherwise in furtherance of the purposes of [the Act].'" Pet. App. 63a (quoting 15 U.S.C. § 3053(e)). The Sixth Circuit denied Petitioners' request for rehearing en banc, and Petitioners petitioned this Court for a writ of certiorari. Pet. App. 120-121a. This Court originally denied the petition in June 2024. Pet. App. 45a.

But 11 days later, the Fifth Circuit held that the Act violated the Constitution's private non-delegation doctrine, creating a circuit split. *National Horsemen's Benevolent & Protective Association* v. *Black*, 107 F.4th 415 (5th Cir. 2024) ("*NHBPA II*"). The Fifth Circuit held that Congress's grant of rulemaking authority to the FTC "cured the nondelegation defect" in the Act's consistency-review requirement that it had identified in its prior decision. *Id.* at 424. But, "part[ing] ways" with the Sixth Circuit, the Fifth Circuit held that "HISA's enforcement provisions are facially unconstitutional." *Id.* at 421. The Fifth Circuit explained that "[t]he power to launch an investigation, to search for evidence, to sanction, [and] to sue" "are all quintessentially executive functions" and "have been considered so from our Nation's founding." *Id.* at 428. Because the Act empowers the private Authority to exercise these powers "all without the FTC's say-so," the Act's delegation of law-enforcement power to the Authority was "forbidden by the Constitution." *Id.* at 421.

In light of the Fifth Circuit's decision and the circuit split it created, Petitioners petitioned for rehearing, asking this Court to reconsider the denial of their petition for a writ of certiorari. While that petition was pending, a divided panel of the Eighth Circuit affirmed a decision rejecting a similar challenge to the Act. The panel majority "agree[d] with the Sixth and Fifth Circuits that the Act's rulemaking structure does not violate the private nondelegation doctrine." *Walmsley* v. *FTC*, 117 F.4th 1032, 1038 (8th Cir. 2024). And, recognizing that its "two sister circuits reached differing conclusions" on the constitutionality of the Authority's law-enforcement powers, the panel majority "agree[d]" with the Sixth Circuit that "the statute is not unconstitutional on its face." *Id.* at 1039. Judge Gruender concurred in part and dissented in part, concluding that "the Fifth Circuit has the better of the argument" that the Authority's enforcement powers are unconstitutional. *Id.* at 1042 (Gruender, J., concurring in part and dissenting in part).

The plaintiffs in the Fifth and Eighth Circuit cases, as well as the federal government and the Authority in the Fifth Circuit case, all petitioned for writs of certiorari and asked this Court to decide whether the Act is constitutional under the private non-delegation doctrine. See *FTC* v. *NHBPA*, No. 24-429 (U.S.); *Horseracing Integrity & Safety Authority, Inc.* v. *NHBPA*, No. 24-433 (U.S.); *Texas* v. *Black*, No. 24-465 (U.S.); *NHBPA* v. *Horseracing Integrity & Safety Authority, Inc.*, No. 24-472 (U.S.); *Gulf Coast Racing, L.L.C.* v. *Horseracing Integrity & Safety Authority, Inc.*, No. 24-489 (U.S.); *Walmsley* v. *FTC*, No. 24-420 (U.S.).

While these petitions were pending, this Court decided *FCC* v. *Consumers' Research*, 606 U.S. 656 (2025), which addressed a private non-delegation challenge to the role that the private Universal Service Administrative Company (the "Administrator") plays in implementing the Telecommunications Act of 1996. The Court confirmed that "a law * * * violates the private nondelegation doctrine when it allows non-governmental entities to govern." *Id.* at 697. The Court upheld the Administrator's role in the regulatory regime because it did not exercise any federal governmental power: "[t]he Administrator 'may not make policy,'" it "plays an advisory role" and "makes recommendations," "the Commission alone has decision-making authority," "the Commission decides whether or how to use" the Administrator's recommendations, and those recommendations "can have only the legal (or, indeed, practical) effect the Commission decides they should." *Id.* at 692-95. Critically, the Court emphasized that the statute was constitutional because the private entity's proposed actions or recommendations "cannot go into effect without an agency's say-so." *Id.* at 695.

On June 30, 2025, the Court granted Petitioners' petition for rehearing, granted certiorari, vacated the Sixth Circuit's judgment, and remanded for further consideration in light of *Consumers' Research*. Pet. App. 44a. The Court similarly granted the petitions in the Fifth and Eighth Circuit cases and remanded those cases for reconsideration as well.

3. On remand, the Sixth Circuit again held that the Act did not violate the private non-delegation doctrine. The Sixth Circuit concluded that the FTC's ability to initiate its own notice-and-comment rulemaking to undo or change the Authority's rules meant the FTC retained "the final say." Pet. App. 21a. As for the Authority's enforcement powers, the court below acknowledged that "'[d]ifficult and fundamental questions' * * * arise when private entities enforce federal law." Pet. App. 33a. As the court noted, "it appears to cut against the grain to permit private entities to make such discretionary decisions, whether to bring an enforcement action or whether to engage in narrow or broad investigations of alleged violations of the law." Pet. App. 33a-34a. Nevertheless, the Sixth Circuit held that the FTC's power to review the Authority's sanctions, "together with the FTC's rule-making powers over enforcement actions," gave it sufficient "oversight and control" over some—if not all—of the Authority's enforcement activities. Pet. App. 30a. As for the Authority's exclusive power to enforce the statute and rules in federal court under 15 U.S.C. § 3054(j), the court refused to consider that provision's constitutionality, noting that the issue would raise numerous difficult questions, and thus the court preferred to wait for an as-applied challenge in a future case. Pet. App. 34a-37a. The remanded Fifth and Eighth Circuit proceedings remain pending.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve the question whether the Act unconstitutionally vests federal governmental power in the private Authority, an important question that previously divided the courts of appeals. In accord with a line of prior private non-delegation doctrine cases, this Court's decision in *Consumers' Research* underscored that the Constitution does not allow private entities to make policy or exercise governmental power over others. Yet—even though the Act allows the Authority to wield a broad assortment of law-enforcement powers against regulated persons outside the FTC's control and to promulgate binding rules over the FTC's policy objections—the Sixth Circuit held that the Act is constitutional. The Sixth Circuit should have reconsidered its view that the Act is constitutional because it blatantly violates the principles reaffirmed in *Consumers' Research*. By contrast, those principles support the Fifth Circuit's prior determinations that the Act is unconstitutional. This case is an ideal vehicle to definitively resolve the unsettled question whether the Act violates the private non-delegation doctrine.

I. THE CIRCUITS PREVIOUSLY DIVIDED ON THE ACT'S CONSTITUTIONALITY, AND *CONSUMERS' RESEARCH* CONFIRMS ITS INFIRMITY.

The proper application of the private non-delegation doctrine to the Act splintered the courts of appeals. The pervasive disagreement the question has engendered verifies the observation by three Justices that the private non-delegation doctrine needs "clarif[ication]" from this Court. *Texas* v. *Commissioner*, 142 S. Ct. 1308, 1308 (2022) (statement of Alito, J., respecting the denial of certiorari).

The history of challenges to the Act underscores the need for guidance. The Fifth Circuit first held that the Act's delegation of rulemaking power to the Authority violates the private non-delegation doctrine because it gave "a private entity the last word over what rules govern our nation's thoroughbred horseracing industry." *NHBPA I*, 53 F.4th at 872. After Congress amended the Act to give the FTC independent rulemaking power, the Sixth Circuit upheld the Act's constitutionality in full because the amendment "ameliorated the concerns underlying the non-delegation challenge." Pet. App. 50a.

When the Fifth Circuit considered the Act as amended, however, the panel unanimously "part[ed] ways" with the Sixth Circuit in holding that the Act's "enforcement provisions are facially unconstitutional" because the Act "empowers the Authority to investigate, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the FTC's say-so." *NHBPA II*, 107 F.4th at 421. When the Eighth Circuit considered the issue, the question of the Act's constitutionality divided the panel. The panel majority agreed with the Sixth Circuit that the Act does not violate the private non-delegation doctrine. *Walmsley*, 117 F.4th at 1037-40. But Judge Gruender dissented in part because, like the Fifth Circuit, he believed that the Act's delegation of enforcement powers to the Authority was facially unconstitutional and that the majority "fail[ed] to reckon with the plain language of HISA, which grants to the Authority a broad enforcement power that is not subordinate to the FTC." *Id.* at 1043 (Gruender, J., concurring in part and dissenting in part). So far, four courts of appeals judges have concluded that the Act as amended is unconstitutional, whereas five have concluded that it is constitutional.

Furthermore, district courts in the circuits that upheld the Act have noted that the FTC's on-the-ground oversight of the Authority appears inconsistent with the private non-delegation doctrine. The Southern District of Iowa held that the FTC acted arbitrarily and capriciously when it approved an Authority rule exempting horse breeders and veterinarians from its fee assessments because the FTC found that exemption "consistent with the discretion afforded to the Authority under the Act to determine what is equitable." Dkt. 57, at 14, *Kelly* v. *Horseracing Integrity & Safety Authority, Inc.*, No. 4:24-cv-00264-SHL-WPK (S.D. Iowa Mar. 23, 2026). The Court explained that "the FTC believed it should perform deferential review under an abuse-of-discretion-type standard," but stated that it was unaware of any "APA case where a private entity proposed a rule that the agency then approved under an abuse-of-discretion standard." *Ibid.* (citing *NHBPA I*, 53 F.4th at 884).

Similarly, the Western District of Kentucky explained that the FTC, when approving the Authority's fee-assessment methodology, "abandoned any pretense of substantive review and instead rubberstamped the method the Authority happened to propose." *Churchill Downs, Inc.* v. *Horseracing Integrity & Safety Authority, Inc.*, 2026 WL 892498, at *14 (W.D. Ky. Apr. 1, 2026). That Court observed that the FTC's "narrow approach to public oversight fits uneasily with the Sixth Circuit's decision rejecting the charge of excessive private delegation" and instead "lends credence to the Fifth Circuit's concern." *Id.* at 14-15 & n.16.

The Sixth Circuit's decision on remand exhibits continued misunderstanding of the proper application of the private non-delegation doctrine. The Sixth Circuit failed to fully engage with or properly apply *Consumers' Research*, which held that the Constitution does not "allo[w] non-governmental entities to govern" or engage in "policy-making," that the government must "retai[n] decision-making power," and that a private party's recommendations "cannot go into effect without an agency's say-so." 606 U.S. at 692-93, 695, 697. Yet the Sixth Circuit doubled down on its prior position that the Act permissibly allows the private Authority to exercise the core executive functions of deciding whether a covered person should be investigated, sanctioned, or sued, and to cause sanctions to go into effect *before* the FTC can review them. Pet. App. 26a-37a. The Sixth Circuit also saw nothing constitutionally objectionable about the fact that the Act allows the Authority to cause federal horseracing policies to go into effect over the FTC's objection.

By contrast, *Consumers' Research* supports the Fifth Circuit's prior decisions that the Act is unconstitutional. This Court's holdings that the Constitution does not "allo[w] non-governmental entities to govern" and requires the government to "retai[n] decision-making power," 606 U.S. at 692, 697, support the Fifth Circuit's prior conclusion that the Act unconstitutionally gives the private Authority—not the FTC—the "quintessentially executive functions" of deciding whether to investigate, subpoena, search, sanction, or sue a regulated person, *NHBPA II*, 107 F.4th at 428-29. And this Court's holdings that the Constitution does not allow a private entity to engage in "policy-making" or cause its proposals to "go into effect without an agency's say-so," 606 U.S. at 693, 695, support the Fifth Circuit's prior holding that "[t]he FTC's limited review of proposed rules"—which excludes review of "the Authority's policy choices in formulating rules"—"falls short of the 'pervasive surveillance and authority' an agency must exercise over a private entity." *NHBPA I*, 53 F.4th at 884-85.

The Court should grant certiorari to clarify the proper application of the private non-delegation doctrine to the Act and correct the Sixth Circuit's misunderstanding of *Consumers' Research*.

II. THE ACT UNCONSTITUTIONALLY DELEGATES GOVERNMENT POWER TO A PRIVATE CORPORATION.

The U.S. Constitution distributes federal power among the three branches of the federal government: legislative power in Congress, executive power in the President, and judicial power in the Judiciary. See U.S. Const. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1. The Vesting Clauses do more than merely demarcate the separation of powers among the three branches. They make clear that *all* federal governmental power is vested in, and only in, the three branches. See *Consumers' Research*, 606 U.S. at 697 ("[A] law * * * violates the private nondelegation doctrine when it allows non-governmental entities to govern.").

The Court should grant certiorari and hold that the Act's delegation of law-enforcement and rulemaking power to the Authority violates the Constitution's private non-delegation doctrine. The Act gives the private Authority the power to exercise quintessentially executive law-enforcement functions, including the exclusive power to sue, investigate, search, or subpoena regulated persons. Additionally, the Act hands over to the Authority the power to create federal horseracing law, even over the FTC's objection.

1. The Act unconstitutionally delegates to the Authority the quintessentially executive power of enforcing federal law in multiple different ways.

a. The Act gives the Authority the *exclusive* power to enforce its rules in federal court by "commenc[ing] a civil action against a covered person or racetrack that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter * * * to enjoin such acts or practices, to enforce any civil sanctions imposed under [15 U.S.C. § 3057], and for all other relief to which the Authority may be entitled." 15 U.S.C. § 3054(j)(1). The Act "gives the FTC no role in this process, either before or after the fact," and provides that it is the Authority—not the FTC—that "decides whether to sue the entity for an injunction or to enforce a sanction it has imposed." *NHBPA II*, 107 F.4th at 429, 431.

That is plainly unconstitutional. "[C]onducting civil litigation in the courts of the United States for vindicating public rights" is a quintessential governmental "functio[n]" that "may be discharged only by persons who are 'Officers of the United States.'" *Buckley* v. *Valeo*, 424 U.S. 1, 140 (1976) (per curiam) (quoting U.S. Const. art. II, § 2, cl. 2); see also *Printz* v. *United States*, 521 U.S. 898, 922-23 (1997) (Congress may not "transfe[r]" responsibility for enforcing federal law outside "the Federal Executive"); *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U.S. 197, 219 (2020) (the "power to seek daunting monetary penalties against private parties on behalf of the United States in federal court" is "a quintessentially executive power"); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992) (Congress may not allow private enforcement of federal law absent concrete injury because that would infringe on "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3"); *In re Aiken County*, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013) (Kavanaugh, J.) ("civil enforcement decisions brought by the Federal Government are presumptively an exclusive Executive power").

As several Justices have emphasized, outsourcing enforcement of federal law to private parties raises "[d]ifficult and fundamental questions." *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring); see also *Department of Transportation* v. *Association of American Railroads*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) ("Private entities are not vested with . . . the 'executive Power,' Art. II, § 1, cl. 1, which belongs to the President.").

The Act's delegation to the Authority of exclusive power to decide whether to bring a civil enforcement action to enforce the Act and its rules (and then to carry out that prosecution) thus unconstitutionally delegates paradigmatic executive power to a private entity.

b. The Act also gives the Authority the power to launch investigations and search for evidence, including "subpoena and investigatory authority"; the right of "access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses"; and "other investigatory powers of the nature and scope exercised by State racing commissions." 15 U.S.C. § 3054(c)(1)(A), (h). And it gives the Authority the power to "impos[e] civil sanctions" for violations of its rules, which may include "lifetime bans from horseracing," "disgorgement," and "monetary fines and penalties." *Id.* § 3057(d).

As the Fifth Circuit previously held, "[t]he power to launch an investigation, to search for evidence, to sanction, [and] to sue * * * are all quintessentially executive functions." *NHBPA II*, 107 F.4th at 428; see *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477, 504 (2010) (the "power to start, stop, or alter individual Board investigations" are "executive activities typically carried out by officials within the Executive Branch"); *Collins* v. *Yellen*, 594 U.S. 220, 254 (2021) (Federal Housing Finance Agency "clearly exercises executive power" because "[i]t is authorized to issue subpoenas"); *Seila Law*, 591 U.S. at 224-25 (Director of Consumer Financial Protection Bureau exercises "significant governmental power" because he may "oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties").

Because the Act delegates to the private Authority the quintessential executive powers of determining federal law-enforcement priorities and whether to investigate, search, subpoena, sanction, or sue particular persons, it unconstitutionally "confer[s] governmental power on a private party." *Consumers' Research*, 606 U.S. at 692. For nearly all the enforcement questions that matter, it is the Authority—not the FTC—that exercises "decision-making power." *Ibid.* Under "[t]he Act's plain terms," "[t]he Authority decides whether to investigate a covered entity for violating HISA's rules"; "[t]he Authority decides whether to subpoena the entity's records or search its premises"; "[t]he Authority decides whether to sanction it"; "[a]nd the Authority decides whether to sue the entity for an injunction or to enforce a sanction it has imposed." *NHBPA II*, 107 F.4th at 429. The Act "does not empower the FTC to decide whether to investigate a covered entity, whether to subpoena its records, whether to search its premises, whether to charge it with a violation, or whether to sanction or sue it." *Ibid.* By vesting the private Authority with the responsibility for making the necessary judgment calls on how to exercise federal law-enforcement powers, the Act delegates executive power in violation of the private non-delegation doctrine.

c. The Sixth Circuit concluded that this regime did not violate the Constitution because it perceived ways the FTC might constrain or influence some of the Authority's law-enforcement decisions. The Sixth Circuit's proposed workarounds cannot render the Act constitutional.

First, the Sixth Circuit reasoned that the FTC could promulgate rules governing the Authority's enforcement activities, such as procedural regulations "constraining the Authority's investigations and increasing the procedural rights of suspected rulebreakers" and even regulations directing the Authority's exercise of enforcement discretion in particular cases, such as a regulation requiring the Authority to "drop a misguided investigation into a particular jockey" or to "pursue an enforcement action against a recalcitrant rule breaker." Pet. App. 28a-29a.

But any ability of the FTC to use notice-and-comment rulemaking to direct the Authority to stop exercising its enforcement powers in particular cases is insufficient to render the delegation of law-enforcement powers to the Authority constitutional. The FTC's use of its separate rulemaking power to stop a particular Authority enforcement action in its tracks does not prevent the Authority from unconstitutionally wielding law-enforcement power and determining enforcement priorities in the first place.

In any event, the text of the Act does not permit the FTC to use its rulemaking power to micromanage the Authority's enforcement activities in such a manner. The Act gives the FTC the power to "abrogate, add to, and modify *the rules of the Authority* promulgated in accordance with this chapter." 15 U.S.C. § 3053(e) (emphasis added). Under the Act, the rules of the Authority include such things as "racetrack safety standards," "a list of permitted and prohibited medications," and "a schedule of civil sanctions." *Id.* § 3053(a). The Authority's rules do not encompass decisions on how to enforce its rules in particular cases. When the Authority decides to investigate or sanction a jockey, for example, it does not propose a rule to the FTC for public comment on that proposed course of action. *Id.* § 3053(b)(1). Instead, the Authority exercises the discretion the Act delegates to it on how to enforce its rules in particular cases.

It does not matter that the Authority has since proposed—and the FTC has approved—a rule requiring the Authority to obtain FTC approval before issuing a subpoena or bringing a civil enforcement action, which are only two of the many enforcement powers the Authority enjoys. See 90 Fed. Reg. at 43,444-45. In the first place, the Act itself gives the Authority the power to issue subpoenas and commence civil actions without FTC approval, 15 U.S.C. § 3054(h), (j), and the Authority cannot render that unlawful delegation constitutional by adopting a rule placing self-imposed limits on its statutory powers. See *Whitman* v. *American Trucking Associations*, 531 U.S. 457, 472 (2001) (agency cannot "cure an unlawful delegation" by "adopting in its discretion a limiting construction of the statute"). Just like in *United States* v. *Arthrex, Inc.*, where the agency similarly conjured a "catalog of steps" that the government "might take to affect the decisionmaking process," such as "jump[ing] in before" the "final decision," this Court rejected those "machinations," saying they are "not the solution" but the "problem." 594 U.S. 1, 15-16 (2021).

Additionally, the regulatory rewrite of the statute itself violates the Act, which already separately divides the governmental powers, giving some to the private Authority and others to the FTC. "Congress set out a definite enforcement scheme, dividing responsibilities among the FTC [and] the Authority." *NHBPA II*, 107 F.4th at 431; see 15 U.S.C. § 3054(a) (directing the Authority and the FTC to enforce the Act "each within the scope of their powers and responsibilities under this chapter"). That is why both the Fifth Circuit and Judge Gruender previously rejected the Sixth Circuit's "rulemaking argument"—it "would let the agency rewrite the statute." *NHBPA II*, 107 F.4th at 431; see *Walmsley*, 117 F.4th at 1043 (Gruender, J., concurring in part and dissenting in part) ("the plain text of [the Act] empowers the Authority, and not the FTC, with broad enforcement power" and "[t]he FTC cannot rewrite the statutory scheme that Congress enacted").

In any event, the rule does not resolve the problem. When the government prosecutes a civil-enforcement action, there are myriad choices it must make in its prosecutorial discretion, and those decisions are uniquely governmental powers. See *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985). The regulation, however, governs only one of those decisions—whether a proposed civil-enforcement action may proceed. But the power to make all decisions about how that enforcement proceeding should be conducted remains solely in the hands of the Authority.

Second, as for proceedings conducted in the Authority's own in-house tribunals, the Sixth Circuit held that the FTC's ability to review any civil sanctions the Authority imposes, and to stay any such sanction pending its review, "insulate[s] the Act from a successful facial challenge." Pet. App. 28a. But that back-end review does not prevent the Authority from exercising "governmental power" in the slightest. *Consumers' Research*, 606 U.S. at 692. By the time the FTC has an opportunity to review an Authority sanction, "[c]onsider everything the Authority was permitted to do up to that point: launch an investigation into [a horse] owner, subpoena his records, search his facilities, charge him with a violation, adjudicate it, and fine him," all outside the FTC's direction and control. *NHBPA II*, 107 F.4th at 430. "Each and every one of those actions is 'enforcement' of HISA" that occurs "without any supervision by the FTC." *Ibid.*

Moreover, the Sixth Circuit incorrectly held that the FTC can always use its stay power to prevent the Authority from "implement[ing] a sanction before the FTC finally reviews it." Pet. App. 28a. The Authority's enforcement rules provide for initial disciplinary hearings to be conducted by a 3-member panel of the Authority's Board of Directors, and a civil sanction ordered by the panel—which takes effect immediately—is appealable to the full Board. 90 Fed. Reg. at 43,441-

43. The decision whether to stay a civil sanction while it is on appeal to the Authority's Board is committed to the Board—not the FTC. *Id.* at 43,443. The decision of the Board on appeal is the "final civil sanction subject to appeal and review" by the FTC, and it is only that decision that the FTC has the power to stay. *Id.* at 43,444; 15 U.S.C. § 3058(d). Thus, if the Authority's Board declines to stay a civil sanction, it *does* go into effect "without the FTC's 'say-so.'" Pet. App. 27a-28a (quoting *Consumers' Research*, 606 U.S. at 695).

Finally, the Sixth Circuit declined to "finally resolve the validity" of the Act's delegation to the Authority of the exclusive power to bring civil enforcement actions because it viewed that challenge as premature in the context of a facial challenge. Pet. App. 34a. This Court's precedents squarely reject that approach. When a regulated party raises a constitutional challenge to the structure of its regulator, courts "do not require plaintiffs to 'bet the farm * * * by taking the violative action' before 'testing the validity of the law.'" *Free Enterprise Fund*, 561 U.S. at 490; see *State National Bank of Big Spring* v. *Lew*, 795 F.3d 48, 54 (D.C. Cir. 2015) (Kavanaugh, J.) (where a party "challeng[es] the legality of the regulating [entity] itself," it "would make little sense to force a regulated entity to violate a law (and thereby trigger an enforcement action against it) simply so that the regulated entity can challenge the constitutionality of the regulating agency"). Instead, in adjudicating structural constitutional challenges to an entity's powers, courts "have no trouble concluding" that a challenge to such power "is ripe even if the * * * power has not been exercised to [plaintiffs'] detriment." *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991).

2. The Act's delegation of rulemaking power to the private Authority also violates the Constitution's private non-delegation doctrine.

a. This Court has long forbidden the government from delegating its power to make legislative rules to a private entity. The Court has stated that it is "obvious" that "a delegation of legislative power" to private groups "so as to empower them to enact the laws they deem to be wise and beneficent" is "unknown to our law, and * * * utterly inconsistent with the constitutional prerogatives and duties of Congress." *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 537 (1935). Similarly, in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the Court struck down a statute granting certain coal producers and miners the power to issue rules setting maximum labor hours and minimum wages. The Court explained that a delegation of rulemaking authority to a private party is "delegation in its most obnoxious form." *Id.* at 311. Congress responded to this Court's instructions in *Carter Coal* by enacting a revised statute, which the Court upheld because the National Bituminous Coal Commission—a government agency—retained the power to "approv[e], disapprov[e], or modif[y]" any proposed rules in its sole discretion. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 388 (1940).

Critically, the Coal Commission in *Adkins* could "disapprov[e]" proposed prices *before* they took effect, 310 U.S. at 388, whenever it decided that they were not "just and equitable" or did not "have due regard to the interests of the consuming public." Pub. L. No. 75-48, § 4, Part II(a), 50 Stat. 72, 78 (1937); see also *Adkins*, 310 U.S. at 399 (the Coal Commission alone "determines the prices"); *Association of American Railroads* v. *United States Department of Transportation*, 721 F.3d 666, 671 (D.C. Cir. 2013) ("the agency in *Adkins* could unilaterally change regulations proposed to it by private parties"), *vacated and remanded on other grounds*, 575 U.S. 43.

These cases embody one crucial constitutional principle: the government cannot delegate its discretionary powers to make and enforce the law to a private entity. When Congress delegates "discretionary policymaking" in the execution of federal law, it must be to the Executive Branch. *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 404 (2024). That is the only manner in which Congress may delegate the power to "fill up the details" of a federal statute, *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825), because the "power to fill up details" of legislation is the power to make "administrative rules and regulations," *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911)—a governmental power. At root, the private non-delegation doctrine vindicates the fundamental rule that "policy choices should be left to" governmental officials because they are "directly accountable to the people." *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497, 520 (2018) (internal quotation marks omitted); see also *Freytag* v. *Commissioner*, 501 U.S. 868, 884 (1991) (federal power can be exercised only by those who are "accountable to political force and the will of the people"); *City of Arlington* v. *FCC,* 569 U.S. 290, 327

(2013) (Roberts, C.J., dissenting) (noting that "policy-making [is] properly left, under the separation of powers, to the Executive").

This Court reaffirmed these principles in *Consumers' Research*, which distilled from the Court's prior decisions in *Carter* and *Adkins* the rule that the Constitution forbids the government from "conferr[ing] governmental power on a private party," and that, although the government "may enlist private parties to give it recommendations," the agency must "retai[n] all decision-making authority." 606 U.S. at 664, 692. The Court held that the private Administrator's role in the FCC's universal-service scheme complied with these constitutional limits because the Administrator did not make policy. In determining the amount each carrier must contribute to the universal-service fund, the Court explained that "the Administrator plays an advisory role," but "the Commission alone has decision-making authority." *Id.* at 693. While the Administrator "makes the initial projections" of the amounts required, which is based on "carriers' projected revenues and the Fund's projected expenses," "that means just doing arithmetic" because carriers "submit their projections" and the Administrator simply "adds them up." *Ibid.* Determining the fund's projected expenses involves "greater effort—but still no policy-making"—because "[t]he FCC's rules implementing the Act dictate the programs' scope" and, "[w]orking within those rules, the Administrator estimates the programs' cost." *Ibid.* The FCC has "a chance to review—and, if needed, to revise—the projections before approving final figures," and, after publicly posting the contribution factor, the FCC has "14 days to make additional changes before the factor is 'deemed approved.'" *Id.* at 693-94.

This Court concluded that "the Commission is, throughout, the final authority" because "[t]he Administrator, following the FCC's rules, makes recommendations," while "the Commission decides whether or how to use them in setting the contribution factor." *Consumers' Research*, 606 U.S. at 694. "[C]ritica[l]" to the Court's holding was the Administrator's "advisory role" and the fact that "the Administrator's projections can have only the legal (or, indeed, practical) effect the Commission decides they should." *Id.* at 693-94. As the Court emphasized, the recommendations of private entities like the Administrator "cannot go into effect without an agency's say-so." *Id.* at 695.

b. The Act's delegation of rulemaking power to the Authority is inconsistent with the principles that a private entity may not engage in "policy-making" and a "private party's recommendations * * * cannot go into effect without an agency's say-so." *Consumers' Research*, 606 U.S. at 693, 695. When the Authority proposes rules to the FTC, it is not "play[ing] an advisory role" or making non-binding "recommendations" that the FTC is free to "decid[e] whether or how to use." *Id.* at 693-94. To the contrary, the Authority exercises its own policymaking discretion when determining which horse medications are permitted or prohibited, the appropriate standards and protocols for racetrack safety, and the appropriate civil sanctions that apply to violations of the Authority's rules. 15 U.S.C. § 3053(a). And when the Authority submits its preferred policy to the FTC in the form of proposed rules, the FTC "shall approve" those rules as binding federal regulations so long as it finds them to be "consistent with" the Act and "applicable rules approved by the Commission." *Id.* § 3053(c)(2).

If the FTC disagrees with an Authority rule as a matter of policy but finds it to be consistent with the Act and prior approved rules, the FTC does not "retai[n] decision-making power" to reject the proposal. *Consumers' Research*, 606 U.S. at 692. Instead, because the Act does not permit the FTC to disapprove the Authority's rules based on "policy disagreements with the Authority," the Act requires the FTC to yield to the private Authority's preferred policy and approve it as law. FTC, *Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority* at 31 (Mar. 27, 2023).[6]

The government's power to disapprove a private entity's proposed regulations on policy grounds is a key feature of all regimes that courts have upheld as constitutional. The Coal Commission in *Adkins* could "disapprov[e]" proposed prices before they took effect. 310 U.S. at 388. The FCC in *Consumers' Research* similarly "retain[ed] decision-making power" and could choose "whether or how to use" the Administrator's "recommendations." 606 U.S. at 692, 694.

In contrast to the regimes approved in those cases, the FTC *cannot* reject the Authority's rules on policy grounds. Yet the Sixth Circuit saw no constitutional problem because the FTC could use its separate rule-making power to modify such rules *after they took effect* to correct any "policy disagreements," which the Sixth Circuit concluded "ensures that the FTC retains

[6] https://tinyurl.com/mr4tnhmk.

ultimate authority over implementation" of the Act. Pet. App. 23a; see 15 U.S.C. § 3053(e). But *Consumers' Research* makes clear that the ability to overrule a private entity's choices after they have already taken legal effect is insufficient. The Constitution limits private entities to offering "recommendations" that "cannot go into effect without an agency's say-so." *Consumers' Research*, 606 U.S. at 695. Because the Authority's rules *can* go into effect over the FTC's policy objection, the FTC is not, "throughout, the final authority." *Id.* at 694.

Moreover, the only way the FTC can exercise its back-end power is to choose to devote its limited time and resources to conducting rulemakings to countermand Authority rules with which it disagrees at the expense of its other regulatory priorities. And even if the FTC decides to pursue notice-and-comment rulemaking to repeal an Authority rule it disagrees with, that is a time-consuming process that typically takes *years* to complete. See Admin. Off. of the U.S. Courts, *About the Rulemaking Process*, https://tinyurl.com/46ndbkf4 ("The federal rulemaking process usually takes two to three years."). By the time the FTC gets around to promulgating its own rule, the Authority's rule—which will have governed in the meantime—may have "engendered serious reliance interests that must be taken into account," such that the FTC would be required to "provide a more detailed justification than what would suffice for a new policy created on a blank state." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Act thus vests the Authority with a first-mover policymaking advantage that further constricts the FTC's discretion to implement its own policy choices.

The Sixth Circuit nevertheless held that the Authority's ability to cause federal horseracing regulations to take legal effect over the FTC's objection did not violate the Constitution because it perceived certain practical ways the FTC might constrain the Authority's exercise of its statutory power. Pet. App. 23a-26a. For example, it stated that the FTC could adopt a rule that all newly approved Authority rules "do not take effect for a certain period of time, thereby giving the FTC time to review rules and prepare preemptive modifications" or simply "decide to hold off on publishing a rule proposed by the Authority until the FTC has promulgated its own modified version of the rule." Pet. App. 24a.

The Act does not permit such end-runs: it gives the FTC the power to "modify the rules of the Authority," 15 U.S.C. § 3053(e), but not the power to modify the "scope of [the Authority's and FTC's] powers and responsibilities under [the Act]," *id.* § 3054(a), including the Act's requirement that the FTC "shall approve" the Authority's proposed rules if consistent with the Act "[n]ot later than 60 days" after they are "published in the Federal Register," *id.* § 3053(c). Nor can an agency "cure an unlawful delegation * * * by adopting in its discretion a limiting construction of the statute." *Whitman*, 531 U.S. at 472. Indeed, under the Sixth Circuit's "logic, *any*" delegation "of rulemaking power [would be] permissible" (whether to governmental or private actors) because Congress or the agency could *always* attempt to "claw back its delegated power" by passing a new law or regulation to regain control of policy-making responsibility. *Texas* v. *Rettig*, 993 F.3d 408, 416 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc).

This regime turns the Constitution's requirements upside-down: under our Constitution, it should take federal action to *make* law, not to *unmake* law that was imposed at the insistence of a private actor over the government's policy objections.

*   *   *

Because the Sixth Circuit once again upheld the Act's unprecedented delegation of federal law-enforcement and rulemaking power to the private Authority, the Court should grant certiorari and reverse.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED

This case is an ideal vehicle for the Court to resolve the question whether the Act's delegation of rulemaking and law-enforcement power to the Authority violates the private non-delegation doctrine.

Petitioners fully preserved and litigated their challenge to the Act's constitutionality under the private non-delegation doctrine in both the district court and the Sixth Circuit. Pet. App. 14a-37a, 103a-113a. The Sixth Circuit upheld the Act's constitutionality in a reasoned, precedential opinion that thoroughly (but erroneously) analyzed the application of the private non-delegation doctrine to the Act. There are no complicating threshold questions that would impede this Court's review of the question presented. And the private non-delegation doctrine issue in this case is outcome-determinative: regardless of whether this Court holds that the Act's delegation of law-enforcement and rulemaking powers to the private Authority is unconstitutional or constitutional, its decision will conclusively resolve Petitioners' challenge to the Act.

The decision below thus cleanly tees up the question whether the Act violates the private non-delegation doctrine. This Court should grant certiorari to resolve that important question and reverse the Sixth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

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