No. 25-1325

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 U.S. Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The **National Horsemen's Benevolent and Protective Association** (the National HBPA) is the leading national trade association for thoroughbred horse owners and trainers. Founded in 1940, today it represents approximately 30,000 members spread across affiliated chapters in 30 states and Canadian provinces.

The National HBPA is lead plaintiff, alongside the State of Texas, the Texas Racing Commission, the Texas Horsemen's Partnership, and a group of Texas-based racetracks, in *National Horsemen's Benevolent & Protective Association v. Black*, the case that has thrice resulted in rulings from the U.S. Court of Appeals for the Fifth Circuit declaring the Horseracing Integrity and Safety Act is facially unconstitutional. 53 F.4th 869 (2022); 107 F.4th 415 (2024), *granted, vacated, and remanded*, 145 S. Ct. 2837 (2025); 2026 U.S. App. LEXIS 16993 (June 11, 2026) (*Black III*).

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[1] No party's counsel authored any part of this brief, and no other person or entity prepared or funded it. *R. 37.*

Notice was provided to all counsel of record via email of the National HBPA's intention to file more than ten days in advance of the filing deadline.

SUMMARY OF ARGUMENT & INTRODUCTION

Last year, this Court clarified for the first time in nearly a century what constitutes a limited, constitutionally permissible delegation from the federal government to a private entity. *FCC v. Consumers' Research*, 606 U.S. 656 (2025).

The Horseracing Integrity and Safety Act calls for this Court now to illuminate the opposite boundary: does a sweeping delegation of substantial federal government power to a private entity transgress the constitutional line?

The answer is a resounding "Yes" when Congress authorizes a private corporation to regulate an entire industry, complete with a private police force, private prosecutor's office, and private system of administrative law, endowed with unsupervised investigative and enforcement powers that previously belonged to state racing agencies.

This unconstitutional act demands this Court's attention. But the timing of such consideration is important: this certiorari petition should be held for review alongside the National HBPA's case, as considering the cases together would give the Court the benefit of both sides of the circuit conflict, a more fully developed evidentiary record, and arguments from both the Fifth and Sixth Circuit's analyses of this vital issue.

ARGUMENT

I. THIS ISSUE MERITS THIS COURT'S ATTENTION.

In our system of government, "checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U. S. 714, 722 (1986). They are also "frequently inconvenient, particularly on the person or the institution being checked and balanced."[2] To get around these annoying checks-and-balances, Congress has employed "novel policy inventions and corresponding structures" that have resulted in a "fifth branch of federal government," with private or quasi-public corporations exercising governmental powers. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 700 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). Such private "delegations threaten liberty and thwart accountability by empowering entities that lack the structural protections the Framers carefully devised." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 701 (2015) (Roberts, C.J., dissenting).

Yet delegation of substantial government power to a private corporation is exactly what Congress did in the Horseracing Integrity and Safety Act, 15 U.S.C. § 3051 *et seq*. It designated a private corporation, the Horseracing Integrity and Safety Authority, Inc., to regulate horseracing nationwide—thereby avoiding the inconveniences of accountability, transparency,

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[2] *State v. Williams*, 198 Wis. 2d 516, 541 (1996) (Bablitch, J., concurring).

due process, and democratic control that would have come with a traditional government agency.

The Act charges the Authority to "implement and enforce the horseracing anti-doping and medication control program and the racetrack safety program" and to "exercise independent and exclusive national authority over the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces." 15 U.S.C. § 3054(a)(2)(A). Indeed, the Act grants the Authority "safety, performance, and anti-doping and medication control authority over covered persons similar to such authority of the State racing commissions" (15 U.S.C. § 3054(a)(2)(B)), and "investigatory powers of the nature and scope exercised by State racing commissions before the program effective date" (*id.* (c)(1)(A)(iii)), making the Act's purpose clear: to strip the states of their historic role regulating horseracing and give the powers of the state regulatory commissions over to one national regulator.

But this regulator—the Authority—is a "private, independent, self-regulatory, nonprofit corporation"—not a government agency. 15 U.S.C. § 3052(a). As a result, the Authority does not have to respect any of the "the structural protections the Framers carefully devised," like the warrants clause, the due process clause, or the right to counsel. *See D. L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (cannot "plead the Fifth" before an investigation by a private regulator); *United States v. Shvarts*, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000) (same, as to Fourth Amendment). Nor are the Authority's leaders subject to democratic accountability via

Senate confirmation or Congress's power of the purse via annual appropriations.

The Fifth Circuit held this contrivance unconstitutional. Under the Act, the 30,000 members of the National HBPA and its state and local affiliates are subject to searches of their private property without warrants and blood draws of their horses without consent—all by order of a private entity. If the Federal Trade Commission thought that a group of horsemen were engaged in an antitrust conspiracy, the FTC would need to provide sufficient evidence to convince a neutral Article III magistrate to issue a warrant before it could search a horseman's office or barn. *See generally Camara v. Municipal Court*, 387 U.S. 523 (1967). Not so the Horseracing Authority. *See* 15 U.S.C. § 3054(h).

The Authority has the power to search and inspect "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," to issue subpoenas, to compel truthful and complete answers to inquiries, to undertake urine and blood tests without advance notice, and to seize evidence.[3] *See Black III*, 2026 U.S. App.

[3] 15 U.S.C. § 3054(c)(1)(A)(i) (search and inspect); 15 U.S.C. § 3054(c)(1)(A)(ii) (subpoena); 15 U.S.C. §§ 3054(c)(3)(B), 3057(a)(2)(F)-(I) (compel answers); 15 U.S.C. § 3055(c)(4)(C) (blood and urine tests); Auth. R. §§ 3040(a)(2)(iii)(D), 5730(b)(2)-(3) (seize evidence).

LEXIS 16993, *25 (Authority "can investigate potential violations, issue subpoenas, conduct searches, levy fines, and seek injunctions").

After the Authority's private police department has completed its investigation, the matter is referred to the Authority's private prosecutions department. Just being charged with certain violations results in automatic suspensions before any federal magistrate has looked at a case. *Compare* Auth. R. §§ 3229, 3247 *with Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.,* 121 F.4th 1314, 1326-28 (D.C. Cir. 2024) (finding suspensions by a private regulator prior to review by a government agency unconstitutional).

Then the private prosecutor brings a case before the Authority's private administrative law judges. Auth. R. §§ 7020-7430. The Authority's judges hold administrative hearings, weigh evidence, decide guilt, and issue civil penalties.[4]

If it prefers, the Authority's prosecutors may go outside their normal enforcement system and instead initiate civil actions in federal district court to enforce the Act and rules, including against *potential* violations.[5]

"[B]y the plain text of the statute, the FTC cannot impede upon the power granted to the Authority, nor can the FTC compel Authority enforcement action. In

[4] 15 U.S.C. §§ 3055(c)(4)(B), 3056(b)(7)-(9), 3057(c).

[5] 15 U.S.C. §§ 3054(i), 3057 (sanctions), § 3054(j) (civil actions).

this fashion, the Authority does not 'function subordinately' to an agency with 'authority and surveillance' over it, in violation of the private nondelegation doctrine." *Walmsley v. FTC*, 117 F.4th 1032, 1042 (8th Cir. 2024) (Gruender, J., dissenting in part), *granted, vacated, and remanded*, 145 S.Ct. 2870 (2025). *Accord Black III,* 2026 U.S. App. LEXIS 16993, *6 ("The statute empowers the Authority to investigate, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the FTC's say-so.").

This scheme violates Article II, which vests "[t]he executive Power" in the President and his officers, not private corporations. U.S. Const. art. II, § 1, cl. 1.

II. THE COURT SHOULD HOLD THIS CASE UNTIL NHBPA V. BLACK REACHES ITS DOCKET.

When considering questions of certiorari, this Court is best served by having a full record in front of it. In the case of a near-simultaneous circuit split, that means having both sides of the split present for the Court's consideration.

There are four reasons why joint consideration would assist the Court here.

First, this Court traditionally grants certiorari in a case when a lower court enjoins an act of Congress as facially unconstitutional, as the Fifth Circuit has now done in the Horsemen's case, not upholds it as the Sixth Circuit did in this case. *Cnty. of Maricopa v. Lopez-Valenzuela*, 575 U.S. 1044, 1045 (2015) (Thomas, J., dissenting from denial of certiorari) (citing as an example *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43 (2015)).

Second, this Court often benefits from hearing the perspective of national trade associations, like the National HBPA, as the industry participants directly regulated by the Act. *See, e.g., Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80 (2020); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015); *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43 (2015); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 540 (2012). The National HBPA is the leading national trade association for thoroughbred horse trainers and owners in the racing industry. *See Jordan v. Horsemen's Benevolent & Protective Asso.*, 448 A.2d 462, 465 (N.J. 1982) ("a national non-profit organization which serves both as a charity aiding the racehorse industry and as a representative of owners, trainers, and other personnel in dealings with racetracks.").

Third, the National HBPA's case arises following a bench trial, with a complete record of exhibits. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 672 F. Supp. 3d 220, 225 (N.D.Tex. 2023). The Oklahoma case, by contrast, arises from the District Court's grant of a motion to dismiss pursuant to F.R.C.P. 12(b)(6). *Oklahoma v. United States*, 2022 U.S. Dist. LEXIS 99448 (E.D.Ky. June 3, 2022). The Horsemen's record of exhibits may assist the Court in its consideration of how the Authority actually exercises the powers Congress conveyed, including topics like the Authority's extensive use of guidance documents to rewrite administrative rules previously promulgated by the FTC.

Fourth and finally, the *Oklahoma* case does not present certain originalist or categorical arguments regarding the private nondelegation doctrine. Rather, those parties took as a given the extant precedential framework based on *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381 (1940). *See* Petition Appendix 19a & 59a ("Whether subordination always suffices to withstand a challenge raises complex separation of powers questions. Simplifying matters for today, if not for a future day, the parties accept this framing of the appeal."). *Accord id*. at 78a (the parties did not provide "briefing with respect to founding-era or contemporary analogs showing the role private entities may, and may not, play in law enforcement." The parties did not litigate the case "as a categorical Article II inquiry or as a question of historical meaning.").

The National HBPA, by contrast, has consistently argued that founding-era analogues show that an approach based on the type of power or function delegated, rather than the amount of supervision exercised, is the key, relying on *Pittston Co. v. United States*, 368 F.3d 385, 398 (4th Cir. 2004). *See Wellness Int'l Network*, 575 U.S. at 700-01 (Roberts, C.J., dissenting) ("It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions."); *Alpine Securities Corp.*, 121 F.4th at 1338 (Walker, J., concurring/dissenting). *Accord* Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 Harv. J.L. & Pub. Pol'y 837, 925 (2022); Aditya Bamzai, *Tenure of Office and the Treasury*, 87 Geo. Wash. L. Rev. 1299, 1346 (2019). In this framework, the Court should consider whether certain functions are proprietary in nature, and thus delegable, while others are sovereign in nature and thus must remain in the hands of the vested branch. Bamzai, 87 Geo. Wash. L. Rev. at 1386 (The founding-era Bank of the United States controversy demonstrates that "past practice and constitutional principle necessarily require a distinction between sovereign functions, which cannot be delegated to private actors, and proprietary functions, which may.").

The Court would benefit from a presentation of this originalist history alongside existing precedent. *See* National HBPA's Opening Brief, 5th Cir. ECF Dkt. 76 at 56-60 ("HISA is directly contrary to the historical understanding of private delegation. Ultimately the corporation is named the Horseracing Integrity and Safety *Authority*, and not Advisors or Administrators, because its purpose is not to advise the FTC or perform ministerial tasks. Its purpose is to exercise sovereign national authority. . .").[6]

Now that the Fifth Circuit has ruled, the National HBPA and its coplaintiffs will act expeditiously as far as is within their power to bring their case before the Court promptly to facilitate joint consideration.

CONCLUSION

Congress recognized the Horseracing Integrity and Safety Authority as a "private, independent, self-regulatory, nonprofit corporation" and charged it with "developing and implementing a horseracing anti-doping and medication control program and a racetrack safety

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[6] Separate from the National HBPA, the Gulf Coast Racing Plaintiffs in that case have asserted an additional challenge to the act based on the Appointments Clause, U.S. Const. Art. II, Sec. 2, Cl. 2, which the Court can also decide whether to consider on appeal.

program for covered horses, covered persons, and covered horseraces." 15 U.S.C. §3052(a). It is, in its own self-description just one year ago, "the national regulatory body overseeing safety and integrity in Thoroughbred racing."[7]

Whether Congress can authorize a private corporation to be the national regulatory body overseeing an entire industry is an incredibly important question to the 30,000 horsemen of the National HBPA and the 312,000 people working in the horseracing industry at large.[8]

Whether Congress can authorize a private corporation to exercise investigatory and enforcement powers equivalent to a government agency is also an important question for every American because it goes to the heart of whether democratic and accountable government remains fundamental to our constitutional order, or whether these time-honored concepts are no longer necessary in the modern administrative state.

Considering both cases together would give the Court the benefit of a live circuit conflict, a fuller factual record, and a broader presentation of constitutional arguments. Holding this petition pending the

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[7] *HISA issues statement on Supreme Court orders,* Horseracing Integrity and Safety Authority (June 30, 2025), https://hisaus.org/news/hisa-issues-statement-on-supreme-court-orders.

[8] *2023 Economic Impact Study of the United States Horse Industry*, American Horse Council, https://horsecouncil.org/economic-impact-study/.

National HBPA v. Black filings presents the best avenue to address these questions when the Court has both matters properly before it.

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