No. 25-1325

In The Supreme Court of the United States

OKLAHOMA, ET AL.

Petitioners,

v.

UNITED STATES, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* STANDARDBRED OWNERS ASSOCIATION OF NEW YORK AND UNITED STATES REPRESENTATIVE CLAY HIGGINS IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Standardbred Owners Association of New York and United States Representative Clay Higgins respectfully submit this brief of *amici curiae* in support of the Petitioners.[1]

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici file their Brief from different vantage points, but with a common concern: preventing unconstitutional executive activity – including extensive and impactful enforcement activity – from being taken by an unaccountable private actor.

The Standardbred Owners Association of New York ("SOANY") is a non-profit organization based in Yonkers, New York, that, among other things, represents the interests of Standardbred horses engaged in the sport of harness racing at Yonkers Raceway in Yonkers, New York, as well as their owners, trainers, drivers and grooms. Established in 1951, the SOANY represents more than 900 members and provides a range of benefits to

[1] In accordance with Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief, either in whole or in part, and no counsel or party aside from the *amici*, their members or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici* state that counsel of record for all parties received timely notice of *amici*'s intent to file this brief.

qualified trainers, drivers and grooms, including medical insurance and pension benefits.

The SOANY and its members have a substantial interest with respect to the issue of the constitutionality of the Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051-3060 ("HISA" or the "Act"). At present, the Act covers Thoroughbred horses and Thoroughbred horseracing (15 U.S.C. § 3051(4)). However, the Act includes a provision enabling the Horseracing Integrity and Safety Authority (the "Authority") to expand its jurisdiction to include other breeds of horses, including Standardbred horses,[2] on a state-by-state basis at the election of a State racing commission or breed governing organization. *Id.*[3]

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[2] Standardbred horses differ physically from Thoroughbred horses in several material respects. Whereas Thoroughbred horses are known for flat races, galloping, with a jockey mounted on a saddle, Standardbred horses are uniquely suited to harness racing, trotting or pacing, and driven by a "driver" in a two-wheeled cart, known as a "sulky." The SOANY believes that many of the rules adopted and implemented under HISA by the private Authority – whether appropriate for thoroughbreds or not – would be very detrimental to the harness racing industry. More fundamentally, however, the types of enforcement actions routinely taken by the private Authority without any FTC involvement would subject the SOANY's members to quintessentially unconstitutional punishment at the hands of that private Authority.

[3] In the event that the Authority's jurisdiction is so expanded, the detrimental impact on Standardbred horses and the harness racing industry would be substantial. For example – as demonstrated by the fateful HISA experience to date – costs, fees

Representative Clay Higgins is the United States Representative from the Third District of Louisiana. Representative Higgins serves on the House of Representatives Armed Services Committee and Oversight & Government Reform Committee. Representative Higgins has opposed the Act, and in the current Congress, he has introduced H.R. 3378, 119th Cong., § 1 (2025), a bill to establish the Racehorse Health and Safety Act of 2025.[4] Among other things the Racehorse Health and Safety Act would repeal HISA and replace it with a constitutionally sound model of regulation that authorizes States to enter into an interstate compact

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and fines assessed by the Authority would likely be so high as to drive participants out of the industry. This would lead to a reduction in breeding and racing and would otherwise substantially diminish an industry that directly or indirectly employs tens of thousands of Americans. Furthermore, a private entity exercising inadequately supervised and effectively unchecked enforcement power – which includes the ability to issue lifetime bans – could have devasting consequences for harness racing participants, including the SOANY members. Moreover, misapplication of medication rules from one breed to another could have a harmful impact on the horses, the true stars of our sport, by denying them therapeutic medications proven to be important to their health and well-being. For all of these reasons, the SOANY, along with similarly situated harness racing associations, has an interest in ensuring that any regulations covering its members, and the horses they care for, are constitutionally sound, and are not written, implemented and enforced by an unelected and unaccountable private entity.

[4] The bill is co-sponsored by Representatives Tom Cole (R-OK) and Donald Davis (D-NC). A companion bill, S. 1770, 119th Cong., § 1 (2025), has been introduced in the Senate by Senator Tom Cotton (R-AR).

to develop and enforce scientific medication control rules and racetrack safety rules.

As a Member of Congress sworn to uphold the Constitution, Representative Higgins has a unique interest in this Court's clarification of the Constitutional status of the regulatory model embodied in the Act – the granting of unprecedented power to a private Authority to take significant enforcement actions against his constituents and the animals under their care. Supreme Court clarification of the current Circuit split would greatly benefit legislators such as Representative Higgins as he performs his legislative work. Judicial guidance and clarification as to the parameters of the private non-delegation doctrine would potentially correct the constitutional missteps embedded in the Act and also allow legislators to avoid such missteps in their future legislative efforts. Indeed, three Members of the Court have specifically recognized the "need to clarify the private non-delegation doctrine." *Texas v. Comm'r*, 142 S. Ct. 1308, 1308 (2022) (statement of Alito, J., joined by Thomas and Gorsuch, JJ.).

Amici jointly and respectfully submit that the HISA regulatory scheme represents Congress going a wayward step further than it has gone before in delegating legislative and executive powers to a private authority. The Authority, whose members are not elected by – or otherwise accountable to – the people in any way, and who, in many cases, are in fact "private persons whose interests may be and often are adverse to the interests of others in the same business," is therefore Constitutionally precluded from taking executive enforcement action. *See Carter* *v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Indeed, this is "legislative delegation in its most obnoxious form." *Id.*

SUMMARY OF THE ARGUMENT

The Petition in this matter has been filed by a variety of interested parties, ranging from three sovereign States, to State racing commissions, to a number of disparate participants in the horse racing industry concerned about the profound and harmful impact that the Act will have on that industry. The substantive concerns articulated by the Petitioners in the proceedings below and in the Petition highlight the critical importance of ensuring that the Act fully adheres to fundamental constitutional principles.

In a decision filed earlier this month on June 11, 2026, the Fifth Circuit Court of Appeals – for the third time – declared that HISA was unconstitutional and that the statutory grant of executive powers to the private Authority violates the private non-delegation doctrine. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, No. 23-10520, 2026 U.S. App. LEXIS 16993 (5th Cir. June 11, 2026) (*Black III*). This ruling, which is contrary to the Sixth Circuit ruling that is the subject of the Petition, reaffirms the split in the Circuits which makes review of this matter by this Court vitally important.

The Fifth Circuit analyzed the statutory language and determined that the distinct allocation of a series of specific and imposing enforcement powers to the Authority – powers which can be freely exercised before any action is taken by the Federal

Trade Commission ("FTC") – violated the constitutional mandate that the exercise of such powers must be confined to accountable government actors, not to private actors who lack that required accountability.

The SOANY, representing the very individuals who would be most impacted by this unconstitutional diversion of power to the Authority,[5] can attest from the perspective of horsemen as to the significant and harmful impact of the specific powers now being exercised by the Authority which concerned the Fifth Circuit and led to its holding regarding the unconstitutionality of the statutory HISA enforcement construct:

(1) It is the Authority – *with no involvement by FTC* – which can decide which horsemen will be investigated;

(2) It is the Authority – *with no involvement by the FTC* – which can decide which horsemen to whom subpoenas will be issued;[6]

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[5] Again, while Standardbred horses are not currently covered by HISA, that day of reckoning could arrive unless HISA is banished to the dust bin of unconstitutional legislation. At any rate, the factual and legal arguments advanced by the SOANY involve the very same issues already having devastating impacts on the SOANY members' Thoroughbred counterparts.

[6] As discussed below, rules recently enacted by the Authority purporting to require advance FTC approval of such investigative acts are not permitted by the Act. *Whitman v. Am.*

(3) It is the Authority – *with no involvement by the* FTC – which can make the initial adjudication as to the guilt of the targeted horsemen;

(4) It is the Authority – *with no involvement by the FTC* – which can impose sanctions, including substantial fines, and banishment from the sport for horsemen who in turn lose the horses under their care, thereby putting them out of business. *These punishments go into effect without any action by the FTC*; and

(5) It is the Authority – *not the FTC* – which under the HISA scheme is specifically granted the statutory power to bring a civil enforcement proceeding against the horsemen in federal court – quintessential executive action.

This panoply of enforcement powers delegated to a private actor cannot be squared with constitutional dictates. Under HISA, all of this enforcement activity can precede any involvement by the FTC. Any after the fact attempt by the FTC to address the harm already caused by the private Authority's enforcement actions cannot undo the fact that the harm should not have been inflicted on real

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Truck Ass'ns, 531 U.S. 457, 472 (2001) ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute").

people – and animals – by a private actor in the first place. Indeed, the specific design of the Act creates a world in which, from the perspective of the horsemen – fined, stripped of the horses they care for, potentially banished for life and saddled with mounting and unsustainable legal fees – the race is already over before the FTC enters the paddock. Try telling the impacted horsemen that the $77 million Authority behemoth is subordinate to the FTC.[7]

This is patently unacceptable, and it is important to confirm this through grant of the Petition for a Writ of Certiorari and a final ruling by this Court that HISA is indeed an unconstitutional delegation of enforcement powers to the private Authority which is freely wielding those powers against the horsemen without the accountability mandated by the Constitution.

Similarly, *amici* respectfully submit that the idea that the FTC can "fix" on an as-you-go basis defects in the Act is an improper and wholly inadequate attempt to fix what fundamentally needs to be fixed: the HISA law itself. To the extent that the Authority is imposing rules which the FTC may not approve of as an initial matter – instead deferring to the Authority's creations even if the FTC would have different policy views and therefore would have

[7] The Authority's assessments for fiscal year 2026 total $77,171,777. *See* Horseracing Integrity and Safety Authority, List of 2026 Assessments by Track, https://bphisaweb.wpengine.com/wp-content/uploads/2023/10/2024-Assessments-by-Track.pdf (last visited June 25, 2026).

established different rules – *ad hoc* FTC rule changes should not be the corrective path taken.

This Court's recent decision in *FCC v. Consumers' Research*, 606 U.S. 656 (2025), stands for the proposition that where a private entity's role is purely advisory and its actions do not take effect without any actual governmental imprimatur, there is no private non-delegation problem to address. That is simply not the case with HISA. The Authority's actions rain down with force on the regulated individuals before the FTC can supply an after-the-fact constitutional umbrella. HISA cannot withstand constitutional scrutiny.

ARGUMENT

I. The Court Should Grant the Petition Because the Act Requires An Unelected and Unaccountable Private Entity to Enforce Federal Law Without Subordination to the FTC

Grant of the Petition in this matter would allow this Court to address the continuing split in the Circuits with respect to the constitutionality of HISA. As pointed out in the Petition, five judges (three from the Sixth Circuit and two from the Eight Circuit) have declared that HISA is constitutional, while four judges (three from the Fifth Circuit and one from the Eighth Circuit) have determined that it is not.

As discussed below, *amici* believe that HISA, in sharp contradistinction to the statute at play in *Consumers' Research*, is fatally flawed and cannot withstand constitutional scrutiny. The Authority is not subordinate to the FTC and does not act in a purely advisory role. Rather the Authority acts independently of the FTC to create rules with which the FTC may not agree – rules which may not be remedied by the FTC until after the private Authority's rules have already negatively impacted industry members – and that same Authority is statutorily authorized to bring executive enforcement actions – including meting out crippling fines and lengthy suspensions and bringing legal proceedings without the approval of the FTC. No *ex post facto* tinkering of the unaccountable Authority's unconstitutional activities can remedy HISA's legal infirmities.

a. The Act Grants Exclusive Enforcement Authority to a Private Entity

In 2020, Congress passed HISA, which granted sweeping powers to the Authority, a private, non-profit corporation, incorporated in Delaware prior to the passage of the Act, to develop, implement and enforce rules to govern a horseracing anti-doping and medication control program and a racetrack safety program for Thoroughbred horses. 15 U.S.C. § 3052(a). Under the Act, the FTC is nominally responsible for overseeing the Authority. 15 U.S.C. § 3053.

However, the oversight provided for in the Act is limited in critical ways, and the FTC does not exercise the "pervasive surveillance and authority" over the Authority necessary to avoid a violation of the private nondelegation doctrine. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). HISA's structural infirmities cede powers to the Authority such that the Authority is not "limited to an advisory or subordinate role in the regulatory process." *Ass'n of Am.R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013), *vacated and remanded on other grounds*, 575 U.S. 43 (2015). Critically, the Authority – not the FTC – remains firmly in the driver's seat when it comes to enforcement and the sweeping punitive actions taken by the private entity against the affected members of the industry.

The Act grants to the FTC and to the Authority (and, separately, to the anti-doping and medication control enforcement agency that the Authority is required to contract with) the right to exercise independent and exclusive national authority over the designated areas, "*each within the scope of their powers and responsibilities under this Act.*" 15 U.S.C. § 3054(a) (emphasis added). The Act goes on to provide, among other things, that the Authority alone "shall" develop uniform procedures and rules, for among other things, access to offices, facilities, other places of business, books and records and personal property of covered horses, issuance and enforcement of subpoenas and subpoenas duces tecum, and other investigatory powers of the nature and scope previously exercised by state racing commissions. 15

U.S.C. § 3054(c)(1)(A).[8] In addition, it provides that the Authority "shall" have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction (15 U.S.C. § 3054(h)), and that it "shall" develop a list of civil penalties with respect to enforcement of its rules (15 U.S.C. § 3054(i)).

HISA further provides the private Authority with exclusive authority to describe rule violations, including, among other things, strict liability for trainers for certain violations (15 U.S.C. § 3057(a)), and to impose civil sanctions for violations of those rules (15 U.S.C. § 3057(d)), which may include lifetime bans from horseracing, disgorgement of purses, and monetary fines and penalties – an onslaught of actions that put the horsemen out of business. Finally, in addition to civil sanctions, it gives the Authority *exclusive* authority to commence a civil action against covered persons. 15 U.S.C. § 3054(j).

These powers are fundamentally executive in nature. *See*, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 138, 140 (1976) (per curiam) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President … that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"); *Collins v. Yellen*, 594 U.S. 220, 254 (2021) (authorization to issue subpoenas is an exercise of executive power). As Justice Alito has previously noted under Article I and Article II of the

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[8] Those procedures and rules are thereafter subject to approval by the FTC subject to the lenient consistency review standard. 15 U.S.C. §§ 3053(c)(2), 3054(c)(2).

Constitution, "[p]rivate entities are not vested with 'legislative Powers.' … Nor are they vested with 'executive Power'" *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) (internal citations omitted). Indeed, "it raises 'difficult and fundamental questions' about 'the delegation of Executive power' when Congress authorizes citizen suits." *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

Under HISA, the Authority does not merely provide "advice and assistance," and the FTC does not have the power to provide "pervasive surveillance and authority." *See Consumers' Research*, 606 U.S. at 692-95; *Adkins*, 310 U.S. at 388. Under these facts, HISA runs afoul of the private nondelegation doctrine and cannot withstand constitutional scrutiny.

i. The Authority May Not Use the Fig Leaf of Regulation to Erase the Statute's Structural Flaws

Recently, the Authority proposed, and subsequently adopted, rules purporting to require the Authority to request and obtain FTC approval before issuing a subpoena pursuant to its authority under 15 U.S.C. § 3054(h) (Horseracing Integrity and Safety Authority Enforcement Rule 8400(e), and before initiating a civil action pursuant to its exclusive authority under 15 U.S.C. § 3054(j) (Horseracing Integrity and Safety Authority Enforcement Rule 8420); *See also* 90 Fed. Reg. 43,431, 43,444-45. In both cases, such requests are to be "deemed approved" by the FTC if not acted upon within 20 days. *Id.*

However, as noted above, the Act grants to the FTC and to the Authority the right to exercise independent and exclusive national authority over the designated areas, "*each within the scope of their powers and responsibilities under this Act.*" 15 U.S.C. § 3054(a) (emphasis added). The Act then goes on to provide to the Authority, and not to the FTC, enforcement powers, including the powers to issue subpoenas, initiate civil actions, and numerous additional powers identified above. The regulations proposed and adopted here can not override the statute. Whether a statute delegates power "is a question for the courts, and an agency's voluntary self-denial has no bearing on the answer." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-73 (2001) ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute"). *See also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6–7 (2000) ("Where a statute names the parties granted the right to invoke its provisions, such parties only may act.") (citing 2A N. Singer, Sutherland on Statutory Construction § 47.23, p. 217 (5th ed. 1992)).

ii. Harms to *Amici*'s Constituents Cannot Be Remedied by Belated Relief from the FTC

In holding that the Act's provisions of enforcement powers to the Authority did not violate the private nondelegation doctrine (both before and after remand) the Sixth Circuit argued that the Authority was subordinate to the FTC (at least after the December 2022 amendment to the statute) because the FTC *could* implement certain prophylactic procedural rules to prevent the temporary implementation of Authority rules with which the FTC disagreed. *Oklahoma, et al. v. United States, et al.,* 62 F.4th 221, 230-32 (6th Cir. 2023) (*Oklahoma I*); *Oklahoma, et al. v. United States, et al.,* 163 F.4th 294, 312 (6th Cir. 2025) (*Oklahoma II*). In addition, the Sixth Circuit pointed to 15 U.S.C. § 3058, which permits aggrieved persons to appeal Authority decisions to an administrative law judge and subsequently to the FTC. *Oklahoma I*, 62 F.4th at 231; *Oklahoma II*, 163 F.4th at 311.

However, the Act provides that there is no automatic stay accompanying such review. 15 U.S.C. § 3058(d) (review by an administrative law judge or by the FTC "shall not operate as a stay of a final civil sanction of the Authority" unless ordered otherwise.) Moreover, the FTC can not implement such a stay until after a sanctioned party has exhausted its appeals internally with the Authority's Board of Directors. 90 Fed. Reg. 43,431 (Sept. 9, 2025); Horseracing Integrity and Safety Authority Enforcement Rules 8350, 8360 and 8370.

As such, the Sixth Circuit's position disregards the present reality. It is of little moment to the people (and animals) adversely impacted in the here and now, perhaps irreparably, by an Authority regulation or action that the FTC *might* undo at some indeterminate point in the future. Simply put, the horse will have left the barn before speculated belated action by the FTC, and the damage to both equine participants (who may be denied commonsense and critical therapeutic medications) and human participants (who may suffer crippling financial sanctions and potential banishment from their livelihoods) will have been irreparably harmed by unelected non-governmental officials.

Nearly half a century ago, this Court recognized the devastating impact that these fines and suspensions can have on the horsemen. *Barry v. Barchi*, 443 U.S. 55, 66 (1979) ([T]he consequences to a trainer of even a brief suspension can be severe … [I]t is as likely as not that [the trainer] and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they have suffered the full penalty imposed."). Worse here, the crippling sanctions imposed by the private Authority in advance of any government action by the FTC are not just devastating. They are constitutionally odious.

In addition, as the Petitioners point out, taken to its logical extreme, this amounts to an argument that there is no such thing as improper delegation, private or otherwise, because Congress can always pass a law overruling regulations issued by a private authority or executive agency. *See Texas v. Rettig*, 993 F.3d 408, 416-17 (5th Cir. 2021) (Ho, J., dissenting from denial of reheating *en banc*) (an agency's ability to issue a new rule does not cure a non-delegation problem because, this "would render the nondelegation doctrine a dead letter. We might as well say that Congress can never violate the nondelegation doctrine, because the American people can always petition Congress to pass a new law and claw back its lawmaking power from an agency.").

The HISA law itself is the problem and it is the HISA law that must be addressed by Congress – not the FTC. Congressmen Higgins has offered the Racehorse Health and Safety Act of 2025 as the legislative fix, which would provide for appropriate regulation without the unconstitutional elements afflicting HISA.

b. Amendments to the Act Do Not Cure the Nondelegation Problem With Respect to Rulemaking

In December 2022, shortly after the Fifth Circuit had ruled in *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022) (*Black I*) that the Act was facially unconstitutional, Congress purported to "fix" the problem by replacing a then-existing provision that authorized the FTC to adopt interim final rules, when necessary for the health and safety of covered horses or the integrity of covered horseraces and wagering on those horseraces, with a provision enabling the FTC to "… abrogate, add to, and modify the rules of the Authority promulgated in accordance with this Act as the Commission finds necessary or appropriate …" 15 U.S.C. § 3053(e).

However, notwithstanding the fact that the Act's grant of rulemaking power to the Authority is not the subject of a split in the Circuit Courts, this limited and actually minimalist amendment buried in a hastily passed omnibus bill did not solve the myriad constitutional issues that infect HISA. Indeed, even after the amendment, the Authority, an unelected body, remains the primary driving force behind the rules. Once submitted by the Authority, the FTC has no ability to reject a proposed rule, even if the FTC disagrees as a matter of policy, so long as the proposed rule numbers among the nearly infinite variety of potential rules on a given subject that can be considered "consistent" with the Act. *See Black I*, 53 F.4th at 885 (saying that a rule is or is not "consistent" with "open-ended" principles "says next to nothing. Such high-altitude oversight … 'largely gives the Authority the power to 'fill up the details' of the Act in places with less specific directives,' and '[f]illing up the details has long been recognized as the very business of regulating.) (citing *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 596 F.Supp.3d 691, (N.D. Tex. 2022); *Gundy v. U.S.*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

c. *Consumers' Research* Demonstrates Why the Delegation in This Case is Unconstitutional

This Court's recent decision in *Consumers' Research* confirms the continuing potency of the private nondelegation doctrine as a limitation on the government's ability to delegate core legislative and executive functions to private entities, and it further demonstrates why the delegation in this case is unconstitutional.

In *Consumers' Research,* the Court held, *inter alia*, that the Telecommunications Act of 1996 did not run afoul of the private nondelegation doctrine in establishing a scheme whereby a private corporation, the Universal Service Administrative Company ("USAC"), generated certain financial projections that the FCC would in turn use to calculate contributions from telecommunications providers to a Universal Service Fund. *Consumers' Research*, 606 U.S. at 692-95.

While the structure at issue in *Consumers' Research* was found to be constitutional, this was because the USAC was relegated to a merely "advisory role" (akin to the coal boards in *Adkins*), with the FCC alone having "decision-making authority." *Consumers' Research*, 606 U.S. at 692-93.

HISA, however, goes well beyond the Telecommunications Act of 1996 in the breadth of its delegation to a private corporation. As the Fifth Circuit has recently noted, the Act empowers the Authority to "launch numerous intrusive enforcement actions — investigations, subpoenas, searches, charges, adjudications — all without any agency oversight." *Black III*, 2026 U.S. App. LEXIS 16993, at *40-41. The USAC's projections, on the other hand, "can have only the legal (or, indeed, practical) effect the Commission decides they should." *Consumers' Research*, 606 U.S. at 694.

With HISA, unlike with the USAC, the scope and practical effect of the Authority's unaccountable enforcement is enormous. As noted above, it would subject the SOANY's constituents – including owners, trainers, drivers and grooms – to onerous fines and banishments, having to divest themselves of the horses the care for, and saddled with unsustainable legal expenses, suffering irreparably before the FTC ever enters the picture.

Moreover, the USAC is subjected to FCC oversight and control to a far greater extent than the Authority is to the FTC. First, unlike the Authority, the USAC's board is appointed by the FCC, and its budget is approved by the FCC. *Consumers' Research*, 606 U.S. at 660. The Authority appoints its own board and establishes its own budget. 15 U.S.C. § 3052(b) and (d). Second, the USAC engages in no policy-making, *Consumers' Research*, 606 U.S. at 693, whereas the Authority engages in rulemaking in the first instance. 15 U.S.C. § 3053(a). Finally, unlike the FTC under HISA, the FCC has the opportunity to review, and if needed to revise, the USAC's projections *before* approving them. *Consumers' Research*, 606 U.S. at 693-94. While the FTC has the power to abrogate, add to or modify the rules of the Authority it *must* approve of a proposed rule of the Authority in the first instance if the proposed rule is consistent with the Act and applicable FCC rules. 15 U.S.C. § 3053(c)(2).

In short, *Consumers' Research*, at least with respect to the issue of private nondelegation, presented the Court with a fairly straightforward example of a private entity providing mere "advice and assistance" to a federal agency. *See Adkins*, 310 U.S. at 388. This Act, on the other hand, presents the Court with an egregious example of improper delegation: with a private entity given far-reaching and, in many ways unprecedented, rulemaking and enforcement authority, and with a government agency given far less authority and surveillance. *Consumers' Research* confirms the unconstitutional flaws inherent in HISA.

II. This Case is the Appropriate Vehicle to Address Private Nondelegation

a. The Fifth Circuit Has Recently Ruled on This Issue, Reaffirming the Circuit Split

As noted above, shortly after the Petition for a Writ of Certiorari was docketed in the instant case, the Fifth Circuit issued a decision, dated June 11, 2026, again finding that the Act violates the private nondelegation doctrine with respect to the enforcement powers arrogated to the Authority. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Black III)*, No. 23-10520, 2026 U.S. App. LEXIS 16993 (5th Cir. June 11, 2026). *Black III* reconfirms the circuit split that existed before the Court vacated and remanded the decisions of the Fifth, Sixth and Eighth Circuits addressing the constitutionality of the

Act for further consideration in light of the Court's decision in *Consumers' Research*.[9]

Both the Fifth Circuit in *Black III* and the Sixth Circuit in this case have addressed *Consumers' Research* and neither court has materially changed its position. This case now presents a prime opportunity for the Court to address the doctrine of private nondelegation in the context of a statute that delegates an unprecedented combination of legislative and executive authority to a private corporation that is not sufficiently subordinate to a governmental agency.

b. A Facial Challenge is Appropriate to Address Both Enforcement and Rulemaking Concerns

In its decision below, the Sixth Circuit held that, at least in the context of a facial challenge, as opposed to an as-applied challenge, it was not in a position to find that all of the enforcement powers delegated to the Authority to be unconstitutional. *Oklahoma II*, 163 F.4th at 314-315.

However, Petitioners on this appeal are not raising a claim, for example, concerning a singular abuse of a covered person's Fourth or Fifth Amendment rights. Rather, the point is that HISA is structurally flawed, providing a private entity with unconstitutionally broad powers to make the rules

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[9] *Horseracing Integrity & Safety Auth., Inc. v. Nat'l Horsemen's Benevolent & Protective Ass'n*, 145 S. Ct. 2837 (2025); *Oklahoma v. United States*, 145 S. Ct. 2836 (2025); *Walmsley v. FTC*, 145 S. Ct. 2870 (2025).

and enforce them, without essential oversight from the FTC. As the Fifth Circuit held, "When a regulated entity raises 'a purely legal challenge' like this one, 'it is unnecessary to wait for the Regulation to be applied in order to determine its legality.' *Black III*, 2026 U.S. App. LEXIS 16993, at *19-20 (internal citations omitted). *See also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014) ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate the law.")

c. This Act Goes Well Beyond the Maloney Act In Delegating Rulemaking and Enforcement to an Unaccountable Private Entity

The Sixth Circuit also analogized to the Maloney Act, a 1938 amendment to the Securities and Exchange Act of 1934 (15 U.S.C. §§ 78a *et seq*.), which provided for the creation of self-regulatory organizations ("SROs") such as the Financial Industry Regulatory Authority ("FINRA").

HISA and the Maloney Act share certain superficial similarities with respect to the relationship between the private authority and its government counterpart (in FINRA's case, the Securities and Exchange Commission ("SEC")). For example, following the 2022 amendment to HISA, the FTC may "abrogate, add to, and modify" the rules of the Authority (15 U.S.C. § 3053(e)), much as the SEC may "abrogate, add to, and delete from" the rules of an SRO such as FINRA. 15 U.S.C. § 78s(b)(2)(C), (c). But these similarities are only skin deep.

With respect to enforcement, in particular, the Securities and Exchange Act provides tools to the SEC to exercise authority and surveillance over FINRA that HISA does not provide to the FTC. For example, as the Fifth Circuit has pointed out, the SEC may remove FINRA's directors, and even strip FINRA of its status as an SRO. 15 U.S.C. § 78s(h)(1) and (4); *Black III*, 2026 U.S. App. LEXIS 16993, at *34-36. The SEC also has independent investigative powers that HISA grants exclusively to the Authority, and not to the FTC. *See*, *e.g.*, 15 U.S.C. § 78u(a)(1) (the independent power to investigate potential violations of, *inter alia*, the rules of a national securities exchange or registered securities association); 15 U.S.C. § 78u(c), (d), (d)(4) (the power to seek criminal sanctions, injunctive relief, or disgorgement); 15 U.S.C. §§ 77s(c), 78u(c) (the power to issue subpoenas).

Moreover, as the Fifth Circuit notes, "HISA diverges radically from the Maloney Act in empowering the Authority to sue. The SEC alone has the power to bring civil suits, §§ 78u-1(a)(1), 78u(d)(1), while HISA gives that power exclusively to the Authority, § 3054(j)(1)." *Black III*, 2026 U.S. App. LEXIS 16993, at *35.

CONCLUSION

This case presents the Court with a prime opportunity. In granting the Petition, the Court may: (1) resolve a circuit split, and (2) develop and clarify the scope of the doctrine of private nondelegation in the context of a statute that grants extensive and unprecedented rulemaking and enforcement powers to unaccountable private actors, while it simultaneously restricts the executive agency from exercising meaningful authority and surveillance. As a practical matter, the affected parties subject to the Authority's actions are denied the constitutionally sound regulation to which they are entitled.

Amici, both from the perspective of the SOANY's horsemen who are impacted by the actions of the private and unaccountable Authority and the perspective of a legislator seeking to ensure fealty to the Constitution, respectfully submit that the Court should grant the Petition for a writ of certiorari.

Respectfully submitted,

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