No. 25-1325

In the Supreme Court of the United States

STATE OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether the Horseracing Integrity and Safety Act of 2020, 15 U.S.C. 3051 *et seq.*—which authorizes the Horseracing Integrity and Safety Authority, a private entity, to propose rules and to assist the Federal Trade Commission in enforcing the statute—violates the private nondelegation doctrine on its face.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 163 F.4th 294. An earlier opinion of the court of appeals (Pet. App. 46a-91a) is reported at 62 F.4th 221. The opinion of the district court (Pet. App. 92a-119a) is available at 2022 WL 1913419.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2025. On February 27, 2026, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including May 16, 2026, and the petition was filed on May 15, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Legal Background

1. Congress enacted the Horseracing Integrity and Safety Act of 2020 (Horseracing Act or Act), Pub. L. No. 116-260, Div. FF, Tit. XII, 134 Stat. 3252 (15 U.S.C. 3051 *et seq.*), in order to prevent doping and improve safety in the horseracing industry. Congress modeled the Act's framework on the longstanding regulatory scheme used in the securities industry, in which industry participants are subject to rules proposed by self-regulatory private entities that are in turn overseen by the Securities and Exchange Commission (SEC). See Pet. App. 109a.

The Horseracing Act "recognized" the Horseracing Integrity and Safety Authority (Authority)—a "private, independent, self-regulatory, nonprofit corporation"—"for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program." 15 U.S.C. 3052(a). The Authority's Board of Governors consists of four members from the horseracing industry and five members from outside the industry. See 15 U.S.C. 3052(b)(1)(A) and (B)(i). The Authority operates under the oversight of the Federal Trade Commission (FTC or Commission). See 15 U.S.C. 3053.

The Horseracing Act directs the Authority to propose rules concerning doping, racetrack safety, and other subjects. See 15 U.S.C. 3055-3057. The Authority must submit its proposals to the FTC "in accordance with such rules as the Commission may prescribe." 15 U.S.C. 3053(a). The Commission must approve a proposed rule if the agency determines that the rule "is consistent with" the Act and the Commission's regulations. 15 U.S.C. 3053(c)(2). A proposal takes effect only if the Commission approves it. See 15 U.S.C. 3053(b)(2).

The Act requires various "[c]overed persons"—*i.e.*, owners, breeders, trainers, jockeys, and other persons involved in the horseracing industry—to register with the Authority and to comply with the rules approved by the FTC. See 15 U.S.C. 3051(6), 3054(d)(1) and (2). The Authority may investigate violations of the rules. See 15 U.S.C. 3054(h). The Authority also may conduct disciplinary proceedings and impose civil sanctions upon violators. See 15 U.S.C. 3057(c) and (d). A final decision by the Authority to impose discipline is subject to de novo review by an FTC administrative law judge (ALJ), see 15 U.S.C. 3058(b), who may "conduct a hearing * * * in such a manner as the Commission may specify by rule," 15 U.S.C. 3058(b)(2)(B). The ALJ's decision is in turn subject to de novo review by the FTC, and the Commission may consider additional evidence that was not presented to the Authority or the ALJ. See 15 U.S.C. 3058(c).

2. In *National Horsemen's Benevolent & Protective Ass'n* v. *Black*, 53 F.4th 869 (2022), the Fifth Circuit held that the Horseracing Act, as originally enacted, violated a constitutional principle that is sometimes known as the "private non-delegation doctrine." See *id.* at 880 (citation omitted). The court explained that, under that doctrine, a private entity may aid a governmental agency in implementing a federal regulatory scheme, but only if the private entity "functions subordinately" to the agency and is subject to the agency's "authority and surveillance." *Id.* at 881 (citation omitted); see *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 399 (1940). The court determined that, under the Horseracing Act in its original form, the FTC lacked

constitutionally sufficient control over the Authority's activities. See *Black*, 53 F.4th at 880-890.

In reaching that conclusion, the Fifth Circuit highlighted a "key distinction" between the original Horseracing Act and the securities-industry scheme on which the Act was modeled. *Black*, 53 F.4th at 887. The court explained that the securities-industry scheme allows the SEC to "abrogate, add to, and delete from" the rules of self-regulatory organizations as the SEC deems "necessary or appropriate." *Ibid.* (quoting 15 U.S.C. 78s(c)). The Act in its original form, in contrast, did not grant the FTC comparable authority to abrogate or modify the Authority's rules. See *ibid*. Because the FTC lacked the "final word on the substance of the rules" under the original Act, the Fifth Circuit concluded that the FTC possessed insufficient control over the Authority's actions. *Ibid.*

3. In response to that decision and to the constitutional concerns that had been raised about the Act in its original form, Congress amended the Horseracing Act. See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. O, Tit. VII, § 701, 136 Stat. 5231-5232. As amended, the Act empowers the FTC to "abrogate, add to, and modify the rules of the Authority" "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 [Act] and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this [Act]." 15 U.S.C. 3053(e). That language is substantially identical to the language used in the statutes that empower the SEC to oversee self-regulatory organizations in the securities industry. See 15 U.S.C. 78s(c).

B. Proceedings Below

1. Petitioners are a group of States, state racing commissions, and private entities involved in horseracing. Pet. App. 10a. In 2021, before the Fifth Circuit issued its decision in *Black* and before Congress amended the Horseracing Act in response, petitioners brought this suit in the United States District Court for the Eastern District of Kentucky. Compl. 1. Petitioners alleged that the Act on its face violated the private nondelegation doctrine. Pet. App. 10a.

The district court dismissed petitioners' suit. Pet. App. 92a-119a. The court determined that, under the original Act, the FTC exercised sufficient oversight of the Authority because the Act empowered the FTC to approve or disapprove any rules that the Authority proposed, *id.* at 107a-112a, and to review de novo the Authority's orders imposing discipline, *id.* at 112a-113a.

2. While petitioners' appeal was pending, the Fifth Circuit issued its opinion in *Black*, and Congress amended the Horseracing Act in response. Pet. App. 11a. The Sixth Circuit upheld the amended Act and affirmed the district court's judgment. *Id.* at 46a-91a. Petitioners sought this Court's review, and the Court ultimately vacated the Sixth Circuit's judgment and remanded the case for further consideration in light of *FCC* v. *Consumers' Research*, 606 U.S. 656 (2025). Pet. App. 44a. On remand, the court of appeals again upheld the amended Act. *Id.* at 1a-43a.

As relevant here, the court of appeals rejected petitioners' claim that the amended Act, on its face, violates the private nondelegation doctrine. Pet. App. 14a-37a. The court interpreted the Constitution and this Court's precedents to establish that "a private entity may aid a public agency so long as the agency retains ultimate authority over the implementation of the federal law." *Id.* at 17a. The court determined that the FTC retains ultimate authority over Horseracing Act rulemaking because the amended Act empowers the Commission to write or rewrite rules as it wishes. See *id.* at 21a-26a. The court also determined that the FTC retains ultimate authority over enforcement of the Act because the Act empowers the Commission to regulate the Authority's enforcement proceedings and to review its disciplinary orders de novo. See *id.* at 26a-37a. Having rejected petitioners' facial challenge, the court "save[d] resolution of other enforcement questions, if such questions there be, for a day when the Authority's actions and the FTC's oversight appear in concrete detail, presumably in the context of an actual enforcement action." *Id.* at 37a.

ARGUMENT

Petitioners argue (Pet. 14-36) that the Horseracing Act's rulemaking and enforcement provisions violate the Constitution by delegating governmental power to the Authority. The court of appeals correctly rejected those contentions. The court's rejection of petitioners' challenge to the rulemaking provisions does not warrant further review because it does not conflict with any decision of this Court or another court of appeals. The court's rejection of petitioners' challenge to the Act's enforcement provisions, by contrast, conflicts with the Fifth Circuit's decision in *National Horsemen's Benevolent & Protective Ass'n* v. *Black*, 178 F.4th 224 (2026), petition for cert. pending, No. 26-199 (filed Aug. 10, 2026), and petition for cert. pending, No. 26-201 (filed Aug. 14, 2026). But the petitions for writs of certiorari filed by the government and the Authority in *National Horsemen* provide the best vehicles for considering that issue. The Court should grant the petitions in *National Horsemen* and hold the petition in this case.

1. Petitioners have chosen to litigate this case as a facial challenge, and "that decision comes at a cost." *Moody* v. *NetChoice, LLC*, 603 U.S. 707, 723 (2024). Because facial challenges "'often rest on speculation'" and "'threaten to short circuit the democratic process,'" this Court has made them "hard to win." *Ibid.* (citations omitted). To prevail on a facial challenge, a party must show that "no set of circumstances exists under which the Act would be valid." *United States* v. *Rahimi*, 602 U.S. 680, 693 (2024) (citation omitted). Conversely, to defeat a facial challenge, the government need show only that the statute "is constitutional in some of its applications." *Ibid.* Under those standards, the court of appeals correctly held that the Horseracing Act's rulemaking and enforcement provisions do not violate the Constitution on their face.

a. The Constitution vests the federal government's legislative, executive, and judicial powers in Congress, the President, and the federal courts, respectively. U.S. Const. Art. I, § 1; Art. II, § 1, Cl. 1; Art. III, § 1. The federal government therefore may not delegate those powers to private entities. But in exercising executive power, the Executive Branch may obtain advice and assistance from private entities.

In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), for example, this Court upheld a statute that authorized local boards consisting of private coal producers to propose minimum coal prices, which could be approved, disapproved, or modified by the National Bituminous Coal Commission (a governmental body). The Court noted that the private boards "function[ed] subordinately" to a federal agency and were subject to its "authority and surveillance." *Id.* at 399. The Court also emphasized that the agency, not the private boards, ultimately "determine[d] the prices." *Ibid.*

In *FCC* v. *Consumers' Research*, 606 U.S. 656 (2025), this Court similarly held that a private, not-for-profit corporation could help the Federal Communications Commission (FCC) administer a federal subsidy program. The Court determined that the private corporation is "broadly subordinate" to the FCC because it "must carry out all its tasks 'consistent with' the FCC's rules," and because "anyone aggrieved by an action of the [corporation] may seek *de novo* review by the [FCC]." *Id.* at 692-693 (citation omitted). The Court also noted that the corporation "plays an advisory role" under the governing statutory scheme, and that the FCC retains final "decision-making authority." *Id.* at 693.

b. The amended Act's rulemaking provisions, on their face, are consistent with those principles. Under those provisions, the Authority may only propose rules to the FTC, see 15 U.S.C. 3053, and proposed rules take effect only when the Commission approves them, see 15 U.S.C. 3053(b)(2). The FTC must approve a proposed rule only if the Commission concludes, in its own judgment, that the proposal "is consistent with" the Act and with other rules approved by the FTC. 15 U.S.C. 3053(c)(2). The amended Act also empowers the Commission to "abrogate, add to, and modify" rules as the Commission "finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to the requirements of [the Act] and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of [the Act]." 15 U.S.C. 3053(e). Because the FTC has "the final word on the substance of the rules," the Authority's role in proposing the rules does not violate the Constitution. Pet. App. 22a (citation omitted); see *Sunshine Anthracite*, 310 U.S. at 399.

Petitioners argue (Pet. 31-33) that the Horseracing Act improperly allows the Authority's proposed rules to take effect even if the FTC disagrees with them. But a proposed rule can take effect only if the Commission determines that it is "consistent with" the Act and other "applicable rules approved by the Commission." 15 U.S.C. 3053(c)(2)(B). Applying that provision, the FTC has directed the Authority to modify proposed rules that do not comport with the Commission's understanding of the statute. See, *e.g.*, FTC, *Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority* 29 (Mar. 25, 2022) (directing Authority to modify a proposed rule); *id.* at 34-35 (same).

Separately, the amended Act empowers the FTC to "abrogate, add to, and modify" the Authority's rules as the Commission finds "necessary or appropriate." 15 U.S.C. 3053(e). "When the FTC decides to act, whether by abrogating one of the Horseracing Authority's rules or by introducing its own, the FTC makes a policy choice and necessarily scrutinizes the Authority's proposed policy choices." Pet. App. 22a. The Commission therefore retains "ultimate discretion over the content of the rules." *Ibid.* Petitioners note (Pet. 32-33) that a rule can remain in effect while the FTC conducts a rulemaking process to abrogate it. But as discussed above, a rule takes effect in the first place only once the agency approves it. And even if the Act were thought to raise constitutional concerns during the interim period while the Commission is seeking to abrogate an existing rule, a court would have no sound basis for invalidating the Act's rulemaking provisions on their face.

c. The Act's enforcement provisions, too, are valid on their face. The Horseracing Authority is "broadly subordinate" to the FTC, which retains final "decision-making authority" regarding the Act's enforcement. *Consumers' Research*, 606 U.S. at 692-693.

On the front end, the FTC makes or approves the rules that govern how the Authority "must carry out all its tasks." *Consumers' Research*, 606 U.S. at 693. The Act directs the Authority to propose rules concerning "investigatory powers," "issuance and enforcement of subpoenas," "access to offices, racetrack facilities, other places of business, books, records, and personal property," "procedures for disciplinary hearings," and "civil sanctions for violations." 15 U.S.C. 3053(a)(9) and (10), 3054(c)(1)(A). Those rules take effect, however, only if the FTC approves them. See 15 U.S.C. 3053(b)(2), 3054(c)(2). The Commission may "abrogate, add to, and modify" those rules, just as it may abrogate, add to, and modify the substantive rules that govern the conduct of regulated parties. 15 U.S.C. 3053(e); see 15 U.S.C. 3054(c)(2).

On the back end, the FTC may review any sanctions that the Authority imposes upon regulated parties. The Commission or an aggrieved party may ask an FTC ALJ to review any such sanction de novo. See 15 U.S.C. 3058(b)(1). The Commission itself may then review the ALJ's decision de novo and may take additional evidence as needed. See 15 U.S.C. 3058(c)(1) and (3). The Act also empowers the ALJ or the Commission to stay a sanction pending review. See 15 U.S.C. 3058(d).

A simple example illustrates a constitutional application of the Act's enforcement provisions. The Authority could seek to enforce its crop rule, which limits how often a jockey may strike a horse with a riding crop during a horse race, by reviewing a video of the race. The Commission or an ALJ could then review the Authority's decision de novo by rewatching the same video. In that scenario, the Authority would not exercise any governmental power. In practical effect, the Authority would simply provide a recommendation that the ALJ and the FTC could accept or reject. A private entity's provision of such a recommendation does not raise constitutional concerns.

Petitioners deny (Pet. 25) that the FTC could make rules to control the Authority's investigative activities, stating that such an interpretation would "rewrite" the Act. But even if the Authority's investigative activities raise constitutional concerns, the ultimate enforcement decisions would remain lawful—which suffices to defeat a facial constitutional challenge. Regardless, under the statutory provisions that govern enforcement of the Horseracing Act, the Commission may approve, add to, abrogate, or modify rules governing matters such as "investigatory powers" and "procedures for disciplinary hearings." 15 U.S.C. 3053(a)(10), 3054(c)(1)(A)(iii). To the extent the statute contains any ambiguity on that point, the principle of constitutional avoidance requires courts to resolve that ambiguity in a way that saves the statute from constitutional attack. See, *e.g.*, *United States* v. *Hansen*, 599 U.S. 762, 781 (2023).

Petitioners also offer the related contention (Pet. 21-22) that the Act empowers the Authority to engage in a broad range of investigative activities, such as conducting searches and seizures. But treating such activities as a ground for facial invalidation conflicts with this Court's precedents. A court reviewing a facial challenge should focus on the circumstances in which the challenged statute is "most likely to be constitutional," not those in which the statute "might raise constitutional concerns." *Rahimi*, 602 U.S. at 701. Statutes also should not be read "extravagantly, the better to create a constitutional problem." *Consumers' Research*, 606 U.S. at 690.

Finally, petitioners contend (Pet. 20-22) that the Act empowers the Authority to issue subpoenas and seek injunctions. But the Authority has explained that it has never issued a subpoena or sought an injunction. See, *e.g.*, Appl. at 17, *Horseracing Integrity & Safety Authority, Inc.* v. *National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (Sept. 19, 2024). The FTC also recently approved a rule that requires the FTC's approval before the Authority may issue a subpoena or bring a civil enforcement suit. See FTC, *Order Approving the Enforcement Rule Modification Proposed by the Horseracing Integrity and Safety Authority* (Dec. 19, 2025), https://perma.cc/ER4F-ZY8M. Speculation that the FTC's rules might change does not justify facial invalidation of the statute. The "delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases." *United States* v. *Raines*, 362 U.S. 17, 22 (1960).

2. Petitioners' challenge to the Act's rulemaking provisions does not warrant further review. The Fifth Circuit, the only other court of appeals that has resolved the issue since the remands after *Consumers' Research*, has agreed with the Sixth Circuit that the rulemaking provisions are constitutional. See *National Horsemen*, 178 F.4th at 233-236. Because the constitutionality of the current Act's rulemaking provisions is not the subject of a circuit conflict, and because no court of appeals

has held those provisions to be unconstitutional, this Court's intervention is not warranted.

By contrast, the question whether the statute's enforcement provisions are facially constitutional does warrant this Court's review. As the government's petition for a writ of certiorari in *National Horsemen* details, that issue has generated a conflict between the Fifth and Sixth Circuits. See Pet. at 14-15, *National Horsemen*, *supra* (No. 26-201). The fact that the Fifth Circuit held a federal statute to be invalid on its face provides a further reason to grant certiorari on that question. See *ibid.*

The petitions filed by the Authority and the government in *National Horsemen*, however, provide better vehicles for resolving that question than does the petition in this case. Granting certiorari in *National Horsemen* would enable the Court to directly review the reasoning of the only court of appeals that has held the Act's enforcement provisions to be facially unconstitutional. The petition in this case also raises an additional issue—*i.e.*, whether the Act's current rulemaking provisions are facially unconstitutional—on which there is no circuit conflict and which does not presently warrant the Court's review.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's resolution of *FTC* v. *National Horsemen's Benevolent & Protective Ass'n*, No. 26-201 (filed Aug. 14, 2026), and *Horseracing Integrity & Safety Authority, Inc.* v. *National Horsemen's Benevolent & Protective Ass'n*, No. 26-199 (filed Aug. 10, 2026), and then disposed of as appropriate.

Respectfully submitted.

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