

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 United States Court Of Appeals
For The Sixth Circuit**

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

	<u>Page</u>
RULE 29.6 STATEMENT	i
REPLY BRIEF FOR PETITIONERS	1
ARGUMENT	2
I. THIS CASE PRESENTS THE BEST VEHICLE TO REVIEW WHETHER THE ACT’S DELEGATION OF ENFORCEMENT POWER TO THE AUTHORITY IS FACIALLY UNCONSTITUTIONAL.	2
II. THE COURT SHOULD ALSO GRANT CERTIORARI TO REVIEW WHETHER THE ACT UNCONSTITUTIONALLY DELEGATES RULEMAKING POWER TO THE AUTHORITY.....	6
CONCLUSION	7

TABLE OF AUTHORITIES

	<u>Page(s)</u>
 Cases	
<i>Axon Enterprise, Inc. v. Federal Trade Commission,</i> 598 U.S. 175 (2023).....	6
<i>FCC v. Consumers’ Research,</i> 606 U.S. 656 (2025).....	6, 7
<i>Loper Bright Enterprises v. Raimondo,</i> 603 U.S. 369 (2024).....	6
<i>Lucia v. SEC,</i> 585 U.S. 237 (2018).....	5
<i>Moody v. NetChoice, LLC,</i> 603 U.S. 707 (2024).....	6
<i>National Horsemen’s Benevolent & Protective Association v. Black,</i> 178 F.4th 224 (5th Cir. 2026)	2
<i>New York State Rifle & Pistol Association, Inc. v. Bruen,</i> 597 U.S. 1 (2022).....	5
<i>Siegel v. Fitzgerald,</i> 596 U.S. 464 (2022).....	5
<i>Trump v. Cook,</i> 146 S. Ct. 2234 (2026).....	4

<i>Wrenn v. District of Columbia</i> , 864 F.3d 650 (D.C. Cir. 2017)	5
---	---

Statutes

15 U.S.C. § 3053(a)	7
15 U.S.C. § 3053(c)(2)	7

Rules

Fed. R. Civ. P. 41(a)	3
Sup. Ct. R. 10(c)	6

Other Authorities

FTC, <i>Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority</i> (Mar. 27, 2023)	7
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REPLY BRIEF FOR PETITIONERS

The United States and the Authority agree with Petitioners that this Court should grant certiorari to resolve the circuit split between the Fifth and Sixth Circuits over the constitutionality of the Horseracing Integrity and Safety Act's delegation of law-enforcement powers to the private Authority. The parties disagree only on whether the Court should grant this petition alone, the petitions from the Fifth Circuit's decision alone, or all petitions together.

This case provides the best vehicle for resolving the circuit split over the Act's constitutionality. In contrast to this case, there is a latent jurisdictional question in the Fifth Circuit case that could impede this Court's review of the merits. The Authority Respondents argued in the Fifth Circuit that the district-court decision in that case was not a final, appealable order. This Court would be obliged to address that threshold issue before considering the merits in the Fifth Circuit case, seemingly without the benefit of adversarial briefing. Here, by contrast, there is no doubt that appellate jurisdiction exists and that (as Respondents do not dispute) the merits are cleanly presented.

Respondents' only proffered reasons for preferring their petitions arising from the Fifth Circuit's decision are makeweights. That the Fifth Circuit sustained a constitutional challenge to HISA while the Sixth Circuit rejected it does not make either a better vehicle. As the Court often does, it can consider all lower-court perspectives on the conflict whichever case it takes. Likewise, that the Fifth Circuit ruled later in time has no bearing. Finally, that the petition in this case

raises an additional issue hardly weighs against review. It simply gives the Court the option to address the full range of constitutional challenges at once if it wishes.

At minimum, the Court should grant review in both cases and consolidate them for briefing and argument. That would avoid any risk that a defect in the Fifth Circuit's jurisdiction frustrates this Court's review. And it would ensure that all of the lower courts' reasoning is before the Court.

Whatever the Court does with Respondents' petitions, the petition in this case should be granted.

ARGUMENT

I. THIS CASE PRESENTS THE BEST VEHICLE TO REVIEW WHETHER THE ACT'S DELEGATION OF ENFORCEMENT POWER TO THE AUTHORITY IS FACIALLY UNCONSTITUTIONAL.

After Petitioners filed their petition for a writ of certiorari in this case, the Fifth Circuit once again held that the Act's delegation of law-enforcement power to the private Authority facially violates the Constitution's private non-delegation doctrine. *National Horsemen's Benevolent & Protective Association v. Black*, 178 F.4th 224, 236-48 (5th Cir. 2026). In doing so, the Fifth Circuit for the second time created a square circuit split with the Sixth Circuit on the constitutionality of the Act's delegation of the power to enforce federal law. All parties agree that the Court should grant certiorari to resolve that split. See Authority Br. 12-19; U.S. Br. 13. The parties disagree only on which vehicle or vehicles the Court should use to do so.

A. This petition provides the better vehicle because the Fifth Circuit case contains a latent jurisdictional issue regarding the finality of the district court's decision that could prevent this Court from reaching the merits. The Authority Respondents argued below that the Fifth Circuit lacked appellate jurisdiction because five claims raised in the district court had not been properly dismissed or finally adjudicated, such that the district court's decision was not an appealable final judgment. Authority Response Brief 1-2, *National Horsemen's Benevolent & Protective Association v. Black*, No. 23-10520 (5th Cir. Aug. 4, 2023), ECF No. 114. The Authority argued that Plaintiff Gulf Coast Racing LLC's attempted voluntary dismissal of the five unadjudicated claims was a "nullity" because parties may dismiss only entire actions—not individual claims—under Federal Rule of Civil Procedure 41(a). *Ibid.* Because Gulf Coast did not amend its complaint to remove the remaining claims or obtain their dismissal with prejudice, the Authority argued, those claims remain pending in the district court, and the Fifth Circuit accordingly lacked jurisdiction over the appeal. *Ibid.* The Federal Respondents, too, acknowledged that "the question is not free from doubt." FTC Response Br. 13, *National Horsemen's Benevolent & Protective Association v. Black*, No. 23-10520 (5th Cir. Aug 4, 2023), ECF No. 113.

Here, by contrast, there is no potential jurisdictional obstacle. The district court in this case dismissed all of Petitioners' claims with prejudice and confirmed that its decision was "a final and appealable order." Pet. App. 119a. And neither Respondent

contests that this case cleanly tees up the merits; indeed, the Authority affirmatively states that it “welcomes consideration of th[e] question presented through either case.” Authority Br. 22. By granting review of the Sixth Circuit’s decision, the Court can avoid the risk that a jurisdictional obstacle lurking in the Fifth Circuit petitions will frustrate review.

The Court should thus grant certiorari in this case to ensure that it has appellate jurisdiction to review the constitutionality of the Act’s delegation of enforcement authority without any need to consider the jurisdictional issue in the Fifth Circuit case.

B. Respondents’ reasons for favoring review of the Fifth Circuit case are insubstantial. They contend that the Fifth Circuit case would “allow for direct review of the reasoning of the only court of appeals that has held the Act facially unconstitutional.” Authority Br. 22; U.S. Br. 13. That invented argument is unserious. This Court “revie[ws] judgments, not statements in opinions.” *Trump v. Cook*, 146 S. Ct. 2234, 2251 n.3 (2026). And when it grants review to resolve a circuit conflict, it is hardly handcuffed to considering only the reasoning of the decision(s) on one side of the split.

Respondents’ suggestion that granting review of a decision on the side of a split that ruled against a statute’s validity is somehow preferable is likewise empty. The Court often grants certiorari of decisions that rejected constitutional challenges to resolve a conflict on the constitutional issue. For example, in *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Court granted review of a case that had *upheld* a firearm permitting scheme—and consulted the reasoning

of another case that struck down a similar permitting scheme. 597 U.S. 1, 15, 57 (2022) (discussing *Wrenn v. District of Columbia*, 864 F.3d 650, 668 (D.C. Cir. 2017)). Similarly, in *Siegel v. Fitzgerald*, the Court granted certiorari in a case that had *upheld* provisions of the Bankruptcy Code against a constitutional challenge—while holding the petitions from the case that had struck them down. 596 U.S. 464, 472-73 & n.1 (2022); see also, *e.g.*, *Lucia v. SEC*, 585 U.S. 237 (2018) (granting review of decision upholding statute’s constitutionality while holding cases striking it down).

Respondents’ reasons for preferring their petitions from the Fifth Circuit’s decision go downhill from there. The Authority contends that the Fifth Circuit case is preferable because it was a “later-in-time decision.” Authority Br. 22. That later-in-time rule makes no sense. The Court often awaits a circuit conflict before granting review because it shows that the *question presented* is recurring and needs definitive resolution. Once a split exists, which opinion is most recent makes no difference. Nor does the fact that the Fifth Circuit had occasion to critique the Sixth Circuit make that case a better vehicle. This Court is fully capable of evaluating both approaches and deciding which lower court’s analysis is correct.

Even if the petitions are in equipoise, Respondents offer no sound reason to grant *only* their petitions from the Fifth Circuit’s decision and merely hold the petition in this case. That approach invites a needless risk of dismissal—and frustration of this Court’s review and waste of its resources—because of the jurisdictional issue in the Fifth Circuit case. To protect its ability to reach the merits, the Court should at least grant all of the petitions in both cases and consolidate

them, as the Court frequently does in complex and significant cases like this one. See, *e.g.*, *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024); *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S. 175, 185 (2023); *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 384 (2024).

II. THE COURT SHOULD ALSO GRANT CERTIORARI TO REVIEW WHETHER THE ACT UNCONSTITUTIONALLY DELEGATES RULEMAKING POWER TO THE AUTHORITY.

The Court should also grant certiorari to review whether the Act unconstitutionally delegates rulemaking power to the private Authority. Respondents contend that the Act’s delegation of rulemaking authority does not warrant this Court’s review because the Fifth and Sixth Circuits both held it to be constitutional. Authority Br. 19-20; U.S. Br. 12-13. But both decisions squarely conflict with *FCC v. Consumers’ Research*, 606 U.S. 656 (2025), see Sup. Ct. R. 10(c), and forgoing review would leave unanswered a central question regarding the Act’s facial constitutionality that is sure to be litigated in other circuits.

This Court held in *Consumers’ Research* that the Constitution does not permit a private entity to engage in “policy-making” and requires the government always to “retai[n] all decision-making authority.” 606 U.S. at 664, 693. The Constitution allows the government to “enlist private parties to give it recommendations,” but a “private party’s recommendations * * * cannot go into effect without an agency’s say-so.” *Id.* at 692, 695. The Act runs afoul of these requirements by delegating to the private Authority the discretion to make nationwide horseracing regulatory policy, see

15 U.S.C. § 3053(a), and does not allow the FTC to “decid[e] whether or how to use” the Authority’s proposed regulations, *Consumers’ Research*, 606 U.S. at 694. To the contrary, the Act mandates that the FTC “shall approve” those rules as binding federal regulations so long as they are “consistent with” the Act and “applicable rules approved by the Commission.” 15 U.S.C. § 3053(c)(2). And when reviewing the Authority’s proposals, the FTC has consistently maintained that the Act does not permit it to reject the Authority’s rules based on “policy disagreements.” FTC, *Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority* 31 (Mar. 27, 2023), <https://tinyurl.com/mr4tnhmk>.

In any event, if the Court determines that the Act’s delegation of rulemaking power does not warrant review, it can limit the question on which it grants review in this case to the Act’s delegation of enforcement authority—an issue that all parties agree is certworthy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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