No. 26-199 & No. 26-201

In the Supreme Court of the United States

HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC., ET AL.

v.

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, ET AL.

FEDERAL TRADE COMMISSION, ET AL.

v.

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CONSOLIDATED MEMORANDUM FOR THE NATIONAL HBPA AND ITS AFFILIATES

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INTRODUCTION

The Court should grant these petitions. While Respondents won in the Fifth Circuit, they acknowledge a clear circuit split. National regulations governing sports are uniquely ill-suited to an ongoing circuit conflict. Respondents seek this Court's resolution affirming the unconstitutionality of the Horseracing Integrity and Safety Act because it violates the nondelegation principles inherent in the vesting clauses of Articles I and II of the Constitution.

"[C]hecks and balances were the foundation of a structure of government that would protect liberty."[1] These checks can be frustrating, but "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."[2] To get around these inconveniences, Congress has employed "novel policy inventions and corresponding structures" going beyond the constitutionally suspect fourth branch of "independent" administrative agencies[3] by creating a "'Fifth Branch'" of 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.*

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[1] *Bowsher v. Synar*, 478 U. S. 714, 722 (1986).

[2] *INS v. Chadha,* 462 U.S. 919, 944 (1986).

[3] *See, e.g., Trump v. Slaughter,* 146 S. Ct. 2283 (2026).

Sharif, 575 U.S. 665, 701 (2015) (Roberts, C.J., dissenting).

Yet delegation of executive powers to a private corporation is exactly what Congress did in the Horseracing Integrity and Safety Act ("HISA" or the "Act"). It designated a newly created private corporation to regulate thoroughbred horseracing nationwide—thereby avoiding the inconveniences of appropriations, appointment and confirmation, due process, transparency, and democratic accountability that would have come with a constitutional government agency.

That Congress may not do. A private delegate may advise and assist. But the "inescapable conclusion is that the Authority does not function subordinately to the FTC when enforcing HISA."[4] As the name shows, the Horseracing Integrity and Safety Authority is *the authority* over horseracing. In its own words, it is "the national regulatory body overseeing safety and integrity in Thoroughbred racing."[5] The Constitution prohibits Congress from giving such sweeping power to a private corporation.

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[4] *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black,* 178 F.4th 224, 239-240 (5th Cir. 2026) (*NHBPA V*). Because this memorandum responds to two certiorari petitions, it uses the F.4th cite for ease of reference.

[5] *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.

STATEMENT OF THE CASE

The Authority's history of HISA and its implementation is one-sided. Auth. Pet. 4-13. An accurate portrayal follows.

I. Legislative and Litigation History

HISA was initially adopted in the dead of night after it was surreptitiously slipped into a 5,600-page, must-pass COVID-19 emergency relief bill by a single U.S. senator.[6] As a result, the horseracing industry was turned upside down without any substantive floor debate or consideration by Congress. States, which had regulated the horseracing industry within their borders for over a century, were unceremoniously stripped of their traditional role.

The Act instead empowered a private corporation, the Horseracing Integrity and Safety Authority, Inc., which had recently been created at the behest of a few industry insiders for this precise moment.

Horseracing industry participants immediately objected to this unconstitutional and ill-advised regulatory railroading. The National Horsemen's Benevolent and Protective Association and thirteen of its affiliates ("the Horsemen") promptly filed suit. So did state racing commissions, racetracks, and allied

[6] The Consolidated Appropriations Act of 2021. The senior senator from Kentucky was one of four caucus leaders with say-so over the bill's contents.

industry groups, with further support from equine veterinarians.[7]

The U.S. District Court for the Northern District of Texas (Hendrix, J.) recognized the peculiarity of the Act, labeling it "novel," "unconventional," "uncommon," and "unique," saying it "breaks new ground" and "pushes the boundaries."[8] But the court ultimately upheld it under *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381 (1940).

The U.S. Court of Appeals for the Fifth Circuit reversed and ruled the Act facially unconstitutional. The court held that Congress had delegated the power to write rules to a private entity while commanding the FTC, nominally charged with overseeing the Authority, to approve those rules with just the facade of a rubber-stamp review. This "consistency review" meant that the FTC was powerless to change the rules if they were consistent with the statute's purposes.[9]

In response, Congress amended the law by only one sentence, the bare minimum allowing HISA's supporters to claim that the entire Act was now "fixed." Slipped into another must-pass mega-bill,[10]

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[7] *See infra* p. 18 and accompanying footnotes 60 and 61.

[8] *NHBPA v. Black*, 596 F.Supp.3d 691, 695, 696, 719, 723, 696, and 728 (N.D. Tex. 2022) (*NHBPA I*).

[9] *National Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022) (*NHBPA II*).

[10] The Consolidated Appropriations Act, 2023.

once more there was no hearing, markup, committee vote, or floor vote on this specific language.[11]

The U.S. Court of Appeals for the Sixth Circuit, hearing a separate case led by the State of Oklahoma, was inclined to enjoin the original act, but upheld it in the light of the new sentence.[12]

The Horsemen returned to the Northern District of Texas, where they filed an amended complaint specific to the revised statute.[13] Judge Hendrix held a bench trial and affirmed the amended Act, while recognizing that "the Authority retains its generous grant of authority to craft and propose rules."[14]

The Horsemen returned to the Fifth Circuit, which upheld the Act's delegation of rulemaking authority in light of the amendment. The court then turned to the Act's delegation of executive powers, which it had not considered previously. It found this delegation facially unconstitutional and struck the Act a second time.[15]

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[11] Senators Chuck Grassley and Joe Manchin offered an amendment to remove the new HISA sentence, but no vote was taken.

[12] *Oklahoma v. United States*, 62 F.4th 221, 237 (6th Cir. 2023) (Cole, J., concurring) (majority "opin[es] in dicta that the original statute was unconstitutional").

[13] The *Oklahoma* case is still based on the initial complaint against the original, unamended statute.

[14] *National Horsemen's Benevolent & Protective Ass'n v. Black*, 672 F. Supp. 3d 220, 242 (N.D. Tex. 2023) (*NHBPA III*).

[15] *National Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024) (*NHBPA IV*).

Without dissent, the *en banc* Fifth Circuit declined further review.[16]

The U.S. Court of Appeals for the Eighth Circuit, last to the party, split 2-1 on the third and final case concerning HISA's constitutionality. The panel majority sided with the Sixth Circuit while Judge Gruender adopted the Fifth Circuit's reasoning.[17]

Then came *FCC v. Consumers' Research*. The Horsemen watched with satisfaction as this Court validated the private nondelegation doctrine after having been derided for years for relying on "*Lochner* era" law.[18]

This Court granted, vacated, and remanded all three cases in light of *Consumers' Research*, and both the Fifth and Sixth Circuits stuck to their respective positions on reconsideration, with the Fifth Circuit calling HISA "a radical delegation."[19]

The Fifth Circuit explained: "The statute empowers the Authority to investigate, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the FTC's say-so. That is forbidden by the Constitution."[20] It continued: "HISA's explicit division of enforcement responsibility

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[16] *National Horsemen's Benevolent & Protective Ass'n v. Black*, 2024 U.S. App. LEXIS 22875 (Sept. 9, 2024).

[17] *Walmsley v. FTC*, 117 F.4th 1032 (8th Cir. 2024).

[18] 606 U.S. 656, 692 (2025).

[19] *NHBPA V*, 178 F.4th at 248.

[20] *Id.* at 230.

empowers the Authority with quintessential executive functions and gives the FTC scant oversight until enforcement has already occurred. Such back-end review by the FTC does not subordinate the Authority."[21] The court concluded: "we DECLARE that HISA violates the private nondelegation doctrine."[22]

The Horsemen acquiesce to certiorari for this Court to agree and affirm the Fifth Circuit.

II. What the Act does

The Act preempts all state regulation of thoroughbred horseracing and replaces it with a single nationwide regulatory scheme drafted and enforced by the Authority, a private corporation.[23] This private corporation was formed months before passage of the Act with a designated Nominating Committee that selected its Board of Directors, all without input from Congress, the President, or the FTC.

The Act gives the Authority two responsibilities. First, it unconstitutionally delegates Congress's lawmaking power to write the rules of horseracing. Second, it authorizes the Authority to enforce these rules against covered persons, *i.e.*, everyone who participates in the horseracing industry.[24] To finance this scheme, the Act authorizes the Authority to set its

[21] *Id.* at 248.

[22] *Id.* at 253.

[23] 15 U.S.C. § 3052(a).

[24] 15 U.S.C. § 3054(d).

own budget and then assess fees that it collects from racetracks and horsemen.[25]

As to rulemaking, the Act empowers the Authority "[t]o formulate detailed rules on an array of topics."[26] First, the Authority drafts the rule. Then the FTC "shall approve" the rule if it is "consistent" with the Act and other applicable rules.[27] The FTC must approve the proposed rule *in toto*—it cannot rewrite, add to, or delete from the Authority's draft.

Even after the new sentence was added to the Act, the FTC still "shall approve" all rules proposed by the Authority that are "consistent" with the Act, *in toto*. The FTC continues to apply this standard in its rule reviews today.[28] Importantly, the FTC cannot abrogate, add to, or modify the Authority's rules based on a policy disagreement.[29] After the new sentence was added to the Act, the FTC has the power to "abrogate, add to, and modify" the Authority's rules *after* they have been promulgated. To do so, the FTC

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[25] 15 U.S.C. § 3052(f).

[26] *NHBPA II*, 53 F.4th at 872.

[27] 15 U.S.C. § 3053(c)(2); *NHBPA II*, 53 F.4th at 874.

[28] *See, e.g., Order Approving the Racetrack Safety Rule Modification Proposed by the Horseracing Integrity and Safety Authority*, Fed. Trade Comm. (June 7, 2024) at 3; *Order Approving the Anti-Doping and Medication Control Rule Modification Proposed by the Horseracing Integrity and Safety Authority*, Fed. Trade Comm. (Nov. 22, 2023) at 3.

[29] *NHBPA II*, 53 F.4th at 885-86.

must initiate a separate rulemaking; until then, the Authority's rules are on the books.[30]

The Act also gives the Authority the power to promulgate "guidance" on how horseracing rules should be interpreted.[31] It further authorizes the Authority's sub-delegate in charge of anti-doping and medication control, the Horseracing Integrity and Welfare Unit ("HIWU"), to issue "protocols, policies, and guidelines"—"for approval" not by the FTC, but "by the Authority."[32] In practice, the rules written by the Authority and rubber-stamped by the FTC are often rewritten by the guidance or protocols.[33]

The Act also unconstitutionally delegates all the President's law enforcement power to enforce the rules it has written. The Act summarizes the Authority's role by saying it must "investigate, prosecute, adjudicate, [and] penalize conduct" in violation of the rules.[34]

To execute that mission, the Authority and HIWU operate a private police department, a private prosecutor's office, and a private system of administrative law judges. The Act grants the

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[30] 15 U.S.C. § 3053(e).

[31] 15 U.S.C. § 3054(g).

[32] 15 U.S.C. § 3055(c)(4)(A).

[33] Visit https://hisaus.org/regulations, then click "Official Guidance" and "Enforcement Updates." Otherwise see the Fifth Circuit Record on Appeal Docs. 3228, 3668, 3672, 3674, 3675, 3676, 3678, 3682, 3685, 3687, and 3690.

[34] 15 U.S.C. § 3054(k)(2)(A).

Authority "safety, performance, and anti-doping and medication control authority over covered persons similar to such authority of the State racing commissions," and "investigatory powers of the nature and scope exercised by State racing commissions before the program effective date."[35]

Thus, the Authority and HIWU have 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 and interviews, to undertake urine and blood tests without advance notice, and to seize evidence.[36] The Authority may also give and receive information from federal and state law enforcement authorities.[37]

After the Authority's private police department has completed its investigation, the matter is referred to the Authority's private prosecutor's office. Just being charged with certain violations results in

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[35] 15 U.S.C. § 3054(a)(2)(B) & (c)(1)(A)(iii).

[36] 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). *See NHBPA V*, 178 F.4th at 240 (Authority "can investigate potential violations, issue subpoenas, conduct searches, levy fines, and seek injunctions").

[37] 15 U.S.C. § 3060(b).

automatic suspensions before any neutral magistrate has looked at a case.[38]

Then the private prosecutor brings a case before the Authority's private ALJs, which in some instances are panels of Authority board members.[39] The Authority's judges hold administrative hearings, weigh evidence, decide guilt, and determine appropriate civil sanctions and suspensions.[40]

If they prefer, the Authority's prosecutors may go outside their normal enforcement system and instead initiate civil actions directly in federal district court to enforce the Act and rules, including against *potential* violations.[41]

"[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."[42] As the FTC itself has said, "the Commission does not

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[38] Auth. R. §§ 3229, 3247.

[39] Auth. R. §§ 7020–7430.

[40] 15 U.S.C. §§ 3055(c)(4)(B), 3056(b)(7)–(9), 3057(c).

[41] 15 U.S.C. §§ 3054(i), 3057 (sanctions) § 3054(j) (civil actions).

[42] *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 NHBPA V,* 178 F.4th at 230 ("The statute empowers the Authority to investigate, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the FTC's say-so.").

actively take part in the Authority's investigative and enforcement decisions."[43]

The result is that Congress has given virtual *carte blanche* to a private corporation to regulate a nationwide industry. "One of the principal authors of the Constitution famously wrote that the 'accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.'"[44] In HISA, Congress has unlawfully concentrated all three powers into one set of hands—and not even those of one democratically accountable public official but those of one private corporation accountable to no one.

SUMMARY OF THE ARGUMENT

The Horsemen acquiesce to certiorari. This case presents a clear circuit split on the facial constitutionality of an act of Congress. There are also important federalism interests and industry interests that call for this Court's review.

But the Horsemen do not acquiesce to the Authority and FTC's narrative that the statute is constitutional, that the Fifth Circuit is an outlier, or that the powers exercised here are ministerial or functionary. Far from it.

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[43] *In the Matter of Philip Serpe,* No. 9441, Slip Op. at 10 (Fed. Trade Comm'n 2026).

[44] *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) (quoting The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison)).

Rather, the Fifth Circuit correctly concluded that the Authority exercises core executive powers: investigating, prosecuting, adjudicating, and penalizing.

And it does so without FTC supervision, as the FTC itself has acknowledged: "the Commission does not actively take part in the Authority's investigative and enforcement decisions."[45] And later, "[T]he Authority makes its own initial determination whether covered persons violated the rules, whether sanctions are warranted, and which sanctions are warranted—all without Commission input or involvement."[46] Late and limited review by the FTC in a sub-set of Authority enforcement actions does not constitute constitutionally sufficient supervision.

ARGUMENT

I. Reviewing Congress's wholesale delegation of executive police powers to a private corporation meets this Court's criteria for certiorari.

The Horsemen acquiesce to certiorari.[47] The Horsemen race their horses throughout the United States and compete against horsemen who did not join

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[45] *Serpe,* No. 9441, Slip Op. at 10.

[46] *Id.* at 11.

[47] *See, e.g.*, *Beard v. Comm'r*, S. Ct. No. 10-1553, Br. for Respondent 8 (the U.S. Solicitor General acquiesces: "In light of the square circuit conflict, and the importance of the uniform administration of federal tax law, the petition for a writ of certiorari should be granted.").

this lawsuit.[48] They seek final resolution to decide the constitutionality of the Act nationwide.

The Court should grant these petitions because they meet five traditional criteria for certiorari:

1. The Authority correctly recognizes an "acknowledged and entrenched circuit split" but then misleadingly presents the Fifth Circuit decision as the "outlier."[49]

The disagreement in the lower courts is far deeper than this superficial snapshot suggests. The Sixth Circuit upheld the statute as amended, but a majority of the panel thought the original version, *sans* one sentence, was unconstitutional.[50] Also, two judges on the Eighth Circuit panel voted to uphold the amended statute, but Judge Gruender vigorously dissented and sided with the Fifth Circuit.[51]

Concerns also permeate the district courts. The trial court in this case labeled the Act "novel," "unconventional," "uncommon," and "unique," saying it "breaks new ground" and "pushes the boundaries."[52]

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[48] *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 703 (2001) (Scalia, J., dissenting) ("the very *nature* of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence.").

[49] Auth. Pet. 2-3 & 14.

[50] *Oklahoma*, 62 F.4th at 237 (Cole, J., concurring).

[51] *Compare Walmsley v. FTC*, 117 F.4th 1032 (8th Cir. 2024) *with id*. at 1042 (Gruender, J., dissenting).

[52] *NHBPA I*, 596 F.Supp.3d at 695, 696, 719, 723, 696, and 728.

In an understatement, the court also recognized that as a private corporation, "the Authority avoids some of the strictures of governmental entities."[53] And you can hear the incredulity in an opinion on the statutory interpretation of the Act's fee provisions from the Western District of Kentucky (Beaton, J.): "The Authority sits outside the contours of Article II, answering to a board rather than the President or a principal officer. Yet it enjoys the power to make and enforce legislative rules for the industry—and fills its coffers not through appropriations but by assessing fees against those it regulates."[54] He called this an "unusual structure" and a "unique design" for regulation.[55] Just so.

The circuit split embodies a broad disagreement in the lower courts about Congress's delegation of substantial executive power to a private authority. The D.C. Circuit recently grappled with executive powers exercised by FINRA, the Financial Industry Regulatory Authority. The whole panel agreed that FINRA exceeded the private nondelegation doctrine when it suspended a company without timely agency review; Judge Walker was ready to declare the entire scheme unconstitutional for hijacking presidential

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[53] *Id.* at 696.

[54] *Churchill Downs, Inc. v. Horseracing Integrity & Safety Auth., Inc.*, 2026 U.S. Dist. LEXIS 72872, *3 (W.D. Ky. April 1, 2026).

[55] *Id.* at *3, *5.

power without executive supervision, just as happens here.[56]

2. As a second basis for certiorari, the Fifth Circuit's opinion held an act of Congress facially unconstitutional.[57]

3. Federalism interests also justify certiorari.[58] The Authority's petition fails to mention that more than a dozen states have also pressed the statute's unconstitutionality, frustrated that it strips them of their regulatory power and transfers it to a private corporation.[59]

4. The horseracing industry urgently needs certainty as to its regulatory structure. The constitutionality of HISA is a foundational issue for 312,000 people employed in the industry, which

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[56] *Compare Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, 121 F.4th 1314 (D.C. Cir. 2024), *with id.* at 1338 *et seq.* (Walker, J., concurring/dissenting).

[57] *United States v. Morrison*, 529 U.S. 598, 605 (2000); *Doe v. Gonzales*, 546 U.S. 1301, 1309 (2005) (Ginsburg, J., as circuit justice). *Accord* Auth. Pet. 31; FTC Pet. 3.

[58] *Sorich v. United States*, 555 U.S. 1204, 1208 (2009) (Scalia, J., dissenting from denial of certiorari).

[59] *See Oklahoma v. United States*, S. Ct. No. 23-402, Amicus Brief of Arkansas, et al.; *Oklahoma v. United States*, 6th Cir. No. 22-5487, ECF Doc. 45 (Amicus Brief of Arkansas, et al.); State A.G. Letter to Senator Mitch McConnell (Dec. 8, 2022), https://ustrottingnews.com/wp-content/uploads/2022/12/12-08-22-Attorney-Generals-HISA-McConnell-Letter.pdf.

represents a major economic engine in many communities.[60]

The Authority again paints a false picture of uniform industry support for the Act, pejoratively labeling the Horsemen as recalcitrant objectors to a supposed industry consensus.[61]

Far from it. For starters, the lead plaintiff here is the national trade association for thoroughbred horse owners and trainers, with 30,000+ members. Standing with them is NAARV, the North American Association of Racetrack Veterinarians.[62] Also fighting the Authority in court are state racing commissions, racetracks, and the national trade associations for two allied horseracing industries: harness and quarter-horse racing.[63]

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[60] 2023 Economic Impact Study of the United States Horse Industry, American Horse Council, https://horsecouncil.org/economic-impact-study/.

[61] Auth. Pet. 9.

[62] *See, e.g.,* Amicus Brief of NAARV in support of NHBPA's petition for certiorari, S. Ct. No. 24-472 (Nov. 13, 2024).

[63] The Texas Racing Commission is a plaintiff here. The Oklahoma Horse Racing Commission and West Virginia Racing Commission are plaintiffs in *Oklahoma*, S. Ct. No. 25-1325. Churchill Downs, Inc., is the plaintiff in *Churchill Downs, Inc. v. Horseracing Integrity & Safety Auth., Inc.*, 2026 U.S. Dist. LEXIS 72872 (W.D. Ky. April 1, 2026). Fair Meadows, Remington Park, and Will Rogers Downs are also plaintiffs in *Oklahoma*, while Lone Star Park is among the Gulf Coast Racing plaintiffs here. The U.S. Trotting Association (harness or standardbred racing) is a plaintiff in *Oklahoma*, while the American Quarter Horse

The reality is that HISA has deeply divided the horseracing industry. But the one thing all corners of the industry agree on is the need for a prompt and clear rule: is HISA constitutional, and the Horsemen need to work to reform it from within? Or is HISA unconstitutional, and Congress needs to start from scratch on a regulatory framework with industrywide buy-in and meaningful congressional engagement, leading to an accountable regulator with appropriate checks and balances on its power?

5. This case is not just about horseracing. Judges and policymakers with purview over other industries are looking for this Court to clarify the contours of the doctrine laid down in *Consumers' Research*. *See, e.g.*, Andy Jung, *Is Private AI Regulation Constitutional?*, Wall St. J. (July 10, 2026) (reporting that Google had "released a framework for artificial-intelligence governance, proposing the creation of 'an independent regulatory organization for frontier AI with government oversight.'"). *See also Paul v. FAA*, 168 F.4th 672, 680 (D.C. Cir. 2026) (expressing "serious constitutional doubts" founded on the private nondelegation doctrine if the Federal Aviation Administration relies exclusively on private airlines to determine who can hold a pilot's certificate under its Drug & Alcohol Handbook).

The Authority unfairly presents the horseracing act as "modeled on the effective framework—uniformly upheld by the courts—that has governed

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Association supported the Horsemen with an amicus brief in the trial court. *See* Dkt. No. 40, 5:21-cv-00071-H (May 13, 2021).

the relationship between the Financial Industry Regulatory Authority ('FINRA') and the Securities and Exchange Commission ('SEC') for 85 years." Auth. Pet. 1. *See id.* 25-26. *See also* FTC Pet. 3.

But there are marked and important differences between FINRA and HISA, especially regarding the exercise of executive power.[64] So though a decision in this case may help guide lower courts' consideration of FINRA, this Court need not decide FINRA's constitutionality here.

Even so, FINRA's record in the courts is far from "uniform." Auth. Pet. 1. The D.C. Circuit found it unconstitutional in at least one circumstance.[65] And Judge Walker was willing to go further: "FINRA wields significant executive authority when it investigates, prosecutes, and initially adjudicates allegations against a company required by law to put itself at FINRA's mercy. That type of executive power

[64] *NHBPA V*, 178 F.4th at 244 ("for enforcement purposes, HISA gives the Authority an enforcement role meaningfully different from FINRA's"). The FTC asserts that HISA operates like FINRA, including that the FTC "retains independent power to investigate violations of the Horseracing Act" like FINRA. FTC Pet. 12. It cites 15 U.S.C. § 3054(a)(1), which "directs 'the Commission' to 'implement and enforce' the Act's provisions." The FTC misses the preceding sentence in the statute, which says "the Commission, the Authority, and the anti-doping and medication control enforcement agency, *each within the scope of their powers and responsibilities under this chapter* . . . shall . . . implement and enforce." (Emphasis added). The balance of the chapter only gives enforcement powers and responsibilities to the Authority and the anti-doping agency, not the FTC.

[65] *Alpine Sec. Corp.*, 121 F.4th 1314.

can be exercised only by the President (accountable to the nation) and his executive officers (accountable to him)."[66] Other judges are similarly concerned.[67]

In sum, though *Consumers' Research* provided some helpful markers, "the need to clarify the private non-delegation doctrine in an appropriate future case" remains. *Texas v. Comm'r*, 142 S. Ct. 1308, 1308 (2022) (Alito, J., concurring in denial of certiorari). This is that case.

II. The executive power question presented is extraordinarily important to the separation of powers found in the Constitution.

This case presents more than just a circuit split. It affords this Court a needed opportunity to explicate an underappreciated area of law at a time when Congress is anxious for new options and permutations to expand the horizons of the administrative state.

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[66] *Id.* at 1338 (Walker, J., concurring/dissenting).

[67] *See Smith v. United States SEC*, 178 F.4th 312, 321 (6th Cir. 2026) ("Congress's decision to assign this enforcement authority to a private entity theoretically might raise private nondelegation problems, as Judge Walker has previously explained"); *Frank Harmon Black & Southeast Invs., N.C., Inc. v. SEC & Fin. Indus. Regul. Auth.*, 2026 U.S. Dist. LEXIS 62340, *28 (W.D.N.C. March 24, 2026) (Orso, J.) (agreeing with Judge Walker that "FINRA is likely a private entity exercising significant executive authority, [and it] subverts the constitutional design.").

A. The Fifth Circuit's decision is correct.

1. The Fifth Circuit correctly found that HISA violates the nondelegation doctrine by granting unsupervised executive power to the Authority.

HISA violates multiple aspects of the Constitution and its separation-of-powers doctrines:

a. Through HISA, Congress delegates not only its own legislative powers to a private corporation, but it also delegates the Executive's powers.
b. HISA transfers *sovereign* executive powers to a private corporation.
c. HISA transfers those executive powers without sufficient and timely oversight.

The Fifth Circuit rightly declared that "the private nondelegation doctrine forbids unaccountable delegations of executive power."[68] The court correctly decided that's what happens in HISA: "The Act's plain terms permit only one conclusion: HISA is enforced by a private entity, the Authority. The Authority decides whether to investigate a covered entity for violating HISA's rules. The Authority decides whether to subpoena the entity's records or search its premises. The Authority decides whether to sanction it. And the Authority decides whether to sue the entity for an injunction or to enforce a sanction it has imposed."[69] "All these actions are enforcement actions, and, by the

[68] App. 20a.

[69] App. 22a.

plain terms of the Act, they can be done by the private entities without the FTC's involvement."[70]

The Fifth Circuit summarized the situation: "A private entity that can investigate potential violations, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the say-so of the agency—does not operate under that agency's 'authority and surveillance.'"[71] Exactly so.

The Fifth Circuit then answered two objections from the other side. First, the Authority and FTC object that Horsemen may appeal their ALJ convictions by the Authority to the FTC.[72] The FTC even characterizes the Authority arbitrators' decisions as mere "recommendations" to the FTC.[73] Balderdash.

Take suspension of racetrack operations. When the Authority wants to suspend a racetrack's operations due to alleged safety violations, it first holds a "provisional hearing" before a three-member panel. The panel may order that "the provisional suspension of the Racetrack's Accreditation shall go into immediate effect."[74] Only under suspension can the racetrack then appeal to the Authority Board, and

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[70] *Id.*

[71] App. 23a.

[72] App. 23a-26a.

[73] FTC Pet. 2, 11.

[74] Auth. R. § 2117(b)(3).

only this "final decision" by the Board is appealable to the FTC.[75]

Similarly, a covered person accused of certain medication violations is subject to provisional suspension by HIWU. HIWU imposes the provisional suspension. The covered person may then appeal to the Authority's arbitrator for a provisional hearing, where the standard of review heavily favors HIWU.[76] The covered person then must wait for a merits hearing before the arbitrator.[77] The arbitrator then renders a decision. According to the Authority's rules, "decisions rendered by the Arbitral Body under the Protocol shall be final and binding."[78] This "final decision" may then be appealed to the FTC.[79] Both the statute and the Authority's rules refer to these judgments as "final decisions,"[80] not "recommendations."

These "final decisions" can "impos[e] civil sanctions against covered persons"[81] including "lifetime bans from horseracing, disgorgement of purses, monetary

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[75] Auth. R. § 2117(c)(3).

[76] Auth. R. § 3247(c).

[77] Auth. R. § 3261.

[78] Auth. R. § 3263.

[79] Auth. R. § 3264.

[80] 15 U.S.C. § 3058 (title); Auth. R. § 3263.

[81] 15 U.S.C. § 3057(d)(1).

fines and penalties, and changes to the order of finish in covered races."[82]

These "final decisions" are "binding" and go into immediate effect. The "penalties imposed by the Authority are not automatically stayed pending appeal. So, any penalty goes into effect as soon as the Authority makes its decision, unless the ALJ or FTC exercises its discretion to implement a stay pending appeal."[83]

In short, horsemen "face a daunting and expensive task if they wish to challenge" the Authority's adjudication. *See Janus v. AFSCME Council 31*, 585 U.S. 878, 923 (2018). Horsemen "must still pay for the attorneys and experts needed to mount a serious challenge" to the Authority's decision. *Id.* "And the attorney's fees incurred in such a proceeding can be substantial." *Id.* On top of their own lawyers, the Horsemen must also pay half the costs of the Authority arbitrator hearing their case.[84] Practically, the expense of a jockey litigating a riding crop sanction, for instance, far exceeds the value of the sanction ($250 for 1 to 3 strikes over the 6-strike cap for a first-time offender[85]), such that very few will. For

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[82] 15 U.S.C. § 3057(d)(3)(A).

[83] App. 24a; § 3058(d). *Compare* Auth. R. § 3264 *with Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, 121 F.4th 1314, 1331 (D.C. Cir. 2024) ("FINRA automatically stays the effectiveness of all sanctions other than a bar or expulsion issued following a non-expedited disciplinary proceeding.").

[84] Auth. R. § 7420(b).

[85] Auth. R. § 282(b)(1)(i)

most cases, the "recommendation" is in fact the final resolution.

In many other situations, horsemen do not even have the option of seeking an FTC ALJ's review—when an investigation is opened, if an investigation is closed and no charges are filed, if an investigation ends in a plea deal or settlement, if the Authority arbitrator finds against the Authority, if the Authority delays on filing charges, or if the Authority creates a safe harbor after investigation. In these circumstances, horsemen find their lives turned upside down by investigations and even sanctions without a reviewable "recommendation."

The Defendants' other answer is that the FTC can solve the executive enforcement problem through an exercise of its legislative rulemaking powers.[86] Not so. Summarizing this dispute, Judge Gruender explained that the Sixth Circuit and his colleagues on the Eighth Circuit panel read the amended Act's language authorizing the FTC to "add to" the rules of the Authority as "allow[ing] the FTC to make basic and fundamental changes to the statute."[87]

That the FTC may not do: that "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."[88] As Judge Gruender explained, the statute governs the agency, not vice versa. "[T]he plain text of HISA empowers the

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[86] App. 29a-31a.

[87] *Walmsley*, 117 F.4th at 1043 (Gruender, J., dissenting in part).

[88] *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 328 (2014).

Authority, and not the FTC, with broad enforcement power. The FTC cannot rewrite the statutory scheme that Congress enacted."[89] The Act explicitly gives the Authority and HIWU exclusive responsibility for enforcement, which the Commission may not rewrite, as the Fifth Circuit held.[90]

Confirming that the FTC cannot tell the Authority how to enforce the rules, the Act gives a limited list of eleven topics on which the FTC may exercise "oversight" through rulemaking.[91] These include laboratory standards, racetrack standards, and a schedule of civil sanctions. None of the eleven enumerated topics covers enforcement activities. The Act explicitly gives enforcement powers only to the Authority and fails to give any contemporaneous oversight of these powers to the FTC.

2. The Fifth Circuit correctly decided this case on a facial basis.

There's a tension inherent in the Authority's petition. On the one hand, the Authority suggests that the industry needs a clear, prompt ruling upholding

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[89] *Id.*

This is why the new rule requiring FTC preclearance of subpoenas and civil injunction suits (FTC Pet. 14) is worthless—it is the agency rewriting the statute, which commits these powers solely to the Authority and also fails to include them on the enumerated points of supervision for the Commission. 15 U.S.C. § 3053(a)(1)–(11) (listing items the FTC oversees).

[90] App. 26a-27a.

[91] 15 U.S.C. § 3053(a)(1)–(11).

HISA so it can move forward with its job regulating horseracing nationwide. *See, e.g.,* Auth. Pet. 34. On the other hand, the Authority insists that the Fifth Circuit erred in deciding HISA's constitutionality now on a facial basis and that this Court should reverse and wait for as-applied challenges to different aspects of HISA. Auth. Pet. 14-15, 18-20.

Those two positions are in conflict. The solution is simple: the Authority is wrong that the Fifth Circuit erred in deciding HISA's constitutionality on a facial basis rather than punting to future as-applied challenges.

The constitutional flaw here "is categorical—present in every case," such that a facial challenge is appropriate. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021). Every time the Authority investigates a covered person or invades private property or requires a urine sample or seizes evidence, it does so without the FTC's prior authorization. Every time the Authority prosecutes, or declines to prosecute, or reaches a plea deal, it does so without the FTC's input. Every time the Authority issues a provisional suspension, it does so without the FTC's review. Every time an Authority ALJ imposes sanctions in a final decision, his sentence is subject to limited FTC review.[92] Virtually every time the Authority acts in any way regarding enforcement, "[n]either the President, nor anyone directly

[92] *Serpe,* No. 9441, Slip Op. at 14.

responsible to him, nor even an officer whose conduct he may review only for good cause," has any control.[93]

Either Congress's decision to delegate executive powers to a private corporation is constitutional or it is not. Either the Act gives the FTC enough oversight to pass constitutional muster, or it does not. An as-applied challenge does not add to the analysis in this case: "The challenges are fundamental, even existential." *Axon Enter. v. FTC*, 598 U.S. 175, 180 (2023). The statute itself is the problem because the "'freedom from Presidential oversight' render[s] unconstitutional 'all power and authority [the Authority] exercise[s].'"[94]

Consider the level of government oversight and control approved in *Consumers' Research*. "The FCC appoints the Administrator's Board of Directors and approves its budget. The Administrator 'may not make policy,' and must carry out all its tasks 'consistent with' the FCC's rules, 'orders, written directives, and other instructions.' And anyone aggrieved by an action of the Administrator may seek de novo review by the Commission."[95] Contrast those facts with the Authority's almost unbridled executive powers:

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[93] *Free Enter. Fund*, 561 U.S. at 496.

[94] *Axon*, 598 U.S. at 189 (quoting *Free Enter. Fund*, 561 U.S. at 508).

[95] 606 U.S. at 692-93 (cleaned up). The FCC Chairman also approves the Administrator's CEO. 47 C.F.R. § 54.704(b)(2)–(3).

a. The Authority appoints its own board and CEO without any oversight or input from the FTC (much less the President or Senate).[96]

b. In response to this litigation, the FTC summarily adopted a rule that requires FTC approval of the Authority's budget, even while recognizing in the Federal Register statement that the Act commits budget authority to the Authority board and that the Act does not list Authority finances as one of the eleven enumerated items of FTC supervision.[97]

c. The Authority constantly makes policy. It drafts rules that *must* be initially approved *in toto* with zero policy discretion. It issues guidance and protocols. It decides when to investigate, prosecute, and charge a case and when to exercise "prosecutorial discretion" and not enforce certain rules.[98] It exercises discretion when it settles a case or when its ALJs decide where within a range to set a sanction.

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[96] Lower courts also looked to the agency's control over leadership at the delegated private entity. *United States v. Frame*, 885 F.2d 1119, 1129 (3rd Cir. 1989); *Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973).

[97] *Procedures for Oversight of the Horseracing Integrity and Safety Authority's Annual Budget*, 88 Fed. Reg. 18034, 18035 (March 27, 2023).

[98] 5th Cir. ROA 3142-43 (Asked about a press release that delayed the effective date of a rule approved by the FTC by 30 days, counsel for the Authority explained to the district court, "[T]hat's an exercise of enforcement discretion. . . What the Authority is saying is, . . . we're going to exercise enforcement discretion. . . we're not going to prosecute. We're not going to enforce that limitation for 30 days. Agencies do that all the time.").

d. FTC review of agency actions is not available to *anyone aggrieved* but only a certain class of someones. Only persons subject to "final decisions of the Authority"[99] may seek FTC review, and they must wait until a *final* decision, not a provision suspension.

e. Finally, as *Consumers' Research* looked specifically at the contribution factor, so this petition looks specifically at the enforcement authority of the Authority. As the FTC has acknowledged, it "does not actively take part in the Authority's investigative and enforcement decisions."[100] That's because the Act does not give it a basis to do so.

Importantly for the facial vs. as-applied question, these flaws are ubiquitous, structural to the statute itself, and "categorical—present in every case."[101] In every case, the Board is not subordinate because the FTC has no appointment or removal power. In every case, the Authority exercises investigative and enforcement discretion without the FTC's active participation. In every case, the Authority ALJs exercise sanction-setting discretion, which the FTC cannot vary upward. In every case, a provisional suspension is not subject to timely FTC review.

"When . . . a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional *on its face*." *Nev. Dep't of Human Res.*

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[99] 15 U.S.C. § 3058 (title).

[100] *Serpe,* No. 9441, Slip Op. at 10.

[101] *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021).

v. Hibbs, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting). Only after determining the statute is constitutional on its face does the Court turn to individual applications. *Id*. And this makes sense: if Congress lacked the power to pass a statute, every application of the statute is unconstitutional.[102] The same is true for other vesting clause challenges: if a statute lacks an intelligible principle, for instance, it is unconstitutional in every application of the statute. If a statute gives sovereign governmental power to a private corporation, every exercise of that power is an unconstitutional delegation. If a statute gives government power to a private corporation without sufficient structural oversight, then every exercise of that unsupervised power is an unconstitutional delegation.

B. Background principles of constitutional law support the Fifth Circuit's decision.

In the past decade, this Court has turned often to the importance of the separation of powers and the fundamental structural features of our Constitution. *See, e.g., Trump v. Slaughter*, 146 S. Ct. 2283 (2026); *Loper Bright Enters. v. Raimondo,* 144 S. Ct. 2244 (2024); *Biden v. Nebraska*, 600 U.S. 477 (2023); *West Virginia v. EPA*, 597 U.S. 697 (2022); *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 595 U.S. 109 (2022); *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758 (2021); *Collins*

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[102] *See generally* Luke Meier, *Facial Challenges and Separation of Powers*, 85 Ind. L.J. 1557 (2012).

v. Yellen, 594 U.S. 220 (2021); *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020).

1. Congress cannot permanently transfer another branch's powers to a private third party.

"Even worse than an interbranch delegation is an extrabranch delegation—the 'most obnoxious form' of delegation."[103] And the most obnoxious form of extrabranch delegation occurs when Congress gives away not its own power but the powers of another branch. *See United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 450 (2023) (Thomas, J., dissenting) (Congress, in the False Claims Act, gives private relators executive powers normally reserved to the President). *See also id.* at 442 (Kavanaugh, J., concurring).

Congress can mandate that when an agency writes rules, exercising delegated legislative authority, the agency must consult certain private parties.[104] And the executive can decide to supplement his law enforcement ranks by bringing private parties to his aid, for instance by invoking *posse comitatus* or hiring contractors as "special policemen."[105] But it is another thing altogether when Congress short-circuits the executive entirely by cutting him out of the statute

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[103] *Alpine Sec. Corp.*, 121 F.4th at 1343 (Walker, J., concurring/dissenting).

[104] *Ass'n of Am. R.Rs. v. Dep't of Transp.,* 721 F.3d 666, 671 (D.C. Cir. 2013), *vacated on other grounds,* 575 U.S. 43 (2015) (internal quotations omitted).

[105] *See Filarsky v. Delia*, 566 U.S. 377, 387-88 (2012).

and handing his powers to a private alternative. *See Consumers' Rsch.*, 606 U.S. at 708 (Kavanaugh, J., concurring) (discussing the problems when Congress transfers executive powers to "independent" agencies).

HISA grants the Authority core executive powers. The power "to start, stop, or alter individual . . . investigations" belongs to the executive.[106] So do the powers "to issue subpoenas"[107] and to "seek daunting monetary penalties against private parties."[108] "[T]he President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law." *Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting). Yet here those powers belong not to the President but to a private corporation over whom the President and his appointees do not even have for-cause removal power. *See Slaughter*, 146 S. Ct. 2283.

2. This principle protects not only the prerogatives of the executive but the liberties of the citizenry at large.

Transferring the executive's power to a third party is interests more than just the executive. It concerns every American because the private nondelegation doctrine safeguards liberty through constitutional structure. *See Dep't of Transp. v. Ass'n of Am. R.Rs. (Amtrak II)*, 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("The principle that Congress cannot

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[106] *Free Enterprise Fund*, 561 U.S. at 504.

[107] *Collins*, 594 U.S. at 254.

[108] *Seila Law LLC*, 591 U.S. at 219.

delegate away its vested powers exists to protect liberty.”).[109]

Here, that interference with personal liberty and private property is all too real. Investigators from the Authority are loose in the industry right now searching private property without warrants, taking blood or urine samples without warrants, conducting coercive interrogations without the presence of counsel, and levying civil penalties without traditional due process.[110]

They do so without meaningful FTC oversight, as the FTC itself has said: “the Commission does not actively take part in the Authority’s investigative and enforcement decisions.”[111] “The Act and the HISA Rules require the Authority to bring administrative enforcement actions through its enforcement agency, HIWU, which in the case of [anti-doping rule violations] adjudicates charges before an arbitral body. In this way, the Authority makes its own initial determination whether covered persons violated the rules, whether sanctions are warranted, and which

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[109] *Accord New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 125 (1978) (Stevens, J., dissenting) (“It is [ ] fundamental that the State’s power to deprive any person of liberty or property may not be exercised except at the behest of an official decisionmaker . . . ‘a statute which attempts to confer [government] power [on a private regulator] undertakes an intolerable and unconstitutional interference with personal liberty and private property.’” (quoting *Carter Coal*, 298 U.S. at 311)).

[110] *NHBPA V*, 178 F.4th at 240 n.12.

[111] *Serpe,* No. 9441, Slip Op. at 10.

sanctions are warranted—all without Commission input or involvement."[112] That's unconstitutional.

Take a simple example: If the FTC thought that a group of horsemen were engaged in an antitrust conspiracy, it would need to provide sufficient evidence to convince a neutral Article III magistrate to issue a warrant before it could search a horseman's property for computers or documents proving the conspiracy.[113] Not so the Authority—it can go in without a magistrate's prior approval.[114]

Similarly, any evidence seized by the FTC in such a search could be challenged in court as violative of the Fourth Amendment. But no such rule applies if there is no "state action" because the search and seizure is conducted by a private corporation.[115]

And when the executive spends funds, meets in committee to formulate policy, or creates documents, it is accountable to the citizenry through a variety of transparency tools: the Administrative Procedure Act,

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[112] *Id.* at 11.

[113] *See generally Camara v. Municipal Court*, 387 U.S. 523 (1967).

[114] *See* 15 U.S.C. § 3054(h).

[115] *Serpe,* No. 9441, Slip Op. at 11.

The Authority's private nature enforcing public laws results in all sorts of anomalies. For instance, is an Authority official a "law enforcement officer" under 18 USCS § 1513(e), the RICO statute? Authority officials investigate, prosecute, and penalize violations of federal law, yet they are not federal law enforcement officials. *Tuma v. Hawthorne Race Course, Inc.,* 2025 U.S. Dist. LEXIS 142734, *24 (N.D. Ill. July 25, 2025).

the Federal Advisory Committee Act, the Freedom of Information Act, the Government in the Sunshine Act. A private corporation is subject to no such accountability.

In sum, not only the executive but also the everyday citizen experiences a violation of his rights by the delegation of governmental power to a private corporation.

III. The Court should revise the Government's Question Presented.

The Question Presented by the Government presumes its victory. *See* S. Ct. R. 14(1)(a) (the question presented should not be "argumentative."). The Government asks whether it is constitutional for the Act to "authorize the Horseracing Integrity and Safety Authority, a private entity, to assist the Federal Trade Commission in enforcing the statute." FTC Pet. I.

The Government chose this wording intentionally because this Court has approved a private delegate's "assistance" to a government agency. *Consumers' Rsch.*, 606 U.S. at 692.

In this instance, though, the Authority does far more than "assist" the FTC in enforcing the statute. The Authority does all the enforcement, and the FTC's role is limited to post-hac review in a particular subset of cases.

The FTC admits as much. The FTC has said that enforcement is not a "joint enterprise;"[116] "the Commission does not actively take part in the Authority's investigative and enforcement decisions."[117] The Commission has admitted that "the Authority makes its own initial determination whether covered persons violated the rules, whether sanctions are warranted, and which sanctions are warranted—all without Commission input or involvement."[118] "[T]he Commission does not conduct initial enforcement investigations and proceedings."[119] All the Commission can do is review final decisions by the Authority, and even then, its review is limited.[120]

Judge Gruender pointed out that "by 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 this fashion, the Authority does not 'function subordinately' to an agency with 'authority and surveillance' over it."[121]

This is not "supplementary support" or "aid."[122] This is doing the whole job itself with very limited,

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[116] *Id.* at 10-11.

[117] *Id.* at 11.

[118] *Id.*

[119] *Id.* at 11 n.91.

[120] *Id.* at 12.

[121] *Walmsley*, 117 F.4th at 1042 (Gruender, J., dissenting in part).

[122] *See* "Assist," Merriam-Webster.com, https://www.merriam-webster.com/dictionary/assist.

very late "supervision." By contrast, the Authority's petition provides a neutral version of the Question Presented, which the Court should prefer: "Whether the enforcement provisions of the Horseracing Integrity and Safety Act are facially unconstitutional under the private-nondelegation doctrine."[123]

IV. This case is the appropriate vehicle to resolve this question.

As the Solicitor General has advised this Court, "the petitions filed by the Authority and the government in this case provide better vehicles for resolving the question presented than do the petition in *Oklahoma*." FTC Pet. 16.[124] The Authority agrees. Auth. Pet. 35. But there are further reasons to prefer this vehicle beyond that the Horsemen were the only ones among the three cases to win below.

This Court often benefits from hearing the perspective of national trade associations, like the National HBPA, as the parties directly regulated by a law.[125] The National HBPA is the leading national

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[123] Auth. Pet. (i).

[124] *See* S. Ct. No. 24-429, FTC Pet. 14 (saying the same of *Oklahoma* and the then-pending *Walmsley* petition).

[125] *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).

trade association for thoroughbred horse trainers and owners in the racing industry.[126]

Also, the Horsemen's case arises following a bench trial, with a complete record of exhibits.[127] The *Oklahoma* case, by contrast, arises from the district court's grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), while the Eighth Circuit case arises in a preliminary injunction posture.[128] The Horsemen's record of exhibits may assist the Court in its consideration of how the Authority actually exercises the powers Congress conveyed.

Finally, the *Oklahoma* case does not present any originalist or categorical arguments regarding the private nondelegation doctrine. Rather, those parties took as a given the extant precedential framework based on *Sunshine Anthracite*. *See Oklahoma*, 163 F.4th at 307 ("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 Oklahoma v. United States,* 62 F.4th 221, 233 (6th Cir. 2023), *vacated*, 145 S. Ct. 2836

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[126] *See Jordan v. Horsemen's Benevolent & Protective Asso.*, 448 A.2d 462, 465 (N.J. 1982) ("a national nonprofit 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.").

[127] *NHBPA III,* 672 F. Supp. 3d at 225.

[128] *Oklahoma v. United States*, 2022 U.S. Dist. LEXIS 99448 (E.D. Ky. June 3, 2022); *Walmsley*, 117 F.4th at 1036.

(2025) (noting that 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;" and that the parties did not litigate the case "as a categorical Article II inquiry or as a question of historical meaning.").

The Horsemen, by contrast, have consistently argued that founding-era analogues show that an approach based on the type of power or function delegated is just as important as the amount of supervision exercised, relying chiefly 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.").[129] *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 ("past practice and constitutional principle necessarily require a distinction between sovereign functions, which cannot

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[129] See *Alpine Securities Corp.*, 121 F.4th at 1338 (Walker, J., concurring/dissenting).

be delegated to private actors, and proprietary functions, which may.”).

Reflecting this theme, private nondelegation cases frequently distinguish between ministerial tasks like fact gathering or fee collection and non-ministerial (*i.e.*, sovereign) tasks like policymaking and rule enforcement. *See Frame*, 885 F.2d at 1128-29 (tasks are “advisory” or “ministerial.”); *Pittston Co.*, 368 F.3d at 396 (tasks “administrative or advisory”); *Ass’n of Am. R.R.*, 721 F.3d at 671 n.5 (“advisory or ministerial functions”); *United States v. Garcia*, 690 Fed. App’x 575, 587 (10th Cir. 2017) (“ministerial acts or support services”). This conclusion accords with Justice Scalia’s comprehensive review of private corporations created or recognized by Congress or executive agencies, all of which filled proprietary roles like guaranteeing loans or managing infrastructure. *See Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 387-91 (1995).

The Court would benefit from a presentation of this originalist history alongside existing precedent.

For all these reasons, this case represents the best vehicle for which the Court should grant certiorari.[130]

[130] There is no need for this Court to wait for the Eighth Circuit to rule again. Last time around, the Eighth Circuit split 2-1 on whether its judges agreed with the Fifth or the Sixth Circuit’s reasoning. There is no reason to anticipate additional percolation will be helpful to the Court.

CONCLUSION

This Court should not take this case simply because of a circuit split, because an act of Congress has been enjoined, or because several states or the Solicitor General ask—though those are all also good reasons to do so. This Court should take this case because fundamental principles of personal liberty and democratic accountability are at stake.

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