

No. 26-199

**In The
Supreme Court of the United States**

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

Petitioners,

v.

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

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

Petitioner Horseracing Integrity and Safety Authority, Inc. is a nonstock, nonprofit corporation organized under the General Corporation Law of the State of Delaware. The Horseracing Integrity and Safety Authority, Inc. has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it. No other Petitioner is a nongovernmental corporation.

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REPLY BRIEF FOR PETITIONERS

The case for this Court’s review could hardly be clearer. Shortly after the Horseracing Integrity and Safety Authority (Authority) filed this petition, the Solicitor General submitted a parallel petition from the decision below presenting the same question: whether the enforcement provisions of the federal Horseracing Integrity and Safety Act (HISA) facially violate the private-nondelegation doctrine. No. 26-201. Two years ago, this Court granted the Authority’s emergency application to stay the mandate associated with the Fifth Circuit’s outlier holding on the identical question. No. 24A287. And now—after the Fifth Circuit “reissue[d]” that GVR’ed decision on remand (Pet. App. 3a)—all respondents have confirmed their agreement that this Court should review it.

The only remaining point of dispute—raised in respondents’ three cross-petitions (as referenced in their responses)—is whether to inject additional constitutional claims the lower courts have rejected uniformly. As the Authority will explain in its separate response to those cross-petitions, there is no need to complicate this case by incorporating those peripheral issues. Instead, the Court should simply review the straightforward question presented by the Authority’s and the Solicitor General’s petitions—*i.e.*, the “one important respect” (and only one) in which the courts of appeals conflict (Pet. App. 4a) and which all parties acknowledge warrants this Court’s resolution.

The Court should grant the petition.

DISCUSSION

1. The Solicitor General and other respondents agree that this Court should review whether HISA’s enforcement provisions on their face violate the private-nondelegation doctrine. *See* Pet. i, *Federal Trade Comm’n v. National Horsemen’s Benevolent & Protective Ass’n*, No. 26-201 (U.S. Aug. 14, 2026); NHBPA Mem. 1 (“The Court should grant these petitions” by the Authority and Solicitor General.); Texas Mem. 3 (“Texas does not oppose granting certiorari to review the Fifth Circuit’s enforcement ruling.”); Gulf Coast Mem. 1 (“The Gulf Coast Racing Plaintiffs therefore acquiesce in the Authority and FTC petitions[.]”).

That consensus follows from the undisputed fact that there is a “direct and mature circuit conflict” on the question. Gulf Coast Mem. 2; *see* Pet. 14-17. The Sixth Circuit held that HISA’s enforcement provisions are facially constitutional “in view of numerous applications of the Act’s *** enforcement provisions in which the Horseracing Authority remains subordinate to the FTC.” *Oklahoma v. United States*, 163 F.4th 294, 308 (6th Cir. 2025); *see id.* at 310-316. The Fifth Circuit, by contrast, resolved a materially identical challenge by holding that “HISA’s enforcement provisions are facially unconstitutional” because “the Authority does not ‘function subordinately’ to the FTC when enforcing HISA.” Pet. App. 4a, 24a. All respondents agree this case provides an “appropriate vehicle” to resolve that clean and “clear circuit split.” NHBPA Mem. 1, 38 (formatting altered).

The parties' alignment also underscores the exceptional importance of the question presented. *See* Pet. 31-35. Respondents acknowledge, for example, that granting certiorari here would comport with this Court's "traditional[]" practice to review decisions invalidating "an act of Congress as facially unconstitutional." NHBPA Amicus Br. 7, *Oklahoma v. United States*, No. 25-1325 (U.S. June 29, 2026). It would allow the Court to resolve dispositive legal issues that "[m]ultiple members of this Court have already expressed interest in considering." Texas Mem. 3-4. And it would yield desperately "need[ed] certainty" for a nationwide industry that employs hundreds of thousands of people and "represents a major economic engine in many communities." NHBPA Mem. 16-17. Indeed, only an authoritative ruling from this Court can prevent the "lack of uniformity *** imped[ing] interstate commerce" that motivated Congress—acting "through a highly deliberative and bipartisan process"—to enact (and amend) HISA to protect the cherished national pastime. 166 CONG. REC. H4982 (Sept. 29, 2020) (Rep. Barr); *see* Amici Br. of Sen. McConnell et al. in Support of Stay Appl. 6-7, *Horseracing Integrity & Safety Auth. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Sept. 24, 2024) (explaining "Congress had to act" in "respon[se] to this crisis in the industry" to prevent "the sport [from] disintegrat[ing]").

2. While agreeing that this Court should review the question presented, certain respondents want to sweep in additional questions on which the courts of appeals are not divided. The Gulf Coast respondents

raise an “alternative” claim about the Appointments Clause. Pet. i, 30, *Gulf Coast Racing L.L.C. v. Horseracing Integrity & Safety Auth., Inc.*, No. 26-332 (U.S. Sept. 9, 2026). The other respondents have recognized that the Appointments Clause challenge to HISA—shot down by every single federal judge to confront it, based on settled precedent this Court “has repeatedly applied *** for three decades,” Pet. App. 51a—is “‘fundamentally incompatible’ with [the] private nondelegation challenge” the Fifth Circuit sustained, *id.* at 45a. The Horsemen’s Association and Texas acquiesce in the grant of certiorari on the “mutually exclusive” (*id.*) private-nondelegation question, but they seek to broaden it to cover a separate constitutional challenge to HISA’s *rulemaking* provisions (in addition to its *enforcement* provisions) that the lower courts have consistently rejected, too.

For the reasons the Authority will set forth in a response to respondents’ three cross-petitions, the Court should limit its review to whether HISA’s enforcement provisions facially violate the private-nondelegation doctrine. That is the only question on which there is a circuit split and the only ground on which the federal statute has been held unconstitutional. The court of appeals’ conflicting answers to that question, despite their uniform rejection of respondents’ other constitutional challenges, undermine the suggestion that those distinct claims are “intertwined” with resolution of the facial constitutionality of the Act’s enforcement provisions. Pet. 15, *National Horsemen’s Benevolent & Protective Ass’n v. Horseracing Integrity and Safety*

Auth., No. 26-___ (U.S.) (filed Sept. 9, 2026; not yet docketed); *see* Pet. App. 16a (explaining that respondents’ argument that “the Authority’s enforcement powers violate the private nondelegation doctrine” was raised “apart from” their argument about the constitutionality of “its rulemaking powers”).

3. Respondents largely ignore the conflict between the decision below and this Court’s precedents on the question presented. *See* Pet. 21-31. Instead, they repeat the Fifth Circuit’s errors in portraying a caricature of the Authority’s powers untethered to any specific enforcement action involving actual parties in this case. *See, e.g.*, NHBPA Mem. 34 (alleging generally that “[i]nvestigators from the Authority are loose in the industry” imposing sanctions “without traditional due process”); *contra, e.g., Oklahoma*, 163 F.4th at 311-312 (explaining there are “plenty” of enforcement scenarios “that do not involve any meaningful investigation” by the Authority); 15 U.S.C. § 3057(c)(3) (mandating that, even before FTC and Article III review, the Authority must “provide for adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness” of an alleged rule violation and possible penalty). Like the Fifth Circuit, respondents also embrace worst-case assumptions about the FTC’s oversight. *See, e.g.*, NHBPA Mem. 36 (“The Authority does all the enforcement, and the FTC’s role is limited to post-h[oc] review in a particular subset of cases.”); *contra, e.g., Oklahoma*, 163 F.4th at 311-313 (explaining that, in addition to the FTC’s full authority to review and “reverse any sanction by the Authority,”

and the FTC’s power to “stay the sanction” “before the FTC finally reviews it,” “the FTC’s rulemaking powers over enforcement actions” allow for the FTC to “control the Authority’s enforcement activities” at any point, including by “micromanag[ing] every particularized decision the Authority makes in an investigation”).

Those conjectures about how the Authority might operate (construing the Act as broadly as possible) and assumptions about the FTC’s oversight powers (construing the Act as narrowly as possible) contradict this Court’s caution against reading statutes “extravagantly, the better to create a constitutional problem.” *FCC v. Consumers’ Rsch.*, 606 U.S. 656, 690 (2025). Respondents’ rhetoric aside, the only “democratic accountability” interests at stake arise not from any serious threat to “personal liberty,” NHBPA Mem. 42, but from the Fifth Circuit’s embrace of a facial challenge that “short circuit[s] the democratic process’ by preventing [a] duly enacted”—and amended—“law[] from being implemented in constitutional ways,” *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008)).

Congress passed (and the President signed) an amendment to HISA to promote “[a]ccountability considerations.” *Oklahoma*, 163 F.4th at 309. Now there can be no serious question that “the FTC, not the Horseracing Authority, is the agency of ultimate resort that decides how the federal government enforces the Act.” *Id.* at 312; see *Consumers’ Rsch.*, 606 U.S. at 693, 695 (explaining that what “matters to the

constitutional inquiry” is that an agency “retains decision-making power” so that it, rather than the private entity, “is in control”). “So in the relationship between the two, the Commission dominates.” *Consumers’ Rsch.*, 606 U.S. at 693. Because the FTC has “‘pervasive’ oversight and control of the Authority’s enforcement activities,” *Oklahoma*, 163 F.4th at 312 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)), “[t]he People may rightly blame or praise the FTC for how adroitly (or, let’s hope not, ineptly) it ‘ensure[s] the fair administration of the Authority’ and advances ‘the purposes of [the Act],’” *id.* at 309 (second and third alterations in original) (quoting 15 U.S.C. § 3053(e)).

4. Beside the petitions by the Authority and the Solicitor General seeking review of the Fifth Circuit decision, the Court now has before it a certiorari petition from plaintiffs in the Sixth Circuit case that also presents whether HISA’s enforcement provisions facially violate the private-nondelegation doctrine. *See Oklahoma v. United States*, No. 25-1325. Although the Authority welcomes consideration of that question (and only that question) through either case, the petitions by the Authority and the Solicitor General present the best vehicle for resolving it. Granting certiorari in this case would allow for direct review of the reasoning of the only court of appeals that has held the Act facially unconstitutional. Moreover, because this case was litigated on remand after the Sixth Circuit’s decision issued, the Fifth

Circuit engaged with the Sixth Circuit’s reasoning (on a full record following trial).¹

CONCLUSION

The Court should grant the petitions by the Authority and the Solicitor General and consolidate those two cases; deny the cross-petitions by the Horsemen’s Association, Texas, and Gulf Coast respondents raising separate questions that would needlessly complicate this case; and hold the petition from the Sixth Circuit case pending resolution of the merits here.

Respectfully submitted.

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¹ Although the Sixth Circuit petitioners point to a “latent jurisdictional issue” briefed below in the Fifth Circuit, Reply at 3, *Oklahoma v. United States*, No. 25-1325 (U.S. Sept. 15, 2026), the challengers in this case clarified years ago that they “abandoned” the claims in question and that the district court’s dismissal of those claims was “with prejudice,” Gulf Coast C.A. Reply Br. at 5-9, No. 23-10520 (5th Cir. Aug. 25, 2023). That is why no party (including the Authority) has pressed any such argument in years, and the Fifth Circuit had no reason to address it.