

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.*, *Respondents*.

FEDERAL TRADE COMMISSION, *et al.*, *Petitioners*,

v.

NATIONAL HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION, *et al.*, *Respondents*.

(For Continuation of Caption See Inside Cover)

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

**BRIEF OF REPOLE STABLE, INC. AS *AMICUS CURIAE*
IN SUPPORT OF TEXAS, THE NATIONAL HBPA AND
ITS AFFILIATES, AND GULF COAST RACING**

ROBERT S. CLARK
JILLIAN E. UPDEGRAFF
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103

MICHAEL B. DE LEEUW
Counsel of Record
WILLIAM N. MERCIER II
COZEN O'CONNOR
3 World Trade Center
175 Greenwich Street, 55th Floor
New York, NY 10007
(212) 509-9400
mdeleeuw@cozen.com

Counsel for Amicus Curiae Repole Stable, Inc.

GULF COAST RACING LLC., *et al.*, *Petitioners*,

v.

HORSERACING INTEGRITY AND SAFETY
AUTHORITY, INCORPORATED, *et al.*, *Respondents*.

TEXAS, *et al.*, *Petitioners*,

v.

JERRY BLACK, *et al.*, *Respondents*.

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. The Fifth and Sixth Circuits’ Rulemaking Holdings Conflict with <i>Consumers’ Research</i> , Warranting this Court’s Review.....	4
II. This Court Should Review HISA’s Enforcement Provisions Only if It Also Reviews HISA’s Rulemaking Provisions.	11
A. The Existing Circuit Split Presumes the Constitutionality of HISA’s Rulemaking Provisions.....	12
B. To Remain a Good Vehicle to Resolve These Important Questions, HISA’s Rulemaking and Enforcement Provisions Must Both Be Reviewed.	15
III. HISA’s Structure Has Had Severe Consequences for the Sport and Industry of Thoroughbred Racing.	17
CONCLUSION	22

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Biden v. Nebraska</i> , 600 U.S. 477 (2023).....	13
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008).....	17
<i>Bowe v. United States</i> , 607 U.S. 13 (2026).....	16
<i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 (1936).....	6, 18, 21
<i>Dep’t of Transp. v. Ass’n of Am. Railroads</i> , 575 U.S. 43 (2015).....	6, 17, 18, 21
<i>Fed. Commc’ns Comm’n v. Consumers’ Rsch.</i> , 606 U.S. 656 (2025).....	2-4, 6-10, 13, 14, 21
<i>Gamble v. United States</i> , 587 U.S. 678 (2019).....	20
<i>Loving v. United States</i> , 517 U.S. 748 (1996).....	17
<i>Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black</i> , 53 F.4th 869 (5th Cir. 2022)	8
<i>Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black</i> , 178 F.4th 224 (5th Cir. 2026)	6, 8, 13-16
<i>Oklahoma v. United States</i> , 163 F.4th 294 (6th Cir. 2025)	6, 8, 12-14, 16
<i>Sunshine Anthracite Coal Co. v. Adkins</i> , 310 U.S. 381 (1940).....	7

<i>Texas v. Comm’r</i> , 142 S. Ct. 1308 (2022).....	17, 21
<i>Trump v. CASA, Inc.</i> , 606 U.S. 831 (2025).....	16

Statutes:

15 U.S.C. § 3052(b)(3)(C)	18
15 U.S.C. § 3052(d)(3)(A)	18
15 U.S.C. § 3053(a).....	4
15 U.S.C. § 3053(a)(2)	5
15 U.S.C. § 3053(a)(5)	5
15 U.S.C. § 3053(a)(8)	5
15 U.S.C. § 3053(a)(9)	5
15 U.S.C. § 3053(b)(1)(A)	5
15 U.S.C. § 3053(b)(1)(B)	5
15 U.S.C. § 3053(c)(1).....	5
15 U.S.C. § 3053(c)(2).....	5, 8
15 U.S.C. § 3053(e).....	6, 8, 12
15 U.S.C. § 3054(e)(1)(A)	14
15 U.S.C. § 3054(e)(1)(B)	14
15 U.S.C. § 3054(e)(1)(E)(iv)	14
15 U.S.C. § 3054(h)	14
15 U.S.C. § 3054(j)(1)	13
15 U.S.C. § 3055(c)(4).....	14

Other Authorities:

- Horseracing Integrity and
 Safety Authority Proposed 2027 Budget,
 91 Fed. Reg. 57,597 (Sept. 10, 2026)19, 20
- Sue Finley, Churchill Asks FTC for
 Independent Review of HISA, *Thoroughbred
 Daily News* (Aug. 31, 2026), available at
[https://www.thoroughbreddailynews.com/chur-
 chill-asks-ftc-for-independent-review-of-hisa/](https://www.thoroughbreddailynews.com/churchill-asks-ftc-for-independent-review-of-hisa/)18
- See Comments on the Proposed 2027 Budget,
Horseracing Integrity & Safety Auth.,
 available at
[https://bphisaweb.wpengine.com/wp-
 content/uploads/2026/07/2027-Budget-
 Comments_Redacted.pdf](https://bphisaweb.wpengine.com/wp-content/uploads/2026/07/2027-Budget-Comments_Redacted.pdf)19, 20
- The Federalist No. 22
 (C. Rossiter ed. 1961) (A. Hamilton)20

INTEREST OF AMICUS CURIAE¹

Repole Stable, Inc. (“Repole Stable”) is a prominent participant in the Thoroughbred racing and breeding industries. It is owned and operated by Mike Repole, who, through Repole Stable, is one of the most successful Thoroughbred owners in America. As of September 10, 2026, Mr. Repole owns more than 330 Thoroughbreds, including horses that are active and in training, unraced yearlings and foals, and a significant band of broodmares for breeding. Repole Stable also has partial interests in more than a dozen Thoroughbred stallions. Since 2004, horses owned fully or partially by Mr. Repole have made more than 6,300 starts in North America with more than 1,400 wins and purse earnings in excess of \$99 million. Horses owned by Mr. Repole have won some of America’s most prestigious races, including the Belmont Stakes, the Breeders’ Cup Classic, two wins in the Travers Stakes, and three wins in the Breeders’ Cup Juvenile. Mr. Repole is a significant contributor to Thoroughbred retirement and retraining initiatives and has invested significantly and advocated strongly for improving the sport and its greater industry, in the hope that future generations can continue to enjoy Thoroughbred racing as much as Mr. Repole has.

¹ Rule 37 statement: All parties’ counsel of record were timely notified of the intent to file this brief as to the Authority’s and FTC’s petitions for certiorari docketed at Nos. 26-199 and 26-201. No such notification is required as to Respondents’ cross-petitions for certiorari because this brief is being filed earlier than 10 days before the due date. No part of this brief was authored by any party’s counsel, and no person or entity other than Repole Stable; its members; and/or its counsel funded this brief’s preparation or submission.

As a Thoroughbred owner and breeder, Repole Stable is directly affected by (1) the Horseracing Integrity and Safety Act (“HISA” or the “Act”); (2) the Horseracing Integrity and Safety Authority, Inc. (the “Authority”); (3) the Authority’s rules; and (4) the Authority’s enforcement or potential enforcement of its rules. Given Mr. Repole and Repole Stable’s history in the sport, Repole Stable has a substantial interest in ensuring that the sport is governed by a regulatory system that is lawful, transparent, democratically accountable, and subject to meaningful oversight. Repole Stable strongly supports efforts to promote horse safety, integrity, and public confidence in Thoroughbred racing, and its experience operating within the HISA regime gives it a unique perspective on the consequences that flow from the novel and unusual regulatory scheme created by HISA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court should grant the FTC and Authority’s petitions for certiorari, as well as Respondents’ cross-petitions for certiorari, to provide necessary guidance to lower courts on the scope of the private non-delegation doctrine. To ensure this case is an ideal vehicle to provide such guidance, this Court should grant certiorari to review the facial constitutionality of both the Act’s rulemaking provisions and its enforcement provisions.

The facial constitutionality of the Act’s rulemaking provisions warrants this Court’s review because the Fifth and Sixth Circuits’ decisions below conflict with this Court’s recent decision in *Federal Communications Commission v. Consumers’ Research*, 606 U.S. 656 (2025). Specifically, the Fifth

and Sixth Circuits failed to appreciate the constitutionally significant distinction between a regulatory scheme in which a federal agency provides its affirmative, *ex ante* approval—the “agency’s say-so,” *id.* at 695—to a private entity’s recommendation and the Act’s novel structure, under which the private Authority’s proposed rules gain legal effect after the FTC’s limited consistency review, subject only to hypothetical, *ex post* revision by the FTC through the notice-and-comment rulemaking process. Both the Fifth and Sixth Circuits also failed to consider or analyze the scope of power delegated to the Authority under HISA, despite this Court’s focus on that issue in *Consumers’ Research*.

This case presents an ideal vehicle to review both the rulemaking and enforcement provisions of the Act, as well as provide guidance on the private non-delegation doctrine, but only if this Court grants certiorari on both issues. Any constitutional analysis of the Act’s enforcement provisions must begin with the constitutionality and scope of the Act’s rulemaking provisions, as demonstrated by the Fifth and Sixth Circuit’s opinions. Indeed, the issues are so intertwined that, if this Court accepted only the enforcement issue, it is possible that this Court’s decision would leave the enforcement provisions vulnerable to further facial constitutional challenge in every circuit except the Fifth and Sixth Circuits, so long as litigants also challenged the constitutionality of the Act’s rulemaking provisions in tandem. For this Court to achieve nationwide uniformity and resolve the uncertainty facing the horseracing industry as a whole, it should review these two closely related issues together.

Finally, this case presents an ideal vehicle to clarify the private non-delegation doctrine because this case provides a perfect demonstration of why delegations of federal governmental power to private entities are forbidden. Removed from any democratic pressures, the Authority's actions have received and continue to receive substantial criticism from prominent members of the horseracing industry. Yet, the Authority is unconcerned, dismissively swatting away criticisms as if they were mere annoyances, not important questions from the ultimate federal sovereign—the People.

ARGUMENT

I. The Fifth and Sixth Circuits' Rulemaking Holdings Conflict with *Consumers' Research*, Warranting this Court's Review.

The facial constitutionality of the Authority's rulemaking powers presents a substantial issue of national importance that warrants this Court's review, particularly given that the Fifth and Sixth Circuit's analysis of this issue conflicts with this Court's recent decision in *Federal Communications Commission v. Consumers' Research*, 606 U.S. 656 (2025).

In passing HISA, Congress cloaked the Authority—a private entity—with rulemaking power. See 15 U.S.C. § 3053(a) (providing that “[t]he Authority shall submit to the [FTC] . . . any proposed rule, or proposed modification to a rule”). Specifically, HISA grants the Authority rulemaking power to regulate broad swaths of the industry, including “permitted and prohibited medications, substances, and methods, including allowable limits of permitted

medications, substances, and methods,” *id.* § 3053(a)(2); “racetrack safety standards and protocols,” *id.* § 3053(a)(5); “a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons,” *id.* § 3053(a)(8); and “a schedule of civil sanctions for violations,” among others. *Id.* § 3053(a)(9).

The FTC’s role in the rulemaking process is limited and, in many cases, effectively ministerial. When the Authority proposes a rule, the FTC is required to “publish in the Federal Register each proposed rule” and “provide an opportunity for public comment.” *Id.* § 3053(b)(1)(A)-(B). But HISA limits the FTC’s ability and authority to reject, or even to meaningfully engage with, the Authority’s proposals. Instead, “[t]he [FTC] shall approve a proposed rule” so long as it “is consistent with—(A) this chapter; and (B) applicable rules approved by the [FTC].” *Id.* § 3053(c)(2). Tellingly, the FTC is not empowered to reject or modify a proposed rule if it disagrees with the proposed rule on policy grounds. Nor may it effectively veto the rule by refusing to act upon it; instead, “the [FTC] shall approve or disapprove the proposed rule or modification” no later than 60 days after its publication in the Federal Register. *Id.* § 3053(c)(1).

If the FTC disapproves of the Authority’s policy choices, it is left with only one tool in its arsenal: notice-and-comment rulemaking. In 2022, Congress amended HISA to provide that the FTC “may abrogate, add to, and modify the rules of the Authority” if the FTC “finds [it] necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to

requirements of this chapter and applicable rules approved by the [FTC], or otherwise in furtherance of the purposes of this chapter.” 15 U.S.C. § 3053(e). But the FTC is still required to approve a proposed rule so long as it is consistent with the law and existing rules; it can only modify or undo that action potentially years later, at great effort and expense.

The Fifth and Sixth Circuits both held that the “sometimes slow, ever deliberate, notice-and-comment [rulemaking] process” was sufficient, alone, to ensure that the FTC remains the “primary rule-maker,” while the Authority remains “subordinate.” *Oklahoma v. United States*, 163 F.4th 294, 309-10 (6th Cir. 2025) [hereinafter *Oklahoma II*] (citations omitted); accord *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 178 F.4th 224, 234-35 (5th Cir. 2026) [hereinafter *Horsemen’s III*]. In doing so, both Circuits departed from the standards recently clarified by this Court in *Consumers’ Research*.

This Court has long recognized that the delegation of power “to private persons whose interests may be and often are adverse to the interests of others in the same business” is “legislative delegation in its most obnoxious form[.]” *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); see also *Consumers’ Rsch. v. Dep’t of Transp.*, 606 U.S. at 692; *Dep’t of Transp. v. Ass’n of Am. Railroads*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) (“By any measure, handing off regulatory power to a private entity is ‘legislative delegation in its most obnoxious form.’” (quoting *Carter*, 298 U.S. at 311)). At the same time, “Government agencies may rely on advice and assistance from private actors[.]” there is nothing constitutionally wrong with an agency acting upon a

private entity’s “recommendations.” *Consumers’ Rsch.*, 606 U.S. at 692 (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)). Indeed, the democratic process often works best when not only Congress and the President, but also federal agencies, are in direct conversation with the People, including those they regulate.

For such a scheme to be constitutional, though, the private entity must remain “subordinate[] to’ the agency and . . . subject to its ‘authority and surveillance.” *Id.* at 692 (quoting *Adkins*, 310 U.S. at 399). If the private entity does not remain subordinate, then it is no longer merely offering advice; it is impermissibly wielding governmental power.

In *Consumers’ Research*, this Court clarified what it means for a private entity to be subordinate to a governmental agency when it comes to rulemaking. “[T]he relevant legal question is not how often the [agency] revises the [entity’s proposals]” *Id.* at 695. However, it must be the case that “the private party’s recommendations . . . cannot go into effect without an agency’s say-so, regardless of how freely given.” *Id.* (citing *Adkins*, 310 U.S. at 399). When a law “allows non-governmental entities to govern” without such prior approval, *id.* at 697, that is an unconstitutional delegation of governmental power to a private entity. *See id.* at 694 (emphasizing that the agency “review[ed]” the private entity’s financial projections and then affirmatively “revise[d] and approve[d]” them before promulgation to the public; “all that action” demonstrated the agency’s “endorse[ment]” of the private entity’s recommendation).

When analyzing HISA’s rulemaking scheme, the Fifth and Sixth Circuits misinterpreted this Court’s opinion in *Consumers’ Research*. HISA permits the Authority to act, not with the FTC’s “say-so,” *id.* at 695, but rather with the FTC’s “say-not.” HISA requires that the FTC give the Authority’s rules effect, and the FTC is rendered powerless to reject or modify any proposed rule unless the rule is inconsistent with the statute or the existing rules. *See* 15 U.S.C. § 3053(c)(2). It is only after the fact that the FTC “may abrogate, add to, and modify the rules of the Authority . . . as the [FTC] finds necessary or appropriate.” 15 U.S.C. § 3053(e). But the Authority sets the default rules through an expedited process, while the FTC may only disturb those defaults much later, through laborious notice-and-comment rulemaking.

Both the Fifth and Sixth Circuits brushed this key distinction aside. The Fifth Circuit suggested that the FTC’s limited consistency review would now “implicitly include[] review of [policy] choices” merely because hypothetical, after-the-fact modification of disfavored rules gave the FTC the “final word over what those rules are.” *Horsemen’s III*, 178 F.4th at 235 (citations omitted). The Sixth Circuit reasoned that even an after-the-fact “final word on the substance of the rules” would allow “[t]he People [to] 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].’” *Oklahoma II*, 163 F.4th at 309 (first quoting *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 53 F.4th 869, 887 (5th Cir. 2022); and then quoting 15 U.S.C. § 3053(e)). Neither Circuit acknowledged this Court’s analysis that, for a private entity to remain subordinate to a federal

agency, the agency must engage in affirmative “action” that amounted to “endorse[ment]” of the private entity’s recommendation before that recommendation was given legal effect. *Consumers’ Rsch.*, 606 U.S. at 694.

Both Circuits also failed to recognize that this Court’s requirement for agency “say-so,” *id.* at 695—that is, affirmative, *ex ante* action to approve of the private entity’s policy choices—serves an important constitutional role in ensuring democratic accountability. The FTC has many responsibilities and limited resources. It must necessarily make policy choices about how to allocate its resources, and even when the FTC disagrees with the Authority’s proposed rules, the FTC could reasonably—correctly, even—decide that its resources are better allocated elsewhere. For instance, the FTC might reasonably decide that it should allocate its resources to high-stakes antitrust enforcement actions or consumer protection efforts, rather than micromanaging the specific medications on the list of prohibited substances under the Authority’s anti-doping rules. That may be the case even if the FTC vehemently disagrees with the Authority’s policy decision regarding a particular medication on the prohibited list.

Under the current scheme, what can the People do if they simultaneously believe that the Authority made the wrong policy choice, but that the FTC correctly allocated its resources? They can do nothing. There is a difference in kind between the power to engage in after-the-fact revisions and a requirement to provide before-the-fact, explicit approval (the “agency’s say-so,” *Consumers’ Rsch.*, 606 U.S. at 695), such that the People can distinguish between whether

the FTC actually agreed with the Authority's proposed rules or was merely along for the regulatory ride. That can make all the constitutional difference.

The Fifth and Sixth Circuits also failed to grapple with the sheer scope of the powers delegated to the Authority. In *Consumers' Research*, this Court repeatedly emphasized that the private entity engaged in "no policy-making." 606 U.S. at 693. Instead, its responsibilities amounted to simply "doing arithmetic" and "estimat[ing] . . . cost[s]" of government programs designed by the agency itself. *Id.* at 693-94. In sum, all that was delegated was mere "accounting functions." *Id.* at 695.

By contrast, here, the Authority is empowered to make *every* relevant policy choice underlying the entire regulatory scheme in the first instance, draft the rules that reflect those choices, and submit those proposed rules to the FTC. The FTC is prohibited from rejecting the Authority's proposals based on disagreement with the underlying policy judgments. Those rules then take effect and govern the conduct of the entire industry just a couple months later, while the FTC can only step in and modify a rule after it already has the force of law.

That sweeping delegation of rulemaking power to a private entity cannot be so lightly swept aside. If the amount of power delegated to a private entity was wholly irrelevant to the private non-delegation analysis, this Court would not have heavily emphasized the number-crunching nature of the private entity's tasks in *Consumers' Research*. *Id.* at 693-95. At the same time, this Court has not yet articulated any standard guiding lower courts in how to determine how much policy-making power in the hands of a private entity is too much. This case

presents an ideal vehicle to provide that necessary guidance regarding an issue of exceptional importance.

II. This Court Should Review HISA's Enforcement Provisions Only if It Also Reviews HISA's Rulemaking Provisions.

The constitutional validity of HISA's enforcement provisions cannot readily be separated from the Act's rulemaking framework, such that this Court cannot meaningfully review the former without also reviewing the latter. Both the Fifth and Sixth Circuit's analysis of HISA's enforcement provisions began from the same premise: that HISA's rulemaking provisions were facially constitutional. If that premise fails, so too does the Sixth Circuit's reasoning, while it would provide another, independent basis to support the Fifth Circuit's ultimate holding.

If this Court were to deny certiorari as to the facial constitutionality of HISA's rulemaking provisions, this case would become a suboptimal vehicle to resolve the facial constitutionality of HISA's enforcement scheme. In effect, this Court would be reviewing only one piece of the overall statutory puzzle—the cart, but not the horse. And this Court would be left unable to conclusively resolve the facial constitutionality of even HISA's enforcement provisions, which would remain subject to further challenge in all but two circuits, as long as future litigants simultaneously challenged HISA's rulemaking provisions.

Accordingly, if the Court seeks to provide meaningful guidance on the private non-delegation doctrine and achieve nationwide uniformity

concerning the constitutional validity of HISA's overall regulatory scheme, the facial constitutionality of the Act's rulemaking and enforcement provisions should be decided together.

A. *The Existing Circuit Split Presumes the Constitutionality of HISA's Rulemaking Provisions.*

From start to finish, the Fifth and Sixth Circuit's disagreement over the facial constitutionality of the Act's enforcement provisions turns on the Act's rulemaking provisions. Therefore, if this Court is going to review the enforcement question in a meaningful way, it must also review its necessary predicate: whether the Act's rulemaking provisions are facially constitutional.

Both the Fifth and Sixth Circuits agreed that the facial constitutionality of HISA's enforcement provisions is closely intertwined with HISA's rulemaking provisions.

The Sixth Circuit reasoned that "the FTC's § 3053(e) rulemaking power provides it with an additional means to supervise the Authority's enforcement practices." *Oklahoma II*, 163 F.4th at 312. The Sixth Circuit speculated that the FTC could hypothetically adopt rules that "bring an overzealous . . . Authority to heel" by, for instance: (1) "constraining the Authority's investigations[;]" (2) "increasing the procedural rights of suspected rulebreakers[;]" (3) abrogat[ing] rules that lead to petty violations[;]" (4) "promulgat[ing] rules that change the elements of a rule violation[;]" (5) "requir[ing] that the Authority seek [the FTC's] authority before investigating an incident[;]" or (6) "requiring, for instance, that the Authority drop a

misguided investigation into a particular jockey,” among other potential rules. *Id.* From this, the Sixth Circuit concluded that “[t]he broad rulemaking authority that Congress delegated to the FTC demonstrates that Congress empowered the agency to supervise the [Authority].” *Id.* at 314 (citing *Consumers’ Rsch.*, 606 U.S. at 692).

The Fifth Circuit’s analysis of the Act’s enforcement provisions also turned heavily upon the Act’s rulemaking provisions. After holding that the rulemaking provisions were facially constitutional, the Fifth Circuit held that this could not save the Act’s enforcement provisions by allowing the FTC to “rein in” the Authority. *Horsemen’s III*, 178 F.4th at 236, 241-44.

While noting that “[t]his argument persuaded the Sixth Circuit that at least a *facial* challenge to the Authority’s enforcement powers should fail,” the Fifth Circuit disagreed because the FTC could not, by rulemaking, “rewrite the statute” and make “basic and fundamental changes in the scheme designed by Congress.” *Id.* at 241-44 (quoting *Biden v. Nebraska*, 600 U.S. 477, 494 (2023) (citations and internal quotations omitted)) (emphasis in original).

For instance, considering an example first posited by the Sixth Circuit, *Oklahoma II*, 163 F.4th at 312, the Fifth Circuit reasoned that the FTC’s rulemaking power could not be used to require the Authority to obtain pre-clearance for any Authority suit to obtain an injunction because the Act expressly commits such decisions to the Authority, without providing the FTC with any role in the process. *Id.* at 242; *see* 15 U.S.C. § 3054(j)(1) (permitting “the Authority”—not the FTC—to file suit “to enjoin . . . acts or practices” that violate HISA or the rules

promulgated thereunder). The same is true of the Authority's "investigatory and subpoena power," which the Act delegates to the Authority and then requires it to re-delegate to another private entity—a double delegation along the same axis. *Horsemen's III*, 178 F.4th at 231-32, 242-43; *see* 15 U.S.C. § 3054(h) ("The Authority"—not the FTC—"shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction."); *id.* § 3054(e)(1)(A)-(B), (E)(iv); (requiring the Authority to further delegate this authority to another private entity); *see also id.* § 3055(c)(4). *But see Consumers' Rsch.*, 606 U.S. at 696-98 (explaining how "two layers" of regulatory schema that "operate[] on a single axis" can "compound . . . the other[] in a way that pushes the combination over a constitutional line").

Despite reaching opposite conclusions, both the Fifth and Sixth Circuits grounded their constitutional analyses of HISA's enforcement provisions in their respective interpretations of the constitutional validity and limits of the FTC's rulemaking authority under the Act. *Oklahoma II*, 163 F.4th 312-14; *Horsemen's III*, 178 F.4th at 241-44. If the Act's rulemaking provisions are facially unconstitutional, then this would only further support the Fifth Circuit's holding, while fundamentally calling the Sixth Circuit's reasoning into question. Therefore, these two closely related issues should be reviewed together.

B. To Remain a Good Vehicle to Resolve These Important Questions, HISA's Rulemaking and Enforcement Provisions Must Both Be Reviewed.

If this Court denies certiorari on the rulemaking question, this case would become a suboptimal vehicle to resolve the enforcement question. Such a course would artificially cleave a single, constitutional whole into two parts, and would fail—no matter the outcome—to provide sufficient guidance to lower courts or conclusively resolve even the facial constitutionality of the enforcement provisions. Such an outcome would only prolong the uncertainty currently facing the horseracing industry, and it would not achieve nationwide uniformity of federal law.

Suppose that this Court were to assume that HISA's rulemaking provisions were facially constitutional for purposes of reviewing HISA's enforcement provisions in isolation. If this Court held that the Act's enforcement provisions are facially unconstitutional, that may bring some level of certainty to the horseracing industry, though it would likely leave unsettled important questions regarding the scope of the private non-delegation doctrine. *Cf. Horsemen's III*, 178 F.4th at 242-44 (holding that the Act grants the Authority not only enforcement power, but in some instances *exclusive* enforcement power, given that it does not provide for any "FTC involvement in the process" of issuing subpoenas, investigating alleged offenders, making charging decisions, or any other of the many stages of the enforcement process that are effectively unreviewable after a final sanction is issued).

But if the Court held that the Act's enforcement provisions were facially constitutional without reaching the question of the constitutionality of the Act's rulemaking provisions, that conditional holding would not actually answer the question on a nationwide basis. Presently, only the Fifth and Sixth Circuits have spoken on the constitutional validity of HISA's rulemaking provisions. *Horsemen's III*, 178 F.4th at 236; *Oklahoma II*, 163 F.4th 310. In all other circuits, it remains an open question whether the Act's rulemaking provision runs afoul of the private non-delegation doctrine. Accordingly, even after such a conditional holding, other litigants would remain free to mount new facial constitutional challenges to HISA's enforcement provisions, so long as they also challenged HISA's rulemaking provisions in parallel.

It would be highly unusual for this Court to grant certiorari on an issue, only to leave it effectively unanswered in all but two circuits. Decisions handed down by this Court are meant to offer clarity and achieve nationwide uniformity of the law. *See Trump v. CASA, Inc.*, 606 U.S. 831, 876 (2025) (Kavanaugh, J., concurring) (stating that it is one of the roles of this Court to “resolve major legal questions of national importance and ensure uniformity of federal law”); *Bowe v. United States*, 607 U.S. 13, 49 (2026) (Gorsuch, J., dissenting) (indicating that “it is often this Court's job to resolve circuit splits and bring nationwide uniformity to the application of federal law”). To achieve those goals, even only as to HISA's enforcement provisions, this Court must also review the facial constitutionality of HISA's rulemaking provisions.

III. HISA's Structure Has Had Severe Consequences for the Sport and Industry of Thoroughbred Racing.

This case also presents an ideal vehicle to provide clarification and necessary guidance on the scope of the private non-delegation doctrine because this case demonstrates the exact ills that the private non-delegation doctrine was designed to prevent. The Authority's own history and dismissive responses to industry criticism demonstrate why a strong private non-delegation doctrine is necessary to preserve democratic accountability.

"Even before the birth of this country, separation of powers was known to be a defense against tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996) (citations omitted). Indeed, our nation's founders recognized the dangers of unbridled governmental power and cabined it specifically in the three branches of government. *See Boumediene v. Bush*, 553 U.S. 723, 742 (2008) ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty." (citations omitted)). At least three members of this Court have emphasized the danger posed by the government's delegation of power to a private entity. *See Texas v. Comm'r*, 142 S. Ct. 1308, 1309 (2022) (Alito, J., joined by Thomas & Gorsuch, JJ., statement respecting the denial of certiorari) ("To ensure the Government remains accountable to the public, it 'cannot delegate regulatory authority to a private entity.'" (first quoting *Ass'n of Am. Railroads*, 575 U.S. at 61 (Alito, J., concurring); and then citing

Carter Coal Co., 298 U.S. 238)); *Ass’n of Am. Railroads*, 575 U.S. at 57 (Alito, J., concurring) (“When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences.”).

Here, Congress has delegated rulemaking and enforcement power to the Authority. But by nature of its private status, it is shielded from any democratic accountability. In fact, the members of the Authority’s board of directors are not appointed by the President with the consent of the Senate, but instead are selected by the Authority’s own nominating committee, *see* 15 U.S.C. § 3052(d)(3)(A), subject to the Authority’s own rules. *See id.* § 3052(b)(3)(C). The Authority’s Board is insulated from any democratic input, while the FTC is constrained to approve their policy decisions.

The consequences of this unaccountable regulatory scheme have reverberated throughout the Thoroughbred racing industry. Recently, Churchill Downs Inc. (“Churchill Downs”), a major player in the Thoroughbred industry, expressed significant concerns about the Authority’s governance and transparency.² Churchill Downs called for an investigation into the Authority’s “recent handling of multiple matters implicating racing integrity, wagering integrity, non-public information, and the safeguarding of sensitive industry data.” *Id.*

² Sue Finley, Churchill Asks FTC for Independent Review of HISA, *Thoroughbred Daily News* (Aug. 31, 2026), available at <https://www.thoroughbreddailynews.com/churchill-asks-ftc-for-independent-review-of-hisa/>.

Meanwhile, the Authority’s fee assessments against industry participants have increased astronomically on a per-racing-start basis—from \$337 per start in the 2024 budget to \$450 per start in the proposed 2027 budget.³ In response to the Authority’s most recent proposed budget, numerous industry participants submitted public comments asking pointed questions about the “prohibitive price paid by our industry to HISA,” which threatens to turn into a “tidal wave of horse owners leaving the sport.”⁴

The Authority’s response to such criticisms demonstrates its complete lack of democratic accountability. *See generally* Horseracing Integrity and Safety Authority Proposed 2027 Budget, 91 Fed. Reg. 57,597 (Sept. 10, 2026) [hereinafter 2027 Proposed Budget]. The Authority dismissed Churchill Downs’s comment, which correctly pointed out the increase in per-start assessments from 2023 to 2027, by branding it “misleading” because it included the “per-start figure from 2023,” which the Authority contends “is not an accurate baseline for evaluating the current budget.” *Id.* at 57,613. The Authority wholly ignored that, whether you compare the \$450

³ *See* Comments on the Proposed 2027 Budget, *Horseracing Integrity & Safety Auth.*, available at https://bphisaweb.wpengine.com/wp-content/uploads/2026/07/2027-Budget-Comments_Redacted.pdf [hereinafter Comments to 2027 Proposed Budget].

⁴ *Id.* at 16-17 (comment by the New York Thoroughbred Horsemen’s Association, Inc.); *accord id.* at 4-6 (comment by Jonathan Stettin, Founder of Past the Wire); *id.* at 18-19 (comment by Churchill Downs); *id.* at 20-22 (comment by New York Thoroughbred Breeders, Inc.); *id.* at 29-34 (comment by Terry J. Westemeir); *id.* at 35-39 (comment by the National Horsemen’s Benevolent and Protective Association).

per-start assessment in 2027 to 2023 (\$285 per start) or 2024 (\$337 per start), the financial figures support Churchill Downs’s observation that the Authority’s per-start assessments have “ballooned” in a manner that will “continue to rise as racetracks pull back or shutter completely” due to the Authority “forcing them to shoulder even more financial responsibility.” *See* Comments to 2027 Proposed Budget at 18-19. Meanwhile, the Authority brushed aside the New York Thoroughbred Horsemen’s Association, Inc.’s comments about the overall cost of the Authority’s regulatory scheme (including specific, legitimate questions about new revenue streams, economies of scale, future cost savings, and other specific efforts that the Authority could take to reduce the financial burden on the industry) entirely, deeming them not “relevant to the Commission’s evaluation of the proposed budget.” *See* 2027 Proposed Budget at 57,613.

Freed from any sense of democratic accountability, the Authority has failed to meaningfully address the widespread concerns of industry participants regarding the costs of its programs and whether the Authority is administering those programs efficiently. Such concerns are treated as mere annoyances, closer to the buzzing of a gadfly than serious questions posed by the ultimate source of federal sovereignty—the People. *See Gamble v. United States*, 587 U.S. 678, 688 (2019) (“[S]overeignty belongs to the people...” (citation omitted)); *The Federalist* No. 22, at 152 (C. Rossiter ed. 1961) (A. Hamilton) (“the consent of the people” is the “pure, original fountain” from which “all legitimate authority” flows).

This is what happens when governmental power is wielded by a private entity, largely unsupervised and wholly insulated from the pressures of the ballot box. *See Consumers' Rsch.*, 606 U.S. at 709 (Kavanaugh, J., concurring) (raising concerns about “democratic accountability” when the American people are unable to hold entities wielding government power “responsible for a bad decision or policy”); *Texas v. Comm’r*, 142 S. Ct. at 1309 (Alito, J., joined by Thomas & Gorsuch, JJ., statement respecting the denial of certiorari) (“To ensure the Government remains accountable to the public, it ‘cannot delegate regulatory authority to a private entity.’” (first quoting *Ass’n of Am. Railroads*, 575 U.S. at 61 (Alito, J., concurring))); and then citing *Carter Coal Co.*, 298 U.S. 238). While HISA may have been enacted with good intentions, the statute unlawfully delegated governmental power to a private entity. As a consequence of that unconstitutional delegation of power, the Authority has lost the trust of industry participants and the general public, who are powerless to hold the Authority accountable in any meaningful sense.

CONCLUSION

For these reasons, this Court should grant both the petitions and cross-petitions for certiorari to review the facial constitutionality of both the rulemaking and enforcement provisions of the Act.⁵

September 16, 2026

Respectfully submitted,

ROBERT S. CLARK
JILLIAN E. UPDEGRAFF
COZEN O’CONNOR
One Liberty Place
1650 Market Street,
Suite 2800
Philadelphia, PA 19103

MICHAEL B. DE LEEUW
Counsel of Record
WILLIAM N. MERCIER II
COZEN O’CONNOR
3 World Trade Center
175 Greenwich Street,
55th Floor
New York, NY 10007
(212) 509-9400
mdeleeuw@cozen.com

Counsel for Amicus Curiae Repole Stable, Inc.

⁵ Repole Stable takes no position regarding the first question presented in the cross-petition for certiorari filed by Gulf Coast Racing L.L.C. et al., which relates to a different issue.