

Nos. 26-199 & 26-201

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.

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

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

On Petitions for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

**CONSOLIDATED MEMORANDUM FOR THE STATE
OF TEXAS AND THE TEXAS RACING COMMISSION**

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MEMORANDUM OF TEXAS RESPONDENTS

Texas agrees that this case warrants the Court's attention. Whether Congress may delegate to a private entity the power to write and enforce the rules governing the Thoroughbred horseracing industry implicates fundamental constitutional questions that have not been fully explored by this Court. But as Texas explained in its certiorari petition (No. 26-335), the Court should not limit its review to the narrow questions presented by the Horseracing Integrity and Safety Authority (the Authority) and Federal Trade Commission (FTC) that concern only the Authority's ability to enforce its rules. The Court should also consider the logically antecedent question presented in Texas's petition: whether the Authority can *make* the rules that it enforces, or whether the Horseracing Integrity and Safety Act (HISA) unconstitutionally delegates legislative authority to a private entity, the "most obnoxious form" of delegation. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

A. The Constitution vests legislative and executive power in Congress and the President, respectively. *See* U.S. Const. art. I, § 1; *id.* art. II, § 1. Under HISA, however, Congress delegated those powers to the Authority—a "private, independent, self-regulatory, nonprofit corporation," 15 U.S.C. § 3052(a)—with minimal oversight by the FTC.

The Authority has a mandate to create industry-wide programs regarding safety and illicit substances, *id.* §§ 3055-56, and the ability to write the rules to do so, *id.* § 3053(a). Regarding enforcement, the Authority determines by rule what sanctions may be imposed, *id.* § 3057(d) (including fines, penalties, disgorgement, and lifetime bans); may give itself the authority to access offices, facilities and other places of business, *id.*

§ 3054(c)(1)(a); may issue subpoenas and exercise other investigatory powers, *id.*; and may bring enforcement actions in court, *id.* § 3054(j). No federal official appoints or removes members of the Authority’s board of directors, as those powers remain with the Authority. *Id.* § 3052(d).

Delegating even further, Congress has authorized the Authority to contract with another private entity to act as the anti-doping and medication-control “enforcement agency.” *Id.* § 3054(e)(1)(B). The Authority has done so, Auth. App. 6a-7a, and that entity’s responsibilities include “independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations,” 15 U.S.C. § 3055(c)(4)(B).

By contrast, the FTC’s duties are primarily to publish the Authority’s proposed rules, *id.* § 3053(b)(1), and approve those rules if they are consistent with HISA and the FTC’s rules, *id.* § 3053(c)(2). The FTC also has the option to engage in its own rulemaking, *id.* § 3053(e), and the discretion to review decisions of administrative law judges regarding Authority enforcement actions, *id.* § 3058(c).

B. Texas intervened in a lawsuit brought by various horsemen’s benevolent and protective associations and asserted that HISA violated the private-nondelegation doctrine. Auth. App. 62a-63a. The first time it considered the case, the Fifth Circuit agreed, holding that the FTC’s limited review of the Authority’s proposed rules for consistency with other law was insufficient supervision. *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 53 F.4th 869, 890 (5th Cir. 2022).

Congress reacted by granting the FTC the ability to make its own rules to abrogate, add to, or modify the

Authority’s rules. 15 U.S.C. § 3053(e). Considering HISA for a second time, the Fifth Circuit found that HISA no longer unconstitutionally delegated legislative authority, but it did unconstitutionally delegate enforcement authority. *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 107 F.4th 415, 420-21 (5th Cir. 2024). All parties sought certiorari.

Following its decision in *FCC v. Consumers’ Research*, 606 U.S. 656 (2025), this Court granted, vacated, and remanded each petition. The Fifth Circuit, now considering the matter for a third time, concluded that *Consumers’ Research* did not alter its prior decision: HISA unconstitutionally delegated enforcement authority, but not legislative authority, to a private entity. Auth App. 2a-5a. In doing so, the court created a split on the enforcement question with the Sixth Circuit, which found no unconstitutional delegation. *Oklahoma v. United States*, 163 F.4th 294, 301 (6th Cir. 2025). All parties have, again, sought certiorari.

Texas does not oppose granting certiorari to review the Fifth Circuit’s enforcement ruling. But for the reasons explained in Texas’s petition, this Court should also consider whether the Authority may first make the rules that it enforces.

C. Review of all aspects of the private-nondelegation doctrine is warranted to further develop the law in this area. Multiple members of this Court have already expressed interest in considering Congress’s ability to delegate its authority. *See, e.g., Texas v. Comm’r for Internal Revenue*, 142 S. Ct. 1308, 1308 (2022) (Alito, J., concurring in denial of review); *Gundy v. United States*, 588 U.S. 128, 149 (2019) (Gorsuch, J., dissenting); *Paul v. United States*, 589 U.S. 1087, 1087-88 (2019)

(Kavanaugh, J., statement respecting the denial of certiorari).

Although the Court recently addressed the nondelegation doctrine in *Consumers' Research*, the Court's primary focus was public nondelegation. 606 U.S. at 672-91. Because the Administrator performed only "accounting functions" that were reviewed and approved by the FCC, the Court's private-nondelegation ruling was largely controlled by its decision in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). *Consumers' Rsch.*, 606 U.S. at 692-95. As a result, *Consumers' Research* did not shed new light on the upper limits of what governmental functions Congress may delegate to a private entity. Nor did it definitively resolve this case, given that HISA's delegation of authority to create and enforce entire regulatory programs goes far beyond the administrative functions delegated in *Consumers' Research*.

Lack of precedent from this Court has led the circuits to adopt a variety of tests. See Pet. for Writ of Certiorari at 27-29, *Texas v. Black*, No. 26-335 (U.S. Sept. 9, 2026) (discussing, *inter alia*, *Pittston Co. v. United States*, 368 F.3d 385, 396 (4th Cir. 2004) (limiting delegation to powers of an "administrative or advisory nature"); *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670-71 (D.C. Cir. 2013) (limiting delegation to providing "help" or acting as "an aid"), *vacated on other grounds*, 575 U.S. 43 (2015)). A thorough analysis of the private-nondelegation doctrine would bring needed clarity where there currently is little precedent with which the circuits can work.

D. Texas's petition raises many of the same questions that will need to be answered in resolving the Authority's and FTC's petitions. One is whether granting the FTC merely the option to review the work of the Authority

suffices to demonstrate that the Authority “function[s] subordinately” to the FTC who has “authority and surveillance” over its activities. *Adkins*, 310 U.S. at 399. The Fifth Circuit’s decision is internally inconsistent on this point. The Fifth Circuit correctly held that the FTC’s ability to review the Authority’s enforcement decisions *was not* enough to subordinate the Authority to the FTC. Auth. App. 24a-27a. But it also held that the FTC’s ability to make its own rules to counter those of the Authority *was* enough to subordinate the Authority to the FTC. Auth. App. 13a-15a.

Whether the FTC’s optional supervision satisfies the private-nondelegation doctrine is also relevant to the Authority’s and FTC’s arguments regarding facial relief. Auth. Pet. 18-21; FTC Pet. 12-14. The theory underlying the facial argument is that nondelegation violations occur on a decision-by-decision basis. As a result, the *possibility* that the FTC might supervise the Authority by making a new rule or reviewing an enforcement decision is sufficient to defeat a facial claim. But this Court has previously held that an agency cannot remedy a delegation violation through its own actions. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001). The nature of a private-nondelegation violation—whether it is structural and complete upon the delegation or whether it is dependent on an agency’s choice to supervise—is a question implicit in all of the petitions.

Finally, the question of delegating legislative authority is logically antecedent to the question of delegating enforcement authority. The Authority itself describes (at 21-22) the FTC’s purported approval of the Authority’s rules as a significant factor in concluding that the Authority’s enforcement actions remain “subordinate” to the FTC. But “there is not even a fig leaf of constitutional

justification” for the delegation of legislative or executive powers to a private entity. *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring). The Court cannot decide whether the Authority may constitutionally enforce its own rules without first considering the Authority’s power to create those rules.

This case is, accordingly, doubly worthy of the Court’s attention, and the Court’s analysis should not be limited to only the questions presented by the Authority and the FTC. Rather, the Court should consider the constitutionality of the entire delegation in HISA to both make and enforce the rules governing the horseracing industry.

Respectfully submitted.

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