

Nos. 26-332, 26-335, 26-430

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

GULF COAST RACING L.L.C., ET AL.,
Petitioners,

v.

HORSERACING INTEGRITY AND SAFETY AUTHORITY,
INCORPORATED, ET AL.

TEXAS, ET AL.,

Petitioners,

v.

JERRY BLACK, ET AL.

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

Petitioners,

v.

HORSERACING INTEGRITY AND SAFETY AUTHORITY,
INCORPORATED, ET AL.

*ON CROSS-PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the rulemaking provisions of the Horseracing Integrity and Safety Act facially violate the private-nondelegation doctrine.

II. Whether the Act facially violates the Constitution's Appointments Clause.

RULE 29.6 STATEMENT

Defendant Horseracing Integrity and Safety Authority, Inc. (cross-petition respondent here) 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 respondent is a nongovernmental corporation.

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INTRODUCTION

Following a series of high-profile equine deaths and corruption scandals that threatened horseracing under the prior patchwork of state-by-state regulations, Congress enacted the Horseracing Integrity and Safety Act (“HISA”) to save the sport. The Act protects athletes (equine and human), the betting public, and the integrity of horseracing through the development and uniform enforcement of racetrack-safety, medication-control, and anti-doping rules. HISA charges the Federal Trade Commission (“FTC”) with its implementation, and the FTC in turn draws on the expertise and resources of the Horseracing Integrity and Safety Authority (“Authority”), a private nonprofit organization, subject to the FTC’s “‘pervasive’ oversight and control.” *Oklahoma v. United States (Oklahoma III)*, 163 F.4th 294, 312 (6th Cir. 2025) (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)). That arrangement is modeled on the effective framework—uniformly upheld by the courts—that has governed the relationship between the Financial Industry Regulatory Authority (“FINRA”) and the Securities and Exchange Commission (“SEC”) for 85 years.

Two administrations have now supported HISA. Two bipartisan Congresses have embraced it, including through an amendment in late 2022 that fortified the FTC’s oversight. And every single federal judge that has considered the two questions presented by the three cross-petitions—whether the amended HISA’s rulemaking provisions facially violate the private-nondelegation doctrine and whether the Act violates the Appointments Clause—has rejected them.

The Court should deny review of those splitless questions and instead grant the petitions filed by the Authority and the Solicitor General presenting the only question on which the courts of appeals conflict: whether HISA’s *enforcement* provisions facially violate the private-nondelegation doctrine.

STATEMENT OF THE CASE

A. Legal Background

1. “[A] beloved tradition in the United States since the early days of the Republic,” horseracing is a fixture of American culture and a “major source of jobs and economic opportunity.” 166 CONG. REC. H4981-4982 (Sept. 29, 2020) (Rep. Barr). Over the last decade, however, “the joy of the races [wa]s marred by accidents that endanger[ed] both the horses and the riders.” *Id.* at H4980 (Rep. Pallone). In 2019 alone, 441 Thoroughbreds died from race-related injuries—a fatality rate two-to-five times greater than in Europe or Asia. H.R. REP. NO. 116-554, at 17 (2020). These casualties sparked investigations by officials, concern within the industry, and “even call[s] for this sport to be abolished altogether.” 166 CONG. REC. S5514 (Sept. 9, 2020) (Sen. McConnell). At the heart of these troubles was a “patchwork system” of state-by-state regulatory schemes that led to “wide disparit[ies]” in standards and enforcement and eroded the betting public’s confidence. 166 CONG. REC. H4981 (Rep. Tonko).

The highly publicized equine fatalities and corruption scandals brought new urgency and support for action in Congress, which had considered various horseracing bills over the prior decade. *See* 166 CONG.

REC. H4981-4982 (Rep. Barr). In 2020, a broad coalition of stakeholders rallied around “bipartisan, bicameral progress” toward finally remedying the “tragedies on the track.” 166 CONG. REC. S5514-5515 (Sen. McConnell). The congressional effort was not only cheered by animal-welfare proponents, but also hailed by “limited government conservative[s]” who sought “smarter, more effective, and streamlined regulation for the industry”—sorely needed given that the “lack of uniformity ha[d] impeded interstate commerce.” 166 CONG. REC. H4982 (Rep. Barr).

Passage of the “landmark” legislation, with “almost 300 cosponsors in the House and Senate” and “broad support” from across the industry, was celebrated on both sides of the aisle for “usher[ing] in a new era in the sport.” Press Release, *McConnell Leads Senate Passage of Horseracing Integrity and Safety Act* (Dec. 21, 2020);¹ Press Release, *Gillibrand Announces Passage Of Her Horseracing Integrity And Safety Act* (Dec. 22, 2020).² President Trump signed HISA into law in December 2020.

2. HISA was “model[ed]” on and is “materially indistinguishable from the Maloney Act,” which has governed the SEC’s relationship with FINRA and other self-regulatory organizations (“SROs”) for over eight decades. Amici Br. of Sen. McConnell et al. in Support of Stay Appl. 5, 10, *Horseracing Integrity & Safety Auth., Inc. v. National Horsemen’s Benevolent & Protective Ass’n*, No. 24A287 (U.S. Sept. 24, 2024).

¹ <http://tinyurl.com/59m9kywy>.

² <http://tinyurl.com/mry9t5pb>.

HISA recognizes the Authority as a “private, independent, self-regulatory, nonprofit corporation” that will help to develop and implement “a horseracing anti-doping and medication control program and a racetrack safety program,” subject always to “Federal Trade Commission oversight.” 15 U.S.C. §§ 3052(a), 3053.

The Authority may submit to the FTC a “proposed rule, or proposed modification to a rule,” relating to the content and implementation of the racetrack-safety, anti-doping, and medication-control programs. 15 U.S.C. §§ 3053(a), 3054(c), 3057. But the FTC alone may give those draft standards the force of law by independently approving them following notice-and-comment. *Id.* § 3053(b). To do so, the FTC must determine that each proposed standard is “consistent with” both the statute and the FTC’s own rules. *Id.* § 3053(c). The agency must be satisfied, therefore, that any standard protects “the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces.” *Id.* § 3054(a). Beyond that overall purpose, Congress directly prescribed the content of some rules, *e.g.*, *id.* § 3055(g)(1)-(2), enumerated “[e]lements” and “[p]rohibition[s]” to be incorporated in others, *e.g.*, *id.* §§ 3055(d), 3056(b), 3057(a)(2), (c)(2), and provided various “[c]onsiderations” to constrain the development and implementation of the programs, *e.g.*, *id.* §§ 3055(b), 3056(b), 3057(d).

The Authority may enforce HISA’s programs, including by investigating and disciplining violations by covered persons who register under the Act,

pursuant only to those “uniform procedures and rules” that are approved by the FTC. *See, e.g.*, 15 U.S.C. §§ 3054(c), 3057. The Authority “shall promptly submit” to the FTC notice of any sanction, *id.* § 3058(a), which “shall be subject to de novo review” by an FTC-appointed administrative law judge, *id.* § 3058(b). The administrative law judge’s decision is subject to yet further review by the Commissioners themselves. *Id.* § 3058(c).

3. Beyond those agency checks, an amendment Congress enacted during—and in response to—this litigation ensures additional, ongoing FTC oversight at all points.

In November 2022, in a precursor appeal, the Fifth Circuit held that HISA (as originally enacted) violated the private-nondelegation doctrine. *National Horsemen’s Benevolent & Protective Ass’n v. Black (Black I)*, 53 F.4th 869 (5th Cir. 2022). Under the version of the Act then considered, only the Authority “wr[o]te[] the regulations and the FTC c[ould] not modify them.” *Id.* at 887. Because the FTC lacked “the final word,” the Fifth Circuit held, the Authority did not “function subordinately” to the agency. *Id.*

“Not so anymore.” *Oklahoma v. United States (Oklahoma II)*, 62 F.4th 221, 231 (6th Cir. 2023). In direct response to the Fifth Circuit’s ruling, in December 2022, Congress enacted (and President Biden signed into law) bipartisan legislation authorizing the FTC to “abrogate, add to, and modify” HISA rules as the FTC “finds necessary or appropriate” to (i) “ensure the fair administration of the Authority,” (ii) “conform the rules of the Authority”

to requirements of the Act and applicable rules, or (iii) otherwise “further[] *** the purposes” of the Act. 15 U.S.C. § 3053(e). That language, drawn directly from the Maloney Act, “eliminates” “the ‘key distinction’” the Fifth Circuit previously identified with the SEC-FINRA statute. *Oklahoma II*, 62 F.4th at 232 (quoting *Black I*, 53 F.4th at 887). Indeed, the Sixth Circuit had suggested this specific remedy at oral argument in a parallel challenge. Oral Arg. Rec. 33:00-33:13, *Oklahoma II*, No. 22-5487 (6th Cir. Dec. 7, 2022) (Sutton, C.J.) (“Why not just say to [Congress,] this is easy, this was bipartisan, just put the modification power straight in, it’ll be just like FINRA and the SEC, problem solved?”).

B. Proceedings Below

1. HISA rules have been successfully implemented since July 2022, currently governing over 97,000 horses and 40,000 people competing across 41 racetracks in 19 states (all outside the Fifth Circuit). Although “the Thoroughbred industry overwhelmingly supported” HISA and “has adjusted to this regime,” Amici Br. of Thoroughbred Industry Participants in Support of Stay Appl. 2, 9, *Horseracing Integrity & Safety Auth.*, No. 24A287 (U.S. Sept. 25, 2024), a faction long opposed to any reforms brought a series of challenges to the Act.

Those challengers include the lead plaintiffs (cross-petitioners here), a national horsemen’s association and several of its state chapters. In 2021, those plaintiffs brought suit in the Northern District of Texas to challenge HISA’s constitutionality. Pet.

App. 59a & n.2 (discussing “lead-case plaintiffs”).³ They named as defendants the Authority and its officials (cross-respondents here), plus the FTC and its commissioners. *Id.* at 59a nn.5-6. The State of Texas and the Texas Racing Commission (collectively, “Texas”) intervened to support the plaintiffs’ challenge. *Id.* at 59a n.4. In 2022, the district court rejected plaintiffs’ constitutional challenge, holding that HISA, as originally enacted, did not “facially violate[] the private-nondelegation doctrine” because the Authority “function[ed] subordinately to the FTC, guided by Congressional standards.” *National Horsemen’s Benevolent & Protective Ass’n v. Black*, 596 F. Supp. 3d 691, 696 (N.D. Tex. 2022).

After Texas and the horsemen’s association appealed from that initial decision, a group of Texas-based plaintiffs pressed a separate facial challenge in the Northern District of Texas. Pet. App. 59a & n.3 (listing “member-case plaintiffs”). That group (the “Gulf Coast plaintiffs”) ultimately comprised a Texas racetrack, a collection of entities that claimed they were working toward operating horseracing tracks in the State, and a partnership of horsemen who race there. *Id.* They raised the same private-nondelegation claims as in the parallel case, but also a “mutually exclusive” Appointments Clause claim on the ground that the Authority was not private for constitutional purposes. *Id.* at 42a, 72a. Texas racetracks have never been subject to HISA rules because Texas has essentially elected to avoid the Act’s reach. Specifically, as Texas’s counsel explained

³ Citations are to the appendix filed in case No. 26-430.

at trial, Texas “opted to stop” the transmission of in-state racing for out-of-state wagering, thereby negating the statutory interstate-commerce element necessary to trigger application of HISA to horseracing in the State. ROA.3086-3087.

2. On remand from the Fifth Circuit’s 2022 decision declaring the original version of HISA unconstitutional, the two cases were consolidated. Pet. App. 65a. The horsemen’s association, Texas, and the Gulf Coast plaintiffs filed amended complaints challenging the amended Act on several facial constitutional grounds. *Id.* at 65a-68a. Following full briefing and a bench trial on the merits, the district court rejected the consolidated challenges and granted final judgment in favor of the Authority and the FTC. *Id.* at 51a-112a. The court concluded that “Congress answered the call” and “cured the constitutional issues.” *Id.* at 88a, 97a.

On appeal, the Fifth Circuit affirmed in part and reversed in part. It agreed that “the amendment solved the nondelegation problem with the Authority’s rulemaking power.” *National Horsemen’s Benevolent & Protective Ass’n v. Black (Black II)*, 107 F.4th 415, 420 (5th Cir. 2024). That holding aligned with the Sixth and Eighth Circuit’s conclusions that because the FTC “has the final say over the rules, there is no impermissible private delegation” with respect to “the Act’s rulemaking structure.” *Walmsley v. FTC*, 117 F.4th 1032, 1038 (8th Cir. 2024); *see also Oklahoma III*, 163 F.4th at 307-310.

The Fifth Circuit also agreed with the district court that HISA does not violate the Appointments

Clause, rejecting the “basic premise of Gulf Coast’s argument *** that the Authority is part of the federal government for Appointments Clause purposes.” *Black II*, 107 F.4th at 437. The Eighth Circuit subsequently “agree[d] with the Fifth Circuit that the Act does not conflict with the Appointments Clause.” *Walmsley*, 117 F.4th at 1041. The Sixth Circuit challengers abandoned the same claim after the district court had rejected it in that case. *Oklahoma v. United States (Oklahoma I)*, No. 5:21-cv-104, 2022 WL 1913419, at *11 (E.D. Ky. June 3, 2022).

The Fifth Circuit disagreed with the district court in only “one important respect”—concluding, on a facial basis, that “apart from its rulemaking powers, the Authority’s enforcement powers violate the private nondelegation doctrine.” *Black II*, 107 F.4th at 421, 426. That decision conflicted with the decisions by the Sixth Circuit and Eighth Circuit, which held that “the statute is not unconstitutional on its face” because the FTC “has broad power to subordinate the Authority’s enforcement activities” as well as its rulemaking activities. *Walmsley*, 117 F.4th at 1039-1040; *Oklahoma II*, 62 F.4th at 229-231 (same).

All parties filed certiorari petitions from the Fifth, Sixth, and Eighth Circuits’ judgments.

3. The Authority also filed an emergency application (supported by the Solicitor General) for a stay of the mandate associated with the Fifth Circuit’s judgment based on its “holding that HISA’s enforcement provisions facially violate the private-nondelegation doctrine.” Stay Appl. 2, *Horseracing Integrity & Safety Auth.*, No. 24A287 (U.S. Sept. 19,

2024). In October 2024, this Court granted the Authority’s application. Pet. App. 113a-114a.

The Court held that stay in place until issuing its June 2025 opinion in *FCC v. Consumers’ Research*, 606 U.S. 656 (2026). That opinion rejected a private-nondelegation challenge. *Consumers’ Rsch.*, 606 U.S. at 692-695. The Court subsequently granted the certiorari petitions in this case, vacated the Fifth Circuit’s judgment, and remanded—while similarly “GVRing” the other two judgments for each circuit to address the nondelegation challenges in light of *Consumers’ Research*. *E.g.*, Pet. App. 118a.

4. Taking a “second look at the Act” post-*Consumers’ Research* after new briefing and oral argument, the Sixth Circuit again rejected the constitutional attacks on HISA. *Oklahoma III*, 163 F.4th at 301. “The Authority yields to FTC supervision and lacks the final say over rulemaking and enforcement of the law, all tried and true hallmarks of an inferior body.” *Id.* at 307.

Six months later, the Fifth Circuit concluded that “*Consumers’ Research* does not affect [its] prior decision.” Pet. App. 3a. So while “continu[ing] to differ with the Sixth Circuit” on whether “the Authority’s *enforcement* powers are subordinate to the FTC,” *id.* at 38a n.22 (emphasis added), the Fifth Circuit concluded that “*Consumers’ Research* also does not change [its] previous holding concerning the Authority’s *rulemaking*,” *id.* at 39a n.23 (emphasis added). Noting that the latter claim was not even “strongly contested by the parties on remand,” the Fifth Circuit reiterated its “critical point” that the amended Act “give[s] the

agency final say-so over the content of any rule before it ever takes effect.” *Id.* The Fifth Circuit also reissued its prior holding that “the Authority is a private entity not subject to Article II’s Appointments Clause.” *Id.* at 49a.⁴

REASONS FOR DENYING THE PETITIONS

Every federal judge that has reviewed the operative version of HISA has concluded that its rulemaking scheme is facially constitutional under the private-nondelegation doctrine. That consensus follows from application of the established agency-subordination standard that Petitioners accepted below, that this Court’s recent precedent reaffirms, and that courts of appeals have relied on uniformly to uphold the materially identical Maloney Act. Congress amended HISA to satisfy that standard by conferring on the FTC the express oversight the Fifth Circuit said the prior version of the statute had omitted. Petitioners’ worst-case assumptions about how the FTC might exercise that supervision and control do not warrant this Court’s review on a facial challenge.

Nor does the “fundamentally incompatible” Appointments Clause question warrant review. As a threshold issue, the only parties pressing that claim

⁴ In addition to those holdings, the Fifth Circuit affirmed the district court’s conclusions that “HISA does not violate the Due Process Clause” and that “Gulf Coast lacks standing to raise” its claim “that HISA unconstitutionally commandeers state officials.” Pet. App. 4a, 49a-50a. Petitioners do not seek review of those holdings. “The Eighth Circuit has not yet issued a decision on remand” in *Walmsley*. *Id.* at 30a n.17.

are not even subject to HISA rules. Standing aside, no court has disagreed with the Fifth Circuit’s holding that the Authority is a private entity not subject to the Appointments Clause. That conclusion flows directly from this Court’s well-settled precedents.

The cross-petitions should be denied.

I. HISA’S RULEMAKING PROVISIONS DO NOT WARRANT REVIEW

A. There Is No Conflict Among The Lower Courts

1. Every court that has resolved a materially identical challenge to HISA—and every single judge sitting on those courts (without exception)—has reached the same conclusion: “[T]he Act’s rulemaking structure does not violate the private nondelegation doctrine.” *Walmsley*, 117 F.4th at 1038 (“agree[ing] with the Sixth and Fifth Circuits,” the Eastern District of Arkansas, the Eastern District of Kentucky, and the Northern District of Texas); *Oklahoma II*, 62 F.4th at 228-231; Pet. App. 10a-15a, 86a-102a.

Even as the Fifth Circuit reached the opposite determination on the facial validity of HISA’s enforcement provisions, it “agree[d] with *** the Sixth Circuit” that the Act’s “amended text gives the FTC ultimate discretion over the content of the rules,’ which ‘makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one.” Pet. App. 11a-12a (quoting *Oklahoma II*, 62 F.4th at 230).

Likewise, although Judge Gruender dissented from the Eighth Circuit’s majority’s original opinion

based on his view that “HISA’s enforcement provisions facially violate the private nondelegation doctrine,” he “concur[red]” in the majority’s rejection of the private-nondelegation challenge to HISA’s rulemaking provisions. *Walmsley*, 117 F.4th at 1041-1044 (Gruender, J., concurring in part and dissenting in part).

Similarly, no court has ever held that the Maloney Act’s 85-year-old rulemaking framework—which undisputedly provided the “model[]” for HISA—violates the private-nondelegation doctrine, either. Pet. App. 11a (citing *Oklahoma II*, 62 F.4th at 231-232). On the contrary, “[i]n case after case, the federal courts have upheld this arrangement” on the ground that the SEC’s “control” makes FINRA and other SROs “permissible aides and advisors.” *Oklahoma III*, 163 F.4th at 307 (citing *Sorrell v. SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982); *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012-1013 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952)).

That broad consensus refutes any suggestion that “the Circuits do not agree” over the framework governing the private-nondelegation challenge to HISA’s rulemaking structure. Texas Pet. 27. Indeed, all courts and “all parties” across every private-nondelegation challenge to HISA’s rulemaking provisions have expressly “agree[d] that the outcome turns on whether the private entity is subordinate to the agency.” *Black I*, 53 F.4th at 881 n.23; see, e.g., *Oklahoma III*, 163 F.4th at 307 (“As the case comes to

us, then, the determinative question is whether the Horseracing Authority remains inferior to the FTC[.]”); *Walmsley*, 117 F.4th at 1039 (“join[ing] the other two circuits” in concluding that “the rulemaking structure of the Act does not violate the private nondelegation doctrine” because “the Authority is subordinate to the Commission”); Pet. App. 10a (same). That reality stands opposite to Petitioners’ depiction of “inconsistent tests.” Texas Pet. 27.

2. Unable to identify any conflict on the constitutionality of the rulemaking scheme in HISA or the parallel Maloney Act framework, Petitioners instead search for “general confusion” among decisions similarly rejecting private-nondelegation challenges to other regulatory schemes. Texas Pet. 27; *see also* NHBPA Pet. 9-11. Far from “contrast[ing]” with those decisions, Texas Pet. 27, however, the Fifth Circuit cited them (and others) as “teach[ing]” the private-nondelegation doctrine it applied in upholding HISA’s rulemaking regime, Pet. App. 10a (citing, *e.g.*, *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128 (3d Cir. 1989)). As the Sixth Circuit explained, *Pittston* and *Frame* “hold this line” “between impermissible delegations of unchecked lawmaking power to private entities and permissible participation by private entities in developing government standards and rules.” *Oklahoma III*, 163 F.4th at 306. The “Ninth Circuit’s standard” is no different. Texas Pet. 28; *see Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) (finding “no difficulty” dismissing public-nondelegation challenge where agency “retains ultimate authority”).

The only decision Petitioners cite that upheld a private non-delegation challenge to a rulemaking scheme is the D.C. Circuit’s (since-vacated) decision concerning Amtrak. *See* NHBPA Pet. 9-11; Texas Pet. 28-29. The *Amtrak* line of cases only reinforces the conclusion courts have reached on HISA’s and the Maloney Act’s rulemaking scheme. *See Association of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 671 & n.5 (D.C. Cir. 2013) (finding private-nondelegation violation because agency could not “unilaterally change regulations proposed to it,” contrary to Maloney Act cases that “resemble *Adkins*”), *vacated on other grounds*, 575 U.S. 43, 53 (2015). As the D.C. Circuit explained (in a remand decision Petitioners ignore), where a “government agency could ‘hold the line’” against “private interests,” such that “[n]o rule will go into effect without the approval and permission of a neutral federal agency,” the framework “raise[s] no constitutional eyebrow.” *Association of Am. R.Rs. v. U.S. Dep’t of Transp.*, 896 F.3d 539, 541, 545-547 (D.C. Cir. 2018) (severing agency-constraining provision that “broke from [*Adkins*] mold” brought statute “back into the constitutional fold”). And here, the Fifth Circuit made clear that it was applying the same standard that its “sister circuit” applied in *Amtrak*. Pet. App. 10a (citing *Ass’n of Am. R.Rs.*, 721 F.3d at 671).

B. The Decisions Upholding HISA’s Rulemaking Scheme Comport With Consumers’ Research

1. The uniform decisions upholding HISA’s rulemaking scheme follow this Court’s precedents. In

Carter v. Carter Coal Company, this Court invalidated a federal statute that directly conferred power on private entities to regulate an industry with zero governmental approval or oversight. 298 U.S. 238, 310-311 (1936). In response, Congress amended the law to “subordinate[] the private coal producers to a public body (the Coal Commission),” *Oklahoma III*, 163 F.4th at 306, by granting the Commission the power to “approve, disapprove, or modify” the private boards’ proposals “to conform to the requirements” of the statute, Bituminous Coal Act of 1937, § 4, pt. II(a), 50 stat. 72, 78. Reviewing that amended statute in *Adkins*, this Court blessed the scheme as “unquestionably valid.” 310 U.S. at 399. And just two terms ago, this Court reaffirmed the standard drawn from those twin precedents: A law that enlists a private actor as part of a regulatory regime does not violate the private-nondelegation doctrine as long as the private actor “function[s] subordinately” to a government agency and “subject to its ‘authority and surveillance.’” *Consumers’ Rsch.*, 606 U.S. at 692 (quoting *Adkins*, 310 U.S. at 399).

The Fifth Circuit (like every other court of appeals to consider HISA’s rulemaking) adopted that settled standard, explaining that “a private entity may wield government power only if it ‘functions subordinately’ to an agency with ‘authority and surveillance’ over it.” Pet App. 10a (quoting *Black I*, 53 F.4th at 881 & n.21). In fact, “[a]ll agree[d]” below on that private-nondelegation test. *Black I*, 53 F.4th at 882 & n.24. And on remand from this Court, the Fifth Circuit confirmed that that “doctrinal formulation” for assessing a law “challenged as the

delegation of legislative power to a private organization” was “identical” to “the same private nondelegation doctrine” articulated in *Consumers’ Research*. Pet. App. 35a-37a. The “touchstone remains the same it has always been—namely, whether the private organization is ‘subordinate’ to a superintending agency.” *Id.* at 37a. So there is no “conflict[] with this Court’s cases” on the governing framework. Texas Pet. 16.

2. Applying that standard in 2022, the Fifth Circuit held that the original version of HISA was unconstitutional because “[t]he Authority, rather than the FTC, ha[d] been given final say over HISA’s programs.” *Black I*, 53 F.4th at 872. Following Congress’s amendment—enacted in direct response to that initial holding—courts (including the Fifth Circuit) have concluded consistently that the version of HISA now in effect “gives the FTC, not the Horseracing Authority, the final say over the Act’s key rulemaking” provisions. *Oklahoma III*, 163 F.4th at 301. No Authority proposal “becomes a binding rule until the FTC approves it[.]” *Id.* at 308. “[T]he FTC may ‘abrogate, add to, and modify’ the Authority’s rules,” so if the FTC “disagrees with the policies reflected in the Authority’s rules, it may change them.” Pet App. 12a (quoting 15 U.S.C. § 3053(e)). And “[t]he Authority yields to FTC supervision[.]” *Oklahoma III*, 163 F.4th at 307.

That framework tracks the rulemaking-related oversight the FCC exercises over the private Administrator in the regulatory scheme this Court approved in *Consumers’ Research*: The FTC “reviews”

the Authority’s “initial” proposals and decides whether to “approve[]” them as the “final” obligations, and the FTC may “make *** changes” to those obligations “if needed.” *Consumers’ Rsch.*, 606 U.S. at 693-695. Because the Authority “must carry out all its tasks consistent with the [FTC’s own] rules, orders, written directives, and other instructions,” “in the relationship between the two, the Commission dominates.” *Id.* at 693-694 (internal quotation marks omitted).

The FTC’s “review authority” also “parallels similar authority” possessed by the federal agency “under the Coal Act [from *Adkins*],” *Oklahoma III*, 163 F.4th at 309, on which *Consumers’ Research* relied for this Court’s understanding and application of the subordination test, 606 U.S. at 693-694. And it reflects “the same” review and rulemaking authority “the SEC has with respect to FINRA.” Pet. App. 15a (citing *Oklahoma II*, 62 F.4th at 225, 229). That oversight standard, this Court previously explained, gives the agency “broad authority to oversee and to regulate the rules adopted by the SROs.” *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 233-234 (1987).

3. Petitioners’ caricature of the FTC’s oversight rests on worst-case assumptions about how the agency might exercise that supervision and strained interpretations of the Act “to create a constitutional problem.” *Consumers’ Rsch.*, 606 U.S. at 690. Basic principles governing facial challenges and constitutional avoidance proscribe that approach. *See, e.g., id.* at 691 (“Statutes (including regulatory statutes) should be read, if possible, to comport with

the Constitution, not to contradict it.”); *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (explaining the Court has “made facial challenges hard to win,” in part by requiring that plaintiffs establish that “no set of circumstances exists” under which the law would be valid (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))); *United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) (“presumption of regularity attaches to the actions of Government agencies”).

As this Court explained in rejecting a “rubber-stamp[ing]” argument in *Consumers’ Research* that resembles Petitioners’ complaints here, “the relevant legal question is not how often the [FTC] revises” or “reject[s]” the Authority’s proposals, but whether the agency “retains decision-making power.” 606 U.S. at 692, 695 (first alteration in original). Congress has made clear the FTC gets the “final word over what [any] rules are” under HISA. Pet. App. 13a. The Authority remains subordinate to that “policymaking discretion” (within Congress’s clear guidelines) both “[w]hen the FTC decides to” exercise its full supervisory powers and “when the FTC decides *not* to act.” *Oklahoma III*, 163 F.4th at 308. Either way, “the FTC bears ultimate responsibility” for any rule promulgated under HISA: “The People may rightly blame or praise the FTC for how adroitly (or, let’s hope not, ineptly)” it carries out its oversight. *Id.* at 309.

Petitioners nevertheless fret that the FTC may make an “intentional choice” to shirk its oversight responsibilities or may lack the resources to perform them. Texas Pet. 23; *see* NHBPA Pet. 8-11 (expressing concern FTC may rubberstamp Authority proposals it

dislikes). But because HISA can be fairly construed to give the FTC “ultimate say on what the rules are,” Pet. App. 15a, that is enough to reject Petitioners’ facial challenge regardless of how the agency exercises its “ultimate discretion over the content of the rules” in any particular instance, *Oklahoma III*, 163 F.4th at 309. As all courts have recognized, “[t]he existence of ample permissible exercises of power by itself suffices to uphold the Act’s rulemaking provisions against this facial challenge.” *Id.* at 310; see Pet. App. 14a (Petitioners’ “hypothetical problems,” if they ever arise, “can be addressed in as-applied challenges”).

None of Petitioners’ specific criticisms displace that consensus following this Court’s precedents.

a. Petitioners primarily argue that the FTC lacks the “ability to reject or revise [the Authority’s] proposed rules before [they] are promulgated.” NHBPA Pet. 11; see Texas Pet. 19-20. That supposed “timing problem” (NHBPA Pet. 11) rests on an incorrect premise—while “[t]he Act permits the Horseracing Authority to draft proposed rules on racetrack safety and anti-doping matters,” “they are just that: proposals.” *Oklahoma III*, 163 F.4th at 308. Any proposed standard the Authority develops “shall not take effect unless the proposed rule or modification has been approved by the Commission.” 15 U.S.C. § 3053(b)(2). So it will never be the case that “the Authority’s rules will bind the industry until the FTC can act.” Texas Pet. 23.

Petitioners worry that the FTC’s standard for reviewing proposals means that, as a practical matter, “the FTC is obligated to accept” them. Texas Pet. 17.

“But that’s searching for clouds on a cloudless day.” *Oklahoma III*, 163 F.4th at 309. Petitioners are wrong that the FTC cannot disapprove “policy decisions” reflected in the Authority’s proposed standards. Texas Pet. 6, 20. Evaluating whether proposals are “consistent with” the Act and the FTC’s own rules, 15 U.S.C. § 3053(c)(2), requires independently determining whether they are consistent with “the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces,” pursuant to the many “[c]onsiderations” and “[e]lements” Congress provided, *id.* §§ 3054(a)(2)(A), 3055, 3056, 3057. That broad standard empowers the FTC to disapprove, for example, a racetrack-safety proposal that the FTC determines as a matter of policy is not “consistent with the humane treatment of covered horses.” *Id.* § 3056(b)(2).

In this context, that substantive determination is tantamount to the “public interest” determination the SEC makes under the Maloney Act pursuant to an identical “consistent with the requirements of the Act” standard. *Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442, 445-447 (D.C. Cir. 2017) (quoting 15 U.S.C. § 78s(b)(2)(C)). Section 3053(c) also mirrors the Coal Act standard this Court has recognized as “unquestionably valid.” *Consumers’ Rsch.*, 606 U.S. at 692 (quoting *Adkins*, 310 U.S. at 399); *see Oklahoma II*, 62 F.4th at 241 (Cole, J., concurring) (explaining the relevant statutory text limited the agency to “‘[a]pprov[ing], disapprov[ing], or modify[ing]’ the private coal boards’ ‘proposed minimum prices [and related terms] to conform to the requirements of this subsection.’”). “[E]very court of appeals to address the

validity of this kind of delegation” has upheld it. *Oklahoma III*, 163 F.4th at 309.

Although that is enough to doom Petitioners’ facial challenge, the FTC’s actions remove any doubt. In December 2022, for example, the FTC construed the Act’s consistency standard as warranting disapproval of the initially proposed anti-doping and medication-control rules in the immediate wake of the Fifth Circuit’s decision in the predecessor appeal. The agency based its determination on (i) the FTC’s independent judgment that “[t]he bedrock principle of the Act is the need for uniformity,” and (ii) the FTC’s policy goal of avoiding potential “confusion *** for industry participants and regulators.” FTC, *Order Disapproving The Anti-Doping And Medication Control Rule Proposed By The Horseracing Integrity And Safety Authority* 1-2 (Dec. 12, 2022).⁵ The FTC also has not hesitated to condition its approval of a proposed standard on its own limiting interpretations. See, e.g., FTC, *Order Approving The Enforcement Rule Modification Proposed By The Horseracing Integrity And Safety Authority* 14-16 (Sept. 23, 2022) (rejecting proposed provision as “unnecessary and overbroad” and directing Authority “not to rely” on it).⁶

b. In any event, Congress’s amendment to HISA is “fatal to the [Petitioners’] arguments regarding consistency review.” Pet. App. 95a. The FTC’s power to “abrogate, add to, and modify” HISA rules renders “irrelevant” that the FTC conducts an initial review

⁵ <https://tinyurl.com/rndfjr8b>.

⁶ <http://tinyurl.com/3h5cb5fm>.

for consistency with the statute and rules.” *Id.* (quoting *Black I*, 53 F.4th at 888 n.35). As the Fifth Circuit explained, “[t]he problem was never that the private entity proposed the rules”; the original version of HISA violated the private-nondelegation doctrine, according to that court, because the FTC formerly “lacked power to second-guess them once they were proposed.” Pet. App. 13a. But under the amendment Congress passed in direct response to that ruling, “the FTC has been given that power.” *Id.* Now, regardless of the Authority’s ability to draft standards “in the first place,” Texas Pet. 3, 17, the FTC’s “authority to modify [and abrogate] *any* rules for any reason at all, including policy disagreements, ensures that the FTC retains ultimate[] authority,” Pet. App. 13a (second alteration in original) (quoting *Oklahoma II*, 62 F.4th at 231).

Petitioners’ attempt to limit the FTC’s authority to the power only to “modify or repeal any rule *after* it has been promulgated,” NHBPA Pet. 11, overlooks another reality. HISA’s amended text undisputedly confers on the FTC not only “authority to ‘modify’ the Authority’s rules,” Texas Pet. 26, but also the independent ability to “initiate new rules,” *Oklahoma III*, 163 F.4th at 310; see *Walmsley*, 117 F.4th at 1038 (“The power to ‘add to *** the rules of the Authority’ thus enables the Commission to adopt new rules.” (ellipsis in original)). Under that “broader rulemaking power,” the FTC will “exercise its own policy choices whenever it determines that the Authority’s proposals, even if consistent with the Act, are not the policies that the Commission thinks would be best for horseracing integrity or safety.” FTC, *Order Ratifying*

Previous Commission Orders As To Horseracing Integrity and Safety Authority's Rules 3 (Jan. 3, 2023).⁷

That “full-throated rulemaking power” is now baked into section 3053(c)’s approval/disapproval process. *Oklahoma III*, 163 F.4th at 310; see Pet. App. 13a-14a. “When the FTC reviews the Horseracing Authority’s proposed rules, it asks not just whether they are ‘consistent’ with the Act; it also asks whether they are ‘consistent’ with other ‘applicable rules approved by the Commission.’” *Oklahoma III*, 163 F.4th at 310 (quoting 15 U.S.C. § 3053(c)(2)). Although HISA requires the FTC to approve or disapprove a proposal within 60 days of publication in the Federal Register, 15 U.S.C. § 3053(c)(1), there is “no time limit on when the FTC publishes such proposals,” *Oklahoma III*, 163 F.4th at 310. If the FTC has concerns about an Authority proposal, the FTC may “hold off on publishing” the proposal until the FTC promulgates its own rule and then determines whether the Authority-proposed standard is consistent with it. *Id.* So any hypothetical delay between approval of an Authority-proposed rule and a new FTC rule on the same subject is itself a “policy choice” by the agency. *Id.*⁸

⁷ <https://tinyurl.com/msswvdrf>.

⁸ As a practical matter, the FTC reviews Authority proposals before publication. See 16 C.F.R. § 1.142(e) (requiring Authority to submit “sufficiently detailed” analyses of each proposal). That process also allows for the type of “behind the scenes” activity that contributes to “the infrequency with which the Commission changes” or disapproves published proposals. *Consumers’ Rsch.*, 606 U.S. at 695; see *Oklahoma III*, 163 F.4th

Moreover, the FTC may exercise its rulemaking authority to delay the effective date of any approved rule. *See* Pet. App. 14a. Little imagination is needed to conceive of such a rule: the FTC already enacted one “delaying the date of effectiveness” of the approved anti-doping and medication-control program to mitigate risk of “inconsistent treatment of similarly situated horses” and “uncertainty *** near[] [last year’s] Triple Crown events.” 88 Fed. Reg. 27,894, 27,894-27,895 (May 3, 2023) (finding “good cause” to forgo “notice and comment” under “section 553(b)(3)(B) of the APA,” as incorporated in 15 U.S.C. § 3053(e)). That real-life example of the FTC’s exercising its rulemaking power on an expedited basis to protect its “policy concerns” and prevent time-sensitive “harms that could frustrate the purposes of the Act,” *id.*, resolves any lingering worry that rulemaking “could take years,” Texas Pet. 23.

c. Petitioners’ ancillary attempts to create “conflicts with this Court’s precedent,” Texas Pet. 16 (formatting altered), only demonstrate the futility of their challenge. For example, Petitioners express concern over the “scope of the delegation in HISA.” *Id.* at 19; *see* NHBPA Pet. 13. But their attempt to reduce the scheme upheld in *Consumers’ Research* to “recommending specific numbers” through a delegation dwarfed by the “sheer magnitude” of HISA, Texas Pet. 19, is difficult to square with the private Universal Service Administrative Company’s central involvement in the nationwide programs governing

at 310 (noting “the threat of modification is not likely to miss the attention of the Authority”).

many billions of dollars and affecting every American who owns a telecommunication device, *see Consumers' Rsch.*, 606 U.S. at 662-670. Regardless, the FTC's oversight "spans the Horseracing Authority's jurisdiction," no matter its scope. *Oklahoma III*, 163 F.4th at 308. Because there are "plenty of constitutional exercises of that power" (and "perhaps only constitutional exercises of that power"), that is enough to defeat Petitioners' facial attack. *Id.* at 310.

Petitioners are also wrong that the Authority "set[s] policy" through "unreviewed guidance." Texas Pet. 20. The FTC's own rules mandate that Authority guidance "does not have the force of law." 86 Fed. Reg. 54,819, 54,819 (Oct. 5, 2021) ("distinguish[ing] HISA Guidance from a proposed modification to a rule"). Moreover, the Authority must submit guidance to the FTC, 15 U.S.C. § 3054(g)(2), paving the way for the agency to override any guidance it dislikes through its plenary rulemaking authority, *id.* § 3053(e); *see* Pet. App. 14a n.6. If any guidance actually imposed a new legal obligation on industry participants, it would exceed the Authority's power and would be ripe for an as-applied challenge.

Finally, Petitioners note "[t]he FTC's inability to remove any member of the Authority board[.]" Texas Pet. 21. As the Fifth Circuit explained, however, that feature does not affect "the far more critical point that the HISA amendments give the agency final say-so over the content of any rule before it ever takes effect." Pet. App. 39a n.23. The "power to abrogate the private organization's rules" altogether is "on par" with the "power to strip" any Board member of her duties—"a

clear hierarchy exists in both cases.” *Black I*, 53 F.4th at 888-889. None of Petitioners’ peripheral complaints about HISA warrants disturbing the settled consensus that “the Authority’s rulemaking power is subordinate to the FTC’s.” Pet App. 15a.

II. THE APPOINTMENTS CLAUSE QUESTION DOES NOT WARRANT REVIEW

A. The Gulf Coast Plaintiffs Lack Standing To Raise The Appointments Clause Claim

The Texas-based Gulf Coast plaintiffs are alone in pressing an Appointments Clause claim that even the other Petitioners have acknowledged is “‘fundamentally incompatible’ with their private nondelegation challenge.” Pet. App. 42a. But it is undisputed that racetracks in Texas have never been subject to HISA rules. As Texas explains, the State has “opted” to “avoid application of HISA by surrendering the ability to simulcast Texas races to other States.” Texas Pet. 9-10. That simulcast signal enables interstate betting; where no “interstate off-track” betting occurs and no advance deposit wagers are permitted (as was already the case in Texas pre-HISA), the horserace is not “covered” by the Act. 15 U.S.C. § 3051(5), (11).

Accordingly, Petitioners have confirmed throughout this litigation that “Texas is not running covered races.” ROA.2768; *see also* ROA.3086-3087 (Texas’s counsel). As a result of the State’s deliberate decision, racetracks in Texas (and the horsemen operating there) are not subject to HISA’s rules—and thus have not suffered an injury-in-fact that is fairly

traceable to the alleged Appointments Clause violation. That poses a threshold jurisdictional hurdle to the Appointments Clause claim the Gulf Coast plaintiffs (and “only” the Gulf Coast plaintiffs) present. Gulf Coast Pet. 2; *see TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (standing required “for each claim”).

B. There Is No Conflict Among The Lower Courts

Standing and ripeness aside, the Appointments Clause challenge is not certworthy. The Gulf Coast plaintiffs say “[t]he Court should grant review to resolve the circuit split[.]” Gulf Coast. Pet. 36. But the conflict is limited to the question of whether HISA’s enforcement provisions facially violate “the private-nondelegation doctrine.” *Id.* at 16. As the Gulf Coast plaintiffs acknowledge, that issue is “alternative” to the separate question of whether HISA violates the Appointments Clause. *Id.* at 30; *see id.* at i. Indeed, the other Petitioners recognize that the two challenges are “mutually exclusive.” Pet. App. 42a, 72a.

All courts faced with the academic argument that HISA is unconstitutional under the Appointments Clause have shot it down. *Walmsley*, 117 F.4th at 1041 (“We agree with the Fifth Circuit that the Act does not conflict with the Appointments Clause.”); Pet. App. 41a-49a, 72a-86a. Both the Fifth and Eighth Circuits applied the same straightforward analysis: “[t]he requirements of the Clause apply only to officers of the United States”; under governing precedent from this Court, “[t]he members of the Board are *** not

officers of the United States”; “so their appointments are not governed by the Appointments Clause.” *Walmsley*, 117 F.4th at 1041 (citing *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995)); see Pet. App. 48a-49a (“In sum, *Lebron* is the governing test to determine whether an entity is private or public and, under that test, the Authority is a private entity not subject to Article II’s Appointments Clause.”). The *Oklahoma* plaintiffs rightly abandoned their Appointments Clause claim on appeal after the district court similarly held that “the Authority is a private entity,” and “[t]herefore, the Court need not consider Plaintiffs’ alternative arguments regarding the Authority as a public entity,” “including that its structure violates the Appointments Clause.” *Oklahoma I*, 2022 WL 1913419, at *11.

That consensus aligns with the uniform determinations “that FINRA, like its predecessor [the National Association of Securities Dealers], is a private entity.” Pet. App. 82a (citing cases). The Gulf Coast plaintiffs’ attempts to distinguish the Maloney Act cases fail. Registering with the Authority to participate in a covered race is no more or less a “consensual” “condition” than registering with FINRA to “participat[e]” in the securities market (Gulf Coast Pet. 32-33): a securities dealer cannot do business without registering with FINRA. 15 U.S.C. § 78o(a)(1), (b)(1)(B); see *Aslin v. FINRA*, 704 F.3d 475, 476 (7th Cir. 2013). Nor is the Authority’s power any more “exclusive” within its field (Gulf Coast Pet. 32): FINRA (or its predecessor) “has since 1939 been the only registered national securities association,” and can “levy sanctions that carry the force of federal law.”

Turbeville v. FINRA, 874 F.3d 1268, 1270 & n.2 (11th Cir. 2017).⁹

C. This Court’s Precedents Do Not Support The Appointments Clause Challenge

1. The plain text of Article II and cases interpreting it confirm that if an entity’s directors “are not officers of the United States, but instead are some other type of officer, the Appointments Clause says nothing about them.” *Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. 448, 459 (2020); see U.S. CONST. art. II § 2 cl. 2 (prescribing appointments methods for “Officers of the United States” holding offices “established by Law”). That fundamental principle is fatal to the Gulf Coast plaintiffs’ claim because, as all courts and other parties recognize, the Authority’s Board members are *private* officers.

This Court’s settled precedent, *Lebron*, 513 U.S. 374, “set[s] out a detailed analysis to determine whether a particular corporation—despite its designation as ‘private’—counts as a government instrument for constitutional purposes.” Pet. App.

⁹ Against that longstanding reality, the Gulf Coast plaintiffs can only point to one single-judge dissenting opinion involving FINRA, in a case in which “this Court denied review.” Gulf Coast Pet. 33 (citing *Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1338-1347 (D.C. Cir. 2024) (Walker, J., concurring in part and dissenting in part)). To the extent “FINRA’s constitutionality remains the subject of ongoing merits litigation” concerning the “Appointments Clause question” raised here, *id.* at 3 n.2, that is only further reason to deny the Gulf Coast plaintiffs’ Petition.

46a. That established test leaves no doubt on which side of the line the Authority lands. *See Walmsley*, 117 F.4th at 1041 (“A private corporation must be regarded as a governmental entity for constitutional purposes only in limited circumstances,” and “[t]he *Lebron* standard is not satisfied here.”). “First, the Authority was not created by the federal government ‘by special law’; it was ‘incorporated under Delaware law shortly before HISA’s passage,’ when there was still uncertainty whether a majority of the (bipartisan and bicameral) Congress would enact the Act or President Trump would sign it. Pet. App. 45a. “Second, the Authority was not created to further ‘governmental objectives,’ but instead as a private association to address doping, medication, and safety issues in the thoroughbred racing industry.” *Id.* (citation omitted). Third, instead of having “retained for itself permanent authority to appoint a majority of the Authority’s directors,” the “government has no role in appointing the Authority’s Board.” *Id.* at 46a (alterations and citation omitted).

2. Unable to seriously dispute those factual determinations (shared by every court to consider the question and essentially uncontested by Petitioners below), the Gulf Coast plaintiffs seek to “displace [this] Court’s governing framework” for answering “precisely the question” at the heart of the Appointments Clause challenge. Pet App. 48a. Under their novel theory, “[b]ecause the Authority exercises significant authority” under a federal statute, “its Directors are [public] officers requiring proper appointments” under the Appointments Clause. Gulf Coast Pet. 30; *see id.* at 32 (arguing Authority is “no

different from any other administrative agency”). The Gulf Coast plaintiffs draw their test from *Buckley v. Valeo*, 424 U.S. 1 (1976) (concerning Federal Election Commissioners), *Lucia v. SEC*, 585 U.S. 237 (2018) (concerning SEC administrative law judges), and other cases about federal agencies. Yet those cases concern officials who indisputably were federal “appointee[s],” *Buckley*, 424 U.S. at 126, so “[t]he sole question” was whether the officials were “Officers of the United States’ or simply employees of the Federal Government,” *Lucia*, 585 U.S. at 244. *Buckley* and *Lucia* “do not *** set forth the critical legal test relevant” to determining whether an entity’s officials are “federal” in the first place. *Financial Oversight & Mgmt. Bd.*, 590 U.S. at 468; see Pet. App. 47a-48a (refusing to “extend *Buckley* and *Lucia* well beyond their facts to analyze whether persons in a *private* entity are ‘Officers’”).

Lebron itself brings to a “dead end” (Pet. App. 46a) the Gulf Coast plaintiffs’ contention that the precedent does not apply to any entity that exercises “regulatory authority” or “government power.” Gulf Coast Pet. 25-28 & n.4. Not only does *Lebron* “rel[y] on cases where Congress turned to private corporations to ‘accomplish purely governmental purposes,’” but this Court and others have recognized that “the corporation actually addressed in *Lebron*—Amtrak—itself exercised regulatory power.” Pet. App. 47a (quoting *Lebron*, 513 U.S. at 395); see, e.g., *Association of Am. R.Rs.*, 721 F.3d at 671.

The Gulf Coast plaintiffs’ new theory also contradicts other precedents that have “since used

Lebron's analysis to discern whether corporations are part of the government for constitutional purposes." Pet. App. 44a & n.27. For example, the Public Company Accounting Oversight Board (PCAOB) is subject to Article II not because it exercises "significant executive power" (which resolves the separate question whether its members are federal officers or federal employees), Gulf Coast Pet. 20 (quoting *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 514 (2010)), but because it was "Government-created" and "Government-appointed," and thus "part of the Government for constitutional purposes," *Free Enter. Fund*, 561 U.S. at 485-486 (internal quotation marks omitted) (quoting *Lebron*, 513 U.S. at 397). On that basis, this Court distinguished the PCAOB from "private self-regulatory organizations in the securities industry," such as FINRA, which are not subject to Article II. *Id.* at 484-485.

The Gulf Coast plaintiffs worry that Congress may "circumvent[]" the Appointments Clause by handing regulatory power to a private entity. Gulf Coast Pet. 36. But "[t]he private nondelegation doctrine *** corrals any attempts to evade *Lebron*" by requiring the private entity to act "subordinately to an agency with authority and surveillance over it." Pet. App. 48a. Despite claims to "harmonize" the analyses, Gulf Coast Pet. 16, the Gulf Coast plaintiffs' theory would rob the private-nondelegation doctrine of any continuing vitality: A private entity would lose its private nature whenever Congress directs it to act under federal law. *See id.* at 29; *see also id.* at 30 (conceding "undeniable tension" between "the private-nondelegation doctrine" and the Appointments Clause

claim the Gulf Coast plaintiffs “consistently pleaded in the alternative”). There is no reason for this Court to go out of its way to consider a never-accepted academic theory when the established private-nondelegation doctrine’s agency-oversight analysis already protects the “[a]ccountability considerations” that motivate Petitioners’ concerns. *Oklahoma III*, 163 F.4th at 309; see Gulf Coast Pet. 18 (urging Court to “address the underlying accountability problem”).

III. THE COURT SHOULD GRANT THE AUTHORITY’S PETITION ON THE CONSTITUTIONALITY OF HISA’S ENFORCEMENT PROVISIONS

Rather than consider claims all lower courts have rejected, the Court should grant the petitions by the Authority and the Solicitor General (Nos. 26-199, 26-201) and limit its review to whether HISA’s *enforcement provisions* facially violate the private-nondelegation doctrine. That is the only question on which the courts of appeals actually conflict. It is the sole basis on which any court has sustained a constitutional challenge to the operative version of HISA. See NHBPA Amicus Br. 7, *Oklahoma v. United States*, No. 25-1325 (U.S. June 29, 2026) (acknowledging this Court’s “traditional[]” practice to review decisions invalidating “an act of Congress as facially unconstitutional,” “not uphold[ing] it”). And all parties agree the question is certworthy. See NHBPA Pet. 3-4; Texas Pet. 2, 32; Gulf Coast Pet. i, 34, 36.

“The Court’s ability to effectively resolve” that question does not “hinge on its resolution” of the

separate questions Petitioners present. Texas Pet. 32. The Appointments Clause question is “alternative” to the private-nondelegation questions. Gulf Coast Pet. 30; see *id.* at i. And under the private-nondelegation doctrine, Petitioners challenged the constitutionality of “the Authority’s enforcement powers” “apart from” their challenge to the constitutionality of “its rulemaking powers.” Pet. App. 15a. In fact, the latter was not even “strongly contested” on remand post-*Consumers’ Research*. *Id.* at 39a n.23. The appellate courts’ conflicting answers on the facial validity of HISA’s *enforcement* provisions, despite their uniform rejection of facial challenges to HISA’s *rulemaking* provisions, undermine any suggestion that those distinct claims are inextricably “intertwined.” NHBPA Pet. 12.

CONCLUSION

The cross-petitions for a writ of certiorari should be denied.

Respectfully submitted.

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