

No. 26-335

In the Supreme Court of the United States

STATE OF TEXAS AND TEXAS RACING COMMISSION,
Petitioners,

v.

JERRY BLACK, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

KEN PAXTON
Attorney General of Texas

WILLIAM R. PETERSON
Solicitor General
Counsel of Record

BRENT WEBSTER
First Assistant Attorney
General

WILLIAM F. COLE
Principal Deputy Solicitor
General

BETH KLUSMANN
Deputy Solicitor General

OFFICE OF THE TEXAS ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
William.Peterson@oag.texas.gov
(512) 936-1700

Counsel for Petitioners

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Reply Brief	1
I. This Court's Precedent Does Not Support Finding HISA Constitutional.....	2
II. The Circuits' Tests Produce Different Results...	8
III. This Question Warrants the Court's Review.	11
Conclusion	12

TABLE OF AUTHORITIES

Page(s)

Cases:

<i>Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.</i> , 721 F.3d 666 (D.C. Cir. 2013)	9
<i>Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.</i> , 896 F.3d 539 (D.C. Cir. 2018)	9
<i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 (1936)	1
<i>Dep’t of Transp. v. Ass’n of Am. R.Rs.</i> , 575 U.S. 43 (2015)	1, 3, 7, 9
<i>FCC v. Consumers’ Rsch.</i> , 606 U.S. 656 (2025)	2, 3, 4, 6, 8
<i>Free Enter. Fund v. PCAOB</i> , 561 U.S. 477 (2010)	3, 7
<i>Kennedy v. Braidwood Mgmt., Inc.</i> , 606 U.S. 748 (2025)	4
<i>Loving v. United States</i> , 517 U.S. 748 (1996)	1
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989)	11
<i>Moody v. NetChoice, LLC</i> , 603 U.S. 707 (2024)	2
<i>Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor</i> , <i>Occupational Safety & Health Admin.</i> , 595 U.S. 109 (2022)	1
<i>Nat’l Horsemen’s Benevolent & Protective Ass’n v.</i> <i>Black</i> , 53 F.4th 869 (5th Cir. 2022)	5, 6
<i>R. H. Johnson & Co. v. SEC</i> , 198 F.2d 690 (2d Cir. 1952)	10

<i>Riverbend Farms, Inc. v. Madigan</i> , 958 F.2d 1479 (9th Cir. 1992).....	8, 9
<i>Sunshine Anthracite Coal Co. v. Adkins</i> , 310 U.S. 381 (1940).....	2, 10
<i>Texas v. Comm’r for Internal Revenue</i> , 142 S. Ct. 1308 (2022).....	11
<i>Trump v. Cook</i> , 609 U.S. 528 (2026).....	10
<i>Trump v. Slaughter</i> , 146 S. Ct. 2283 (2026).....	11
<i>United States v. Frame</i> , 885 F.2d 1119 (3d Cir. 1989).....	8, 9
<i>Whitman v. Am. Trucking Ass'ns</i> , 531 U.S. 457 (2001).....	2, 3, 5
Constitutional Provisions, Statutes and Rules:	
U.S. Const. art. I, § 1	1
15 U.S.C.	
§ 78s(a)(1).....	10
§ 78s(h)(1)	10
§ 78s(h)(4)	10
§ 3052(a)	3
§ 3052(b).....	4
§ 3052(d).....	4
§ 3052(f)(1)(C)(iv)	4
§ 3053(a).....	3
§ 3053(b)(2)	6
§ 3053(c)(2).....	5, 6, 9
§ 3053(e).....	1, 6
16 C.F.R. § 1.150(a).....	4
47 C.F.R. §§ 54.701-725	4

Horseracing Integrity and Safety Authority Enforcement Rule Proposed Modification, 90 Fed. Reg. 43,431 (Sept. 9, 2025)	7
--	---

Other Authorities:

Marianne K. Smythe, <i>Government Supervised Self- Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation</i> , 62 N.C. L. Rev. 475 (1984)	10
---	----

REPLY BRIEF

The People chose to vest “[a]ll legislative Powers . . . in a Congress of the United States.” U.S. Const. art. I, § 1. The nondelegation doctrine reinforces that choice by “prevent[ing] Congress from forsaking its duties.” *Loving v. United States*, 517 U.S. 748, 758 (1996). The doctrine promotes “democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials,” *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor, Occupational Safety & Health Admin.*, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring), or, as here, to private parties.

The question the private-nondelegation test asks is “who is making the law?” When it comes to the Thoroughbred horseracing industry, the answer is not Congress or a federal agency but rather a private entity—the Horseracing Integrity and Safety Authority (the Authority). This delegation of lawmaking power to a private entity is “legislative delegation in its most obnoxious form.” *Dep’t of Transp. v. Ass’n of Am. R.Rs. (Amtrak II)*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)).

Respondents assert that the delegation in the Horseracing Integrity and Safety Act (HISA) is permissible because Congress gave the FTC the power to adopt rules through notice-and-comment rulemaking to counter the rules made by the Authority. 15 U.S.C. § 3053(e). But if the mere power to adopt a different law is all that is necessary to avoid a constitutional violation, the doctrine poses no discernible limit on delegation, as Congress always retains that power.

This Court’s cases, however, do not support holding HISA constitutional based on the possibility of FTC rulemaking. Rather, this Court looks at the entirety of the relationship between the government and the private entity to determine which one is deciding what the law should be. *See FCC v. Consumers’ Rsch.*, 606 U.S. 656, 693 (2025); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 387-88 (1940). In HISA, Congress made the Authority the primary lawmaker—the Authority is charged with crafting regulatory schemes to govern the horseracing industry, it has board members who cannot be appointed or removed by federal actors, and the FTC’s supervision is limited to notice-and-comment rulemaking. Under HISA, horseracing law and policy is set by the Authority with little federal control and oversight. The Constitution prohibits that delegation, and the Fifth Circuit’s holding otherwise warrants the Court’s review.

I. This Court’s Precedent Does Not Support Finding HISA Constitutional.

A. Respondents attempt to avoid any consideration of HISA’s constitutionality by arguing that the possibility that the FTC might exercise some supervision over the Authority is enough to defeat Texas’s facial claim. Auth. 18-19; FTC (Okla.) 7 (citing *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024)).¹ But a nondelegation violation is a structural problem, complete upon the delegation. As the Court held in *Whitman v. American Trucking Associations*, “the constitutional question is whether the statute has delegated legislative power to the agency.” 531 U.S. 457, 472 (2001). HISA grants legislative power to

¹ The FTC’s memorandum in opposition incorporated its brief in opposition filed in *Oklahoma v. United States*, No. 25-1325. Texas will refer to the FTC’s Oklahoma brief as FTC (Okla.).

the Authority, 15 U.S.C. §§ 3052(a), 3053(a), and the FTC’s rulemaking authority does not alter that delegation.

This Court has already recognized that notice-and-comment rulemaking is a “poor means of micromanaging [an entity]’s affairs.” *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 504 (2010). Under *Whitman*, it is also an insufficient means to defeat a nondelegation claim because the relevant question is “[w]hether the *statute* delegates legislative power,” and the agency’s actions have no bearing on the answer. 531 U.S. at 473 (emphasis added). The possibility that the FTC might claw back power delegated to the Authority does not render HISA constitutional when Congress delegated too much authority in the first place.

It is, therefore, constitutionally irrelevant that the FTC once disapproved the Authority’s proposed rules after the Fifth Circuit originally found HISA unconstitutional, Auth. 22; once instructed the Authority to modify an approved rule, FTC (Okla.) 9; and once delayed the effective date of a rule through emergency rulemaking, Auth. 25. Because HISA is structurally unsound, *any* power exercised by the Authority is unconstitutional, regardless of the FTC’s response. *See Amtrak II*, 575 U.S. at 62 (Alito, J., concurring) (explaining that “even the *possibility*” of a private arbitrator making binding rules violates the Constitution).

B. Respondents’ main argument is that HISA is constitutional under this Court’s recent decision in *Consumers’ Research*. But as Texas explained in its petition, Congress delegated far greater power to the Authority in HISA than the FCC delegated to the private party in *Consumers’ Research*—and with far less supervision.

Rather than demonstrate HISA’s constitutionality, *Consumers’ Research* reveals its flaws.

Respondents and the Fifth Circuit assert that the FTC’s power to engage in notice-and-comment rulemaking constitutes sufficient supervision of the Authority. App. 11a-13a; Auth. 17; FTC (Okla.) 8-9. In *Consumers’ Research*, the FCC had that power, too, having delegated authority to the Administrator by rule, *see* 47 C.F.R. §§ 54.701-725, it could presumably have limited it by rule.

This Court’s decision, however, did not rest on the possibility of FCC rulemaking but on the overall structure of the relationship. The Administrator was “broadly subordinate” to the FCC because (1) the FCC appointed the Administrator’s Board of Directors and approved its budget, (2) the Administrator could not make policy, (3) the Administrator had to follow, not only the FCC’s rules, but also its written directives and instructions, and (4) the FCC “alone ha[d] decision-making authority” to determine the contribution factor. *Consumers’ Rsch.*, 606 U.S. at 692-93. HISA is different in every way.

First, the FTC has no control over the Authority’s Board—no federal official does. *See* 15 U.S.C. § 3052(b), (d). The Authority claims (at 26-27) that removal power is irrelevant in light of the FTC’s notice-and-comment authority. But this Court identified appointment as a relevant fact in *Consumers’ Research* and has emphasized removal authority as a means of controlling federal actors. *See, e.g., Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 762 (2025). And as for the Authority’s budget, the only power the FTC has is the power the FTC took for itself, 16 C.F.R. § 1.150(a), or that exercised in consistency review, *see* 15 U.S.C. § 3053(a)(11). Under

Whitman, the FTC’s budget rule is irrelevant to the constitutionality of the original delegation. 531 U.S. at 473.

Second, Congress gave the Authority the power to make policy choices. As the Fifth Circuit’s original opinion explained, “consistency review”—the FTC’s obligation to determine whether the Authority’s proposed rules are consistent with HISA and FTC rules, 15 U.S.C. § 3053(c)(2)—leaves the power to make policy with the Authority. *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black (Black I)*, 53 F.4th 869, 890 (5th Cir. 2022). The FTC appears to agree, as it has repeatedly rejected comments regarding the Authority’s proposed rules that raise policy disagreements. For example, when state agencies commented that a proposed rule gave the Authority access to offices, facilities, and records beyond what state law permitted, the FTC labeled it a “policy difference” and approved the rule. ROA.3326; *see also* ROA.3288 (rejecting comments about permitted horseshoes as “essentially policy disagreements”), 3319-20 (noting that “most comments offered policy recommendations without identifying any inconsistency” with HISA).²

Third, the Authority claims (at 18) that it must carry out its duties in accordance with the FTC’s “orders, written directives, and other instructions.” But it cites no provision of HISA for that proposition because there is none: Congress did not give the FTC authority to issue orders, written directives, or instructions to the Authority.

Fourth, the FTC does not “*alone* ha[ve] decision-making authority” over the rules governing the

² “ROA” refers to the paginated record on appeal in the Fifth Circuit.

horseracing industry. *Consumers' Rsch.*, 606 U.S. at 693 (emphasis added). Rather, the FTC must approve all lawful rules proposed by the Authority. 15 U.S.C. § 3053(c)(2). If the FTC disagrees with a rule as a policy matter, it must adopt rules of its own. *See* ROA.3388-89 (FTC order explaining that, if it does not believe an approved rule “reflect[s] the policies the [FTC] believes would best to protect horseracing integrity or safety,” the FTC must adopt a modified rule under section 3053(e)). Absent FTC rulemaking, the Authority decides what the law is.

Under *Consumers' Research*, whether the Authority truly “functions subordinately” to the FTC is determined by considering how Congress structured the relationship between the Authority and the FTC. And that structure gives primary lawmaking power to the Authority. As long as it stays inside the wide lane Congress gave it, the Authority writes the law, and the possibility that the FTC might make a different rule is not sufficient to subordinate the Authority to the FTC's control.

C. Respondents' repeated assertion that the Authority's rules do not become law without the FTC's approval does not carry the weight Respondents wish. Auth. 17, 20; FTC (Okla.) 8-9. Although section 3053(b)(2) provides that no rule of the Authority takes effect unless approved by the FTC, section 3053(c)(2) compels the FTC to approve any lawful rule proposed by the Authority. As the Fifth Circuit correctly held in its first opinion, consistency review is not sufficient supervision. *Black I*, 53 F.4th at 884. Claiming that the FTC “approves” the Authority's rules is of no moment when Congress has mandated that approval.

The Authority and FTC do not even agree on the scope of the FTC’s consistency review. The Authority claims that the FTC “independently determin[es]” whether the Authority’s proposed rules are “consistent with ‘the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces.’” Auth. 21. Yet when the FTC publishes the Authority’s proposed rules, it instructs commenters that questions regarding “health and safety of horses and jockeys[and] the integrity of horseraces” should be raised in separate rulemaking petitions, not during consistency review. Horseracing Integrity and Safety Authority Enforcement Rule Proposed Modification, 90 Fed. Reg. 43,431, 43,438 (Sept. 9, 2025).

The FTC’s ability to make rules is also insufficient supervision. *See PCAOB*, 561 U.S. at 504. Absent emergency rulemaking by the FTC, the Authority’s rules will become law before the FTC can act. This is not just a problem of timing but of power. A private entity will have determined what the law is. *See Amtrak II*, 575 U.S. at 64 (Alito, J., concurring) (arguing that “nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it”). An agency that must engage in emergency rulemaking to prevent a private entity’s rules from becoming law is not supervising the entity—it is competing with it.

Neither Respondent addressed Texas’s argument that the private-nondelegation doctrine would be eviscerated if all that was required to satisfy it was the possibility that a federal actor, like the FTC, might one day enact a contrary law. Congress always retains the power to override by statute any authority it delegates to a private entity. Under Respondents’ theory, Congress’s

lawmaking power would render the private-nondelegation doctrine toothless.

In *Consumers' Research*, the Court referred to the Administrator as providing “non-binding advice” and “recommendations” that the FCC “decides whether or how to use . . . in setting the contribution factor.” 606 U.S. at 664, 694. The rules proposed by the Authority are not advice and recommendations that the FTC decides whether or how to use. Under consistency review, the FTC must approve the rules if they are lawful, meaning the Authority makes the law and sets nationwide policy. That the FTC has the option to make contrary rules does not detract from this unconstitutional delegation. This Court should grant review to determine whether HISA crosses the constitutional line.

II. The Circuits' Tests Produce Different Results.

A. The courts of appeals apply different tests in their private-nondelegation decisions. Pet. 27-29.

The Authority (at 14-15) asserts the circuits are not divided. But under the tests used by the other circuits, HISA would not be found constitutional. For example, in *United States v. Frame*, the Secretary of Agriculture appointed and removed private Board members; had final approval over budgets, plans, and projects; and had final approval over any contracts entered into by the Board. 885 F.2d 1119, 1129 (3d Cir. 1989). Unlike the Secretary, the FTC cannot appoint or remove Board members and is limited to consistency review and notice-and-comment rulemaking. And unlike the Board, the Authority's role cannot be described as “advisory” or “ministerial.” *Id.*

Similarly, in *Riverbend Farms, Inc. v. Madigan*, a private committee made a “recommendation to the Secretary as to the volume of oranges he should authorize

for shipment into the domestic market.” 958 F.2d 1479, 1483 (9th Cir. 1992). The Secretary, however, “retain[ed] ultimate authority to issue the regulation.” *Id.* at 1488 (explaining he “retains the authority to depart from or ignore the[recommendations] altogether”). The FTC does not retain ultimate authority to issue the Authority’s proposed rules, as Congress has mandated that the FTC approve them if they are otherwise lawful. 15 U.S.C. § 3053(c)(2).

And the D.C. Circuit rejected a very similar argument to the one Respondents are making here, that “the government’s ‘active oversight, participation, and assent’” in private rulemaking avoided a nondelegation violation. *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp. (Amtrak I)*, 721 F.3d 666, 673 (D.C. Cir. 2013), *vacated and remanded sub nom. Amtrak II*, 575 U.S. 43 (2015). The Authority claims the D.C. Circuit’s decision on remand supports it, but the portion quoted concerns a Due Process claim, not a nondelegation violation. *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp. (Amtrak III)*, 896 F.3d 539, 547 (D.C. Cir. 2018).

The FTC notes (at 2-3) that these decisions do not concern HISA, which is true. HISA is a far more expansive delegation of legislative authority to a private entity with more limited supervision than the statutes considered by other circuits. Rather than recommend the volume of orange shipments (*Riverbend*) or a program to promote beef (*Frame*), the Authority crafted nationwide regulatory schemes to govern racetrack safety and the use of illicit substances while the FTC was limited to consistency review and notice-and-comment rulemaking. That is all the more reason for this Court to consider the nondelegation question and provide guidance to the circuits.

B. The Authority also claims that HISA is similar to the Maloney Act, which concerns a delegation to a self-regulatory organization (FINRA) overseen by the SEC and which has withstood multiple nondelegation challenges in the circuits. Auth. 13. But only one of those decisions cited this Court’s nondelegation ruling in *Adkins*, and even then, it was in a footnote following a single sentence of analysis. *R. H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 n.10 (2d Cir. 1952).

Regardless, there are differences between HISA and the Maloney Act that give the SEC greater supervision over self-regulatory organizations. For example, the SEC may remove the officers and directors of a self-regulatory organization for misconduct. 15 U.S.C. § 78s(h)(4). The SEC can also approve new self-regulatory organizations, *id.* § 78s(a)(1), and revoke their registration for various forms of misconduct, *id.* § 78s(h)(1).

Further, the historical roots of self-regulatory organizations in the securities field make the Maloney Act different from HISA. *See Trump v. Cook*, 609 U.S. 528, 535 (2026) (noting that statutory interpretation “must reflect the Federal Reserve’s unique historical status and role”). “Self-regulation in the securities industry is nearly as old as the federal government.” Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 N.C. L. Rev. 475, 480 (1984). Horseracing, however, was not governed by self-regulatory organizations prior to HISA but rather by the States. Auth. 2. Taking power from the States and handing it to a private entity creates federalism concerns in addition to private-nondelegation problems.

III. This Question Warrants the Court’s Review.

The legislative delegation here is far greater than the actuarial standards delegated in *Texas v. Commissioner of Internal Revenue*, yet three Justices there raised concerns that “a legislative determination . . . was made not by Congress or even by the Executive Branch but by a private group.” 142 S. Ct. 1308, 1309 (2022) (Alito, J., respecting the denial of certiorari). And as Justice Gorsuch has explained, the Court has “sometimes shrunk from applying [the nondelegation doctrine], worried that ‘our increasingly complex society’ cannot manage unless someone else assumes Congress’s job of making the laws that govern us.” *Trump v. Slaughter*, 146 S. Ct. 2283, 2318 (2026) (Gorsuch, J., concurring) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). But democratic accountability requires being able to hold responsible those “making the laws that govern us.” The private delegation in HISA prevents that, as lawmaking has been entrusted to a private entity that no federal official controls or adequately supervises.

The parties agree that the question of private nondelegation should be taken up by the Court, but Respondents would limit the Court to the enforcement issue. It makes little sense, however, to determine whether the Authority can enforce the rules without first determining whether the Authority can make the rules. The Court should grant Texas’s petition to consider the issue of legislative delegation.

CONCLUSION

For these reasons, this Court should grant the petition for certiorari.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

WILLIAM R. PETERSON
Solicitor General
Counsel of Record

BRENT WEBSTER
First Assistant Attorney
General

WILLIAM F. COLE
Principal Deputy Solicitor
General

BETH KLUSMANN
Deputy Solicitor General

OFFICE OF THE TEXAS ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
William.Peterson@oag.texas.gov
(512) 936-1700

Counsel for Petitioners

October 26, 2026