

No. 26-_____

In the Supreme Court of the United States

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

v.

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

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

**CROSS-PETITION FOR
A WRIT OF CERTIORARI**

DANIEL R. SUHR
Counsel of Record
Center for
American Rights
1341 W. Fullerton Ave.
Suite 170
Chicago, IL 60614
414.588.1658
dsuhr@
americanrights.org

BRIAN KELSEY
The Kelsey Firm, PLLC
116 Agnes Rd., Ste. 200
Knoxville, TN 37919

CHRISTOPHER E. MILLS
Spero Law LLC
557 East Bay St. #22251
Charleston, SC 29413

FERNANDO M. BUSTOS
Bustos Law Firm, P.C.
5504 – 114th St.
Lubbock, TX 79424

PETER ECABERT
National HBPA
836 Euclid Ave. #207
Lexington, KY 40502

QUESTION PRESENTED

In 2020, Congress nationalized regulation of the horseracing industry. But rather than create a governmental regulator, it delegated governmental powers to a newly created private corporation. Petitioners sued and won. The Fifth Circuit ruled that the Horseracing Integrity and Safety Authority, Inc. could not write the rules for horseracing without the Federal Trade Commission (“FTC”) being able to “approve[], disapprove[], or modif[y]” them. *Nat’l Horsemen’s Benevolent and Protective Ass’n v. Black*, 53 F.4th 869, 881 (5th Cir. 2022) (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)).

After the Fifth Circuit’s ruling, Congress added one new sentence to the statute. Under the revised law, the private corporation still writes the first draft of all rules. 15 U.S.C. § 3053(a). And the FTC cannot change those rules: it “shall” promulgate them if they are “consistent” with the Horseracing Integrity and Safety Act and applicable FTC rules. 15 U.S.C. § 3053(c)(2). The new sentence only gives the FTC the power to institute a separate rulemaking to abrogate, add to, and modify the rules *after* the corporation’s rules have already been promulgated. 15 U.S.C. § 3053(e).

Question Presented #2:¹ Does it violate the private nondelegation doctrine if a private entity’s rules enter into force without the supervising federal agency being able to contemporaneously revise or reject them?

¹ The Horsemen agree with the Authority and the FTC that the Court should grant certiorari on the first question presented, whether HISA unconstitutionally delegates *executive* powers.

PARTIES TO THE PROCEEDINGS

1. **Petitioners** (Plaintiffs-Appellants below): the National Horsemen’s Benevolent and Protective Association (NHBPA), Arizona Horsemen’s Benevolent and Protective Association, Arkansas Horsemen’s Benevolent and Protective Association, Indiana Horsemen’s Benevolent and Protective Association, Illinois Horsemen’s Benevolent and Protective Association, Louisiana Horsemen’s Benevolent and Protective Association, Mountaineer Park Horsemen’s Benevolent and Protective Association, Nebraska Horsemen’s Benevolent and Protective Association, Oklahoma Horsemen’s Benevolent and Protective Association, Oregon Horsemen’s Benevolent and Protective Association, Pennsylvania Horsemen’s Benevolent and Protective Association, Washington Horsemen’s Benevolent and Protective Association, Tampa Bay Horsemen’s Benevolent and Protective Association (collectively, “the Horsemen”).

2. **Intervenor Concurrent Petitioners:** the State of Texas and the Texas Racing Commission (collectively, “Texas”).

3. **Consolidated Concurrent Petitioners:** Gulf Coast Racing LLC, LRP Group Ltd., Valle de Los Tesoros Ltd., Global Gaming LSP LLC, and Texas Horsemen’s Partnership LLP.

4. **Private Respondents** (Defendants-Appellees below): the Horseracing Integrity and Safety Authority, Inc., Charles Scheeler, Steve Beshear,

Adolpho Birch, Leonard Coleman, Joseph De Francis, Susan Stover, Bill Thomason, D.G. Van Clief, Nancy Cox, Katrina Adams, Jerry Black, Joseph Dunford, Frank Keating, Kenneth Schanzer, Ellen McClain, and Lisa Lazarus (collectively, “the Authority”).

5. **Federal Respondents** (Defendants-Appellees below) include the Federal Trade Commission, Chair Andrew Ferguson, and Commissioner Mark Meador (collectively, the “FTC” or “the Commission”).
6. **Former Federal Respondents** former FTC Chair Lina Khan and former FTC Commissioners Noah Phillips, Christine Wilson, Rebecca Slaughter, Alvaro Bedoya, and Melissa Holyoak are no longer parties to the proceeding because they no longer hold their former Commission titles. *See* Rule 35.3.

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6, National Horsemen's Benevolent and Protective Association, et al., disclose the following:

- A. National Horsemen's Benevolent and Protective Association (National HBPA) has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
- B. Arizona HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
- C. Arkansas HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
- D. Indiana HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
- E. Illinois HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
- F. Louisiana HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
- G. Mountaineer Park HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
- H. Nebraska HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
- I. Oklahoma HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

- J. Oregon HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
- K. Pennsylvania HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
- L. Tampa Bay HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.
- M. Washington HBPA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

LIST OF ALL PROCEEDINGS

United States District Court for the Northern District of Texas

National Horsemen's Benevolent & Protective Ass'n v. Black, No. 21-cv-71 (March 31, 2022)

National Horsemen's Benevolent & Protective Ass'n v. Black, No. 21-cv-71 (May 4, 2023)

United States Court of Appeals for the Fifth Circuit

National Horsemen's Benevolent & Protective Ass'n v. Black, No. 22-10387 (Nov. 18, 2022)

National Horsemen's Benevolent & Protective Ass'n v. Black, No. 23-10520 (July 5, 2024) (panel); (Sept. 9, 2024) (denial of rehearing en banc)

National Horsemen's Benevolent & Protective Ass'n v. Black, No. 23-10520 (June 11, 2026) (after GVR Order)

United States Supreme Court (2024)

Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n, No. 24A287 (filed Sept. 19, 2024)

Federal Trade Commission, et al. v. National Horsemen's Benevolent & Protective Ass'n, No. 24-429 (filed Oct. 16, 2024)

Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n, No. 24-433 (filed Oct. 15, 2024)

State of Texas et al. v. Jerry Black, et al., No. 24-465 (filed Oct. 22, 2024)

Gulf Coast Racing, L.L.C., et al., Petitioners v. Horseracing Integrity and Safety Authority, Inc., et al., No. 24-489 (filed Oct. 28, 2024)

National Horsemen's Benevolent and Protective Association, et al., Petitioners v. Horseracing Integrity and Safety Authority, Inc., et al., No. 24-472 (filed Oct. 22, 2024)

United States Supreme Court (2026)

Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n, No. 26-199 (filed Aug. 10, 2026)

Federal Trade Commission, et al. v. National Horsemen's Benevolent & Protective Ass'n, No. 26-201 (filed Aug. 14, 2026)

TABLE OF CONTENTS

	Page
Question Presented.....	I
Parties to the Proceedings.....	II
Rule 29.6 Disclosure	IV
List of All Proceedings	VI
Appendix.....	IX
Table of Authorities	X
Decisions Below	1
Statement of Jurisdiction	1
Pertinent Constitutional and Statutory Provisions.....	2
Introduction.....	3
Statement of the Case	7
Argument	8
I. The case presents an important question of federal law that has not yet been settled by this Court: whether a private entity can draft rules that go into effect before the government can change them.	8
II. The Court should grant this second question presented to consider the constitutionality of the Horseracing Integrity and Safety Act in its entirety.	12
Conclusion	16

APPENDIX

Appendix A	Opinion in the United States Court of Appeals for the Fifth Circuit (June 11, 2026)	App. 1a
Appendix B	Opinion in the United States District Court for the Northern District of Texas, Lubbock Division (May 4, 2023)	App. 51a
Appendix C	Order of the Supreme Court granting stay (October 28, 2024)	App. 113a
Appendix D	Order of the Supreme Court granting, vacating, and remanding case (June 30, 2025)	App. 115a
Appendix E	Order of the United States Court of Appeals for the Fifth Circuit staying mandate (July 14, 2026)	App. 119a
Appendix F	Horseracing Integrity and Safety Act	App. 121a

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<i>Ass’n of Am. R.Rs. v. Dep’t of Transp.</i> , 575 U.S. 43 (2015)	9
<i>Ass’n of Am. R.Rs. v. Dep’t of Transp.</i> , 721 F.3d 666 (D.C. Cir. 2013)	5, 9, 10
<i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 (1936)	5, 8, 15
<i>FCC v. Consumers’ Research</i> , 606 U.S. 656 (2025)	4, 5, 6, 8, 12, 13
<i>Nat’l Fed’n of Indep. Bus. (NFIB) v. DOL, OSHA</i> , 595 U.S. 109 (2022)	6
<i>Nat’l Horsemen’s Benevolent and Protective Ass’n v. Black</i> , 53 F.4th 869 (5th Cir. 2022)	i, 3, 13
<i>Nat’l Horsemen’s Benevolent and Protective Ass’n v. Black</i> , 107 F.4th 415 (5th Cir. 2024)	4
<i>Nat’l Horsemen’s Benevolent and Protective Ass’n v. Black</i> , 145 S. Ct. 2836 (2025)	4
<i>New Eng. Fishermen’s Stewardship Ass’n v. Raimondo</i> , 761 F. Supp. 3d 141 (D. Me. 2024)	10
<i>Sunshine Anthracite Coal Co. v. Adkins</i> , 310 U.S. 381 (1940)	i, 6, 9, 11, 13

<i>Texas v. Comm’r</i> , 142 S. Ct. 1308 (2022)	14
<i>Texas v. Rettig</i> , 987 F.3d 518 (5th Cir. 2021)	13, 14, 15
<i>Whitman v. Am. Trucking Ass’ns</i> , 531 U.S. 457 (2001)	7

STATUTES

15 U.S.C. § 3053(a)	i
15 U.S.C. § 3053(c)(2)	i
15 U.S.C. § 3053(e).....	i

OTHER AUTHORITIES

Horseracing Integrity & Safety Authority, <i>Definitions and General Compliance</i> , https://hisaus.org/faqs ...	14
---	----

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 1, cl. 1.....	3, 16
U.S. Const. art. II, § 2.....	4, 16

DECISIONS BELOW

The first opinion of the U.S. District Court for the Northern District of Texas is reported at 596 F. Supp. 3d 691 (2022).

The first opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 53 F.4th 869 (2022).

The second opinion from the U.S. District Court for the Northern District of Texas is reported at 672 F. Supp. 3d 220 (2023).

The second opinion from the U.S. Court of Appeals for the Fifth Circuit is reported at 107 F.4th 415 (5th Cir. 2024).

The order from the U.S. Court of Appeals for the Fifth Circuit denying en banc review is available at 2024 U.S. App. LEXIS 22875 (Sept. 9, 2024).

This Court's grant, vacate, and remand order is available at 145 S. Ct. 2837 (2025) and reproduced at App. 115a.

The third opinion from the U.S. Court of Appeals for the Fifth Circuit following the GVR is reported at 178 F.4th 224 (2026) and reproduced at App. 1a.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 11, 2026. App. 1a. The Horsemen invoke the Court's jurisdiction under 28 U.S.C. § 1254(1). The Authority and FTC filed certiorari petitions from the same judgment, respectively Nos. 26-199 and 26-201.

**PERTINENT CONSTITUTIONAL
AND STATUTORY PROVISIONS**

The relevant constitutional provision is Article I, Section I, Clause I (“All legislative Powers herein granted shall be vested in a Congress of the United States...”). The relevant statutory provisions are found in the Horseracing Integrity and Safety Act, as amended, 15 U.S.C. Ch. 57A, which is included in the appendix, App. 121a *et seq.*

INTRODUCTION

The National Horsemen’s Benevolent & Protective Association and twelve of its state affiliates (the “Horsemen”) won this case below on the question of whether the Horseracing Integrity and Safety Act (“HISA” or the “Act”) unconstitutionally delegates *executive* powers to a private entity. But the case also presents the important question of whether HISA unconstitutionally delegates *legislative* powers to a private entity. The Court should grant certiorari on both questions.

The first time the case reached the Fifth Circuit, the court “declare[d] HISA facially unconstitutional.”² The court reasoned that HISA unconstitutionally delegated legislative powers to a private entity, in violation of Article I, Section 1, Clause 1, which vests all legislative power in Congress. It cited two particularly egregious problems with the statute. First, only the Horseracing Integrity and Safety Authority, Inc. (the “Authority”)—and not the Federal Trade Commission (the “Commission” or “FTC”)—could draft proposed rules for the horseracing industry.³ Second, “[i]f those rules are ‘consistent’ with HISA’s broad principles, the FTC *must* approve them.”⁴

In response, Congress tweaked the statute, but it left both of those offending provisions in place.

² *Nat’l Horsemen’s Benevolent and Protective Ass’n v. Black*, 53 F.4th 869, 873 (5th Cir. 2022).

³ *Id.* at 882-86.

⁴ *Id.* at 872 (emphasis in original).

Instead, it inserted a sentence at the end of that code section that also gives the FTC the authority to promulgate rules on its own.

The second time the case reached the Fifth Circuit, the court declared the statute unconstitutional once more.⁵ This time, it ruled that Congress had unconstitutionally delegated *executive* powers to a private corporation, in violation of Article II, Section 1, which vests all executive powers in the President. The Court found that the FTC did not have meaningful oversight of the Authority's enforcement activities. In the same opinion, it changed its former decision regarding *legislative* powers given the amendment.

This Court granted, vacated, and remanded that decision in light of *FCC v. Consumers' Research*, 606 U.S. 656 (2025).⁶

The third time the case reached the Fifth Circuit, it reissued its second opinion in light of *Consumers' Research* without substantial modification.⁷

The Authority and the FTC have petitioned for certiorari on the question of the delegation of executive powers.⁸ In a filing contemporaneous with this one, the Horsemen agree that the Court should grant certiorari on those petitions. But here, they also petition the Court to consider Congress's delegation of

⁵ 107 F.4th 415 (5th Cir. 2024).

⁶ 145 S. Ct. 2836 (2025).

⁷ App. 1a.

⁸ S. Ct. Dkt. Nos. 26-199 (Authority) and 26-201 (FTC).

legislative powers to the Authority.

The Court should grant certiorari on whether HISA unconstitutionally delegates legislative powers in violation of Article I, Section I, Clause I, to a private corporation for two reasons.

First, this is an important question of federal law that has not been settled by this Court. This Court laid down a clear rule last year in *Consumers' Research*: a private entity may recommend and advise on rules, which means it cannot draft rules unless a governmental agency can approve, disapprove, or modify them.⁹ But it is not settled whether the agency's determination must be made before promulgation or after. Put differently, must the agency have the power to rewrite or reject the private corporation's proposed rule? This Court and the D.C. Circuit seem to say that agency determination must occur "before" promulgation and the rule going into effect.¹⁰ But the Fifth Circuit in this case allowed it to occur after.¹¹ The Court should grant certiorari to settle the question.

Second, doing so allows the Court to review the constitutionality of HISA in its entirety. Parsing legislative and executive powers illuminates in some ways, but the powers require differentiation in other

⁹ *Consumers' Rsch.* 606 U.S. at 692.

¹⁰ *Id.* at 684. See also *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-311 (1936); *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015).

¹¹ App. 11a-12a.

respects.¹² Separating them also comes at a cost: it denies the Court a full picture of the sheer breadth and depth of control given by Congress to a private corporation over an entire industry. Only by looking at both legislative *and* executive powers together can the Court fully appreciate the degree of delegation inherent in HISA.

HISA presents the need for a “major delegations” doctrine, in which sweeping delegations to a private entity require greater governmental oversight. A significant part of the problem with HISA is the total amount of power delegated to the Authority when both legislative and executive powers are considered together. Unlike the private entities at issue in *Sunshine Anthracite* and *Consumers’ Research*, which simply proposed a number that the agency could change at will, the Authority has been tasked with regulating an entire industry. It both writes the rules and then investigates, prosecutes, adjudicates, and penalizes all violations of the rules. Further, it funds this system through mandatory registration and fee assessments on industry participants in amounts that it also determines by exercising legislative power.

Taking this case in its entirety allows the Court to illuminate an issue recurring in the background of its nondelegation cases: that the quantity and quality of the power delegated are as important as the amount

¹² For instance, if a private entity may make only nonbinding recommendations for the exercise of legislative power, the question of supervision over that private entity seems much less urgent than if the private entity is actually exercising executive powers, such that hands-on executive supervision and accountability for the use of those powers is required.

of supervision. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) (“the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”).

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

STATEMENT OF THE CASE

The Horsemen incorporate by reference the statement of the case provided in their consolidated memorandum filed contemporaneously in S. Ct. Nos. 26-199 (petition of the Horseracing Integrity and Safety Authority, Inc.) and 26-201 (petition of the Federal Trade Commission).

ARGUMENT

I. The case presents an important question of federal law that has not yet been settled by this Court: whether a private entity can draft rules that go into effect before the government can change them.

A private entity can “recommend,” “propose,” and give “advice” to a government agency writing regulations. But a private entity cannot hold “decision-making power.” “[D]ecision making authority” must rest with the agency “alone.”¹³ Delegation of decision-making power to a private entity is “delegation in its most obnoxious form.”¹⁴ The question presented by this petition is whether the governmental agency’s final decision-making review must occur before a regulation is promulgated or after. Phrased differently, must the agency have power to rewrite or reject proposed rules, or is the power to later modify or repeal promulgated rules sufficient?

Last year, this Court seemed to say the agency’s discretionary review must occur *before* promulgation. In *Consumers’ Research*, the Court upheld a statute reasoning that the agency’s ability to revise the private entity’s recommended assessments occurred *before* promulgation: “That gives the Commission a chance to review—and, if needed, to revise—the projections *before* approving final figures.”¹⁵ The Court emphasized this pre-promulgation approval in

¹³ *Consumers’ Rsch.*, 606 U.S. at 692.

¹⁴ *Id.* (quoting *Carter Coal*, 298 U.S. at 311).

¹⁵ *Id.* at 694 (italics added).

upholding the statute.

Likewise, eighty years earlier, in *Sunshine Anthracite*, this Court upheld a statute against a nondelegation challenge that allowed the governmental agency to change the private entity's recommendation *before* it went into effect. There, the private coal boards could “propose minimum prices,” but the governmental coal commission retained the power to “approve[], disapprove[], or modif[y]” the prices before they went into effect.¹⁶ Therefore, the governmental agency, “not the [private] code authorities, determine[d] the prices.”¹⁷

Neither case presented this Court with the question presented by this petition: whether an agency's ability to change a private corporation's rules after they go into effect is sufficient. Without direction from this Court, circuit courts have struggled with this question.

For example, the D.C. Circuit seemed to take a position contrary to that of the Fifth Circuit in this case. *See Ass'n of Am. R.Rs. v. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013) (*Amtrak I*). There, the D.C. Circuit enjoined a statute because the agency could not modify the allegedly private entity's rules before promulgation; the statute allowed both the allegedly private entity, Amtrak, and the governmental agency, the Federal Railroad Administration (“FRA”), to draft rules and regulations

¹⁶ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940).

¹⁷ *Id.* at 399.

for the industry.¹⁸ Then the statute allowed for each party to reject the other party’s proposed rules and send the disputed portion to arbitration.¹⁹

The D.C. Circuit held that the private party (Amtrak) and the agency (the FRA) could not hold joint regulatory authority—the FRA had to be superior. The court noted with dismay that if the arbitrator were also private, promulgation would occur with no government action whatsoever when the private arbitrator sided with the private party: “That means it would have been entirely possible for metrics and standards to go into effect that had not been assented to by a single representative of the government.”²⁰ The court found no comfort in the government’s ability to institute a new rulemaking later. The nub of the constitutional problem was that rules could go into effect before the government had a chance to disapprove or modify them.²¹

Similarly, the original Fifth Circuit decision for the Horsemen said that “the FTC’s limited review of *proposed* rules does not make the Authority function subordinately to the agency.”²² The court’s problem

¹⁸ 721 F.3d at 669-70.

¹⁹ *Id.* at 696, 673-74.

²⁰ *Id.* at 674.

²¹ *Accord New Eng. Fishermen’s Stewardship Ass’n v. Raimondo*, 761 F. Supp. 3d 141, 215 (D. Me. 2024) (no private nondelegation doctrine violation by advisory fisheries management councils because of the Secretary of Commerce’s “ongoing supervision of the Councils’ proposals before any of them take legal effect”), *partially rev’d on other grounds*, 174 F.4th 263 (1st Cir. 2026).

²² 53 F.4th at 887 (emphasis added).

was that the FTC could not review the Authority's rules when they were proposed—not promulgated.

But now the Fifth Circuit says the scheme is constitutional because the FTC can modify or repeal any rule *after* it has been promulgated.²³ Even though this is a facial challenge, the court reached outside the text of the statute to hypothesize that the FTC can fix the timing problem of the statute by promulgating an emergency rule. *Id.* In the court's telling, this new FTC rule could suspend the effective date of the unwanted Authority rule, and then the FTC could initiate a separate rulemaking procedure to modify or repeal the promulgated Authority rule before its effective date. *Id.*²⁴ But an emergency rule cannot rewrite a statute. The hypothetical shows why "[e]nacting new [FTC] rules through the required notice and comment procedures would be a poor means of micromanaging the" Authority. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 480 (2010).

The D.C. Circuit was right and the Fifth Circuit was wrong regarding the timing of agency review. Per *Sunshine Anthracite*, the agency must retain the ability to reject or revise a private entity's proposed rules before are promulgated. This is an important question of federal law that has not been, but should be, settled by this Court.

²³ App. 14a.

²⁴ *Accord Oklahoma v. United States*, 163 F.4th 294, 310 (6th Cir. 2025).

II. The Court should grant this second question presented to consider the constitutionality of the Horseracing Integrity and Safety Act in its entirety.

HISA concerns both legislative and executive powers. It grants the Authority a formalized role in drafting rules and setting fees—quintessential legislative acts. It also grants the Authority quintessential executive powers, such as the power to implement and enforce those rules and assessments through investigations, prosecutions, administrative adjudications, and sanctions. The two powers are integrated in the statute, which charges the Authority with “developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces.” 15 U.S.C. § 3052(a). As the name suggests, the Authority is “the authority” for both writing the rules of horseracing and enforcing them. Tracking the statute, the Court should consider how the intertwined legislative and executive powers as a whole violate the nondelegation doctrine.²⁵

²⁵ HISA does the same in individual statutory subsections. HISA grants the Authority legislative powers for medication control: “the Authority shall issue, by rule” “uniform standards for” “medication[s]” and “laboratory testing.” 15 U.S.C. § 3055(c)(1). Next, the same subsection gives executive powers: the Authority is required to enter into an agreement with a private “anti-doping and medication control enforcement agency,” which shall conduct “investigations, charging and adjudication” such that all decisions of the agency “shall be the final decision or civil sanction of the Authority” *Id.* § (c)(4)(B). The same combination of powers happens for racetrack safety. 15 U.S.C. § 3056(a)-(b).

As this Court said recently, the constitutional question is whether multiple layers of delegation operate along the same axis, such that “when combined, each compounded the other’s effect, so that the [FTC is] left with no real authority.”²⁶

That’s the case here. Because HISA delegates almost unfettered executive and legislative power to the Authority, the Act overall operates to delegate too much power to a private organization. The breadth of the delegation at issue is stunning. In HISA, Congress has handed authority to regulate a nationwide industry worth \$12 billion to a private corporation. The Authority is, in its own words, “the national regulatory body overseeing safety and integrity” for the entire industry.²⁷

The constitutional principle is clear: Congress may authorize a private entity to advise, recommend, and propose (as to rulemaking), and the Executive may authorize (to a ministerial degree) a private entity to assist and administer.²⁸

Here, the delegation of legislative power is so great as to be different not only in degree but in *kind*. Anyone can make a proposal. And a regulator is

²⁶ *Consumers’ Rsch.*, 606 U.S. at 697.

²⁷ *HISA issues statement on Supreme Court orders*, Horseracing Integrity and Safety Authority (June 30, 2025), <https://hisaus.org/news/hisa-issues-statement-on-supreme-court-orders>.

²⁸ In our accompanying consolidated memorandum, we address the separate question of whether one branch (Congress) may permanently transfer the powers of another branch (the Executive) to a private third party.

normally free to ignore anyone’s proposals. Here, by contrast, the private organization has congressionally created inertia on its side—its proposals always and almost automatically take effect and can only later be modified by the government’s proactive action—that’s real power.

In *Adkins*, the private advisor recommended a single number, the price for coal in that region. 310 U.S. at 388. In *Consumers’ Research*, the private advisor also recommended a single number, which required “no policymaking,” just “doing arithmetic.” 606 U.S. at 693.

Similarly in *Texas v. Rettig*, 987 F.3d 518 (5th Cir. 2021), which concerned a private body’s role in setting actuarial standards for a Medicaid reimbursement calculation, “the private board contributed to a small part of the regulatory scheme, merely acting as an aid to HHS.”²⁹ But even in *Rettig*, Justice Alito found that this small role “present[ed] a fundamental question about the limits on the Federal Government’s authority to delegate its powers to private actors.” *Texas v. Comm’r*, 142 S. Ct. 1308, 1308 (2022) (Alito, J., concurring in the denial of certiorari).

This case presents a problem different in kind than those the Court confronted in *Rettig*, *Consumers’ Research*, or *Sunshine Anthracite*.

Here, Congress has handed the power to regulate a nationwide industry to a private authority. The Authority’s first job was to write a comprehensive set of rules for every aspect of thoroughbred horseracing:

²⁹ *NHBPA*, 53 F.4th at 889.

governing jockeys, veterinarians, owners, trainers, racetracks, and even racetrack chaplains.³⁰ The Authority's second job is to enforce the rules it has written. The two jobs are so intertwined that the Court should consider them together and set forth a clear set of rules for the private nondelegation doctrine.

That doctrine, seen as a whole, is about much more than the quantum of supervision assigned to an agency. The *quality of powers* delegated matters. Sovereign powers which are “necessarily a government function” generally may not be delegated, while non-sovereign powers (*i.e.*, administrative, proprietary, ministerial, or advisory roles) may be delegated.³¹ And, as this petition highlights, the *quantity of powers* delegated matters. It's one thing to give a private actor a limited, specific role to aid and assist. It's another thing to give a private corporation comprehensive nationwide oversight of an industry with all the authority of a government agency.

³⁰ Authority FAQs #6: “Racetrack Chaplains and Jockey’s Agents are required to register with HISA.” Definitions and General Compliance, <https://hisaus.org/faqs>.

³¹ See *Carter Coal*, 298 U.S. at 311 (“the difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function.”).

CONCLUSION

If the Court grants the petitions of the Authority and FTC, as it should, it should also grant this Petition and that of Texas to clarify the private non-delegation doctrine in both its Article I and Article II contexts.³²

As to Article I legislative power, this Court should hold that the agency must have contemporaneous control to rewrite or reject a proposed rule by a private entity.

³² The Court could either keep the two questions regarding legislative and executive powers separate or it could combine them into one question presented: Does HISA unconstitutionally delegate governmental power to a private entity? The Court may also wish to grant the Gulf Coast Racing Petition, which raises a complementary Appointments Clause challenge.

Respectfully submitted,

DANIEL R. SUHR
Counsel of Record
Center for
American Rights
1341 W. Fullerton Ave.
Suite 170
Chicago, IL 60614
414.588.1658
dsuhr@
americanrights.org

BRIAN K. KELSEY
The Kelsey Firm, PLLC
116 Agnes Rd., Ste. 200
Knoxville, TN 37919

CHRISTOPHER E. MILLS
Spero Law LLC
557 East Bay St. #22251
Charleston, SC 29413

FERNANDO BUSTOS
Bustos Law Firm, P.C.
5504 – 114th St.
Lubbock, TX 79424

PETER ECABERT
National HBPA
836 Euclid Ave. #207
Lexington, KY 40502

Counsel for the Horsemen

SEPTEMBER 9, 2026