
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*

**REPLY IN SUPPORT OF CROSS-PETITION
FOR A WRIT OF CERTIORARI**

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RULE 29.6 STATEMENT

Cross-Petitioners National Horsemen's Benevolent and Protective Association and its twelve state affiliates are all nonstock corporations with no parent corporation. No publicly held company has an ownership interest in any Cross-Petitioner.

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ARGUMENT

I. This cross-petition presents an important question of federal law that the Court has never answered before.

That significant question is whether a private entity can draft binding rules that go into effect *before* the government can change them based on the government's policy disagreement with the private entity.

A. The HISA Authority's reason for denying certiorari—that the FTC can contemporaneously change proposed rules based on policy—is contradicted by the statute and by the FTC's own view of its power.

The HISA Authority incorrectly asserts that “consistency” review is a “broad standard” that “empowers” the Commission to reject a rule it dislikes “as a matter of policy.” Auth. Opp. 21. But the plain meaning of the statute reads otherwise.

Under the Horseracing Integrity & Safety Act, the Authority *must* begin the rulemaking process: “The Authority shall submit to the Commission ... any proposed rule” on the host of subjects covered by the Act. 15 U.S.C. § 3053(a). Next, the Commission *must* publish the rule for public comment, whether it likes the rule or not: “The Commission shall—(A) publish in the Federal Register each proposed rule” 15 U.S.C. § 3053(b). Then, the Commission *must* act on the rule within “60 days.” 15 U.S.C. § 3053(c). But the

Commission cannot change the rule: it *must* only “approve or disapprove the proposed rule.” *Id.* Most importantly, the Commission *must* approve the rule as long as it is consistent with HISA and the applicable FTC rules, *i.e.*, as long as it covers subjects outlined in the Act and does not stray beyond the Act: “The Commission shall approve a proposed rule or modification if the commission finds that the proposed rule or modification is consistent with—(A) this chapter; and (B) applicable rules approved by the Commission.” *Id.* Therefore, under the plain meaning of the statute, the Commission *cannot* reject a proposed rule based on “a matter of policy.” *Contra* Auth. Opp. 21.

The FTC agrees with the Horsemen’s reading of the statute. *See Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022) (“the FTC concedes it cannot review the Authority’s policy choices” during its rule reviews). In its most recent order approving a rule, the FTC opened by reminding the industry that the Act commands that the Commission “shall approve” any Authority proposal that is “consistent with” the Act. *Order Approving the Enforcement Rule Modification Proposed by the Horseracing Integrity and Safety Authority* 4 (Fed. Trade Comm’n Dec. 19, 2025).¹ In the order, the Commission set aside a comment when it “offered policy recommendations but did not identify any inconsistency between the proposed rule modifications and the Act.” *Id.* at 15.

¹ https://www.ftc.gov/system/files/ftc_gov/pdf/P222100HISAEnfRuleOrder.pdf.

In its first major HISA-related order after Congress amended the statute, the FTC elaborated on its role in the process: “Under the Act, the Commission must approve a proposed rule if it finds that the proposed rule is consistent with the Act and ‘applicable rules approved by the Commission.’ 15 U.S.C. § 3053(c)(2). Here, the ‘applicable rules’ are the ones issued by Commission that provide the procedures necessary for the Commission’s Office of the Secretary to accept proposed rule or rule modification submissions under the Act.” *Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority*, 2023 FTC LEXIS 96, *2 (March 27, 2023).

The Authority argues that the amended statute means the FTC’s policy choices are “baked into section 3053(c)’s approval/disapproval process” because that statutory provision requires that the Authority’s proposed rules be consistent not only with the Act, but also with the extant rules. Auth. Opp. 24. But the Commission agrees with the Horsemen that this is only a procedural requirement. The Act does not require the Authority’s proposed rules to be consistent with *all* Commission rules—only the “applicable rules.” 15 U.S.C. § 3053(c)(2)(B). The “applicable rules,” according to both the Horsemen and the FTC, are the procedural rules that the FTC has adopted to govern how the Authority should submit its proposed rules. On its website, the FTC distinguishes these procedural rules, which it calls “FTC Rules” and which are codified at 16 C.F.R. §§ 1.140-1.156, from the HISA

Authority's substantive rules, which it calls "HISA Rules" and which are not codified.²

Therefore, while the amended Act allows the FTC to exercise its independent policy judgment to enact a new rule governing horse racing, *Order Approving Anti-Doping and Med. Control Rule*, 2023 FTC LEXIS 96, at *1 n.2, that power does not change the process by which the FTC must approve the Authority's proposed rules *without* exercising its own policy judgment: "the Commission's statutory mandate to approve or disapprove a proposed Authority rule is limited to considering only whether the proposed rule 'is consistent with' the Act and the Commission's procedural rule." *Id.* at *4.

For example, when the Kentucky Horse Racing Commission pointed out a policy problem with a proposed rule, the FTC responded that it "agrees with the Authority that this does not reflect an inconsistency with the Act but essentially a policy disagreement with the Authority." *Id.* at *67. When a "policy disagreement" exists between a state regulator and the HISA Authority, the FTC cannot consider the competing policy views and decide which is better. Rather, the FTC must approve the Authority's policy, so long as there is "no apparent inconsistency with any requirement in the Act." *Id.* at *11.

According to the statute, the Horsemen, the FTC, the Fifth Circuit,³ and even the HISA Authority itself

² Horseracing Integrity and Safety Authority (HISA) Oversight, Fed. Trade Comm'n, <https://www.ftc.gov/enforcement/hisa> (last visited Oct. 20, 2026).

³ *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 885 (5th Cir. 2022).

when urging approval of its rules⁴, the FTC cannot exercise independent policymaking discretion when approving a rule proposed by the Authority.

In effect, the Authority urges this Court to deny the cross-petition based on a straw man characterization of the question presented. The question is not whether the nondelegation doctrine is violated when an agency can disapprove a private corporation’s proposed rule because the agency disagrees with its policy. Rather, the question presented is whether the nondelegation doctrine is violated when an agency *must* approve a private corporation’s proposed rule, even when the agency disagrees with the policy.

B. The question presented is new and different from that in *Consumers’ Research* and *Sunshine Anthracite*.

It is misleading for the Authority to say that the HISA “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.” Auth. Opp. 17-18 (cleaned up) (citing *FCC v. Consumers’ Research*, 606 U.S. 656 (2025)). It is similarly misleading to argue that “[t]he FTC’s review

⁴ See, e.g., Horseracing Integrity and Safety Auth., Response to Public Comments 31 (Feb. 21, 2023), <https://perma.cc/52L6-JDYT> (stating, “This comment did not address whether the AMDC Rule Proposal complies with the Act.”).

authority also parallels similar authority possessed by the federal agency under the Coal Act from *Adkins*.” *Id.* at 18 (cleaned up) (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940)).

In both *Consumers’ Research* and *Sunshine Anthracite*, the agency had complete, contemporaneous power to revise or reject the private delegate’s proposal. Not to mention, the private proposal was merely a number that the agency could reject and rewrite. *Consumers’ Research*, 606 U.S. at 693; *Sunshine Anthracite*, 310 U.S. at 388. Here the private corporation has been given the power to regulate the entire industry. And the FTC does not have complete contemporaneous power to revise or reject the Authority’s proposals.

While the Authority may be correct that the Commission has the “ultimate” authority over the rules, Auth. Opp. 19, it does not have *timely* authority over the rules. The Commission can modify or repeal rules proposed by the Authority only by initiating a new, separate notice-and-comment rulemaking. 15 U.S.C. § 1353(e). But it does not have *timely* authority over the rules because it cannot revise or reject rules proposed to it by the Authority until after they have gone into effect. 15 U.S.C. § 1353(c). That lack of contemporaneous control presents an important question of federal law that has not yet been settled by this Court. The Court should grant this cross-petition to settle the question.

II. Rulemaking and rule enforcement are inherently intertwined in this case, so review of both strengthens the Court's overall analysis.

The Court should consider whether HISA unlawfully delegates *executive* power and whether it unlawfully delegates *legislative* power because the scope and significance of 15 U.S.C. § 3053(e)'s rulemaking power bear on both disputes.

Importantly, in upholding HISA under a challenge to its *enforcement* provisions, the Sixth Circuit relied on the same § 3053(e) *rulemaking* power that the Horsemen challenge in this legislative nondelegation petition. As the court said, “the FTC’s § 3053(e) rulemaking power provides it with an additional means to supervise the Authority’s enforcement practices.” *Oklahoma v. United States*, 163 F.4th 294, 312 (6th Cir. 2025). The Sixth Circuit explicated an expansive view of FTC rulemaking, seemingly uninhibited by the statute or normal administrative procedure: “The FTC could promulgate rules requiring, for instance, that the Authority drop a misguided investigation into a particular jockey or, conversely, that the Authority pursue an enforcement action against a recalcitrant rule breaker.” *Id.*

The Authority invokes a similar nonsensical interpretation of § 3053(e) to justify both its claims that HISA does not delegate enforcement powers and that it does not delegate legislative powers. *Compare* Auth. Cert. 27-31 *with* Auth. Opp. 23-25. Because rulemaking is a primary tool by which the FTC

supposedly governs enforcement, the question of rulemaking is inseparable from the question of enforcement.

The Court should not interpret § 3053(e) in an enforcement case without first deciding whether the rulemaking provision is unconstitutional in its own right. If the Authority is correct that consistency review provides robust, independent policy review by the Commission (Auth. Opp. 18-20), then its use of rulemaking to govern enforcement is more meaningful. If, however, the Horsemen, Fifth Circuit, and FTC are correct that consistency review is drastically limited and does not provide for independent policy review of the Authority's proposed rules, then rulemaking is a much less potent tool by which to govern enforcement. The Court should examine the legislative delegation question to help it decide the executive delegation question.

Both the Fifth and the Sixth Circuits, even in their differing analyses, benefited from reviewing the two questions together. Companion review would allow this Court the same benefit: to evaluate the asserted supervisory relationship as a whole rather than in fragments. The Court should grant the certiorari petitions of the Authority and the FTC, as well as the cross-petitions of Texas and the Horsemen, to examine the full panoply of the Authority's powers.

III. The Appointments Clause should remain available as an alternative constitutional theory, and if there is a jurisdictional problem with the Gulf Coast case, the Court should de-consolidate it.

The Horsemen believe that the private nondelegation doctrine, rather than the Appointments Clause, is the appropriate basis for resolution of this case. However, the Horsemen urge the Court to accept and consolidate the Gulf Coast Petition to ensure the Court has the widest array of meritorious legal arguments before it. *See Consumers' Rsch.*, 606 U.S. at 720 n.6 (Gorsuch, J., dissenting); *see also id.* at 710 (Jackson, J., concurring).⁵

The Private Nondelegation Doctrine and the Appointments Clause both serve the important values of public accountability and transparency: they protect citizens from unchecked bureaucrats. The Horsemen claim that the Authority is a private entity that has been unlawfully delegated governmental powers. Gulf Coast presents an alternative claim that, because the Authority's directors exercise governmental power, they must be appointed by a superior officer. The Court should grant both petitions to consider both theories by which HISA violates the Constitution.

⁵ This is another reason to prefer the Fifth Circuit case as the vehicle for this Court's consideration of HISA over the Sixth Circuit's *Oklahoma* case, as the Appointments Clause question is raised only in this case.

However, the Petitioners in *Oklahoma* have questioned whether there is a jurisdictional defect in the Gulf Coast case.⁶ Gulf Coast, the Authority, and the FTC have all explained why that is not true.⁷ But if the Court does have jurisdictional concerns about Gulf Coast’s case, then the correct answer is to de-consolidate it from the Horsemen’s and Texas’s case—not to hold their petitions and instead grant the *Oklahoma* petition.

The District Court consolidated the Gulf Coast case with the Horsemen’s case *sua sponte* for judicial convenience, against the Horsemen’s will.⁸ Texas, by contrast, intervened in the Horsemen’s case with the Horsemen’s support.⁹

The Gulf Coast Plaintiffs’ jurisdictional issues in no way affect jurisdiction in the Horsemen’s and Texas’s case. Even once consolidated, “separate actions do not merge into one.” *Hall v. Hall*, 584 U.S. 59, 75 (2018). *See id.* at 76 (“actions do not lose their

⁶ Reply at 3, *Oklahoma v. United States*, No. 25-1325 (U.S. Sept. 15, 2026).

⁷ Gulf Coast Reply at 8-9, *Gulf Coast Racing LLC v. Horseracing Integrity & Safety Authority*, No. 26-332 (Oct. 27, 2026); Gulf Coast Reply at 5-9, *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, No. 23-10520 (5th Cir. Aug. 25, 2023); Reply at 12, n. 1, *Horseracing Integrity & Safety Authority, Inc. v. Nat’l Horsemen’s Benevolent & Protective Ass’n*, No. 26-199 (U.S. Sept. 30, 2026); Reply at 3, *Fed. Trade Comm’n v. Nat’l Horsemen’s Benevolent & Protective Ass’n*, No. 26-201 (U.S. Sept. 30, 2026).

⁸ Order Consolidating & Setting Trial, *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, No. 5:21-cv-00071-H (N.D. Tex. Apr. 11, 2023), ECF No. 135.

⁹ Pls.’ Resp. in Supp. of Texas’s Mot. to Intervene, *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, No. 5:21-cv-00071-H (N.D. Tex. Feb. 9, 2022), ECF No. 82.

separate identity because of consolidation,” quoting *Bank Markazi v. Peterson*, 578 U. S. 212, 233 (2016), itself quoting 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2382, p. 10 (3d ed. 2008)); see also *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933). Here, the consolidated cases remain distinct and can be de-consolidated as easily as they were joined. See, e.g., *United States v. Carrasco*, 361 Fed. Appx. 230, 231 (2d Cir. 2010); *Muntaqim v. Coombe*, 449 F.3d 371, 374 n.2 (2d Cir. 2006); *United States v. Rhynes*, 218 F.3d 310, 313 (4th Cir. 2000) (causes that were previously consolidated were de-consolidated on appeal).

If the Court concludes that Gulf Coast suffers from a jurisdictional defect, then the Court should separate those petitioners and grant only the petitions from the Authority, the FTC, the Horsemen, and Texas. Even setting aside the Appointments Clause argument unique to this case, this vehicle remains preferable to *Oklahoma* because it is brought by the relevant national trade association, arises from a bench trial, and preserves the originalist and categorical arguments not made in *Oklahoma*. See Consolidated Mem. of the NHBPA in No. 26-199 & 26-201 at 38-41.

CONCLUSION

Consumers’ Research reaffirmed that a private participant must remain subordinate to governmental decision-making. This case presents a different statutory arrangement: the government is mandated to approve a proposed rule after a consistency finding,

coupled with a separate rulemaking power Respondents also invoke to defend private enforcement. The Court should grant the cross-petitions from the Horsemen (No. 26-430) and Texas (No. 26-335) alongside the enforcement petitions from the Authority (No. 26-199) and the FTC (No. 26-201) to decide whether that arrangement supplies constitutionally sufficient control. If the Court determines that the Gulf Coast cross-petition (No. 26-332) is jurisdictionally sound, it should also grant that petition to consider the alternative Appointments Clause question.

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