Nos. 24-465, 24-472, and 24-489

In the Supreme Court of the United States

TEXAS, ET AL., PETITIONERS

v.

JERRY BLACK, ET AL.

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

v.

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

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

v.

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

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Horseracing Integrity and Safety Act of 2020 (Act), 15 U.S.C. 3051 *et seq.*, allows the Horseracing Integrity and Safety Authority (Authority), a private entity, to assist the Federal Trade Commission in the enforcement of the statute. The questions presented are as follows:

1. Whether the Act's rulemaking provisions violate the private nondelegation doctrine.

2. Whether the Authority's directors are officers of the United States who must be appointed in accordance with the Appointments Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulation:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a*) is reported at 107 F.4th 415. A previous opinion of the court of appeals (Pet. App. 107a-146a) is reported at 53 F.4th 869. The memorandum opinion and order of the district court (Pet. App. 45a-104a) is reported at 672 F. Supp. 3d 220.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2024. Petitions for rehearing were denied on September 9, 2024 (Pet. App. 104a-106a). The petitions for writs of certiorari were filed on October 22, 2024 (Nos. 24-465 and 24-472) and October 28, 2024 (No. 24-489). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Horseracing Integrity and Safety Act of 2020 (Horseracing Act or Act), Pub. L. No. 116-260, Div. FF, Tit. XII, 134 Stat. 3252 (15 U.S.C. 3051 *et seq.*), in order to prevent doping and improve safety in the horseracing industry. Congress modeled the Act's framework on the longstanding regulatory scheme used in the securities industry, in which industry participants are subject to rules proposed by self-regulatory private entities, which are in turn overseen by the Securities and Exchange Commission (SEC). See *Oklahoma* v. *United States*, 62 F.4th 221, 229 (6th Cir. 2023), cert. denied, 144 S. Ct. 2679 (2024).

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* This brief uses "Texas Pet." and "Pet. App." to refer to the petition for a writ of certiorari and appendix in No. 24-465; "National Horsemen Pet." to refer to the petition in No. 24-472; and "Gulf Coast Racing Pet." to refer to the petition in No. 24-489.

The Horseracing Act "recognized" the Horseracing Integrity and Safety Authority (Authority)—a "private, independent, self-regulatory, nonprofit corporation"—"for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program." 15 U.SC. 3052(a). The Authority's Board of Directors consists of four members from the horseracing industry and five members from outside the industry. See 15 U.S.C. 3052(b)(1). The Authority operates under the oversight of the Federal Trade Commission (FTC or Commission). See 15 U.S.C. 3053 (Supp. IV 2022).

The Horseracing Act directs the Authority to propose rules concerning doping, racetrack safety, and other subjects. See 15 U.S.C. 3055-3057. The Authority must submit its proposals to the FTC "in accordance with such rules as the Commission may prescribe." 15 U.S.C. 3053(a). The FTC must approve a proposed rule if it determines that the rule "is consistent with" the Act and the Commission's regulations. 15 U.S.C. 3053(c)(2). A proposal takes effect only if the Commission approves it. See 15 U.S.C. 3053(b)(2).

The Act requires various "[c]overed persons"—*i.e.*, owners, breeders, trainers, jockeys, and other persons involved in the horseracing industry—to register with the Authority and to comply with the rules approved by the FTC. See 15 U.S.C. 3051(6), 3054(d)(1) and (2). The Authority may investigate violations of the rules. See 15 U.S.C. 3054(h). The Authority also may conduct disciplinary proceedings and impose civil sanctions upon violators. See 15 U.S.C. 3057(c) and (d). A final decision by the Authority to impose discipline is subject to de novo review by an FTC administrative law judge (ALJ), see 15 U.S.C. 3058(b), who may "conduct a hearing * * *

in such a manner as the Commission may specify by rule," 15 U.S.C. 3058(b)(2)(B). The ALJ's decision is in turn subject to de novo review by the Commission, and the Commission may consider additional evidence that was not presented to the Authority or the ALJ. See 15 U.S.C. 3058(c).

2. In 2021, the National Horsemen's Benevolent and Protective Association and its affiliates (collectively National Horsemen) filed this suit in the United States District Court for the Northern District of Texas, asserting various constitutional challenges to the Act. See 53 F.4th 869, 875. The National Horsemen named as defendants the Authority and its officials (collectively Authority), as well as the FTC and its Commissioners. See *ibid.* The State of Texas and the Texas Racing Commission (collectively Texas) intervened to support the National Horsemen's challenges. See *ibid.*

In an earlier phase of this litigation, the Fifth Circuit held that the Act, as originally enacted, violated a constitutional principle that is sometimes known as the private nondelegation doctrine. See 53 F.4th at 880. The court explained that, under that doctrine, a private entity may aid a governmental agency in implementing a federal regulatory scheme, but only if the private entity "functions subordinately" to the agency and is subject to the agency's "authority and surveillance." *Id.* at 881; see *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 399 (1940). The court determined that, under the Horseracing Act in its original form, the FTC lacked constitutionally sufficient control over the Authority's activities. See 53 F.4th at 880-890.

In reaching that conclusion, the Fifth Circuit highlighted a "key distinction" between the Horseracing Act and the securities-industry self-regulatory scheme

on which the Act was modeled. 53 F.4th at 887. The securities-industry scheme, the court emphasized, allows the SEC to "abrogate, add to, and delete from" the rules of self-regulatory organizations as the SEC deems "necessary or appropriate." *Ibid.* (quoting 15 U.S.C. 78s(c)). The Act in its original form, in contrast, did not grant the FTC comparable authority to abrogate or modify the Authority's rules. See *ibid.* Because the FTC lacked the "final word on the substance of the rules," the court concluded that the FTC possessed insufficient control over the Authority. *Ibid.*

Congress responded by amending the Horseracing Act to empower the FTC to "abrogate, add to, and modify" the rules promulgated under the Act "as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this [Act] and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this [Act]." 15 U.S.C. 3053(e) (Supp. IV 2022); see Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. O. Tit. VII, § 701, 136 Stat. 5231-5232. That language is substantially identical to the language used in the statutes that empower the SEC to oversee self-regulatory organizations in the securities industry. See 15 U.S.C. 78s(c).

3. After Congress amended the statute, the court of appeals remanded this case to the district court for further proceedings. See Pet. App. 7a. On remand, the district court consolidated this case with a separate suit filed by Gulf Coast Racing L.L.C., et al. (collectively Gulf Coast Racing). See *ibid.* The court conducted a bench trial and granted final judgment to the defendants. See *id.* at 45a-103a.

The district court first held that the Authority's role in the rulemaking process does not violate the private nondelegation doctrine. See Pet. App. 80a-90a. The court explained that, by amending the Act to give the FTC the final word on the content of the rules, Congress had "cured the constitutional issues identified by the Fifth Circuit." *Id.* at 81a.

The district court also held that the Authority's role in enforcing the Act does not violate the private nondelegation doctrine. See Pet. App. 94a-96a. The court noted that "any Authority enforcement decision will be reviewed by an ALJ and the FTC." *Id.* at 94a-95a.

Finally, the district court rejected Gulf Coast Racing's contention that the Authority's directors are officers of the United States who must be appointed in accordance with the Appointments Clause. See Pet. App. 65a-78a. The court explained that the Authority is a private entity and that "private entities are not subject to the constitutional requirements governing appointment and removal of officers." *Id.* at 66a.

4. The Fifth Circuit affirmed in part and reversed in part. See Pet. App. 1a-44a.

The court of appeals agreed with the district court that, by amending the Act, Congress had "cured the private nondelegation flaw in the Authority's rulemaking power." Pet. App. 43a-44a. "Because the FTC has ultimate say on what the rules are," the court of appeals stated, "the Authority's power to propose horseracing rules does not violate the private nondelegation doctrine." *Id.* at 14a.

The court of appeals concluded, however, that "the FTC lacks adequate oversight and control over the Authority's enforcement power." Pet. App. 33a. The court determined that "the Authority," not "the agency," de-

cides "whether to investigate a covered entity," "whether to subpoena the entity's records or search its premises," "whether to sanction it," and "whether to sue the entity for an injunction or to enforce a sanction it has imposed." *Id.* at 21a. The court accordingly declared that the Act's "enforcement provisions are facially unconstitutional." *Id.* at 4a.

Like the district court, the court of appeals rejected Gulf Coast Racing's Appointments Clause challenge. See Pet. App. 35a-42a. It explained that "the Authority is a private entity not subject to Article II's Appointments Clause." *Id.* at 42a.

ARGUMENT

In the decision below, the Fifth Circuit held that the Horseracing Act's enforcement provisions violate the private nondelegation doctrine on their face. That holding is incorrect and conflicts with decisions of the Sixth and Eighth Circuits rejecting facial challenges to the same statutory provisions. The government and the Authority have filed petitions for writs of certiorari challenging that ruling, and Texas and the National Horsemen agree that those petitions should be granted. See 24-429 Pet. I; 24-433 Pet. i; 24-429 Texas Mem. 1-5; 24-429 National Horsemen Mem. 1-4.

Texas, the National Horsemen, and Gulf Coast Racing have also filed their own petitions for writs of certiorari. All three groups of petitioners contend (Texas Pet. I; National Horsemen Pet. i; Gulf Coast Racing Pet. i) that the Act's rulemaking provisions violate the private nondelegation doctrine. Gulf Coast Racing further contends (Gulf Coast Racing Pet. i) that the Authority's directors are officers of the United States who must be appointed in accordance with the Appointments Clause. The Fifth Circuit correctly rejected those con-

tentions, and its rulings on those issues do not conflict with any decision of this Court or of any other court of appeals. The petitions should be denied.

1. Petitioners argue that the Act's rulemaking provisions violate the private nondelegation doctrine. That argument lacks merit and does not warrant this Court's review.

a. In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), this Court explained that the Constitution prohibits the federal government from transferring unchecked governmental power to a private entity. The statute at issue in that case allowed producers of two-thirds of the coal in a particular district to set wages and hours for all producers in that district, without review by any federal agency. See *id.* at 281-283. The Court held that the statute violated the Constitution by delegating to "private persons" the unchecked "power to regulate the affairs of an unwilling minority." *Id.* at 311.

In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), however, this Court clarified that Congress may rely on private organizations to assist public agencies in the performance of their functions. The statute at issue in that case authorized local boards consisting of private coal producers to propose minimum prices for coal, but empowered the National Bituminous Coal Commission (a governmental agency) to approve, disapprove, or modify those prices. See *id.* at 388. The Court held that the statute complied with the Constitution because the private boards "function[ed] subordinately" to a federal agency. *Id.* at 399. The Court emphasized that the agency, not the private boards, "determine[d] the prices," and that the agency had "authority and surveillance over the [private boards'] activities." *Ibid.*

The court of appeals correctly held that the Horseracing Act's rulemaking provisions comply with those principles. The Authority's only role in the rulemaking process is to propose rules to the FTC, see 15 U.S.C. 3053 (Supp. IV 2022), and a proposed rule takes effect only if the Commission approves it, see 15 U.S.C. 3053(b)(2). The Act directs the FTC to approve a proposed rule only if the Commission determines, in its own judgment, that the proposed rule "is consistent with" the Act and with other rules approved by the Commission. 15 U.S.C. 3053(c)(2). The amended Act also empowers the FTC to "abrogate, add to, and modify" rules "as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to the requirements of [the Act] and applicable rules approved by the Commission, or otherwise in furtherance of the purpose of [the Act]." 15 U.S.C. 3053(e) (Supp. IV 2022). "Because the FTC has ultimate say on what the rules are, the Authority's power to propose horseracing rules does not violate the private nondelegation doctrine." Pet. App. 14a.

b. Petitioners' contrary arguments lack merit. Petitioners contend (Texas Pet. 28) that, in deciding whether to approve the Authority's proposed rules, the FTC must focus on whether the proposals "are contrary to statute—not whether they are good policy." That is incorrect. The Act empowers the Commission to decide not only whether a proposed rule is consistent with the statute, but also whether it is consistent with other "applicable rules approved by the Commission," 15 U.S.C. 3053(c)(2)—which, in turn, can reflect the Commission's policy views. The Act separately empowers the FTC to "abrogate, add to, and modify" the rules as the Commission finds "necessary or appropriate." 15 U.S.C. 3053(e)

(Supp. IV 2022). As a result, "if the FTC * * * disagrees with the policies reflected in the Authority's rules, it may change them." Pet. App. 11a.

Petitioners also argue (Texas Pet. 23-24) that a rule proposed by the Authority can remain in effect while the Commission conducts a rulemaking process to abrogate it. But "[t]o the extent this timing gap creates a problem, the FTC is free to resolve it ahead of time. It might, for example, adopt a rule that all [Authority proposals] do not take effect for 180 days, thereby giving the FTC time to review rules and prepare preemptive modifications." *Oklahoma* v. *United States*, 62 F.4th 221, 232 (6th Cir. 2023), cert. denied, 144 S. Ct. 2679 (2024). Petitioners, moreover, have challenged the Horseracing Act's rulemaking provisions on their face. See Pet. App. 8a. Even assuming that the Act's rulemaking provisions might raise constitutional concerns in some situations, such as the interim period while the Commission is seeking to abrogate a rule, a court would have no sound basis for invalidating the provisions on their face. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

Petitioners argue (National Horsemen Pet. 9) that "the Act gives the Authority final say over the fees it charges." But the FTC has adopted a rule under which the Commission "may modify the amount of any line item" in the Authority's budget, including the fees that the Authority charges. 16 C.F.R. 1.151. Petitioners contest (National Horsemen Pet. 11 n.5) the lawfulness of that rule, but that issue should be resolved through a statutory challenge to the rule, not a facial constitutional challenge to the Act.

Finally, petitioners argue (National Horsemen Pet. 8) that the Authority may issue "binding guidance"

without the FTC's approval. That is incorrect. The Authority's guidance "does not have the force of law." 86 Fed. Reg. 54,819, 54,819 (Oct. 5, 2021). And the FTC "has authority to review guidance documents * * * and to promulgate a rule overruling guidance it disagrees with." Pet. App. 13a n.6 (citation omitted); see 15 U.S.C. 3054(g)(2).

c. In *Oklahoma* v. *United States*, 144 S. Ct. 2679 (2024), this Court denied certiorari after the Sixth Circuit held that the amended Act's rulemaking provisions comply with the private nondelegation doctrine. That denial reflected a determination that the challenge to the rulemaking provisions does not warrant this Court's review, and no intervening development casts doubt on that determination. Since the denial of certiorari in *Oklahoma*, the Fifth and Eighth Circuits have both agreed with the Sixth Circuit that the amended Act's rulemaking provisions comply with the Constitution. See Pet. App. 9a-14a; *Walmsley* v. *FTC*, 117 F.4th 1032, 1038-1039 (8th Cir. 2024), petition for cert. pending, No. 24-420 (filed Oct. 10, 2024).

Petitioners contend (Texas Pet. 28-29; National Horsemen Pet. 13-16) that the Fifth Circuit's decision in this case conflicts with various decisions of other courts. See, *e.g.*, *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990); *Pittston Co.* v. *United States*, 368 F.3d 385 (4th Cir. 2004), cert. denied, 544 U.S. 904 (2005); *Consumers' Research* v. *FCC*, 67 F.4th 773 (6th Cir. 2023), cert. denied, 144 S. Ct. 2628 (2024); *Riverbend Farms, Inc.* v. *Madigan*, 958 F.2d 1479 (9th Cir.), cert denied, 506 U.S. 999 (1992); *Consumers' Research* v. *FCC*, 88 F.4th 917 (11th Cir. 2023), cert. denied, 144 S. Ct. 2629 (2024). But those decisions, most of which were issued long before

Congress enacted the Horseracing Act, involved other federal statutes, and the courts in those cases upheld the challenged statutes against private nondelegation claims. See *Frame*, 885 F.2d at 1128-1129; *Pittston*, 368 F.3d at 393-398; *Consumers' Research*, 67 F.4th at 795-796; *Riverbend*, 958 F.2d at 1488; *Consumers' Research*, 88 F.4th at 926. The courts' decisions upholding other statutes provide no basis for inferring that the courts would have struck down this statute. It is especially incongruous for petitioners to assert (National Horsemen Pet. 8) a conflict with the Sixth Circuit's decision in *Consumers' Research* when the Sixth Circuit has squarely rejected a private nondelegation challenge to the amended Act's rulemaking provisions. See *Oklahoma*, 62 F.4th at 229-231.

Petitioners also argue (Texas Pet. 22-23) that the decision below conflicts with the D.C. Circuit's decision in *Association of American Railroads* v. *United States Department of Transportation*, 721 F.3d 666 (2013), vacated and remanded on other grounds, 575 U.S. 43 (2015). But that case, too, did not involve the Horseracing Act. And this Court vacated the D.C. Circuit's decision after determining that the entity at issue was not actually a private body. See *Department of Transportation* v. *Association of American Railroads*, 575 U.S. 43, 46 (2015).

2. Gulf Coast Racing's Appointments Clause challenge likewise does not warrant further review.

The Appointments Clause requires that "Officers of the United States" be appointed by the President with the advice and consent of the Senate; by the President alone; by the courts of law; or by the heads of departments. U.S. Const. Art. II, § 2, Cl. 2. The Clause governs only the selection of "federal officers," *i.e.*, "offic-

ers exercising power of the National Government." *Financial Oversight & Management Board* v. *Aurelius Investment, LLC*, 590 U.S. 448, 460 (2020). It does not govern the selection of the officers of private bodies. See Pet. App. 36a.

Gulf Coast Racing acknowledges (Gulf Coast Racing Pet. 1) that the Authority is a "private nonprofit corporation," not a governmental entity. Indeed, Gulf Coast Racing's private nondelegation claim (see *id.* at 3) rests on the premise that the Authority is a private body. Once that premise is accepted, it necessarily follows that the Authority's directors are not officers of the United States and that the Appointments Clause does not govern their selection. See Pet. App. 42a.

Gulf Coast Racing argues that the decision below allows Congress to "evade" the Appointments Clause by vesting governmental authority in a private body rather than in a federal agency. Gulf Coast Racing Pet. 20 (citation omitted). That is incorrect. As the Fifth Circuit explained, the "private nondelegation doctrine * * * corrals any attempts to evade [the Appointments Clause] by giving unaccountable governmental power to a * * * private entity." Pet. App. 42a. And for nearly a century, this Court has applied that doctrine—rather than the Appointments Clause—to evaluate contentions that a private person's role in a federal regulatory scheme exceeds constitutional limits. See, *e.g.*, *Carter*, 298 U.S. at 311. Gulf Coast Racing identifies no sound basis to adopt a different jurisprudential approach now.

The Fifth Circuit's decision rejecting Gulf Coast Racing's Appointments Clause challenge does not conflict with any decision of another court of appeals. The Eighth Circuit has "agree[d] with the Fifth Circuit that the Act does not conflict with the Appointments

Clause," *Walmsley*, 117 F.4th at 1041, and no Appointments Clause challenge was raised in the Sixth Circuit case. Further review of this challenge is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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