

No. 24-429

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

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

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

REPLY BRIEF FOR THE PETITIONERS

ELIZABETH B. PRELOGAR
*Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

In the Supreme Court of the United States

No. 24-429

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

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

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

REPLY BRIEF FOR THE PETITIONERS

In the decision below, the Fifth Circuit held that the enforcement provisions of 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.*), violate the private nondelegation doctrine on their face. That decision conflicts with decisions of the Sixth and Eighth Circuits rejecting facial challenges to the same statutory provisions. See *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023), cert. denied, 144 S. Ct. 2679 (2024); *Walmsley v. FTC*, 117 F.4th 1032, 1040 (8th Cir. 2024), petition for cert. pending, No. 24-420 (filed Oct. 10, 2024).

Two groups of respondents—(1) the State of Texas and the Texas Racing Commission, and (2) the National Horsemen’s Benevolent and Protective Association and its affiliates—agree that this Court should grant the pe-

titions for writs of certiorari filed by the government and the Horseracing Integrity and Safety Authority (Authority). See Texas Mem. 1; National Horsemen Mem. 1. Those respondents also ask the Court to grant their own certiorari petitions, which present the question whether the Horseracing Act’s rulemaking provisions violate the nondelegation doctrine. See Pet. I, *Texas v. Black*, No. 24-465 (Oct. 22, 2024); Pet. i, *National Horsemen’s Benevolent & Protective Ass’n v. Horseracing Integrity & Safety Authority, Inc.*, No. 24-472 (Oct. 22, 2024). But as the government will explain in its brief in opposition to those petitions, that question does not warrant this Court’s review. Congress amended the Horseracing Act in 2022 to enhance the Federal Trade Commission’s control over rulemaking under the Act, and the Fifth, Sixth, and Eighth Circuits have all rejected private nondelegation challenges to the Act’s amended rulemaking provisions. See Pet. App. 9a-14a; *Oklahoma*, 62 F.4th at 229-231; *Walmsley*, 117 F.4th at 1038.

A third group of respondents—Gulf Coast Racing, L.L.C., et al. (collectively Gulf Coast Racing)—opposes the petitions for writs of certiorari filed by the government and the Authority. See Gulf Coast Racing Br. in Opp. 1. Those respondents argue that the Court should instead grant only Gulf Coast Racing’s own certiorari petition, which focuses on the question whether the Authority’s structure violates the Appointments Clause. See Pet. i, *Gulf Coast Racing, L.L.C. v. Horseracing Integrity & Safety Authority*, No. 24-489 (Oct. 28, 2024). Again, as the government will explain in its brief in opposition to that petition, that question does not warrant this Court’s review. The Fifth and Eighth Circuits have rejected Appointments Clause challenges to the Act,

and no Appointments Clause claim was raised in the Sixth Circuit case. See Pet. App. 35a-43a; *Walmsley*, 117 F.4th at 1041. Gulf Coast Racing also criticizes (Br. in Opp. 2) the question presented in the government’s petition as “unhelpfully narrow,” but that question is appropriately limited to the issue that has divided the courts of appeals: whether the Horseracing Act’s enforcement provisions violate the private nondelegation doctrine on their face.

* * * * *

The petitions for writs of certiorari filed by the government (No. 24-429) and the Authority (No. 24-433) should be granted, and the cases should be consolidated.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NOVEMBER 2024