No. 23-402

In the Supreme Court of the United States

STATE OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH 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.*, authorizes the Horseracing Integrity and Safety Authority (Authority), a private entity, to propose racetrack safety and anti-doping rules for the horseracing industry. The Act empowers the Federal Trade Commission (FTC) to determine whether those proposed rules will take effect and to abrogate, add to, or modify the rules. The Authority is funded through fees allocated and collected under rules approved by the FTC. But the Act gives state racing commissions the option of allocating and collecting the fees themselves and then remitting the fees to the Authority. The questions presented are as follows:

1. Whether the Act unconstitutionally delegates governmental power to a private entity.

2. Whether the Act's fee provisions violate the anti-commandeering doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 62 F.4th 221. The opinion of the district court (Pet. App. 44a-70a) is not published in the Federal Supplement but is available at 2022 WL 1913419.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2023. A petition for rehearing was denied on May 18, 2023 (Pet. App. 71a). On July 18, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including October 15, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Legal Background

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, 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 members are subject to rules proposed by self-regulatory entities, which in turn are overseen by the Securities and Exchange Commission (SEC). See Pet. App. 60a-61a.

The Horseracing Act recognizes 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.S.C. 3052(a). The Authority's Board of Governors 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.

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 a proposal to the FTC "in accordance with such rules as the Commission may prescribe." 15 U.S.C. 3053(a). The FTC must publish the proposal, provide an opportunity for public comment, and then determine whether to approve the proposal. See 15 U.S.C. 3053(b)(1). 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 "covered 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(4), 3054(d)(1) and (2). The Authority may investigate violations of the rules. 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 review by an FTC administrative law judge (ALJ). See 15 U.S.C. 3058(b). The ALJ's decision is in turn subject to review by the Commission. See 15 U.S.C. 3058(c).

The Authority is funded through fees collected from covered persons. See 15 U.S.C. 3052(f). Every year, the Authority calculates each State's proportionate share of the fees that must be collected. See 15 U.S.C. 3052(f)(1)(C). It then allocates that amount among covered persons in each State, in accordance with rules approved by the Commission. See 15 U.S.C. 3052(f)(3). Alternatively, a state racing commission may elect to allocate the State's fees in the manner that it prefers and then remit the fees to the Authority. See 15 U.S.C. 3052(f)(2). If a state commission does not elect that course, it "shall not impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters for covered horseraces." 15 U.S.C. 3052(f)(3)(D).

2. In *National Horsemen's Benevolent & Protective Association* v. *Black*, 53 F.4th 869 (2022), the Fifth Circuit held that the Horseracing Act, as initially enacted,

violated a constitutional principle that is sometimes known as the "private nondelegation doctrine." See *id.* 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 it "functions subordinately" to the agency and is subject to the agency's "authority and surveillance." *Id.* at 881 (citation omitted). The court determined that the FTC lacked constitutionally sufficient control over the Authority's activities. See *id.* at 880-890.

In reaching that conclusion, the Fifth Circuit highlighted a "key distinction" between the Horseracing Act and the securities-industry regulatory scheme on which it was modeled. *Black*, 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 Commission lacked the "final word on the substance of the rules," the court concluded that the FTC exercised insufficient control over the Authority's actions. *Ibid.*

3. Congress responded by amending the Horseracing Act to empower the FTC to "abrogate, add to, or 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); 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).

B. Proceedings Below

1. Petitioners are a group of States, state racing commissions, and private entities involved in horseracing. See Pet. App. 8a. In 2021, before the Fifth Circuit issued its decision in *Black* and before Congress amended the Horseracing Act in response, petitioners brought this suit in the United States District Court for the Eastern District of Kentucky. See Complaint 1. Petitioners alleged that the Act on its face violated the private nondelegation doctrine, and that its fee provisions violated the anticommandeering doctrine. See Pet. App. 8a.

The district court dismissed petitioners' suit. See Pet. App. 44a-70a. In rejecting petitioners' private nondelegation challenge, the court determined that the FTC exercised sufficient oversight of the Authority because the Act in its then-current form empowered the FTC to approve or disapprove rules proposed by the Authority, see *id.* at 55a-63a, and to review de novo the Authority's orders imposing discipline, see *id.* at 64a-65a. In rejecting petitioners' anticommandeering challenge, the court explained that the Act gives state racing commissions "a choice": state entities may either allocate fees themselves and then remit the fees to the Authority, or allow the Authority to allocate and collect the fees. *Id.* at 67a.

2. While petitioners' appeal was pending, the Fifth Circuit issued its opinion in *Black*, and Congress amended the Horseracing Act in response. See Pet. App. 8a. The Sixth Circuit upheld the amended Act and

affirmed the district court's judgment. See *id.* at 1a-43a.

The court of appeals first rejected the claim that the amended Act, on its face, violated the private nondelegation doctrine. See Pet. App. 10a-21a. The court interpreted the Constitution and this Court's precedents to mean that "a private entity may aid a public federal entity that retains authority over the implementation of federal law," so long as the private entity is "subordinate to a federal actor." *Id.* at 11a, 13a. The court determined that the Authority is subordinate to the FTC in rulemaking because the amended Act empowers the Commission to write or rewrite rules as it wishes. See *id.* at 13a-16a. The court also determined that the Authority is subordinate to the FTC in imposing discipline because the Act empowers the Commission to regulate the Authority's disciplinary proceedings and to review its disciplinary orders de novo. See *id.* at 16a-17a.

The court of appeals next rejected the claim that the Act's fee provisions commandeer state racing commissions. See Pet. App. 22a-27a. It observed that the Act "presents States with a choice, not a command": "States may elect to collect fees from the industry and remit the money to the Horseracing Authority or States may refuse." *Id.* at 23a. The court acknowledged that the Act includes a "conditional preemption" provision, under which a State that refuses to collect fees may not impose its own fees or taxes "relating to anti-doping and medication control or racetrack safety matters." *Id.* at 24a (quoting 15 U.S.C. 3052(f)(3)(D)). But the court explained that, under this Court's precedents, "Congress may encourage the States through conditional preemption." *Id.* at 23a.

Judge Cole concurred. See Pet. App. 28a-43a. He expressed the view that the Horseracing Act had complied with the Constitution even before Congress amended it in response to the Fifth Circuit's decision. See *id.* at 29a.

ARGUMENT

Petitioners argue (Pet. 13-35) that the Horseracing Act violates the Constitution by delegating governmental power to the private Authority and by commandeering the States. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioners contend that the Horseracing Act on its face violates the private nondelegation doctrine. That argument lacks merit.

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 entities 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

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, ultimately "determine[d] the prices" and that the agency "ha[d] authority and surveillance over the [private boards'] activities." *Ibid.*

The court of appeals correctly held that the Horseracing Act, at least as amended, complies with those principles. Under the Act, the Authority operates only as an "aid to the Commission" and is "subject to its pervasive surveillance and authority." *Sunshine Anthracite*, 310 U.S. at 388.

The Act grants the Commission "supervision over the rules that govern the horseracing industry." Pet. App. 13a. As relevant here, the Authority may only propose rules to the FTC, see 15 U.S.C. 3053, 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 proposal "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 purposes of [the Act]." 15 U.S.C. 3053(e). Because the FTC has "the final word on the substance of the rules," the Authority's role in proposing the rules does not vio-

late the Constitution. Pet. App. 16a (citation omitted); see *Sunshine Anthracite*, 310 U.S. at 399.

The Act also grants the FTC "oversight and control of the Authority's enforcement activities." Pet. App. 16a. The Authority must conduct its disciplinary proceedings in accordance with rules approved by the Commission. See 15 U.S.C. 3057(c)(1)(B). Any order imposing discipline is, in addition, subject to de novo review by an ALJ and then by the Commission itself. See 15 U.S.C. 3053(b) and (c). The FTC is not limited to the evidence considered by the Authority; rather, it "may, on its own motion, allow the consideration of additional evidence." 15 U.S.C. 3058(c)(3)(C)(i). It is thus the Commission, not the Authority, that "ultimately decides how the Act is enforced." Pet. App. 17a.

Longstanding practice reinforces those conclusions. Since 1938, Congress has authorized self-regulatory organizations in the securities industry to propose rules and to discipline their members, subject to oversight by the SEC. See Maloney Act, ch. 677, § 1, 52 Stat. 1070. Like the scheme at issue here, the securities laws empower the SEC to "abrogate, add to, and delete" self-regulatory organizations' proposed rules, 15 U.S.C. 78s(c), and to review self-regulatory organizations' disciplinary decisions, see 15 U.S.C. 78s(e). Multiple courts of appeals have rejected private nondelegation challenges to the use of those organizations in implementing the securities laws, citing the SEC's power to supervise the organizations' activities. See *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.), cert. denied, 344 U.S. 855 (1952); *First Jersey Securities, Inc.* v. *Bergen*, 605 F.2d 690, 697 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *Sorrell* v. *SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982).

b. Petitioners' contrary arguments lack merit. Petitioners contend (Pet. 17-20) that the Act improperly allows the Authority's proposed rules to take effect even if the FTC disagrees with them. But a proposed rule can take effect only if the Commission determines that it is "consistent with" the Act and other "applicable rules approved by the Commission." 15 U.S.C. 3053(c)(2). Exercising that power, the FTC has directed the Authority to modify proposed rules that do not comport with the Commission's understanding of the statute. See, *e.g.*, FTC, *Order Approving the Enforcement Rule Proposed By the Horseracing Integrity and Safety Authority* 29 (Mar. 25, 2022) (directing Authority to modify a proposed rule); *id.* at 34-35 (same).

The amended Act also empowers the FTC to "abrogate, add to, and modify" the Authority's rules as the Commission finds "necessary or appropriate." 15 U.S.C. 3053(e). Petitioners assert (Pet. 17) that the FTC's "back-end role" is "merely ministerial," but that is incorrect. The Act grants the Commission "complete authority" to "write and rewrite the rules." Pet. App. 15a, 19a.

Petitioners also argue (Pet. 19) 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." Pet. App. 19a. Petitioners, moreover, have brought a facial challenge to the Horseracing Act. See *id.* at 17a. Even assuming that the Act raises 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 Act on its face. See *ibid.* (citing *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)).

Petitioners next claim (Pet. 21) that the Authority may conduct investigations "without FTC supervision." But the Authority's investigations, like all its other activities, must comply with the rules made or approved by the FTC. See 15 U.S.C. 3053(e). The Commission's "rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities, just as it does in the rulemaking context." Pet. App. 16a (citation omitted).

Petitioners also object (Pet. 20) to a never-invoked provision under which the Authority may bring civil suits to enforce the Horseracing Act. See 15 U.S.C. 3054(j). But petitioners lack Article III standing to challenge the Authority's hypothetical initiation of a civil suit against an unknown defendant in unknown circumstances at some unknown future time. See *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 401 (2013). The court of appeals correctly declined to address petitioners' argument in the context of this facial challenge, instead "sav[ing] resolution of such questions * * * for a day when the Authority's actions and the FTC's oversight appear in concrete detail, presumably in the context of an actual enforcement action." Pet. App. 20a-21a. Petitioners' objection to Section 3054(j) lacks merit in any event. The Commission, exercising its general rulemaking power, could require the Authority to obtain its approval before bringing any civil suits.

Finally, petitioners challenge (Pet. 21) a Horseracing Act provision under which a state racing commission

or a "breed governing organization" may, with the Authority's approval, elect to have "a breed of horses other than Thoroughbred horses" be covered by the Act. 15 U.S.C. 3054(*l*)(1). But no justiciable dispute exists with respect to that provision. Petitioners have identified no reason to think that a state racing commission or breed governing organization will imminently elect to have another breed of horses covered by the Act, much less that such an election would be approved by the Authority and would injure petitioners. In any event, the Commission's general rulemaking power allows it to "revoke the Authority's decision [to approve an election] or place procedural and substantive conditions on any such decision." Pet. App. 20a.

2. There is likewise no merit to petitioners' contention that the Horseracing Act's fee provisions commandeer the States.

a. Under the anticommandeering doctrine, Congress may neither command state legislatures to enact state law, see *New York* v. *United States*, 505 U.S. 144, 161 (1992), nor conscript state officers to administer federal law, see *Printz* v. *United States*, 521 U.S. 898, 935 (1997). Congress may, however, "encourage a State to regulate in a particular way" or "hold out incentives to the States as a method of influencing a State's policy choices." *New York*, 505 U.S. at 166. In particular, "where Congress has the authority to regulate private activity under the Commerce Clause," Congress may "offer States the choice" between (1) "regulating that activity according to federal standards" and (2) "having state law pre-empted by federal regulation." *Id.* at 167; see *FERC* v. *Mississippi*, 456 U.S. 742, 764-765 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288-289 (1981).

As the court of appeals correctly held, the Horseracing Act's fee provisions comport with those principles because they offer States "a choice, not a command." Pet. App. 23a. Under those provisions, a state racing commission may choose whether or not to collect fees and remit them to the Horseracing Authority. See 15 U.S.C. 3052(f)(2). If a state racing commission elects to collect the fees, it determines how the fees are "allocated, assessed, and collected." 15 U.S.C. 3052(f)(2)(D). If a state racing commission declines to perform that function, the Authority collects the fees itself, but the state racing commission may not "impose or collect" its own fees "relating to anti-doping and medication control or racetrack safety matters for covered horseraces." 15 U.S.C. 3052(f)(3)(D). "This scheme fits comfortably within the conditional preemption framework" permitted by this Court's precedents. Pet. App. 24a.

b. Petitioners' contrary arguments lack merit. Petitioners contend (Pet. 33) that "Congress may not secure States' compliance in one context by threatening to cut off state power in another, broader context." But the Act does no such thing. To the contrary, the preemption clause concerns the same "context" as the Horseracing Authority's fees (*ibid.*): It simply precludes a state racing commission from imposing or collecting its own fees or taxes "relating to anti-doping and medication control or racetrack safety matters for covered horseraces." 15 U.S.C. 3052(f)(3)(D).

Petitioners also argue (Pet. 34) that "Congress may not use preemption as a cudgel to coerce compliance." But this Court has squarely rejected the argument that "the threat of federal usurpation of [state] regulatory [authority] coerces the States." *Hodel*, 452 U.S. at 289.

Finally, petitioners argue that Congress may not "threaten to preempt state laws when the 'threat serves no purpose other than to force unwilling States' to enforce a federal program." Pet. 34 (citation omitted). But this Court has upheld conditional preemption as a "permissible method of encouraging a State to conform to federal policy." Pet. App. 26a (citation omitted). In all events, the Act's preemption provision does serve purposes other than inducing the States to comply, by preventing double taxation and encouraging nationwide uniformity. See *ibid.*

3. Constitutional challenges to the amended Horseracing Act are currently pending before the Fifth and Eighth Circuits. See *National Horsemen's Benevolent & Protective Ass'n* v. *Black*, No. 23-10520 (5th Cir.) (argued Oct. 4, 2023); *Walmsley* v. *FTC*, No. 23-2687 (8th Cir.) (briefing completed Jan. 22, 2024). For now, however, the Sixth Circuit remains the only court of appeals that has addressed the amended Act's constitutionality. Given the absence of a circuit conflict, neither question presented warrants the Court's review at this time.

Petitioners contend (Pet. 22) that the Fifth and Sixth Circuits applied conflicting "analytical frameworks" in reviewing the original and amended Acts. That is incorrect. Both courts applied the same framework, asking whether the Authority functions subordinately to the Commission. See *National Horsemen's Benevolent & Protective Ass'n* v. *Black*, 53 F.4th 869, 881 (5th Cir. 2022) ("If the private entity does not function subordinately to the supervising agency, the delegation of power is unconstitutional."); Pet. App. 13a ("[A] private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge."). The Fifth Cir-

cuit held that the Authority did not function subordinately to the FTC under the original Act, see *Black*, 53 F.4th at 882-890, while the Sixth Circuit has held that the Authority does function subordinately to the FTC under the amended Act, see Pet. App. 13a-21a.

Petitioners also observe (Pet. 25) that, whereas the Fifth Circuit struck down the original Act, two district courts upheld it. But the original Act is no longer in effect, and any disagreement about the constitutionality of a superseded statute does not warrant this Court's review. The Court, moreover, ordinarily grants certiorari to resolve conflicts among different courts of appeals, not to resolve conflicts with decisions of district courts. See Sup. Ct. R. 10(a).

Petitioners further observe (Pet. 27) that a motions panel of the D.C. Circuit recently granted an injunction pending appeal halting a disciplinary proceeding conducted by a self-regulating securities association. See *Alpine Securities Corp.* v. *Financial Industry Regulatory Authority*, No. 23-5129, 2023 WL 4703307, at *1 (July 5, 2023) (per curiam). But *Alpine Securities* involves an administrative proceeding brought under a different (though analogous) statutory scheme, and it is unclear whether the motions panel even passed on a nondelegation claim, since the plaintiff in that case has raised multiple constitutional challenges, see Mot. for Injunction Pending Appeal at 6-15, *Alpine Securities*, *supra* (No. 23-5129), and the panel's decision did not specify which of those challenges prompted it to grant injunctive relief, see *Alpine Securities*, 2023 WL 4703307, at *1. In granting preliminary relief, moreover, the panel did not definitively resolve the merits. See *ibid.* Finally, the panel's decision was unpublished and thus lacks binding precedential effect. See D.C.

Cir. R. 36(e)(2) ("[A] panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition."). For all those reasons, the Sixth Circuit's decision in this case does not conflict with the D.C. Circuit's interlocutory ruling in *Alpine Securities*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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