

No. 22-5487

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

STATE OF OKLAHOMA; OKLAHOMA HORSE RACING COMMISSION; TULSA COUNTY PUBLIC FACILITIES AUTHORITY, DBA FAIR MEADOWS RACING AND SPORTS BAR; STATE OF WEST VIRGINIA; WEST VIRGINIA RACING COMMISSION; HANOVER SHOE FARMS, INC.; OKLAHOMA QUARTER HORSE RACING ASSOCIATION; GLOBAL GAMING RP, LLC, DBA REMINGTON PARK; WILL ROGERS DOWNS, LLC; UNITED STATES TROTTING ASSOCIATION; STATE OF LOUISIANA,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.; LEONARD S. COLEMAN, JR.; NANCY M. COX; FEDERAL TRADE COMMISSION; STEVE BESHEAR; ADOLPHO BIRCH; ELLEN MCCLAIN; CHARLES P. SCHEELER; JOSEPH DEFRANCIS; SUSAN STOVER; BILL THOMASON; D.G. VAN CLIEF; ANDREW N. FERGUSON, CHAIRMAN OF THE FEDERAL TRADE COMMISSION; MARK R. MEADOR, COMMISSIONER OF THE FEDERAL TRADE COMMISSION; MELISSA ANN HOLYOAK, COMMISSIONER OF THE FEDERAL TRADE COMMISSION,
Defendants-Appellees.

On Appeal from the U.S. District Court
for the Eastern District of Kentucky

**AUTHORITY DEFENDANTS-APPELLEES'
SUPPLEMENTAL RESPONSE BRIEF**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 22-5487

Case Name: OK, et al. v. USA, et al.

Name of counsel: Pratik A. Shah

Pursuant to 6th Cir. R. 26.1, See attached
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on June 14, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

**ATTACHMENT TO
DISCLOSURE OF CORPORATE AFFILIATIONS AND
FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, (*Name of Party*):

Appellees Horseracing Integrity and Safety Authority, Inc.; Leonard S. Coleman, Jr.; Nancy M. Cox; Steve Beshear; Adolpho Birch; Ellen McClain; Charles P. Scheeler; Joseph DeFrancis; Susan Stover; Bill Thomason; and D. G. Van Clief.

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STATEMENT REGARDING ORAL ARGUMENT

In light of the Court's familiarity with this case and its extensive treatment of the issues already, the Authority does not believe oral argument is necessary. If the Court determines that oral argument would aid its consideration of this appeal, however, counsel for the Authority plans to participate.

INTRODUCTION

“While ‘[i]t is emphatically the province and duty of the judicial department to say what the law is,’ it is equally—and emphatically—the exclusive province of the Congress *** to formulate legislative policies and mandate programs and projects[.]” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). In this case, “constructive exchanges between Congress and the federal courts” occurred in real time both to advance the legislature’s pressing policy goals and to address the judiciary’s asserted constitutional concerns. *Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023). This Court’s unanimous opinion upholding the Horseracing Integrity and Safety Act of 2020 (the “Act” or “Horseracing Act”) rightly explained that the statutory amendment Congress passed in direct response to constitutional challenges answered Appellants’ facial private nondelegation objections by confirming that the Federal Trade Commission (“FTC”) has “final say over implementation of the Act.” *Id.* “Sometimes government works.” *Id.*

Nothing has changed to call that judgment into doubt. As the Supreme Court just reaffirmed in a decision *rejecting* a private nondelegation challenge, a federal law may enlist a private entity to assist with regulatory activities as long as the entity “function[s] subordinately” to a federal government agency. *FCC v. Consumers’ Rsch.*, 145 S. Ct. 2482, 2508 (2025). That is the same test this Court applied when

holding that the private Horseracing Integrity and Safety Authority (“Authority”) is “subordinate” to the FTC with respect to the role it plays in improving equine safety and restoring integrity to the sport. *Oklahoma*, 62 F.4th at 229. The Eighth Circuit subsequently agreed with this Court in full. When the Fifth Circuit parted ways with respect to the Act’s enforcement scheme (but not its rulemaking apparatus), the Supreme Court immediately stayed that outlier decision. Facing seven certiorari petitions arising out of the judgments from the three courts of appeals, the Supreme Court ultimately remanded each case “for further consideration in light of [*Consumers’ Research*].”

Consumers’ Research only reinforces this Court’s prior holding. Rather than confront *Consumers’ Research* in any meaningful way, Appellants’ supplemental brief relitigates the arguments they already pressed and this Court already rejected. Appellants rely on the conflicting Fifth Circuit opinion, a dissenting opinion from the Eighth Circuit, and a D.C. Circuit opinion in an as-applied challenge that underscores why Appellants’ facial claim fails. None of those opinions (which also predate *Consumers’ Research*) provides any reason to reconsider this Court’s conclusion that, as a facial matter, the Act subordinates the Authority to the FTC with respect to both rulemaking and enforcement activities.

Consistent with this Court’s prior opinion, the judgment below should be affirmed.

STATEMENT OF THE ISSUE

Whether the Horseracing Integrity and Safety Act of 2020, as amended, is facially unconstitutional under the private nondelegation doctrine.

STATEMENT OF THE CASE

Because the Court is already familiar with the legal framework and factual background of this case, the Authority provides only a brief summary.

1. Almost five years ago, Congress enacted (and President Trump signed into law) bipartisan legislation establishing a framework for uniform health-and-safety regulation of thoroughbred horseracing to curb the tragic deaths, severe injuries, and diminished public trust that had threatened the national pastime. The Act charges the FTC with its implementation, and the FTC in turn draws on the expertise of the Authority, a private nonprofit organization, subject to the FTC's approval, oversight, and independent power. As Senator McConnell and other legislative sponsors explained to this Court, the Act was "modeled squarely on the Maloney Act," which has governed the relationship between the Securities and Exchange Commission ("SEC") and self-regulatory organizations ("SROs"), like the Financial Industry Regulatory Authority ("FINRA"), for over eight decades. Amicus Br. of Sen. McConnell et al. 11, Doc. 62.

In particular, the Authority may propose rules (or rule modifications) relating to racetrack-safety, anti-doping, and medication-control programs, but the FTC

alone may give those draft standards the force of law by independently determining, following public notice-and-comment, that they are “consistent with” the Act and FTC rules. 15 U.S.C. § 3053(c); *compare with id.* § 78s(b). Following a congressional amendment, the FTC may “abrogate, add to, and modify” rules as the agency deems “necessary or appropriate” to “further[] *** the purposes” of the Act, among other reasons. *Id.* § 3053(e); *compare with id.* § 78s(c). And any Authority decision imposing a sanction for a rule violation is subject to two layers of *de novo* FTC review, followed by Article III review. *Id.* § 3058; *compare with id.* § 78s(d)-(f).

The new programs have been fully implemented since May 2023 with tremendous success. “[H]orses have never been safer racing in the U.S. than in the past two years at tracks” covered under the Act, Frank Angst, *HISA Believes Big Data Provides Path Forward on Safety*, BLOODHORSE (Feb. 4, 2025),¹ and it is widely acknowledged that the Act has made the sport more “fair, transparent, efficient, and economically sound,” *Thoroughbred Industry Reiterates Support of HISA*, PAST THE WIRE (July 13, 2023).²

2. Yet a faction of the industry long opposed to any change to the status quo has pursued legal challenges in multiple courts, arguing principally that the Act

¹ <https://tinyurl.com/4h29a5m6>.

² <https://tinyurl.com/nhkxhn6u>.

violates the private nondelegation doctrine. In November 2022, the Fifth Circuit held that the absence of independent “rulemaking power” for the FTC under the original version of the Act “meaningfully distinguish[ed] the SEC-FINRA relationship from the FTC-Authority relationship” as then considered. *National Horsemen’s Benevolent & Protective Ass’n v. Black* (“*Black II*”), 53 F.4th 869, 887 (5th Cir. 2022). At oral argument in this case a few weeks later, the panel suggested that a congressional amendment conferring that power on the FTC would remedy the alleged constitutional defect. Oral Arg. Rec. 33:00-33:13 (Dec. 7, 2022) (Sutton, C.J.) (“Why not just say to [Congress,] this is easy, this was bipartisan, just put the modification power straight in, it’ll be just like FINRA and the SEC, problem solved?”).

In direct response, Congress enacted (and President Biden signed) the amendment expressly giving the FTC the same plenary independent rulemaking authority as the SEC to solidify its “oversight” of the Authority. 15 U.S.C. § 3053(e). Following supplemental briefing, in May 2023, this Court issued a unanimous opinion explaining that “[a] productive dialogue [between the branches] occurred in this instance, and it ameliorated the concerns underlying the non-delegation challenge” by confirming that “[t]he Horseracing Authority is subordinate to the agency.” *Oklahoma*, 62 F.4th at 225, 229. Judge Cole “agree[d] in full with the majority’s discussion of section 3053(e)’s amended text” and wrote

to explain his view that, even before the amendment, “the original statute was constitutional because the private Authority has always been subordinate to the FTC.” *Id.* at 237, 239 (Cole, J., concurring).

The Court (without dissent) denied Appellants’ petition for rehearing en banc. And the Supreme Court denied Appellants’ petition for a writ of certiorari. *Oklahoma v. United States*, 144 S. Ct. 2679 (2024) (Mem.).

3. The Fifth Circuit subsequently “agree[d]” with this Court that the Act’s rulemaking provisions are now constitutional, holding that “the amendment cured the nondelegation defect” identified in its earlier opinion. *National Horsemen’s Benevolent & Protective Ass’n v. Black* (“*Black IV*”), 107 F.4th 415, 424-426 (5th Cir. 2024). But the Fifth Circuit “part[ed] ways” with this Court in concluding that “[the Act’s] enforcement provisions violate the private nondelegation doctrine.” *Id.* at 421. According to the Fifth Circuit, “the FTC’s general rulemaking power provides no answer because executive rulemaking cannot amend the plain division of enforcement power laid out in [the Act’s] text.” *Id.* at 435. And “backend review by the FTC” of any disciplinary decision “does not subordinate the Authority” because “enforcement has already occurred” at that point. *Id.*

In a third challenge to the Act presenting the same claim, the Eighth Circuit “agree[d] with the Sixth and Fifth Circuits” that, because the FTC “has the final say over the rules, there is no impermissible private delegation” with respect to “the

Act’s rulemaking structure.” *Walmsley v. Federal Trade Comm’n*, 117 F.4th 1032, 1038 (8th Cir. 2024). Acknowledging that its “sister circuits reached differing conclusions” with respect to the Act’s enforcement provisions, the majority “agree[d] with [this Court] that the statute is not unconstitutional on its face because the Commission’s rulemaking and revision power gives it ‘pervasive oversight and control of the Authority’s enforcement activities.’” *Id.* at 1039 (quoting *Oklahoma*, 62 F.4th at 231). Judge Gruender concurred with respect to the Act’s rulemaking scheme, but dissented from Chief Judge Colloton’s majority opinion with respect to the Act’s enforcement scheme. *Id.* at 1041-1044.

4. Appellants filed in the Supreme Court for rehearing of the denial of their certiorari petition in this case “[i]n light of” the intervening “opening of a circuit split” on the facial validity of the Act’s enforcement provisions. Reh’g Pet. 1, *Oklahoma v. United States*, No. 23-402 (U.S. July 18, 2024). Acknowledging that certiorari had become necessary on that question following the Fifth Circuit’s judgment, the Authority and the FTC did not oppose Appellants’ rehearing petition, but asked the Court to hold it pending their own certiorari petitions from the Fifth Circuit judgment.

The Authority also filed an emergency application for a stay of the mandate associated with the Fifth Circuit’s judgment. In October 2024, the Supreme Court granted the Authority’s application (supported by the Solicitor General).

Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n, 145 S. Ct. 8 (Oct. 28, 2024) (Mem.).

The Supreme Court left that stay in place until issuing its June 2025 opinion in *Consumers' Research*. As described below, *Consumers' Research* rejected a private nondelegation challenge and reaffirmed the nondelegation test employed by this Court and the Eighth Circuit. 145 S. Ct. at 2507-2510. After issuing that opinion, the Supreme Court granted the Authority's and FTC's petitions for a writ of certiorari, vacated the Fifth Circuit's judgment, and remanded—while similarly “GVRing” the other two judgments for each circuit to address the nondelegation challenges in light of *Consumers' Research*.³

SUMMARY OF ARGUMENT

Recent developments only reinforce this Court's considered conclusion that the Act does not facially violate the private nondelegation doctrine.

³ See *Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24-433, 2025 WL 1787684 (U.S. June 30, 2025) (Mem.); *FTC v. National Horsemen's Benevolent & Protective Ass'n*, No. 24-429, 2025 WL 1787682 (U.S. June 30, 2025) (Mem.); *Texas v. Black*, No. 24-465, 2025 WL 1787677 (U.S. June 30, 2025) (Mem.); *National Horsemen's Benevolent & Protective Ass'n v. Horseracing Integrity & Safety Authority, Inc.*, No. 24-472, 2025 WL 1787680 (U.S. June 30, 2025) (Mem.); *Gulf Coast Racing, L.L.C. v. Horseracing Integrity & Safety Authority, Inc.*, No. 24-489, 2025 WL 1787683 (U.S. June 30, 2025) (Mem.); *Walmsley v. FTC*, No. 24-420, 2025 WL 1789398 (U.S. June 30, 2025) (Mem.); *Oklahoma v. United States*, No. 23-402, 2025 WL 1787679 (U.S. June 30, 2025) (Mem.).

A. The Supreme Court’s *Consumers’ Research* decision reaffirms the subordination test that this Court already applied to Appellants’ private nondelegation claim: what “matters to the constitutional inquiry” is that the government agency, not the private actor, “is in control.” 145 S. Ct. at 2510. In that decision and others, the Supreme Court also reiterated the restraint that should guide the judicial approach to facial constitutional challenges: “proper respect for a coordinate branch of Government” means that “[s]tatutes (including regulatory statutes) should be read, if possible, to comport with the Constitution, not to contradict it.” *Id.* at 2507.

B. Applying those standards, all twelve federal judges that have confronted the Act’s rulemaking scheme have held that the Authority’s role does not pose a facial private nondelegation problem. While Appellants (still) primarily attack the “consistency review” the FTC conducts when deciding whether to approve (or not) the Authority’s proposals, the independent rulemaking (and rule revision and abrogation) power that Congress’s amendment confers on the agency (still) ensures that it “retains decision-making power” over any rule with binding effect. *Consumers’ Rsch.*, 145 S. Ct. at 2508. Moreover, to the extent the FTC’s consistency review remains relevant, it allows the agency to exercise policy discretion in the same manner as the “unquestionably valid” arrangement from which *Consumers’ Research* derives the subordination test, *id.* (quoting *Sunshine Anthracite Coal Co.*

v. Adkins, 310 U.S. 381, 399 (1940)), and the longstanding SEC-FINRA framework that courts have uniformly upheld.

The FTC’s plenary rulemaking power, buttressed by the two layers of *de novo* FTC review of any Authority discipline, also subordinates the Authority’s role in the Act’s enforcement scheme. In contending otherwise, Appellants rely on the outlier Fifth Circuit decision, which the Supreme Court immediately (and tellingly) stayed. The Fifth Circuit’s principal reasoning—*i.e.*, that the FTC’s independent rulemaking power cannot touch enforcement activities without disrupting the statutory division of labor—conflicts with the Act’s plain language, context, and enactment history, and with the Supreme Court’s repeated insistence that courts should, when possible, avoid statutory constructions that generate constitutional problems. Concrete illustrations of recent FTC rulemakings drive home the point. And if any doubt remained, it would be eliminated by the Supreme Court’s observation that the Federal Communications Commission’s (“FCC”) parallel “*de novo* review” of the private entity’s actions in the regulatory scheme considered in *Consumers’ Research*—such as suspending participation in the federal program or recouping funds for rule violations—means that “in the relationship between the two, the Commission dominates.” 145 S. Ct. at 2508.

ARGUMENT

THE ACT DOES NOT VIOLATE THE PRIVATE NONDELEGATION DOCTRINE

A. *Consumers' Research* Reaffirms The Standard This Court Applied To Appellants' Facial Private Nondelegation Challenge.

In the two years since this Court upheld the Act against Appellants' challenge, the Supreme Court has only reaffirmed the principles guiding that determination. *Consumers' Research* supports this Court's approach in at least two key respects: (1) It embraces the substantive standard this Court applied to the private nondelegation claim; and (2) it reinforces the judicial humility that marked this Court's posture in the context of a facial constitutional challenge.

1. *Consumers' Research confirms the subordination standard.*

Consumers' Research confirms the substantive standard this Court applied to Appellants' claim. A law that enlists a private actor as part of a regulatory regime does not violate “what is commonly called the private nondelegation doctrine” as long as the private actor “function[s] subordinately” to a government agency and “subject to its ‘authority and surveillance.’” *Consumers' Rsch.*, 145 S. Ct. at 2508 (quoting *Adkins*, 310 U.S. at 399). The Supreme Court derived that private nondelegation standard from the same twin cases that this Court understood to “draw a line between impermissible delegation of unchecked lawmaking power to private entities” and “permissible participation by private entities” overseen by “a public federal entity that retains authority over the implementation of federal law.”

Oklahoma, 62 F.4th at 228-229. The statute considered in *Carter v. Carter Coal Company*, 298 U.S. 238 (1936), unconstitutionally “conferred governmental power on a private party” because it “authoriz[ed] certain coal producers to set maximum hours and minimum wages for the rest of the industry” with zero governmental approval or oversight. *Consumers’ Rsch.*, 145 S. Ct. at 2508. But where the statute “enacted in response to *Carter Coal*[] permitt[ed] boards of coal companies to propose minimum coal prices to a Government agency for ‘approval, disapproval, or modification,’” the Supreme Court in *Adkins* held that the “arrangement . . . was ‘unquestionably valid.’” *Id.* (alterations omitted) (quoting *Adkins*, 310 U.S. at 399).

Applying that subordination test, the Supreme Court in *Consumers’ Research* rejected a private nondelegation challenge to FCC regulations that “appointed the Universal Service Administrative Company” (the “Administrator”), a “private, not-for-profit corporation owned by an association of [telecommunications] carriers,” to help the FCC establish and implement a Universal Service Fund to achieve reliable and affordable telecommunications service across the country. 145 S. Ct. at 2491-2495. Under those regulations, the private Administrator “produc[es] the financial projections that end up determining” the “subsidy payments [the Fund] will make plus overhead” every quarter and “how much carriers must contribute to the Fund for those programs.” *Id.*; see, e.g., 47 C.F.R. § 54.705 (conferring on the Administrator “authority to make decisions concerning” how to “project[] demand”

for the various programs, which dictates industry participants' payments). The private Administrator also "manages the day-to-day operations of the Fund," *Consumers' Rsch.*, 145 S. Ct. at 2495, which includes "activities to ensure compliance with Federal Communications Commission rules and regulations," "[p]erformance of audits of beneficiaries" of the funds, and "[d]evelopment and implementation of other functions" under the programs, 47 C.F.R. § 54.705; the "authority to audit contributors and carriers" and "establish procedures" to investigate activities covered by funding programs, *id.* § 54.707(a); and the power to "suspend" participation in the funding programs, "assess an administrative remedial collection charge" or other "penalties," and recover substantial sums for violations of rule requirements, *id.* §§ 54.707(a), 54.713(c). "Any party aggrieved by an action taken by the Administrator * * * must first seek review from the Administrator." *Id.* § 54.719(a).

Despite the Administrator's role in developing, implementing, and adjudicating the rules governing billion-dollar programs under federal law, the Supreme Court held that the regulatory scheme does not violate the private nondelegation doctrine. "In every way that matters to the constitutional inquiry"—and in each way that resembles the FTC's relationship to the Authority—"the Commission, not the Administrator, is in control": (i) the FCC "approv[es]" and thus ultimately "set[s] the contribution" requirements that the Administrator

proposes; (ii) the Administrator “must carry out all its tasks consistent with the FCC’s rules”; and (iii) “anyone aggrieved by an action of the Administrator may seek *de novo* review by the Commission.” *Consumers’ Rsch.*, 145 S. Ct. at 2508-2510 (internal quotation marks omitted). “So in the relationship between the two, the Commission dominates.” *Id.* at 2508.

That inquiry mirrors the “determinative question” that this Court answered previously and that all “the parties accept” still as dispositive: “whether the Horseracing Authority is inferior to the FTC.” *Oklahoma*, 62 F.4th at 229; *see id.* at 239 (Cole, J., concurring) (“[The Act] as a whole is facially constitutional because the Authority is subordinate to the FTC in several ways.”). Indeed, even before *Consumers’ Research*, every court to consider private nondelegation challenges to the Act adopted the same test. *See Walmsley*, 117 F.4th at 1038 (“Where a private entity is subordinate to a governmental body, *** Congress may assign certain tasks to the entity.”); *Black IV*, 107 F.4th at 423 (“In essence, the doctrine teaches that a private entity may wield government power only if it functions subordinately to an agency with authority and surveillance over it.” (citations and internal quotation marks omitted)). All courts (and parties) agree, moreover, that “the constitutional standard is the same” regardless of whether the challenge to the Authority’s role in the implementation of the Act concerns rulemaking or enforcement. *Black IV*, 107 F.4th at 428.

2. Consumers' Research *confirms that statutes should be read to avoid constitutional problems, especially on a facial challenge.*

Consumers' Research also reinforces that “[s]tatutes (including regulatory statutes) should be read, if possible, to comport with the Constitution, not to contradict it.” 145 S. Ct. at 2507. The Supreme Court resisted petitioner’s invitation to read the law there “extravagantly, the better to create a constitutional problem,” explaining that arguments depending on maximalist readings and worst-case assumptions “do not show statutory construction at its best” or “proper respect for a coordinate branch of Government.” *Id.* Consistent with that approach, the Supreme Court rejected the challengers’ contention that the FCC’s approval of the Administrator’s decisions “is too often automatic—simply rubber stamping.” *Id.* at 2509 (alterations and quotation marks omitted). “[T]he relevant legal question” on a claim that a law violates the private nondelegation doctrine, the Supreme Court explained, is *whether* the agency “has decision-making authority,” “not *how often*” the agency exercises that authority to “reject[]” or “revise[]” the private entity’s decisions. *Id.* at 2508-2509 (emphasis added).

That judicial restraint toward construing a law “past the Constitution’s breaking point,” *Consumers’ Rsch.*, 145 S. Ct. at 2507, is buttressed by other recent Supreme Court decisions emphasizing that a plaintiff’s choice to litigate a case “as [a] facial challenge[] *** comes at a cost.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). “Facial challenges *** strain the limits of the federal courts’

constitutional authority to decide only actual ‘Cases’ and ‘Controversies.’” *Id.* at 778 (Alito, J., concurring, joined by Thomas & Gorsuch, JJ.). Claims of facial invalidity typically rest on expansive readings of a statute that require “speculation about the law’s coverage and its future enforcement” and “threaten to short circuit the democratic process by preventing duly enacted laws from being implemented in constitutional ways.” *Id.* at 723 (internal quotation marks and citations omitted).

The Supreme Court “has therefore made facial challenges hard to win.” *NetChoice, LLC*, 603 U.S. at 723. In particular, the Supreme Court’s “precedents governing facial challenges” make clear that “when legislation and the Constitution brush up against each other, a court’s task is to seek harmony, not to manufacture conflict.” *United States v. Rahimi*, 602 U.S. 680, 701 (2024) (alterations omitted). Because “a facial challenge fails if the law is constitutional in at least some of its applications,” courts should “consider the circumstances in which [a law] [i]s most likely to be constitutional,” rather than “hypothetical scenarios where [the law] might raise constitutional concerns.” *Id.* at 701 & n.2.

Those principles underscore this Court’s recognition of the significance that this “is a facial challenge to the Act,” not “an as-applied challenge to an individual enforcement action” or a specific rulemaking, and so Appellants “must show that the Act is unconstitutional in all its applications.” *Oklahoma*, 62 F.4th at 231, 233; *see Walmsley*, 117 F.4th at 1039 (same). The Court’s appropriate refusal to weigh

whether the FTC is (or speculate about whether it will become) “a demanding taskmaster or a lenient one,” *Oklahoma*, 62 F.4th at 231, parallels the Supreme Court’s refusal in *Consumers’ Research* to assess “how freely” the FCC actually blesses the Administrator’s actions, 145 S. Ct. at 1509. That “the FTC *could* subordinate every aspect of the Authority’s enforcement” and rulemaking activities “suffices to defeat a facial challenge” regardless of “how adroitly (or, let’s hope not, ineptly)” the FTC exercises its “ultimate discretion.” *Oklahoma*, 62 F.4th at 230-231. That restraint reflects the “‘interdependence’ and ‘reciprocity’” that *Consumers’ Research* reaffirms “should characterize the relationship between the branches”—particularly apt here given the “productive dialogue” that has occurred between the judiciary, two Congresses, and two Administrations. *Oklahoma*, 62 F.4th at 225 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

B. *Consumers’ Research* Reinforces This Court’s Holding That The Act Does Not Facially Violate The Private Nondelegation Doctrine.

Applying the same substantive test and the same constitutional-interpretation standard to Appellants’ same challenge yields the same answer: As amended, the Act is not facially invalid under the private nondelegation doctrine. The Supreme Court’s analysis in *Consumers’ Research* only supports this Court’s prior determination that “[t]he Authority wields materially different power from the FTC, yields to FTC supervision, and lacks the final say over the content and enforcement

of the law—all tried and true hallmarks of an inferior body.” *Oklahoma*, 62 F.4th at 229.

1. *The Act’s Rulemaking Provisions Do Not Facially Violate The Private Nondelegation Doctrine.*

a. The Authority’s role in the Act’s rulemaking scheme is subordinate to the FTC in at least two key respects. First, because the Authority’s proposed standards become binding rules only upon the FTC’s independent consideration and approval (following notice-and-comment), the proposals have “only the legal (or, indeed, practical) effect the Commission decides they should.” *Consumers’ Rsch.*, 145 S. Ct. at 2509; *see* 15 U.S.C. § 3053(c). “[T]he Authority does not have independent rulemaking power—only the FTC can promulgate regulations with the force of law.” *Oklahoma*, 62 F.4th at 240 (Cole, J., concurring). Second, “[t]he FTC’s power to abrogate and change the Authority’s rules” at any time, *id.* at 230, means that “the Commission, not the [Authority], is in control,” *Consumers’ Rsch.*, 145 S. Ct. at 2510; *see* 15 U.S.C. § 3053(e). That “broad power” to “create new rules or modify existing rules as [the FTC] deems ‘appropriate to’ advance ‘the purposes of [the] Act’ *** amounts to true oversight authority.” *Oklahoma*, 62 F.4th at 230 (second alteration in original) (quoting 15 U.S.C. § 3053(e)).

That framework tracks the rulemaking-related oversight the FCC exercises over the Administrator in the regulatory scheme considered in *Consumers’ Research*: The Administrator “makes the initial projections,” which the FCC “reviews” and

decides whether to “approve[.]” as the “final” obligations; and the FCC may “make *** changes” to those obligations “if needed.” *Consumers’ Rsch.*, 145 S. Ct. at 2508-2510. The FTC’s “review authority” also “parallels similar authority exercised by” the federal agency “in the Coal Act [from *Adkins*],” *Oklahoma*, 62 F.4th at 231-232, on which *Consumers’ Research* relied for its understanding and application of the subordination test, 145 S. Ct. at 2508-2509.

The Act’s agency checks also align rulemaking under the Authority-FTC framework with rulemaking under the FINRA-SEC framework, which “has been widely approved as constitutional” for eight decades. *Walmsley*, 117 F.4th at 1039 (quoting *Oklahoma*, 62 F.4th at 229). “Both the Maloney Act and [the Horseracing Act] *** provide for analogous consistency review” by the relevant agency over standards proposed by the private entity. *Oklahoma*, 62 F.4th at 241 (Cole, J., concurring); compare 15 U.S.C. § 3053(c), with *id.* § 78s(b). And Congress’s amendment to the Horseracing Act, enacted in direct response to this (and related) litigation, “give[s] the FTC the same general rulemaking authority that the SEC has with respect to FINRA” and other SROs. *Black IV*, 107 F.4th at 426 (citing *Oklahoma*, 62 F.4th at 225); compare 15 U.S.C. § 3053(e), with *id.* § 78s(c).

It is thus unsurprising that every court that has considered the question—and every single judge sitting on those courts (without exception)—has “agree[d]” that, as amended, “the Act’s rulemaking structure does not violate the private

nondelegation doctrine.” *Walmsley*, 117 F.4th at 1038. The Eighth Circuit partial dissent agreed. *Id.* at 1041-1044 (Gruender, J., concurring in part and dissenting in part). Even the Fifth Circuit agreed that this Court “correctly observed[] [that] ‘§ 3053(e)’s amended text gives the FTC ultimate discretion over the content of the rules,’ which ‘makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one.’” *Black IV*, 107 F.4th at 424 (quoting *Oklahoma*, 62 F.4th at 230).

In fact, after the Supreme Court initially denied Appellants’ certiorari petition, Appellants’ rehearing application did not even mention the Authority’s role in the Act’s rulemaking scheme. On the contrary, Appellants argued that the Supreme Court “should grant rehearing and certiorari in this case” only “[i]n light of” the intervening “opening of a circuit split” that was cabined to the facial validity of the Act’s enforcement provisions. Reh’g Pet. 1, *Oklahoma v. United States*, No. 23-402 (U.S. July 18, 2024); *see* Appellants’ Br. 14. There is no reason for this Court to disturb the constitutional consensus on the Act’s rulemaking provisions.

b. Each of Appellants’ counterarguments fails.

i. Once again, Appellants’ challenge to the Act’s rulemaking structure principally attacks the “consistency review” the FTC conducts when determining whether to approve (or not) Authority proposals under section 3053(c). Br. 31. But the FTC’s ongoing plenary power under section 3053(e) to “abrogate, add to, and

modify” any rule as it deems “necessary or appropriate” renders any dispute about the FTC’s “front end” review (Appellants’ Br. 31) constitutionally “irrelevant.” *National Horsemen’s Benevolent & Protective Ass’n v. Black*, 672 F. Supp. 3d 220, 245 (N.D. Tex. 2023) (“*Black III*”) (quoting *Black II*, 53 F.4th at 888 n.35).

As the FTC explained after Congress amended the Act to confer the “broader rulemaking power,” the FTC will not hesitate to “exercise its own policy choices whenever it determines that the Authority’s proposals, even if consistent with the Act, are not the policies that the Commission thinks would be best for horseracing integrity or safety.” FTC, *Order Ratifying Previous Commission Orders As To Horseracing Integrity and Safety Authority’s Rules 3* (Jan. 3, 2023).⁴ So “even if” Appellants were right that the agency’s approval/disapproval discretion is limited under consistency review, the FTC’s “authority to modify *any* rules for any reason at all, including policy disagreements, ensures that the FTC retains ultimate[] authority over the implementation of the Horseracing Act.” *Oklahoma*, 62 F.4th at 231; *see Black IV*, 107 F.4th at 426 (“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.”). The FTC “retain[s] all decision-making authority within that sphere.” *Consumers’ Rsch.*, 145 S. Ct. at 2492.

⁴ <https://tinyurl.com/pjta3zwx>.

Appellants acknowledge that the Act permits the FTC “to undo Authority rules it dislikes.” Br. 35. But Appellants argue that power is “insufficient” because there may be instances where the industry is “governed in the meantime” by “the Authority’s rule” until “the time the FTC gets around to making its own rule.” Br. 34-36. All three circuits have rightly rejected “[t]his timing argument.” *Walmsley*, 117 F.4th at 1038; *see Black IV*, 107 F.4th at 425 (“We disagree” that “the FTC’s new review power creates a timing problem.”); *Oklahoma*, 62 F.4th at 232 (same). And Appellants still cannot show that any “potential timing gap in FTC’s § 3053(e) review makes [the Act] unconstitutional in all its applications.” *Black IV*, 107 F.4th at 425.

That is because, “[t]o the extent this timing gap creates a problem, the FTC is free to resolve it ahead of time” by, for example, “adopt[ing] a rule that all newly enacted rules do not take effect for 180 days, thereby giving the FTC time to review the rules and prepare preemptive modifications.” *Oklahoma*, 62 F.4th at 232; *see Walmsley*, 117 F.4th at 1038-1039 (rejecting argument “that there inevitably will be a gap *** because the Commission may use its power to postpone the effective date of a proposed rule or to delay the effective date of a rule”). Appellants halfheartedly say it is “doubtful” that “the FTC has the power to delay the effective date of the Authority’s rules” because “those rules govern racetrack safety and medication control—not the allocation of decision-making power between the FTC and the

Authority.” Br. 39. That newfound doubt contradicts Appellants’ prior concession that the SEC’s parallel modification power, which section 3053(e) imports into the Act, “gives the SEC ‘largely unbounded authority to craft [the private entity’s] regulations as it sees fit.’” *Oklahoma*, 62 F.4th at 232 (alteration in original) (quoting Appellants’ Reply Br. 7, Doc. 66). Appellants’ suggestion is also nonsensical: the determination of when a racetrack-safety or medication-control standard takes effect *is* a “rule[] govern[ing] racetrack safety and medication control.” Br. 39.

Congress expressly granted that independent rulemaking power to strengthen “[FTC] oversight” over the Authority—and did so by allowing the agency not only to “conform the rules of the Authority to requirements of [the Act],” but also to “ensure the fair administration of the Authority” and “otherwise *** further[] *** the purposes of the [Act].” 15 U.S.C. § 3053(e). That broad language undermines any contention that an FTC rule that constrains an Authority-proposed rule would somehow disturb the “allocation of decision-making power between the FTC and the Authority *** that is made by the Act itself.” Appellants’ Br. 39. Far from “evad[ing] a statutory prohibition on review,” *id.* at 41 (quoting *United States v. Arthrex, Inc.*, 594 U.S. 1, 16 (2021)), or adopting “a limiting construction of the statute,” *id.* at 37 (quoting *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 472 (2001)), the FTC would simply exercise the extensive supervision and control Congress conferred on the agency. After all, section 3053(e)’s language, “borrowed

from the Maloney Act, gives the agency ‘broad authority to oversee and to regulate the rules adopted by the [Authority]’” as the agency deems necessary or appropriate. *Black IV*, 107 F.4th at 425 n.5 (alteration in original) (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233-234 (1987)).

Moreover, the “prospect that the FTC might attempt to pass such a rule” that “delay[s] the effective date of the Authority’s rules” is no mere “hypothetical.” Appellants’ Br. 38-39. After this Court issued its prior decision, the FTC promulgated a rule “delaying the date of effectiveness” of the newly approved anti-doping and medication-control program to mitigate risk of “inconsistent treatment of similarly situated horses” and “uncertainty *** as the Thoroughbred horseracing industry near[ed] the Triple Crown events” of that year. 88 Fed. Reg. 27,894, 27,894-27,895 (May 3, 2023) (finding “good cause” to forgo “notice and comment” under “section 553(b)(3)(B) of the APA,” as incorporated in 15 U.S.C. § 3053(e)). That real-life example of the FTC’s exercise of its section 3053(e) power on an expedited basis to protect its “policy concerns” and prevent time-sensitive “harms that could frustrate the purposes of the Act,” *id.*, resolves any lingering worry that rulemaking “typically takes an agency *years* to complete,” Appellants’ Br. 35.

In any event, Appellants’ arguments about a potential time delay “overlook[] another reality.” *Oklahoma*, 62 F.4th at 232. It is undisputed that the Act’s amended text confers on the FTC not only “back-end” or “after-the-fact power” to “modify or

repeal” rules already approved, Appellants’ Br. 2, 19, 34, but also the independent ability to “create new rules” in the first place, *Oklahoma*, 62 F.4th at 230; *see Walmsley*, 117 F.4th at 1038 (“The power to ‘add to *** the rules of the Authority’ thus enables the Commission to adopt new rules.” (ellipsis in original)). “When the FTC reviews the Horseracing Authority’s proposed rules, it asks not just whether they are “consistent” with the Act; it also asks whether they are “consistent” with other “applicable rules approved by the Commission.” *Oklahoma*, 62 F.4th at 232 (quoting 15 U.S.C. § 3053(c)(2)). Although the Act requires the FTC to approve or disapprove a proposal within 60 days following publication in the Federal Register, 15 U.S.C. § 3053(c)(1); *see* Appellants’ Br. 39, there is no deadline for the FTC to publish the proposal in the first instance, *see* 16 C.F.R. § 1.142(d) (requiring Authority to submit standards and accompanying documents “at least 90 days in advance” of proposed publication, absent waiver); *see also, e.g.*, 90 Fed. Reg. 43,431, 43,431 (Sept. 9, 2025) (publishing notice of proposed rule modification Authority had initially submitted to the agency almost two years prior).

If the FTC has concerns (policy-based or otherwise) about an Authority proposal, the FTC may publish its own proposed rule on the same topic before publishing the Authority’s proposal. The agency can then finalize its own rule before determining whether the Authority-proposed standard is consistent with it. The

Authority's proposal "shall not take effect" in the interim—or ever, if the FTC disapproves it as inconsistent with the agency's own rule. 15 U.S.C. § 3053(b)(2).

So there will never be—and, on this facial challenge, it is enough that there certainly need not be—a case in which “the horseracing industry will be bound by a regulation with which the FTC might disagree as a policy matter and which no politically accountable governmental officer ever endorsed.” Appellants’ Br. 36. Any hypothetical delay between consistency review and a new FTC rule on the same subject is itself a policy choice by the FTC. *See Oklahoma*, 62 F.4th at 230 (explaining agency “makes a policy choice and necessarily scrutinizes the Authority’s policies” when it “decides to act” and when it “decides *not* to act”). In other words, the Authority’s proposals do not “go into effect without an agency’s say-so.” *Consumers’ Rsch.*, 145 S. Ct. at 2509. Rather, “the Commission is, throughout, the final authority.” *Id.*; *see Oklahoma*, 62 F.4th at 230-231 (explaining that the FTC “bears ultimate responsibility” with “final word on the substance of the rules”).

ii. To the extent Appellants’ cramped conception of the FTC’s “consistency” review is relevant following Congress’s amendment, Appellants are wrong that the FTC cannot “reject Authority proposals it disagrees with at the front end as a policy matter.” Br. 31. Evaluating whether proposals are “consistent with” the Act, 15 U.S.C. § 3053(c)(2), requires determining whether they “are consistent with ‘the

safety, welfare, and integrity of covered horses, covered persons, and covered horseraces,” *Oklahoma*, 62 F.4th at 240 (Cole, J., concurring) (quoting 15 U.S.C. § 3054(a)(2)(A)), pursuant to the many “[c]onsiderations” and “[e]lements” Congress provided, 15 U.S.C. §§ 3055, 3056, 3057. The broad standard empowers the FTC to disapprove, for example, a racetrack-safety proposal that the FTC determines as a matter of policy is not “consistent with the humane treatment of covered horses.” *Id.* § 3056(b)(2).

In this context, that substantive determination is tantamount to the “public interest” determination the SEC makes under the Maloney Act pursuant to an identical “consistent with the requirements of the Act” standard. *Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442, 446-447 (D.C. Cir. 2017) (quoting 15 U.S.C. § 78s(b)(2)(C)); *contra* Appellants’ Br. 32-33 (arguing “the scope of [the SEC’s] review is fundamentally different”). Under both the Maloney Act and the Horseracing Act, “[i]t is ultimately FINRA’s [or the Authority’s] burden to demonstrate [to the SEC or FTC] that its proposed rule change is consistent with the Act and applicable rules and regulations.” *Bloomberg L.P. v. SEC*, 45 F.4th 462, 470 (D.C. Cir. 2022); *see* 16 C.F.R. § 1.142 (requiring Authority to submit to FTC “sufficiently detailed” analysis of each proposal, a “description of any reasonable alternatives,” an explanation of the proposal’s effects, “copies of the pertinent factual information underlying” the proposal, etc., and warning that “conclusory

statement[s]” of consistency are “insufficient” for FTC to make “affirmative finding” required). If anything, FINRA’s powers are broader than the Authority’s in relevant respects. *Compare, e.g.*, 15 U.S.C. § 78s(b)(2)(D) (FINRA rules “shall be deemed to have been approved” if SEC fails to act within prescribed period), *with id.* § 3053(b)(2) (Authority-proposed standards cannot take effect unless approved by FTC).

Appellants are also incorrect to suggest some material distinction between section 3053(c) and the Coal Act provision upheld as “unquestionably valid” in *Adkins*. 310 U.S. at 399; *see* Appellants’ Br. 32. The relevant statutory text limited the coal agency to “‘[a]pprov[ing], disapprov[ing], or modify[ing]’ the private coal boards’ ‘proposed minimum prices [and related terms] *to conform to the requirements* of this subsection.’” *Oklahoma*, 62 F.4th at 241 (Cole, J., concurring). “[E]very court of appeals to address the validity of such delegations under the Maloney Act and the Coal Act, as noted, has upheld them.” *Id.* at 232.

Although that is enough to doom Appellants’ facial challenge, the FTC’s actions remove any doubt. For example, the FTC construed the Act’s consistency standard as warranting disapproval of the originally proposed anti-doping and medication-control rules in the immediate wake of the Fifth Circuit’s initial decision. *FTC, Order Disapproving The Anti-Doping And Medication Control Rule Proposed*

By The Horseracing Integrity And Safety Authority (Dec. 12, 2022).⁵ Nothing in the Act mandated that disapproval. Instead, the agency based its determination on (i) the FTC’s independent judgment that “[t]he bedrock principle of the Act is the need for uniformity,” and (ii) the FTC’s policy goal of avoiding potential “confusion *** for industry participants and regulators.” *Id.* at 1-2. The FTC also has not hesitated to condition its approval of a proposed standard on its own limiting interpretations. *See, e.g., FTC, Order Approving The Enforcement Rule Modification Proposed By The Horseracing Integrity And Safety Authority* 14-16 (Sept. 23, 2022) (rejecting proposed provision as “unnecessary and overbroad” and directing Authority “not to rely” on it).⁶

iii. Appellants are left to rely on conjecture about “if the FTC fails to act” with diligence or seriousness of purpose. Br. 37. But as a factual matter, the examples above and others illustrate the FTC’s commitment to wielding its rulemaking (and rule-approval) power to advance its policy choices and conduct its oversight responsibilities. *See, e.g.,* 88 Fed. Reg. 18,034, 18,035 (Mar. 27, 2023) (rule promulgated under section 3053(e) requiring Authority to submit proposed budgetary decisions for FTC approval so agency can determine whether “the

⁵ <https://tinyurl.com/rndfjr8b>.

⁶ <http://tinyurl.com/3h5cb5fm>.

proposed budget serves the goals of the [Act] in a prudent and cost-effective manner,” among other conditions).

And as a legal matter, the “relevant” question is whether the FTC “retains decision-making power,” not “how freely” the agency exercises that power to disapprove, undo, or modify an Authority proposal. *Consumers’ Rsch.*, 145 S. Ct. at 2508-2509 (rejecting “rubber-stamp[ing] argument). That is particularly true given that, in Appellants’ own words, the independent rulemaking power Congress imported from the Maloney Act means the Authority “propose[s] rules in the shadow of [the FTC’s] power” to abrogate, add to, and modify them. Appellants’ Reply Br. 7, Doc. 66. As Appellants explained with respect to the Maloney Act (before section 3053(e) of the Horseracing Act was amended to replicate it), that power yields real “leverage”: the FTC “can use the threat of its modification power to force [the Authority] to propose only rules with which the agency agrees.” *Id.*; see *Consumers’ Rsch.*, 145 S. Ct. at 2509-2510 (rejecting petitioner’s contention that “the infrequency with which the Commission changes the Administrator’s publicly submitted projections shows that it simply is not paying attention”).

Indeed, the FTC’s informal review of Authority proposals before publication in the Federal Register, see 16 C.F.R. § 1.142, allows for the types of “behind the scenes” activity that contributes to “the infrequency with which the Commission changes” or disapproves published proposals, *Consumers’ Rsch.*, 145 S. Ct. at 2509-

2510; *see, e.g.*, 90 Fed. Reg. at 43,431-43,432 (noting that Authority initially submitted proposed modifications to enforcement rules in September 2023 and subsequently filed a “revised submission” in July 2025 “reflect[ing] updated proposed modifications,” which FTC ultimately published in September 2025). As this Court observed, “the threat of modification is not likely to miss the attention of the Authority.” *Oklahoma*, 62 F.4th at 232. Because “the private party’s recommendations (as is true here) cannot go into effect without any agency’s say-so,” that “is sufficient” to defeat Appellants’ private nondelegation claim. *Consumers’ Rsch.*, 145 S. Ct. at 2509; *see Walmsley*, 117 F.4th at 1038 (“As long as the Commission has the final say over the rules, there is no impermissible private delegation.”).

Appellants cannot dodge that reality, at least in the context of this facial challenge, through speculative hypotheticals about “*if* the Authority proposes a rule to which the FTC objects and the FTC has not already promulgated a contrary rule,” or “*if* the FTC elects [not] to exercise its independent rulemaking power and [not] reject[] Authority proposals that are not ‘consistent with’ rules adopted under such power.” Br. 40-42 (first emphasis added). In examining facial challenges, courts must “consider the circumstances in which [a law] [i]s most likely to be constitutional,” rather than “hypothetical scenarios where [the law] might raise constitutional concerns.” *Rahimi*, 602 U.S. at 701. If the FTC shows a “lack of

attention” or the Authority somehow “override[s] the FTC’s policy preferences,” Appellants’ Br. 37, 40, industry stakeholders may bring an APA challenge to the FTC’s order approving the rule (or to the FTC’s denial of a petition for rulemaking)—just as stakeholders have done in the SEC-SRO context. *See, e.g., Susquehanna Int’l Grp.*, 866 F.3d at 443 (remanding case to SEC because agency “granted approval without itself making the findings and determinations prescribed by the Securities Exchange Act” and instead “effectively abdicated that responsibility to the Corporation”).

2. *The Act’s Enforcement Provisions Do Not Facially Violate The Private Nondelegation Doctrine.*

a. *Consumers’ Research* also supports this Court’s conclusion that the Authority’s enforcement activities are “subject to [the FTC’s] pervasive surveillance and authority,” revealing that the Authority ‘operate[s] as an aid to the [FTC],’ nothing more.” *Oklahoma*, 62 F.4th at 231 (alterations in original) (quoting *Adkins*, 310 U.S. at 388). The Authority’s role in the Act’s enforcement scheme is subordinate to the FTC in at least three critical respects.

First, the Authority may not take any investigatory or disciplinary action that is not “authoriz[ed]” by “uniform procedures and rules” independently approved by the FTC. 15 U.S.C. § 3054(c); *see also id.* §§ 3053(c), 3057(a)(1), (c)(1). So any enforcement standards (like any other standards the Authority proposes) have “only the legal (or, indeed, practical) effect the [FTC] decides they should,” and the

Authority must “[w]ork[] within those rules” to implement the Act. *Consumers’ Rsch.*, 145 S. Ct. at 2508-2509. Second, because the FTC may wield plenary rulemaking power to further steer or restrict any of the Authority’s enforcement activities, “the Commission is, throughout, the final authority.” *Id.* at 2509; *see* 15 U.S.C. § 3053(e). And third, “anyone aggrieved by an action of the [Authority] may seek *de novo* review by the Commission” (followed by Article III judicial review). *Consumers’ Rsch.*, 145 S. Ct. at 2508; *see* 15 U.S.C. § 3058. So there is no question that “in the relationship between the two, the Commission dominates.” *Consumers’ Rsch.*, 145 S. Ct. at 2508.

Although *Consumers’ Research* did not directly concern a challenge to enforcement authority, the FTC’s supervisory powers map onto various tools the Supreme Court observed that the FCC possesses to oversee the private Administrator’s implementation of that regulatory scheme. Regulations promulgated by the FCC “dictate the programs’ scope” within which the Administrator may operate. *Consumers’ Rsch.*, 145 S. Ct. at 2508-2509. The Administrator “must carry out all its tasks,” including auditing industry participants’ and investigating their compliance with federal law, “consistent with the [FTC’s own] rules, orders, written directives, and other instructions.” *Id.* at 2508 (internal quotation marks omitted). And the FCC reviews Administrator actions that harm industry participants, such as the Administrator’s recovery of funds or exclusion of

certain industry participants from the federal programs, “after” the aggrieved stakeholder “seek[s] review from the Administrator.” 47 C.F.R. § 54.719(b); *see Consumers’ Rsch.*, 145 S. Ct. at 2508.

The FTC’s supervision over the Authority’s role in the Act’s enforcement scheme also parallels the Maloney Act framework in relevant respects. Beyond the SEC’s identical rulemaking powers discussed above, the Maloney Act provides that any “final disciplinary sanction” by FINRA (or another SRO) is subject to SEC review. 15 U.S.C. § 78s(d)-(f). In fact, the FTC’s review of Authority sanctions “is even more substantial than the SEC’s review of FINRA decisions.” *Black III*, 672 F. Supp. 3d at 248 (citation omitted); *see Oklahoma*, 62 F.4th at 244 (Cole, J., concurring) (“[The Act], unlike the Maloney Act, unambiguously empowers the FTC to obtain additional evidence not in the record below[.]”); *compare* 15 U.S.C. § 3058(c)(3)(c), *with id.* § 78s(e).

Just as the SEC retains “direct regulatory power over [SRO] rules *and practices*,” such that the agency is not “impoten[t] to affect *application* of exchange rules in *particular circumstances*,” *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 685 (1975) (emphases added), “the FTC, not the Authority, ultimately decides how the Act is enforced” in any given instance, *Oklahoma*, 62 F.4th at 231. As Appellants’ own counsel has argued *on behalf of FINRA*, the Horseracing Act “put[s] the [Authority] ‘on equal footing to FINRA in its role “in aid of” the federal

agency.” FINRA Opp’n to Mot. for Inj. Pending Appeal 19, *Alpine Sec. Corp. v. FINRA*, No. 23-5129 (D.C. Cir. June 15, 2023) (quoting *Black III*, 672 F. Supp. 3d at 245). Although Appellants now contend otherwise by saying “the SEC has the powers to ‘derecognize FINRA’s regulatory role entirely” or “‘remove FINRA Board members for cause,”” Br. 51 (quoting *Black IV*, 107 F.4th at 435), the FTC’s new “power to abrogate the private organization’s rules” is “on par” with “[t]he power to strip the private organization’s power altogether” because “a clear hierarchy exists in both cases,” *Black II*, 53 F.4th at 888-889. And “[a]ll circuits that have ruled on” the facial validity of that framework under the private nondelegation doctrine “have held that the Maloney Act’s enforcement scheme is constitutional where, as here, a private entity *** brought enforcement actions against covered entities.” *Oklahoma*, 62 F.4th at 243 (Cole, J., concurring) (citing cases).

So, too, all but one court that has confronted the question with respect to the amended Horseracing Act “agree with [this Court]” that the FTC “has broad power to subordinate the Authority’s enforcement activities,” such that “the statute is not unconstitutional in all of its applications.” *Walmsley*, 117 F.4th at 1039-1040; Hr’g Tr. at 44, *Walmsley v. Federal Trade Comm’n*, No. 3:23-cv-81 (E.D. Ark. July 21, 2023), Doc. 47 (denying preliminary injunction on “lack of probability of success on the merits” of private nondelegation claim based on “the Sixth Circuit opinion”); *Black III*, 672 F. Supp. 3d at 242, 248-249 (agreeing with “Sixth Circuit’s persuasive

opinion”); *see also* Opinion, R.105:PageID#1504-1505 (holding, even before congressional amendment, that “Plaintiff’s enforcement power arguments also fail to show that [the Act] violates the private nondelegation doctrine”).

b. Nothing warrants displacing that clear majority view.

i. Appellants’ supplemental brief essentially relies on the Fifth Circuit’s aberrant judgment—not *Consumers’ Research*—to relitigate the same arguments this Court rejected previously. *See* Br. 43-61 (citing *Black IV* over twenty times); *see also, e.g.*, Br. 46 (“As the Fifth Circuit explained”); Br. 50 (“As the Fifth Circuit recognized”); Br. 53 (“as the Fifth Circuit explained”); Br. 55 (“But as the Fifth Circuit recognized”); Br. 59 (“As the Fifth Circuit recognized”). But the Supreme Court granted the Authority’s emergency application to stay the mandate associated with the Fifth Circuit’s judgment. *Horseracing Integrity & Safety Authority, Inc. v. National Horsemen’s Benevolent & Protective Ass’n v. Black*, 145 S. Ct. 8 (Oct. 28, 2024) (Mem.). To issue that stay, the Supreme Court necessarily concluded that the Authority had established not only “a reasonable probability that four Justices will consider the issue [of the facial validity of the Act’s enforcement provisions] sufficiently meritorious to grant certiorari,” but also “a fair prospect that a majority of the Court will vote to *reverse* the judgment below.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (emphasis added); *see Noem v. Vasquez Perdomo*, No. 25A169, 2025 WL 2585637, at *2 (U.S. Sept. 8, 2025) (Kavanaugh, J., concurring in the grant

of the application for stay) (“To obtain a stay from this Court, the moving party must demonstrate a fair prospect that *** this Court would grant certiorari and reverse.”).

That decision “carries precedential weight.” *National Insts. of Health v. American Pub. Health Ass’n*, No. 25A103, 2025 WL 2415669, at *4 (U.S. Aug. 21, 2025) (Gorsuch, J., concurring, joined by Kavanaugh, J.) (explaining that order granting stay pending certiorari in one case “constitutes a precedent that commands respect in lower courts” facing similar cases). The Supreme Court’s “probabilistic holding[]” that it would reverse the Fifth Circuit’s judgment that the Act’s enforcement provisions facially violate the private nondelegation doctrine “must ‘inform how a [lower] court’ proceeds ‘in like cases,’” such as this one. *Id.* (second alteration in original) (quoting *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025)). At a minimum, that cautionary signal casts serious doubt that Appellants gain any traction by “invok[ing] *** a repudiated court of appeals decision to reach a different conclusion on an equivalent record” here. *Id.*

ii. In any event, Appellants’ counterarguments fail. As an initial matter, although Appellants spend pages contending that the Act “bestows on the Authority an array of enforcement powers” traditionally “reserved only for the Executive,” Br. 43, this Court already recognized that the “Authority’s enforcement duties are extensive, granted.” *Oklahoma*, 62 F.4th at 231. That is largely beside the point: Appellants acknowledge that the resolution of a private nondelegation claim turns

not on whether “Congress involves a private entity in a federal regulatory program,” but on whether a federal government agency “‘retai[ns] decision-making power’ and the private entity *** ‘functio[ns] subordinately to the agency’ and *** ‘subject to its authority and surveillance.’” Br. 42 (quoting *Consumers’ Rsch.*, 145 S. Ct. at 2508). That is because a law prevents “private governance” by giving the agency “final authority” over the private entity’s activities. *Consumers’ Rsch.*, 145 S. Ct. at 2509, 2511. The Maloney Act jurisprudence confirms that analysis: Although there is no question that SROs like FINRA “initially enforce the rules through internal adjudication,” courts have consistently “reason[ed] that the SEC’s ultimate control over the rules and their enforcement makes the SROs permissible aides and advisors.” *Oklahoma*, 62 F.4th at 229.

Accordingly, this case still “turn[s] on ‘governmental oversight’ of and ‘accountability’ for the Horseracing Authority’s activities,” rather than some “categorical Article II inquiry” or “question of historical meaning.” *Oklahoma*, 62 F.4th at 233 (quoting First Am. Compl. ¶ 150, R.53:PageID#400; Reply in Supp. of Pls’ Mot. for Summ. J., R.98:PageID#1163-1164). To the extent the Act involves the Authority in the exercise of “quintessentially executive power,” Appellants’ Br. 42, that may trigger the private nondelegation doctrine but does not resolve the doctrine’s application in this case. The Supreme Court agrees that the dispositive

“constitutional inquiry” is whether “the Commission, not the [Authority], is in control” with respect to those activities. *Consumers’ Rsch.*, 145 S. Ct. at 2510.⁷

⁷ Appellants’ historical dabbling is lacking. Our Nation’s history is replete from the beginning with examples illustrating that “Congress has long delegated regulatory authority to private entities,” including for enforcement, often with far less government agency oversight. *Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1325 (D.C. Cir. 2024) (citing examples). For instance, a 1790 customs statute empowered private persons not only to assess weights and sizes of imported goods, but also to “use their best endeavours to prevent and detect frauds in relation to the duties imposed by the laws of the United States.” Act of Aug. 4, 1790, Ch. 35, 1 Stat. 145, 153-154. Similarly, beginning in the late eighteenth century, Congress delegated to “outside actors *** fact-based determinations,” including the ability “to resolve disputes between two competing patent applicants or even reverse determinations issued by the head of the [patent] office with no mechanism for further review outside of the Article III court system.” Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 HARV. J. L. & PUB. POL’Y 837, 881-882 (2022); *see id.* at 895 (explaining that Congress’s reasoning for eliminating these private boards after 40 years was “practical rather than constitutional”). “As early as 1809, Congress authorized private parties to exercise the eminent domain power—including through the initiation of direct condemnation proceedings—within areas subject to federal jurisdiction.” *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 495 (2021). And the federal government “used private guards and detectives for its occasional police work,” so much so that a private group became known in the nineteenth century as “America’s de facto national law enforcement agency.” David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1211, 1213 (1999); *see Filarsky v. Delia*, 566 U.S. 377, 385-387 (2012) (explaining that, historically, “the line between public and private policing was frequently hazy” and “private lawyers were regularly engaged to conduct criminal prosecutions on behalf of the State”). In several respects, “the common law did not draw a distinction between public servants and private individuals engaged in public service” when “carrying out government responsibilities.” *Filarsky*, 566 U.S. at 387; *see* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551-556 (2000) (“Virtually every service or function we now think of as ‘traditionally’ public, including tax collection, fire protection, welfare provision, education, and policing, has at one time or another been privately performed,” and “[e]ven as public agencies took on these responsibilities in the twentieth century, the private role in governance persisted.”).

iii. Appellants are wrong that “[t]he Act does not give the FTC any ability to control the Authority’s exercise of *** [enforcement powers.” Br. 52. Every federal court that has considered the Act’s constitutionality (including the Fifth Circuit) has held that it validly confers on the FTC power to “modify *any* rules for any reason at all” to “ensure[] that the FTC retains ultimate[] authority over the implementation of the Horseracing Act.” *Black IV*, 107 F.4th at 425 (emphasis and second alteration in original) (quoting *Oklahoma*, 62 F.4th at 231). Such power necessarily encompasses oversight over enforcement of the Act.

Thus, beyond the requirement for the FTC to determine whether to approve (or not) every rule that dictates any investigatory and disciplinary activity on the front end, Congress’s amendment to the Act confirms that the agency has “the tools to step in” at any point to further “control the Authority’s enforcement activities.” *Oklahoma*, 62 F.4th at 231 (citing 15 U.S.C. § 3053(e)); see *Walmsley*, 117 F.4th at 1039 (same). For example, in addition to a prospective rule governing “*how* the Authority exercises” the (never-utilized) investigatory subpoena power or its authority to pursue disciplinary sanctions for certain rule violations, Appellants’ Br. 55-56 (quoting *Black IV*, 107 F.4th at 433), the FTC could issue a rule *barring* unapproved subpoenas or disciplinary charges, or a rule *quashing* particular ones. Or the FTC could wield its existing rule controlling the Authority’s budget—including by “modify[ing] any line item” or withholding necessary “approval,” 88

Fed. Reg. at 18,034-18,036—to prevent a civil action. On a facial challenge, those examples (among others) “suffice[]” to show that the Act does not lack the potential for agency supervision over enforcement in at least certain (if not all) applications. *Oklahoma*, 62 F.4th at 231.⁸

Appellants argue “that reasoning cannot survive *Consumers’ Research*, which makes clear that *** private entities cannot effect governmental actions without the agency’s ‘say-so.’” Br. 53 (quoting *Consumers’ Rsch.*, 145 S. Ct. at 2508-2509). But as this Court explained (and Appellants ignore), whether “the FTC decides to act” or “decides *not* to act,” it “makes a policy choice and necessarily scrutinizes the Authority’s” actions. *Oklahoma*, 62 F.4th at 230. So any decision by the FTC not to require “prior approval” for a specific enforcement activity, Appellants’ Br. 21, would itself be a policy judgment by the agency. Either way, the FTC is “politically accountable.” Appellants’ Br. 53. It “bears ultimate responsibility” for any enforcement activity under the Act, and “[t]he People may rightly blame or praise the FTC for how adroitly” it exercises its oversight and advances “the ‘purposes of [the] Act.’” *Oklahoma*, 62 F.4th at 231 (second alteration in original) (quoting 15 U.S.C. § 3053(e)).

⁸ In fact, the FTC recently published a proposed modification to the enforcement rules that would “require the Authority to request and obtain the approval of the Commission before issuing a subpoena under 15 U.S.C. § 3054(h)” and “before initiating any civil action pursuant to 15 U.S.C. § 3054(j).” 90 Fed. Reg. at 43,435-43,436.

Appellants parrot the Fifth Circuit’s assertion that such FTC supervision “would let the agency rewrite the statute” to alter the Act’s “division of labor.” Br. 53-54 (quoting *Black IV*, 107 F.4th at 431-432). But as the Eighth Circuit explained, “[t]o subordinate the Authority’s enforcement activity, *** the [FTC] need only work within the structure of the Act as designed, not create a new statutory regime.” *Walmsley*, 117 F.4th at 1040. The amendment Congress enacted confers plenary rulemaking power on the FTC not only “to conform the rules of the Authority” to statutory requirements, but also to “ensure the fair administration of the Authority” and take supervisory action “otherwise in furtherance of the [Act’s] purposes.” 15 U.S.C. § 3053(e). Those clear purposes include “implement[ing] and enforc[ing] the horseracing anti-doping and medication control program and the racetrack safety program.” *Id.* § 3054(a). In fact, the FTC has exercised that power to promulgate rules facilitating “effective Commission oversight over the Authority,” including with respect to any “investigations conducted,” “sanctions imposed,” “subpoenas issued,” and “actions commenced” in federal court. 89 Fed. Reg. 66,546, 66,547, 66,550-66,551 (Aug. 16, 2024). It is Appellants’ claim, not the FTC’s understanding of the Act, that relies on a “limiting construction” of the power Congress conferred on the agency. Appellants’ Br. 55 (quoting *Whitman*, 531 U.S. at 472).

Like the Fifth Circuit, Appellants assume incorrectly that by empowering the Authority, the Act impliedly strips the FTC of initial enforcement powers relating to

racetrack safety, anti-doping, and medication control. *See* Br. 53-55; *see also* Br. 50-51 (contending, *e.g.*, that the FTC cannot “launch investigations” as a purported “contrast” with the FINRA-SEC relationship). To the extent it even matters, that negative inference contradicts Congress’s clear instruction that “[n]othing [in the Act] shall be construed to limit the authority of the Commission under any other provision of law,” 15 U.S.C. § 3054(b)—including laws authorizing the FTC to, for example, “investigate,” issue “subpoenas,” and “bring suit in a district court,” *id.* §§ 43, 45-46, 49, 53, 57b. Moreover, Appellants’ assertion that the Act “says ‘nothing about FTC involvement’” in the enforcement scheme, Br. 54 (quoting *Black IV*, 107 F.4th at 432), simply overlooks provisions contemplating the FTC’s direct involvement. *E.g.*, 15 U.S.C. § 3054(d)(3) (covered person shall “cooperate with the Commission *** during any civil investigation” and “respond truthfully *** if questioned by the Commission”); *id.* § 3054(k)(2)(A) (“The Authority and the Commission may not investigate, prosecute, adjudicate, or penalize conduct in violation of the horseracing anti-doping and medication control program and the racetrack safety program that occurs before the program effective date.”).

iv. Appellants also fall flat in their attempt to discount the FTC’s “full authority to review the Horseracing Authority’s enforcement actions.” *Oklahoma*, 62 F.4th at 231; *see* Br. 56-58. Every Authority decision is subject to two layers of *de novo* FTC review, whereby the agency may “affirm, reverse, modify, set aside, or

remand for further proceedings,” and may “make any finding or conclusion that, in the judgment of the [FTC], is proper and based on the record.” 15 U.S.C. § 3058. Appellants assert that this Court’s (and the Eighth Circuit’s) consideration of that review power “cannot survive *Consumers’ Research’s* clarification of what the ‘functio[n] subordinately’ test requires.” Br. 56 (alteration in original) (quoting 145 S. Ct. at 2509-2509). But that is puzzling (and wrong): the Supreme Court observed that one of the features of the regulatory scheme that makes the Administrator “broadly subordinate” to the FCC is that “anyone aggrieved by an action of the Administrator may seek *de novo* review by the Commission.” *Consumers’ Rsch.*, 145 S. Ct. at 2508. Remarkably, that on-point finding in the Supreme Court’s opinion appears nowhere in Appellants’ supplemental brief.

The Administrator actions that the FCC reviews may involve, for example, recovery of substantial sums of federal funding (far in excess of the purse amounts typically forfeited through Authority-FTC proceedings) “based on the [industry participant’s] failure to comply with the Commission’s rules.” *In re Request for Rev. of a Decision of the Universal Serv. Adm’r by Big Bend Tel. Co.* (“*Big Bend*”), No. DA25-489, 2025 WL 1915924, at *1 (F.C.C. June 6, 2025) (affirming Administrator’s recovery of \$5.5 million). Or, to take another example, the Administrator can decide to suspend an industry member’s participation in the federal program after determining that it acted “in violation of *** Program

requirements” set forth in the federal regulations. *In re Requests for Rev. of Decisions of the Universal Serv. Adm’r by Windstream Commc’ns, LLC, et al.*, 35 F.C.C. Rcd. 10312, 10313 (2020) (affirming Administrator’s decision to deny applicant’s eligibility for funding program because its business relationships had “created a conflict of interest that impaired [its] ability to hold a fair and open competitive bidding process”). In each of these instances (among others), the availability of the FCC’s *de novo* review means that “the Commission dominates” in its relationship with the Administrator. *Consumers’ Rsch.*, 145 S. Ct. at 2508.

The Supreme Court reached that conclusion in *Consumers’ Research* even though the industry participant is necessarily “aggrieved” prior to the FCC’s exercise of its review. 145 S. Ct. at 2508; *see* 47 C.F.R. § 54.719. That refutes Appellants’ argument that the subordination effected by an agency’s *de novo* review is negated by “everything that the [private actor] was permitted to do up to that point,” Appellants’ Br. 56-67 (quoting *Black IV*, 107 F.4th at 430)—which, in the case of the Administrator, includes, *e.g.*, conducting an investigation to “audit[] [the industry participant’s] compliance with the Commission’s rules” and making “findings” that “show[] evidence of non-compliance with FCC rules,” *Big Bend*, 2025 WL 1915924, at *1 & n.11. Moreover, because “[a]ny party aggrieved by an action taken by the Administrator *** must first seek review from the Administrator” before seeking “review from the [FCC],” 47 C.F.R. § 54.719(a)-(b), the agency review may “not

come into play at all if the alleged rule violator, ‘instead of fighting the process, opts to settle,’” Appellants’ Br. 58 (quoting *Black IV*, 107 F.4th at 430). The Supreme Court’s finding that the FCC’s *de novo* review nevertheless subordinates Administrator actions tracks the “unanimous principle from the circuit decisions” concerning “the Maloney Act’s enforcement scheme”: “so long as the agency retains *de novo* review of a private entity’s enforcement proceedings, there is no unconstitutional delegation of legislative or enforcement power,” *Oklahoma*, 62 F.4th at 243 (Cole, J., concurring).

Similar real-world examples confirm that the FTC’s review of Authority decisions ensures that “in the relationship between the two, the Commission dominates.” *Consumers’ Rsch.*, 145 S. Ct. at 2508; *see, e.g.*, Order 3, *In re Parram*, No. 9424 (F.T.C. May 1, 2024) (“review[ing] the record ‘anew,’ as though the issue had not been heard before, and no decision had previously been rendered,” and reversing sanction Authority had imposed under Void Claim Rule);⁹ Order 6, *In re Peacock & Ceballos*, No. 9415 (F.T.C. Sept. 11, 2023) (reversing Authority’s crop-violation decision based on *de novo* determination that “the evidence fails to prove that Ceballos struck Sheriff Brown more than the 6 times on the hindquarters that are permitted under HISA Rule 2280(b)(1)”).¹⁰ Those examples also illustrate that

⁹ <https://tinyurl.com/f9afmxk3>.

¹⁰ <https://tinyurl.com/zfy7xe4n>.

the FTC may stay any sanction pending the agency's *de novo* review. See Order Granting Appellant's Request for Stay Pending Appeal, *In re Parram*, No. 9424, 2024 WL 168059 (F.T.C. Jan. 9, 2024); Order Granting Stay Application, *In re Peacock & Ceballos*, No. 9415 (F.T.C. July 3, 2023);¹¹ see also 16 C.F.R. § 1.148(b).

Appellants are wrong that “[t]he D.C. Circuit recently rejected a similar argument.” Br. 57. *Alpine* involved an as-applied (not facial) challenge to a unique FINRA expulsion order. The court's concern there was that FINRA's “expedited-hearing process” would not allow for meaningful SEC review of FINRA's decision “before it goes into effect and the expelled member's business collapses.” *Alpine*, 121 F.4th at 1328; see *id.* at 1330 (expressly “limit[ing]” opinion “to expulsion orders issued in expedited proceedings” under the “limited record” and then-existing rules). The D.C. Circuit explained that in less extreme circumstances, “the lack of pre-enforcement government review is unlikely to violate the Constitution because review can take place after FINRA's sanctions take effect[,] *** because many types of sanctions imposed by FINRA, short of expulsion, can be undone later.” *Id.* at 1330. Even with respect to the “corporate death penalty” at issue in that case, *id.* at 1340 (Walker, J., concurring in part and dissenting in part), the court went out of its way to signal that a different outcome would likely result if, for example, the SEC “lower[ed] its stay standard in expulsion cases” or future evidence “demonstrate[s]

¹¹ <https://tinyurl.com/2yvb2t4k>.

that [the challenger] can stay in business long enough for the SEC to complete its review of FINRA’s expedited expulsion order,” *id.* at 1330-1331. That reasoning would foreclose a facial challenge.

So too here. Even if the FTC’s stay procedures were ever inadequate in some enforcement proceeding involving the most extreme sanction available (a lifetime ban), *see* Appellants’ Br. 57, that “hypothetical fault[]” would “not justify invalidating [the Act] on its face,” *Rahimi*, 602 U.S. at 701 n.2. That the FTC may issue—and in fact has issued—stays allowing challenges to Authority decisions “to be fully considered before enforcement,” Order, *In re Calhoun*, No. 9430, 2024 WL 2724039, at *3 (F.T.C. May 21, 2024), dooms Appellants’ facial claim.

* * * * *

At bottom, Appellants are left fighting against the reality that their choice to litigate facially “comes at a cost.” *NetChoice*, 603 U.S. at 723. They depend on conjecture about what they see as the “[m]ost troubling[]” scenarios of potential enforcement, Br. 52; *see* Br. 43-45, 58-61, rather than “consider the circumstances in which [the Act’s enforcement] [i]s most likely to be constitutional,” *Rahimi*, 602 U.S. at 701. For example, a straightforward application of the FTC-approved crop rule—the basis of the vast majority of infractions since the Act’s inception—typically involves a steward’s nondiscretionary assessment of the number of times a jockey strikes a horse in a public race, according to an FTC-approved limit and

subject to the FTC's *de novo* review of the same video recording. In that scenario, there is no need to “launch an investigation into a horse owner” or “search his facilities,” much less to do so “outside the FTC’s discretion and control.” Appellants’ Br. 56-57 (alteration omitted) (quoting *Black IV*, 107 F.4th at 430). For most violations of rules under the Act, Appellants are “slaying a straw man.” *Rahimi*, 602 U.S. at 701.

Worse yet, Appellants’ “maximalist approach” urges “mere speculation” about provisions “never-before enforced.” *NetChoice*, 603 U.S. at 758, 761 (Thomas, J., concurring). Their focus on “Authority-run lawsuits” and the “investigative power[.]” to issue subpoenas, Br. 43-45, 61, concerns activities that not only have “not been exercised to *plaintiffs*’ detriment,” Br. 60 (emphasis added) (citation and alteration omitted), but that have never been exercised with respect to *anyone*, period. Appellants’ claim requires the Court to embrace their worst-case assumption that the Authority will, in some hypothetical scenario, “exercise[.] this power without any governmental oversight whatsoever.” Br. 43. But as this Court explained, “[t]he FTC’s ultimate authority over all rules promulgated under the Act, which would include any rules related to enforcement, offers a potent answer to this concern in the context of a facial challenge.” *Oklahoma*, 62 F.4th at 233. *Consumers’ Research* only reinforces that sound conclusion.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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September 15, 2025

CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 11,635 words, and thus complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5)-(7) and 6th Circuit Rule 32(b)(1).

/s/Pratik A. Shah

Pratik A. Shah

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2025, I served the foregoing brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

/s/Pratik A. Shah

Pratik A. Shah

DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), Appellees designate the following relevant district court documents in the electronic record:

Record Entry	Description	Page ID #
R.1	Complaint for a Declaratory Judgment and Injunctive Relief	2-50
R.53	First Amended Complaint for a Declaratory Judgment and Injunctive Relief	358-414
R.68	Motion to Dismiss and Brief in Support by Authority Defendants	493-595
R.70	Motion to Dismiss and Brief in Support by Federal Defendants	598-640
R.87	Plaintiffs' Combined Motion for Summary Judgment and Opposition to Defendants' Motions to Dismiss	849-956
R.98	Reply in Support of Plaintiffs' Motion for Summary Judgment	1133-1172
R.105	Memorandum Opinion and Order	1480-1512
R.106	Judgment	1513
R.109	Notice of Appeal	1518-1521