

Racing on the Emergency Docket

Client Alerts

October 30, 2024

By: Ian Heath Gershengorn, Anand Viswanathan

Many skeptics of the regulatory state root their arguments in separation of powers principles: Congress is tasked with lawmaking, the judiciary is tasked with interpreting the laws, and executive agencies cannot encroach on Congress or the judiciary's roles. In the wake of the Supreme Court's *Loper Bright* and *Relentless* decisions last term overturning *Chevron* deference—wherein the Court held that the 40-year-old doctrine deferring to agencies' interpretation of ambiguous laws contravened courts' role of interpreting laws—other doctrines of agency skepticism have percolated. One such doctrine, the private nondelegation doctrine, sits at the Supreme Court's doorstep.

The **nondelegation doctrine** is a principle restricting Congress from ceding its legislation power to other entities. A related but distinct principle, the **private non-delegation doctrine**, restricts the legislative branch from transferring certain powers to private actors. In short, “a private entity may aid a public federal entity that retains authority over the implementation of federal law,” but “if a private entity creates the law or retains full discretion over any regulations,” that exercise of federal power is unlawful. *Oklahoma v. United States*, 62 F.4th 221, 228–29 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024).

With these principles likely in mind, on October 28, 2024, the Supreme Court issued a preliminary stay of the Fifth Circuit's opinion in *National Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024) (*Nat'l Horsemen's II*), which struck down the enforcement mechanism for the Horseracing Integrity & Safety Authority (“Authority”), a private corporation created through the Horseracing Integrity and Safety Act of 2020 (“HISA”). This means the challenged law will remain in effect while the Court considers the pending cert petition.

Horseracing has been a part of American culture since the 1600s. See *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 873 (5th Cir. 2022) (*Nat'l Horsemen's I*). Unlike other sports though, there was no authority to regulate the industry, and despite its popularity, horseracing proved dangerous for human and horse alike. Against this backdrop, in 2020, Congress enacted HISA with broad bipartisan support. *Nat'l Horsemen's II*, 107 F.4th at 421. HISA created the Authority, a “private, independent, self-regulatory, nonprofit corporation,” 15 U.S.C. § 3054(a), to develop and implement “nationwide rules governing doping, medication control, and racetrack safety in the thoroughbred horseracing industry,” *Nat'l Horsemen's II*, 107 F.4th at 421 (citing 15 U.S.C. § 3054(a)). The statute empowers the Authority to enforce HISA by exercising subpoena and

investigatory authority, imposing civil sanctions, and filing civil actions seeking injunctions or enforcement of sanctions. HISA also instructs the Authority to contract enforcement of doping and medication rules to a private non-profit, here, the US Anti-Doping Agency.

The statute tasked the Federal Trade Commission with oversight over the Authority, requiring any proposed rules be submitted to the agency. The FTC would then engage in a “consistency review,” where it approves a proposed rule “consistent” with the HISA and “applicable rules approved by the [FTC].” *Id.* (quoting 15 U.S.C. § 3053(c)(2)). This initial version of the statute did not empower the FTC to reject a proposed rule based on disagreement with the Authority’s policy choices.

After the initial passage of the Act, multiple lawsuits challenged the law. In one case, a national horsemen’s association and Texas-based racetracks sued the Authority, arguing, among other things, that it was an unconstitutional delegation of both (i) legislative and (ii) executive authority to a private party. In 2022, the Fifth Circuit agreed with the challengers and struck down the law as an unlawful legislative delegation to a private actor, reasoning that the lack of meaningful FTC oversight doomed the law. *See generally Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 53 F.4th 869 (5th Cir. 2022). The court did not consider the merits of the delegation of executive authority. Shortly thereafter, Congress amended HISA to allow the FTC to “abrogate, add to, and modify” any rules. Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022). The plaintiffs then renewed their private non-delegation challenges.

So far, three circuits have considered whether the amended HISA violates the private nondelegation doctrine. All three agree that Congress fixed the legislative problem. *See Walmsley v. FTC*, No. 23-2687, 2024 WL 4248221, at *2 (8th Cir. Sept. 2024) (“We agree with the Sixth and Fifth Circuits that the Act’s rulemaking structure does not violate the private nondelegation doctrine.”). The amended HISA lawfully delegates rulemaking power to the Authority.

The courts diverged, however, on the question of whether, under the revised Act, the enforcement power of the HISA violates the private nondelegation doctrine. On one side, the Sixth Circuit, in an opinion authored by Chief Judge Sutton, rejected the challenge. Although the Authority’s “enforcement duties are extensive,” the Sixth Circuit held that the FTC has pervasive oversight and control. *Oklahoma*, 62 F.4th at 231; *see also Walmsley*, 2024 WL 4248221 (8th Cir. Sept. 2024). The FTC can issue rules to protect entities from overly broad subpoenas or provide a group with as many procedural protections as necessary. Perhaps most importantly, the FTC may reverse the Authority’s decision, just like with rulemaking.

The Fifth Circuit reached the opposite conclusion. It held that HISA still suffers constitutional deficiencies because it impermissibly delegates executive authority. According to the court, the Authority decides when to investigate an entity, whether to subpoena the entity’s records, whether to sanction the entity, and whether to sue for an injunction or an enforcement of the imposed sanction. *Nat’l Horsemen’s II*, 107 F.4th at 429. Therefore, it concluded the “inescapable

conclusion is that the Authority does not ‘function subordinately’ to the FTC when enforcing HISA.” *Id.* (quoting *Horsemen’s I*, 53 F.4th at 881).

Following the Fifth Circuit’s opinion, the Authority sought a stay of the Fifth Circuit’s mandate pending the filing and disposition of a writ of certiorari. It asserted that the Supreme Court will likely grant certiorari because of the circuit split, that there is a “fair prospect” the judgment will be reversed, and significant irreparable harm will ensue because the law already successfully regulates 100,000 industry participants. The Solicitor General filed a response in support of the application. She added three reasons why the Court should grant the stay: (1) there is a strong presumption to allow Acts of Congress to remain in force until the Supreme Court can assess their constitutionality; (2) the “Fifth Circuit contravened this Court’s precedents limiting facial challenges”; and (3) the contrary decisions of the Sixth and Eighth Circuits reinforce why a stay is needed.

Both parties, moreover, emphasized the “important comity concerns.” App. 28. The HISA rules do not actually govern any horseracing in the three states within the Fifth Circuit. Neither Texas nor Mississippi has a covered racetrack, and a different federal court order has left Louisiana races completely exempt. The Solicitor General, in her response, urged the Court not to countenance such “forum shopping.”

The Respondents urged the Court to deny the stay, largely repeating their claims in the Fifth Circuit: that the Act’s provisions were unconstitutional, that history aligns with the panel opinion, that no irreparable harm would ensue, and that the United States’s “demand for total deference falls flat.” Resp. Br. 29.

Ultimately, the Supreme Court granted the stay. Only Justice Ketanji Brown Jackson dissented from the grant. She said that intervention, in the emergency posture, was not warranted. A petition for a writ of certiorari is now pending before the Court. Given the stay and circuit split, there is a fair chance the Court will grant the cert petition and hear the case, possibly later this term. Although appellate stays sometimes provide insight into the Court’s leanings on the merits of a case, this stay provides little insight into the fate of the private non-delegation doctrine. Between the circuit split and the reality that the decision invalidating the law arose from a circuit devoid of horseracing governed by the changed law, various reasons other than the Court’s approval of the private non-delegation doctrine can explain the decision.

The Supreme Court’s 2023–2024 Term has substantially rewritten the rules that govern the administrative state. The reversal of *Chevron*, in conjunction with the Court’s recent decisions in *Jarkesy* and *Corner Post*, has placed significant constraints on rulemaking and injected significant uncertainty into the regulatory landscape. To best serve our clients, Jenner & Block launched its post-*Chevron* task force to bring together our diverse strengths across practices to address the pressing and novel questions that companies now face.

Related Attorneys



Ian Heath Gershengorn

Partner

igershengorn@jenner.com

+1 202 639 6869



Anand Viswanathan

Partner

aviswanathan@jenner.com

+1 202 639 6044

© 2026 Jenner & Block LLP. Attorney Advertising. Jenner & Block LLP is an Illinois Limited Liability Partnership including professional corporations. This publication, presentation, or event is not intended to provide legal advice but to provide information on legal matters and/or firm news of interest to our clients and colleagues. Readers or attendees should seek specific legal advice before taking any action with respect to matters mentioned in this publication or at this event. The attorney responsible for this communication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a similar outcome. Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our Privacy Notice. For further inquiries, please contact dataprotection@jenner.com.

Stay Informed

