No. 26-199

IN THE

Supreme Court of the United States

HORSERACING INTEGRITY AND SAFETY AUTHORITY, INCORPORATED, *et al.*,

Petitioners,

v.

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ALEXANDER VOLOKH, CATO INSTITUTE, AND COMPETITIVE ENTERPRISE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Alexander "Sasha" Volokh is a law professor at Emory University. He teaches constitutional law and administrative law, and has written extensively about nondelegation, including the so-called "private nondelegation doctrine." *E.g., The Myth of the Federal Private Nondelegation Doctrine*, 99 NOTRE DAME L. REV. 203 (2023); *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391 (2017); *The Shadow Debate over Private Nondelegation in* DOT v. Ass'n of American Railroads, 2014-2015 CATO SUP. CT. REV. 359. His work was cited in various opinions in *FCC v. Consumers' Research*. *See* 606 U.S. 656, 710 (2025) (Jackson, J., concurring) (citing his *Notre Dame Law Review* article); id. at 720 n.6 (Gorsuch, J., dissenting) (citing his *amicus* brief on behalf of the Reason Foundation).

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[1] Pursuant to Sup. Ct. R. 37.6, *amici* affirm that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, Counsel of Record for all parties were provided timely notice of *amici*'s intent to file this brief.

liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. This case is of central concern to Cato because it implicates the constitutional structures that secure our liberty.

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SUMMARY OF ARGUMENT

1. This case is obviously certworthy. The Horseracing Integrity and Safety Authority is an unaccountable agency exercising significant federal rulemaking, investigation, and enforcement authority, though its members are not politically appointed. There is a circuit split on the private nondelegation issue. A circuit court has struck down part of a federal statute. Parties from both sides, including the federal government, agree that certiorari is warranted.

However, this Court shouldn't merely grant certiorari on the private nondelegation issue. It should also grant certiorari on the Appointments Clause issue, because these two issues are closely related, and the Fifth Circuit reached the incorrect result on each one. Therefore, the Court shouldn't grant this petition without also granting Gulf Coast Racing's cross-petition, No. 26-332, which is the only petition that raises the Appointments Clause issue.

2. The Fifth Circuit was wrong that the Authority's enforcement power violates the "private nondelegation doctrine." There is no such doctrine. The idea that delegations to private parties are judged more strictly than delegations to public parties has no support in any holdings of this Court. Any decisions that seem to the contrary have either been misinterpreted or were based on other doctrines, like the Due Process Clause. And the lack of such a doctrine makes sense, because the nondelegation doctrine, rooted in Article I, sensibly asks whether Congress has ceded too much power, not who the recipient of such power is.

   If the Authority is considered private, the delegation to the Authority should be judged by the same standard as a delegation to a public agency.

3. However, the Fifth Circuit reached the partially right result, though for the wrong reason. Contrary to the Fifth Circuit's holding, exercises of power by

the Authority, whether rulemaking or enforcement power, violate the Appointments Clause, because its members are Officers of the United States who were not appointed under Article II.

That the Authority members are nominally private is unimportant. The statutory labeling of the Authority as private, and the fact that the Authority is organized as a private organization under state law, are constitutionally irrelevant; and in any event, Appointments Clause doctrine doesn't demand that an Officer formally be a public employee.

4. Even if public status were relevant to the Appointments Clause, the Fifth Circuit still erred in holding that the Authority isn't a state actor. This is an easy case for state action, because rulemaking, investigation, and enforcement of federal law are traditionally exclusive public functions. One easy way of deciding the case would be to hold that the Authority is public because it is a state actor, which would uncontroversially activate both the Appointments Clause and the traditional (public) nondelegation doctrine.

5. The difference between the "private nondelegation doctrine" and the Appointments Clause isn't just of academic interest.

   First, the doctrines rest on different theories. The nondelegation doctrine is *giver-focused*, asking whether Congress has given up too much power; the public-private question fits poorly with this concern. By contrast, the Appointments Clause is *recipient-focused*, asking, from a democratic accountability perspective, whether the recipient of major power has been validly authorized by the proper political process. The problem here fits more naturally with the Appointments Clause.

Second, the doctrines won't always produce the same results. When a private nondelegation doctrine finds private status, it would apparently invalidate *all* delegations of "government power" that aren't subordinate to a public agency. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 878 (5th Cir. 2022) (*Horsemen I*). By contrast, the Appointments Clause asks whether someone (public or private) is "exercising significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). An Appointments Clause approach turns on *how much* power the agent exercises, ignoring trivial cases and requiring political accountability for significant ones. This is sensible—otherwise, countless private delegations might be indiscriminately invalidated, from *qui tam* suits to private prison contracting to incorporation of private actuarial standards into healthcare regulation. Whether these are valid should depend on an inquiry into "significant authority."

6. Therefore, this Court should grant certiorari on the Appointments Clause question, which involves also granting Gulf Coast Racing's cross-petition, No. 26-332.

This Court could reach the right result by *only* considering the Appointments Clause, because the correct resolution of that issue (that the Authority wields power unconstitutionally) would correctly resolve the entire case. But because parties from both sides, including the federal government, are asking the Court to consider private nondelegation, and because that issue is obviously certworthy, *amici* ask that the private nondelegation and Appointments Clause issues be considered together.

ARGUMENT

I. This case is obviously certworthy, but the grand of certiorari should include the Appointments Clause question.

This case is certworthy for several reasons. First, there is a circuit split on whether the Horseracing Integrity and Safety Act violates the "private nondelegation doctrine." Second, the Fifth Circuit struck down part of a federal statute. Third, all parties, including the federal government, agree that this Court should grant certiorari. And fourth, this case raises important questions of federal law. But this case actually raises *two* important federal questions.

The first question is whether any so-called "private nondelegation doctrine" even exists. The Fifth Circuit said yes, and accordingly partially invalidated the delegation of enforcement power (but not rulemaking power) to the Authority. But, as argued in

Part II *infra*, no such doctrine exists. This Court has never recognized such a doctrine; on the contrary, this Court has repeatedly upheld delegations to private parties. The cases commonly thought to establish such a doctrine have been misinterpreted or arise under other doctrines. Nor should this Court now invent such a doctrine.

The second question is whether the members of the Authority comply with the Appointments Clause. As argued in Part III *infra*, they don't. The Horseracing Integrity and Safety Authority is an unaccountable agency exercising significant federal rulemaking, investigation, and enforcement authority, even though its members aren't politically appointed. The Fifth Circuit had the right instinct about the unconstitutionality of the Authority, but it located the problem in the wrong doctrine. The true problem is that the members of the Authority are Officers of the United States, and should have been appointed accordingly if they are to exercise significant federal power.

The Fifth Circuit wrongly held that only instrumentalities of the federal government are subject to the Appointments Clause, even though the true test is whether someone (public or private) exercises significant authority pursuant to federal law. Even then, as explained in Part IV *infra*, the Fifth Circuit could have saved its analysis by concluding that the Authority is a state actor because it exercises a traditionally exclusive public function. But the Fifth Circuit compounded its error by incorrectly applying the State Action Doctrine and determining that the Authority isn't a state actor.

The private delegation doctrine and the Appointments Clause are thus closely related in this case, and *the Fifth Circuit reached the wrong result on both issues*. It (wrongly) struck down *some* of the Authority's power under the private nondelegation doctrine, and then it (wrongly) rejected the challenge to *more* of the Authority's power under the Appointments Clause. As argued in Part V *infra*, this wasn't harmless; the Fifth Circuit's two errors don't cancel each other out. The two doctrines serve different purposes and can lead to different results, including in this very case. If this Court's grant of certiorari is limited to the private nondelegation issue, and if this Court agrees with this brief that such a doctrine doesn't exist, then it would reverse the Fifth Circuit and wrongly uphold *all* of the Authority's power—leaving in place the constitutional problem of an unaccountable agency. The only way to get the right result and preserve constitutional accountability is to reverse the Fifth Circuit on *both* issues.

II. There is no "private nondelegation doctrine."

The Fifth Circuit held that the Constitution bars delegations of governmental power to private bodies, and that at least some of the Authority's powers run afoul of such a principle. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 178 F.4th 224, 240 (5th Cir. 2026) (*Horsemen III*). It purported to find such a principle in two of this Court's precedents:

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

But this Court's precedents don't support any private nondelegation doctrine that is stricter than the ordinary public nondelegation doctrine. *See* Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 NOTRE DAME L. REV. 203, 229-33 (2023). The Authority's powers are indeed unconstitutional, but—as explained in Part III *infra*—the problem lies in the Appointments Clause, not in the nondelegation doctrine.

This Court has *never* invalidated a delegation to private parties under the nondelegation doctrine. On the contrary, it has endorsed such delegations multiple times. *See Butte City Water Co. v. Baker*, 196 U.S. 119 (1905); *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U.S. 281 (1908); *Currin v. Wallace*, 306 U.S. 1 (1939); *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939).

In *Rock Royal*, this Court simply upheld the delegation. *See* 307 U.S. at 578. In *Butte City Water*, this Court wrote that "Congress has power to delegate to a body of miners the making of additional regulations respecting [the] location [of mining claims]." 196 U.S. at 127. Two other times—in *St. Louis* and *Currin*—this Court went further, and upheld the delegation by explicitly analogizing it to a similar case involving delegation to the President or an executive official. The *St. Louis* Court upheld a delegation to the American Railway Association simply by appealing to the precedent of *Buttfield v. Stranahan*, 192 U.S. 470 (1904), which had upheld a similar delegation to the Secretary of the Treasury; this Court wrote that the public-delegation *Buttfield* case, "in principle, is completely in point." 210 U.S. at 287. And in *Currin*, this Court upheld a delegation to industry members by analogizing it to a delegation *to the President* of the power to set equalizing tariffs, which had been upheld in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928); *see Currin*, 306 U.S. at 16.

No later case has taken a contrary approach. Indeed, *Butte City Water* and *St. Louis* were explicitly cited in *Schechter Poultry* as examples of cases where private delegation was constitutional. 295 U.S. at 537 nn.14-15.

And this is the correct rule: because the nondelegation doctrine is rooted in the Article I Vesting Clause, the question is whether Congress has given away too much power. The focus is on *how much* power Congress has given away (i.e., whether the delegation is adequately constrained), not on *who* is the recipient of such power. Thus, though this Court's nondelegation doctrine cases have usually concerned executive officials or agencies, they have also concerned the judiciary, *see Mistretta v. United States*, 488 U.S. 361 (1989); Indian tribes, *see United States v. Mazurie*, 419 U.S. 544 (1975); and (as discussed above) private parties. Indeed, Congress's dynamic incorporation of state law in many areas is a sort of delegation to state legislatures, which, by altering their tort law or definitions of marriage, affect the federal government's sovereign immunity or federal taxpayers' liability. There are indeed constitutional problems with the Authority's rulemaking power, but those problems implicate the Appointments Clause, not the nondelegation doctrine.

Though the Fifth Circuit purported to rely on *Schechter Poultry* and *Carter Coal*, neither of these cases is on point. *See* Volokh, *supra*, at 233-36.

Schechter Poultry didn't involve any delegation to private parties: the only power involved was the President's power to adopt codes of fair competition (which private industries were merely allowed to propose). 295 U.S. at 521-22. In dictum, this Court denied that Congress could give unrestricted power to industry. *Id.* at 537. But then it struck down the challenged statute because it gave unrestricted power to the President. *Id.* at 537-42. So, if anything, *Schechter Poultry* stands for the rule that Congress can't give *anyone* unrestricted power, not for treating private and public delegations differently.

Carter Coal, in turn, is best characterized as a Due Process case: the problem there was that power to regulate wages and prices was delegated to self-interested groups of competitors. *Carter Coal* thus fits naturally into a line of cases stretching back to *Eubank v. Richmond*, 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), disapproving of coercive power being wielded by financially self-interested parties. (That Due Process concern is absent here: the Fifth Circuit correctly rejected the Due Process challenge, *see Horsemen III*, 178 F.4th at 248.) This Court has repeatedly declined to classify *Carter Coal* as a nondelegation doctrine case. *See Mistretta*, 488 U.S. at 373; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001); *cf. Synar v. United States*, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986) (Scalia, J.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986). And even if *Carter Coal* were considered a nondelegation doctrine case, its holding could be explained in conventional terms: because the delegation to industry was unrestricted, it would have been unconstitutional under the ordinary rule that delegations require an "intelligible principle," *Whitman*, 531 U.S. at 472.

Recently, in *FCC v. Consumers' Research*, 606 U.S. 656 (2025), this Court continued its tradition of *not* endorsing any private nondelegation doctrine. First, this Court characterized the challenge to the delegation from the FCC to the private Universal Service Administrative Company as being based on the "what is *commonly called* the private nondelegation doctrine." *Id.* at 692 (emphasis added). Then, this Court characterized the holding in "the leading case" of *Carter Coal* as being primarily based on the adversity of financial interest between the private regulator and the regulated parties (an issue absent here). Finally, this Court held that no such doctrine applied because the private party was "broadly subordinate" to the FCC, so there was no true delegation of power. *Id.* at 692-95. The Court's holding thus did not rest on the existence of a private nondelegation doctrine, and so the doctrine continues to have no support in this Court's holdings. Indeed, Justice Jackson "join[ed] the Court's opinion in full," even though she "express[ed] her skepticism that the private nondelegation doctrine . . . is a viable and independent doctrine in the first place." *Id.* at 710 (Jackson, J., concurring) (citing Volokh, *supra*).

III. The Authority's exercise of government power is unconstitutional because its members weren't appointed consistently with the Appointments Clause.

A. Whether the Appointments Clause applies is governed by a simple test.

In *Buckley*, 424 U.S. at 126, this Court held that Officers of the United States are those who "exercis[e] significant authority pursuant to the laws of the United States." Other cases establish that, to be an Officer, one must exercise such authority as a "continuing and permanent" (rather than "occasional and intermittent") matter. *See United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868); *United States v. Germaine*, 99 U.S. 508, 512 (1878). Officer status is significant because only Officers are subject to the Appointments Clause.

By this standard, the members of the Authority are plainly Officers. The Authority has rulemaking, investigatory, and enforcement power—core governmental powers that aren't available to ordinary citizens. 15 U.S.C. §§ 3054, 3057. The Authority's rules have not only binding force but also preemptive effect over state law. *Id.* § 3054(b). And the Authority is a continually existing organization, whose members may exercise their powers full-time.

A standing organization with such substantial powers is plainly "exercising significant authority pursuant to the laws of the United States." Any possible subordination of the Authority to the FTC affects, at most, whether the Authority members are *inferior* Officers, not whether they are Officers at all.

B. Whether the members of the Authority are formally part of the structure of the federal government is irrelevant.

The above factors—whether, as a "continuing and permanent" matter, one "exercis[es] significant authority pursuant to the laws of the United States"—don't depend on whether one is formally within the federal government. The Fifth Circuit was right that "the government [cannot] evade constitutional restrictions by mere labeling." *Horsemen III*, 178 F.4th at 250.

If actors formally outside the federal government couldn't count as Officers, some classic cases could have been radically simplified. Consider, for instance, *Auffmordt v. Hedden*, 137 U.S. 310 (1890), where an importer challenged the appointment of an expert merchant appraiser on the grounds that the appraiser should have been appointed as an Officer. This Court ruled that the appraiser wasn't an Officer and was thus exempt from Appointments Clause constraints, but it didn't simply rely on the fact that he wasn't a federal employee. *Id.* at 326. Rather, the Court focused on factors like the tenure, duration, compensation, and duties of the office, and particularly whether the appraiser's duties were "occasional and temporary" or "continuing and permanent." *Id.* at 327. None of that discussion would have been necessary if the Appointments Clause didn't apply to parties outside the federal government.

The Office of Legal Counsel has also taken this view. In a 2007 opinion, OLC stated that "it is not within Congress's power to exempt federal instrumentalities from . . . the Appointments Clause"; "Congress may not, for example, resort to the corporate form as an artifice to evade the solemn obligations of the doctrine of separation of powers." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 75 (2007) (cleaned up). A key element in whether one is an Officer is whether one exercises "delegated sovereign authority," which "one could define . . . as power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit. . . . [S]uch authority primarily involves the authority to administer, execute, or interpret the law," *id.* at 87, and generally includes "functions in which no mere private party would be authorized to engage," *id.* at 90.

On January 16, 2025, OLC issued a new opinion that modified the language of the previous test. *See The Test for Determining "Officer" Status Under the Appointments Clause*, 49 Op. O.L.C. __, Jan. 16, 2025.

OLC's rephrased approach considers whether an individual (1) occupies a continuing position that is part of the federal government for constitutional purposes, and (2) exercises significant authority pursuant to the laws of the United States. *Id.* at *2 (citing *Lucia v. SEC*, 585 U.S. 237, 245 (2018)).

On its face, the language about being "part of the federal government for constitutional purposes" seems to differ from OLC's previous test, which required that an Officer position (1) possess delegated sovereign authority of the federal government and (2) be "continuing." 31 Op. O.L.C. at 77. However, OLC wrote, there is "less disagreement than first appears" between its previous and current views. 49 Op. O.L.C. at *9. This is because nominally private entities can still be part of the federal government *for constitutional purposes*; this Court recognized as much in *DOT v. Ass'n of American Railroads*, 575 U.S. 43 (2015), when it held (applying *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995)) that Amtrak should be considered public for purposes of the nondelegation doctrine. "[W]hether a position is part of the federal government for constitutional purposes—such that the Appointments Clause applies—turns not on the label Congress assigns the position but rather on the functional considerations the Supreme Court identified in [cases like] *Lebron*." 49 Op. O.L.C. at *9.

Perhaps the difference between OLC's past and present views makes a difference when, say, Congress assigns a federal role to state officials, *see id.* at *11, but it makes little difference when Congress gives regulatory and enforcement powers to a nominally private entity. Thus, as OLC wrote in 2007 (and consistent with its analysis in 2025), "[a] person's status as an independent contractor does not per se provide an exemption from the Appointments Clause," though most contractors turn out to be exempt because they usually merely provide goods and services rather than wielding power, and "in most cases . . . their actions . . . have no legal effect on third parties or the Government absent subsequent sanction," 31 Op. O.L.C. at 96-98. Appointments Clause constraints do apply "in those rare cases where a mere contractor [*does*] exercise delegated sovereign authority (and [does] so on a continuing basis)." *Id.* at 98 (citing *United States v. Maurice*, 26 F. Cas. 1211, 1216-20 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Cir. Justice)). Likewise, whether someone is paid by the government isn't relevant to whether they are an Officer. *Id.* at 119.

It is true that this Court has occasionally characterized Officers as being "appointees," *Buckley*, 424 U.S. at 126, or implied that they are "functionaries," *id.* n.162; a recent opinion contrasted Officers with "'lesser functionaries' such as employees or contractors," *United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021). Even if these words clearly excluded private parties, the public-private question wasn't at issue in those cases. Most cases concern the Officer status of traditional government employees, and so statements assuming that Officers work for the government should be interpreted with that context in mind; anything those cases might say about private Officers is dictum. *See* Volokh, *supra*, at 240-47.

IV. If "state actor" status is a relevant factor here, it is plainly satisfied.

In considering whether the Authority is "part of the federal government for Appointments Clause purposes," the Fifth Circuit applied *Lebron*. In that case, this Court held that Amtrak was a state actor for purposes of constitutional rights; and in *Ass'n of American Railroads*, 575 U.S. at 54-55, this Court used *Lebron* to hold that Amtrak was public for purposes of the nondelegation doctrine. So the Fifth Circuit's view that *Lebron* was relevant was probably reasonable enough. Nonetheless, the Fifth Circuit was mistaken in its conclusion that the Authority isn't a state actor.

The Fifth Circuit wrongly assumed that the *Lebron* test was the only way that one could become a state actor. The State Action Doctrine contains many different paths to state action, and the *Lebron* path is only one of them. Here, the relevant test is whether the Authority performs a "traditionally exclusive public function." Under that test, the Authority is the quintessential example of a state actor, because its powers—investigation, enforcement, and regulation—are traditionally exclusive public functions. One easy way to resolve this case, then, is to hold that anyone with such governmental powers is necessarily a state actor subject to the Appointments Clause.

A. The *Lebron* test isn't the only possible way to be a state actor.

The State Action Doctrine implements the basic principle that "most rights secured by the Constitution are protected only against infringement by governments." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978). "If [constitutional rights are] not to be displaced," the ambit of the State Action Doctrine "cannot be a simple line between [government] and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if [the government] had caused it to be performed." *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001).

What are these "sometimes," when an individual's action counts as that of the government? The caselaw has distinguished a variety of different contexts. For instance, as this Court held in *Lebron*, 513 U.S. at 394-400, corporations (like Amtrak) count as "part of the government" if they are created by special law to further governmental objectives and are mostly directed by governmental appointees.

That test wouldn't cover the Authority, which wasn't created by federal law. But the Fifth Circuit wrongly suggested that *Lebron* is the *only* path to state action. *Horsemen III*, 178 F.4th at 250-51 ("The analysis guiding that inquiry comes from *Lebron*. . . . The Supreme Court and circuit courts have since used *Lebron's* analysis to discern whether corporations are part of the government for constitutional purposes.

Applying *Lebron*, we conclude that the Authority is not a federal instrumentality for purposes of the Appointments Clause.”).

A moment’s reflection suggests that the Fifth Circuit’s reasoning is implausible. If the Authority—an organization that can make regulations with the force of law—weren’t a state actor, it wouldn’t be bound by the First Amendment, the Due Process Clause, or most other constitutional rights. That would mean that the Authority could adopt an anti-doping rule discriminating against Democrats, or safety regulations treating Christians differently from Jews. Surely that can’t be true of rules with binding force. If private corporations incorporated under state law couldn’t be state actors, then private prison firms would be free to ignore even the limited constitutional rights that apply to public-prison inmates, *see Turner v. Safley*, 482 U.S. 78 (1987), or impose “atypical and significant hardship” on inmates without the protective procedures that the Due Process Clause requires in public prisons, *see Sandin v. Conner*, 515 U.S. 472, 484 (1995). But that suggestion is virtually self-refuting: private and public prisons are subject to identical substantive constitutional standards, even though private prison firms are private corporations. The reason, as the Circuit Courts have rightly recognized, is that private prison firms are state actors. *See, e.g., Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 460-61 (5th Cir. 2003).

Moreover, the Fifth Circuit’s suggestion—that the Authority isn’t a governmental entity because it wasn't created to further federal objectives and was incorporated under state law a few weeks before the federal statute investing it with power, *see Horsemen III*, 178 F.4th at 249-50—is in substantial tension with its own recognition that "deeming an entity 'private' does not settle whether it is legally part of the federal government[; o]therwise, the government could evade constitutional restrictions by mere labeling." *Id.* at 250. Surely the government can't evade constitutional restrictions by merely transferring its powers to someone else.

Indeed, the suggestion that *Lebron* is the exclusive path to state action is doctrinally incorrect: there are several ways for private parties to become state actors.

A private party's acts can be state action if the government is entwined in its management or control. *See Brentwood Acad.*, 531 U.S. at 296-303. Or if the private party jointly participates with government actors in some coercive activity. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941-42 (1982). Or if the private party performs an act under the coercive pressure or significant encouragement of the government. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170-71 (1970). Or if the government "insinuate[s] itself into a position of interdependence" with the private party. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). Or—this one is very important—if the private party performs a traditionally exclusive public function. *See, e.g., Marsh v. Alabama*, 326 U.S. 501 (1946).

These various tests are ones of inclusion, not exclusion: satisfying any single *one* is enough to make one a state actor.

B. The Authority exercises traditionally exclusive public functions.

And the relevant test is clear here: it's the "traditionally exclusive public function" test. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55 (1999). This Court has found state action in several cases where a private party has exercised "powers traditionally exclusively reserved to the [government]." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). For instance, formally private associations like political parties are state actors when they determine their candidates in party primaries because, "if heed is to be given to the realities of political life, [parties] are now agencies of the state." *Nixon v. Condon*, 286 U.S. 73, 84 (1932); *see also Terry v. Adams*, 345 U.S. 461, 468-70 (1953). As another example, a corporation engages in state action when it runs a municipality and performs the full range of municipal functions. *See Marsh*, 326 U.S. at 505-07.

This Court has been careful about expanding this category, especially when there's a strong tradition of private provision. Thus, schooling, *see Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); nursing care, *see Blum v. Yaretsky*, 457 U.S. 991, 1012-13 (1982); electric provision, *see Metro. Edison*, 419 U.S. at 352-53; debtor-creditor dispute settlement, *see Flagg Bros.*, 436 U.S. at 159-63; and workers' compensation benefits, *see Sullivan*, 526 U.S. at 55-57, aren't traditionally exclusive public functions.

But some functions clearly do satisfy this test. In *Metropolitan Edison*, this Court suggested that powers "traditionally associated with sovereignty, such as eminent domain," would qualify. 419 U.S. at 353. The Circuit Courts have therefore been correct to hold that private prison firms are state actors, *see, e.g., Rosborough*, 350 F.3d at 460-61. Similarly, in *Collins v. Yellen*, 594 U.S. 220, 253-54 (2021), this Court rejected a claim that the Fair Housing Finance Agency was a private party when it acted as a conservator or receiver, stressing the range of the FHFA's governmental powers.

Here, likewise, the Authority's powers—investigation, enforcement, and rulemaking—are quintessentially governmental. This is self-evidently state action. Thus, even if we assume that only state actors are subject to the Appointments Clause, this is plainly satisfied here.

V. The Fifth's Circuit's error on the private nondelegation doctrine doesn't cancel out its error on the Appointments Clause.

In response to the suggestion that its Appointments Clause holding would remove all accountability from the Authority, the Fifth Circuit replied that its private nondelegation doctrine holding took care of that problem:

> Gulf Coast argues that if *Lebron* is the test, then the federal government can simply vest all executive power in a private corporation and avoid the Appointments Clause. This argument ignores the role of the private nondelegation doctrine. The government cannot delegate core governmental powers to unsupervised private parties. A private entity can only act subordinately to an agency with authority and surveillance over it. The private nondelegation doctrine thus corrals any attempts to evade *Lebron* by giving unaccountable governmental power to a pre-existing private entity.

Horsemen III, 178 F.4th at 252-53 (cleaned up).

If the Fifth Circuit were right, its two errors would cancel out and be essentially harmless, and this brief's argument about the two doctrines would be merely academic. But this is incorrect. Observe what the Fifth Circuit did here. First, it rebuffed the private nondelegation challenge to the Authority's rulemaking authority on the ground that the Authority was adequately supervised by the FTC—even though the FTC's ability to disapprove the Authority's regulations is limited, and the FTC's ability to modify or repeal the Authority regulations requires the FTC to conduct an entirely new notice-and-comment regulation (with the Authority's regulation remaining on the books until that process is done). *Id.* at 234. The status quo—if the FTC simply does nothing—is that an Authority regulation goes into effect and stays in effect. But, because the Fifth Circuit relied on the FTC's (theoretical) oversight, it didn't even insist on the "intelligible principle" that it would have demanded if the Authority were public.

Next, it rebuffed the Appointments Clause challenge on the ground that the Authority was private—so we don't even get the basic accountability of presidential nomination and Senate confirmation (or the requirement, for inferior Officers, that Authority members be appointed by the President, the courts, or department heads). *Id.* at 253.

The Fifth Circuit may claim that its strict private nondelegation holding is enough to maintain the Authority's accountability despite its loose Appointments Clause holding, but the result in this very case shows that this assurance is hollow.

More generally, the two doctrines should be kept analytically distinct because they serve different purposes. The purpose of the nondelegation doctrine is to ensure that Congress doesn't give up too much power, and this concern applies no matter who the delegate is—executive agencies, Indian tribes, the judiciary, state governments, or private organizations. Provided Congress adequately narrows its delegation (to comply with the "intelligible principle" test or whatever other test might be adopted in the future), it should have the flexibility to select its choice of delegate.

The purpose of the Appointments Clause, on the other hand, is to ensure that nobody, whatever their status, can exercise "significant authority pursuant to the laws of the United States" without being properly appointed by the necessary officials. *Buckley*, 424 U.S. at 126. Provided Congress delegates significant authority, the recipient should be held to the requisite degree of accountability; alternatively, Congress may dispense with that accountability when delegating more trivial powers.

The Fifth Circuit's private nondelegation inquiry would apparently invalidate *any* exercise of power by non-subordinate private parties. But under the Appointments Clause, whether private prison firms, *qui tam* relators, or actuarial standard-setting associations are unconstitutional should (as with anyone else, public or private) depend on factors such as how much federal power they wield.

VI. This case is a good vehicle to review the Appointments Clause issue.

Therefore, this Court should grant certiorari on the Appointments Clause question, which involves granting Gulf Coast Racing's cross-petition, No. 26-332.

This Court could reach the right result by *only* considering the Appointments Clause, because the correct resolution of that issue (that the Authority wields power unconstitutionally) correctly resolves the entire case. But because parties from both sides, including the federal government, are asking the Court to consider private nondelegation, and because that issue is obviously certworthy, *amici* ask that the private nondelegation and Appointments Clause issues be decided together.

CONCLUSION

Therefore, this Court should grant certiorari, and the grant should include at least the Appointments Clause question raised in Gulf Coast Racing's cross-petition, No. 26-332.

Respectfully submitted,

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