No. 24-489

In the Supreme Court of the United States

GULF COAST RACING L.L.C., ET AL.,

PETITIONERS

v.

HORSERACING INTEGRITY AND SAFETY AUTHORITY, ET AL.,

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

REPLY BRIEF FOR PETITIONERS

ILAN WURMAN
UNIV. OF MINNESOTA LAW SCHOOL
229 S. 19th Ave.
Minneapolis, MN 55455

S. REEVES JORDAN
MAYNARD NEXSEN PC
1901 Sixth Ave. N.
Suite 1700
Birmingham, AL 35203

GREGORY P. SAPIRE
Counsel of Record
CARLOS R. SOLTERO
MAYNARD NEXSEN PC
2500 Bee Caves Road
Building 1, Suite 150
Austin, TX 78746
(512) 969-6540
gsapire@maynardnexsen.com

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6, Petitioners Gulf Coast Racing L.L.C., LRP Group, Limited, Valle de Los Tesoros, Limited, Global Gaming LSP, L.L.C., and Texas Horsemen's Partnership, L.L.P. (collectively, the "Gulf Coast Racing Plaintiffs") disclose the following:

1. Gulf Coast Racing L.L.C. has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

2. LRP Group, Limited has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

3. Valle de Los Tesoros, Limited has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

4. Global Gaming LSP, L.L.C. is 51% owned by Racing Partners of Texas, LLC, and 49% owned by Global Gaming Solutions, LLC. No publicly held company has a 10% or greater ownership interest in it.

5. Texas Horsemen's Partnership, L.L.P. has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

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1. Hoping to avoid this Court's review of the Appointments Clause issue, the Authority, for the first time, manufactures an Article III standing argument that it has not raised in any brief or filing at any stage of this multi-year litigation and that the federal parties do not join. Admittedly, the Authority argued in the District Court that the Gulf Coast Racing Plaintiffs did not have Article III standing to pursue their Seventh Amendment, Fourth Amendment, and Article III claims. ROA.5423-24. The Gulf Coast Racing Plaintiffs, in turn, agreed to abandon those claims before trial. Pet. App. 60a, 103a. And in the District Court and the Court of Appeals, the Authority argued the Gulf Coast Racing Plaintiffs lacked standing to pursue an anti-commandeering claim. ROA.5424-25; C.A. Doc. 114 at 55. The Fifth Circuit agreed with the Authority, *see* Pet. App. 42a-43a, and the Gulf Coast Racing Plaintiffs do not appeal that decision.

But now, altogether new in its brief in opposition to certiorari, the Authority argues that the Gulf Coast Racing Plaintiffs *also* lack Article III standing to pursue their *central* claim under the Appointments Clause because they are not subject to the Authority's rules. Although Article III standing cannot be waived, this Court should be skeptical of invocations of novel standing arguments as a last-ditch effort to avoid certiorari on an unfavorable question. This is late-stage jurisdictional gamesmanship of the kind that the courts have often, and rightly, admonished. *See, e.g.*, *Aves ex rel. Aves v. Shah*, 997 F.2d 762, 767 (10th Cir. 1993) ("while subject matter jurisdiction enjoys a special status," reminding counsel that "as an officer of the court, candor and honesty are not only expected, they are demanded").

In any event, no one could plausibly claim the Gulf Coast Racing Plaintiffs have no injury from the enactment of the Horseracing Integrity and Safety Act ("HISA") and the industry-wide operations of the Authority. Satisfying their threshold standing requirement under Article III of the U.S. Constitution requires showing only that the Gulf Coast Racing Plaintiffs have suffered some actual or threatened injury that can be fairly traced to HISA, and that is likely redressed by a favorable decision. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). They readily meet this test. Among other things, the Gulf Coast Racing Plaintiffs would like to be able to simulcast their races, with commensurately increased purses for participants, including the many members of the Texas Horsemen's Partnership (a plaintiff in this action). The only reason they cannot do so—and the reason they are losing millions of dollars related to simulcast revenue per racing season—is because of Texas's decision to respond to HISA and the Authority by prohibiting simulcasting in Texas. That is a direct injury "fairly traceable" to HISA's enactment.

More still, during the pendency of this litigation, undersigned counsel for the Gulf Coast Racing Plaintiffs, who hoped to simulcast their races without running afoul of Texas's desire to avoid the Authority's jurisdiction, asked counsel for the Authority whether the Authority would seek to enforce HISA against them if they reinitiated simulcasting. Counsel for the Authority advised the Gulf Coast Racing Plaintiffs that the Authority would seek to enjoin them from or penalize them for interstate simulcasting if they did not first submit to its regulatory authority. The Gulf Coast Racing Plaintiffs therefore have an injury—among other

things, they lose millions of dollars a year because they are unable to simulcast their races. *See* Gulf Coast Opp'n to Stay Appl. 28-29, *Horseracing Integrity & Safety Auth., Inc. v. Nat'l Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Sept. 30, 2024).

Additionally, if the Gulf Coast Racing Plaintiffs had sued Texas for not allowing simulcasting and won, they would then have been subject to the Authority's rules and would have had to turn back around and immediately sue the Authority. No matter which way one cuts it, the Gulf Coast Racing Plaintiffs have suffered actual injury by the enactment of HISA and by the Authority. To say here they have no injury would be to say they have no remedy for the loss of millions upon millions of dollars stemming directly from the enactment of an unconstitutional law. That cannot be right, which is perhaps why the Authority has not raised the issue until this eleventh hour and why the federal parties have not joined in the argument.

2. The Authority next argues against certiorari because, according to the Authority, there is no circuit split on the Appointments Clause question. As an initial matter, this Court has routinely granted certiorari in important cases where all the courts of appeals had reached the same result. *See, e.g.*, *Muscarello v. United States*, 524 U.S. 125, 131 (1998) (agreeing with unanimous view among courts of appeals that to "carry" a gun includes doing so in a locked glove compartment); *United States v. Feola*, 420 U.S. 671, 677 (1975) (addressing, despite "practical unanimity of the Courts of Appeals," whether offense required knowledge of victim's status as a federal officer); *see also, e.g.*, *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 472 (2008) (Thomas, J., dissenting) ("Unlike decisions of this

Court, decisions of the courts of appeals, even when unanimous, do not carry *stare decisis* weight, nor do they relieve us of our obligation independently to decide the merits of the question presented.").

Moreover, this Court's "opinions sometimes contradict the *unanimous* and longstanding interpretation of lower federal courts." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 621 (2001) (Scalia, J., concurring) (citing example). Simply put, here the Fifth Circuit meaningfully addressed the issue, which is entirely legal and constitutional in nature. The parties fully briefed and litigated it below—and they likewise will fully brief it to this Court. There is no reason to deny certiorari on the basis that there is no circuit split yet on the issue, certainly not where the relevant question may be dispositive of the issue on which all parties agree that the courts of appeals *have* split.

In any event, the Authority overlooks (or willfully disregards) the fact that the decision below—and the Sixth and Eighth Circuit decisions—do create a split not only with other circuits but with this Court's decisions. Namely, the Fifth Circuit's ruling creates a split with this Court's Appointments Clause jurisprudence. The Gulf Coast Racing Plaintiffs generally agree with the Authority's description of the private nondelegation doctrine: "[A]ll parties and courts across every private nondelegation challenge to HISA's rulemaking structure have expressly agreed that the outcome turns on whether the private entity is subordinate to the agency." Auth. Br. Opp. 13 (cleaned up). But the conflict this creates with this Court's Appointments Clause jurisprudence is obvious: The very test for the

private nondelegation doctrine is also the test for inferior officer status under the Appointments Clause. *See Edmond v. United States*, 520 U.S. 651, 663 (1997) (establishing test for inferior officer and noting "subordinate" officers were "inferior"); *United States v. Arthrex, Inc.*, 594 U.S. 1, 17-18 (2021) ("*Edmond* recognized the Appointments Clause as a significant structural safeguard that preserves political accountability through direction and supervision of subordinates.") (cleaned up). How can the very same test (subordination) lead to one conclusion in this case—the Authority's officers and directors may exercise government power without proper appointments—but lead to the opposite conclusion in other cases where these exact same individuals would have to be properly appointed as inferior officers? *See, e.g.*, *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. 237, 249 (2018) (holding a subordinate administrative law judge to be an inferior officer). To say that some individuals exercising ongoing and significant authority pursuant to statute are constitutional officers and other individuals exercising ongoing and significant authority pursuant to statute are not is to admit and acknowledge the very split the Authority incorrectly claims does not exist in this case.

3. On the merits, the Authority argues that in this Court's Appointments Clause cases, Congress had decided that the individuals in question were already part of the government, thereby making the Appointments Clause applicable. Auth. Br. Opp. 33-35. But Congress does not get to decide whether the Appointments Clause is applicable. That clause is applicable where an individual exercises ongoing and significant authority pursuant to a statute. It is the *statute* that creates the office; the prior natural or corporate existence of the person or entity executing that statute is

simply irrelevant. That the Authority so cavalierly makes an argument that would allow Congress to "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form," *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995), by relying on the very case that held Congress was prohibited from doing precisely that, is all the more reason this Court's review is warranted.

The federal parties' opposition on the merits fails for the same reason. Their brief argues that the Gulf Coast Racing Plaintiffs "acknowledge[]" that the Authority is "private," which "necessarily" leads to the conclusion that its directors are not "officers." SG Br. Opp. 13. But this argument misses the whole point. *Everyone* is private *until* they are appointed to execute statutory duties. No one would doubt that a statute providing "John Doe is hereby appointed to execute this statute" would violate the Appointments Clause. A statute providing "John Doe L.L.C. is hereby appointed to execute this statute" would be equally impermissible. And yet that is exactly what HISA does. If Congress cannot by statute specify which individual is to execute a statute, it cannot by statute specify which group of individuals is to execute a statute. Only the President and the officers whom he or she appoints are constitutionally permitted to execute the laws.

CONCLUSION

For all these reasons, the Court should grant the Gulf Coast Racing Plaintiffs' petition for a writ of certiorari.

Respectfully submitted.

ILAN WURMAN
UNIV. OF MINNESOTA
LAW SCHOOL
229 S. 19th Ave.
Minneapolis, MN 55455

S. REEVES JORDAN
MAYNARD NEXSEN PC
1901 Sixth Ave. N.
Suite 1700
Birmingham, AL 35203

GREGORY P. SAPIRE
Counsel of Record
CARLOS R. SOLTERO
MAYNARD NEXSEN PC
2500 Bee Caves Road
Building 1, Suite 150
Austin, TX 78746
(512) 969-6540
gsapire@maynardnexsen.com

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