No. 24-433

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

AMICI CURIAE BRIEF OF REASON FOUNDATION AND GOLDWATER INSTITUTE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Page

Page

Constitutional Provisions

Statutes

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties were provided timely notice of *amici*'s intent to file this brief.

SUMMARY OF ARGUMENT

1. This case is obviously certworthy. The Horseracing Integrity and Safety Authority is an unaccountable agency that exercises significant federal rulemaking, investigation, and enforcement authority, even though its members haven't been politically appointed and even though it doesn't have meaningful oversight by any other agency. 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 a grant of 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 of these issues.

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 of power to private parties are judged by a stricter standard 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 in fact based on other doctrines, like the Due Process Clause. And the lack of such a doctrine makes sense, because the nondelegation doctrine, which is rooted in Article I, sensibly asks whether Congress has given up too much power, not who the recipient of such power is.

If the Authority is considered a private organization, the delegation to the Authority should be judged by the same "intelligible principle" standard as a delegation to a public agency—and the delegation here clearly passes that test.

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 the members of the Authority are Officers of the United States but weren't appointed as Officers should be under Article II.

   That the Authority members are nominally private is unimportant for Officer status. 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—and even if the Fifth Circuit were correct to assume that "state actor" status under the State Action Doctrine is relevant here—the Fifth Circuit still erred in holding that the Authority isn't a state actor. On the contrary, this is an easy case for state action, because rulemaking, investigation, and enforcement of federal law are traditionally exclusive public functions. Therefore, an alternative 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 are motivated by 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 issue.

Second, the doctrines won't always produce the same results. A private nondelegation doctrine requires tough judgment calls about whether an organization is public or private, so the results will depend on the vagaries of public-private doctrines. And when the doctrine finds private status, it would apparently invalidate *all* delegations of "government power" that aren't subordinate to a public agency. *Horsemen's I*, 53 F.4th at 878. By contrast, the Appointments Clause asks whether someone (public or private) is "exercising significant authority pursuant to the laws of the United States." Thus, an Appointments Clause approach will turn on *how much* power the agent exercises, ignoring trivial cases and requiring political accountability for significant ones. This is a sensible approach—otherwise, countless private

delegations could 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.

   This Court could reach the right result by *only* considering the Appointments Clause issue, 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 the private nondelegation issue, and because that issue is obviously certworthy, *amici* ask that the private nondelegation and Appointments Clause issues be considered as linked and decided together.

   The Sixth Circuit case (*Oklahoma v. United States*, No. 23-402) didn't consider the Appointments Clause at all, so it would not be a good vehicle for a grant of certiorari. By contrast, the Eighth Circuit case (*Walmsley v. FTC*, No. 24-420) did consider the Appointments Clause, essentially incorporating the Fifth Circuit's analysis (though the Appointments Clause issue was not part of the Questions Presented in the petition in that case). Therefore, this Court should grant certiorari—making sure that the grant includes the Appointments Clause question—in this case or in the Eighth Circuit case (or in both cases together).

ARGUMENT

I. This case is obviously certworthy, but the grant 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 Authority 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. The parties' petitions already adequately address this issue.

But this case actually raises *two* important questions of federal law. The first question is whether any so-called "private nondelegation doctrine" even exists. The Fifth Circuit held that there is such a doctrine, and accordingly partially struck down the delegation of power to the Authority (the delegation of enforcement power, not the delegation of rulemaking power). But, as this brief argues 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, and arise straightforwardly under other doctrines. Nor would it be a good idea for this Court to now invent such a doctrine.

The second question is whether the members of the Authority comply with the Appointments Clause. As this brief argues in Part III *infra*, they don't. The Horseracing

Integrity and Safety Authority is an unaccountable agency that exercises significant federal rulemaking, investigation, and enforcement authority, even though its members haven't been politically appointed and even though it doesn't have meaningful oversight by any other agency. The Fifth Circuit had the right basic idea about the unconstitutionality of the Authority, but it located the problem in the wrong constitutional 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 this brief explains 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.

It is thus clear that the private delegation doctrine and the Appointments Clause are closely related in the context of this case, *because 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 this brief argues in Part V *infra*, this wasn't harmless; the Fifth Circuit's errors on the two doctrines

don't cancel each other out. The two doctrines serve different purposes and will in general 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 basic constitutional problem of a politically 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*, 53 F.4th 869, 880-90 (5th Cir. 2022) (*Horsemen I*); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 423-35 (5th Cir. 2024). 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 nondelegation doctrine that applies to federal agencies. *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 upheld such delegations against nondelegation challenges at least four times: in *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905), *St. Louis, Iron Mountain, & Southern Railway Co. v. Taylor*, 210 U.S. 281 (1908), *Currin v. Wallace*, 306 U.S. 1 (1939), and *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 553 (1939).

In two of those cases—*Butte City Water* and *Rock Royal*—this Court simply upheld the delegation. Two other times—in *St. Louis Railway* and *Currin*—this Court went even further, and upheld the delegation by explicitly analogizing it to a similar case where the delegation was to the President or an executive official. The *St. Louis Railway* 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 delegation of tea-inspecting authority to the Secretary of the Treasury; this Court wrote that the public-delegation *Buttfield* case, "in principle, is completely in point." *St. Louis Railway*, 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 Railway* were explicitly cited in *Schechter Poultry* as examples of cases where private delegation would be constitutional.

And this is the correct rule: because the nondelegation doctrine is rooted in Article I (in particular, the 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*, 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 scope of the federal government's sovereign immunity or the amount of federal taxpayers' liability. There are indeed constitutional problems with the Authority's rulemaking power, but those problems are properly located in the Appointments Clause, not in 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 in the case was the President's power to adopt codes of fair competition (which private industries were merely allowed to propose). In dictum, this Court denied that Congress could give unrestricted power to industry. 295 U.S. at 537. But then it went on to strike down the challenged statute on the grounds that 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; it doesn't support any rule that would treat private and public delegations differently.

As for *Carter Coal*, that case is most properly 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. City of 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, *Horsemen II*, 107 F.4th at 435-36.) This Court has repeatedly declined to classify *Carter Coal* as a nondelegation doctrine case. *See Mistretta v. United States*, 488 U.S. 361, 373 (1989); *Whitman v. Am. Trucking Ass'ns, Inc.*, 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 very conventional terms: Because the delegation to industry was unrestricted, it would have been unconstitutional under the ordinary rule that delegations require an "intelligible principle," *id.* at 472.

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

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

In *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), 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 (1867); *United States v. Germaine*, 99 U.S. 508, 512 (1879). Officer status is significant, because only Officers are subject to the requirements of 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.

It is simply inconceivable that a standing organization with such substantial powers isn't "exercising significant authority pursuant to the laws of the United States." If the members of the Authority were federal employees, this result wouldn't be remotely controversial. 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 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 II*, 107 F.4th at 437.

If actors formally outside the federal government couldn't count as Officers—and could thus be granted governmental powers exempt from Appointments Clause requirements—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. 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." None of that discussion would have been necessary if the Appointments Clause simply didn't apply to parties outside the federal governmental structure.

The Office of Legal Counsel, after canvassing caselaw and voluminous historical evidence, has also taken the same view. "[I]t 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. OLC 73, at *2 (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 *11, and generally includes "functions in which no mere private party would be authorized to engage," *id.* at *14.

"A person's status as an independent contractor," the OLC continued, "does not per se provide an exemption from the Appointments Clause," *id.* at *18, 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," *id.* at *19. Appointments Clause constraints, OLC stressed, do apply "in those rare cases where a mere contractor *did* exercise delegated sovereign authority (and did so on a continuing basis)." *Id.* at *20 (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 *36-*38.

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.* at 126 n.162; a recent opinion contrasted Officers with "'lesser functionaries' such as employees or contractors," *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021). Even if these words clearly excluded private parties, the public-private question wasn't at issue in those cases. The vast

majority of cases concern the Officer status of traditional governmental employees, and so statements assuming that Officers formally 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 assumed that this was the same question as whether the Authority is "part of the federal government for constitutional purposes" more generally. *Horsemen II*, 107 F.4th at 437. By relying on *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), a case about the State Action Doctrine, the Fifth Circuit assumed that the State Action Doctrine and the Appointments Clause incorporate the same public/private distinction, so that an organization that isn't a state actor for purposes of constitutional rights also isn't subject to the Appointments Clause.

Even if the Appointments Clause did incorporate a public/private distinction, it wouldn't be obvious that this distinction is coextensive with that in the State Action Doctrine. But even if the Fifth Circuit was correct in that assumption, it 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 an entity could become a state actor. The State Action Doctrine contains many different

paths by which a person or entity can be a state actor, 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. Thus, one easy way to resolve this case would be to rule that anyone with such governmental powers is necessarily a state actor and is thus subject to the Appointments Clause.

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

The State Action Doctrine, which implements the basic principle that "most rights secured by the Constitution are protected only against infringement by governments," is fundamental in constitutional law. *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. Athletic 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 II*, 107 F.4th at 437-38 ("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 would be able to adopt an anti-doping rule that discriminated against Democrats or racetrack safety regulations that applied differently to Christians than to Jews. Surely that can't be the case for rules that have binding force on the regulated community. If private corporations incorporated under state law couldn't be state actors, then private prison firms would be free to ignore even the limited version of 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 sorts of protective procedures that the Due Process Clause requires in public prisons, *see Sandin v. Conner*, 515 U.S. 472, 484 (1995). But such a suggestion is virtually self-refuting: Of course,

private prisons 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, and is thus exempt from the Appointments Clause, because it wasn't created to further federal objectives and was incorporated under state law prior to the federal statute investing it with power, *see Horsemen II*, 107 F.4th at 438—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 437. Surely the government can't evade constitutional restrictions by merely transferring its powers to someone else.

And indeed, the suggestion that the *Lebron* path to state action is exclusive does turn out to be doctrinally incorrect. There are actually several ways for private parties to become state actors.

A private party's acts can also 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., Inc.*, 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).

And these various tests are tests of inclusion, not of exclusion: All it takes to be a state actor is to satisfy *any one* of these tests.

2. 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 engaged in state action when they determine their candidates in party primaries—thus controlling a particular pathway to ballot access—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 v. Alabama*, 326 U.S. 501, 505-07 (1946).

This Court has been careful about expanding this category, especially when there is a strong tradition of

certain services being provided by the private sector. Thus, schooling isn't a traditionally exclusive public function, *see Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); neither is nursing care, *see Blum v. Yaretsky*, 457 U.S. 991, 1012-13 (1982); neither is the provision of electricity, *see Metro. Edison*, 419 U.S. at 352-53; neither is the settlement of debtor-creditor disputes, *see Flagg Bros.*, 436 U.S. at 159-63; and neither is the provision of workers' compensation benefits, *see Sullivan*, 526 U.S. at 55-57.

But clearly, certain functions *do* satisfy this test. In *Metro. Edison*, this Court suggested that powers "traditionally associated with sovereignty, such as eminent domain," would qualify, 419 U.S. at 353, which is why (as noted above) the Circuit Courts have surely 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 (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 governmental powers that the FHFA exercised. *Id.* at 253-54.

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

V. The Fifth 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 II, 107 F.4th at 440 (cleaned up).

If the Fifth Circuit were right about this, its two errors would cancel each other out, in a sense, and so would be essentially harmless; perhaps, then, this brief's argument about the two doctrines would be of merely academic interest. 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's 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). The status quo—if the FTC does nothing,

perhaps because it has too much else on its agenda—is that an Authority regulation goes into effect and stays in effect. Possibly temporarily, possibly permanently. 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, as a private organization, was exempt from those requirements—so we don't even get the basic accountability that consists of the President's and the Senate's approval of the Authority's head (or the requirement, for inferior officers, that the Authority members be appointed by the President, the courts, or the head of a department).

The Fifth Circuit may well 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 is valid no matter who the delegate is—whether Congress delegates to 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 a delegate of its choice.

The purpose of the Appointments Clause, on the other hand, is to ensure that nobody, whatever their status, can exercise "significant authority under the laws of the United States" without being personally approved by the necessary federal officials. Provided Congress delegates that sort of significant authority, the recipient of that authority should be held to the requisite degree of accountability; alternatively, Congress should be able to dispense with that degree of accountability if it chooses to delegate some more trivial power.

The Fifth Circuit's private nondelegation inquiry would apparently invalidate *any* exercise of power by non-subordinate private parties; in this era of mixed public-private associations, that would require a threshold inquiry that depends on the vagaries of public-private doctrines like the State Action Doctrine. But under an Appointments Clause analysis, whether private prison firms, *qui tam* relators, or actuarial standard-setting associations are unconstitutional should (as with anyone else, public or private) properly depend on 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.

This Court could reach the right result by *only* considering the Appointments Clause issue, 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 the private nondelegation issue, and because that issue is obviously certworthy, *amici* ask that the private nondelegation and Appointments Clause issues be considered as linked and decided together.

The Sixth Circuit case (*Oklahoma v. United States*, No. 23-402) didn't consider the Appointments Clause at all, so it would not be a good vehicle for a grant of certiorari. By contrast, the Eighth Circuit case (*Walmsley v. FTC*, No. 24-420) did consider the Appointments Clause, essentially incorporating the Fifth Circuit's analysis (though the Appointments Clause issue is not part of the Questions Presented in the petition in that case). Therefore, this Court should grant certiorari—making sure that the grant includes the Appointments Clause question—in this case or in the Eighth Circuit case (or in both cases together).

CONCLUSION

For all these reasons, this Court should grant certiorari, and the grant should include the Appointments Clause question.

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