

Nos. 26-199, 26-201

In the Supreme Court of the United States

HORSERACING INTEGRITY AND SAFETY AUTHORITY,
INCORPORATED, ET AL.

v.

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE
ASSOCIATION, ET AL.

and

FEDERAL TRADE COMMISSION, ET AL.

v.

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE
ASSOCIATION, ET AL.

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

**GULF COAST RACING PLAINTIFFS'
CONSOLIDATED BRIEF IN RESPONSE**

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RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6, 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, L.L.C., and 49% owned by Global Gaming Solutions, L.L.C. 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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INTRODUCTION

The Gulf Coast Racing Plaintiffs—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.—respectfully submit this consolidated brief in response to the petitions for writ of certiorari filed by the Horseracing Integrity and Safety Authority, Inc. (the “Authority”), No. 26-199, and the Federal Trade Commission (the “FTC”), No. 26-201.

The Gulf Coast Racing Plaintiffs agree that review is warranted in this case. They have independently filed a cross-petition for review that presents the question whether the Horseracing Integrity and Safety Act (“HISA”) violates the Appointments Clause by vesting exclusive regulatory and enforcement authority in what effectively is an administrative agency masquerading as a private corporation. The Gulf Coast Racing Plaintiffs alone preserved that issue, and the Fifth Circuit expressly decided it. Because HISA also raises questions under the private-nondelegation doctrine, this Court should clarify how the doctrines relate. The Gulf Coast Racing Plaintiffs therefore acquiesce in the Authority and FTC petitions, but respectfully urge the Court to also grant their petition that raises the Appointments Clause question.

The questions are doctrinally distinct but structurally inseparable. If the Authority is private, its power to investigate, subpoena, search, charge, adjudicate, sanction, and sue must remain subordinate to a federal agency. If its Directors instead exercise federal power as officers of the United States, the Appointments Clause governs their selection; their subordination would then be relevant only to the question of

whether they were inferior as opposed to principal officers. Reviewing only the private-nondelegation question would decide one side of that constitutional divide while leaving the other for another round of litigation.

The Authority and FTC petitions further identify a direct and mature circuit conflict over the facial constitutionality of a federal statute. The Fifth Circuit has twice held HISA’s enforcement provisions unconstitutional under the private-nondelegation doctrine. *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 107 F.4th 415 (5th Cir. 2024), *vacated and remanded*, 145 S. Ct. 2837 (2025); *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 178 F.4th 224 (5th Cir. 2026), Pet. App. 1a-53a.¹ The Sixth Circuit has twice sustained the same provisions, including after this Court’s decision in *FCC v. Consumers’ Research*, 606 U.S. 656 (2025). *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), *vacated and remanded*, 145 S. Ct. 2836 (2025); *Oklahoma v. United States*, 163 F.4th 294 (6th Cir. 2025). That acknowledged conflict warrants review.

On that enforcement question, the Fifth Circuit was correct. FTC review of sanctions at the end of an enforcement proceeding does not supervise the Authority’s earlier investigations, subpoenas, searches, charging decisions, adjudications, settlements, or suits for injunctive relief. The Commission has specifically disclaimed such supervision: “[T]he Commission does not actively take part in the Authority’s investigative and enforcement decisions. . . . [T]he Authority

¹ References to “Pet. App.” in this consolidated brief in response are to the Authority’s petition for a writ of certiorari in No. 26-199 and the accompanying appendix.

makes its own initial determination whether covered persons violated the rules, whether sanctions are warranted, and which sanctions are warranted—all without Commission input or involvement.” *In re Philip Serpe*, Docket No. 9441 (F.T.C. June 30, 2026), slip op. at 10-11. Nor may the FTC use rulemaking to revise Congress’s statutory allocation of those functions. Those features distinguish HISA from the advisory arrangement upheld in *Consumers’ Research* and from the SEC’s much broader authority over FINRA.

The Gulf Coast Racing Plaintiffs also acquiesce in the related cross-petition filed by the National Horsemen’s Benevolent and Protective Association and the petition filed by the State of Texas and the Texas Racing Commission arguing that the FTC insufficiently supervises the Authority’s legislative rulemaking. At a minimum, the Court should grant the Gulf Coast Racing Plaintiffs’ cross-petition in No. 26-332 as a companion to Nos. 26-199 and 26-201.

ARGUMENT

I. THE COURT SHOULD GRANT THE AUTHORITY AND FTC PETITIONS ALONG WITH GULF COAST’S CROSS- PETITION.

The opening petitions ask only whether HISA’s enforcement provisions authorize a private entity to exercise enforcement authority consistently with the private-nondelegation doctrine. The FTC’s question describes the Authority as a private entity that “assist[s]” the FTC. FTC Pet. i. That formulation assumes the very classification and relationship that the Gulf Coast Racing Plaintiffs dispute. It also omits the

separate adverse judgment on the Gulf Coast Racing Plaintiffs' Appointments Clause claim.

The Gulf Coast Racing Plaintiffs' cross-petition supplies the necessary vehicle to review that judgment. The Gulf Coast Racing Plaintiffs pleaded the Appointments Clause claim, litigated it through final judgment, and obtained an express ruling from the Fifth Circuit. No factual or procedural obstacle prevents review. And because the claim concerns the same entity, the same statutory powers, and the same judgment as the private-nondelegation petitions, the questions should be considered together.

The Fifth Circuit itself recognized the logical relationship: "For constitutional purposes, an entity is either governmental or not." Pet. App. 45a. The court treated the Gulf Coast Racing Plaintiffs' Appointments Clause theory and the other plaintiffs' private-nondelegation theory as mutually exclusive alternatives. *Id.* The Court therefore should not decide whether the Authority is adequately supervised as a private actor without also deciding whether the nature and continuity of its federal authority make its Directors officers of the United States.

The Appointments Clause applies to persons who occupy a continuing federal position and exercise significant authority under federal law. *Lucia v. SEC*, 585 U.S. 237, 245-246 (2018); *Buckley v. Valeo*, 424 U.S. 1, 125-126 (1976) (per curiam). The Authority exists to implement a federal statute and participates in creating and enforcing nationwide rules carrying the force of federal law. Its Directors oversee that work. Yet, as the Fifth Circuit explained, the Directors are appointed by the Authority itself after selection by its

own nominating committee. Pet. App. 44a n.25 (citing 15 U.S.C. § 3052(d)(3)). They are not appointed by the President, a court of law, or the head of a department.

The Fifth Circuit nevertheless rejected the Gulf Coast Racing Plaintiffs' claim under *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), because it concluded that the federal government does not exercise the control necessary to treat the Authority as a governmental entity. Pet. App. 46a-52a. But *Lebron* addressed whether Amtrak—which (at the time) exercised no governmental power and to which the Appointments Clause clearly did not apply—was *nevertheless* a governmental actor for purposes of the individual-rights provisions of the Constitution because it was created by the government to pursue governmental objectives in an efficient national passenger train service. 513 U.S. at 394-399. The Court in *Lebron* simply did not address one way or another whether a purportedly private corporation's officers might be *officers of the United States* if they exercise significant authority pursuant to the laws.

The Fifth Circuit also addressed the Office of Legal Counsel's conclusion—consistent with the position of the Gulf Coast Racing Plaintiffs—that a person's formal status as a government employee is not dispositive under the Appointments Clause. The court believed, however, that to the extent the OLC analysis suggests an alternative to *Lebron*, adopting that alternative is something “only the Supreme Court could act upon.” Pet. App. 51a n.29. The Gulf Coast Racing

Plaintiffs' cross-petition squarely asks this Court to resolve that question.²

Consumers' Research underscores that the issue remains open. Justice Gorsuch noted that one might ask whether the private administrator's leaders in that case were officers of the United States and, if so, whether their role complied with the Appointments Clause. 606 U.S. at 720 n.6 (Gorsuch, J., dissenting). That issue was not before the Court there. The Gulf Coast Racing Plaintiffs preserved it here.

Granting the Gulf Coast Racing Plaintiffs' cross-petition would allow the Court to address both constitutional frameworks in one proceeding and to provide durable guidance for hybrid regulatory bodies. Denying it while granting the Authority and FTC petitions would risk resolving only half the dispute and returning the parties to the lower courts over the same statutory structure. The Court thus should grant the Gulf Coast Racing Plaintiffs' cross-petition and consolidate it with Nos. 26-199 and 26-201 for briefing and argument.

II. THE ACKNOWLEDGED CIRCUIT SPLIT WARRANTS REVIEW.

All parties agree that the Court should resolve the conflict between the Fifth and Sixth Circuits. In 2024, the Fifth Circuit held that HISA's enforcement provisions facially violate the private-nondelegation doctrine because the statute assigns essential

² The Gulf Coast Racing Plaintiffs' view of the matter, as explained in their cross-petition, is that the private-nondelegation doctrine applies only where officer status is otherwise absent, usually because the individual in question exercises only episodic duties and thus does not qualify as an officer.

enforcement functions to private actors without adequate FTC control. 107 F.4th at 427-435. This Court granted certiorari, vacated the judgment, and remanded for reconsideration in light of *Consumers' Research*. 145 S. Ct. 2837 (2025).

On remand, the Fifth Circuit again held the provisions unconstitutional. It explained that the private administrator in *Consumers' Research* performed accounting and advisory tasks whose work had no legal or practical effect unless and until the FCC approved it. Pet. App. 39a-40a (citing 606 U.S. at 693-695). The Authority, by contrast, may undertake intrusive enforcement actions—including but not limited to searches and seizures—without the FTC's prior approval and, for several of those actions, without any FTC review at all. Pet. App. 40a-41a.

The Sixth Circuit reached the opposite result. It relied on the FTC's de novo review of sanctions and the Commission's general rulemaking authority to conclude that the Authority remains subordinate to the FTC. *Oklahoma*, 163 F.4th at 310-312. The conflict thus persists after both courts considered the same statutory text and the same intervening decision of this Court.

Uniformity is especially important here. HISA establishes a nationwide regulatory regime for an industry operating across the country. The same enforcement provisions cannot be both facially valid in one circuit and facially invalid in another. Indeed, in the Gulf Coast Racing Plaintiffs' view, the Appointments Clause solves the conflict because neither the Fifth Circuit nor the Sixth Circuit had to reach private non-delegation so long as the Authority's Directors are

indeed officers. Thus, the Court should grant all the petitions—including the Gulf Coast Racing Plaintiffs’ cross-petition—and resolve the conflict.

III. THE FIFTH CIRCUIT’S ENFORCEMENT HOLDING IS CORRECT.

Although the Gulf Coast Racing Plaintiffs acquiesce in certiorari, the Fifth Circuit’s judgment as to the Authority’s enforcement powers should be affirmed. Even under the private-nondelegation doctrine, *Consumers’ Research* permits a private entity to assist a federal agency only when the private entity functions subordinately and remains subject to the agency’s authority and surveillance. 606 U.S. at 692 (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). HISA’s enforcement scheme does not satisfy that standard.

The Authority and its enforcement affiliate may investigate suspected violations, issue subpoenas, conduct searches and inspections, initiate charges, adjudicate disputes, impose sanctions, and settle cases. 15 U.S.C. §§ 3054(c)-(h), 3055(c), 3057. The Authority also may bring a civil action to enjoin a violation without any FTC role before or after suit. § 3054(j). Those are exercises of enforcement discretion, not recommendations awaiting an agency’s independent decision.

The FTC’s de novo review of sanctions does not supervise the steps that precede a sanction. Before Commission review is available, the enforcement apparatus may investigate, subpoena, search, charge, adjudicate, and impose a penalty; penalties are not automatically stayed pending review. *See* 15 U.S.C. § 3058; 16 C.F.R. § 1.148(a). “[T]he Commission does not

actively take part in the Authority’s investigative and enforcement decisions. . . . [T]he Authority makes its own initial determination whether covered persons violated the rules, whether sanctions are warranted, and which sanctions are warranted—all without Commission input or involvement.” *In re Philip Serpe, supra*, at 10-11. And if a respondent settles, no FTC review occurs. The Fifth Circuit correctly concluded that this back-end review comes too late to supply authority and surveillance over the entire enforcement process. Pet. App. 24a-27a, 40a n.22.

The opening petitions’ use of the word “assist” does not alter that statutory allocation. In *Consumers’ Research*, the private administrator supplied projections that had no legal or practical effect until the FCC reviewed and approved them; the FCC retained the final say at every relevant stage. 606 U.S. at 693-695. Here, the Authority’s investigations, subpoenas, searches, charges, adjudications, settlements, and injunction suits do not await an FTC decision. As the Fifth Circuit put it, those powers go “far beyond” the recommendations of the Universal Service Fund’s administrator. Pet. App. 41a; *see also Free Enter. Fund v. PCAOB*, 537 F.3d 667, 709 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff’d in part, rev’d in part and remanded*, 561 U.S. 477 (2010) (concluding that the PCAOB members were *principal* officers because the SEC did not have “power to prevent and affirmatively command, and to manage the ongoing conduct of, Board inspections, investigations, and enforcement actions”).

The FTC’s rulemaking authority under § 3053(e) does not cure the defect. Congress expressly divided enforcement responsibilities among the FTC, the

Authority, and the Horseracing Integrity and Welfare Unit, directing each to act within its statutory role. 15 U.S.C. § 3054(a)(1). A regulation may constrain how the Authority exercises a granted power, but it cannot transfer that power to the FTC or revise Congress’s division of responsibilities. Pet. App. 28a-33a. The Sixth Circuit’s view that the FTC could subordinate every enforcement function by rule therefore depends on authority the statute does not confer. *See also Free Enter. Fund*, 537 F.3d at 711 (Kavanaugh, J., dissenting) (“The phrase ‘in furtherance of this Act’ means, of course, that SEC rules have to further some aspect of the Act. But the Act nowhere gives the SEC authority to direct and supervise Board inspections, investigations, and enforcement actions.”).

The comparison to FINRA likewise favors affirmation. The SEC may investigate and enforce securities laws itself, revoke FINRA’s authority to enforce its rules, remove FINRA directors and members, and de-recognize FINRA as a self-regulatory organization. 15 U.S.C. §§ 78o(b)(4), 78s(g)(2), (h), 78u(a), (d). HISA gives the FTC no comparable power to enforce the Act itself, replace the Authority as enforcer, remove its Directors, or withdraw federal recognition. The Authority also has power to bring civil enforcement suits, while FINRA does not. Pet. App. 33a-36a. Whatever the constitutional status of the SEC-FINRA framework, HISA provides materially less governmental control over enforcement.

Finally, the facial nature of the challenge does not save the statute. As an initial matter, and as explained in the Gulf Coast Racing Plaintiffs’ cross-petition, the Appointments Clause challenge is necessarily a facial challenge—either the officer is properly appointed or

not. But moreover, even as to private nondelegation, the Gulf Coast Racing Plaintiffs and the other plaintiffs challenge where Congress lodged enforcement power, not merely how the Authority exercised it in particular cases. On its face, HISA authorizes private actors to perform front-end enforcement functions without FTC supervision and authorizes the Authority to seek injunctions without Commission review—enforcement powers the Authority has threatened to use against the Gulf Coast Racing Plaintiffs if they simulcast their races across state lines. ROA.4592-4595. Those statutory features apply whenever the respective powers are used. The possibility that the FTC may later review a sanction does not create a valid application of the antecedent, unsupervised powers. Pet. App. 25a-26a.

IV. THE RELATED PETITIONS SHOULD BE CONSIDERED TOGETHER.

Granting the related petitions together would permit the Court to resolve the constitutional controversy in a single proceeding. The Appointments Clause question asks whether the Authority's Directors may exercise the federal power assigned to them without constitutional appointment. The private-nondelegation question asks whether, if the Authority is private, its enforcement powers are sufficiently subordinate to the FTC. The related petitions concerning HISA's rule-making structure present another aspect of the same public-private arrangement.

The Court has already stayed the Fifth Circuit's mandate once and remanded this litigation for reconsideration under *Consumers' Research*. Yet the conflict remains. A grant limited to the Authority and FTC

petitions could produce another incomplete resolution and further litigation over the same statutory scheme. Coordinated review would give the parties, Congress, and the nationwide horseracing industry the clearest guidance.

The Court therefore should grant Nos. 26-199 and 26-201, grant the Gulf Coast Racing Plaintiffs' cross-petition, and consider all of the related petitions together. At the least, the Court should not grant the opening petitions without also granting the Gulf Coast Racing Plaintiffs' preserved and expressly decided Apointments Clause question.

CONCLUSION

The petitions for writ of certiorari filed by the Authority (No. 26-199) and the Federal Trade Commission (No. 26-201) should be granted, but so should the Gulf Coast Racing Plaintiffs' cross-petition be granted and consolidated with those petitions for briefing and argument. The Court also may wish to grant the related cross-petition filed by the National Horsemen's Benevolent and Protective Association and the petition filed by the State of Texas and the Texas Racing Commission.

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