

IN THE

Supreme Court of the United States

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

Cross-Petitioners,

v.

HORSERACING INTEGRITY AND SAFETY AUTHORITY, ET AL.,

Cross-Respondents.

and

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

Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.,

Cross-Respondents.

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

REPLY BRIEF FOR CROSS-PETITIONERS

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RULE 29.6 STATEMENT

The Rule 29.6 disclosure set forth in the cross-petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR CROSS-PETITIONERS

INTRODUCTION

Every party agrees that the Court should review the Fifth Circuit's judgment. The Horseracing Integrity and Safety Authority (the "Authority") and the Solicitor General ask the Court to decide whether the enforcement provisions of the Horseracing Integrity and Safety Act ("HISA" or the "Act") facially violate the private-nondelegation doctrine, a question on which the Fifth and Sixth Circuits are openly divided. Auth. Opp. 2, 34-35; Gov't Opp. 2. The Gulf Coast Racing Plaintiffs ("Cross-Petitioners") agree that those petitions should be granted. But Cross-Respondents' preferred question rests on an unexamined premise: that the Authority is a private entity. If it is not, the private-nondelegation analysis that divides the circuits is beside the point, and the Appointments Clause resolves the case because the Authority's Board exercises significant authority pursuant to federal law without the appointments Article II requires. The Fifth Circuit resolved that antecedent question against Cross-Petitioners because it read *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), to foreclose any other answer. It said that a different approach was "a suggestion only the Supreme Court could act upon." Pet. App. 48a n.29.

Cross-Respondents offer three reasons to look away: a standing objection the Authority never pressed below and that the government does not join; the absence of a second appellate decision on a question no other litigant preserved; and merits arguments that confirm, rather than dispel, the need for review. This cross-petition is the only vehicle through which the Court can decide whether Congress may vest

exclusive nationwide rulemaking, investigative, prosecutorial, and adjudicatory authority in what is effectively an administrative agency without proper appointments merely because the agency purports to be a private organization. It offers a rare opportunity to reconcile the Court’s decisions concerning private non-delegation, government-created corporations, private self-regulatory organizations, and the Appointments Clause. The Court should grant it together with the related petitions.

ARGUMENT

I. CROSS-PETITIONERS HAVE STANDING TO PRESS THEIR APPOINTMENTS CLAUSE CLAIM.

A. The objection was not raised below and not even the FTC joins it.

The Authority alone contends that Cross-Petitioners lack Article III standing to press their Appointments Clause claim because Texas racetracks are not currently running “covered” races. Auth. Opp. 27-28. The government does not join that argument. *See* Gov’t Opp. 3-4. Nor did the Authority obtain dismissal of the claim on that ground in either court below. In the district court, the Authority challenged Cross-Petitioners’ standing only as to claims they abandoned before trial and as to their anti-commandeering claim. ROA.5422-5425. The courts below rejected the latter claim for lack of standing, and Cross-Petitioners do not seek review of that ruling. Pet. App. 4a, 49a-50a, 104a-108a. Both courts resolved the Appointments Clause claim on the merits. Pet. App. 41a-49a, 72a-86a.

The Authority first floated its theory in opposing certiorari in 2024, and now repeats that theory nearly

word for word. Compare Auth. Opp. 28-29, Nos. 24-465, 24-472, 24-489 (U.S. Nov. 12, 2024), with Auth. Opp. 27-28. Article III standing cannot be waived, of course. But a jurisdictional objection that neither court below adopted, that the government declines to make, and that was not raised except as a last-ditch effort to avoid certiorari of an unfavorable question, is no reason to deny review.

B. Cross-Petitioners suffer a concrete, traceable, and redressable injury.

The objection fails on its own terms. Cross-Petitioners are a Texas racetrack, entities developing race-tracks in the State, and a partnership of horsemen who race there. Auth. Opp. 7. The district court described them as covered persons who “will be regulated and subject to assessments” under HISA. Pet. App. 107a. Their injury is concrete and ongoing. Cross-Petitioners wish to simulcast their races interstate, which would generate substantial revenue and larger purses. They cannot do so without subjecting themselves to the Authority’s jurisdiction. Counsel for the Authority advised Cross-Petitioners’ counsel that the Authority would seek to enjoin or penalize interstate simulcasting if Cross-Petitioners did not first submit to its regulatory authority. *See* ROA.4592-4595; Gulf Coast Opp. to Stay Appl. 28-29, No. 24A287 (U.S. Sept. 30, 2024). As a result, Cross-Petitioners lose millions of dollars in simulcast revenue each racing season. Gulf Coast Opp. to Stay Appl. 28-29.

That injury is fairly traceable to the Authority and would be redressed by a ruling that its Board may not wield federal power. The Authority’s argument reduces to the proposition that Cross-Petitioners lack

standing because they have declined to submit to the very regime they challenge. But this Court does not require a regulated party to “bet the farm” by first subjecting itself to an allegedly unconstitutional regime. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 490–491 (2010) (citation omitted). Preenforcement review is common. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

Nor does Texas’s decision to suspend interstate simulcasting break the causal chain. Texas made that choice precisely to avoid HISA’s reach. Auth. Opp. 27. Standing may rest on “the predictable effect of Government action on the decisions of third parties.” *Department of Commerce v. New York*, 588 U.S. 752, 768 (2019). Here, Texas’s decision in response to the Authority’s action was not merely predictable, *it actually happened*—leading to an injury *directly* traceable to the Authority’s unlawful exercise of power.

II. THIS PETITION IS THE SUPERIOR VEHICLE.

A. Only this cross-petition presents the antecedent constitutional question, which is both important and can resolve the existing circuit split.

The Authority concedes that the courts of appeals are divided over the constitutionality of HISA’s enforcement provisions. Auth. Opp. 2, 9, 34. The Authority nonetheless insists that the Appointments Clause question is “alternative” to, and “mutually exclusive” with, the private-nondelegation question. Auth. Opp. 28, 35. That is a reason to grant review, not to deny it. Both doctrines turn on a single antecedent classification: whether the Authority is part of the government

for constitutional purposes. As the Fifth Circuit put it, “an entity is either governmental or not.” Pet. App. 42a. A ruling on the enforcement question would necessarily assume the answer. Without this cross-petition, the Court would decide whether a private entity’s enforcement powers are adequately supervised while taking as given that the entity is private—the very premise Cross-Petitioners contest and that the Fifth Circuit squarely decided. Granting the related petitions together would allow the Court to resolve the controversy in full.

No other case presents the question. The government acknowledges that “no Appointments Clause issue was raised in the Sixth Circuit case.” Gov’t Opp. 4. The Oklahoma plaintiffs abandoned the claim after the district court rejected it. Auth. Opp. 9, 29. The Eighth Circuit’s preliminary-injunction ruling in *Walmsley v. FTC*, 117 F.4th 1032 (8th Cir. 2024), was vacated, 145 S. Ct. 2870 (2025), and that court has not ruled on remand. Pet. 1 n.1; Auth. Opp. 11 n.4. Cross-Petitioners alone preserved the claim, tried it to judgment, presented it to the Fifth Circuit twice, and obtained a reasoned appellate ruling after this Court’s remand. Pet. App. 41a-49a. The question is purely legal and requires no further factual development.

That is also a complete answer to the Authority’s argument that this Court should deny the cross-petition because there is no circuit split. The Authority creates the misimpression that the courts below have unanimously held against the Appointments Clause argument. But as indicated above, the *only* live appellate decision involving that issue is the one in this case. But what is more, this Court regularly grants review of important questions even where the courts of

appeals agree. *See, e.g., Muscarello v. United States*, 524 U.S. 125, 131 (1998); *United States v. Feola*, 420 U.S. 671, 677 (1975); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 472 (2008) (Thomas, J., dissenting) (appellate unanimity does not bind this Court). As Justice Scalia observed, this Court may reject even a “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). And this Court’s Rules contemplate review of “an important question of federal law that has not been, but should be, settled by this Court.” Sup. Ct. R. 10(c).¹

The question’s importance is evident. The Authority’s rules govern more than 97,000 horses and 40,000 people at 41 racetracks in 19 States. Auth. Opp. 6. The Authority proposes the rules, investigates violations, brings charges, adjudicates them, and imposes

¹ The Executive Branch has not spoken with one voice on this question. In 2007, the Office of Legal Counsel (“OLC”) concluded that a position, “however labeled,” is a federal office subject to the Appointments Clause if it is invested by legal authority with a portion of the sovereign powers of the federal government and is “continuing,” and that “federal employment is not necessary for the Appointments Clause to apply.” *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 73-74, 78 (2007). Then, on January 16, 2025, in the final days of the Biden Administration, OLC issued a new opinion concluding that the Appointments Clause reaches only positions that are “part of the federal government for constitutional purposes” under *Lebron*, and that private entities exercising federal authority are constrained, if at all, only by the private-nondelegation doctrine. *The Test for Determining “Officer” Status Under the Appointments Clause* 1, 7-10 (Jan. 16, 2025). The Executive Branch’s own divergent readings confirm that the question is unsettled and that only this Court can resolve it.

sanctions. If the decision below is correct, Congress may vest such powers in a board that no President, court of law, or head of department appoints, so long as the entity incorporated before Congress enacted the statute conferring its powers. The “private” label and the timing of incorporation would then supply a ready means of avoiding Article II.

That concern is not confined to horseracing. Three Justices have observed that whether the leaders of a different private entity assisting a federal agency “qualify as officers of the United States” remains unaddressed. *FCC v. Consumers’ Research*, 606 U.S. 656, 720 n.6 (2025) (Gorsuch, J., joined by Thomas and Alito, JJ., dissenting). A fourth Justice has questioned whether the private-nondelegation doctrine—the only constraint the Fifth Circuit thought remained—is “a viable and independent doctrine in the first place.” *Id.* at 710 (Jackson, J., concurring). This is the only petition that presents the convergence of private nondelegation, government-created corporations, and the Appointments Clause in an unusually clean posture that will allow the Court to resolve which constitutional framework applies.

The Authority further emphasizes that HISA was modeled on the Maloney Act, which governs FINRA. Auth. Opp. 1, 3. The constitutional status of such self-regulatory organizations remains contested. *See Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1338-1347 (D.C. Cir. 2024) (Walker, J., concurring in the judgment in part and dissenting in part). The Authority treats that ongoing litigation as a reason to deny review. Auth. Opp. 30 n.9. It is the opposite: it shows that the question recurs.

Moreover, the Gulf Coast Racing Plaintiffs argue that HISA is materially different from the Maloney Act in that the Authority has a monopoly and the industry does not participate in any governance whatsoever. Thus, this Court need not decide the constitutionality of self-regulatory organizations because the Authority is not such an organization. Clarifying the connection between private nondelegation, the Appointments Clause, and self-regulatory organizations would simply be another reason to grant review.

B. The vehicle objection raised in the parallel case is illusory.

The petitioners in *Oklahoma v. United States* suggest that a “latent jurisdictional question” about the finality of the district court’s judgment makes this case a poorer vehicle. Okla. Reply 1, 3-4, No. 25-1325 (U.S. Sept. 15, 2026). There is no such question. Before trial, Cross-Petitioners advised that they would abandon five claims on stated conditions, and Cross-Respondents filed notices agreeing to those conditions. Pet. App. 66a. The district court recognized that Cross-Petitioners had voluntarily withdrawn those claims, adjudicated every remaining claim, and entered final judgment. Pet. App. 112a; *see* Pet. App. 9a (“[T]he district court entered final judgment dismissing all claims.”). The Authority later conceded that Cross-Petitioners’ abandonment of those claims had “obviated that issue,” which “is why the Fifth Circuit did not address it and why nobody in this case raises it any longer.” Gulf Coast Pet. 3 n.1, No. 24-489 (U.S. Oct. 28, 2024) (quoting Auth. Pet. 31 n.13, No. 24-433 (U.S. Oct. 15, 2024)).

Consistent with that concession, neither cross-respondent raises finality. To the contrary, both ask the Court to grant certiorari from this very judgment. Auth. Opp. 34-35; Gov’t Opp. 2.

III. THE DECISION BELOW IS WRONG.

A. The Authority exercises significant federal authority.

The government does not defend the Fifth Circuit’s reasoning. It argues instead that the Authority’s directors are not officers because the Authority merely “recommends” rules and sanctions and so exercises no governmental power at all. Gov’t Opp. 4. That argument cannot be squared with the statute, with the government’s own petition, or with this Court’s precedents. The Fifth Circuit held—and the government asks this Court to review—that HISA authorizes the Authority to enforce federal law “without the FTC’s involvement,” including by filing suit to enjoin violations. Pet. App. 4a, 22a, 38a. Those are core executive functions that “may be discharged only by persons who are ‘Officers of the United States.’” *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam).

Nor is the Authority’s adjudicative role merely advisory. An Authority sanction receives de novo review only if the Commission or an aggrieved person affirmatively seeks it; otherwise, the Authority’s decision governs. 15 U.S.C. § 3058(b). That mirrors the position of the SEC ALJs in *Lucia*, whose decisions became final and were “deemed the action of the Commission” when the Commission declined review. *Lucia v. SEC*, 585 U.S. 237, 249 (2018). The availability of further review did not prevent those ALJs from being officers. *Ibid.* The government’s argument would mean that

the SEC ALJ exercising the very powers at issue in *Lucia* would have ceased to be an officer merely if a second ALJ could rehear the matter on request. Nothing in *Lucia* supports that distinction.

The same is true of rulemaking. HISA requires the FTC to approve an Authority proposal if it is “consistent with” the Act and the FTC’s rules. 15 U.S.C. § 3053(c)(2). The Sarbanes-Oxley Act imposed the same standard on the SEC’s review of rules proposed by the Public Company Accounting Oversight Board (PCAOB), 15 U.S.C. § 7217(b)(3), and empowered the SEC to abrogate, delete, or add to them, *id.* § 7217(b)(5). Yet the parties agreed that the PCAOB’s members were officers of the United States. *Free Enterprise Fund*, 561 U.S. at 486. A broad statutory mandate coupled with consistency review leaves the proposing body substantial discretion to determine the content of binding rules. The possibility that the FTC may later amend an approved rule does not erase the power exercised when the rule is adopted. Under the government’s “recommendatory” theory, the PCAOB would have been a private body rather than a board of inferior officers.

What these exercises of authority have in common is that they all can be *reviewed* at some level by a superior officer. But as noted several times, that merely means that the officers in question may be *inferior* officers, not that they aren’t officers at all. Clarifying the connection between private nondelegation, where subordination is the test, and the line between inferior and principal officers, where subordination is *also* the test, is still more reason to grant review.

B. *Lebron* does not displace the Appointments Clause.

The Authority defends the Fifth Circuit’s holding that *Lebron*’s three factors are the exclusive test for determining governmental status. Auth. Opp. 30-34. But *Lebron* is an anti-evasion principle. It held that government may not “evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.” 513 U.S. at 397. It did not hold that an entity failing its three-part test may exercise federal power free of Article II. *Lebron* addressed Amtrak’s status for First Amendment purposes, not the source and nature of any official’s authority. *Id.* at 383, 400. The Appointments Clause asks a different question: whether a person occupies a “continuing” position established by law and exercises “significant authority pursuant to the laws of the United States.” *Lucia*, 585 U.S. at 245. That inquiry looks to the office, which federal law creates, not to the corporate pedigree of the person who fills it. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. 448, 456-469 (2020).

The Fifth Circuit’s application of *Lebron* was also circular. Its decisive factor—that “the government has no role in appointing the Authority’s Board”—is the constitutional violation alleged. Pet. App. 46a. If an unconstitutional selection method establishes private status, Congress can always avoid the Appointments Clause by designating a private selector. Congress could not evade Article II by directing a named individual to execute federal law, and neither can it do so by directing a preexisting corporation’s privately selected board to execute it. The timing of incorporation changes nothing.

The Authority's remaining arguments fare no better. *Free Enterprise Fund* distinguished private self-regulatory organizations, Auth. Opp. 33, but it had no occasion to decide whether their directors are officers. And the Fifth Circuit's view that the private-nondelegation doctrine "corrals" any evasion, Pet. App. 48a, assumes that doctrine supplies the only limit. A doctrine that permits private parties to advise an agency, see *Consumers' Research*, 606 U.S. at 692-695, does not license them to occupy continuing federal offices and wield coercive power outside Article II. The resulting asymmetry is stark. An SEC administrative law judge who issues initial decisions must be constitutionally appointed. *Lucia*, 585 U.S. at 249. Under the decision below, a privately selected board with far broader powers need not be. Only this Court can resolve that anomaly in its precedents.

CONCLUSION

The cross-petition for a writ of certiorari should be granted and considered together with the petitions in Nos. 26-199, 26-201, 26-335, and 26-430.

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