No. 23-10520

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; ARIZONA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; ARKANSAS HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; INDIANA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; ILLINOIS HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; LOUISIANA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; MOUNTAINEER PARK HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; NEBRASKA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; OKLAHOMA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; OREGON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; PENNSYLVANIA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; WASHINGTON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; TAMPA BAY HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; GULF COAST RACING, L.L.C.; LRP GROUP, LIMITED; VALLE DE LOS TESOROS, LIMITED; GLOBAL GAMING LSP, L.L.C.; TEXAS HORSEMEN'S PARTNERSHIP, L.L.P.,

Plaintiffs—Appellants

STATE OF TEXAS; TEXAS RACING COMMISSION

Intervenor Plaintiffs—Appellants

v.

JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN; MD NANCY COX; JOSEPH DUNFORD; FRANK KEATING; KENNETH SCHANZER; HORSERACING INTEGRITY AND SAFETY AUTHORITY, INCORPORATED; FEDERAL TRADE COMMISSION; COMMISSIONER NOAH PHILLIPS; COMMISSIONER CHRISTINE WILSON; LISA LAZARUS; STEVE BESHEAR; ADOLPHO BIRCH; ELLEN MCCLAIN; CHARLES SCHEELER; JOSEPH DEFRANCIS; SUSAN STOVER; BILL

THOMASON; LINA KHAN, CHAIR; REBECCA SLAUGHTER, COMMISSIONER; ALVARO BEDOYA, COMMISSIONER; D. G. VAN CLIEF,
Defendants—Appellees

Appeal from the United States District Court
For the Northern District of Texas, Lubbock Division
No. 45:21-cv-71

BRIEF FOR AMICI CURIAE REASON FOUNDATION, CATO INSTITUTE, COMPETITIVE ENTERPRISE INSTITUTE, GOLDWATER INSTITUTE, MANHATTAN INSTITUTE FOR POLICY RESEARCH, AND NISKANEN CENTER IN SUPPORT OF APPELLANTS

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I supplement the certificate of interested persons provided in the briefs of appellants and appellees by naming the following persons who have an interest in the outcome of this litigation:

Amici Curiae:

Reason Foundation

Cato Institute

Competitive Enterprise Institute

Goldwater Institute

Manhattan Institute for Policy Research

Niskanen Center

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INTERESTS OF AMICI CURIAE[1]

Reason Foundation ("Reason") is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason Magazine*, online commentary, and policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

Cato Institute ("Cato") is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to

[1] Counsel certifies that (1) no counsel for a party authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person or entity—other than amici curiae—contributed money intended to fund the preparation or submission of this brief. *See* FIFTH CIR. R. 29(a)(4)(E). All counsel consent to the filing of this brief.

promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs.

Competitive Enterprise Institute ("CEI") is a nonprofit 501(c)(3) organization incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation.

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Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has sponsored scholarship and filed briefs supporting economic freedom and property rights.

Niskanen Center ("Niskanen") is a nonprofit, nonpartisan 501(c)(3) public policy think tank and advocacy organization dedicated to strengthening liberal democratic governance and promoting widespread prosperity and opportunity. Niskanen supports a vision of market liberalism that is rooted in an effective public sector, a competitive private sector, and that is committed to upholding the principles of a pluralistic and open society that encourages engagement, cooperation, discussion, and learning. Niskanen has a strong interest in protecting constitutional separation of powers and improving public trust in democratic institutions and processes.

SUMMARY OF ARGUMENT

1. Whether a particular person is an Officer, and thus subject to the Appointments Clause, is governed by a simple test: whether, as a "continuing and permanent" matter, that person "exercis[es] significant authority pursuant to the laws of the United States." The members of the Horseracing Integrity and Safety Authority are plainly Officers by that standard.

2. Whether the members of the Authority 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 does not demand that an Officer formally be a public employee.

3. The District Court's use of a rigid public-private distinction here was misguided. First, the fact that the members of the Authority wield quintessentially governmental powers—rulemaking, investigation, and enforcement—means that they should be considered public for Appointments Clause purposes, regardless of whether they are classified as private under the statute or under state law.

Second, to the extent some public-private distinction is relevant here, that distinction can apply differently for different doctrines, so it is a mistake to use public-private distinctions from the Appointments Clause, the Nondelegation Doctrine, and the State Action Doctrine interchangeably. Thus, the previous panel's assumption that the Authority was private for Nondelegation Doctrine purposes does not foreclose this Appointments Clause challenge, even if one believes that the Appointments Clause does not apply to private entities.

And third, regardless of the public-private distinction, notions of political accountability demand that the Authority be subject to Appointments Clause constraints.

4. Even if the District Court were correct to assume that the State Action Doctrine is relevant here, it was wrong to determine that the Authority is not 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.

5. The December 2022 statutory amendment does not change any of the foregoing, because it leaves all of the Authority's powers intact. In the limited context of rulemaking, it is now true that the FTC may alter

any rule promulgated by the Authority. But unless and until the FTC conducts a rulemaking to do so, the Authority's rules remain binding. At most, this limited FTC oversight is possibly relevant to whether the Authority members are principal or inferior Officers.

ARGUMENT

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

In *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), the Supreme 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—in this case, the requirements of presidential nomination and Senate confirmation.

By this standard, the members of the Horseracing Integrity and Safety Authority ("Authority") are plainly Officers. The Authority has rulemaking, investigatory, and enforcement power—core governmental powers that are not 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 is not "exercising significant authority pursuant to the laws of the United States." If the members of the Authority were federal employees, this result would not be remotely controversial; it would be clear that the Authority should be treated like a traditional federal regulatory agency. If the members of the Authority are principal Officers, they must go through the process of presidential nomination and Senate confirmation before they can exercise their governmental powers; but the same is true even if they are inferior Officers, since Congress has not vested their appointment "in the President alone, in the courts of law, or in the heads of departments." U.S. Const. art. II, § 2.

II. Whether the members of the Authority are nominally "private" 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"—do not depend on whether one is formally a federal government employee. It is true that, by statute, the Authority is labeled a "private, independent, self-regulatory, nonprofit corporation,"

§ 3052(a), and the Authority itself is incorporated under Delaware law, but Congress may not evade a core doctrine of political accountability by statutory labeling, or by choosing to assign significant continuing governmental powers to actors outside the formal federal governmental structure. The Authority is a federal regulatory agency—and should be treated as one—because of its powers, despite its nontraditional labeling.

Because the Authority engages in rulemaking and law enforcement, it is wielding executive power, and such power "acquires its legitimacy and accountability to the public through a clear and effective chain of command down from the President, on whom all the people vote." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021) (quoting *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 496–97 (2010) (quoting *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., dissenting))) (internal quotation marks omitted).

If actors formally outside the federal government could not 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. The Supreme Court ruled that the appraiser was not an Officer and was thus exempt from Appointments Clause constraints, but it did not simply rely on the fact that he was not 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." *Id.* at 327-38. 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. O.L.C. 73, at *2 (2007) (citations and internal quotation marks omitted). 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 [*does*] exercise delegated sovereign authority (and [does] so on a continuing basis)." *Id.* at *20. For instance, in *United States v. Maurice*, Chief Justice Marshall, riding circuit, held that James Maurice, an "agent of fortifications" and apparently a mere contractor, was in fact an officer, and thus invalidly appointed, because of his "important duties." 26 F. Cas. 1211, 1214–16

(C.C.D. Va. 1823) (No. 15,747) (Marshall, Cir. Justice); *see also* 31 Op. O.L.C. 73, at *20 (citing *Maurice*).

Likewise, whether someone is paid by the government is not relevant to whether they are an Officer. *Id.* at *36–*38.

It is true that Supreme Court cases occasionally characterize Officers as being "appointees," *Buckley*, 424 U.S. at 126, or imply that they are "functionaries," *id.* at 126 n.162; a recent opinion contrasted Officers with "'lesser functionaries' such as employees or contractors," *Arthrex*, 141 S. Ct. at 1980. These words do not clearly exclude all private parties, even ones who exercise significant federal authority as a continuing matter. But even if they did, it is significant that the public-private question was not 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.

III. Seeking to apply a rigid public-private distinction here is misleading.

Trying to rigidly characterize the Authority here as "public" or "private" is misleading, for three reasons. First, in light of the Authority's

governmental powers, the Authority is most sensibly characterized as public. Second, there is no unitary public-private distinction for all areas of law; different doctrines have their own purposes and their own definitions, and so the District Court was wrong to treat them all as interchangeable. And third, principles of constitutional accountability demand that the Authority be subjected to Appointments Clause constraints, regardless of whether it is characterized as private.

A. The Authority is most sensibly characterized as public.

To even use the term "private" in the context of the Authority is inappropriate. Once we (rightly) ignore the statutory labeling of the Authority as "private," why would we even consider characterizing it as private for constitutional purposes? After all, private parties do not generally have rulemaking, investigatory, and enforcement power under federal law. If there is to be any public-private distinction in Appointments Clause doctrine, any person or entity that wields such classically governmental powers should properly be considered "public"—regardless of whether they formally work for or are officially located in the government, and regardless of whether they're part of an association labeled private or organized under private law. And if, in addition, that

power is federal, significant, and "continuing and permanent," such an actor should also necessarily be considered an Officer for Appointments Clause purposes.

B. There are many different public-private distinctions in constitutional law.

The District Court assumed that the Nondelegation Doctrine, the State Action Doctrine, and the Appointments Clause all used the same concept of "private." Thus, it concluded, the earlier panel's assumption that the Authority is private for Nondelegation Doctrine purposes, *NHBPA v. Black*, 53 F.4th 869, 872–75, 880–90 (5th Cir. 2022), means that it must also be private for Appointments Clause purposes, *NHBPA v. Black*, 2023 WL 3293298, at *10-13 (N.D. Tex. May 4, 2023). And in the alternative, the District Court decided, the fact that the Authority is not a "state actor" for purposes of the State Action Doctrine also implies that the Authority is private for purposes of the Appointments Clause. *Id.* at *13–*15.

But this is wrong on multiple levels. For instance, the D.C. Circuit has held (discussing Amtrak) that an entity can be private for purposes of the Nondelegation Doctrine even if it is a state actor under the State Action Doctrine. *See Ass'n of Am. R.R.s v. DOT*, z, 676–77 (D.C. Cir.

2013), *rev'd on other grounds*, 575 U.S. 43 (2015). "Just because . . . Amtrak [is] a government agency for purposes of the First Amendment [and other rights provisions] does not dictate the same result with respect to all other constitutional provisions." *Id.* at 676.

Similarly, even if the District Court were right that private actors are excluded from the Appointments Clause, an entity that is "private" for Nondelegation Doctrine purposes need not thereby be "private" for Appointments Clause purposes. Therefore, the earlier panel's assumption that the Authority is private for Nondelegation Doctrine purposes, even if it is taken to be an actual holding and part of the law of the case (as the District Court assumed, *NHBPA*, 2023 WL 3293298, at *10–*13), does not foreclose appellants' current Appointments Clause argument.

Moreover, as discussed in Part IV below, the District Court was quite wrong to decide that the Authority is not a state actor: on the contrary, the Authority fits easily under the State Action Doctrine because it exercises traditionally exclusive public functions. As discussed above, "not a state actor" under the State Action Doctrine is not necessarily the same as "private" under the Appointments Clause, so the

District Court's ruling to the contrary is not dispositive for Appointments Clause purposes. Still, the fact that the Authority performs traditionally exclusive public functions further strengthens the case that the Authority's members must be Officers subject to the Appointments Clause.

C. Constitutional accountability does not depend on the public-private distinction.

But ultimately, whether the authority is characterized as public or private is not very important. One could argue that private persons exercising significant federal governmental power are nonetheless Officers; or one could instead argue, as above, that such persons should be classified as public and should be considered Officers for that reason; and one might make such an argument with or without reference to the State Action Doctrine. But none of this playing with characterization should have any doctrinal relevance for purposes of the Appointments Clause. As a constitutional matter, those who, on a continuing basis, engage in rulemaking, investigation, and enforcement of federal law must be held politically accountable, regardless of Congress's attempts to avoid such accountability by creative use of coercive nonprofits. The virtue of *Buckley*'s "exercising significant authority pursuant to the laws

of the United States" test is that it applies to everyone, avoiding potentially tricky public-private questions entirely.

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

The District Court assumed that the State Action Doctrine and the Appointments Clause used the same public-private distinction: if an entity is not a state actor, it is thereby private and thus not subject to Appointments Clause requirements. As explained above, this is not necessarily so. But even if the District Court was correct in this assumption, it was mistaken in its conclusion that the Authority is not a state actor, for the following two reasons.

First, the District Court wrongly assumed that the test the Supreme Court stated in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), was the only way that an entity could become a state actor. 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.

Second, the relevant state action test here is the "traditionally exclusive public function" test. 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.

It is true that the State Action Doctrine can sometimes be hard to apply. *See NHBPA*, 2023 WL 3293298, at *13 ("Even the Supreme Court has admitted that the cases deciding when private action might be deemed that of the state have not been a model of consistency." (quoting *Lebron*, 513 U.S. at 378 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting)) (internal quotation marks omitted))). But the Doctrine turns out to be quite easy to apply in this case, and it clearly cuts in favor of state action.

A. The *Lebron* test is only one 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 the Supreme 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 government appointees.

The District Court recognized that these sorts of special corporations are state actors, and that the Authority does not fall within this category. *NHBPA*, 2023 WL 3293298, at *14. But it wrongly suggested that the *Lebron* path is the *only* path to state action. *Id.* at *13 ("This case law teaches that to be considered a government entity for constitutional purposes, a corporation must be created by the government."); *id.* at *14 ("Courts continue to emphasize the requirement that a corporation is *only* 'part of the government' if it is created by special law." (emphasis added)).

A moment's reflection suggests that the District Court's suggestion is implausible. If the Authority 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 cannot 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 impose "atypical and significant hardship" on inmates without the sorts of protective procedures that the Due Process Clause requires in public prisons. *Sandin v. Conner*, 515 U.S. 472, 484 (1995). But such a suggestion is virtually self-refuting: private prisons and public prisons are subject to identical substantive constitutional standards, even though private prison firms are private corporations. The reason, as this Circuit has rightly recognized, is that private prison firms are state actors. *See Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 460–61 (5th Cir. 2003).

And indeed, the District Court's 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, including associations or corporations, to become state actors.

The *Lebron* path may well be appropriate for certain types of entities. For instance, the Metropolitan Washington Airports Authority manages specific properties (D.C.-area airports) and lacks federal regulatory power; a test designed for a quasi-commercial entity that provides passenger rail service seems like a good fit for such an entity. *See, e.g.*, *Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152, 158–60 (4th Cir. 2018).

But 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). Indeed, some of the cases cited by the District Court recognize the variety of subdoctrines that can support a finding of state action. *See, e.g.*, *NHBPA*, 2023 WL 3293298, at *14 (citing *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999) (citing a variety of state-action cases)); *id.* at *15 (citing *Kerpen*, 907 F.3d at 159 (same)).

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. Thus, some cases, like *Free Enterprise Fund*, 561 U.S. at 485–86, have indeed used *Lebron* to find state action, but of course this doesn't mean that state action is absent when *Lebron* doesn't apply. That the Authority doesn't fit under the *Lebron* test is thus unimportant: it can still qualify as a state actor under any of the other tests.

B. The Authority exercises traditionally exclusive public functions.

And the relevant test is clear here: it's the "traditionally exclusive public function" test. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S.

40, 55 (1999). The Supreme 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, political parties (even though they are formally private associations) are engaged in state action when they determine their candidates in party primaries, because, "if heed is to be given to the realities of political life, [parties] are now agencies of the state." *Nixon v. Condon*, 286 U.S. 73, 84 (1932); *see also Terry v. Adams*, 345 U.S. 461, 468–70 (1953). As another example, a corporation engages in state action when it runs a municipality and performs the full range of municipal functions. *See Marsh v. Alabama*, 326 U.S. 501, 505–07 (1946).

The Supreme 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 is not 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 it is clear that certain functions *do* satisfy this test. In *Metropolitan Edison*, the Supreme Court suggested that powers "traditionally associated with sovereignty, such as eminent domain," would qualify, 419 U.S. at 353, which is why the Circuit Courts (including this one) 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*, 141 S. Ct. 1761 (2021), the Supreme 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 1785–86.

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 factor is plainly satisfied here.

V. The recent statutory amendment does not change this result.

In November 2022, the previous panel held that the delegation of power to the Authority violated the Nondelegation Doctrine. *NHBPA v. Black*, 53 F.4th 869, 880–90 (5th Cir. 2022). In December 2022, in response to that ruling, Congress amended the Horseracing Integrity and Safety Act to provide that the FTC, by notice-and-comment rulemaking under § 553 of the APA, "may abrogate, add to, and modify" the Authority's rules. 15 U.S.C. § 3053(e). The Sixth Circuit later held that this statutory amendment, by beefing up FTC oversight of the Authority, cured the nondelegation problem. *Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023).

But regardless of the effect of the amendment on Nondelegation Doctrine analysis, the amendment makes no difference to the foregoing Appointments Clause discussion. The amendment has no effect on any of the Authority's non-rulemaking powers (i.e., its investigatory and enforcement powers). And even in the context of rulemaking, all the Authority's rulemaking powers are left intact. All that has changed is that, if the FTC disagrees with any rule promulgated by the Authority, it can later conduct a new rulemaking to "abrogate, add to, [or] modify" that

rule. Unless and until that happens, the Authority's rule is unchanged and applies in full force.

The Authority members thus still "exercis[e] significant authority pursuant to the laws of the United States." At most, the FTC's new oversight authority might affect what kind of Officers the Authority members are—principal or inferior. But it does not affect whether they are Officers.

CONCLUSION

The structure of the Authority violates the separation of powers because the members of the Authority, although Officers, are not appointed with presidential nomination and Senate confirmation, as the Appointments Clause requires.

The Appointments Clause does not depend on any public-private distinction; rather, all that matters is whether, as a "continuing and permanent" matter, a person "exercis[es] significant authority pursuant to the laws of the United States." The members of the Authority are plainly Officers by that standard. Even if a public-private distinction were relevant here, the extent of the Authority's power should be enough to categorize it as "public," regardless of how the Authority is labeled

under the statute or under state law. And, to the extent this is relevant, the Authority is also a state actor because rulemaking, investigation, and enforcement of federal law are traditionally exclusive public functions.

Finally, there is nothing in the December 2022 statutory amendment that alters any of this reasoning: Congress did not change any of the Authority's powers, only giving the FTC the power to conduct a later rulemaking in case it wants to change any of the Authority's rules.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on July 12, 2023, a true and correct copy of the foregoing document was filed with the clerk of the court for the United States Court of Appeals for the Fifth Circuit, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Raffi Melkonian
Raffi Melkonian

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,422 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook (Scalable) 14 pt. for text and Century Schoolbook (Scalable) 12pt for footnotes.

/s/ Raffi Melkonian
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ECF CERTIFICATION

I hereby certify (i) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; (ii) the electronic submission is an exact copy of any paper document submitted pursuant to 5th Cir. R. 25.2.1; (iii) the document has been scanned for viruses and is free of viruses; and (iv) the paper document will be maintained for three years after the mandate or order closing the case issues, pursuant to 5th Cir. R. 25.2.9.

/s/ Raffi Melkonian
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I hereby certify that I have conferred with counsel for all parties in this litigation, and they consent to the filing of this brief.

/s/ Raffi Melkonian
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