No. 22-859

IN THE

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

GEORGE R. JARKESY, JR., ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Respondents.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF has a particular interest in this case because it believes the Securities and Exchange Commission's ("SEC") structure offends the Constitution on many levels. For-cause removal protections of SEC ALJs violate Article II, unconstitutionally shielding these officials from accountability to the President and thus to the American people. Worse, the SEC's administrative process—in which the SEC acts as investigator, prosecutor, and judge of its own cause—offends due process, Article III, and the Seventh Amendment. On top of this, the SEC has unfettered power to alter the jurisdiction of Article III courts.

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[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

AFPF believes this unconstitutional arrangement cannot stand and the SEC's extralegal administrative prosecution is void.

SUMMARY OF ARGUMENT

The Constitution "sets out three branches [of government] and vests a different form of power in each—legislative, executive, and judicial." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2216 (2020) (Thomas, J., concurring in part, dissenting in part) (citations omitted). "[T]he legislature makes, the executive executes, and the judiciary construes the law[.]" *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) (Marshall, C.J.). "By vesting each branch with an exclusive form of power, the Framers kept those powers separate." *Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018) (plurality). Or so they thought. Framers, meet the administrative state.

"The administrative state makes hash out of this basic allocation of constitutional powers." Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 Notre Dame L. Rev. 821, 852 (2019). "[A]s a practical matter" modern administrative bodies "exercise legislative power," "executive power," "and judicial power[.]" *City of Arlington v. FCC*, 569 U.S. 290, 312–13 (2013) (Roberts, C.J., dissenting). *Cf.* Federalist No. 47 (Madison). Indeed, this "is a central feature of modern American government." *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting). But "[t]he Framers could hardly have envisioned today's vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities." *Id.* (Roberts, C.J., dissenting)

(cleaned up). "It would be a bit much to describe" this state of affairs as "'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 315 (Roberts, C.J., dissenting). It is past time to confront the problem.

This case is an ideal opportunity to do so. The SEC is an exemplar of the administrative state's unconstitutionality. *See generally Cochran v. SEC*, 20 F.4th 194, 214–25 (5th Cir. 2021) (en banc) (Oldham, J., concurring) (exploring SEC's origin story). This administrative body wields vast legislative, executive, and judicial power, posing a grave threat to core private rights and individual liberty. As relevant here, it brings inhouse prosecutions where it acts as investigator, prosecutor, and judge of its own cause. The SEC also gets to make the rules for this slanted administrative process, further rigging the game in its own favor. Unsurprisingly, the Commission consistently finds in favor of itself. The SEC's ALJs are also unconstitutionally insulated from accountability to the political branches and, by extension, to the American People. This arrangement offends due process and makes a mockery of the Constitution's structural protections of individual liberty. It should not be allowed to stand.

Respondents are entitled to a meaningful remedy for the government's separation-of-powers violations that will afford them complete redress. By purporting to wield Article III judicial power to deprive Respondents of their private rights, the Commissioners here were mere usurpers in an unlawful office. This enforcement action against

Respondents, therefore, is necessarily void *ab initio,* and the Order must be vacated without remand.

More broadly, this case also provides the Court with an opportunity to address "[t]he most blatant way in which the administrative state violates the constitutional separation of powers"; to wit, "the vast subdelegation of legislative authority that permeates modern government." Calabresi & Lawson, 94 Notre Dame L. Rev. at 853. The Constitution flatly prohibits Congress from delegating *any* of its legislative power to other entities. U.S. Const. Art. I, § 1. Yet, Congress has increasingly sought to insulate itself from accountability by purporting to delegate its legislative power to various administrative bodies. And as Congress has in this way shirked its own constitutional responsibilities, those politically unaccountable administrative bodies have filled the resulting vacuum and taken up the policymaking role Congress has abandoned. To remedy this state of affairs, the Court should make clear the Constitution exclusively tasks the People's elected representatives with making important policy choices through the deliberately difficult legislative process, subject to constitutional limits on federal power.

For the foregoing reasons, the decision below should be affirmed.

ARGUMENT

I. The SEC's Administrative Prosecution Violates Article III and Is Therefore Void *Ab Initio.*

A. The SEC's Administrative Prosecution Implicates Private Rights.

In analyzing whether the SEC's inhouse administrative prosecution complies with the Constitution, a threshold inquiry is whether it implicates Respondents' private (as opposed to public) rights. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018). It does. Private rights include "life, liberty, and property[.]"[2] *Axon Enter. v. FTC*, 143 S. Ct. 890, 907 (2023) (Thomas, J., concurring). *Cf. Den Ex Dem. Murray v. Hoboken Land & Improv. Co.*, 59 U.S. (18 How.) 272, 284 (1856). Here, the SEC sought to deprive Respondents of vested property rights and infringe their economic liberty. *See* Pet. App. 3a–4a; *see also* Pet. App. 1a (SEC's "decisions have broad consequences for personal liberty and property").

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[2] "The original idea appears to have been that certain rights belong to individuals inalienably—things like the rights to life, liberty, and property—and they may not be deprived except by an Article III judge. Meanwhile, additional legal interests may be generated by positive law and belong to the people as a civic community and disputes about their scope and application may be resolved through other means, including legislation or executive decision." *In re Renewable Energy Dev. Corp.*, 792 F.3d 1274, 1278 (10th Cir. 2015) (Gorsuch, J.).

Among other things, the SEC imposed $985,000 in civil penalties and disgorgement and barred Mr. Jarkesy from pursuing his chosen occupation. *See* Pet. App. 3a–4a. That well describes core private rights. *See Axon*, 143 S. Ct. at 910–11 (Thomas, J., concurring). *Cf. Tull v. United States*, 481 U.S. 412, 422 (1987) ("A civil penalty was a type of remedy . . . that could only be enforced in courts of law."). Respondents are entitled to the constitutional process required when private rights are infringed.

B. The Constitution Exclusively Vests the Judicial Power To Find Facts and Independently Interpret the Law in Article III Courts.

"[A]n exercise of the judicial power is required when the government wants to act authoritatively upon core private rights that had vested in a particular individual." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 713 (2015) (Thomas, J., dissenting) (cleaned up); *see Axon*, 143 S. Ct. at 907 (Thomas, J., concurring) ("[W]hen private rights are at stake, full Article III adjudication is likely required."). "Article III of the Constitution begins with a clause that vests [this] particular kind of power in a specialized branch of the federal government." Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Geo. J.L. & Pub. Pol'y 27, 43 (2018). The Judicial Vesting Clause exclusively vests the "judicial Power of the United States" in Article III

courts,[3] U.S. Const. Art. III, § 1; *see Oil States*, 138 S. Ct. at 1372, "in independent judges,"[4] *id.* at 1381 (Gorsuch, J., dissenting); *see CFTC v. Schor*, 478 U.S. 833, 867 (1986) (Brennan, J., dissenting).

"Congress cannot 'confer the Government's "'judicial Power"' on entities outside Article III." *Oil States*, 138 S. Ct. at 1372–73 (quoting *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011)); *see also* Bernick, 16 Geo. J.L. & Pub. Pol'y at 43–46. *Cf. Severino v. Biden,* 71 F.4th 1038, 1050 (D.C. Cir. 2023) (Walker, J., concurring) (noting this Court "has doubted Congress's ability to vest any judicial power (whether 'quasi' or not) in an executive agency" (citing *Oil States*, 138 S. Ct. at 1372–73)). "The allocation of powers in the Constitution is absolute[.]" *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 69 (2015) (Thomas, J., concurring in judgment). And "[u]nder our Constitution, the 'judicial power' belongs to Article III courts and cannot be shared with the Legislature or the Executive." *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) (citing *Stern*, 564 U.S. at 482–83); *see* Caleb Nelson,

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[3] "As originally understood, the judicial power extended to 'suit[s] at the common law, or in equity, or admiralty.'" *Oil States*, 138 S. Ct. at 1381 (Gorsuch, J., dissenting) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)); *see also* U.S. Const. Art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States[.]").

[4] "This constitutional design is all about ensuring 'clear heads . . . and honest hearts,' the essential ingredients of 'good judges.'" *In re Renewable Energy Dev. Corp.*, 792 F.3d at 1277 (citation omitted).

Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 569–70 (2007). It "can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *Stern*, 564 U.S. at 483 (cleaned up). After all, Article III "promis[es] . . . the federal government will never be allowed to take the people's lives, liberties, or property without a decisionmaker insulated from the pressures other branches may try to bring to bear." *In re Renewable Energy Dev. Corp.*, 792 F.3d at 1278.

C. The SEC Cannot Possess or Exercise Article III Judicial Power.

"Administrative agencies" like the SEC "have been called quasi-legislative, quasi-executive or quasi-judicial . . . in order to validate their functions within the separation-of-powers scheme of the Constitution." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). But merely labeling their function as "adjudicative" cannot change that *all* "federal administrative agencies are part of the Executive Branch[.]" *B&B Hardware*, 575 U.S. at 171 (Thomas, J., dissenting). And "[e]ven when an executive agency acts like a legislative or judicial actor, it still exercises executive power." *Garcia v. Garland*, 64 F.4th 62, 70 n.7 (2d Cir. 2023). Indeed, "under our constitutional structure," *all* of the SEC's activities, including bringing inhouse administrative prosecutions, "*must be* exercises of" Article II executive power. *City of Arlington*, 569 U.S. at 304 n.4 (citing U.S. Const. Art. II, § 1, cl. 1); *see Seila Law*, 140 S. Ct. at 2198 n.2; *Bowsher v. Synar,* 478 U.S. 714, 761 n.3 (1986) (White, J., dissenting).

The SEC Commissioners and ALJs are executive officials housed within an Article II agency, who therefore cannot possess or exercise Article III judicial power. U.S. Const. Art. III, § 1; *see Stern*, 564 U.S. at 482–84; *see also B&B Hardware*, 575 U.S. at 171 (Thomas, J., dissenting). "[F]actfinding" and "deciding questions of law" "are at the core of judicial power, as Article III itself acknowledges." *Axon,* 143 S. Ct. at 910 (Thomas, J., concurring) (citing U.S. Const. Art. III, § 2, cl. 2). Accordingly, the Constitution bars the SEC from making factual findings and deciding questions of law in disputes implicating core private rights. But that is exactly what the SEC's administrative prosecution scheme allows it to do.

The SEC "houses . . . both prosecutorial and adjudicative activities," *Axon*, 143 S. Ct. at 902, "combin[ing] the functions of investigator, prosecutor, and judge under one roof," *id.* at 917 (Gorsuch, J., concurring in judgment). "The agency effectively fills in for the district court, with the court of appeals providing judicial review." *Id.* at 900 (majority opinion); *see Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) ("an SEC ALJ exercises authority comparable to that of a federal district judge conducting a bench trial" (cleaned up)). But with a twist: federal appellate courts review district courts' legal conclusions *de novo*; by contrast, federal appellate courts have granted "*Chevron* deference" to the *SEC's* legal conclusions announced in inhouse administrative prosecutions, even ruling that the SEC's inhouse decisions can "trump" Article III precedent. *See VanCook v. SEC*, 653 F.3d 130, 140 n.8 (2d Cir. 2011). Further still, the Commission's factual findings are subject to great deference: "The findings of the

Commission as to the facts, if supported by substantial evidence, are conclusive."[5] 15 U.S.C. § 78y(a)(4); *accord id.* § 80b-13; *see Lorenzo v. SEC,* 872 F.3d 578, 583 (D.C. Cir. 2017) (describing substantial evidence "standard as a 'very deferential' one" (citation omitted)).

The substantial evidence standard essentially reverses the burden of proof on petitions for review, given that substantial evidence is a lower standard of proof than the preponderance standard.[6] *See Meadows v. SEC*, 119 F.3d 1219, 1224 (5th Cir. 1997) ("'Substantial evidence . . . is more than a mere scintilla and less than a preponderance.'" (citation omitted)); *Gebhart v. SEC*, 595 F.3d 1034, 1043 (9th Cir. 2010) ("[A] reviewing court must uphold the agency's [factual] findings 'unless the evidence presented would compel a reasonable finder of fact to reach a contrary result.'" (citation omitted)). Indeed, some courts have described "[t]his deferential review" as "no more searching than if [an appellate court] were evaluating a jury's verdict." *Impax Labs., Inc. v. FTC*, 994 F.3d 484, 492 (5th Cir. 2021).

This arrangement violates the separation of powers. *See* Philip Hamburger, Is Administrative Law Unlawful?, 319 (2014). As Justice Thomas recently

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[5] "The reviewing court also cannot take its own evidence—it can only remand the case to the agency for further proceedings." *Axon*, 143 S. Ct. at 907 (Thomas, J., concurring).

[6] "Deferential review of the SEC's . . . decisions is particularly concerning given their tendency to overwhelmingly agree with their respective agency's decisions." *Axon*, 143 S. Ct. at 907 n.3 (Thomas, J., concurring).

suggested, SEC's administrative process "may violate the separation of powers by placing adjudicatory authority over core private rights—a judicial rather than executive power—within the authority of Article II agencies" and "violate Article III by compelling the Judiciary to defer to administrative agencies regarding matters within the core of the Judicial Vesting Clause." *Axon*, 143 S. Ct. at 909–10 (Thomas, J., concurring). *Cf. Lorenzo*, 872 F.3d at 602 (Kavanaugh, J., dissenting) ("[A]gency-centric process is in some tension with Article III of the Constitution[.]"). Exactly so.

"Requiring judges in core-private-rights cases to defer to facts found by administrative agencies effectively divests the courts of a key component of judicial power—and therefore violates Article III."[7] Bernick, 16 Geo. J.L. & Pub. Pol'y at 46. "It is no answer that an Article III court may eventually review the agency order and its factual findings under a deferential standard of review." *Axon*, 143 S. Ct. at 910 (Thomas, J., concurring). "[W]hen agency adjudicators stray outside the proper limits of executive adjudication, such as by depriving individuals of vested property rights, they must not serve even as fact-finders subject to judicial deference. All cases and controversies subject to the federal judicial power—or parts of those cases and controversies—must be evaluated and determined by Article III judges[.]" Jennifer Mascott,

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[7] This practice also violates the Seventh Amendment jury-trial right. *See Axon*, 143 S. Ct. at 910 (Thomas, J., concurring) (citing *Tull*, 481 U.S. at 417); Resp. Br. 12–24; Pet. App. 17a.

Constitutionally Conforming Agency Adjudication, 2 Loyola U. Chi. J. Reg. Compliance 22, 25 (2017) (footnotes omitted). At minimum, "Article III requires de novo review, of both fact and law, of all agency adjudication that is properly classified as 'judicial' activity." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1248 (1994).

In sum, here Congress has unconstitutionally delegated to the SEC—an Article II executive body—core judicial power Article III's Vesting Clause exclusively vests in Article III courts. *See Oil States,* 138 S. Ct. at 1372–73. The statutory provisions granting the SEC unfettered discretion to choose to bring inhouse administrative prosecutions are part and parcel of this unconstitutional arrangement.

D. The Commissioners Are Usurpers In An Unlawful Office Whose Inhouse Enforcement Actions Are Void *Ab Initio*.

Congress lacks power to transfer Article III judicial power to an Article II administrative body.[8] Because Congress has assigned the SEC "judicial Power"—a sovereign function it cannot possess—the SEC's administrative tribunal cannot constitutionally exist, and its Commissioners are mere usurpers, whose inhouse enforcement actions are void *ab initio*.[9]

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[8] More broadly, Congress cannot constitutionally "create agencies that straddle multiple branches of government." *Seila Law*, 140 S. Ct. at 2216 (Thomas, J., concurring).

[9] The "intelligible principle" regime does not apply to violations of Article III's Vesting Clause.

Cf. Hildreth's Heirs v. M'Intire's Devisee, 24 Ky. 206, 208 (Ky. 1829) ("The offices attempted to be created, never had a constitutional existence; and those who claimed to hold them, had no rightful or legal power."). *See generally Calcutt v. FDIC*, 37 F.4th 293, 344–45 (6th Cir. 2022) (Murphy, J., dissenting) (surveying case law), *rev'd*, 143 S. Ct. 1317 (2023) (per curiam). As this Court explained long ago: "Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached[.]"[10] *Norton v. Shelby Cnty.*, 118 U.S. 425, 449 (1886). And this "Court's modern cases also treat an officer's actions as void if the generic office could 'not lawfully possess' the power to take them." *Calcutt*, 37 F.4th at 344 (Murphy, J., dissenting) (citing *Collins v. Yellen*, 141 S. Ct. 1761, 1788 (2021)).

Here, the Commission cannot lawfully possess the "judicial Power" the Commissioners purported to exercise. Therefore, those actions are void *ab initio*.

II. The SEC's Administrative Prosecution Violates Due Process.

The SEC's Order cannot stand for a second reason: The SEC's administrative prosecution violated Respondents' due-process rights.

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[10] "This rule extended to constitutional defects. The Supreme Court may have followed it as early as *United States v. Yale Todd* (U.S. 1794)." *Calcutt*, 37 F.4th at 344 (Murphy, J., dissenting) (citing *United States v. Ferreira*, 54 U.S. 40, 52–53 (1851) (note by Taney, C.J.)).

A. The SEC's Administrative Process Is Rigged Against Respondents.

It is important to understand the degree to which the SEC's administrative process stacks the deck against respondents. After all, the SEC "combines the functions of investigator, prosecutor, and judge under one roof." *Axon*, 143 S. Ct. at 917 (Gorsuch, J., concurring in judgment). It "employ[s] relaxed rules of procedure and evidence—rules they make for themselves." *Id.* (Gorsuch, J., concurring in judgment). *See generally* Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. Pa. J. Const. L. 45, 65–70 (2016) (describing SEC's inhouse rules). Worse, since 2010, the SEC has been able to impose civil penalties through its inhouse administrative process. *See Tilton v. SEC,* 824 F.3d 276, 279 (2d Cir. 2016). "[T]he S.E.C. can today obtain through internal administrative proceedings nearly everything it might obtain by going to court." Jed S. Rakoff, U.S. Dist. Judge for the S. Dist. of N.Y., PLI Securities Regulation Institute Keynote Address: Is the S.E.C. Becoming a Law Unto Itself?, 5 (Nov. 5, 2014).[11]

Unsurprisingly, the agency "win[s] the vast majority of these in-house prosecutions[.]" Adam Katz, *Eventual Judicial Review*, 118 Colum. L. Rev. 1139, 1153–54 (2018). In contested cases, SEC ALJs overwhelmingly rule against respondents. *See* Gideon Mark, *Response: SEC Enforcement Discretion*, 94 Tex. L. Rev. Online 261, 262 (2016). In short, SEC

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[11] https://securitiesdiary.files.wordpress.com/2014/11/rakoff-pli-speech.pdf.

administrative prosecutions are severely slanted against respondents from start to finish.

B. The SEC's Combination of Investigative, Prosecutorial, and Judicial Functions Violates Due Process.

This arrangement is unconstitutional. Due process demands that SEC may not act as investigator, prosecutor, and judge of its own cause. *See Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."). *See generally* Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. Mich. J.L. Reform 103 (2018). "In this country, judges have no more power to initiate a prosecution of those who come before them than prosecutors have to sit in judgment of those they charge." *Donziger v. United States*, 143 S. Ct. 868, 870 (2023) (Gorsuch, J., dissenting from denial of certiorari).

This constitutional workaround should not be allowed to stand. If SEC wants to prosecute Respondents, Article III and due process require SEC to do so in federal court. *See Axon,* 143 S. Ct. at 910 (Thomas, J., concurring) (SEC review scheme "may violate due process by empowering entities that are not courts of competent jurisdiction to deprive citizens of core private rights."); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1993 (2021) (Gorsuch, J., concurring in part, dissenting in part).

III. The Time Has Come to Enforce Article I's Vesting Clause.

Congress lacks power under Article I to transfer Article III power to an Article II entity. Even if the SEC's inhouse enforcement process would otherwise pass constitutional muster, the forum-selection provisions would constitute an unconstitutional delegation for an additional reason: Article I bars Congress from transferring its exclusive legislative power to other entities.

A. The Forum-Selection Provisions Implicate Article I.

As Petitioner tells it, the forum-selection provisions do not confer legislative power but instead merely grant prosecutorial discretion. S*ee* Pet. Br. 37–44. Not so. To be sure, the decisions whether and, if so, what to charge and whether to seek civil or criminal penalties *are* exercises of prosecutorial discretion Article II generally entrusts the Executive with making. But here, by contrast, the forum-selection provisions grant the SEC a blank check to make the jurisdictional decision *which branch of government*, Executive or Judicial, is empowered to find facts and adjudicate liability, by what process, and under what standards, and theoretically to do so for *categories* of cases.[12] *See Tilton*, 824 F.3d at 278

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[12] Whether the SEC has exercised this power is irrelevant. "[A]bsent [statutory] provision[s] cannot be supplied by the courts." *Little Sisters of the Poor Saints Peter & Paul Home v.*

(choice of forum "belongs to the SEC without express statutory constraint"); *see also* 15 U.S.C. § 78w(a)(1) (granting broad rulemaking authority). *That* is legislative power. After all, subject to other constitutional limits, the Constitution tasks Congress with determining what matters that could otherwise be adjudicated within the Executive are instead within the purview of lower federal courts. *See* U.S. Const. Art. I, §§ 1, 8; U.S. Const. Art. III, §§ 1, 2.

"'[T]he mode of determining matters of this class is completely within congressional control.'"[13] *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)); *see Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). The forum-selection provisions transfer Congress's power "[t]o constitute Tribunals inferior to the supreme Court," U.S. Const. Art. I, § 8, "with such Exceptions, and under such Regulations as the Congress shall make," U.S. Const. Art. III, § 2, to an Article II body, giving it carte blanche to, in essence, regulate the jurisdiction of Article III courts for a wide range of matters. Indeed, the agency could presumably choose to *only* bring inhouse administrative prosecutions or, conversely, *only* litigate in Article III courts. In sum, the decision

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Pennsylvania, 140 S. Ct. 2367, 2381 (2020) (cleaned up). And this Court "ha[s] never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001).

[13] Because SEC's prosecution of Respondents implicates their private rights, it cannot be assigned to an administrative tribunal and may only be adjudicated in an Article III court.

below correctly concluded the SEC's forum-selection provisions implicate Article I. *See* Pet. App. 21a–24a.

B. Article I's Vesting Clause Protects Liberty.

"In its design and structure, the Constitution is tilted in the direction of liberty." Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1911 (2014).[14] As relevant here, the baseline Article I sets is that the Executive has *no authority* to act unless and until Congress confers power on it via duly enacted legislation.[15] *See La. Pub. Serv. Com v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986). And the Constitution deliberately makes it difficult to alter this liberty-tilted baseline.

To protect liberty, "the framers went to great lengths to make lawmaking difficult," requiring "that any proposed law must win the approval of two Houses of Congress . . . and either secure the President's approval or obtain enough support to override his veto." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting). And the

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[14] "[T]he liberty protected by the separation of powers in the Constitution is primarily freedom from government oppression[.]" *Id.* at 1909.

[15] *Chevron* maximalism wrongly reverses this baseline, *see Buffington v. McDonough*, 143 S. Ct. 14, 19–20 (2022) (Gorsuch, J., dissenting from denial of certiorari), also implicating nondelegation concerns, *see Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154–55 (10th Cir. 2016) (Gorsuch, J., concurring).

Constitution flatly prohibits Congress from delegating any of its legislative power to other entities. U.S. Const. Art. I, § 1; *see Shankland v. Washington*, 30 U.S. 390, 395 (1831) (Story, J.) ("[T]he general rule of law is, that a delegated authority cannot be delegated."). As Chief Justice Marshall wrote: "It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative." *Wayman*, 23 U.S. (10 Wheat.) at 42.

For good reason. "If Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'" *Gundy*, 139 S. Ct. at 2134–35 (Gorsuch, J., dissenting) (citation omitted). "[I]t would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Id.* at 2133 (Gorsuch, J., dissenting) (citation omitted). "By shifting responsibility to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have." *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring). "Legislation would risk becoming nothing more than the will of the current President, or . . . of unelected officials barely responsive to him." *West Virginia v. EPA*, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

C. Line-Drawing Questions Should Not Deter Enforcement of the Separation of Powers.

"Strictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta v. United*

States, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting) (emphasis in original).[16] This raises the question what is "legislative power" that Congress may not delegate. To be sure, "[t]he line has not been exactly drawn" between "important subjects, which must be entirely regulated by the legislature itself" and matters of "less interest" that Congress can delegate to others "to fill up the details." *Wayman*, 23 U.S. (10 Wheat.) at 43. And as Professor Ronald Cass has explained, "the hard question is how to specify clearly—at least, as clearly as possible—what power the Congress can and cannot assign to others." Ronald A. Cass, *Separating Powers in the Administrative State: Understanding Delegation, Discretion, and Deference*, C. Boyden Gray Center for the Study of the Administrative State Research Paper No. 23-22, at 36 (September 20, 2023) [hereinafter "*Separating Powers*"].[17] "But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *Ass'n of Am. R.R.*, 575 U.S. at 61 (Alito, J., concurring); *see id.* at 86 (Thomas, J., concurring). And "the difficulty of the inquiry doesn't mean it isn't worth the effort." *United States v. Nichols*, 784 F.3d

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[16] "When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons[.]" *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting); *see* Federalist No. 75 (Hamilton). "[T]he core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct." *Ass'n of Am. R.R.*, 575 U.S. at 76 (Thomas, J., concurring in the judgment).

[17] https://administrativestate.gmu.edu/wp-content/uploads/2023/08/23-22_Cass-1.pdf.

666, 671 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

No matter the difficulty of the task, the Judiciary is dutybound to search for the line and could do so on a case-by-case basis. *Cf. Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 789 (6th Cir. 2023) (Nalbandian, J., dissenting) (finding nondelegation violation), *petition for rehearing en banc filed*, No. 22-3772 (6th Cir. Oct. 6, 2023); *United States v. Pheasant*, No. 21-cr-00024, 2023 U.S. Dist. LEXIS 72572, at *19-22 (D. Nev. Apr. 26, 2023) (same). "To leave this aspect of the constitutional structure alone undefended would serve only to accelerate the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people's representatives in order to protect their liberties." *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting). And "[d]evelopments in the modern administrative state suggest the time has come to articulate judicially manageable standards for identifying delegations of legislative power. The reasons for judicial restraint in this area have largely collapsed[.]" Naomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y. U. L. Rev. 1463, 1508 (2015).

More than sufficient ink has been spilled to allow this Court to articulate judicially manageable standards. For example, surveying the jurisprudence and scholarship, Professor Cass has identified three

"essential elements" shaping the nondelegation doctrine:[18]

> *[F]irst*, that Congress cannot pass to others the power to make important judgments on legally binding rules, *second*, especially on matters respecting the regulation of private rights rather than of public property, and, *third*, that grants of authority must fall within the constitutionally assigned purview of the delegate (must pertain to the exercise of that delegate's own power).

Cass, *Separating Powers*, *supra*, 43. *See generally West Virginia v. EPA,* 142 S. Ct. at 2625 n.11 (Gorsuch, J., concurring) (collecting scholarship); The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine (Peter J. Wallison & John Yoo eds. 2022) [hereinafter "Nondelegation Perspectives"]. As Professor Cass suggests, "[t]ogether, these elements should prove sufficient to allow a judicially manageable—though, admittedly, far from a bright-line—nondelegation doctrine." Cass, *Separating Powers*, *supra*, 44.

If the Court "revisit[s] how nondelegation under Article I operates, it" could also "consider what

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[18] As Paul Larkin has suggested, there may well be "multiple nonexclusive" nondelegation principles that, if enforced, would "force Congress to do its job, to prevent the President from doing Congress's work, and to avoid taking on that responsibility themselves." Paul Larkin, *Revitalizing the Nondelegation Doctrine*, 23 Federalist Soc'y Rev. 238, 263 (2022).

Congress historically delegated to federal officials around the Framing. . . . [T]he statutes [then] authorized the executive to create rules that were only 'binding' on executive officials, not members of the public." *Allstates*, 79 F.4th at 788 n.17 (Nalbandian, J., dissenting) (citations omitted); *see* Jennifer Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388, 1449 (2019). This approach suggests "[t]he Government may create generally applicable rules of private conduct only through the proper exercise of legislative power." *Ass'n of Am. R.R.*, 575 U.S. at 86 (Thomas, J., concurring).

Founding-era agency law principles may also provide further shape to the doctrine; after all, the Constitution is a form of fiduciary instrument in which "We the People" are the principal and Congress is supposed to be our faithful agent. *See generally* Gary Lawson, *A Private-Law Framework for the Subdelegation*, *in* Nondelegation Perspectives.

The Commerce Clause's original public meaning may be another relevant background principle providing additional guideposts.[19] *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (noting Commerce Clause "objection, far-reaching and incurable, aside from any defect of unlawful delegation"). *Cf. BST Holdings, L.L.C. v. OSHA*, 17

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[19] "By departing from th[e Commerce Clause's] limited meaning, the Court's cases have licensed federal regulatory schemes that would have been unthinkable to the Constitution's Framers and ratifiers." *Sackett v. EPA*, 143 S. Ct. 1322, 1358 (2023) (Thomas, J., concurring) (cleaned up).

F.4th 604, 619 (5th Cir. 2021) (Duncan, J., concurring). *See generally Sackett*, 143 S. Ct. at 1358 (Thomas, J., concurring). For example, where a statute grants "authority to regulate an area—public health and safety—traditionally regulated by the States," "lack of guidance" bounding an agency's discretion should be greeted skeptically. *Allstates*, 79 F.4th at 788 n.16 (Nalbandian, J., dissenting) (cleaned up). Novelty may provide yet another indicator of a serious subdelegation problem. *Cf. Seila Law*, 140 S. Ct. at 2201 ("Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it.").

This Court has also said "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475; *see also Allstates*, 79 F.4th at 776 (Nalbandian, J., dissenting) ("Laws that vest more power require more constraints."). Accordingly, "when the grant of power is bigger, such that it can 'affect the entire national economy,' Congress 'must provide substantial guidance.'" *Allstates*, 79 F.4th at 787 (Nalbandian, J., dissenting) (quoting *Whitman*, 531 U.S. at 475). Indeed, there may be cases where "the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative,'" even where Congress provides detailed guidance. *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

In sum, this Court is well equipped to articulate judicially manageable standards for enforcing Article I's Vesting Clause on a case-by-case basis. And the time has come to do so.

D. This Court Should Jettison the "Intelligible Principle" Remark.

In all events, this Court should make clear "th[e] mutated version of the 'intelligible principle' remark" in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), that forms the basis of the modern "intelligible principle" test "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting). After all, "[a]lthough this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: '*All* legislative Powers herein granted shall be vested in a Congress.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) (citations omitted). And in all events, this Court should reaffirm that while Congress may task ministers with "fill[ing] up the details" on matters "of less interest," the Constitution categorically bars Congress from punting important policy decisions to unelected bureaucrats housed within a warren of administrative bodies. *Wayman*, 23 U.S. (10 Wheat.) at 42–43.

E. Enforcing Article I's Vesting Clause Will Have Salutary Effects.

The sky will not fall if this Court enforces Article I's Vesting Clause. As Judge Thapar has suggested elsewhere, common strawman critiques advanced by proponents of the administrative state—"Congress is incapable of acting quickly in response to emergencies" and "modern society is too complex to be

run by legislators"—are constitutionally irrelevant and, in any event, lack merit on their own terms. *See Tiger Lily*, 5 F.4th at 674–75 (Thapar, J., concurring).

On the other side of the ledger, the benefits of putting Congress back in the driver's seat of setting public policy—where the Constitution puts it—are immense. *See* Antonin Scalia, *A Note on the Benzene Case*, Reg., July/Aug. 1980, at 28 ("[T]he unconstitutional delegation doctrine is worth hewing from the ice."). Unconstitutional "[d]elegations have weakened accountable government in both political branches, allowing agencies to initiate policy and congressmen to serve as shadow administrators. This brings things too far out of alignment with the vesting of legislative and executive powers in separate branches." Rao, 90 N.Y. U. L. Rev. at 1508. This "drives a wedge between the personal interests of legislators and the institutional interests of Congress, undermining the collective legislative process established to promote the public good." *Id.* at 1477. "[D]elegation also contributes to . . . political polarization[.]" Thomas J. Philbrick, *A Purple Garment for Their Nakedness: Wilson, Hegel, and the Non-Delegation Doctrine*, 14 Alb. Gov't L. Rev. 30, 63 (2020). Enforcing Article I's Vesting Clause would ameliorate some of these awful effects.

Sketching out the contours of the Constitution's bar against subdelegation of legislative power would also provide much-needed clarity as to the major questions doctrine's metes and bounds. As this Court has explained, the major questions doctrine is grounded in "both separation of powers principles and a practical understanding of legislative intent[.]" *West Virginia v. EPA*, 142 S. Ct. at 2595. *Cf. Jones v.*

Hendrix, 143 S. Ct. 1857, 1876–77 (2023) (citing *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam), as involving a "statute implicat[ing] historically or constitutionally grounded norms"). This case provides an ideal opportunity for this Court to elucidate the relationship between Article I's Vesting Clause and the major questions doctrine.[20]

Guidance as to which assertions of agency power in this Court's recent major questions cases *would* violate Article I's Vesting Clause had these power grabs been clearly authorized would provide much-needed doctrinal clarity and conceptual certainty.[21] *See, e.g.*, *NFIB v. OSHA*, 142 S. Ct. at 669 (Gorsuch, J., concurring) ("[I]f the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority."); *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 1002 (D.C. Cir. 2021) (Walker, J., concurring in part, dissenting in part) ("[I]f Congress merely *allowed* generation shifting (it didn't), but did not clearly *require* it, I

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[20] The major questions doctrine appears to have emerged in the wake of the judicially created "intelligible principle" regime as an alternative to enforcing Article I's Vesting Clause. *See Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting); *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 669 (2022) (per curiam) (Gorsuch, J., concurring).

[21] Importantly, *West Virginia v. EPA* did not squarely present a nondelegation question. *See* 142 S. Ct. at 2600. This Court's other recent major-questions precedent likewise turned on whether the agency's claimed powers were statutorily authorized and did not require this Court to address nondelegation claims. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023); *NFIB v. OSHA*, 142 S. Ct. at 663; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486.

doubt doing so was constitutional."), *rev'd sub nom.*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *see also Tiger Lily*, 5 F.4th at 672 ("[T]he government's interpretation of § 264(a) could raise a nondelegation problem."). This would answer a concern expressed by some that "the Court's failure to say anything about nondelegation creates genuine conceptual uncertainty about what exactly it was doing in these cases, a conceptual uncertainty that will matter for future cases." Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 297 (2022). It would also provide Congress with much-needed guidance on the universe of today's important subjects that cannot constitutionally be assigned (clearly or otherwise) to administrative bodies. *See Wayman*, 23 U.S. (10 Wheat.) at 43.

CONCLUSION

For these reasons, this Court should affirm the decision below.

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