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 AMICI CURIAE ADVANCING AMERICAN FREEDOM; MANHATTAN INSTITUTE; AMERICANS FOR LIMITED GOVERNMENT RESEARCH FOUNDATION; CENTER FOR POLITICAL RENEWAL; CITIZENS UNITED; CITIZENS UNITED FOUNDATION; COMMITTEE FOR JUSTICE; FAITH AND FREEDOM COALITION; FRONTLINE POLICY COUNCIL; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; TIM JONES, MISSOURI CENTER-RIGHT COALITION; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; NEVADA POLICY RESEARCH INSTITUTE; NEW JERSEY FAMILY FOUNDATION; NORTH CAROLINA INSTITUTE FOR CONSTITUTIONAL LAW; RIO GRANDE FOUNDATION; SETTING THINGS RIGHT; AND TEA PARTY PATRIOTS ACTION, INC. IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether statutory provisions that empower the Securities and Exchange Commission (SEC) to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment.

2. Whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine.

3. Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness. AAF believes, as did America's Founders, that the separation of government powers is essential to ensuring the promises of the Declaration of Independence to all Americans.[1]

Amici Manhattan Institute; Americans for Limited Government Research Foundation; Center for Political Renewal; Citizens United; Citizens United Foundation; Committee for Justice; Faith and Freedom Coalition; Frontline Policy Council; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Missouri Center-Right Coalition; National Center for Public Policy Research; Nevada Policy Research Institute; New Jersey Family Foundation; North Carolina Institute for Constitutional Law; Rio Grande Foundation; Setting Things Right; and Tea Party Patriots Action, Inc. believe, as did America's Founders, that the maintenance of the separation of government powers into three co-equal branches is essential to ordered liberty.

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[1] No counsel for a party authored this brief in whole or in part. No person other than *Amici Curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns the authority of the Securities and Exchange Commission (SEC) to adjudicate, in house, alleged violations of law or SEC regulations. The most relevant constitutional requirement at issue in this case is the principle of separation of powers that undergirds the governmental structure created by the Constitution. The Constitution carefully separates the legislative, executive, and judicial functions into different branches of government. Apart from the specific instances of overlap designed to allow the branches to protect their own power, they are separate and distinct as are the categories of power they wield.

Today, the agencies that comprise the administrative state, on the other hand, act with significant unchecked power. Contrary to the constitutionally required separation of powers, "[a]gencies like the SEC and FTC combine the functions of investigator, prosecutor, and judge under one roof." *Axon Enter. v. FTC*, 143 S. Ct. 890, 917 (2023) (Gorsuch, J., concurring in the judgment). According to then-SEC Commissioner Edward Fleischman, "the true life force of a fourth branch agency is expressed in a commandment that failed, presumably only through secretarial haste, to survive the cut for the original decalogue: Thou shalt expand thy jurisdiction with all thy heart, with all thy soul and with all thy might."[2]

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[2] Edward H. Fleischman, Commissioner, SEC, Address to the

The constitutional separation of powers was not an accident. It was designed by the Framers of the Constitution to ensure that the federal government, which exists to protect individual rights, would not become a source of those rights' violation. The Constitution's structures are not suggestions or guidelines. They are rules those who govern must follow. The SEC's adjudication of cases before its own administrative law judges ("ALJ") undermines that structure by violating the distribution of powers among the three branches and thus is illegal.

Here, the SEC brought an action against respondents George Jarkesy and Patriot28 for fraud "under the Securities Act, the Securities and Exchange Act and the Advisers Act" through the agency's in-house adjudicatory process. *Jarkesy v. SEC*, 34 F.4th 446, 450 (5th Cir. 2022). The respondents' constitutional challenges to, and requests to enjoin, that adjudication were denied. *Id*. After it was found that respondents had committed securities fraud, and that finding was affirmed by the Commission, Jarkesy was ordered to "pay a civil penalty of $300,000" and was "barred [] from various securities industry activities." *Id*. Thus, should the Court deny respondents' claims here, they will suffer deprivations of both liberty and property while having had their case brought and reviewed by an agency operating outside of the constitutionally required separation of powers.

Women in Housing and Finance, *The Fourth Branch at Work*, (November 29, 1990)
https://www.sec.gov/news/speech/1990/112990fleischman.pdf.

ARGUMENT

I. The Securities and Exchange Act's Delegation of Adjudicatory Power to the Executive Branch is Inconsistent with Article I and III of the Constitution and with the Constitutional Separation of Powers.

Officials of the federal government have no authority or right to change the Constitution apart from the amendment process. Yet for at least one hundred years, an effort has been made to undermine the constitutional separation of powers without going through that process. The Framers understood that governmental structure was a necessary protection for individual liberty. When government officials violate that structure, they undermine those protections, endangering the liberty of the people that it is their job to safeguard.

A. Delegation of judicial power to ALJs is inconsistent with Article III and is thus outside the power of Congress.

Congress may only exercise the powers vested in it by the Constitution. The Constitution, "rather than granting general authority to perform all the conceivable functions of government," "lists, or enumerates, the Federal Government's powers." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012). An "enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.'" *Id.* at 534 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824)) (alteration in original). Thus, Congress may only delegate power if

the power to do so is either enumerated or is fairly contained within the Necessary and Proper Clause. Because the power to delegate is not enumerated and is not fairly contained within the Necessary and Proper Clause, Congress may not exercise that power.

First, it is indisputable that there is no enumerated power to delegate. Article I of the Constitution lists all the powers of Congress, and delegation is not among them. Nor is a lack of such power surprising. "Permitting Congress to divest its legislative power to the Executive Branch would 'dash [the] whole scheme,'" of constitutional lawmaking. *West Virginia v. EPA*, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (quoting *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 61 (2015) (Alito, J., concurring)). Further, as John Locke understood, "*[t]he legislative cannot transfer the power of making laws to any other hands*: for it being but a delegated power from the people, they who have it cannot pass it over to others."[3] The same is true of the judicial power. It is delegated by the people to the judicial branch and cannot be removed therefrom apart from a constitutional amendment.

Second, delegation of legislative power is not "necessary and proper for carrying into execution" Congress's enumerated powers. U.S. Const. art. I, § 8,

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[3] John Locke, *Second Treatise on Government*, § 141 at 74-75 (C.B. Macpherson ed., 1980) (emphasis in original). *See also*, Thomas Jefferson, *Notes on the State of Virginia*, Query XIII, 136 (1853) ("Our ancient laws expressly declare that those who are but delegates themselves shall not delegate to others powers which require judgment and integrity in their exercise.").

cl. 18. The Necessary and Proper Clause "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *Sebelius*, 567 U.S. at 559 (quoting *McCulloch*, 17 U.S. at 411). "Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with the basic constitutional principles." *Gonzales v. Raich*, 545 U.S. 1, 52 (2005) (O'Connor, J. dissenting) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting)). That clause is not "a pretext . . . for the accomplishment of objects not entrusted to the government." *Raich*, 545 U.S. at 66 (Thomas, J., dissenting) (quoting *McCulloch*, 17 U.S. at 423) (internal quotation marks omitted).

Rather, "the Necessary and Proper Clause is exceeded . . . when [congressional action] violates the background principle of enumerated (and hence limited) federal power." *Sebelius*, 567 U.S. at 653 (Scalia, J., dissenting). The Necessary and Proper Clause merely "ensure[s] that the Congress shall have all means at its disposal to reach the heads of power that admittedly fall within its grasp . . . Congress shall not fail because it lacks the means of implementation."[4] But necessary and proper means necessary *and* proper. The scope of the powers vested by the clause is limited by "the word 'proper' [which] in this context requires executory laws to be distinctively and peculiarly within the jurisdictional competence of the national government -- *that is,*

[4] Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1397-1398 (1987).

consistent with background principles of separation of powers, federalism, and individual rights."[5]

Even Justice Marshall, in his famous explication of the clause, generally taken to be an expansive reading, demanded that the "means . . . consist with the letter and spirit of the Constitution." *McCulloch v. Maryland*, 17 U.S. 17 U.S. 316, 421 (1819). Both the letter and the spirit of the Constitution require congressional exercises of power under the clause to be consistent with the separation of powers. Thus, any attempt to restructure the powers of the federal government inconsistent with the separation of powers established by the Constitution is beyond the power of Congress. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372-73 (2018) (quoting *Stern*, 564 U.S. at 484) ("Congress cannot 'confer the Government's judicial Power on entities outside Article III.'").

B. The executive branch cannot exercise judicial power.

Adjudication by the executive is sometimes unconstitutional, including in this case. *See B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) (citing *Stern v. Marshall*, 564 U.S. 462, 482-83 (2011)). ("Under our Constitution, the 'judicial power' belongs to Article III courts and cannot be shared with the Legislature or

[5] Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1234-1235 (1994) (emphasis added).

the Executive."). The question is whether the power being exercised is judicial in nature.

The distinction between adjudication that can properly be exercised by the executive on the one hand, and core judicial power reserved to Article III courts on the other, hinges on the distinction between public and private rights. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 713 (2015) (Thomas, J., dissenting). *See B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) ("Because federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights."). The adjudication of "core private rights" is "a judicial rather than executive power." *See Axon Enter.*, 143 S. Ct. at 909 (Thomas, J., concurring). Thus, "[w]hen private rights are at stake, full Article III adjudication is likely required." *Id.* at 907.

Private rights, in turn, "encompass 'the three absolute rights,' life, liberty, and property, 'so called because they 'appertain and belong to particular men merely as individuals, not . . . depending upon the will of the government.'" *Axon Enter.*, 143 S. Ct. at 907 (Thomas, J., concurring) (quoting *Wellness Int'l Network*, 575 U.S., at 713–714 (dissenting opinion) (quoting 1 W. Blackstone, Commentaries on the Laws of England 119 (1765)).

Relatedly, "it may violate due process by empowering entities that are not courts of competent jurisdiction to deprive citizens of core private rights." *Id.* at 910 (citing *B&B Hardware*, 575 U.S. at 164 (Thomas, J. dissenting)). As Professor Lawson

suggests "the Article III inquiry merges with questions of due process: if the government is depriving a citizen of 'life, liberty, or property,' it generally must do so by *judicial* process."[6] While the line is difficult to draw, "the imposition of a civil penalty or fine is very hard to distinguish from the imposition of a criminal sentence (especially when the criminal sentence is itself a fine). If the latter is judicial, it is difficult to see why the former is not as well."[7]

Here, the penalty is a deprivation of private rights in the form of a fine and a restriction on future engagement in securities activity. *See Jarkesy*, 34 F.4th at 450. Such invasions of liberty and property demand due process of law. In agency adjudications, "[a]gencies like the SEC and FTC combine the functions of investigator, prosecutor, and judge under one roof." *Axon Enter.*, 143 S. Ct. at 917 (Gorsuch, J., concurring in the judgment). Because "the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator," in the same case," *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (citing *In re Murchison*, 349 U.S. 133, 136-37 (1955)), due process of law requires Article III review.

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[6] Lawson, *supra* note 5, at 1247 (citing *Murry's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855)).
[7] *Id.*

C. Article III appellate review is insufficient to provide the process due under the Constitution.

Mere Article III appellate review of an agency's adjudicatory decision is insufficient. "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 Enter.*, 143 S. Ct. at 910 (Thomas, J., concurring). Both factfinding and deciding questions of law are "at the core of the judicial power." *Id.* Further, "[i]t is obvious that Article III 'would not be satisfied if Congress provided for judicial review but ordered the courts to affirm the agency no matter what.'" *Id.* (quoting Lawson, *supra* note 5, at 1247). Nor can Congress "simply order[] courts to put a thumb (or perhaps two forearms) on the agency's side of the scale." *Id.* (quoting Lawson, *supra* note 5, at 1247-48) (internal quotation marks omitted). "Such a regime 'allows a mere party to supplant a jury as the court's factfinder.'" *Id.* (quoting Philip Hamburger, *Is Administrative Law Unlawful*, 319 (1st ed. 2014)). Finally, even if Article III courts' review of agency adjudication of private rights were entirely *de novo*, such an arrangement is still inconsistent with the Constitution's arrangement of powers and is thus unconstitutional.

The inability of defendants to opt out of the ALJ system furthers the injustice of that system. Under the Dodd-Frank Act, "Congress gave *the SEC* the power to bring securities fraud actions for monetary penalties within the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so." *Jarkesy*, 34 F.4th at 461 (citing 15

U.S.C. § 78u-2(a)) (emphasis in original). Thus, defendants often have no right to demand that their case be heard by an independent Article III court.

II. Governments Must be Subject to the Rule of Law if they Are to Fulfill Their Reason for Being: The Protection of Individual Rights.

The founding generation understood the purpose of government to be the protection of individual rights. Because government can violate individual rights, the Framers understood that government itself had to be restrained. The constitutional separation of powers was implemented as just such a protection.

A. Individuals have rights that preexist government.

The rights of individuals preexist government and come from man's Creator. The Declaration of Independence, which imbues meaning into the Constitution, expresses the fundamental philosophy of American government: "Governments are instituted among Men," to secure "certain unalienable rights," which come from man's Creator and among which "are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). These provisions of the Declaration of Independence "refer[] to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth." *Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., dissenting).

The Declaration, though perhaps revolutionary in its clarity and universality, was not espousing entirely new ideas. Rather, it echoes the reasoning of William Blackstone and John Locke, among many others. According to Blackstone, absolute rights are those "which are such as appertain and belong to particular men, merely as individuals or single persons."[8] The Declaration shows its indebtedness to the ideas of Locke, who wrote, "no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business" are "made to last during his, not one another's pleasure."[9]

The Constitution, "like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State." *Obergefell*, 576 U.S. at 736 (Thomas, J., dissenting). The Ninth Amendment reinforces the idea that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. In other words, the people were to retain their *pre-existing* rights, both enumerated and unenumerated, under the new government.

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[8] 1 W. Blackstone, Commentaries on the Laws of England 119 (1765).

[9] Locke, *supra* note 3, § 6 at 9.

B. The rights of individuals are at all times threatened by human nature, whether in the hypothetical state of nature or under any government.

The Founder's view of government "was rooted in a general skepticism regarding the fallibility of human nature." *See INS v. Chadha*, 462 U.S. 919, 949 (1983). In a state of anarchy, the rights of individuals are real, but are subject to violation by the strong. Under a government, the rights of individuals are real but are subject to the whims of those exercising governmental power. According to Montesquieu, "constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go."[10] In thousands of years of recorded human history, that nature has not changed.[11]

The Founders were familiar with the abuse of government power. The "government [is] the greatest of all reflections on human nature[.]"[12] As Madison explained:

> If men were angels, no government would be necessary. If angels were to

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[10] Montesquieu, *Spirit of the Laws*, § 11.4 (Thomas Nugent trans. 1752) (1748).

[11] *See* Jefferson, *supra* note 3, at 130 ("Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes. The time to guard against corruption and tyranny is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.").

[12] The Federalist No. 51 at 349 (James Madison) (Jacob E. Cooke ed., 1961).

> govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[13]

Yet someone must govern. Virtually no one would suggest that American government should be ruled by the one or the few. But the Framers also feared the tyranny of the majority. As Madison put it, while "[a] dependence on the people is, no doubt, the primary controul on the government," "experience has taught mankind the necessity of auxiliary precautions."[14] *Id*.

C. Government exists to protect rights but is also a potential source of their violation. This conundrum necessitates "a government of laws and not of men."

Quis custodiet ipsos custodes? John Adams suggested the answer in the Massachusetts Constitution. Proper government does not impose the rule of one man, nor of the few or the many. Under proper government, the *law* must rule. *See* Mass.

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[13] *Id*.

[14] *See also*, Aristotle, *Politics*, Book III, 1287a (Benjamin Jowett, trans. 1885) (350 BC) ("[H]e who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.").

Const. pt. 1 art. XXX. Citing this provision of the Massachusetts Constitution, the Court in *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), wrote that the idea of a person's rights held "at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

The law that must rule is the Constitution. The Declaration describes the higher law upon which government is based, and the truths explicated in Declaration, including the reality of "inalienable rights" are "embedded in our constitutional structure." *McDonald v. Chicago*, 561 U.S. 742, 807 (2010) (Thomas, J., concurring in part and concurring in the judgment). The Constitution, in turn, is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It is also "the law that governs those who govern [the people]," and "is put in writing so that it can be enforced against the servants of the people."[15] Those who administer American government swear an oath to uphold and defend it.[16]

III. The Constitution Establishes the Separation of Powers as a Means of Ensuring the Rule of Law.

A. Belief in separation of powers was widespread at the founding and had significant philosophical precedent.

John Adams explained the purpose of a government of separated powers in the Massachusetts

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[15] Randy E. Barnett, *Our Republican Constitution* 23 (1st ed. 2016).

[16] U.S. Const. art. II, § 1, cl. 7; U.S. Const. art. VI, cl. 3.

Constitution. Under the state constitution, the executive, judicial, and legislative organs of the state government may not exercise the powers of one another so that, "it may be a government of laws and not of men." Mass. Const. pt. 1 art. XXX. In other words, the separation of powers is one of the fundamental solutions to the dilemma discussed above: the conflict between the need for government to protect rights because of human nature and the tendency of governments in which men rule to destroy the rights the institution exists to protect. For the Founders, the most important proponent of the separation of powers was Montesquieu.[17]

As Montesquieu wrote, "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[18] Further, "there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control," and if it were, "joined to the executive power the judge might behave with violence and oppression."[19] For all three

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[17] The Federalist No. 47 at 324 (James Madison) (Jacob E. Cooke ed. 1961) ("The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.").

[18] Montesquieu, *supra* note 10, at § 11.6.

[19] *Id*.

powers to be exercised by the same person or body "would be an end of everything."[20]

The Founders shared Montesquieu's understanding. As Jefferson wrote, "The concentrating [of powers] in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. . . An elective despotism was not the government we fought for."[21] The founding generation's view of separation of powers as essential to liberty was so strong that a major antifederalist critique of the proposed

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[20] *Id*.

[21] Jefferson, *supra* note 3, at 128-29. *See also*, John Adams Excerpt from *Thoughts on Government*, https://www.senate.gov/artandhistory/history/common/generic/exerpt-thoughts-on-government-adams-1776.htm (last visited Oct. 17, 2023) ("A single Assembly is liable to all the vices, follies and frailties of an individual. Subject to fits of humour, starts of passion, flights of enthusiasm, partialities of prejudice, and consequently productive of hasty results and absurd judgments: And all these errors ought to be corrected and defects supplied by some controuling power."); The Federalist No. 47 (James Madison) (Jacob E. Cooke ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); The Federalist No. 71 at 483 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The same rule, which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render the one independent of the other.").

Constitution was that it did not separate powers enough.[22]

B. The Framers infused the Constitution with their shared understanding of separation of powers.

The design of the Constitution directly reflects an understanding of government that sees it as both the protector of, and a threat to, individual liberty. *See PHH Corp.* v. *Consumer Fin. Prot. Bureau*, 881 F.3d 75, 164 (C.A.D.C. 2018) (Kavanaugh, J., dissenting) ("To prevent tyranny and protect individual liberty, the Framers of the Constitution separated the legislative, executive, and judicial powers of the new national government.").

Article I establishes the legislative branch and vests "*All* legislative Powers" of the federal government in "a Congress of the United States which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1 (emphasis added). Article II vests "the 'executive Power' –all of it," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020), in "a President of the United States." U.S. Const. art. II, § 1. Finally, Article III vests "the judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. The judges of these courts

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[22] The Federalist No. 47 at 323 (James Madison) (Jacob E. Cooke ed., 1961) ("One of the principal objections inculcated by the more respectable adversaries to the Constitution is its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct.").

"shall hold their Offices during good Behaviour," and may not have their compensation reduced while in office. *Id*. The Constitution only departs from this strict separation in specific ways to create a system of checks and balances.

Those checks and balances were meant to work along with the separation of powers to ensure that each branch could protect its own power. According to Madison, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[23] He continued, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." *Id*.

The Constitution enumerates specific powers that Congress may exercise and vests it with the power, "[t]o make all Laws which shall be necessary and proper for carrying into Execution," its enumerated powers. U.S. Const. art. I, § 8, cl. 18. Those "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. Those powers that are delegated are not a blank check.[24] In contravention of these constitutional principles, there has been a

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[23] The Federalist No. 51 at 349 (James Madison) (Jacob E. Cooke ed., 1961).

[24] The Federalist No. 45 at 313 (James Madison) (Jacob E. Cooke ed., 1961) ("The powers delegated by the proposed constitution to the federal government, are few and defined.").

concerted effort over the past century to comingle the powers of government in the executive branch.

IV. Those Who Created the Administrative State Knew that What They Were Proposing was Unconstitutional and Inconsistent with the Fundamental Purpose of the Constitution.

The administrative state became a major player in the federal government during the administration of Franklin Delano Roosevelt ("FDR"), largely as a result of his New Deal policies.[25] However, the ideas did not start with him. According to FDR himself, many of the principles for the New Deal came from President Woodrow Wilson.[26] Wilson, in turn, was influenced by Frank Goodnow, a professor at Columbia and later Johns Hopkins.[27] Finally, one of the most important early architects of the administrative state was James Landis.[28] "Through Landis' work on securities legislation, and his subsequent service on the FTC and SEC," he "became the animating force behind the growth of modern administration as we know it today."[29]

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[25] *See* Ronald J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, Social Philosophy and Policy, January 2007, at 16, 16 n.1.
[26] *Id*. at 28.
[27] *See id*. at 25, 43.
[28] *Id*. at 25.
[29] *Id*. at 16.

A. These early architects of the administrative state believed that the Framers had gotten the purpose of government wrong.

In the minds of these men, the government cannot merely protect the rights of individuals because the complexity of the modern world demands government intervention. To Wilson:

> The object of constitutional government is to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need . . .whatever institutions, whatever practices serve these ends, are necessary to such a system: those which do not, or which serve it imperfectly should be dispensed with or bettered.[30]

Goodnow also believed that America had moved past the Founders' vision of government. He wrote, "[W]hile insistence on individual rights may have been of great advantage at a time when the social organization was not highly developed, it may become a menace when social rather than individual efficiency is the necessary prerequisite of progress."[31] Apparently, then, it was a good thing that "the sphere of governmental action is continually widening and

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[30] Woodrow Wilson, *Constitutional Government in the United States* 14 (1914) https://www.loc.gov/resource/gdcmassbookdig.constitutionalgo00wils_0/?sp=28&r=-0.831,-0.033,2.661,1.184,0.

[31] Frank J. Goodnow, *The American Conception of Liberty* 21 (1916) https://archive.org/details/americanconcepti00goodrich/page/n5/mode/2up.

the actual content of individual private rights is being increasingly narrowed."[32]

Landis wrote similarly, "[t]he complexities of our modern society are increasing rather than decreasing," which "call[s] for greater surveillance by government."[33] Nonetheless, "modern government had to move beyond the separation of powers, since the end of government had changed from rights protection to what Landis called the 'promotion of the welfare of the governed' or, more generally, 'well-being.'"[34]

Somewhat more subtly, though no less dangerously, FDR said, "[t]he task of statesmanship has always been the re-definition of [the] rights [people enter into the social contract to protect] in terms of a changing and growing social order. New conditions impose new requirements upon Government and those who conduct Government."[35] Thus, contrary to the understanding that informed the drafting of the Constitution, these innovators of administration saw government's purpose not as rights protection but as the restructuring of society for social and economic efficiency with less and less regard paid to individual rights.

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[32] *Id*.
[33] Pestritto, *supra* note 27, at 35.
[34] *Id*. at 27.
[35] Franklin Delano Roosevelt, President of the United States, Address to the Commonwealth Club (September 23, 1932) https://teachingamericanhistory.org/document/commonwealth-club-address/.

B. These innovators of the administrative state believed that the structure of good government demands the separation of administration and politics.

Because those who created the administrative state believed the purpose of government was different from that which animated the creation of the Constitution, they also thought the structures created by that Constitution had to go.

For Goodnow, "the sphere of administration," was "outside the sphere of constitutional law."[36] Further, in place of separation of powers, Goodnow and Wilson advocated for the separation of politics and administration.[37] According to Wilson the government is a living organism, not a machine, as the Founders thought. As he asserted, "No living thing can have its organs offset against each other, as checks, and live."[38] Landis, "fully conceded" that "[t]he growth of modern administration . . . does not fit within the form of American constitutionalism," specifically the separation of powers.[39]

As one particularly relevant example of this philosophy in practice, the SEC was designed based on the belief that complexity demands not only government intervention but government free of normal constraints, with sufficient flexibility to address the apparently ever-arising issues.[40] Landis

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[36] Pestritto, *supra* note 27, at 47.
[37] *See id*. at 25, 46-47.
[38] *Id*. at 39.
[39] *Id*. at 27.
[40] *See id*.

"pointed to the Securities and Exchange Act of 1934, which he had helped to draft, as an example of how to create an agency with powers flexible enough to meet unforeseen exigencies."[41] Landis thought "[t]he discretionary language with which the act empowered the SEC was a vast improvement" over the earlier Securities Act which gave the agency more limited powers.[42]

Landis complained that "[a] legalistic approach that reads a governing statute with the hope of finding limitations upon authority rather than grants of power with which to act decisively" was common because doing otherwise was a political gamble.[43] On the other hand, Landis held up as an example,

> One of the ablest administrators that it was my good fortune to know . . . [who] never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding, he sought his own solutions.[44]

This Court has at times imbibed the progressive view of government. *Seila Law*, 140 S. Ct. at 2212 (Thomas, J., concurring) (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 115-16 (2015) (Thomas, J.,

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[41] *Id.*
[42] *Id.*
[43] James M. Landis, *The Administrative Process*, 75 (1st ed. 1938).
[44] *Id.*

concurring) ("Unfortunately, this Court 'ha[s] not always been vigilant about protecting the structure of our Constitution,' at times endorsing a 'more pragmatic, flexible approach' to our Government's design.") (alteration in original). For example, the Court wrote in *Mistretta v. United States*, 488 U.S. 361, 372 (1989), "[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." If that is the case, the Constitution may be amended. Until it is, however, those who govern the people are bound by that document as it is, not as they wish it were. Because the innovators of the administrative state had little respect for the Constitution and its limitations on power, it should be unsurprising that the system they created circumvents those limitations.

C. These innovators of the administrative state were widely successful at undermining the basic structure of American federal government.

The administrative state is insulated from both methods of restraint of government foreseen by the Framers. According to Madison, "a dependence on the people" is the "primary controul" of government, but certain "auxiliary precautions" were also necessary.[45] As Justice Thomas has noted, when "independent agencies wield substantial power with no accountability to the President or the people they 'pose

[45] The Federalist No. 51 at 349 (James Madison) (Jacob E. Cooke ed., 1961).

a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *Seila Law*, 140 S. Ct. at 2212 (Thomas, J., concurring) (quoting *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting)).

The design of administrative agencies intentionally avoids both democratic and structural constraints. First, many agency officials, despite being a part of the executive branch and thus exercising the President's power, are nonetheless protected from removal by, and otherwise from the control of, the President.

Further, the very structures that were designed to protect the liberty of the people function to insulate the administrative state from congressional review. Enacting federal legislation is not easy, nor is it supposed to be. *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (explaining that the rigors of bicameralism and presentment, "Article I's detailed and arduous processes for new legislation," were, "to the framers . . . bulwarks of liberty."). The slow, deliberative process protects liberty against populist whims in the federal government. Yet that same process now makes it practically impossible for the legislature to oversee the exercise of the legislative and judicial power it has delegated to agencies. Because neither the President nor Congress can exercise meaningful oversight of much of what happens in the administrative state, the "primary controul" envisioned by Madison and the Framers is rendered largely ineffectual.

Second, the "auxiliary precautions," established by the Constitution are undermined. The general structural protection that comes from a system of checks and balances operating among branches exercising distinct powers is absent in the administrative state which consists of agencies exercising legislative, executive, and judicial powers, all directed towards a shared goal. Thus, neither the primary nor the auxiliary limits on government power are reliably operable in the administrative state.

D. The ideas of these so-called progressives were, in fact, regressive and were inconsistent with the Constitution.

Those who designed and established the administrative state thought of themselves as progressive, but they were not. As President Calvin Coolidge explained on the Declaration's 150th anniversary,

> It is often asserted that the world has made a great deal of progress since 1776, that we have had new thoughts and new experiences which have given us a great advance over the people of that day, and that we may therefore very well discard their conclusions for something more modern. But that reasoning can not be applied to this great charter. If all men are created equal, that is final. If they are endowed with inalienable rights, that is final. If governments derive their just powers from the consent of the governed, that is final. No advance, no progress can

> be made beyond these propositions. If anyone wishes to deny their truth or their soundness, the only direction in which he can proceed historically is not forward, but backward toward the time when there was no equality, no rights of the individual, no rule of the people. Those who wish to proceed in that direction can not lay claim to progress. They are reactionary. Their ideas are not more modern, but more ancient, than those of the Revolutionary fathers.[46]

Hamilton argued that while the federal government would need extensive powers in the realms over which it had authority, "the most vigilant and careful attention of the people," was essential "to see that it be modelled in such a manner, as to admit of its being safely vested with the requisite powers."[47] As part of that vigilance, "If any plan which has been, or may be offered to our consideration, should not, upon a dispassionate inspection, be found to answer this description, it ought to be rejected."[48] The plan of the administrative state is, by design, inconsistent with the protections of which Hamilton was speaking. Because the view expressed by Hamilton was the view established in law by the adoption of the Constitution

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[46] Calvin Coolidge, President of the United States, Speech on the 150th Anniversary of the Declaration of Independence (July 5, 1926) https://millercenter.org/the-presidency/presidential-speeches/july-5-1926-declaration-independence-anniversary-commemoration.

[47] The Federalist No. 23 at 150 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[48] *Id*.

and which represented the general understanding of government and the Constitution at the time of the founding, the later meddling of "sophisters, economists, and calculators,"[49] and the unconstitutional adjudication of judicial cases by the executive branch must be rejected.

CONCLUSION

For the forgoing reasons, the Court should rule for the respondents on all three questions presented.

Respectfully submitted,

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[49] 3 EDMUND BURKE, *Reflections on the Revolution in France*, *in* THE WORKS OF EDMUND BURKE 19, 98 (1839).