No. 22-859

In the

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

GEORGE R. JARKESY AND PATRIOTS28, L.L.C.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that structural provisions of the Constitution must be upheld in order to protect individual liberty. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Loper Bright v. Raimondo*, No. 22-451 (2023); *West Virginia v. EPA*, 142 S.Ct. 2587 (2022); *Kisor v. Wilke*, 139 S.Ct. 2400 (2019); *Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015), *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); and *Christopher v. SmithKline Beecham, Corp.*, 567 U.S. 2156 (2012), to name a few.

SUMMARY OF ARGUMENT

The SEC argues that it does not exercise legislative power when it chooses whether to bring an enforcement action by agency adjudication or by prosecuting the matter in an Article III court. But this Court has already ruled that the question of whether a matter may be enforced through agency adjudication is "exclusively within" the control of Congress. *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 339 (1909). Thus, where Congress authorizes enforcement by either agency adjudication or Article III

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[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

courts, the choice of which to use is a matter "exclusively" within lawmaking power. There is no inherent Executive Branch power to choose to bring an action in an administrative forum rather than an Article III court. Such power exists only if Congress, through its lawmaking power, creates the choice. It is Congress, not the Executive Branch, that designates the forum for enforcement actions. The agency action in making the choice then must be guided by Congress's policy as set down through an "intelligible principle."

This is not the same as "prosecutorial discretion." The agency can, of course, choose which cases to pursue. Still, however, that choice is constrained by the terms of the statute. Regulatory enforcement actions are limited to those actions outlawed by the statute. The agency does not choose the result of enforcement actions. That is determined by an Article III court based on the statute enacted by Congress.

The choice here is not whether to bring an enforcement action, but in what forum. Normally, there is no question as to the forum – Congress designates the forum in the statute. There is a choice here only because Congress provided that choice in the law – not because the Executive Branch always has had inherent power to choose between administrative and Article III tribunals. Because Congress has chosen to provide that choice, the choice must be exercised in accord with the policy set out by Congress in the form of an "intelligible principle."

That intelligible principle test, as applied by the courts, has failed to restrain delegation of Congress's power. In this case, Congress did not even attempt to set out the principle by which the SEC should be guided in whether to use administrative adjudication

or an Article III court. As a practical matter, this failure to set out an intelligible principle is little different than the so-called intelligible principles the courts have approved in the past. The Court should use this case to replace the intelligible principle test with a test of judicially manageable standards.

This will make it more difficult for some administrative agencies to operate free from oversight. Agencies will be held to a standard that Congress must adopt, and that might make things less "efficient." But administrative efficiency is not something built into our Constitution. Quite the opposite.

The Framers and Ratifiers of the Constitution were not attempting to design an efficient government structure. Instead, they sought to design a federal government with authority to act, but that was bound by "checks and balances" as a means of protecting individual liberty. The design they settled on is a finely tuned separation of powers. The powers of legislation, execution, and judicial review are housed in separate and competing branches of government.

The Framers and Ratifiers recognized that the power of legislation was the most potent threat to individual liberty, and so they incorporated procedural hurdles to slow down the process of lawmaking. Congress is granted *all* legislative power authorized under the Constitution, but that power is constrained by bicameralism and presentment requirements. The exclusivity of the Vesting Clause and the restrictions on how the legislative power may be exercised prohibit delegation of that power to the Executive. That the problem that Congress seeks to address is complex

is irrelevant. The Framers and Ratifiers did not include a "complexity" exception to these checks and balances.

As demonstrated in this case, administrative agencies are a threat to the design of separation of powers, especially where Congress has delegated its power to the agency with no guidance. The policy-making authority vested by the Constitution in Congress is simply delegated to the agency. This, the Constitution forbids.

ARGUMENT

I. Nondelegation Is Inherent in Both the Vesting Clause and the Procedure Mandated by the Constitution for Lawmaking.

A. The Constitution protects individual liberty through its separation of powers structure.

Separation of powers is the design of the Constitution, not simply an abstract idea. It protects individual liberty more surely than the Bill of Rights. *See e.g.*, *Ass'n of American Railroads*, 575 U.S. at 61 (Alito, J. concurring); *Stern v. Marshall*, 564 U.S. 462, 483 (2011); *Bond v. United States*, 564 U.S. 211, 222 (2011); *see also Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The notion that separation of powers lies at the core of the Constitution is not a modern judicial invention. The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. *Ass'n of Am. Railroads*, 575 U.S. at 75 (Thomas, J., concurring). In this, the founding generation relied on the

works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See, e.g.*, Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed., Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 150-51 (William S. Hein & Co., Inc. 1992) (1765); John Locke, THE SECOND TREATISE OF GOVERNMENT 82 (Thomas P. Reardon ed., Prentice-Hall, Inc. 1997) (1690).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. *See* FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter, ed., 1961); FEDERALIST NO. 47, *supra*, at 301-02 (James Madison); FEDERALIST NO. 9, *supra*, at 72 (Alexander Hamilton); *see also* Letter from Thomas Jefferson to John Adams (Sept. 28, 1787), in 1 THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in the Supreme Court and lower federal courts. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. FEDERALIST NO. 48, *supra* at 308 (James Madison). Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested

each branch with the power necessary to resist encroachment by another. *Id*.

Under the Constitution, the executive branch has no authority to enact laws. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). And Congress has no authority to delegate its lawmaking power. *Gundy v. United States*, 139 S.Ct. at 2133 (plurality op.); *Field v. Clark*, 143 U.S. 649, 692 (1892); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825). Delegation of lawmaking power defeats the structural protections of liberty in the Constitution.

B. Exercise of the legislative power is constrained by procedural requirements of Bicameralism and Presentment.

As this Court noted in *Chadha*, Congress may only exercise its power under the Constitution in accordance with "a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951. That procedure is intentionally difficult. The founding generation was not interested in making it easy or efficient to pass new laws. They were more interested in protecting individual liberty.

Justice Alito noted, "[p]assing legislation is no easy task." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 472 (2015) (Alito, J. dissenting). This was intentional on the part of the Framers and Ratifiers of the Constitution. The founding generation was acutely aware that the "supreme power" of government was in making the laws. James Kent, Commentaries 1:207-10 (1826), *reprinted in* 2 The Founders' Constitution 39. Thus, it was important that significant checks be placed on that power in order to preserve liberty. The

solution they came up with was to slow the legislative process – to make it difficult to enact legislation too quickly. *Id*.

They accomplished this by splitting Congress into two houses, both of which must concur before a legislative proposal can be adopted, and requiring that that the legislatively approved measure be presented to the President for approval. One house serves as a check on the other. William R. Davie, North Carolina Ratifying Convention (1788) *reprinted in* 2 THE FOUNDERS' CONSTITUTION 36; Federal Farmer No. 11 (1788) *reprinted in* 1 THE FOUNDERS' CONSTITUTION 350. Requiring consent of two different bodies was thought more likely to produce consensus in line with the will of the citizenry, something well worth the increased time and effort involved. *See* Benjamin Rush, Observations on the Government of Pennsylvania (1777) *reprinted in* 1 THE FOUNDERS' CONSTITUTION 364; James Wilson, Of Government, The Legislative Department, Lectures on Law (1791) *reprinted in* 1 THE FOUNDERS' CONSTITUTION 377.

The chief benefit of requiring two different bodies to approve proposed legislation is that it slows the process down and inhibits "rash" and "hasty" decisions. Joseph Story, Commentaries on the Constitution 2:§ 550 (1833), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 379; The Essex Result (1778) *reprinted in* 2 THE FOUNDERS' CONSTITUTION 365. Justice Gorsuch noted these same points in his dissent in *Gundy*. He wrote that the "framers went to great lengths to make lawmaking difficult." *Gundy*, 139 S.Ct. at 2134 (Gorsuch, J., dissenting). To those who argue that the bicameralism and presentment requirements of Article I make the enactment of federal law arduous and slow,

the Framers and Ratifiers would have responded that that was the point. It is in that slow process that liberty is best protected. *Id.* Efficiency is not the goal. Protection of individual liberty is.

Delegation of lawmaking power to an administrative agency circumvents this arduous process mandated by the Constitution. This Court has, however, approved delegations of lawmaking power to administrative agencies under the theory that the agencies are "constrained" by an "intelligible principle" set out by Congress. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 488 (2001) (Thomas, J. concurring).

Nonetheless, this Court has frankly acknowledged that Congress has delegated to administrative agencies the power to make complex policy choices, and that the practice of *Chevron* deference counsels that the Court should defer to the executive agency's policy choices. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995) ("The proper interpretation of a term such as 'harm' involves a *complex policy choice*. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of *wise policy* for his." (emphasis added)). As described below, the intelligible principle test has failed to constrain the delegation of lawmaking power, a delegation forbidden by the Constitution.

The Court, in some cases, seems to allow Congress the authority to delegate its lawmaking power because the subject of the regulation is too complex for our elected representatives to manage. There is, however, no complexity exception to the procedure laid down in Article I for the making of laws.

C. There is no complexity exception to the exclusive delegation of lawmaking Power to Congress or to the constitutional limits on how that power may be exercised.

This Court has vacillated on whether it views Congress as capable of handling complex matters. In a number of cases, the Court has approved broad delegations of lawmaking power based on the theory that Congress cannot deal with complex problems on its own. *See*, *e.g.*, *Mistretta*, 488 U.S. at 372 ("our jurisprudence has been driven by a practical understanding that in 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"); *Am. Trucking Ass'ns v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 409 (1967) ("The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms."); *United States v. Storer Broad. Co.*, 351 U.S. 192, 203 (1956) ("The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers.").

In other cases, by contrast, this Court recognizes Congress's capability to deal with exceedingly complex matters. *See*, *e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S.Ct. 1891, 1924 (2020) ("Congress has provided for relief from removal in *specific and complex ways. This nuanced detail* indicates that Congress has provided the full panoply of methods it thinks should be available." (emphasis added)); *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973) ("The subjects of modern

social and regulatory legislation often by their very nature *require intricate and complex responses from the Congress*." (emphasis added)); *First Agr. Nat. Bank of Berkshire Cnty. v. State Tax Comm'n*, 392 U.S. 339, 352 (1968) ("'Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the *greatest difficulty and delicacy. Such complex problems* are ones which Congress is best qualified to resolve.'" (emphasis added)); *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527 (1941) ("It is for Congress alone" to make decision based on the "*complexity of engineering data*." (emphasis added)).

This is not to say that Congress must determine for itself scientific matters, such as whether and at what dosage a particular chemical is toxic. But it is for Congress, and Congress alone, to determine the policy – including the cost that will be imposed on citizens for the level of regulation. *Cf. West Virginia*, 142 S.Ct. at 2608 (the Court hesitates before concluding Congress meant to delegate authority to an executive agency over matters of "economic and political" significance); *see Industrial Union Dept. AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 673 (1980) (Rehnquist, J., dissenting) (the case involves the most difficult choice confronting a decisionmaker and "Congress, the governmental body best suited and most obligated to make the choice … has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.").

Congress has demonstrated its ability time and again to enact complex statutory schemes to regulate matters within its purview. Nothing less should be expected from the People's elected representatives.

No doubt hard choices need to be made. But Congress, the body answerable to the electorate, is the constitutionally designated body to make those hard choices. *See Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice…").

No doubt the agency here, and in most cases, believes that it is acting in the best interest of the public. "But our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S.Ct. at 2490; *see also Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way…"). A desire to pursue the public good is not enough to circumvent the procedures for lawmaking set out in the Constitution. This is true even if the problem to be addressed is complex.

There is no "complexity exception" to either the separation of powers structure of the Constitution or the nondelegation doctrine.

II. The Intelligible Principle Test, as Applied by the Courts, Has Failed to Constrain Legislative Delegations.

Since its decision in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), the Court has tested the constitutionality of delegations of legislative power by whether Congress set out an "intelligible principle" to which the agency must conform in the exercise of the delegated power. *Id.* at 409. Yet, as

Justice Thomas has pointed out, "the Constitution does not speak of 'intelligible principles." *Whitman*, 531 U.S. at 487 (Thomas, J., concurring). The Constitution vests all legislative power in Congress and Justice Thomas voiced concern that the "intelligible principle" test does not "prevent all cessions of legislative power." *Id.*

Further, this Court never insisted that the "intelligible principle" contain judicially manageable standards. It is not enough that the legislation guide the discretion of the agency. It must also set out a standard by which the courts can discern whether the agency is acting within the policy set by Congress. Instead, the Court has allowed free rein to administrative agencies. *Whitman*, 531 U.S. at 474-75 (the Court has "almost never qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law" (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

It is no surprise, therefore, that the Court has upheld as sufficient "intelligible principles" directions that an agency decide "what is 'unfair' or 'unnecessary.'" *Ass'n of American Railroads*, 575 U.S. at 85 (Thomas, J., concurring in the judgement). The Court found sufficient Congress's direction to the Federal Communications Commission to regulate based on "public interest, convenience, or necessity." *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943). Similarly, the Court has upheld delegations that authorized recovery of "excess profits" (*Lichter v. United States*, 334 U.S. 742, 777 (1948)), the regulation of commodities prices under the standard that they be "fair and equitable" (*Yakus v. United States*,

321 U.S. 414, 426-27 (1944)), regulation of the rates for natural gas sales on the standard that they be "just and reasonable" (*Federal Power Commission v. Hope Gas Co.*, 320 U.S. 591, 602 (1944)), and authorizing an agency to outlaw "unfair methods of competition" (*Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304, 311 (1934)), to name just a few. More recently, the Court approved the delegation to the sentencing commission the power to promulgate sentencing guidelines for violation of criminal statute that "provide certainty and fairness." *Mistretta*, 488 U.S. at 374.

Whatever constraint on delegation of lawmaking power the "intelligible principle" requirement may have had at the time it was set out by the Court in *Hampton*, it provides no limitation on Congress's delegations today. Indeed, in the statute under consideration here, Congress did not even bother to provide an intelligible principle. Despite the Court's discomfort at "second guessing" congressional delegations, the time has come to require Congress to set out a judicially manageable standard in the legislation so that the courts can be sure that it is congressionally-enacted policy at work rather than agency policy.

CONCLUSION

The Constitution does not permit the naked delegation of legislative power. It is up to Congress to determine the forum for enforcement of its laws. That decision cannot be delegated to an administrative agency.

October 2023 Respectfully submitted,

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