NO. 22-859

In the
Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

GEORGE R. JARKESY, JR. and PATRIOT28, L.L.C.,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* PIONEER PUBLIC INTEREST LAW CENTER IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. The Court Should Reject the Government's Disaggregation Approach for Defeating the Constitution's Structural and Procedural Guarantees 5

   A. Multiple constitutional requirements limit when executive officials may exercise adjudicatory powers 6

   B. The Commission's novel adjudicatory process renders void multiple layers of constitutional protections 12

II. The Dodd Frank Act Strays Far Beyond Constitutional Limitations 14

   A. The new powers granted to the Commission exceed constitutional limits 15

   B. Allowing the Commission to adjudicate its own prosecutions violates constitutional requirements 18

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813 (1986) 26

Am. Cyanamid Co. v. FTC,
363 F.2d 757 (6th Cir. 1966) 22

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877 F.2d 721 (8th Cir. 1989) 22

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430 U.S. 442 (1977) 11

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556 U.S. 868 (2009) 19

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470 F.3d 1131 (5th Cir. 2006) 27

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478 U.S. 833 (1986) 11

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285 U.S. 22 (1932) 11

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59 U.S. (18 How.) 272 (1856) 9

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573 U.S. 25 (2014) 7

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381 U.S. 739 (1965) 22

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492 U.S. 33 (1989) 23

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349 U.S. 133 (1955) 18, 20

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307 U.S. 268 (1939) 12

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138 S. Ct. 2044 (2018) 23

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v. Marathon Pipe Line Co.,
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v. Brand X Internet Servs.,
545 U.S. 967 (2005) 27

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301 U.S. 292 (1937) 18

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v. Greene's Energy Grp., LLC,
138 S. Ct. 1365 (2018) 6, 9, 10, 11

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432 U.S. 197 (1977) 27

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No. 22-cv-8343,
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140 S. Ct. 2183 (2020)...................................... 9, 14

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564 U.S. 462 (2011).................................... 6, 11, 13

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336 F.2d 754 (D.C. Cir. 1964) 22

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473 U.S. 568 (1985)... 11

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409 U.S. 57 (1972)... 26

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136 S. Ct. 1899 (2016)..................................... 19, 21

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418 U.S. 539 (1974) 8

Constitutional Provisions

U.S. Const. art. I, § 1 7

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U.S. Const. amend. IV 7

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Statutes

5 U.S.C. § 554(d) 19

15 U.S.C. § 77h(d) 16

15 U.S.C. § 77h-1(g) 17

15 U.S.C. § 77t(d) 17

15 U.S.C. § 78d-1(a) 23

15 U.S.C. § 78*l*(j) 16

15 U.S.C. § 78*o*(b)(4) 16

15 U.S.C. § 78u(b) 23

15 U.S.C. § 78u(d) 17

15 U.S.C. § 78u-2 .... 16, 17

15 U.S.C. § 78u-6 25

15 U.S.C. § 78y 26, 27

15 U.S.C. § 80a-41(e) ... 17
15 U.S.C. § 80a-8(e) ... 16
15 U.S.C. § 80a-9(b) ... 16
15 U.S.C. § 80a-9(d) ... 16, 17
15 U.S.C. § 80b-3(c)(2)(B) ... 16
15 U.S.C. § 80b-3(e) ... 16
15 U.S.C. § 80b-3(f) ... 16
15 U.S.C. § 80b-3(i) ... 16, 17
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15 U.S.C. § 7246 ... 25
Pub. L. No. 101-429, 104 Stat. 931 (1990) ... 16, 17
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Regulations & Rules

17 C.F.R. § 200.30-10 ... 23
17 C.F.R. § 201.101(a) ... 19, 20
17 C.F.R. § 201.200 ... 20
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Law Sec. Reg. § 16:101 23

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& Fin. L. 367 (2008)... 16, 17

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677 (2019)... 11

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Wall St. J. (May 6, 2015) 24, 27

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No. 10 (James Madison) 18

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No. 47 (James Madison) 13

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The Federalist
No. 78 (Alexander Hamilton) 7, 9

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No. 79 (Alexander Hamilton) 7

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(last updated Nov. 28, 2017) 20

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to Certain Administrative Adjudications
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92 Wash. L. Rev. 315 (2017).................................. 28

Wurman, Ilan
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69 Stan. L. Rev. 359 (2017) 8

STATEMENT OF INTEREST[1]

Pioneer Public Interest Law Center ("Pioneer") is a non-profit, non-partisan, public interest law firm that defends and promotes freedom of speech, freedom of association, open and accountable government, economic opportunity, and educational opportunities. Through legal action and public education, Pioneer works to preserve and enhance constitutional and civil liberties.

One key to resolving this case is to appreciate that the relevant separation-of-powers and due process principles that informed the decision below are designed to work together to ensure that government remains accountable to the citizenry as a whole and to protect individual citizen's rights. Pioneer is submitting this brief to explain how these interconnected doctrines are a vital part of an integrated constitutional structure. This brief also explains why the government's position—which seeks to disaggregate the applicable constitutional principles and to treat them as imposing only weak, disconnected constraints on executive action—are contrary both to this Court's precedents and the constitutional safeguards that are essential to ensuring lawful and accountable government.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The novel procedures used by the Securities and Exchange Commission to enforce the securities laws allow that agency to serve simultaneously as lawmaker, investigator, prosecutor, jury, and judge. The administrative enforcement process offers defendants, like petitioner George Jarkesy, little opportunity to develop their defenses or to be meaningfully heard. The entire process is drenched in institutional bias. And lying at the bottom of this inherent bias is a statutory scheme that blurs lines of accountability, eliminates layers of constitutional protections, and leaves executive officials with open-ended discretion to target disfavored citizens and steamroll private rights.

The constitutional concerns underlying the statutory scheme and the Commission's one-sided procedures are reflected in how far this case has departed from basic rule-of-law principles. The events underlying this action began nearly 15 years ago, just before the 2008 financial crisis. In early 2007, Jarkesy founded the John Thomas Capital Management Group, LLC with the intent of managing several "hedge" investment funds. Those funds were geared toward sophisticated parties interested in high-risk, high-reward investments. After raising approximately $24 million from more than 100 investors, some of the venture's early investments did not pan out, and the funds suffered losses.

Jarkesy's hedge-fund businesses did not fall under the Commission's licensing authority. He has never been a registered broker-dealer or investment adviser; he has never enjoyed special legal privileges

under the securities laws; and he did not need the Commission's permission to open or manage his hedge funds. At all relevant times, Jarkesy was a private business owner entitled to all of the rights and privileges of any other private citizen.

Nonetheless, following the hedge funds' losses and a political push to crack down on the financial industry, the Commission prosecuted Jarkesy, subjecting him to a summary administrative process under the Dodd-Frank Wall Street Reform Act of 2010. After years of nonpublic investigation, the Commission's enforcement staff provided a privileged, *ex parte* presentation to the Commissioners describing Jarkesy's alleged misconduct. The Commissioners then relied on that presentation to initiate a public enforcement action and, on the same day, issued an official press release touting the merits of the agency's case. Following prehearing procedures promulgated by the Commission, which hampered Jarkesy's ability to develop his defense, Jarkesy was tried before an Administrative Law Judge ("ALJ") who was appointed by and reports to the Commission. Surprising no one, the ALJ made credibility determinations and factual findings in the Commission's favor. The Commissioners then affirmed those findings on intra-agency appeal while modestly reducing the financial sanctions.

The Commission's processes are not consistent with our constitutional order, and they yield predictably biased and unfair results. The Constitution separates government powers and guarantees fair and impartial adjudicative procedures to ensure accountability and to prevent arbitrary

deprivations of life, liberty, and property. Although this Court's precedents have eased those requirements in limited circumstances, they have never allowed so many essential safeguards to be eliminated all at once. By authorizing the Commission to adjudicate private rights through administrative proceedings and by allowing the agency to decide by its own lights whether a citizen is entitled to the evidentiary and due process protections provided by Article III courts (or should be deprived of those protections through a summary administrative process), Congress and the Commission have violated the Constitution's separation of powers and infringed on Jarkesy's due process rights.

The regulatory scheme overseen by the Commission is infected with an unacceptable risk and appearance of institutional bias. The court of appeals correctly recognized that the Commission's inquisitorial process against Jarkesy cannot be reconciled with constitutional requirements. This Court should affirm.

ARGUMENT

I. The Court Should Reject the Government's Disaggregation Approach for Defeating the Constitution's Structural and Procedural Guarantees.

The government's defense of the Commission and the Dodd-Frank Act follows a familiar path: Treating constitutional doctrine in disconnected fashion, the government urges the Court to allow what it suggests are only modest expansions of existing law. Public rights are redefined to depend not on the nature of the underlying right but only on whether Congress has enacted a statute that imposes new statutory obligations. Whether individuals are entitled to the protections provided by an Article III court—or can be dispossessed of those protections and forced into a one-sided, administrative process—is reimagined as merely a question of executive enforcement discretion. And the Court is urged to accept multiple layers of removal protections for Commission ALJs on the view that tenure protections enhance the "perceived fairness of the relevant agency proceedings," but with no answer to the well-documented bias that infects those proceedings through and through.

This mode of analysis, which seeks to disaggregate constitutional doctrines and divorce them from the overall constitutional architecture, is contrary to this Court's separation-of-powers precedents and the principle that statutory schemes must be evaluated in their entirety and in light of the Constitution as a whole. As this Court has long recognized, the "proper" approach "is to take the [C]onstitution as a whole, and keep constantly in mind

the grand design and intentions of its framers." *Rhode Island v. Massachusetts*, 37 U.S. 657, 673 (1838). Accordingly, while the Court has allowed Congress and executive agencies to relax constitutional restrictions in certain limited circumstances, it has never countenanced the simultaneous elimination of the many safeguards bulldozed by the Commission in this case. The Commission's quasi-criminal prosecutions under Dodd Frank eviscerate due process, intrude on private rights, and impermissibly diffuse lines of accountability.

A. Multiple constitutional requirements limit when executive officials may exercise adjudicatory powers.

Executive-branch officials are not supposed to exercise judicial power. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) ("The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."). In most cases, the Constitution's due process guarantees require the government to bring any accusatory, quasi-criminal lawsuits against private persons in Article III courts, where impartial adjudication by independent judges and lay juries is guaranteed. *See Stern v. Marshall*, 564 U.S. 462, 482–83 (2011). Administrative adjudications are a narrow and carefully limited exception to these essential rules. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018). They are available only when a suit involves public rights and privileges, and not when the vested liberty and property rights of private citizens are at stake. *See Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 32–

33 (2014); *see also* Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 563 (2007).

This bedrock principle has been long recognized. The Framers separated the United States' sovereign powers to allow executive officials to act with "energy" and "dispatch," *see* The Federalist No. 70 (Alexander Hamilton), while also erecting a system incorporating the protections for individual rights characteristic of Anglo-American jurisprudence. *See Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 116–19 (2015) (Thomas, J., concurring); *see also* William Bradford Reynolds, *Originalism and the Separation of Powers*, 63 Tul. L. Rev. 1541, 1550–51 & n.31 (1989) ("The framers … had a deep and distrustful vision of … the corrupting effects of unchecked power …."). The Framers achieved these goals by taking two profound and related steps: *First*, they vested the political powers—legislative and executive—in two representative branches, *see* U.S. Const. art. I, § 1; *id.* art. II, § 1, cl. 1, while entrusting the judicial power to a separate, independent branch, *see id.* art. III, § 1; *see also* The Federalist Nos. 78, 79 (Alexander Hamilton). *Second*, they provided individualized safeguards for those accused of wrongdoing. Among those essential protections are the centuries-old common law rights to due process and trial by jury. *See* U.S. Const. art. III, § 2, cl. 3; *id.* amends. IV–VII.

These structural features of our Constitution advance essential principles of republican government. The Constitution separates powers to ensure that our government is *accountable* to its citizens. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477

(2010). That constitutional organizing principle requires courts to perform an important oversight function in ensuring that (1) executive officials act with *fidelity* to the commands of the sovereign people, (2) the sovereign people are governed in *regular* and non-arbitrary ways, and (3) the nature and effects of the government's activities on behalf of the sovereign people are *transparent* and therefore subject to proper evaluation through political debate and correction through the ballot box. *See* Robert R. Gasaway & Ashley C. Parrish, *Administrative Law in Flux: An Opportunity for Constitutional Reassessment*, 24 Geo. Mason L. Rev. 361, 361, 367 (2017).

These guiding principles—accountability, fidelity, regularity, and transparency—are grounded in the Constitution's separation of powers and reinforced by the Constitution's due process guarantees, which together protect individual citizens against "arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see generally* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672 (2012). To ensure that no person is deprived of rights in life, liberty, or property without a broad political consensus and an impartial assessment of relevant facts, the Constitution requires "a law permitting such [a] deprivation, an executive deci[sion] to enforce that law, and a court adjudicat[ion of] the facts" in front of an impartial judge and lay jury. Ilan Wurman, *Constitutional Administration*, 69 Stan. L. Rev. 359, 370 (2017). Building that consensus is difficult—but that's the point. "[T]he Framers weighed the need for federal government efficiency against the potential for abuse and came out heavily in favor of limiting federal

government power." Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1017 (2006).

In modern times, the political branches have often pushed for more lenient constraints and expedient arrangements. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2241 (2020) (Kagan, J., concurring in the judgment and dissenting in part) ("[N]ew times would often require new measures, and exigencies often demand innovation."). As the Framers envisioned, temporary "ill humors" sometimes "occasion … innovations in the government" that cut against traditional safeguards, checks, and balances. The Federalist No. 78 (Alexander Hamilton); *see* Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 Notre Dame L. Rev. 821, 829–30 (2018). Responding to these pressures, this Court has sometimes allowed executive-branch adjudications as a substitute for full judicial process in an independent forum—but only to a limited extent and only under narrow and defined circumstances. *See Oil States,* 138 S. Ct. at 1373; *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1246–48 (1994).

A citizen's *procedural* rights to an Article III court (and its attendant constitutional protections) turn on the nature of the *substantive* interests that hang in the balance. On one hand, there are "private right[s]," which must be adjudicated in "the common law, … equity, or admiralty" courts. *Den ex rel. Murray v. Hoboken Land & Improvement Co.* (*Murray's Lessee*), 59 U.S. (18 How.) 272, 284–85 (1856). As traditionally

understood, "private rights" encompass interests in life, liberty, and property that are fully vested in private persons and are protected by the common law. *See* Nelson, 107 Colum. L. Rev. at 565–67. Because Congress possesses no judicial power and, therefore, no power to adjudicate claims that would deprive citizens of their private rights, it also cannot delegate that power to executive officials. *See* Chapman & McConnell, 121 Yale L.J. at 1803.

On the other hand, there are *privileges* tied to "public rights," for which something less than an Article III process is required. *Id.*; *see also Oil States*, 138 S. Ct. at 1373 (noting that Congress has "significant latitude to assign adjudication of public rights to entities other than Article III courts"); *see also* William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1536 (2020). "Public rights" encompass "the ownership interests of the government," which it may tentatively confer on private persons. John Harrison, *Public Rights, Private Privileges, and Article III*, 54 Ga. L. Rev. 143, 163–64 (2019); *see id.* at 166–70; Nelson, 107 Colum. L. Rev. at 567–68. Such privileges and benefits—which include welfare benefits, public land grants, and other instances of government largess—can be kept from fully vesting in private hands (and thus becoming private rights) by the government's imposition of special encumbrances and conditions. *Oil States*, 138 S. Ct. at 1373; *see* Nelson, 107 Colum. L. Rev. at 583; Harrison, 54 Ga. L. Rev. at 170. Because a remedy for a public right's violation depends on whether Congress has chosen to allow it by waiving sovereign immunity, "Congress may set the terms of adjudicating" that type of suit, as "the suit

could not otherwise proceed at all." *Stern*, 564 U.S. at 489.

As the administrative state has expanded, this Court has at times wandered in grappling with the "public rights" exception's narrow boundaries, and precedent has "not been entirely consistent." *Oil States*, 138 S. Ct. at 1373 (quoting *Stern*, 564 U.S. at 488). In some contexts, for example, the Court has allowed private rights *affiliated* with certain regulatory schemes to be adjudicated (at least initially) outside of the Article III courts. *See Crowell v. Benson*, 285 U.S. 22, 51–65 (1932). In others, the Court has expanded the concept of "public rights" to include traditionally private rights impacted by certain regulatory regimes. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589–90 (1985); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450–56 (1977). And the Court has allowed certain private rights to be adjudicated by executive agencies when all involved have "indisputably waived" any right to a full trial "before an Article III court." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986).

These precedents have been subject to intense criticism. *See, e.g.*, Kent Barnett, *Due Process for Article III—Rethinking* Murray's Lessee, 26 Geo. Mason L. Rev. 677, 681–92 (2019) (describing the "public-rights exception" as a "doctrinal and theoretical mess," *id.* at 692). But for present purposes, it is enough to recognize that they delineate the outermost bounds of administrative adjudication. The government faces an insurmountable burden where, as here, it seeks to extend the scope of an

administrative adjudicatory process beyond those bounds, which themselves stand on tenuous constitutional ground.

B. The Commission's novel adjudicatory process renders void multiple layers of constitutional protections.

In this case, none of this Court's existing precedents justify the government's position. The Commission's defense of its post-Dodd-Frank adjudication process urges this Court to go far beyond what it has previously permitted. *See* Ryan Jones, *The Fight Over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. Rev. 507, 516 (2015) (explaining the expansion of adjudication authority through Dodd-Frank in 2010). The government's position also relies on an expansive understanding of "public rights" that is obviously wrong and inconsistent with the Court's precedents.

Congress cannot convert matters of private right into matters of public right—and evade constitutional safeguards—simply by enacting a statute that imposes new statutory obligations on private parties. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (noting that "[t]he Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections" (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939))). To the contrary, as this Court has emphasized, if Congress were permitted to withdraw from the judiciary any matters that are "deem[ed] part of some amorphous 'public right,' then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful

thinking." *Stern*, 564 U.S. at 495. As the respondent's brief explains, the issues raised in this case involve rights that are by their nature private. It thus makes no difference that Congress has enacted a statute, purportedly in the name of the public interest, that seeks to invade those rights.

More broadly, the serious concerns raised by the government's attempt to redefine "public rights" are amplified by the Dodd-Frank Act's delegation of legislative powers to the Commission. *See* The Federalist No. 47 (James Madison) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control." (quoting Montesquieu)). The Commission is not only seeking to adjudicate private rights through a novel, extra-judicial adjudicatory process permeated with bias; it is also claiming unfettered discretion to decide when individual citizens must participate in that process (deprived of the protections afforded by Article III courts) and have their rights adjudicated by executive officials who are not subject to the President's control and oversight. *See Free Enter.,* 561 U.S. at 496 (striking down "novel structure" that transformed an agency's independence by eliminating multiple layers of constitutional protections).

This case presents a much greater threat to separation of powers and individual rights and liberty than any of the precedents relied on by the government. Even if the government were correct that each of Dodd-Frank's innovations, on its own, might be countenanced despite departing from the constitutional baseline, their combination together would still present an egregious violation of the

Constitution's structural guarantees. *See* Michael S. Greve, *Delegation in Context* 52 (George Mason Univ. Legal Studies Research Paper Series, Working Paper No. 23-07, 2003), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4486697 (explaining that statutes are most susceptible to challenge when Congress puts "a broad delegation together with a lack of procedural and judicial safeguards, in a domain where citizen's liberties are at stake"). When private rights are at stake, the Constitution mandates an Article III forum. Even when public rights are involved, deciding whether individuals are entitled to the protections of litigation before an Article III forum requires careful legislative judgment; it cannot be left to the unilateral discretion of an executive agency with no statutory requirements to guide the agency's decision. And that is especially true where, as here, the executive officials responsible for overseeing the adjudicatory process are biased and subject to tenure protections, making any attempt to ensure accountability to the public for their decisions a forlorn dream. *See Seila Law*, 140 S. Ct. at 2192, 2200.

In short, whatever the merits of the government's position when each of Dodd-Frank's innovations are taken in isolation, it is clear that the statutory scheme *as a whole* is contrary to the Constitution.

II. The Dodd Frank Act Strays Far Beyond Constitutional Limitations.

The grave constitutional concerns raised by the Dodd-Frank Act's novel provisions are reinforced by examining how the Commission's administrative proceedings work in practice. Unleashed from constitutional constraints, the Commission has

abused its powers to impose an unprecedented adjudicatory process that bears almost no resemblance to the fair, unbiased procedures that due process demands when private rights are at stake.

A. The new powers granted to the Commission exceed constitutional limits.

The Commission's novel enforcement scheme under the Dodd-Frank Act marks the culmination of a decades-long creep and expansion of agency power. When Congress first established the Commission in the mid-1930s, it respected the separation of powers and the rights of the accused. The original Securities Exchange Act of 1934 empowered the Commission to enforce violations primarily by "seeking injunctions in federal district court." Thomas Glassman, *Ice Skating Up Hill: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. Bus. & Sec. L. 47, 50 (2015). In contrast, administrative proceedings could be used only to "expel members or officers of [the] national securities exchanges" that the Act directly regulated. *Id.*

Even as the Commission's powers and duties expanded over subsequent decades, a respondent's right to process in an Article III court was largely preserved. Each time the Commission 'obtained or asserted additional administrative powers … the expansion was tied to the agency's oversight of regulated entities or those representing those entities before the Commission, and even then was largely ancillary to the broader remedies and sanctions [the Commission] could obtain" in court. *See id.* (quoting Jed S. Rakoff, U.S. Dist. Judge, Keynote Address at

the PLI Securities Regulation Institute: Is the SEC Becoming a Law Unto Itself? (Nov. 5, 2014), *available at* https://perma.cc/PM3Y-GWF9). The Commission's adjudicative purview largely remained limited to cases involving the registration and deregistration of securities, *see* 15 U.S.C. §§ 77h(d), 78*l*(j), and the barring or suspension of Commission-licensed securities firms and their associated persons, *see id.* §§ 78*o*(b)(4), 80a-8(e), 80a-9(b), 80b-3(c)(2)(B), 80b-3(e), 80b-3(f).

Over the past four decades, however, Congress and the Commission have seized on crisis and scandal to push constitutional boundaries. In the 1980s, concerns over insider trading led to an expansion of the remedies the Commission could obtain as punishment for violating the law. *See* Glassman, 16 J. Bus. & Sec. L. at 51; Jones, 68 SMU L. Rev. at 511. And with enactment of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (the "Remedies Act"), the Commission's administrative adjudications could result in monetary penalties against regulated parties and permanent cease-and-desist orders against even *non-regulated* parties. *See* Pub. L. No. 101-429, §§ 202(a), 301, 401, 104 Stat. 931, 937, 941–45, 946–49 (1990) (codified respectively at 15 U.S.C. §§ 78u-2, 80a-9(d), and 80b-3(i)); *see* Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 Fordham J. Corp. & Fin. L. 367, 392–93 (2008). In this same time frame, the Commission set out to increase "efficiency" in its adjudicative process by truncating and streamlining discovery and trial procedures. *See* Jones, 68 SMU L. Rev.at 513. Still, if the Commission wished to impose

penalties on unregistered private citizens, or otherwise to materially deprive them of their private rights to liberty or property, it had to prove its case before an Article III court. *See* Remedies Act §§ 101, 201, 302, 402 (codified at 15 U.S.C. §§ 77t(d), 78u(d); 80a-41(e), and 80b-9(e)).

In the wake of the 2008 financial crisis, however, Congress took an unprecedented leap. In the Dodd-Frank Act, it purported to empower the Commission to impose harsh quasi-criminal sanctions against *any* private citizen through the agency's own administrative adjudications with only limited, after-the-fact review by a federal court of appeals. *See* Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1862–64 (2010) (codified at 15 U.S.C. §§ 77h-1(g), 78u-2(a); 80a-9(d), and 80b-3(i)); *see also* Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 Yale J. on Reg. 1, 9 (2017). The Commission had sought this extraordinary power decades earlier, but Congress had declined to grant it "specifically 'because the [Commission] might be perceived to have an incentive to conduct more enforcement actions through its own administrative proceedings.'" Jones, 68 SMU L. Rev. at 516 (quoting Atkins, 13 Fordham J. Corp. & Fin. L. at 393–94). Through Dodd-Frank, Congress threw that caution to the wind.

The results were predictable. Rather than exercise its novel authority to avoid (or at least minimize) serious constitutional concerns, the Commission has exacerbated them. This case is a perfect example: Jarkesy is a private citizen, not a government licensee or even a registered professional

subject to the Commission's authority. He acquired his money in private commerce, not from the public fisc. He has never consented to adjudication before an administrative tribunal. Yet the Commission seeks to deprive him of more than $1,000,000 of personal property. And to accomplish this result, the Commission chose *not* to try Jarkesy before an independent Article III court. Instead, the Commission opted to investigate, charge, adjudge, and punish Jarkesy all on its own.

B. Allowing the Commission to adjudicate its own prosecutions violates constitutional requirements.

The constitutionally suspect structure of the Commission's in-house adjudicatory process creates the inherent risk and appearance of institutional bias, and it yields predictably unfair results. Chief among the liberties secured by the Constitution is the right to a "fair trial in a fair tribunal," *In re Murchison*, 349 U.S. 133, 136 (1955), "one of the rudiments of fair play assured to every litigant," and an "inexorable safeguard" of individual liberty. *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 304–05 (1937) (internal quotation marks and citation omitted).

A fair trial requires an adjudicator who lacks "a direct, personal, substantial, pecuniary interest" in a case. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *see also* The Federalist No. 10 (James Madison) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."). Also forbidden is the "objective risk of actual bias," regardless of "whether or not actual bias exists or can be proved."

Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886 (2009); *accord Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (courts "apply an objective standard" that asks not whether the adjudicator harbors actual, subjective bias but instead whether, as an objective matter, "'there is an unconstitutional potential for bias'" (quoting *Caperton*, 556 U.S. at 881)). Due process is violated where perceived bias, "under all the circumstances 'would offer a possible temptation to the average … judge to … lead him not to hold the balance nice, clear[,] and true.'" *Caperton*, 556 U.S. at 885 (quoting *Tumey*, 273 U.S. at 532).

The Commission's administrative proceedings are rife with institutional biases that create a constitutionally intolerable risk and perception that those accused will not get a fair shake. To start, the Commission is quite literally on the same side as the prosecutors: The Commission's Division of Enforcement is primarily composed of attorneys who simultaneously advise the Commissioners as trusted fiduciary counsel and who represent the Commission as litigation counsel in other cases in federal court.

The Commission and its staff ostensibly adhere to certain "separation of function" rules. *See* 5 U.S.C. § 554(d) & 17 C.F.R. § 201.101(a). But the Commission *admitted* in April 2022 that those rules were breached in a number of cases (including Jarkesy's), which eventually led to the discretionary dismissal of more than two dozen still-pending cases (though not Jarkesy's). *See* SEC, Commission Statement Relating to Certain Administrative Adjudications (Apr. 5, 2022), https://tinyurl.com/3e3c6hpr; SEC, Second Commission Statement

Relating to Certain Administrative Adjudications (June 2, 2023), https://tinyurl.com/4h5kw7z3. Despite that embarrassing admission, the Commission continues to adjudicate its own cases—a well-established violation of due process. *See In re Murchison*, 349 U.S. at 136 ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."). In such circumstances, some measure of institutional bias is unavoidable. *See* Philip Hamburger, Is Administrative Law Unlawful? 337–38 (2014) ("Like employees of the old prerogative bodies, employees of administrative bodies become psychologically attached to the sort of power in which they play a role, and they therefore are in no position to judge the lawfulness of any exercise of that power."). And indeed, this "combination of investigative and adjudicative functions" violates due process where "from the special facts and circumstances … the risk of unfairness is intolerably high." *Withrow v. Larkin*, 421 U.S. 35, 58 (1975).

This functional cross-pollination within the Commission is apparent from the outset—when *the Commission* decides whether to institute an enforcement action (for which it then becomes the ultimate adjudicator). *See* 17 C.F.R. §§ 201.101(a), (4), (7) and 201.200. It typically makes this determination after the agency's Enforcement Division prosecutors have presented their case to the Commissioners in written and oral *ex parte* communications cloaked by attorney-client privilege. *See* SEC Enforcement Manual § 2.5 (last updated Nov. 28, 2017); *see also Sierra Club v. Costle,* 657 F.2d 298, 400 (D.C. Cir. 1981), *as amended* (June 1, 1981) ("[T]he insulation of

the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved."). Although the accused is typically allowed to submit a written position statement (commonly referred to as a "Wells submission") before the Commission decides whether to file charges, *see* 17 C.F.R. § 202.5(c), the Commission's prosecution team can refute that statement in *ex parte* communications with the Commissioners, whereas the accused neither sees the prosecutors' written presentation nor hears the contents of their (privileged) discussions with the Commissioners.

As a result, by the time the Commission *initiates* its public adjudicatory proceeding, it has already weighed the evidence and made a threshold determination that the case has enough merit to justify public charges and a public hearing, which is more than enough to undermine "the very appearance of complete fairness." *Amos Treat & Co. v. SEC*, 306 F.2d 260, 266, 267 (D.C. Cir. 1962) ("We are unable to accept the view that a member of an investigative or prosecuting staff may … recommend the filing of charges, and thereafter … participate in adjudicatory proceedings"); *accord Williams*, 136 S. Ct. at 1907–08 (due process violated in civil post-conviction case where state supreme court justice, as a former district attorney, had approved subordinate prosecutor's request to seek death penalty in underlying criminal case 25 years earlier).

In some cases, including Jarkesy's, *the Commission* will then issue an official press release that reads as if the case has already been proved, the facts found, and the accused deemed guilty. *See* Press

Release, SEC, No. 2013-46, SEC Charges Hedge Fund Manager and Brokerage CEO With Fraud (Mar. 22, 2013), https://www.sec.gov/news/press-release/2013-2013-46htm. These press releases typically blur the line between the Enforcement Division's mere allegations and the Commission's purported neutrality as the ultimate adjudicator. Reviewing the Commission's accusatory press releases, "a disinterested reader … could hardly fail to conclude" that the Commission has "in some measure decided in advance" that the accused has violated the law. *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated on unrelated grounds sub nom. FTC v. Texaco, Inc.*, 381 U.S. 739 (1965) (per curiam)). Such prejudgment violates due process. *See Antoniu v. SEC*, 877 F.2d 721, 725 (8th Cir. 1989) (SEC Commissioner's speech about pending case created impermissible bias); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966) (disqualifying commissioner who had, in a former role, investigated many of the same facts at issue).

From the very start of the adjudicative proceeding, then, those accused are publicly labelled wrongdoers unless and until they prove otherwise. But the deck is further stacked against them with lopsided procedural rules promulgated by *the Commission*. Forced to prepare their defenses within strict timelines—a *maximum* of ten months in the most complex of cases, *see* 17 C.F.R. § 201.360(a)(2)(ii)—respondents are immediately on the back foot. And yet, while scrambling to catch up, respondents have few tools at their disposal—only in the most complex administrative cases are they allowed depositions (subject to strict limits). *Compare*

17 C.F.R. § 201.233(a)(1) (maximum of three depositions per side in single-respondent cases and five per side in multi-respondent cases), *with* Fed. R. Civ. P. 30 (permitting 10 depositions and more with leave). In contrast, the Commission's prosecution team has typically already taken all the time it needs to investigate and prepare its case; the average investigation takes more than two years, *see* SEC, Division of Enforcement, 2020 Annual Report 6 (2020), and many take five years or more. In addition, the prosecutors have typically enjoyed subpoena power throughout their investigation, often amassing substantial evidence through document productions and sworn nonpublic testimony. *See, e.g.*, 15 U.S.C. §§ 78u(b), 80b-9(b); 6 Thomas Lee Hazen, Law Sec. Reg. § 16:101.

The Commission's administrative proceedings thus substitute trial before a petit jury—the constitutional gold standard for adjudicating private rights, *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)—with an initial hearing before an ALJ who, like the prosecutors, reports to *the Commission*. *See* SEC Organizational Chart, https://www.sec.gov/about/secorg.pdf. That is not a fair trade and provides little comfort for the accused. ALJs act according to authority delegated by *the Commission*, 15 U.S.C. § 78d-1(a); 17 C.F.R. § 200.30-10, and their positions are created, maintained, and funded by *the Commission*, raising serious constitutional concerns. *See Lucia v. SEC*, 138 S. Ct. 2044 (2018) (holding the Commission's ALJs are inferior officers); *Free Enter.*, 561 U.S. at 492, 496 (holding unconstitutional two-layer tenure protection of inferior officers).

Anecdotal evidence suggests that Commission ALJs are pressured to find for the agency. *See* Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803 (former ALJ stating that she "came under fire … for finding too often in favor of defendants"); Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 Admin. L. Rev. 271, 278–79 (1994) (34% of non-Social Security ALJs were "asked to do things that are against their better judgment," 15% believe "threats to independence were a problem," and 9% were "pressure[d] to make different decisions"). Regardless of whether actual bias exists, there is a serious risk and appearance of a biased proceeding—an unacceptable risk in this quasi-criminal context. *See* Hamburger, *supra*, at 231 ("[W]here agencies adjudicate cases of a criminal nature, they tend to deny the associated constitutional rights.").

An ALJ's initial decision is appealable to the Commission, but that too is cold comfort. The Commission rarely rules against itself. From 2010 to 2015, the Commissioners decided 95% of appeals in the agency's favor, sometimes overruling ALJ decisions that were more favorable to the respondent and sometimes imposing harsher sanctions. *See* Eaglesham, *SEC Wins with In-House Judges*, *supra*. That is predictable; after all, the Commission describes itself as "[f]irst and foremost … a law enforcement agency," and has pledged to be "bold and unrelenting" in pursuit of securities violators. *See* Christopher Cox, Chair, SEC, Address at the PLI 40th Annual Securities Regulation Institute: Building on Strengths in Designing the New Regulatory Structure

(Nov. 12, 2008), https://www.sec.gov/news/speech/2008/spch111208cc.htm; *Nominations Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 113th Cong. 10 (2013) (statement of Chair Mary Jo White).

The Commission's financial and political interests also provide strong temptation to rule against respondents. Although the Commission does not directly profit from the monetary awards it imposes, recovered funds are either distributed to harmed investors under the Fair Funds for Investors provision of Sarbanes-Oxley, *see* 15 U.S.C. § 7246, or deposited into a fund that pays whistleblowers under a provision of Dodd-Frank, *see* 15 U.S.C. § 78u-6. The Commission frequently boasts about these efforts. *See* SEC Whistleblower Office Announces Results for FY 2022, at 1 (Nov. 15, 2022), *available at* https://www.sec.gov/files/2022_ow_ar.pdf ("Since the beginning of the program, the SEC has paid more than $1.3 billion in 328 awards to individuals."); *Selected Division of Enforcement Accomplishments: December 2016 – December 2020*, SEC.gov (last modified Mar. 6, 2023), https://tinyurl.com/3x9abw72 (Commission has "returned approximately $3.6 billion to harmed investors" since 2016). And the Commission is lavishly praised for them by the media, advocacy groups, and (most crucially) the politicians who ultimately determine the agency's budget. *See* Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 Harv. J. L. & Pub. Pol'y 639, 643–46 (2010) ("It certainly appears that the SEC is carrying out its (enforcement) duties so as to maintain a base of support within the Congressional budget process."

(internal quotation marks omitted)). With its mission and funding at stake, it is not hard to fathom the Commission's incentives to win cases and pad its numbers. *Cf. Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) ("[T]he mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from [fines imposed by] the mayor's court.").

The Commission also has strong jurisprudential temptations to rule in favor of its Enforcement Division prosecutors whenever possible. By doing so, the Commission can steer the development of securities law in its favor, establishing a body of self-serving "precedent" it can then use to its advantage when litigating subsequent cases in federal courts—where, as noted above, the same Enforcement Division prosecutors represent the agency as its counsel—or when extracting settlements. *See* Rakoff, Is the SEC Becoming a Law Unto Itself?, *supra* (expressing concern about the Commission using administrative adjudication to undermine the impartial development of securities law); Joseph A. Grundfest, *Fair or Foul? SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 Fordham L. Rev. 1143, 1148 (2016) (by litigating administratively, the SEC seeks to control the interpretation of federal securities laws); *cf. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824–25 (1986).

When the Commission's adjudication concludes with the usual (and largely predictable) result of a final decision in its own favor, the respondent may seek review of the decision in a federal court of appeals, 15 U.S.C. § 78y, but that review is

circumscribed. The Commission's conclusions of law are typically entitled to significant deference and courts frequently acquiesce to the Commission's self-serving views of securities law. *See VanCook v. SEC*, 653 F.3d 130, 140 n.8 (2d Cir. 2011) (SEC's interpretation of securities law "trumps" Second Circuit precedent (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005))); *SEC v. Tex. Gulf Sulphur, Co.*, 401 F.2d 833, 848 (2d Cir. 1968) (adopting SEC's novel interpretation that insider trading constitutes fraud in violation of Exchange Act Section 10(b)). Moreover, the Commission's factual findings—often rubber-stamped from the initial ALJ hearing—are conclusive if supported by "substantial evidence," 15 U.S.C. § 78y(a)(4), a notoriously undemanding standard permitting reversal only where "no reasonable factfinder could reach a contrary conclusion." *Chen v. Gonzales*, 470 F.3d 1131, 1134–41 (5th Cir. 2006). Federal court review is thus often an empty promise.

The resulting reality of the Commission's administrative adjudication process is that the deck is stacked heavily against the respondent from start to finish, with the burden of proof effectively on the respondent rather than the government, where it rightly belongs in this kind of quasi-criminal prosecution. *Cf. Patterson v. New York*, 432 U.S. 197, 211 (1977) ("[T]he universal rule in this country [is] that the prosecution must prove guilt beyond a reasonable doubt."). As a former ALJ put it, "the burden was on the people who were accused to show that they didn't do what the agency said they did." Eaglesham, *SEC Wins with In-House Judges*, *supra*. And the cumulative effect is predictable: Most

respondents, with the looming threat of a process skewed against them, understandably cry uncle rather than risking costly hearings and years of uphill appeals. *See* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 Wash. L. Rev. 315, 340, 346–47 (2017); *see also* Choi, 34 Yale J. on Reg. at 16 (confirming empirically hypothesis "that the SEC would use its additional enforcement powers under the Dodd-Frank Act as leverage to obtain greater monetary penalties in administrative proceedings").

Evidence shows that a very high percentage of Commission enforcement actions settle before final resolution, with some suggesting that the Commission "currently settles approximately 98% of its enforcement cases." *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011, at *2 n.5 (S.D.N.Y. Oct. 28, 2022) (quoting Luis A. Aguilar, Commissioner, SEC, Remarks Before the 20th Annual Securities and Regulatory Enforcement Seminar (Oct. 25, 2013), https://www.sec.gov/news/speech/2013-spch102513laa). Perhaps even more significantly, studies show that a very high percentage of cases settle as soon as they are initiated and without further proceedings. *See* Cornerstone Rsch., SEC Enforcement Activity: Public Companies and Subsidiaries, Fiscal Year 2022 Update 5 (2022) (showing that 93 percent of cases brought against public companies and their subsidiaries were filed and simultaneously settled). The extremely high settlement rate strongly suggests that the procedural backdrop is unfair to the accused, and the ability to seek judicial review is all but ephemeral. The Commission's procedures are not only one-sided they are also outcome dispositive: Having stacked the deck

against respondents, the Commission forces them to fold.

* * *

The Commission's campaign against Jarkesy—reminiscent of the rule by prerogative that our nation's Founders sought to abandon—culminated in a summary adjudicative process that was drenched with institutional bias and dispensed with multiple layers of constitutional safeguards. According to the government, there is nothing to see here because, when disaggregated and examined in isolation, the relevant constitutional boundaries, in each and every instance, are being only incrementally transgressed as compared to past cases. But the Constitution is not something to be so readily cast aside. Determining whether the Commission's adjudications under the Dodd-Frank scheme comply with the Constitution requires more than piecing together precedents that already represent the outermost limits of acceptable departures from constitutional baselines. The Court should instead recognize that the combined infractions in this case (and others)—the adjudication of private rights, the unlawful delegation of powers, and the improper removal restrictions—render the statute and the Commission's administrative process far beyond what the Constitution conceivably permits.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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