No. 22-859

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

GEORGE R. JARKESY, JR., ET AL.

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

BRIEF FOR INDEPENDENT WOMEN'S LAW CENTER AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Congress has given the Securities and Exchange Commission (SEC) absolute discretion to decide whether to prosecute certain enforcement actions in court or in an administrative proceeding within the agency. In so doing, Congress has effectively—and unlawfully—given the SEC power to decide which defendants receive certain legal protections and which do not.

The grant of such unbridled power to an administrative agency greatly concerns *amicus* Independent Women's Law Center (IWLC). IWLC is the legal advocacy arm of Independent Women's Forum (IWF), a nonprofit, non-partisan 501(c)(3) organization founded by women to develop and promote policies that enhance freedom, opportunity, and well-being. IWLC supports the mission of IWF by advocating—in court, in Congress, and before administrative agencies—for equal opportunity, individual liberty, and respect for the American constitutional order.

IWLC agrees with Respondents that Section 929P(a) of the Dodd-Frank Act, 15 U.S.C. § 78u-2(a), lacks the intelligible principle required to guide the exercise of the SEC's discretion in pursuing securities fraud actions. IWLC writes further to detail the ways in which broad grants of power to the executive limit

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[1] No counsel for any party authored this brief in whole or in part and 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.

individual rights, particularly those of minority populations, and to emphasize the destabilizing effect of allowing executive agencies to change the rules of the game with each new administration.

This Court should take this opportunity to revisit the nondelegation doctrine and to remind Congress that it may not transfer its policy-making duties to executive agencies.

SUMMARY OF ARGUMENT

The framers of our Constitution had good reason to fear the concentration of power in any one branch of government. The central innovation of the Constitution was, therefore, the division of powers among three co-equal branches of government. This structural separation of powers and its built-in checks and balances were not intended to be theoretical abstractions. To the contrary, they were intended as "practical and real protections for individual liberty." *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 118 (2015) (THOMAS, J., concurring in the judgment) (citation omitted); accord The Federalist No. 51 (J. Madison), (Wash. D.C.: Libr. of Cong.), available at https://guides.loc.gov/federalist-papers/text-51-60#s-lg-box-wrapper-25493427; *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) ("[w]ithout a secure structure of separated powers, our Bill of Rights would be worthless.").

Under our Constitution, only Congress—the branch of government most accountable to the people—has the power to legislate. And that power is deliberately constrained in order to prevent legislative

majorities from running roughshod over minority interests.

To put it simply, ***the framers never meant for legislating to be easy. In fact, they made legislating difficult by design.*** And they certainly did not intend for politicians to skirt the Constitution's limitations by delegating their power to another branch of government.

And, yet, that is exactly what Congress has done, time and time again. The result is that federal bureaucrats, unaccountable to the people and not subject to liberty-preserving checks and balances, have acquired the power to burden individual liberty in precisely the ways the framers feared. This poses a particular threat to minority interests and to individual rights. Open-ended delegations of authority also allow agencies to easily reverse regulatory requirements, undermining the stability of the law.

For these reasons, and the reasons stated by Respondents, the Court should affirm the decision below that Congress unconstitutionally delegated legislative power to the SEC.

ARGUMENT

I. Broad Delegations of Power Allow Agencies to Burden Individual and Minority Interests.

The framers vested "[a]ll legislative Powers" in the Congress of the United States. U.S. Const. art. I, § 1. The Constitution thus "promises that only the people's elected representatives may adopt new

federal laws restricting liberty." *Gundy* v. *United States*, 139 S. Ct. 2116, 2131 (2019) (GORSUCH, J., dissenting).

Congress, however, has increasingly delegated broad policy-making authority to executive agencies. See *Industrial Union Dep't*, *AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 686-687 (1980) (Rehnquist, J., concurring)); see also Bethany A. Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 Yale J. Regul. 1100, 1104 & n.17 (2022) (describing trend of presidents relying on administrative rules rather than legislation to accomplish their policy objectives). These delegations fundamentally conflict with the separation of powers enshrined in the Constitution and have serious consequences for the people governed by it.

A. Broad Delegations of Power Allow Agencies to Adopt Regulations that Burden Minorities.

Recognizing that legislative majorities can easily threaten minority rights, the framers of our Constitution adopted a legislative process designed to ensure that no federal law would be enacted lightly—or easily. *Gundy*, 139 S. Ct. at 2134 (GORSUCH, J., dissenting). By insisting on "a legislature composed of different bodies subject to different electorates," the framers ensured that minority votes "would often decide the fate of proposed legislation." *Id.* at 2134-2135. Our system thus protects minorities from the tyranny of the majority by deliberately building in gridlock.

Because agencies, which developed long after our constitutional founding, are subject neither to the bicameral legislative process nor to the clear "lines of accountability" that guide and limit Congress's discretion, *id.* at 2134, it is unsurprising that they often fail to account for important minority interests. To take just one example, in 2022 the Department of Labor (the Department) proposed a new regulation that would reverse its previous rule for determining whether an individual is operating as an "employee" or an "independent contractor" under the Fair Labor Standards Act (FLSA). See Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218, 62,218 (Oct. 13, 2022) (Independent Contractor Rule). The FLSA itself does not define the term "independent contractor," 29 U.S.C. § 203(r), so the Department's previous rule tried to bring some clarity to this area of the law.

Such clarity was critical for the over 51 million independent contractors who were operating in 2021,[2] for it allowed them to find work and to organize their financial affairs without fear that they would be deemed part of an employment relationship they neither desired nor in reality had.[3] This protection of independent contracting status was particularly

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[2] MBO Partners, *11th Annual State of Independence: The Great Realization* 7 (Dec. 2021), https://tinyurl.com/3bkwk5fs.

[3] See Karen Kosanovich, *Spotlight on Statistics, Workers in Alternative Employment Arrangements*, at tab 9, U.S. Bureau of Lab. Stats. (Nov. 2018), https://tinyurl.com/2mjdc7ah (reporting that "Independent contractors overwhelmingly favored their alternative employment arrangement (79 percent) to a traditional one (9 percent)").

important to the many women who depend upon the flexibility that independent contracting provides.[4]

The Department's proposed 2022 rule wholly disregards the needs of this minority constituency. Instead of offering an accurate determination of worker status, the proposed rule concededly misclassifies some independent contractors as employees. See Independent Contractor Rule, 87 Fed. Reg. at 62,260 (explaining that Department does not believe independent contractors will be misclassified only "for the most part"). And the Department fails even to consider the burden on these contractors in its cost-benefit analysis of the rule. See *id.* at 62,265-62,266.

Because the bureaucrats at the Department are not elected by any of the 51 million independent contractors, however, they face no threat of losing their jobs. Agencies like the Department of Labor simply lack the accountability the Constitution requires of Congress and therefore can more easily

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[4] See *Chasing Work: Independent Contractors, Hear real stories of workers impacted by job-killing regulations*, Indep. Women's Forum, https://www.iwf.org/chasing-work-independent-contractors/ (last visited Oct. 15, 2023); Gabriella Hoffman, *Freelancing Gives Women an Edge. New Labor Department Rule Will Stifle Our Potential*, Indep. Women's Forum (Sept. 8, 2023), https://www.iwf.org/2023/09/08/freelancing-gives-women-an-edge-new-labor-department-rule-will-stifle-our-potential/; Adam Ozimek, *Freelance Forward Economist Report*, Upwork, https://tinyurl.com/mrybzau3 (last visited Oct. 15, 2023); Courtney Connley, *More than 860,000 women dropped out of the labor force in September, according to new report*, CNBC (Oct. 2, 2020, 2:45 PM), https://tinyurl.com/bdzf9npm.

disregard the needs of discrete populations they govern.

B. Broad Delegations of Power Allow Agencies to Burden Individual Liberty Interests.

Shifting policy-making power to executive agencies is also problematic because agencies may use their increased authority to eliminate procedures that protect individual rights. Here, the SEC used its unfettered discretion to select a method of prosecution that lowered its burden at trial, bypassing a jury in which one vote of twelve could have prevented conviction. Resp'ts' Br. 47-52. But this is not the only occasion on which an executive agency has used its power in liberty-constricting ways.

In the Title IX context, the Department of Education has proposed rules that disregard fundamental due process rights of individuals accused of sexual misconduct in postsecondary educational institutions. Although sexual assault is a crime, the Department of Education wants colleges and universities to investigate and punish this class of offenses outside the criminal justice system and without all of the attendant constitutional protections that our justice system provides. See, *e.g.*, Jennifer C. Braceras, *Title IX, Sexual Misconduct, and Due Process on Campus*, Indep. Women's Forum 2-3 (Jan. 2020), https://tinyurl.com/2ezrk6hp.

Students at public universities are constitutionally entitled to robust procedural protections, including the right to notice and an opportunity to be heard. See, *e.g.*, *Doe* v. *Purdue*

Univ., 928 F.3d 652, 663 (7th Cir. 2019); *Doe* v. *University of Cincinnati*, 872 F.3d 393, 399-400 (6th Cir. 2017) (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976)); *Gorman* v. *University of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988).[5] But rules proposed by the Department of Education in 2022 would eliminate those basic due process rights. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,567 (July 12, 2022) (allowing investigations to proceed solely on the basis of verbal complaints).

College investigators should not—and under the Due Process Clause cannot—trample individual liberties, even in the pursuit of justice. But agencies without specific guidance from Congress, and with no accountability or incentive to protect liberty, often ignore, and indeed undermine, the process that our Constitution requires.

II. Broad Delegations of Power to Administrative Agencies Destabilize the Law.

In addition to burdening minority and individual rights, the broad delegation of policy-making authority to executive agencies also undercuts the stability of the law. The framers' decision to "[r]estrict[] the task of legislating to one branch

[5] See also 34 C.F.R. §§ 106.30(a), 106.45(b)(5)(vi) (current regulations codifying due process requirements by requiring schools to provide accused students with written notice of the charges against them and an opportunity to inspect the evidence against them).

characterized by difficult and deliberative processes was * * * designed to promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules." *Gundy*, 139 S. Ct. at 2134 (GORSUCH, J., dissenting) (citation omitted). That stability has proven increasingly unattainable in a world of administrative legislation, where "presidents have come to rely on the administrative state as a primary mechanism for accomplishing their policy objectives." Noll & Revesz, *supra*, at 1104.

To be sure, presidential attempts to reverse the administrative course of their predecessors have gone on for decades. *Id.* at 1135 (describing efforts by President Reagan, among others, to suspend rules from previous administrations). But they have become especially prevalent in recent years. Indeed, while the Trump administration was criticized for "unusually aggressive effort[s] to undo the regulatory output of its predecessor," *id.* at 1102, recent research confirms that the Biden Administration has made good use of the "Trump-era toolkit on rollbacks," in some cases using it even more aggressively than the Trump administration itself. *Ibid.*[6]

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[6] One regulatory tracker counts President Biden's administration as proposing or issuing dozens of regulations overturning rules adopted when President Trump was in office. See Brookings Inst., *Tracking Regulatory Changes in the Biden Era* (last updated Sept. 19, 2023), https://www.brookings.edu/articles/tracking-regulatory-changes-in-the-biden-era/ (noting that Biden administration has proposed or issued the following rules that overturn regulations adopted by President Trump:

- Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB), 88 Fed. Reg. 32,300 (May 19, 2023) (requiring colleges to meet employment standards to receive federal funding);
- Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. 29,184 (May 5, 2023) (proposing new emission standards);
- Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19,450 (Mar. 31, 2023) (reinstating 2013 anti-discrimination effects standard);
- National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Revocation of the 2020 Reconsideration and Affirmation of the Appropriate and Necessary Supplemental Finding, 88 Fed. Reg. 13,956 (Mar. 6, 2023) (revising mercury standards);
- Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. 7,236 (Feb. 2, 2023) (restricting religious and moral exemptions for contraceptive coverage);
- Revised Definition of "Waters of the United States", 88 Fed. Reg. 3,004 (Jan. 18, 2023) (expanding definition of waters under federal jurisdiction);
- Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 820 (Jan. 5, 2023) (partially rescinding rule protecting healthcare workers' exercise of conscience rights);
- Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022) (revising criteria for investments made by 401(k) plan administrators);
- Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218 (Oct. 13, 2022) (changing FLSA regulations and making it more difficult to be classified as an independent contractor);

- Public Charge Ground of Inadmissibility, 87 Fed. Reg. 55,472 (Sept. 9, 2022) (revising criteria for immigration admissions);
- Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 87 Fed. Reg. 37,757 (June 24, 2022) (expanding protected habitats);
- Withdrawing Rule on Securing Updated and Necessary Statutory Evaluations Timely, 87 Fed. Reg. 32,246 (May 27, 2022) (repealing rule requiring periodic reevaluation of rules issued by Department of Health and Human Services);
- National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022) (revising environmental assessment rules);
- Recission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 Fed. Reg. 16,022 (Mar. 21, 2022) (rescinding rule permitting expedited removal of certain undocumented immigrants);
- Corporate Average Fuel Economy (CAFE) Preemption, 86 Fed. Reg. 74,236 (Dec. 29, 2021) (reconsidering emissions waiver for California and partially rescinding rule governing vehicles);
- Energy Conservation Program: Definition of Showerhead, 86 Fed. Reg. 71,797 (Dec. 20, 2021) (reversing definition of "showerhead" for water usage standards);
- Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 86 Fed. Reg. 70,892 (Dec. 13, 2021) (revising several appliance energy standards);
- Pipeline Safety: Safety of Gas Gathering Pipelines: Extension of Reporting Requirements, Regulation of Large, High-Pressure Lines, and Other Related Amendments, 86 Fed. Reg. 63,266 (Nov. 15, 2021) (adopting stricter reporting standards for pipeline operators);

- Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63,110 (Nov. 15, 2021) (adopting stricter emission standards);
- Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60,114 (Oct. 29, 2021) (rescinding portion of rule governing who could participate in tip pool);
- Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56,144 (Oct. 7, 2021) (reinstating federal funding to clinics that provide abortions or abortion referrals);
- Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54,642 (Oct. 4, 2021) (revoking Trump-era standards governing actions affecting migratory birds);
- Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 32,767 (June 23, 2021) (reinstating Obama-era fair housing rule);
- Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States: Delay of Effective and Transition Dates, 86 Fed. Reg. 26,164 (May 13, 2021) (delaying rule governing wage requirements for certain employment-based immigrants);
- Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 86 Fed. Reg. 26,406 (May 14, 2021) (rescinding rule governing cost-benefit analyses under Clean Air Act);
- Removal of International Entrepreneur Parole Program, 86 Fed. Reg. 25,809 (May 11, 2021) (rejecting Trump-era proposal to remove entrepreneur program finalized by Obama administration);
- Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs; Withdrawal; Regulatory

Moreover, in addition to using agency power to repeal and replace rules they dislike, President Biden's executive agencies have also attempted to scuttle disfavored rules simply by refusing to defend them in court—by confessing error, withdrawing appeals, or seeking abeyances—and thereby securing "vacatur of the rules." Noll & Revesz, *supra*, at 1103.

Researchers believe such moves will now be standard operating procedure: "[a] one-term president now only has approximately two years to finalize major policies, after which she can be reasonably confident that the policies will be undone speedily by a successor." *Ibid.* Tools including regulatory suspensions, the adoption of interim final "interpretive" rules, and the abandonment of litigation make it all too easy for agencies to reverse their

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Review, 86 Fed. Reg. 22,125 (Apr. 27, 2021) (withdrawing rule permitting single-sex shelters to establish independent admission requirements related to biological sex);

- National Vaccine Injury Compensation Program: Rescission of Revisions to the Vaccine Injury Table, 86 Fed. Reg. 21,209 (Apr. 22, 2021) (rescinding rule that removed two injuries from vaccine injury compensation program);
- Affidavit of Support on Behalf of Immigrants, 86 Fed. Reg. 15140 (Mar. 22, 2021) (withdrawing rule increasing evidentiary requirements for immigrant sponsors);
- Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration, Exec. Order No. 14,013, 86 Fed. Reg. 8,839 (Feb. 4, 2021) (expanding refugee admissions program);
- Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H–1B Petitions, 86 Fed. Reg. 1,676 (Jan. 8, 2021) (reversing rule giving preference to visa applicants with higher wages)).

predecessors' regulations at the drop of a hat. *Id.* at 1106, 1118, 1143-1144.

This is not a sustainable way to govern. Regulatory pendulum swinging has serious adverse consequences for individuals subject to agency demands. For example, countless independent contractors who could reliably determine their status under the Department of Labor's 2021 FLSA rule will see their livelihoods at risk under the Department's new proposal. See *infra* at 5-6. In the environmental sphere, individuals who own land that potentially encompasses "waters of the United States" have seen the usability of their property seesaw back and forth under regulations issued by the last three administrations.[7] And low-income patients who depend on certain life-saving drugs had no way of knowing how much their prescriptions would cost as the Biden administration's Department of Health and

[7] See Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015) (Obama); Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (Trump); The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22,250 (Apr. 21, 2020) (Biden), *vacated by Pascua Yaqui Tribe* v. *U.S. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021), *appeal voluntarily dismissed*, No. 21-16791, 2022 WL 1259088 (9th Cir. Feb. 3, 2022); Revised Definition of "Waters of the United States", 88 Fed. Reg. 3,004 (Jan. 18, 2023) (Biden), *stayed*, Order, *Texas* v. *U.S. EPA*, No. 3:23-cv-00017 (S.D. Tex. July 10, 2023), ECF No. 81 (staying litigation over President Biden's rule until EPA has opportunity to amend it consistent with this Court's opinion in *Sackett* v. *EPA*, 143 S. Ct. 1322 (2023)); Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023) (revising definition consistent with *Sackett*)).

Human Services repeatedly delayed the effective date of the Trump administration's Affordable Life-Savings Medications Rule, "which required certain medical centers to provide insulin and epinephrine to low-income patients at lower prices." Noll & Revesz, *supra*, at 1139. These individuals and myriad other Americans have found themselves subject to ever-shifting legal and economic demands as each new administration undoes the regulatory work of the last. That is not government of the people, by the people, or for the people; it is a power struggle between warring factions with the lives of ordinary Americans caught in the balance.

In short, the only aspect of agency governance that has proven "relatively stable and predictable," *Gundy*, 139 S. Ct. at 2134 (GORSUCH, J., dissenting) (citation omitted), is that it regularly changes course. That is not how the framers designed our constitutional system to operate. But it is how the system will continue to function so long as Congress is permitted to delegate "hard policy choices" to executive agencies, rather than making them itself. *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting) (quoting *Industrial Union Dep't*, 448 U.S. at 671 (Rehnquist, J., concurring)). The Court should therefore take this opportunity to revisit the application of the nondelegation doctrine and reiterate that "Congress, and not the Executive Branch," must "make the policy judgments" that governing demands. *Gundy*, 139 S. Ct. at 2131, 2141 (GORSUCH, J., dissenting).

CONCLUSION

The decision below should be affirmed.

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