No. 22-859

IN THE

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

PETITIONER,

V.

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

RESPONDENTS.

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

AMICUS CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

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

2. Whether statutory provisions that vest the SEC with unfettered discretion to choose to enforce common law fraud claims in the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine.

3. Whether Congress violated Article II by affording at least two levels of for-cause removal protection to the SEC's administrative law judges.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

To advance these goals, the Liberty Justice Center regularly litigates cases challenging overbroad assertions of regulatory discretion. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, No. 22-10387, 2022 U.S. App. LEXIS 31958 (5th Cir. Nov. 18, 2022) (striking down Congress's delegation of regulatory authority to a private industry group); *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 609 (5th Cir. 2021) (enjoining the Occupational Safety and Health Administrations' vaccination mandate) (enjoining the Occupational Safety and Health Administrations' vaccination mandate).

This case interests *amicus* because the SEC's unfettered discretion to decide the forum for enforcement actions is a violation of the separation of powers, and the separation of powers is fundamental to the preservation of liberty.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

The Securities and Exchange Commission claims the right to decide for itself whether citizens deserve the jury trial guaranteed them by the Bill of Rights. It's perhaps not a coincidence that the agency prefers its internal tribunals, since they always win when they get to make the rules themselves—as opposed to those cases they bring before juries, who unlike ALJ's do not hear arguments presented by their own employer. This determination as to when and how these securities fraud claims are adjudicated is a fundamentally legislative decision, and one that Congress declined to make, instead delegating that determination to the agency.

This Court's precedents require such delegations to, at a minimum, include the standard by which the agency is to exercise the delegated authority. But here there is *no standard* by which they make that determination—no principle, intelligible or otherwise—so it is entirely at the agency's caprice.

Amicus submits this brief to emphasize that these doctrinal limits on delegation are not simply technicalities, but a core protection for liberty, recognized from the early English common law sources, through the Founding, and this Court's jurisprudence, in which the nondelegation doctrine protects the separation of powers that is fundamental to the rule of law—and the preservation of liberty. Moments where this Court has made exceptions to these principles have demonstrated the importance of the rule. *See Hirabayashi v. United States*, 320 U.S. 81, 104 (1943) (approving the

delegation of authority to military commanders to intern citizens of Japanese descent). In ruling for Respondent, this Court should follow John Adams's proscription, and reaffirm that "[t]he executive shall never exercise the legislative and judicial powers . . . to the end it may be a government of laws and not of men." Mass Const. pt. 1, art. XXX.

ARGUMENT

I. The Rule of Law requires separation of the powers of lawmaking and law enforcement.

"There can be no liberty where the legislative and executive powers are united in the same person." The Federalist No. 47 (Madison) (quoting Montesquieu). The reason, per Montesquieu, is that "apprehensions may arise, lest 'the same monarch or senate that makes tyrannical laws will execute them tyrannically.'" Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 Tul. L. Rev. 265, 307 (2001) (quoting Montesquieu, The Spirit of the Laws 157 (Anne M. Cohler et al. eds., Cambridge Univ. Press 1989) (1748)). Or as Locke put it:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.

Id. (quoting John Locke, THE SECOND TREATISE OF GOVERNMENT 141, at 73 (J.W. Gough ed., Basil Blackwell 3d ed. 1976) (1690)).

To this end, the "Constitution does not vest the Federal Government with an undifferentiated 'governmental power.'" *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring). Rather, each branch is granted its own sphere of authority, such that "'[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' Art. I, §1, '[t]he executive Power shall be vested in a President of the United States,' Art. II, §1, cl. 1, and '[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,' Art. III, §1." *Id.*

This structure is not simply technical or formalistic, but is an essential safeguard of liberty. Madison warned that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison). "The Framers were concerned not just with the starting allocation, but with the 'gradual concentration of the several powers in the same department.'" *Ass'n of Am. R.R.*, 575 U.S. at 74 (Thomas, J., concurring) (citing The Federalist No. 51 (Madison)).

"[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal

motives to resist encroachments of the others." The Federalist No. 51 (Madison). The Framers therefore "built into the tripartite Federal Government [] a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

"To the Framers, the separation of powers and checks and balances were more than just theories." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring). "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than [the separation of powers]." The Federalist No. 47 (Madison). The same principle can be found in this Court's federalism jurisprudence: "denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of lawful powers, that liberty is at stake." *Bond v. United States*, 564 U.S. 211, 221-22 (2011) (internal quotes and citations omitted). The Vesting Clauses are therefore exclusive and nondelegable.[2] "When the Government is called upon to perform a

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[2] *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 67-68 (2015)(Thomas, J., concurring) ("These grants are exclusive") (citing *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 472, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) (legislative power); *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 496-497, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010) (executive power); *Stern v. Marshall*, 564 U. S. 462, 482-483, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011) (judicial power)).

function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it." *Ass'n of Am. R.R.*, 575 U.S. at 68 (2015) (Thomas, J., concurring) In fact, "Vesting Clauses, and indeed the entire structure of the Constitution, make no sense [if there is no limit on delegations]." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002); *see also Mistretta v. United States*, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.")nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.").

Blackstone "defined a 'law' as a generally applicable 'rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'" *Ass'n of Am. R.R.*, 575 U.S. at 73 (2015) (Thomas, J., concurring). He defined a tyranny as the ability to both make and enforce those rules. *Id*. Lord Coke affirmed that the King could not "change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament." *Id*. at 72 (citing *Case of Proclamations*, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K. B. 1611)). Yet this combination is exactly what Dodd-Frank authorizes.

II. The Dodd-Frank Act impermissibly delegates core legislative powers to the executive.

These concerns for the separation of powers, and ultimately the rule of law, are most acute where they

implicate the life, liberty, and property of citizens. Although this Court traditionally hesitates to disapprove delegations of regulatory authority for want of a clear line, this case is not about some technical area where the agency can claim subject-matter expertise. This is a question of the process due to citizens under government investigation, and ultimately prosecution—a core competency of courts, and a core legislative power of Congress to determine. *See Wayman v. Southard*, 23 U.S. 1, 42 (1825) (Congress cannot "delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("Congress cannot, under the Constitution, delegate its legislative power to the President."). The power to assign disputes to agency adjudication resides with Congress. For "matters, involving public rights . . . congress may or may not bring within the cognizance of the courts of the United States as it may deem proper." *Den Ex Dem. Murray v. Hoboken Land & Improv. Co.*, 59 U.S. 272, 284 (1856). Such power is "peculiarly within the authority of the legislative department." *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). Yet the executive in this case insists that it is entitled to make these legislative determinations itself. Section 929P(a) of the Dodd-Frank Act gave the SEC unfettered discretion to bring securities fraud actions for monetary penalties within the agency or Article III courts. *See* 15 U.S.C. § 78u-2. And it's no surprise which the SEC prefers, given that its internal conviction rate, in its own venue with its own "judges," is more or less one hundred percent—much higher than the mixed results they get from those pesky juries. *See* Respondents Opp. at 5 & n.5.

What's more, the SEC's discretion is not bounded by even the most basic limitations. Nondelegation principles "do not prevent Congress from obtaining the assistance of its coordinate Branches," *Mistretta*, 488 U.S. at 372 (1989), and few doubt "the inherent necessities of government coordination." *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("[T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality."). Modern jurisprudence, therefore, has allowed for delegations where Congress furnishes an "intelligible principle." "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

This has not traditionally been a high bar. Indeed, this Court has "found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance . . . [while the other] conferred authority to regulate the entire economy on the basis of no more precise a standard than . . . assuring 'fair competition.'" *Whitman,*531 U.S. at 474-76 (2001); *see Panama Ref. Co.,* 293 U.S. at 421 ("Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is [constitutionally] vested."); *Schechter Poultry* 295 U.S. at 529 ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.").

There's no debate in this case whether the principle provided by Congress is intelligible, because there is no principle in the first place: no standard of reasonableness, no rubric based on the severity or malice of the charged conduct, not even the most basic requirement that the discretion be exercised in the "public interest." *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225 (1943). It is entirely up to the agency whether a citizen deserves his Seventh Amendment rights. It can be as capricious, or as punitive, as it likes.

The government insists there is nothing to see here, because the decision in question is simply a version of traditional prosecutorial discretion. But prosecutors don't get discretion as to whether to have a jury; defendants do. And venue determinations are traditionally cabined by specific rules—in federal criminal prosecutions, a venue limitation is built right into the Sixth Amendment (the accused has the right to "an impartial jury of the State and district wherein the crime shall have been committed"). Simply labeling an enforcement proceeding "civil" rather than criminal does not absolve Congress of its role in making these determinations. "Congress, in exercising the powers confided to it, may establish 'legislative' courts (as distinguished from 'constitutional courts in which the judicial power conferred by the Constitution can be deposited') . . . ." *Crowell v. Benson*, 285 U.S. 22, 50 (1932). "But the mode of determining matters of this class is completely within congressional control." *Id.* (quotations and citations omitted). "[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency…". *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 455 (1977).

Whether Congress intended this discretion is of no moment, since the doctrine exists to prevent voluntary abdication of responsibility. "The nondelegation doctrine ensures democratic accountability by preventing" intentional delegations of power. *NFIB v. DOL, OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring). Of course, Congress prefers to leave difficult decisions to others. "Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress." Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1465 (2015). In place of a clash of ambitions, "[l]awmakers may prefer to collude, rather than compete, with executive agencies over administrative power and so the Madisonian checks and balances will not prevent excessive delegations." *Id.* The result is a legislature whose members are less accountable both to their constituents and to each other.

These values of accountability and responsibility secure the blessings of our liberty, since where "the right both of making and of enforcing the laws…are united together, there can be no public liberty." 1 W. Blackstone, Commentaries On The Laws Of England 142 (1765). The Declaration of Independence denounced the King's "Arbitrary government" and "pretended offenses." It is this arbitrary tyranny the Constitution was designed to prevent, and the SEC's standardless discretion in this case is completely, utterly, and demonstrably arbitrary.

CONCLUSION

For the foregoing reasons, and those stated by Respondents, the decision below should be affirmed.

Respectfully submitted,

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