No. 25-966

In the Supreme Court of the United States

DEPARTMENT OF LABOR, ET AL.,

Petitioners,

v.

SUN VALLEY ORCHARDS, LLC,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Article III of the Constitution precludes the Department of Labor from adjudicating proceedings to collect monetary remedies from employers who have allegedly violated the terms and conditions of employment of H-2A workers and domestic workers in corresponding employment.

2. Whether 8 U. S. C. §1188(g)(2) authorizes the Department of Labor to adjudicate proceedings to collect monetary remedies from employers who have allegedly violated the terms and conditions of employment of H-2A workers and domestic workers in corresponding employment.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Cato Institute scholars have published extensive research on constitutional law and the role of the judiciary. This case interests the Cato Institute because it reflects a pattern of Executive overreach, implicates the distinction between public and private rights, and illuminates the scope of Article III and the structure of the Constitution.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

"We sometimes take it for granted today that independent judges will hear our cases and controversies. But it wasn't always so." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 346 (2018) (Gorsuch, J., dissenting). The Declaration of Independence charged that colonial courts were one of King George's "Oppressions," because judicial tenure and salaries were "dependent on his Will alone." THE DECLARATION OF INDEPENDENCE paras. 11, 30 (U.S. 1776). The Founders eliminated this royal oppression through the creation of an independent judiciary under Article III of the Constitution. *See, e.g., Oil States Energy Servs.*, 584 U.S. at 347 (Gorsuch, J., dissenting).

An independent judiciary is central to our constitutional system. "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting U.S. CONST. art. III, § 1). In the matter at hand, Respondents ask this Court to ensure that the promise of Article III is kept. This Court should not ignore *Stern*'s warning: The outcome Petitioners request would undermine the independent authority of the judiciary by conferring "the Government's 'judicial Power' on entities outside Article III." *See id.*

In 2016, the Department of Labor ("the Department") alleged that Sun Valley Orchards had violated an employment agreement under the H-2A immigrant visa program. Pet. App. 1a, 183a. The H-2A program allows for the temporary employment of foreign agricultural workers in the United States. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The Department imposed civil penalties of $212,250 and back wages of $369,703.22. Pet. App. 7a. Sun Valley challenged the fees the only way they could—in a hearing before the Department's administrative tribunal. *Id.* The administrative tribunal affirmed the violation, although it reduced the fees by a minute amount. *Id.* Sun Valley sought review by the Department's Administrative Review Board, which affirmed the judgment of the administrative tribunal. *Id.* In the district court, Sun Valley then contested the fee assessments as inconsistent with the Administrative Procedure Act. That court eventually dismissed Sun Valley's claims. *Id.* at 7a–8a. Ultimately, however, the Third Circuit reversed the district court's judgment, holding that "Sun Valley was entitled to have its case decided by an Article III court." *Id.* at 2a.

This Court should uphold the Third Circuit's decision. Because a work contract is at issue here, and because work contracts are uncontroversially situated in "traditional actions at common law," *see Stern*, 564 U.S. at 484, only an Article III court can decide this case. Executive adjudication is improper here: This case is not about a public right, or one that "historically could have been determined exclusively by [the executive and legislative] branches." *See SEC v. Jarkesy*, 603 U.S. 109, 128 (2024) (quoting *Stern*, 564 U.S. at 493).

The Department contends otherwise. It argues that this case involves two public rights: immigration and conditions tied to government privileges. Pet. Br. 29–30. Both arguments fail. Although the federal government can regulate immigration, extending the public rights exception to include the adjudication of penalties for violations of work contracts would sweep in cases only incidental to immigration and thereby bloat the exception almost beyond recognition. Furthermore, forcing employers like Sun Valley to forgo their Article III rights to participate in the H-2A program is akin to "the government . . . coercing people into giving" up their constitutional rights or imposing an unconstitutional condition. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Such coercion is at odds with the structural protections granted to litigants by the Constitution.

Protecting the promises of Article III requires limiting the public rights exception to its longstanding and proper role. The expansion of that exception would impede the nation's independent judiciary from enforcing the Constitution's checks and balances.

ARGUMENT

I. WORK CONTRACTS DO NOT FALL UNDER THE PUBLIC RIGHTS EXCEPTION, SO SUN VALLEY ORCHARDS IS ENTITLED TO HAVE ITS CASE HEARD IN AN ARTICLE III COURT.

Article III of the Constitution provides: "The 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." U.S. CONST. Art. III, § 1. This "judicial Power" may not be "shared with the other branches." *Jarkesy*, 603 U.S. at 127 (quoting *Stern*, 564 U.S. at 483). Only Article III courts can consider private rights or "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Stern*, 564 U.S. at 484 (citation omitted). Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

The Executive Branch cannot force litigants to adjudicate private rights outside Article III, but it may adjudicate matters involving public rights. *Id.*[2] "While the phrase 'public rights' has been much confused in modern case law, in the nineteenth century it generally referred to forms of adjudication that did not deprive any people of their private rights to life, liberty, or property." William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1542 (2020). This narrow exception allows the Executive to consider matters that "historically could have been determined exclusively by [the executive and legislative] branches." *Jarkesy*, 603 U.S. at 128 (quoting *Stern*, 564 U.S. at 493).

The subject at issue here, a work contract under the H-2A program, is easily traced to "traditional actions at common law," *see Stern*, 564 U.S. at 484 (citation omitted), such as the right to contract for labor. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *425. Cases involving work contracts do not involve public rights, because they "historically" could not have been "determined exclusively by [the executive and

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[2] Executive adjudications function differently from Article III courts. Executive decision-making and Article III courts "differ in who presides and makes legal determinations, what evidentiary and discovery rules apply, and who finds facts." *Jarkesy*, 603 U.S. at 117. Generally, in an Article III court, "a jury finds the facts" and an "Article III judge presides." *Id.* In an executive adjudication, however, an administrative tribunal may do both. *See id.*

legislative] branches." *See Jarkesy*, 603 U.S. at 128 (quoting *Stern*, 564 U.S. at 493). Because the work contract here does not implicate the public rights exception, Sun Valley has the constitutional right to an Article III court.

A. Work Contracts Involve Private Rights That Originate in Common Law.

"It has been said that contract law is the most important contribution to jurisprudence made by the English common law." Alvin C. Harrell, *The Importance of Contract Law: A Historical Perspective*, 41 OKLA. CITY UNIV. L. REV. 1, 1 (2016). This body of law evolved from the assumpsit action. J. B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 15 (1888). "By the mid-sixteenth century, assumpsit claims were increasingly used as a means to bring what were ostensibly contractual claims." Matthew J. Baker, *Medieval Roots, Modern Insights: The Origins of Common Law Contract*, 59 IND. L. REV. 173, 184 (2025). In *Slade's Case*, for example, the King's Bench noted that "every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver any thing, thereby he assumes or promises to pay, or deliver it." *Slade's Case* (1602), 76 Eng. Rep. 1074, 1077; 4 Co. Rep. 92 b, 93 b.

By 1711, the right to contract had been affirmed by the Queen's Bench in *Mitchel v. Reynolds* (1711), 24 Eng. Rep. 347, 352; 1 P. Wms. 181, 197. In that case, the plaintiff sued after the defendant breached his agreement not to open a bakery in a certain area for five years. *See id.* at 347. The defendant argued that the contract was an unlawful restraint on trade. *Id.* The court upheld the contract, explaining that it was "made upon a good and adequate consideration, so as to make it a proper and useful contract." *Id.* at 349, 352. Lord Mansfield is generally credited with the development and modernization of contract law through the incorporation of the Law Merchant, "the English private law of merchants derived from commercial practices." Harrell, *supra*, at 17.[3]

The common law right to contract began to be applied to employment settings during this period, allowing employers to reinforce the common law's established master-servant structure. SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET 61–62 (Paul Davies et al. eds., 2005). Under this structure, "[t]he contract between [servants] and their masters ar[ose] upon the hiring." BLACKSTONE, *supra*, at *425.[4] For example, "the standard form contract . . . in 1796, provided that the (female) worker should work for thirteen hours daily at weekly wages of four shillings for a six-day week." Douglas Hay, *England:*

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[3] This shift to contract law can be understood as an attempt by judges to expand their jurisdiction. William Searle Holdsworth, *The Development of the Law Merchant and Its Courts*, *in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 289, 315 (Ass'n of Am. L. Schs. ed., 1907) ("The common law had not in the past claimed jurisdiction over contracts made or offences committed abroad, and probably not over contracts made and offences committed in ports . . . Such jurisdiction was now coveted. By supposing these contracts or offences to have been made or committed in England the Common Law Courts assumed jurisdiction; and . . . they endeavoured to capture jurisdiction over the growing commercial business of the country. The other common law judges followed Coke's lead.").

[4] Blackstone's treatise on the common law was both a summary of the law and a symbol of its moral and political force. Lea VanderVelde, *Servitude and Captivity in the Common Law of Master-Servant: Judicial Interpretations of the Thirteenth Amendment's Labor Vision Immediately After Its Enactment*, 27 WM. & MARY BILL RTS. J. 1079, 1082 (2019).

1562-1875, *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955 59, 102 (Douglas Hay & Paul Craven eds., 2004). If an employment contract were violated, the servant or master could sue; the contract would be upheld in a court of law. Douglas Hay, *Master and Servant in England: Using the Law in the Eighteenth and Nineteenth Centuries*, *in* PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE 227, 228–229 (Peter Wende & Willibald Steinmetz eds., 2000).

This case involves a 21st-century work contract, but it retains the key elements of a contract case from the time of Coke and Blackstone. The H-2A program that the Respondent engaged in allows employers, under certain conditions, to hire foreign agricultural workers temporarily. Pet. App. 2a; *see* 8 U.S.C. § 1101(a)(15)(H)(ii)(a). These employers, under the H-2A program, must provide housing, 20 C.F.R. § 655.122(d)(1) (2026), meals or a kitchen facility, *id.* § 655.122(g), and transportation to the worksite, *id.* § 655.122(h). The statute's "job order" then functions as a work contract, *id.* § 655.121(f), "[i]n the absence of a separate, written work contract." *Id.* § 655.122(q). The administrative tribunal acknowledged this work contract in their 2019 order. Pet. App. 156a ("Respondent violated 20 C.F.R. § 655.122(i)(1) in discharging twenty-four total workers before they had worked for at least three-fourths of the workdays of the total period specified in the work contract."). Sun Valley allegedly breached this contract by providing deficient meals, drinks, workdays, housing, and transportation. Pet. App. 5a–7a. These alleged deficiencies form the crux of the dispute between Sun Valley and the Department—a dispute with deep similarities to those of common law employment cases. *See id.*

The remedy at issue confirms the common law nature of the claim. The Department imposed civil penalties against Sun Valley to the tune of $212,250 and back wages for $369,703.22. *Id.* at 7a. This civil penalty is "a type of remedy at common law that could only be enforced in courts of law." *See Tull v. United States*, 481 U.S. 412, 422 (1987); *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 204 (2023) (Thomas, J., concurring) ("These types of [monetary] penalties and orders implicate the core private right to property. Accordingly, they likely must be adjudicated by Article III courts and juries."). The Administrative Review Board affirmed the penalty to "deter other H-2A employers," Pet. App. 13a, but "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Jarkesy*, 603 U.S. at 123 (quoting *Austin v. United States*, 509 U.S. 602, 610 (1993)). The punitive aspect of the remedy thus underscores the private nature of the claim.

The Department's defense of these monetary penalties (*see* Pet. Br. 32–35) is not supported by the sources it provides. First, most of the caselaw it cites is about the federal government's ability to regulate entry and expulsion *generally*. *Lem Moon Sing v. United States*, 158 U.S. 538, 539, 547 (1895); *Kleindienst v. Mandel*, 408 U.S. 753, 754, 769–70 (1972); *Zakonaite v. Wolf*, 226 U.S. 272, 273, 275 (1912); *Keller v. United States*, 213 U.S. 138, 143 (1909); *United States v. Ju Toy*, 198 U.S. 253, 259, 261 (1905); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904); *The Japanese Immigrant Case*, 189 U.S. 86, 94, 97 (1903); *Wong Wing v. United States*, 163 U.S. 228, 230, 237 (1896). And the remaining fraction only addresses the federal government's ability to promulgate fines related to entry at the border; they are devoid of any reference to a work contract. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 329 (1909); *United States v. New York & Cuba Mail S.S. Co.*, 269 U.S. 304, 309 (1925); *Lloyd Sabaudo Societa Anonima per Azioni v. Elting*, 287 U.S. 329, 333, 335 (1932). Finally, the statutes that the Department relies on are just more of the same—monetary penalties connected to the border. *See* Pet. Br. 35.

Jarkesy, a case cited by the Department, nicely summarizes the impact of these sources: "Congress could also prohibit *immigration* by certain classes of persons and enforce those prohibitions with administrative penalties assessed without a jury." *Jarkesy*, 603 U.S. at 129 (emphasis added); Pet. Br. 34. That is: Monetary penalties can be imposed as long as they are connected to the *entry* of aliens. *See Jarkesy*, 603 U.S. at 129.

But the monetary penalties at issue here have nothing to do with the federal government's policing of the border. These penalties are unconnected to the arrival of aliens with "loathsome" diseases (as in *Oceanic Steam*, 214 U.S. at 337), the failure to pay "hospital expenses" of a seaman with a "venereal disease" (as in *Cuba Mail Steamship Co.*, 269 U.S. at 309), or the transport of a person with a "disease or disability" to the United States (as in *Lloyd Sabaudo*, 287 U.S. at 333). In this case, the alleged violations occurred after foreign workers had already been lawfully admitted to the United States and begun working in New Jersey. *See* Pet. App. 4a, 150a.

Furthermore, some of Sun Valley's employees are domestic workers—which leaves open the possibility that they never crossed the border before starting work. *See id.* at 4a. The Department's fine is a function of the workers' contracts, not of the workers' entry into the United States.

If this Court resuscitated the penalties enacted by the Department, it would make the public rights exception swallow the rule. Ruling for the government would extend the government's authority to adjudicate monetary penalties from contexts confined to border control to intrastate employment activities. Such a change in the law would be a stark departure from longstanding precedent that requires monetary penalties to be governed by the norms of the common law. *See Tull*, 481 U.S. at 422.

B. Work Contracts Fall Outside the Public Rights Exception.

The public rights exception applies to matters that "historically could have been determined exclusively by [the executive and legislative] branches." *Jarkesy*, 603 U.S. at 128 (quoting *Stern*, 564 U.S. at 493). These rights "have at least one feature in common: a serious and unbroken historical pedigree." *Id.* at 153. Indeed, all the historical examples of the public rights exception that this Court listed in *Jarkesy* rest on the exclusive exercise of federal power: relations with Indian tribes, administration of public lands, public benefit grants, customs enforcement, tariff collection, and immigration. *Id.* at 128–30.

Immigration falls within the scope of the public rights exception because the federal government has "absolute power . . . over the right to bring aliens into the United States." *Oceanic Steam*, 214 U.S. at 342.

This power necessarily allows the Executive to manage the entry of immigrants into the nation. *Id.* at 342–43. Consider *Oceanic Steam*, in which this Court upheld an act that excluded "from admission into the United States . . . those afflicted 'with loathsome or with dangerous contagious diseases.'" *Id.* at 330, 343. The Court upheld that act because the "plenary power of Congress as to the admission of aliens leaves no room for doubt as to its authority." *Id.* at 343.

But this power has its limits. In *Wong Wing*, this Court defined the limits of the government's power to regulate immigration. The petitioners in *Wong Wing* challenged a law that allowed a commissioner of the Circuit Court to subject immigrants to hard labor merely because they were unlawfully present in the United States. *Wong Wing*, 163 U.S. at 229–30, 233, 238. This Court held that the government could regulate immigration without the involvement of the judiciary, but "when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property," the Constitution requires "a judicial trial to establish the guilt of the accused." *Id.* at 237. More generally, the federal government could regulate *entry* into the United States, but a trial was required for matters incidental to immigration. *See id.*

As the Department correctly recognized: "The right to control immigration is a public right that belongs to the United States." Pet. Br. 29. But the Department stretches the immigration exception to a breaking point. The power to regulate immigration does not give the Executive an unchecked and unlimited authority to wade into any matter that is remotely related to immigration and to impose any penalty it pleases. *See*

Wong Wing, 163 U.S. at 237. A work contract between an employer and employees cannot be untethered from its common law antecedents just because it involves foreign workers. If that cord gets cut, then any matter conceivably associated with immigration, such as a criminal offense committed by an alien or a civil cause of action involving the property of an alien, would enter the zone of public rights and leave the zone of Article III protections.

Furthermore, this claim implicates the interests of domestic workers, not foreigners alone. The Department assessed monetary penalties that rested on Sun Valley's employment of both domestic and foreign workers. Pet. App. 4a–5a, 150a. The work contract's inclusion of domestic employees underscores this dispute's broad scope and its broader consequences. An incidental effect on immigration cannot, by itself, resolve whether public rights or private rights are ultimately implicated here.

In cases involving a mix of public and private rights, the Court looks to the nature of the claim. *Granfinanciera v. Nordberg*, 492 U.S. 33, 36, 64 (1989). In *Granfinanciera*, Congress added a private rights action (fraudulent conveyance) to a public rights scheme (the bankruptcy code). The Court ruled that the fraudulent conveyance claim was not transformed into a public right just because it was embedded in a regulatory framework. Fraudulent conveyance remained a private right because it was deeply rooted in the common law as a private right. *Id.* at 43, 61. For the same reasons, even though Congress has enacted a vast web of immigration regulations and charged the Executive with enforcing them, that cannot transform a private right—that is, the set of rights and duties that are created by a work contract—into a public one.

The Department states that public rights belong to "the people at large." Pet. Br. 27 (quoting *Appleby v. City of New York*, 271 U.S. 364, 382 (1926)). It adds that this case involves "a public right that belongs to the United States, not a private right that belongs to particular individuals." *Id.* at 29. But work contracts do not belong to "the people at large." *See Appleby*, 271 U.S. at 382. "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 197 (1819). It is a private transaction, not a public one that is entirely controlled by federal regulation. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270 (1986) ("Properly understood, contract law is that part of a system of entitlements that identifies those circumstances in which entitlements are validly transferred from person to person by their consent.").

The Department also provides a list of issues that "executive officers may adjudicate." Pet. Br. 29. But its examples are inapposite. All of them involve matters that are central to border crossing as such: admission, deportation, transportation of aliens to the United States, and "the statutory requirements for importing foreign labor." *Id.* at 29–30. The work contract involving foreign and domestic workers at issue here falls under none of these categories. *See* Pet. App. 4a, 150a. None of the Department's examples even relate to aliens during their employment; thus, this list cannot demonstrate that the matter at hand could "historically . . . have been determined exclusively by [the executive and legislative] branches." *See Jarkesy*, 603 U.S. at 128 (quoting *Stern*, 564 U.S. at 493).

The Department's position cannot be reconciled with the Court's jurisprudence, which has restricted the public rights exception to a few legal fields "defined and limited by history." *Id.* at 152 (Gorsuch, J., concurring). If that were not so, Congress could eliminate the Constitution's broad guarantee of Article III protections just by creating new statutory obligations whose performance could be monitored solely through administrative hearings. *See id.* at 120. The Court has blocked the Executive's design to embed the federal government deeper into private life; it should maintain this posture by preventing the transfer of work contracts into the public domain.

II. THE GOVERNMENT CANNOT COERCE EMPLOYERS INTO RELINQUISHING THEIR CONSTITUTIONAL RIGHT TO AN ARTICLE III COURT.

"The Government has broad powers, but the means it uses to achieve its ends must be 'consist[ent] with the letter and spirit of the constitution.'" *Horne v. Dep't of Agric.*, 576 U.S. 351, 362 (2015) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). This means "that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In particular, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Id.* The "unconstitutional conditions" doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 570 U.S. at 604; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413,

1421–22 (1989); RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 5 (1993).

The unconstitutional conditions doctrine is not "anchored to any single clause of the Constitution." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 10 (1988). Rather, this Court has applied the doctrine in many different domains. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Koontz*, 570 U.S. at 604; *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). One such domain is the protection of Article III rights. *See Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922) ("a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts").

The problem of unconstitutional conditions undercuts much of the Department's arguments. The Department suggests that "the employer receives the privilege conferred by the program . . . only by agreeing to follow the program's terms and conditions." Pet. Br. 36. And its case rests on a theory that "[w]hen Congress confers a privilege, it generally may require the recipient, as a condition of obtaining the benefit, to submit to non-Article III adjudication of matters related to the privilege." *Id.* at 30. These elements, when placed together, suggest an indefensible bargain: forgo the right to an Article III court in exchange for the ability to hire needed workers.

An employer should not be required to relinquish the constitutional right to an Article III court as a condition of participation in the H–2A program. The government may not force people to give up their right to a judicial proceeding in exchange for the opportunity to pursue the benefits of public programs. Doing so would place undue pressure on those who want to participate in such programs, even though the government is barred from "coercing people into giving [their constitutional rights] up." *See Koontz*, 570 U.S. at 604.

Notably, those who participate might not even knowingly waive their right to an Article III court. Here, for example, "the 2015 application form did not generally call for express consent from all participating employers." American Federation of Labor and Congress of Industrial Organizations Amicus Br. 5. Compare the guilty plea: It must be "intelligent and voluntary." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). The waiver of a critical constitutional right, access to an Article III court, should not be surreptitious.

The Department's proposed trade also scoops away a substantial portion of the authority of Article III courts, a consequence not contemplated by the Founders. The Founders provided "checks and balances" to "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). The judiciary was meant to take "all possible care . . . to defend itself against" attacks by the other government branches. THE FEDERALIST NO. 78 (Alexander Hamilton). But the judiciary cannot play its proper role when the Executive invades judicial territory and encroaches on judicial authority.

The Department relies on Justice Thomas's concurrence in *Axon Enterprise* to characterize this matter as a conditioned privilege and then to call it a public right. *See* Pet. Br. 30 (quoting 598 U.S. at 197 (Thomas, J., concurring) ("Privileges stand in contrast to the private rights of life, liberty, and property")). But this statement ignores a central point of Justice Thomas's concurrence—namely, monetary fines presumptively implicate private rights. *Axon Enter.,* 598 U.S. at 204; *see* discussion *supra*, Section I.A. As Justice Thomas explains, "These types of [monetary] penalties and orders implicate the core private right to property. Accordingly, they likely must be adjudicated by Article III courts and juries." *Axon Enter.,* 598 U.S. at 204. Sun Valley was subject to over $500,000 in monetary penalties, and Justice Thomas's concurrence thus cannot save the government's position. Pet. App. 7a. Labeling coercion as a lawful condition does not make it so.

The Department also cites Justice Thomas's dissent in *Wellness International Network, Ltd. v. Sharif* to suggest that the government may impose conditions in exchange for a benefit. That dissent addresses the ability to arbitrate, not to forgo Article III rights. *See* Pet. Br. 30 (quoting 575 U.S. 665, 718 (2015) (Thomas, J., dissenting)). Indeed, that dissent explains how "the law has long encouraged and permitted private settlement of disputes, including through the action of an arbitrator not vested with the judicial power" immediately thereafter. *Wellness Int'l Network*, 575 U.S. at 719 (Thomas, J., dissenting). The person who accepts arbitration cannot be equated to the person who is forced to forgo the right to an Article III court—one voluntarily chooses a commonplace mechanism to resolve claims, while the other is subjected to an inequality of power that can easily become coercive.

Finally, the Department rests its argument on an academic article that cannot bear the argument's weight. The Department enlists William Baude's *Adjudication Outside Article III* (*see* Pet. Br. 30 (quoting Baude, *supra*, at 1579)) to support its self-attested power to attach conditions to government benefits, but that article equivocates on the subject. Baude, *supra*, at 1579. Baude explains that if the waiver of rights is "broad," then the Executive agency's fine "might be constitutional," but if the waiver is "narrower," "then there are limits" on the agency. *Id.* The article is ultimately indeterminate on the question presented, because it gives little or no actionable guidance about whether the concrete circumstances of this case—or almost any such case—are consistent with the Constitution. *See id.*

In short, the Department's sources cannot keep pace with its theories. Without well-grounded arguments, the Department cannot justify requiring employers to trade their right to Article III justice for the ability to hire needed workers. Ultimately, the Department has provided no real support either for its alternative argument or for its unconstitutional condition.

CONCLUSION

The Department has strayed too far from the vision of the Founders. Although "dispensing with constitutionally prescribed procedures is often expedient," that is no excuse for devaluing the importance of Article III courts. *See Oil States Energy Servs.*, 584 U.S. at 347 (Gorsuch, J., dissenting). "[T]he independence of the Judiciary [must] be jealously guarded" from Executive overreach to protect "the constitutional system of checks and balances." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58, 60 (1982). Executive adjudications must be cabined to respect the established public-private rights distinction, and the constraints of Article III must be respected. The Court should affirm the Third Circuit's decision.

Respectfully submitted,

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