No. 26-473

IN THE
Supreme Court of the United States

SLIGO CREEK CENTER,
Petitioner,
v.

U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the right to a jury trial, to due process of law, and to have laws made by the nation's elected legislators through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, executive branch officials, administrative agencies, and even some courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints against the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type that the Constitution was designed to prevent. This

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is especially concerned by the relocation of judicial power from courts—in which Article III solely vests such power—to executive departments and administrative agencies. Congress lacks any judicial power whatsoever, so it cannot delegate that power to another branch of government. The judicial power of the United States resides in the federal courts by the Constitution's very terms, so it cannot be transferred to other branches of government—especially not alongside the prosecutorial power.

SUMMARY OF THE ARGUMENT

Congress cannot delegate judicial power to the Executive Branch, as it does not belong to Congress. The Constitution vests judicial power in Article III courts, and its location there is mandatory. Casting the inquiry in terms of "delegation" doctrine misses the constitutional point altogether. Congress lacks judicial power, and it may only lawfully locate the judicial power of the U.S. in inferior Article III courts.

By the same token, the Executive Branch is confined to the exercise of executive power. No executive officer can constitutionally exercise the judicial power of the United States. Furthermore, judicial power cannot be shared with the other branches, nor be subject to political review. Yet the Department of Health and Human Services' ("HHS") adjudicatory regime challenged in this case is premised on such review. By shifting law enforcement cases into administrative tribunals, agencies transform Americans' basic civil liberties into mere

options from which the government can escape by taking the administrative path.

Finally, the misnamed and inscrutable "public rights" exception confuses government *power* with government *rights* and is alien to American constitutionalism. The court-created exception is an atextual recasting of our constitutional order and should be discarded. If the Court does not jettison the prevailing and much criticized hash of this exception entirely, it should at least overrule *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*. An explicit overruling should emphasize that the exception applies exclusively where the Government is disbursing public privileges, benefits, assets, or other largesse to which the recipient would otherwise have no pre-existing entitlement and in which the recipient has no vested property interest. Thus, the exception could never empower the executive branch to adjudicate cases, like this one, where the Government threatens to impose punitive sanctions against private citizens or businesses and brand them as lawbreakers.

ARGUMENT

I. CONGRESS CANNOT RELOCATE JUDICIAL POWER FROM FEDERAL COURTS TO EXECUTIVE DEPARTMENTS AND AGENCIES

Relocating judicial power from Article III courts to executive departments and agencies, even with Congress's authorization, encounters at least five obstacles. Separately, each would suffice to hold HHS's administrative exercise of judicial power

unconstitutional. Together, the five objections are insuperable.

A. Congress Cannot Delegate a Power It Lacks

Congressional delegation can neither explain nor justify executive exercise of judicial power, because the Constitution gives Congress only legislative powers. Congress cannot delegate a power it does not have, including judicial power. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 132 (2015) (Thomas, J., concurring in the judgment) ("Lacking the [judicial] power itself, [Congress] cannot [delegate] that power to an agency."). Because judicial power is exclusively vested in Article III, the question must be decided in terms of *vesting*, not *delegation*.

The vesting language separately appearing at the beginning of Articles I, II and III forbids describing congressional transfers of power as mere "delegations." *See* U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1. A delegated power can be reclaimed by the delegator, such as when an Executive Officer delegates power to a subordinate which she can recall at her own discretion. Similarly, when Congress delegates authority to the Congressional Budget Office, it has full discretion to retrieve any of the delegated authority. But when Congress enacts a law, purporting to authorize the Executive to exercise *judicial* power, Congress cannot transfer that power back to the judiciary easily, as it may have to overcome a Presidential veto, something not always (or even usually) possible. *See* Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1086 (2023) (footnote omitted).

Delegation's analytical framework especially fails when Congress—vested with only legislative power—purports to shift judicial power from the courts to executive departments and agencies. Lacking that power in the first place, Congress cannot lawfully delegate it. The Constitution speaks in terms of what power is *vested*. This Court should refuse any illusory inquiry about *delegation* of power and ask instead whether Congress has unconstitutionally *divested* the courts of *their* judicial power.

The analysis must focus on the language of the Constitution. Because the Constitution places "the judicial power of the United States" exclusively and squarely in Article III, Congress cannot shift that judicial power to HHS.

B. Article III's Vesting of Judicial Power in the Courts Is Mandatory

Article III of the Constitution provides: "The judicial Power of the United States, shall be vested" in the courts. U.S. CONST. art. III, § 1. This phrase is significant.

Had Article III recited that the judicial power "*is hereby vested*" in the courts, that power could arguably be conveyed without any limitation on its subsequent transfer. Courts, leaving aside Congress, could plausibly claim a freedom to shift their judicial power elsewhere.

Tellingly, however, Article III avoided this familiar language of conveyancing, instead saying that judicial power "shall be vested," and making the location of that power mandatory. U.S. CONST. art.

III, § 1. The text of the Constitution specifies not merely that powers are "vested," but where they must be placed, thus rendering them nontransferable. *See Dept. of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 67-68 (2015) (Thomas, J., concurring in the judgment). The legislative power shall be in Congress, U.S. CONST. art. I, § 1, the executive power shall be in the President, *id.* art. II, § 1, and the judicial power shall be in the courts, *id.* art. III, § 1. "These grants are exclusive." *Ass'n of Am. R.Rs.*, *Id.* at 67.

The principle that the Constitution unambiguously vests judicial power in federal courts resounds from *Marbury v. Madison*'s recognition of this demarcation—it is "emphatically the province and duty of the judicial department to say what the law is[,]" 5 U.S. (1 Cranch) 137, 177 (1803)—to cases such as *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), where the Court held that § 27A of the Securities Exchange Act of 1934 violated the separation of powers, *id.* at 218 ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."). Any lingering doubt was removed two years ago by *Loper Bright Enterprises v. Raimondo* and *Relentless v. Dep't of Com.*, 603 U.S. 369, 385–86 (2024) (Framers required judges to decide cases independent of influence from political branches; while views of executive officials could inform judicial decisions they could not supersede them).

Nor should this mandatory assignment of powers come as a surprise. The Constitution did not vest government powers in separate branches as "merely an initial distribution of cards," to be played and transferred as soon as the game began, but rather

to secure liberty. Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. at 1138.

C. Article III Does Not Authorize Congress to Locate Judicial Power in HHS

Article III begins: "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. Thus, in contrast to the vesting clauses of Article I and Article II, Article III does permit Congress to designate the location of part of the judicial power. But placement is limited to "inferior courts," not other bodies. *See Oil States Energy Services, LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 333–34 (2018). Congress therefore cannot place the judicial power in HHS or any other executive department or agency.[2] *See SEC v. Jarkesy*, 603 U.S. 109, 127 (2024) (the judicial power "cannot be shared with the other branches"); Hamburger, *supra*, at 1174 (judicial vesting clause "[o]bviously" does not textually let "some of the judicial power be shared with Congress or the executive").

To be sure, Article I also empowers Congress "[t]o constitute Tribunals inferior to the Supreme

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[2] "The judicial Power" Article III vests in courts alone "extend[s] to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States[.]" U.S. CONST. art. III, § 2, cl. 1. Its protections thus apply regardless of whether the government is seeking "legal" relief implicating the Seventh Amendment or equitable relief. *See, e.g., Intuit, Inc. v. FTC*, 170 F.4th 411, 420, 422–23 (5th Cir. 2026).

Court[.]" U.S. CONST. art. I, § 8. But tribunals, many of which do not exercise the judicial power *of the United States*, should not be confused with federal *courts*, which do. *See Freytag v. Comm'r*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring in part, concurring in the judgment) ("[T]his power 'plainly relates to the inferior Courts provided for in Article III, § 1; it has never been relied on for establishment of any other tribunals.'" (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962)). Article I's Tribunal Clause gives Congress the power to constitute tribunals, including the inferior federal courts exercising the judicial power of the United States (per Article III), but also lesser tribunals, such as territorial and District of Columbia courts, which exercise the judicial power, respectively, of the territories and that district.

While Congress may establish these tribunals, they cannot endow them with the judicial power of the United States. Article III does not say that judicial power "shall be vested" in the Supreme Court and such inferior courts *and other tribunals* as Congress may ordain and establish. The judicial vesting clause thus imposes a double limit: the judicial power must be in the courts, and when Congress distributes the judicial power of the U.S. not belonging to the Supreme Court, it must place that power in an inferior Article III court, not another sort of tribunal.[3]

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[3] As Justice Thomas has observed, "when administrative agencies adjudicate private rights … they are unconstitutionally exercising '[t]he judicial Power of the United States,' as agencies are not Article III courts and do not 'enjoy a unique, textually based' carve-out from the Vesting Clause of Article III." *Ortiz v.*

Whatever the HHS tribunal is, it is not an inferior *court*.

The Constitution's restriction of judicial power to the courts is essential. In *Stern v. Marshall*, the Supreme Court stated that "Article III could neither serve its purpose … 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." 564 U.S. 462, 484 (2011); *see also In re Renewable Energy Dev. Corp.*, 792 F.3d 1274, 1277–78 (10th Cir. 2015) (Gorsuch, J.). Congress simply cannot shift judicial power from one branch to another—especially not to be joined with the prosecutor![4]

That danger was expressly articulated at the Founding. "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers." THE FEDERALIST No. 78, at 523 (Alexander Hamilton) (Cooke ed. 1961). Far from being merely an eighteenth-century concern, this danger is alive at HHS and other executive departments and agencies, where ALJs must worry that their superior executive officers are looking over their shoulders and can alter their decisions, adjust their salaries, and even set in motion their termination. Indeed, the Declaration of Independence

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United States, 585 U.S. 427, 462–63 (2018) (Thomas, J., concurring).

[4] *Cf. Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.").

assailed this very evil—objecting to the Crown's making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE para. 11 (1776).

The exclusive vesting of powers in separate branches cannot be undone, even by Congress, because that would allow executive officials to function as prosecutors, judges and juries, something the Constitution emphatically prohibited.

D. The Executive Is Vested with Only Executive Power

Article II vests only executive power in the President. *See City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013). So, executive departments and agencies simply cannot exercise judicial power. *See Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 201–02 (1928).

For a branch of government to exercise a power not constitutionally vested in it is to revive the sin long ago repudiated in *Hayburn's Case*, 2 U.S. 408 (1792). That case—actually a series of judicial protests dating from the earliest days of the Republic—centered on the courts' refusal to exercise non-judicial power. For example, the Circuit Court for the District of Pennsylvania said that "the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the circuit court must, consequently, have proceeded without constitutional authority." *Id.* at 410 (1792) (citing C.C.D. Pa.: letter April 18, 1792).

This principle applied across all branches. No branch could exercise a type of power other than that vested in it by the Constitution. As put by the Circuit Court for the District of North Carolina, "the legislative, executive[,] and judicial departments are each formed in a separate and independent manner," and "the ultimate basis of each is the [C]onstitution only, within the limits of which each department can alone justify any act of authority." *Id.* at 410 (citing C.C.D.N.C.: letter June 8, 1792). Executive departments and agencies therefore cannot exercise any power that is not executive.

E. Judicial Power Cannot Be Subject to Political Review

Another conclusion of *Hayburn's Case* was that court decisions could not be reviewable by the Executive Branch or Congress. *See* Hamburger, *supra* at 1111 & n.129. Other courts have echoed this essential point—notably *Gordon v. United States*, 69 U.S. 561 (1864) (Supreme Court lacked jurisdiction to hear appeal from Court of Claims because, at the time (but subsequently amended), Court of Claims decisions were subject to review by the Secretary of the Treasury and Congress and thus were not exercises of judicial power).

Judicial power cannot be reviewable by political power. Yet, that is exactly what happens at HHS, because the decisions of its ALJs are re-examinable by the Secretary of HHS. If judicial power really could be placed in ALJs—it cannot—then it could not be reviewable by non-judicial political commissioners.

* * *

HHS's exercise of judicial power is therefore inconsistent with the text of the Constitution on five separate grounds. Any one of them renders HHS's judicial power unconstitutional; taken together, they doom HHS's administrative adjudication.

II. THE PUBLIC RIGHTS EXCEPTION TO ARTICLE III JURISDICTION IS INAPPLICABLE AND SHOULD BE DISCARDED

In recent decades, the Court has frequently referred to a "public rights" exception when considering Article III jurisdiction and Seventh Amendment jury-trial claims.[5] *See, e.g.*, *Jarkesy*, 603 U.S. at 127–40 (public-rights exception inapplicable to SEC penalty claims based on securities fraud); *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 (1977) (stating "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment[] … .").[6]

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[5] Although Article III's promise of a trial *de novo* in an independent court sweeps more broadly than the Seventh Amendment jury-trial right, "there is only one public-rights test across both provisions." *Axalta Coating Sys. LLC v. FAA*, 144 F.4th 467, 484 (3d Cir. 2025) (Bibas, J., concurring).

[6] The Fifth Circuit correctly analyzed the public rights *exception* in *Tobacco Barn* when it held that even a putatively "novel and comprehensive scheme for the regulation of tobacco products" required a jury trial. Pet. Br. 2–3 (quoting *Tex. Tobacco Barn*, 180 F.4th at 237). That conclusion is even stronger here. HHS's

Amicus urges the Court to re-examine its application of this exception—beginning by abandoning use of the term "public rights," which does not accurately describe the Government's power in this case or others, and tends to mislead judges and lawyers alike.

A. The Public-Rights Exception Is Atextual

As this Court recognized in *Jarkesy*, the court-created public-rights exception "has no textual basis in the Constitution." 603 U.S. at 131. Where did it

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regulations aim to prevent transmission of tuberculosis. Prior to 1791, statutes such as the Virginia Act to Regulate Inoculation of the Smallpox (1770, amended 1778), *see* A Bill to Regulate Smallpox Inoculations (Jan. 12, 1778), in 1 *The Papers of George Mason* 411–13 (Bernard Bailyn & James Morton Smith eds., 1970), required physicians to certify non-infectiousness before a patient's discharge from the hospital after inoculation. Penalties for release without a certificate started at £3 per offense; penalties exceeding £5 could be recovered by an "Action of Debt or Information in any Court of Record." *Id*. Similarly, the Maryland Quarantine Act of 1767, *see* Md. Gazette, July 9, 1767, at 5, required ship captains to certify that their ships did not carry diseased passengers. Improper release of passengers subjected the captain to "forfeit and pay One Hundred Pounds Sterling, to be recovered, with full Costs of Suit, in any Court of Record." *Id*. Actions of debt over a certain small-debt threshold were classic civil suits at common law heard in Courts of Record, which entitled defendants to a trial by jury. *See Tull v. United States*, 481 U.S. 412, 418–19 (1987) ("Actions by the Government to recover civil penalties under statutory provisions … historically have been viewed as one type of action in debt requiring trial by jury."). Sligo Creek's civil monetary penalties of $1.5M presumably meet any such threshold. Accordingly, the Fourth Circuit's facile assumption that regulation of transmissible disease is "novel" and unknown to common-law courts before 1791 is itself very much in question.

come from? The concept of the executive's "public rights" derives from Roman law, not English law, *see* Philip Hamburger, *The Inversion of Rights and Power*, 63 Buff. L. Rev. 731, 825 (2015), and did not appear in this Court's decisions until the mid-19th century, *see Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855); *see also* Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. Pa. L. Rev. 1429, 1436 n.38 (2021). Moreover, *Murray's Lessee*, "the putative source of the public rights doctrine itself," *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 715–16 (2015) (Thomas, J., dissenting), used the term in a narrow context largely unrelated to its 20th-century usage, *see* Philip Hamburger, *Is Administrative Law Unlawful?* 247–48 note m (2014). In *Murray's Lessee*, "public rights" was simply shorthand for "the executive's traditional power under law," not "any executive power of issuing binding legislative or judicial edicts." *Id.*

Murray's Lessee involved the federal government's effort to collect $1.4 million in customs revenues from the former collector of customs for the port of New York. An 1820 statute authorized Treasury Department officials to conduct an audit, place a lien on the collector's property in the amount of the unremitted taxes, and then issue a "distress warrant" authorizing sale of the property. 59 U.S. at 274–75.

At issue was whether the Treasury officials exercised "the judicial Power of the United States." *Id.* at 275. If so, "the proceeding was void," because (as the Court recognized) Article III provides that only

the judicial branch of government may exercise that judicial power. *Id*.

The Court determined that the Treasury officials were *not* exercising judicial power—but only after carefully analyzing the history of government efforts to collect tax revenue from absconding tax officials. The Court concluded that throughout English and American history, collection of tax revenues that a customs official failed to forward to the public treasury was an executive, not judicial function. *Id*. at 276–82.

The Court's holding turned on the special status of tax collectors, who could collect unpaid taxes without going to court, not a broader right of executive officials to collect funds or seek enforcement extra-judicially. The court's sole reference to "public rights" came at the very end, in rejecting an argument that Congress had converted the "distress warrant" proceeding into an exercise of judicial power when it granted the debtor a private right of action to challenge the proceeding. *Id*. at 282–84. The Court explained in dictum that the government's right to maintain summary proceedings against its tax collector was a "public right," unaffected by Congress's discretionary decision to permit judicial review.[7] *Id*. at 284.

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[7] This stray "public rights" remark in *Murray's Lessee* would later "become a springboard for claims of administrative power, and it therefore is worth examining it, to understand where it came from[.]" Hamburger, *Is Administrative Law Unlawful?*, *supra*, 247–48 note m. Tellingly, "references to 'public rights cases' did not become popular among either judges or

The absence of any constitutional text to support the public-rights exception supports either abandoning it altogether or at least confining it to the limited spaces it already occupies. *Cf. Jarkesy*, 603 U.S. at 152–53 (Gorsuch, J., concurring) ("public rights are a narrow class" with "a serious and unbroken historical pedigree"). At most, executive adjudication should be permitted only where the Government is dispensing or reclaiming public privileges, benefits, assets, or other largesse from the public fisc to which the recipient would otherwise have no pre-existing entitlement and in which the recipient has no vested property interest. *See generally* Michael Showalter, *Defining the Public-Rights Exception After* Jarkesy, 23 Geo. J.L. Pub. Pol'y 361, 363–64 (2025). Adjudications that can make binding determinations depriving private citizens or businesses of their right to life, liberty, or property quintessentially involve *private* rights, not public rights. *See Axon Enter. v. FTC* and *SEC v. Cochran*, 598 U.S. 175, 198 (2023) ("*Axon/Cochran*") (Thomas, J., concurring) (as originally understood, private rights include "life, liberty, and property"); Jennifer Mascott, *Constitutionally Conforming Agency Adjudication*, 2 Loy. U. Chi. J. Reg. Compliance 22, 45 (2017).

Under no circumstances should law enforcement cases like this one, in which the Government seeks to punish private parties and

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commentators until modern times." Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. Pa. L. Rev. at 1436-37 n.38.

brand them lawbreakers, ever be adjudicated outside Article III courts. Such cases are more akin to criminal prosecutions than to decisions about entitlement to government-bestowed privileges or welfare benefits. *See, e.g.*, *Sessions v. Dimaya*, 584 U.S. 148, 184 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (many "civil" penalties today "are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies"); Hamburger, *Is Administrative Law Unlawful?*, *supra*, at 246 ("most administrative proceedings" in which the government sues in its sovereign capacity are "criminal in nature"). If anything, therefore, the Court would do well to consider whether these quasi-criminal prosecutions not only must be adjudicated in Article III courts (with jury trials if the Seventh Amendment applies) but also deserve the full panoply of protections guaranteed by the Sixth Amendment. *See* Russell G. Ryan, *Uncivil Procedure: The Need for Heightened Due Process Protection in SEC Enforcement Prosecutions*, 38 Crim. Just. 12, at 12-13, (Summer 2023), (suggesting that courts dispense with the fiction that punitive SEC law-enforcement prosecutions seeking harsh penalties are "civil" rather than criminal cases).

B. Converting Governmental Powers into Governmental Rights Is Contrary to the Framers' Constitutional Design

Although the "public rights" moniker is often used to describe "rights" belonging to the federal government, the federal government does not possess rights in relation to the people. The government

possesses limited *powers* granted to it in the U.S. Constitution, *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816), and the governed possess constitutional *rights*, which they may assert as limits on government power. Even when the government purports to act in pursuit of what it deems the public interest, it is merely exercising its own powers, not its own rights or those of the citizens. *See* Hamburger, *The Inversion of Rights and Power*, *supra*, at 757–62.

Further, the Court's frequent invocation of the term has done little or nothing to flesh out its meaning. As the Court recently conceded with considerable understatement, "Our opinions governing the public rights exception have not always spoken in precise terms." *Jarkesy*, 603 U.S. at 130; *accord Oil States*, 584 U.S. at 334 ("This Court has not definitively explained the distinction between public and private rights … and its precedents applying the public-rights doctrine have not been entirely consistent." (cleaned up)). Even after *Jarkesy*, lower courts continue to harbor wildly different views regarding what the remnants of the exception still cover. *Compare, e.g.*, *Axalta*, 144 F.4th at 477 (public rights exception applied to FAA penalty adjudication), *with Intuit v. FTC*, 170 F.4th 411, at 418 (5th Cir. 2026) (public rights exception not applicable to FTC cease-and-desist adjudication).

Amicus urges the Court to abandon its nomenclature of "public rights" and, instead, examine whether the case involves exercise of executive or

judicial power.[8] The latter may be performed only by real Article III courts.

III. THE COURT SHOULD EXPRESSLY OVERRULE *ATLAS ROOFING CO. V. OSHRC*

In *Jarkesy*, this Court appropriately criticized and distinguished *Atlas Roofing*. *See* 603 U.S. at 136–40 & n.4. The Court expressly acknowledged that "*Atlas Roofing* represents a departure from our legal traditions" and that scholars have mostly either criticized or "simply ignored the case." *Id.* at 138 n.4. The Court further noted that the Justice who authored *Atlas Roofing* later suggested it may have already been overruled. *Id.* at 136 n.3 (quoting *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 71 n.1, 79 (1989) (White, J., dissenting)). *Jarkesy* thus "cast doubt on whether *Atlas Roofing* remains good law." *Intuit*, 170 F.4th at 417. For many reasons, the time has come for the Court to explicitly overrule this egregiously mistaken decision.

To begin, *Atlas Roofing* relied on *Murray's Lessee*. *See* 430 U.S. at 450–51 & n.8, 456–57. But as previously noted, the "public rights" briefly alluded to in *Murray's Lessee* bear no relationship to the broadly reimagined "public rights" exception endorsed by *Atlas Roofing*. *See* Hamburger, *The Inversion of Rights and Power*, *supra*, at 760–62; Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L.

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[8] "[F]actfinding" and "deciding questions of law" "are at the core of judicial power" and must be reserved to courts alone. *Axon/Cochran*, 598 U.S. at 203 (Thomas, J., concurring) (citing U.S. CONST. art. III, § 2, cl. 2).

Rev. 559, 604 n.189 (2007) (suggesting *Atlas Roofing* overread *Murray's Lessee*). Moreover, *Jarkesy*'s logic is difficult to square with *Atlas Roofing*. Under *Jarkesy*, "[e]ven with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." 603 U.S. at 132.[9] *Atlas Roofing* flips that presumption on its head, "default[ing] to public rights, untethered from history." *See Axalta*, 144 F.4th at 483 (Bibas, J., concurring).

Atlas Roofing also failed to take account of the Fifth Amendment right to due process of law. Since the Middle Ages, the core of due process has been the right to be held accountable only in a court. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1679–80 (May 2012). The 1641 Act of Parliament abolishing the Star Chamber recited the principle, first stated in 1368, that "No Man be put to answer without presentment … by due Process and Writ Original according to the old Law of the Land." An Act for the Regulating of the Privy Council and for Taking Away the Court Commonly Called the Star Chamber, 16 Car. 1, c. 10 (1641). Likewise, under our Constitution, due process of law means the right to be held to account only in the courts. *See Jarkesy*, 603 U.S. at 150 (Gorsuch, J., concurring) ("due process of law generally implied and included a judge, regular allegations, opportunity to answer, and a trial

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[9] "Though *Jarkesy* did not expressly limit public rights to the kinds recognized at the Founding, its analysis implied as much." *Axalta*, 144 F.4th at 483 (Bibas, J., concurring).

according to some settled course of judicial proceedings" (cleaned up) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 280)); Hamburger, *Is Administrative Law Unlawful?*, *supra*, at 499 ("due process of law" means "judicial decisions in accord with the law, in the courts of law, according to their traditional procedures").

When this Court in *Atlas Roofing* contorted the public-rights exception to reject a Seventh Amendment jury-trial challenge, it denied both the company's due-process right to be heard in an independent court and its right to a jury trial. *Cf. Axon/Cochran*, 598 U.S. at 202 (Thomas, J., concurring) (suggesting appellate review model "may violate due process by empowering entities that are not courts of competent jurisdiction to deprive citizens of core private rights"); *Lorenzo v. SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (deferential review "is in some tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment"). By skirting independent judges and juries, *Atlas Roofing* also enabled executive departments and agencies to find facts and required judges to defer to an administrative record shaped by the prosecuting party—or, at best, by an ALJ employed by that party. This deference to one side's facts institutionalized systematic judicial bias in violation of the due process of law. *See* Hamburger, *Is Administrative Law Unlawful?*, *supra*, at 317–21.

Nor can *Atlas Roofing* be squared with Article III which vests "all Cases" within the federal judicial power in independent courts. That phrasing is absolute, "making an exception for any novel action

far harder to defend." *Axalta*, 144 F.4th at 484 (Bibas, J., concurring) (citations omitted) (quoting U.S. CONST. art. III, § 2). And in cases where core private rights are at stake, deference to administrative factfinding "effectively divests the courts of a key component of judicial power—and therefore violates Article III." Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Geo. J.L. & Pub. Pol'y 27, 46 (2018); *see* Mascott, *Constitutionally Conforming Agency Adjudication*, *supra*, at 25. "It is no answer that an Article III court may eventually review the agency order and its factual findings under a deferential standard of review." *Axon/Cochran*, 598 U.S. at 202–03 (Thomas, J., concurring). To the contrary, "Article III requires de novo review, of both fact and law." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1248 (1994). Simply put, "[w]hen the Federal Government seeks to deprive a person of property, it must go through an Article III court." *FCC v. AT&T, Inc.*, 146 S. Ct. 1418, 1433 (2026) (Thomas, J., dissenting) (citation omitted).

Despite *Atlas Roofing*'s many deficiencies, including its failure to adhere to Article III and the Fifth and Seventh Amendments, it continues to lead federal courts throughout the country to allow administrative proceedings that plainly violate Article III and deny due-process and jury-trial rights. Many of these cases have expressly noted that they remain bound by *Atlas Roofing*—precisely because *Jarkesy* stopped a few inches short of overruling it. *See, e.g.*, *Axalta*, 144 F.4th at 475–76; *id.* at 482 (Bibas, J., concurring) (*Jarkesy*'s failure to overrule *Atlas Roofing* "has left us with a theoretical scramble: a public-rights exception that the Founders

understood narrowly but that precedents force us to construe broadly."); *Meta Platforms, Inc. v. FTC*, 723 F. Supp. 3d 64, 92 (D.D.C. 2024) (*Atlas Roofing* "forecloses … [Meta's Article III] claim"). *Cf. Tex. Tobacco Barn, LLC v. U.S. HHS*, 180 F.4th 229, 244 (5th Cir. 2026) (Douglas, J., dissenting), including the Fourth Circuit here. *Sligo Creek Ctr. v. U.S. HHS*, 177 F.4th 556, 560 (2026) (Seventh Amendment inapplicable "because this action 'cannot be distinguished from the enforcement action considered in *Atlas Roofing*.'" (quoting *Axalta*, 144 F.4th at 475–76)).

Broader structural considerations further support jettisoning *Atlas Roofing*. The in-house administrative enforcement scheme here is but one example of a far-reaching problem. "[T]here are, at the very least, more than two dozen agencies that can impose civil penalties in administrative proceedings." *Jarkesy*, 603 U.S. at 199 (Sotomayor, J., dissenting). Such agencies also impose pseudo-equitable remedies that implicate private rights. *See, e.g.*, 15 U.S.C. § 45(c); *Axon/Cochran*, 598 U.S. at 204 (Thomas, J., concurring) (FTC's attempt to force business "to transfer intellectual property" implicates "the core private right to property").

Until recently, many of these executive law-enforcement agencies operated as "independent" commissions, such as the Federal Trade Commission. But last Term, this Court held that for-cause removal protections shielding the heads of these bodies from at-will removal are "contrary to the separation of powers enshrined in the Constitution." *Trump v. Slaughter*, No. 25-332, 2026 WL 1855612, at *6 (U.S. June 29, 2026); *see id.* at *15 (overruling *Humphrey's*

Executor v. United States, 295 U.S. 602 (1935)). Now, as Justice Gorsuch warned, "the fourth branch's powers still exist; they have just been reassigned to the President." *Id.* at *27 (Gorsuch, J., concurring). "The ability to judge disputes in-house remains, but now the house is white." *Id.* at *26.

Slaughter lays bare the fundamental due process problems with in-house administrative prosecutions.[10] After all, whatever one thinks of ALJ independence, it is the factual findings and decisions of these formerly independent agency heads that are reviewed with great deference. *See,* 42 U.S.C. § 1320(a)-7a(e) (The agency's "findings … with respect to questions of fact" are "conclusive" so long as they are "supported by substantial evidence.") *Slaughter* underscores why this Court should enforce the Constitution's bar against in-house adjudication of private rights—full stop—and jettison *Atlas Roofing*. *See Slaughter*, 2026 WL 1855612, at *26, *28–29 (Gorsuch, J., concurring).

The Court should overrule this fatally mistaken precedent and declare that whenever an executive department or agency prosecutes a law-enforcement case against a private citizen or business for alleged violations of law, it must do so in federal court.

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[10] Ironically, *Humphrey's Executor* itself observed that "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U.S. at 629.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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