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 FIFTH CIRCUIT*

# BRIEF *AMICI CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE, AMERICANS FOR PROSPERITY FOUNDATION, AND THE BUCKEYE INSTITUTE IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI 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, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* 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 any branch of government. The judicial power of the United States resides in the federal courts by the Constitution's very terms, and it cannot be shared with the other branches of government—especially not with the prosecutor.

**Americans for Prosperity Foundation (AFPF)** is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those ideas include constitutionally limited government, the separation of powers, and due process of law. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF believes that when the federal government brings an enforcement action implicating private rights, the Constitution requires that it do so in a neutral Article III court, subject to the Seventh Amendment jury-trial right. In this country, the prosecuting agency is not allowed to be the judge and jury of its own cause. That is the antithesis of the most basic requirements of due process: a fair trial in a fair forum. But that is exactly what the inhouse administrative enforcement scheme at issue here—and a host of others—purports to allow. That unconstitutional arrangement—which flows from this

Court's atextual and ahistorical "public rights" exception—should not stand.

To be clear, AFPF takes no position on whether the monetary penalties and backpay at issue are warranted. But the Respondent was constitutionally entitled to have those factual and legal determinations made in federal court with a right to a jury trial. At its core, that is all this case is about and is AFPF's sole interest, here. More broadly, AFPF urges this Court to critically examine the origin of its "public rights" exception, repudiate *Atlas Roofing*, and return to constitutional first principles by enforcing Article III's promise that, at least where private rights are at stake, "all Cases, in Law and Equity, arising under" federal law must be adjudicated in court.

**The Buckeye Institute** was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits *amicus* briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax exempt organization, as defined by I.R.C. Section 501(c)(3).

## 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 such power 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 Labor ("DOL") adjudicatory regime challenged in this case is premised on such review as an integral part of its in-house adjudication scheme. 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 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 explicitly overrule *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*. A candid and long-overdue overruling should reiterate with clarity and emphasis that the exception applies exclusively where the Government is disbursing 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. 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 DOL's administrative exercise of judicial power unconstitutional. Together, the five objections are insuperable.

#### A. Congress Cannot Delegate a Power It Lacks

Although it is often assumed that Congress delegates power to executive departments and agencies, 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, so it cannot delegate 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."). Judicial power is exclusively vested in Article III; therefore, 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 properly should be the focus of the Court's decision in this case because it avoids the inaccuracy of describing congressional transfers of power as mere "delegations." A delegated power is one that 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 authorizing the Executive to exercise legislative power—or purporting to authorize it to exercise *judicial*—power,[2] Congress cannot retrieve that power 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) ("At stake is not merely another judicial doctrine. The nondelegation doctrine is what justifies the shift of regulatory power from

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[2] As Sun Valley persuasively argues, it is questionable whether Congress has indeed statutorily authorized DOL in this case.

Congress to agencies. It thus is a foundation stone of the administrative state.").

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

Once the analysis focuses on the language of the Constitution—as it must—it becomes clear that Congress cannot delegate a power it does not have. One cannot intelligibly analyze the constitutionality of the transfer of judicial power to DOL in terms of *delegation*, because the Constitution places the judicial power of the United States exclusively and squarely in Article III. It thus becomes imperative to focus on vesting—and divesting—to decide this case.

### 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, it could be argued that that power, like title to land, could be conveyed without any limitation on its subsequent transfer. Courts, leaving aside Congress, could plausibly claim a freedom to shift their judicial power beyond the courts.

Tellingly, however, Article III avoided this familiar language of conveyancing, instead saying that the judicial power "shall be vested." It thereby made clear that the location of that power was mandatory. The text of the Constitution specifies not merely that powers are "vested" and therefore non-transferable, but where they must be placed. *See Dept. of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 67 (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.*, 575 U.S. at 67 (Thomas, J., concurring in the judgment).

The principle that the Constitution unambiguously vests judicial power in courts resounds over centuries of case law, 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."). If there were any doubt, it 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 intended judges to decide cases independent of influence from political branches, and 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 its powers in separate branches of government merely as an initial distribution of cards, to be played and transferred as soon as the game began.

### C. Article III Authorizes Congress to Locate Judicial Power Only in Inferior Courts, Not in Administrative Agencies

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. This judicial vesting clause stands apart from the other vesting clauses. The other clauses fully specify the mandatory locations of their powers: the legislative powers in Congress and executive power in the President. In contrast, Article III allows Congress to designate the location of part of the judicial power—but only in "inferior courts," not other bodies. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 333–34 (2018). Congress therefore cannot place the judicial power in the DOL or any other executive department or agency.[3] *See*

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[3] "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

*SEC v. Jarkesy*, 603 U.S. 109, 126 (2024) (the judicial power "cannot be shared with the other branches"); Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 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 empowers Congress "[t]o constitute Tribunals inferior to the Supreme Court[,]" U.S. CONST. art. I, § 8, and it may be thought that with this power, Congress could place the judicial power in "tribunals," such as the adjudication machinery of the DOL, that are not inferior courts. But this would be to confuse the *courts*, which exercise the judicial power of the United States, with the host of tribunals that do not exercise that judicial power. *See Freytag v. Commissioner*, 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."). Article I's Tribunal Clause gives Congress the power to constitute a range of tribunals, including the inferior federal courts exercising the judicial power of the United States, but also lesser tribunals, such as territorial and District of Columbia courts, which exercise the judicial power, respectively, of the territories and that district.

But no matter what kind of non-judicial tribunals Congress might establish, Article III is clear

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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).

that the judicial power of the United States "shall be vested" in the *courts*, not in those other sorts of tribunals. So, even with the power to constitute tribunals, Congress cannot locate the judicial power of the United States in bodies that are not inferior Article III courts, such as executive departments and agencies.[4]

Whatever the DOL is, it is not an inferior *court*. The Constitution 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 spells out a double limit: the judicial power must be in the courts, and when Congress distributes the judicial power not belonging to the Supreme Court, it cannot place that power in any tribunal other than an inferior Article III 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*

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

*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 the prosecutor![5]

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 the DOL 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. *Cf.* Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 801 (2013) (noting that "increasing presidential control over ALJs would create impartiality concerns"). Indeed, the Declaration of Independence 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." Decl. of Indep. ¶ 11 (1776).

When it is recognized that the judicial power mandatorily "shall be vested" in the courts, and that Congress may distribute that power only to inferior courts, the constitutional failing of administrative judging comes into sharp focus. The exclusive vesting

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[5] *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.").

of powers 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 in *Hayburn's Case* did not concern just the courts but applied equally to all of the 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, being lodged in the Executive Branch, 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, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. at 1111 & n.129. Other cases across the centuries 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).

Here, of course, judicial power has been displaced from the courts to the Executive Branch. All the same, the above-cited case law holds more broadly that judicial power cannot be reviewable by political power. That is exactly what happens at the DOL, because the decisions of its ALJs are re-examinable by the Secretary of Labor. If judicial power really could be placed in ALJs—it cannot—then it could not be reviewable by non-judicial political commissioners.

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

## II. THE "PUBLIC RIGHTS" EXCEPTION TO ARTICLE III JURISDICTION IS INAPPLICABLE AND SHOULD BE ABANDONED

In recent decades, the Court has frequently referred to a "public rights" exception when considering Article III jurisdiction and Seventh Amendment jury-trial claims.[6] *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 and Health Review Comm.*, 430 U.S. 442, 455 (1977) (stating that "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 … ."). *Amici* urge 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

[6] 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).

others, and tends to mislead judges and lawyers alike.[7]

### A. The Public-Rights Exception Is Atextual

As this Court recognized in *Jarkesy*, the public-rights exception "has no textual basis in the Constitution." 603 U.S. at 131. Where did it 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 & Imp. Co*., 59 U.S. 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"; the Court was not referencing or

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[7] Throughout its opening brief, the Government confuses matters further by semantically elevating what "is, after all, an *exception*," *Jarkesy*, 603 U.S. at 131, to a "doctrine." The brief references this mythical "doctrine" more than 30 times, not once acknowledging *Jarkesy*'s emphatic teaching that it is in fact a limited *exception*. The Court should not be fooled by this linguistic legerdemain.

suggesting the existence of "any executive power of issuing binding legislative or judicial edicts." *Id.*

*Murray's Lessee* involved an effort by the federal government to collect customs revenues from Swartwout, the former collector of customs for the port of New York. An audit of his books showed that he had collected $1.4 million in customs taxes that were never forwarded to the federal treasury. An 1820 statute authorized Treasury Department officials to conduct the audit, place a lien on Swartwout'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 before the Court was whether the actions of Treasury officials constituted "the exercise of the judicial power of the United States." If so, "the proceeding was void," because (as the Court recognized) Article III of the Constitution provides that only the judicial branch of government may exercise that judicial power. *Id.* at 275.

The Court determined that the Treasury officials acted properly because they were not exercising judicial power—but only after undertaking a lengthy analysis of the history of government efforts to collect tax revenue from absconding tax officials. The Court concluded that throughout English and American history, taking steps to collect all tax revenues that a customs official failed to properly forward to the public treasury had been considered an executive function and never a part of the judicial power. *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 extra-judicially, let alone to adjudicate extra-judicial enforcement proceedings. The court's sole reference to "public rights" came at the very end of the opinion, in response to 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 rejected that argument, explaining in dictum that the government's right to maintain summary proceedings against its tax collector was a "public right" that was unaffected by Congress's discretionary decision to permit subsequent judicial review.[8] *Id.* at 284.

The absence of any constitutional text or basis to support the public-rights exception strongly 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,

[8] This stray "public rights" remark in *Murray's Lessee* would later take on a life of its own to "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. *Cf. Loper Bright*, 603 U.S. at 441–43 (Gorsuch, J., concurring) (examining origin of *Chevron*). Tellingly, "references to 'public rights cases' did not become popular among either judges or commentators until modern times." Nelson, *Vested Rights, "Franchises," and The Separation of Powers*, 169 U. Pa. L. Rev. at 1436-37 n.38.

extra-judicial 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); Br. of *Amicus Curiae* Professor Ilan Wurman in Support of Respondent at 5–6 (July 13, 2026). Adjudications that threaten to make binding determinations and deprive 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 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*, Crim. Just., Summer 2023, at 12, 12–13 (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 is not normally thought of as possessing any rights whatsoever 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* (notably those enumerated in the Bill of Rights), which they may assert as limits on government power. The government often acts in pursuit of what it deems the public interest; but in doing so, it is exercising its own powers, not in any sense its own rights or even those of the citizens it hopes will benefit from its actions. *See* Hamburger, *The Inversion of Rights and Power*, *supra*, at 757–62.

Second, 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 remaining remnants of the exception still cover. *Compare, e.g.*, *Axalta*, 144 F.4th at 477 (exception applied to FAA penalty adjudication), *with Intuit*, 170 F.4th at 418 (exception not applicable to FTC cease-and-desist adjudication).

*Amici* urge the Court to abandon its nomenclature of "public rights" and, instead, speak about matters in terms of whether they are exercises of executive or judicial power.[9] The latter may be performed only by real Article III courts.

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[9] "[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)).

## 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. *Cf.* Resp. Br. 43–44.

To begin, *Atlas Roofing* purported to rely heavily 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. 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.[10] *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 (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. 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 according to some settled course of judicial proceedings" (cleaned up) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 280)); 2 St. George Tucker, *Law Lectures*, at 4 (1795) (under the Fifth Amendment, "[d]ue process of law must then be had before a judicial court, or a judicial magistrate"); Hamburger,

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[10] "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).

*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) (noting this 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 assembled by the prosecuting party—or, at best, by an ALJ employed by that party. This deference to one side's facts (sometimes denoted "fact deference") 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's demands. To begin, "Article III 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 extra-judicial administrative proceedings that plainly violate Article III and deny due-process and jury-trial rights under any fair reading of *Jarkesy*. 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, leaving lower courts no choice but to follow it. *See, e.g.*, *Axalta*, 144 F.4th at 475–76; *id.* at 482 (Bibas, J., concurring) (*Jarkesy*'s "commendable restraint" in not overruling *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"); *Sligo Creek Ctr. v. U.S. HHS*, 177 F.4th 556, 560 (4th Cir. 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)); *Meta Platforms, Inc. v. FTC*, 723 F. Supp. 3d 64, 92 (D.D.C. 2024) (concluding *Atlas Roofing* "forecloses … [Meta's Article III] claim"); *Manis v. U.S. Dep't of Agric.*, 796 F. Supp. 3d 178, 205 (M.D.N.C. 2025) ("*Atlas Roofing* controls" post-*Jarkesy* and thus public-rights exception applies to Horse Protection Act), *appeal dismissed as moot*, No. 25-2001 (4th Cir. June 17, 2026). *Cf. Tex. Tobacco Barn, LLC v. U.S. HHS*, 180 F.4th 229, 244 (5th Cir. 2026) (Douglas, J., dissenting).

Finally, broader structural considerations may further support jettisoning *Atlas Roofing*. It is important to understand that the in-house administrative enforcement scheme at issue here is but one example of a far broader 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.[11] *See Utica Packing Co. v. Block*, 781 F.2d 71, 78 (6th Cir. 1986) ("There is no guarantee of fairness when the one who appoints a judge has the power to remove the judge before the end of proceedings for rendering a decision which displeases the appointer."). 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, e.g.*, 15 U.S.C. § 45(c) ("The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."), § 78y(a)(4) (similar); *see Impax Labs., Inc. v. FTC*, 994 F.3d 484, 492 (5th Cir. 2021) (likening "[t]his deferential review" to "evaluating a jury's verdict"). *Slaughter* underscores why this Court should enforce the Constitution's bar against in-house adjudication

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[11] 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.

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 (as here) prosecutes a law-enforcement case against a private citizen or business for alleged violations of law, it must do so in federal court, and it may not do so administratively.

## CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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