No. 22-859

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

v.

GEORGE R. JARKESY, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ENERGY TRANSFER LP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Calcutt v. *FDIC*,
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Cochran v. *SEC*,
20 F.4th 194 (5th Cir. 2021) (en banc) 27, 29

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Consol. Edison Co. v. *NLRB*,
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Cases—Continued: **Page(s)**

Free Enterprise Fund v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) 13, 18, 23, 24, 32

Freytag v. *Comm'r*, 501 U.S. 868 (1991) 25

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Jarkesy v. *SEC*, 803 F.3d 9 (D.C. Cir. 2015) 29

Kisor v. *Wilkie*, 139 S. Ct. 2400 (2019) 16, 19

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Nat'l Cable Television Ass'n, Inc. v. *United States*, 415 U.S. 336 (1974) 34

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Panama Ref. Co. v. *Ryan*, 293 U.S. 388 (1935) 20

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Seila Law LLC v. *CFPB*, 140 S. Ct. 2183 (2020) 23, 24

Stern v. *Marshall*, 564 U.S. 462 (2011) 20

Cases—Continued: **Page(s)**

Tull v. *United States*,
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United States v. *Arthrex, Inc.*,
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Wiener v. *United States*,
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42 U.S.C. § 7171(c) 13, 14

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Act Concerning Aliens,
1 Stat. 570 (1798) 31

Act Concerning the District of Columbia
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Administrative Materials:

Amaranth Advisors, L.L.C.,
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Amaranth Advisors, L.L.C.,
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BP Am. Inc.,
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BP Am. Inc.,
173 FERC ¶ 61,239 (2020).................................... 15

Brian Hunter,
135 FERC ¶ 61,054 (2011).................................... 15

Enforcement of Statutes, Orders, Rules, and Regulations, 113 FERC ¶ 61,068 (2005) 34

Administrative Materials—Continued: **Page(s)**

Enforcement of Statutes, Regulations, and Orders, 123 FERC ¶ 61,156 (2008) 10, 11

Ex Parte Contacts and Separation of Functions, 123 FERC ¶ 61,158 (2008).................................... 12

Ex Parte Contacts and Separation of Functions, 125 FERC ¶ 61,063 (2008).................................... 12

La. Pub. Serv. Comm'n v. *System Energy Res., Inc.*, 184 FERC ¶ 61,097 (2023)...................... 13, 28

New England Power Co., 42 FERC ¶ 61,016 (1988)...................................... 21

Oasis Pipeline, L.P., 126 FERC ¶ 61,188 (2009).................................... 17

Office of Enforcement Response to Respondent's Request for Rehearing, *Rover Pipeline, LLC*, FERC Docket IN17-4-000 (Mar. 2, 2022)............. 12

Process for Assessing Civil Penalties, 117 FERC ¶ 61,317 (2006).............................. 15, 33

Rover Pipeline LLC, 178 FERC ¶ 61,028 (2022)........................ 11, 13, 34

Southwestern Elec. Coop., Inc., 97 FERC ¶ 61,008 (2001)...................................... 21

Total Gas & Power North Am., Inc., 155 FERC ¶ 61,105 (2016).................................... 12

Total Gas & Power North Am., Inc., 176 FERC ¶ 61,026 (2021).............................. 11, 34

Other Authorities: **Page(s)**

Accountability and Department of Energy Perspectives on Title IV: Energy Efficiency: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Com., 114th Cong. 12 (2015) 10

1 ANNALS OF CONG. (1789) 20

Bamzai, Aditya & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756 (2023) 24, 25

Bamzai, Aditya, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 Harv. L. Rev. 164 (2019) 32

1 Blackstone, William, *Commentaries on the Laws of England* (1753) 30

Bondy, William, *The Separation of Governmental Powers in History, in Theory, and in the Constitutions* (1896) 33

Calabresi, Steven G. & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153 (1992) 21

Chabot, Christine, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81 (2021) 32

Declaration of Kimberly D. Bose, *TotalEnergies Gas & Power N. Am., Inc. v. FERC*, No. 22-cv-04318 (S.D. Tex. Feb. 6, 2023), ECF No. 37-1 13

Other Authorities—Continued: **Page(s)**

Grossman, Andrew M. & Sean Sandoloski, *The End of Independent Agencies? Restoring Presidential Control of the Executive Branch*, 22 Federalist Soc'y Rev. 216 (2021)....................... 27

Hamburger, Philip, *Delegating or Divesting?*, 115 N.W. U. L. Rev. Online 88 (2021)................... 32

Hamburger, Philip, *Is Administration Law Unlawful?* (2014)... 32

Lawson, Gary, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002) 32

Locke, John, *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* (1690)..................... 31

Madison, James, *The Report of 1800*, *in* 17 THE PAPERS OF JAMES MADISON 31

Mortenson, Julian Davis & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021)... 32

Supplemental Brief for Respondent, *Fleming* v. *U.S. Dep't of Agric.*, 987 F.3d 1093 (D.C. Cir. Feb. 27, 2020) (No. 17-1246), 2020 WL 1025336 22

THE FEDERALIST No. 45 (James Madison) (Clinton Rossiter ed., 1961) 20

Tracy, Ryan & Dan Fitzpatrick, *J.P. Morgan Settles Electricity-Market Case*, Wall St. J. (July 30, 2013)... 7

Wurman, Ilan, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021) 32

INTEREST OF *AMICUS CURIAE*[1]

Energy Transfer LP (Energy Transfer) is one of the largest and most diversified midstream energy companies in North America, owning and operating through its subsidiaries nearly 125,000 miles of pipelines and associated energy infrastructure across 41 states, transporting the oil and gas products that make modern life possible. Energy Transfer has a direct and substantial interest in the questions presented in this case because it and its subsidiaries are regulated by certain federal agencies whose enforcement regimes raise the same separation-of-powers concerns that the Fifth Circuit recognized here with regard to the Securities and Exchange Commission (SEC).

In particular, many of Energy Transfer's pipelines and related infrastructure are regulated by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act (NGA). FERC exercises regulatory and enforcement authority over the interstate natural gas sector, including proceedings related to the siting and construction of pipelines and other facilities, and proceedings related to the rates and terms of interstate service. FERC also undertakes investigations and enforcement proceedings involving

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person aside from *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

potential violations of the NGA and its implementing regulations.

In one pending proceeding involving an Energy Transfer pipeline, FERC has alleged certain violations of the Natural Gas Act and is seeking millions of dollars in civil penalties. FERC intends to adjudicate those claims and potentially impose penalties through an in-house court, in a trial overseen by an administrative law judge (ALJ) similarly situated (for constitutional purposes) as the SEC ALJs at issue here. In that case, Energy Transfer sought—and a Texas federal district court has granted—a stay of FERC's ongoing enforcement proceeding. In seeking that relief, Energy Transfer raised (among other things) separation-of-powers concerns under the Fifth Circuit's decision in *Jarkesy* v. *SEC*, including that FERC's adjudication of fraud claims seeking civil penalties in an agency forum would violate Article III and the Seventh Amendment, and that FERC's ALJs are unlawfully insulated from Presidential removal by multiple layers of statutory tenure protection.

Through this *amicus* brief, Energy Transfer offers the Court broader context about the extent to which the separation-of-powers violations present in this case also exist for other federal agencies. This brief also illustrates the concrete, real-world consequences of those constitutional infirmities for enforcement targets who are ensnared in years-long proceedings before unconstitutional agency courts. As the brief explains, the SEC is hardly alone in depriving enforcement targets of core Article III rights and the protections of the Seventh Amendment.

FERC asserts broad authority to supplant federal courts as the forum to adjudicate penalty claims rooted in common-law fraud, and ultimately to impose crippling civil penalties. And FERC, like the SEC, delegates sweeping executive authority to ALJs who are subject to multiple layers of for-cause removal restrictions, infringing the President's Take Care authority. At both agencies, these separation-of-powers violations are exacerbated by an assertion of unconstrained discretion to assign claims to an agency forum, instead of Article III court.

The constitutional issues in this case are profoundly important to the modern administrative state, and to ensuring fidelity to Founding Era principles of limited government and shielding individual liberty through the separation of powers. But the Court should not lose sight of the concrete and urgent real-world consequences that unconstitutional agency courts have for the many companies and individuals who are ensnared in years or decades-long enforcement proceedings that stack the deck against defendants at every turn. Those proceedings would be unrecognizable to those who ratified the Constitution and Bill of Rights. The Court should affirm.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case presents the question whether the SEC may constitutionally choose to adjudicate securities-fraud claims and impose civil penalties through juryless, in-house agency courts presided over by ALJs who enjoy multiple layers of for-cause removal protection. FERC's enforcement regime mirrors the SEC's separation-of-powers violations by depriving

litigants of their right to a jury under Article III and the Seventh Amendment; by delegating authority to unaccountable ALJs who operate outside of Article III's procedural and substantive guardrails; and by arrogating to the agency standardless discretion to channel claims to its in-house court. FERC's remarkable "success" rate for its in-house enforcement proceedings is attributable in no small part to these constitutional infirmities.

2. FERC enforcement proceedings that expose litigants to the threat of civil penalties also violate Article III. The right of private property is among the few "core private rights" recognized in the foundational documents of British law. The government's arguments would extend the "public rights" principle beyond any doctrinally or historically defensible limits, and in practice would eviscerate any constitutional bar to Congress authorizing the adjudication of statutory enforcement claims brought by the government against private parties in juryless administrative forums.

3. The multiple layers of removal restrictions enjoyed by ALJs at both SEC and FERC violate the President's Article II authority under the Take Care Clause. Both as a matter of theory and practice, as inferior officers within the executive branch, ALJs necessarily exercise executive power. Thus, the Constitution requires that they be removable by the President. The government's attempt to create a vast new exception to Article II by characterizing ALJ authority as "adjudicatory" lacks support in this Court's cases or the Constitution's text and history.

4. Congress also violates the separation of powers by granting an executive agency unconstrained discretion to channel enforcement proceedings into its own in-house tribunal, rather than Article III court. As to the SEC, the government does not contest that Congress must provide an "intelligible principle" in delegating authority to the executive branch, or that Congress failed to provide any such principle to the SEC. Instead, the government portrays this kind of discretion as being fundamentally "executive" in nature. That argument runs headlong into historical understanding and this Court's cases. For its part, FERC mangles its governing statutes to claim the same unconstrained authority as the SEC. But Founding-era nondelegation debates reflected particular concern over the delegation of authority involving matters of life, liberty, and property—a concern directly implicated where an agency seeks to impose civil penalties. The government identifies no apt Founding-era examples, and none are apparent from the historical record, of Congress delegating to executive branch officials this kind of unconstrained discretion to assign claims to Article I adjudicators. The absence of any historical example is strong evidence of a constitutional problem.

ARGUMENT

I. Like the SEC, FERC's In-House Courts Violate the Separation of Powers.

A. FERC Adjudicates Violations and Imposes Civil Penalties Through Unconstitutional In-House Courts.

FERC, an independent commission within the Department of Energy, exercises regulatory and enforcement authority over a vast portion of the nation's energy sector, and the companies and individuals who participate in it. FERC regulates, among other things, facilities for the interstate transportation of natural gas (*e.g.*, pipelines and liquified natural gas terminals) and sales of natural gas in interstate commerce (including rate-making) under the Natural Gas Act, 15 U.S.C. §§ 717-717z, and the interstate transmission and sale of electric energy under the Federal Power Act, 16 U.S.C. §§ 791a-828g. FERC is composed of up to five Commissioners, each appointed by the President by and with the advice and consent of the Senate to fixed five-year terms, and who "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 42 U.S.C. § 7171(b). One Commissioner is designated by the President as Chair. *Ibid.*

FERC enforces compliance with a broad array of statutory and regulatory obligations under the threat of civil penalties, disgorgement, restitution, and other remedies. FERC's in-house enforcement arm subjects targets to years-long investigations and in-house agency adjudications for a range of offenses—including fraud-based market-manipulation claims

that track verbatim the SEC anti-fraud provisions at issue in this case. Compare 18 C.F.R. § 1c.1 (FERC) with, *e.g.*, 17 C.F.R. § 240.10b-5 (SEC). Targets of FERC enforcement proceedings face the threat of crippling civil liability and a range of other legal and equitable sanctions. See 15 U.S.C. § 717t-1 (authorizing civil penalties of up to $1 million per day per violation, adjusted for inflation).

A few examples illustrate the nature and magnitude of the private interests at stake. In one recent case, FERC strong-armed a corporate defendant into paying a multi-million-dollar settlement, under the threat of $300 million in civil penalties for alleged market-manipulation violations; years later, after the sole individual defendant who did not settle appealed the $30 million penalty imposed by FERC's in-house court against that defendant personally, the D.C. Circuit threw out the agency's entire theory of the case, holding that FERC lacked jurisdiction over the alleged acts. See *Amaranth Advisors, L.L.C.*, 120 FERC ¶ 61,085 (2007); 128 FERC ¶ 61,154 (2009); *Hunter* v. *FERC*, 711 F.3d 155 (D.C. Cir. 2013). In another case, FERC extracted a $400 million settlement from a major financial institution, after naming three individuals (traders) as defendants, but declining to charge or propose sanctions against them—effectively imposing an unreviewable unilateral reputational sanction on those individuals, while denying them any opportunity to defend themselves or clear their names before a neutral decisionmaker. See Ryan Tracy & Dan Fitzpatrick, *J.P. Morgan Settles Electricity-Market Case*, Wall St. J. (July 30, 2013).

FERC's in-house enforcement and adjudication process stacks the deck against targets at every turn. Many parties are forced to settle by the prospect of enduring years of agency investigation and hearing proceedings, the in terrorem effect of career- and business-ending civil sanctions, and the agency's essentially unbroken "win" record when trying claims before its in-house court. FERC sharply limits defendants' procedural and substantive rights in the agency's in-house courts. For instance, FERC allows investigators and prosecutors to engage in unrestricted and unrecorded *ex parte* communications with the ultimate agency decisionmakers (*i.e.*, the Commissioners and their staff) throughout many stages of a case—inevitably poisoning the well and inviting prejudgment. FERC also sharply limits defendants' access to discovery.

B. FERC's Enforcement Regime Mirrors the Separation-of-Powers Violations that Infect the SEC.

1. FERC's in-house process deprives litigants of core Article III protections, including the jury-trial right.

Seventh Amendment. FERC oversees an in-house enforcement regime crafted to deprive litigants of many of the procedural and substantive protections that would apply in Article III courts. Foremost among these is a complete denial of Seventh Amendment jury-trial rights. FERC administers and enforces various statutory and regulatory obligations that have deep roots at common law. For instance, FERC enforces anti-market-manipulation provisions that are virtually identical to the SEC fraud claims at

issue here, and are deeply rooted in common-law actions that were historically tried to a jury. And FERC adjudicates and assesses millions of dollars in civil penalties for violations of those provisions. Those claims and penalties would trigger Seventh Amendment jury-trial rights if adjudicated in Article III court. See *Tull* v. *United States*, 481 U.S. 412 (1987); Pet. App. 10a-17a. Yet, FERC asserts authority to route those claims into a juryless in-house "court."

Mixing of prosecution and decisionmaking functions. The deprivation of Seventh Amendment rights is only one of the infirmities that follows from FERC's preference for in-house agency courts. Congress granted FERC authority to "investigate any facts" it finds "necessary or proper * * * to determine whether any person" has violated the NGA, or to "aid in the enforcement" of the Act. 15 U.S.C. § 717m(a). In practice, FERC delegates broad authority to its in-house prosecutorial arm—the Office of Enforcement—to "conduct investigations relating to any matter subject to [FERC's] jurisdiction." 18 C.F.R. § 1b.3 (2023); see also *id.* § 1b.13 (detailing investigatory powers, including subpoena authority).

Throughout the investigatory and initial decisionmaking phase, FERC enforcement staff (*i.e.*, the agency prosecutors) have unrestricted access to, and in practice engage in regular off-the-record *ex parte* communications with, the ultimate agency decisionmakers (*i.e.*, Commissioners) and their closest

staff.[2] These "candid back-and-forth discussions and oral briefings"[3] covering the facts, merits, and ultimate conclusions of an investigation, conducted outside the defendant's presence or knowledge, invariably stack the deck and invite prejudgment. FERC imposes no limits on these communications during the investigatory stage, and keeps no records of them.

If enforcement staff preliminarily determines that a statutory violation has occurred, the subject has a chance to respond and provide additional information—but enforcement staff need not (and typically do not) respond to a subject's submission.[4] Enforcement staff may seek formal settlement authority from the Commissioners, essentially allowing prosecutors to present their preferred view of the evidence and legal issues to the Commissioners.[5] The Commission itself determines an appropriate range of

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[2] See Accountability and Department of Energy Perspectives on Title IV: Energy Efficiency: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Com., 114th Cong. 12 (2015) (written testimony of Larry R. Parkinson, Director, Office of Enforcement, FERC) https://tinyurl.com/yck5tzjr ("Parkinson Testimony"); see generally 18 C.F.R. pt. 1b.

[3] Parkinson Testimony at 10-11.

[4] *Barclays Bank PLC*, 144 FERC ¶ 61,041, P 18 (2013) (Office of Enforcement "is under no obligation to provide any response" to "the legal and factual arguments put forward by the subject of an investigation").

[5] See *Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156, P 34 (2008) ("2008 Policy Statement"); Parkinson Testimony at 12.

remedies for purposes of settlement discussions.[6] In other words, before the agency has afforded the target a hearing, the Commissioners effectively form a view about the existence and magnitude of the target's liability. If no settlement is reached, enforcement staff refers the matter to the Commission with a recommendation to initiate a formal enforcement action. 18 C.F.R. § 1b.19.

Lack of discovery or access to exculpatory information. The Commissioners invariably respond to staff's recommendation by issuing an "order to show cause." Although FERC insists that such an order does not constitute a finding by Commissioners of a violation of law,[7] it effectively shifts the burden of proof. A subject must rebut the Commission's determination that enforcement staff have made a prima facie case of a violation.[8] The subject is afforded no opportunity for discovery (*e.g.*, to seek exculpatory information developed during the investigatory phase) or any factual development, in responding to the show-cause order.[9] Adding insult to injury, FERC deems "waived" any defenses not raised in a subject's initial answer—even though FERC deprives

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[6] 2008 Policy Statement at P 34.

[7] *Id.* P 37.

[8] *Total Gas & Power North Am., Inc.*, 176 FERC ¶ 61,026, P 29 (2021).

[9] *Rover Pipeline LLC*, 178 FERC ¶ 61,028, P 28 (2022) (holding that only after FERC issues hearing order will enforcement target receive "the typical elements of adversarial adjudication including discovery").

them of information needed to formulate defenses. 18 C.F.R. § 385.213(c)(2)(ii). Months or years later, FERC typically sets the matter for a trial-type proceeding before an agency ALJ, to "determine whether a violation or violations occurred."[10]

Only *after* FERC issues the show-cause order does FERC restrict *ex parte* communications.[11] But even that late-stage prohibition applies only to enforcement staff who are "assigned to work upon the proceeding or to assist in the trial." See 18 C.F.R. § 385.2202. No similar bar applies to enforcement staff who were involved in the investigation but will not continue for the hearing; those staff remain free to advise the Commissioners on the merits and as to ultimate findings.[12] Needless to say, these sorts of communications would be unthinkable in Article III court.

2. FERC convenes in-house "trials" before ALJs whose appointment and removal defects parallel those of SEC ALJs.

FERC delegates broad authority to ALJs to conduct hearings, administer oaths, subpoena witnesses and compel their attendance, take evidence, require

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[10] *Total Gas & Power North America, Inc.*, 155 FERC ¶ 61,105, P 6 (2016).

[11] *Ex Parte Contacts and Separation of Functions*, 123 FERC ¶ 61,158, PP 7-8, 11 (2008) (notice of proposed rulemaking); 125 FERC ¶ 61,063, PP 21-23 (2008) (final rule).

[12] See, *e.g.*, Office of Enforcement Response to Respondent's Request for Rehearing, *Rover Pipeline, LLC*, FERC Docket IN17-4-000 (Mar. 2, 2022).

production of records, find facts, and make legal and policy determinations. See 18 C.F.R. § 1b.13. But FERC ALJs operate outside of the procedural and substantive guardrails that apply in Article III court. To take just a few examples, ALJs are not bound by the Federal Rules of Evidence or normal discovery principles, and jury trials are categorically unavailable. Even though enforcement subjects have no discovery rights *whatsoever* prior to the Commission's hearing order, even in subsequent proceedings, ALJs are free to (and often do) deny a target's discovery requests and limit access to information.

With regard to their method of appointment and protections from removal, FERC concedes (as it must) that its ALJs are "inferior Officers" for constitutional purposes.[13] See *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018). But although Congress created FERC as a multi-member body that exercises authority by majority vote, see 42 U.S.C. § 7171(e), FERC ALJs have traditionally been appointed by the FERC Chair, acting alone, see *id.* § 7171(c). FERC persisted in that appointment practice for more than a decade after this Court's admonition in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477, 512 (2010), that the SEC Chairman—like the FERC Chairman, designated by the President unilaterally—"cannot be regarded as "the head of an agency" under the Reorganization Act.[14]

[13] *Rover Pipeline, LLC,* 178 FERC ¶ 61,028, P 65.

[14] In response to pending litigation, the Commission recently made efforts to ratify ALJ appointments. But the nature and

As to removal, FERC ALJs are similarly situated to the SEC ALJs—indeed, the removal concerns are arguably *worse* at FERC. SEC and FERC ALJs can be removed "only for good cause established and determined by the Merit Systems Protection Board." 5 U.S.C. § 7521(a). MSPB members, in turn, may be removed "only for inefficiency, neglect of duty, or malfeasance in office," *id.* § 1202(d). Removing a FERC ALJ also requires at least the assent of the FERC Chair, because Congress has specified that the Chair is "responsible on behalf of the Commission" for matters relating to ALJ "appointment and employment," 42 U.S.C. § 7171(c). Although the role of Chair is "designated by the President," the Chair must be "[o]ne of the members" of the Commission, who can be removed from office "only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 7171(b)(1). Thus, FERC's ALJs are protected by three layers of express statutory removal restrictions.

After a hearing, the ALJ renders a written decision. 18 C.F.R. § 385.708(b)(1). The parties may file exceptions with the Commission. *Id.* § 385.711. "[I]f

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validity of those actions remains sharply disputed, among other things because FERC has not issued an actual order effectuating the ratification or articulating a statutory basis for the Commissioners, acting collectively, to appoint ALJs. See Declaration of Kimberly D. Bose ¶¶ 2-3, *TotalEnergies Gas & Power N. Am., Inc. v. FERC*, No. 22-cv-04318 (S.D. Tex. Feb. 6, 2023), ECF No. 37-1. Regardless, to this day FERC maintains that its Chair, acting alone, is the relevant agency head. See *La. Pub. Serv. Comm'n* v. *System Energy Res., Inc.*, 184 FERC ¶ 61,097, P 131 (2023).

the Commission determines that there is a violation, the Commission will issue an order and may assess any appropriate penalty." *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, P 7.4 (2006). If no exceptions are filed, the ALJ's decision automatically "becomes a final Commission decision," unless the Commission stays its effectiveness sua sponte, pending its review. 18 C.F.R. § 385.708(d)(2).

The Commission "affords deference to the ALJ's credibility determinations and the amount of weight to be given to particular testimony or documentary evidence," *Brian Hunter*, 135 FERC ¶ 61,054, P 31 (2011), and affirms ALJ factual and credibility findings unless "erroneous," *BP Am. Inc.*, 156 FERC ¶ 61,031, P 175 (2016), "based on the totality of the record evidence," *BP Am. Inc.*, 173 FERC ¶ 61,239, P 146 (2020), pet. for review granted in part, 52 F.4th 204 (5th Cir. 2022). The trial-type hearing before an ALJ is thus an enforcement target's *only* opportunity (albeit limited) to litigate the facts of alleged violations.

3. Judicial review is constrained by deference canons.

Even if an enforcement target can resist settlement pressure and fight through years of agency proceedings, Article III review is typically available only after FERC has issued a final order. For most issues, judicial review is constrained by applicable standards of review. See generally *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 196-198 (2023) (Thomas, J., concurring) (discussing constitutional concerns with this model). The Commission's interpretation of statutes it administers is typically afforded *Chevron* deference, and

FERC's interpretation of its own regulations is reviewed under the deferential framework of *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019). Other determinations are subject to arbitrary-and-capricious review.

An agency's findings of fact (typically made by the ALJ and adopted by the Commission) are "conclusive" if "supported by substantial evidence." 15 U.S.C. § 717r(b). That standard is understood to be satisfied whenever the agency can point to "more than a mere scintilla" of evidence. In other words, FERC can make factual findings to support a violation of law, and impose tens or hundreds of millions of dollars in penalties and other relief—and a federal court must uphold those determinations—even where the preponderance of evidence shows that no violation in fact occurred. See *Consol. Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938); *Columbia Gas Transmission Corp.* v. *FERC*, 448 F.3d 382, 385 (D.C. Cir. 2006).

4. FERC almost always wins on its home court.

Much like other agencies who enjoy a striking "home court advantage" when litigating in their in-house tribunals, FERC has a remarkable success rate pursuing enforcement actions before ALJs. In all but one of the Natural Gas Act civil-penalty proceedings that have been adjudicated by a FERC ALJ since 2005, the ALJ has imposed the same penalties proposed by enforcement staff, and the Commission, in turn, has approved and adopted that same assess-

ment.[15] This win record if anything *undercounts* FERC's success rate, because many parties settle shortly after the Commission's show-cause order, with issues never tried before the ALJ.

II. FERC Violates Article III by Adjudicating Core Private Rights in Agency "Court."

"Article III vests the judicial power of the United States 'in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'" *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018) (quoting U.S. Const. art. III, § 1). This Court has recognized, however, that certain adjudicatory tasks can properly be conducted outside of Article III courts, under what has become known as the "public rights" doctrine. *Id.* at 1373. Although the distinction between public and private rights is not entirely clear, see *ibid.*, this Court's existing cases, as informed by the Constitution's original meaning and historical practice, provide key principles to guide the analysis. For at least two independent reasons, those principles show that the claims at issue here—like similar claims enforced by FERC—fall well outside any reasonable understanding of this Court's "public rights" doctrine. First, Article III forbids juryless adjudication of fraud-based claims, such as those at is-

[15] The one exception effectively proves the rule. There, an ALJ ruled for the enforcement target on the majority of enforcement staff's allegations after enforcement staff essentially conceded their case, and the case subsequently settled. *See Oasis Pipeline, L.P.*, 126 FERC ¶ 61,188, PP 28-29 (2009).

sue here and in FERC enforcement proceedings, because those claims have deep roots at common law. See Resp. Br. 34-37. Second, civil penalties seek to deprive a party of a core private right—*i.e.*, private property. Stretching the public rights doctrine to that extent would be contrary to history, first principles, and this Court's Seventh Amendment jurisprudence. See *Tull*, 481 U.S. at 422-425.

III. Dual For-Cause ALJ Removal Protections Are Unconstitutional and Warrant Vacatur.

A. ALJ Removal Restrictions Violate the Take Care Clause and Are Inconsistent with Historical Practice.

This Court has held that (1) dual for-cause removal protections for "inferior officers" violate the Constitution, see *Free Enter. Fund*, 561 U.S. at 484; and (2) the SEC's ALJs are "inferior officers," see *Lucia*, 138 S. Ct. at 2053-2054. The Fifth Circuit correctly concluded that those two holdings, considered together, control this case. See Pet. App. 28a-34a. The government seeks to avoid that outcome by distinguishing inferior "executive officers" (of the type at issue in *Free Enterprise Fund*) from inferior "adjudicative officers" (of the type supposedly at issue here), contending that "Congress has more leeway to grant tenure protection to adjudicators than to other officers." SEC Br. 51.

There are two problems with that argument. First, the government's strained distinction between "adjudicative" and "executive" officers is illusory, because ALJs are situated in the Executive Department and necessarily exercise executive authority. Second,

the government, despite emphasizing the importance of "history" in ascertaining the limits on the removal power, identifies *no* analogous historical precedent for the type of dual (or triple) for-cause protection at issue here.

1. ALJs exercise executive power.

The government's proposed distinction between "adjudicators" and "other executive officers" fails at the outset because all executive officers—including "adjudicators"—necessarily exercise executive power, and therefore must be removable by the President. Cf. SEC Br. 50. The government's "assum[ption] that ALJs are categorically different from other Executive Branch officers * * * is incompatible with the Constitution and recent Supreme Court decisions." *Fleming* v. *U.S. Dep't of Agric.*, 987 F.3d 1093, 1118 (D.C. Cir. 2021) (Rao, J., concurring in part).

This Court has explained that the "activities of executive officers may take legislative and judicial forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the executive Power, for which the President is ultimately responsible." *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (internal quotation marks omitted); accord *Kisor*, 139 S. Ct. at 2422 (plurality op. of Kagan, J.) ("[E]ven when agency activities take legislative and judicial forms," they are "exercises of the executive Power—or otherwise said, ways of executing a statutory plan." (internal quotation marks and brackets omitted)).

The government's suggestion that ALJs exercise "adjudicative" power that is akin to that of "Article

III judges" (SEC Br. 54) tracks the *dissent* in *City of Arlington* v. *FCC*, 569 U.S. 290 (2013). But six Members of this Court expressly rejected that proposition, reasoning that agencies do not *ever* "exercise 'legislative power' [or] 'judicial power,'" because the former is "vested exclusively in Congress" and the latter is vested exclusively in the Article III courts. 569 U.S. at 304 n.4. *City of Arlington* made clear that, even when executive officers "conduct adjudications," they are "exercis[ing] * * * the executive Power." *Ibid.* (internal quotation marks omitted); *accord Panama Ref. Co.* v. *Ryan*, 293 U.S. 388, 427-428 (1935) (characterizing Interstate Commerce Commission adjudications as the execution of executive power).

To be sure, executive officers such as ALJs may sometimes perform tasks that seem "adjudicative." But that does not alter the reality that the functions of executive officers, however described, are invariably exercises of executive power. See 1 ANNALS OF CONG. 611-612 (1789). The Framers designed the Vesting Clauses with the purpose of making sure each Department's powers were "defined." THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). To suggest that ALJs exercise something other than executive power errs by presupposing that the President has some "defined" power *other than* executive power to delegate to them. By definition, adjudication by executive officers cannot be a "judicial" function, contra SEC Br. 55, because no branch of government may lawfully "confer the * * * 'judicial Power' on entities outside Article III." *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011).

Even the government concedes that agency ALJs necessarily play a "policy-making" role, for instance by announcing a new rule or policy of general applicability in the course of a specific adjudication. SEC Br. 52. A few examples from the FERC context underscore this point. The Commission may specifically assign a matter to an ALJ for a hearing to "address whether the Commission's policy on [a particular issue] * * * should be changed prospectively, based on the specific facts presented." *New England Power Co.*, 42 FERC ¶ 61,016, 1988 WL 243523, at *2 (1988). And the Commission in some instances will clarify or change its policy in response to suggestions from an ALJ. *Southwestern Elec. Coop., Inc.*, 97 FERC ¶ 61,008, p. 61,022 (2001) (ALJ "rightly criticized" one FERC policy for its "murkiness and ambiguity"). Applying, clarifying, or defining agency policy is a core executive power.

Once it is established that "bureaucrats exercise solely executive power, because only executive power can be delegated," this is not a difficult case. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1183 n.153 (1992). For "[i]f bureaucrats can receive executive power only by delegation from the President, they must be subject to his direct supervision and control." *Ibid.* The Fifth Circuit was therefore correct to hold that the removal protections for the SEC's ALJs violate the separation of powers.

2. The Government's Take Care exception for "adjudicatory" officers lacks a sound historical basis.

History provides no warrant for the government's suggestion that the Constitution allows more onerous removal protections if an inferior officer's responsibilities might be described as "adjudicative." Indeed, the government itself has previously *disclaimed* the view that ALJs' "adjudicative" powers differentiate them from other executive officers for removal purposes, reasoning that "ALJs' role as impartial adjudicators does *not* eliminate the need for them to remain accountable executive officers." Supplemental Brief for Respondent at 21, *Fleming*, 987 F.3d 1093 (D.C. Cir. Feb. 27, 2020) (No. 17-1246), 2020 WL 1025336 (capitalization altered) (emphasis added); see *id.* at 22 (explaining that there is no reason "why ALJs' adjudicatory function would constitutionally exempt them from * * * presidential supervision and accountability").

The government's cursory account of the historical record obfuscates the reality that layered-for-cause removal protections of the type at issue in this case were unknown at the Founding. The government does not, and could not, dispute that "the double layered independence for ALJs is a relatively recent innovation." *Fleming*, 987 F.3d at 1117 (Rao, J., concurring in part). From the time of their statutory creation until 1946, federal ALJs lacked tenure protection. See *Ramspeck* v. *Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 130 (1953). ALJs received a first layer of for-cause removal protection in the APA, and a second layer of protection when the Merit Systems

Protection Board was created in 1978 (replacing the former Civil Service Commission, whose members had been removable by the President at-will). See *Fleming*, 987 F.3d at 1117 (Rao, J., concurring in part).

The government also skips past the fact that this Court has not hesitated to strike down multiple-layered removal restrictions for officers with judicial-type functions. See *Free Enterprise Fund*, 561 U.S. at 498; *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2193 (2020) (discussing CFPB Director's "extensive adjudicatory authority"). It is no answer to distinguish these cases as involving officers who *also* exercised other functions, because, as explained above, executive officers necessarily exercise executive power.

The Solicitor General nonetheless contends that "[h]istory confirms that Congress has greater latitude to grant tenure protection to adjudicators than to other executive officers." SEC Br. 54. But the government marshals just two examples in support of that sweeping proposed rule. Neither is persuasive.

The government first points to an 1801 statute granting removal protections to justices of the peace for the District of Columbia. SEC Br. 54. There are numerous problems with this argument.

First, the lesson the government would draw from *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)—*i.e.*, that an inferior executive officer can be *entirely* protected from removal for a five year term, SEC Br. 54—is fundamentally at odds with this Court's more recent teaching. In the two centuries since *Marbury*, this Court has clarified that fixed-length terms of the

type accorded to the justices of the peace at issue in *Marbury* should be understood as conferring only for-cause removal protection. See *Wiener* v. *United States*, 357 U.S. 349, 352, 356 (1958); *Free Enterprise Fund*, 561 U.S. at 487. The justices of the peace from *Marbury* should therefore be understood as having had a single layer of for-cause removal protection, which is the same type of protection that this Court has upheld for certain other inferior officers. See *Seila Law*, 140 S. Ct. at 2199-2200.

Thus, at most, *Marbury* establishes that executive officers with adjudicative responsibility can be afforded the *same* removal protections as those who lack such responsibilities—not that they can be afforded "*greater*" protections. SEC Br. 54 (emphasis added). *Marbury* might well be a helpful precedent for the government if Respondents challenged only one layer of for-cause protection. But because this case involves *dual* (or *triple*) for-cause protections of a type functionally unprecedented prior to the New Deal, *Marbury* has little probative value.

Second, it is far from clear what kind of removal protection DC justices of the peace actually enjoyed. The statute at issue merely granted them a five year term. See 2 Stat. 103, 107 (Feb. 27, 1801). President Jefferson fired them all in 1801, and the Senate confirmed replacements. See Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1818 (2023). Historians have uncovered no evidence of any "American official or scholar at the Founding" who believed "that a term of years implies nonremovability." *Ibid.* To the extent the Court suggested otherwise in *Mar-*

bury, see 5 U.S. at 162, its statements were dictum, because "nobody argued [in *Marbury*] that the justices were executive officers," with the parties instead contending that they were either Article III judges or territorial officers. Bamzai & Prakash, *supra*, at 1812-1813.

Third, the particularities of justices of the peace in the District of Columbia weigh against extrapolating a federal-government-wide constitutional rule, given the "the unique context of the territories and D.C." Bamzai & Prakash, *supra*, at 1818. Outside of the District of Columbia—over which the Constitution gave Congress special and expansive authority, see art. I, § 8, cl. XVIII—the early American Congresses "did not enact any term-of-years provisions that were seen to limit presidential removal." Bamzai & Prakash, *supra*, at 1818.

The government's only other historical example are the tenure protections granted to judges on Article I courts. SEC Br. 54-55. But the suggestion that judges of "legislative courts" have sometimes been granted a single layer of "for-cause" protection, *id.* at 55 n.7, at most proves only that so-called "adjudicatory" officers can be granted one level of protection as other executive officers, not *greater* protection.

That leaves only the government's suggestion that Congress has sometimes granted Article I judges the same type of "good-behavior tenure" that is "enjoyed by [Article III] judges." SEC Br. 55 & n.6. The problem with this analogy is that Article I courts can exercise the judicial power of the United States, see *Freytag* v. *Comm'r*, 501 U.S. 868, 889 (1991), whereas executive branch ALJs cannot. The extent to which

Article I judges can be insulated from removal is a question that continues to percolate in the lower courts, and it need not be addressed here. Because Article I courts are fundamentally different than ALJ-led agency enforcement proceedings, the permissible scope of removal protections for Article I judges—whatever it may be—provides little guidance on whether ALJs can be shielded by *dual* (or *triple*) for-cause protections.

B. If this Court Addresses Remedy, It Should Clarify that *Collins* Does Not Apply.

The government briefly addresses the question of what remedy would be warranted if this Court agrees that the multiple layers of removal restrictions applicable to the SEC's ALJs are unconstitutional. The Solicitor General contends that the appropriate remedy would be to hold that the SEC can remove its ALJs at will, and then to "remand the case for the court of appeals to perform the prejudice inquiry required by *Collins* [v. *Yellen*, 141 S. Ct. 1761 (2021)]." SEC Br. 67. To the extent this Court reaches the remedial question, it should clarify that the *Collins* framework does not apply here. *Collins* has confounded the lower courts and risks all but foreclosing meaningful remedies for structural constitutional violations.

In *Collins*, this Court stated that a plaintiff was not entitled to a remedy on a removal claim unless it could demonstrate that the unconstitutional removal protection caused them a "compensable harm." 141 S. Ct. at 1789. As examples of "compensable harm," this Court gave the hypothetical of a President who

was "prevented" from removing an officer "by a lower court decision" or who publicly "asserted that he would remove the [officer] if the statute did not stand in the way." *Ibid*.

The *Collins* remedial framework has frustrated the lower courts, in large part because it is "very challenging" and "quite uncommon"—if not outright impossible—for litigants to demonstrate "compensable harm" of the type "hypothesized by the *Collins* Court." *Cochran* v. *SEC*, 20 F.4th 194, 232-233 (5th Cir. 2021) (en banc) (Oldham, J., concurring), aff'd sub nom. *Axon*, 598 U.S. 175. It appears that no litigant has *ever* succeeded in showing "compensable harm" in the years since *Collins* was decided. Cf. Andrew M. Grossman & Sean Sandoloski, *The End of Independent Agencies? Restoring Presidential Control of the Executive Branch*, 22 Federalist Soc'y Rev. 216, 223 (2021); see also *Collins* v. *Dep't of Treasury*, No. 22-20632, --- F.4th ----, 2023 WL 6630307, at *7-9 (5th Cir. Oct. 12, 2023) (plaintiff failed to show "compensable harm" despite President Trump's express statement that he would have fired the officer in question but for the removal restriction).

Moreover, the manner in which lower courts are applying *Collins* is in significant tension with this Court's recent decision in *Axon*. The *back-end* requirement that a party first sustain an adverse agency ruling and then attempt to show prejudice (*e.g.*, a statement by the President expressing disagreement with the decision but an inability to remove the ALJ due to the tenure protection) is inconsistent with this Court's recognition in *Axon* that a party suffers cognizable and potentially irreparable harm from being

subject to an unconstitutionally structured agency process, and is therefore entitled to a federal district-court forum to litigate its claims *at the front end*. See *Axon*, 598 U.S. at 191-192, 195.

The *Collins* remedial framework also invites executive agencies to disregard their independent obligation to comply with the Constitution's *substantive* obligations—even where a private party may not have a viable *remedy* in Article III courts. For instance, in one recent order, a party had claimed that FERC's presiding ALJ was unlawfully insulated from removal. FERC rejected the claim, but astonishingly offered *no merits defense* of the multiple for-cause removal restrictions. Instead, FERC stated that even if the "removal restrictions are unconstitutional," the party had not shown entitlement to a *remedy* under *Collins*. Therefore, FERC upheld the ALJ's actions. *Louisiana Pub. Serv. Comm'n* v. *System Energy Res., Inc.*, 184 FERC ¶ 61,097, PP 128-130 (2023). Put differently, agencies are reading *Collins* as a free pass to thumb their nose at the Constitution and separation of powers, viewing courts as powerless to grant particular plaintiffs any relief.

If the Court does address remedial questions, it could clarify that Justice Gorsuch's concurrence in *Collins* applies in these circumstances. Justice Gorsuch explained that the remedy for an unconstitutional removal statute should be the same as for a violation of the Appointments Clause—*i.e.*, vacating the unlawful agency action. See *Collins*, 141 S. Ct. at 1795-1197. The experience of *Collins* in the lower courts has shown that Justice Gorsuch's view is more

faithful to the separation of powers and easier to administer.

At the very least, this Court should clarify that the "compensable harm" requirement does *not* apply when a plaintiff seeks prospective relief. Contra *Calcutt* v. *FDIC*, 37 F.4th 293, 316 (6th Cir. 2022), rev'd on other grounds, 598 U.S. 623 (2023). *Collins* was a case about *retrospective* relief only, see 141 S. Ct. at 1780, and it makes no sense to apply its remedial framework where a party seeks *prospective* relief to enjoin an agency action—as Mr. Jarkesy did in the course of challenging the SEC proceedings,[16] and as other parties are doing now via pre-hearing challenges under *Axon*. See *Cochran*, 40 F.4th at 210 n.16 (suggesting that *Collins* should not apply to claims for *prospective* relief). That clarification would ensure that lower courts do not improperly deny relief based on the perceived absence of a "compensable harm," even while agreeing that a plaintiff's removal argument "ha[s] merit." *Burgess* v. *FDIC*, 639 F. Supp. 3d 732, 746 (N.D. Tex. 2022), appeal docketed, No. 22-11172 (5th Cir. Dec. 5, 2022).

[16] See *Jarkesy* v. *SEC*, 803 F.3d 9, 13 (D.C. Cir. 2015), abrogated by *Axon*, 598 U.S. 175 (2023).

IV. Text, History, and Caselaw Weigh Against Giving an Agency Unconstrained Discretion to Choose an Agency Venue for Adjudicating Private Rights

The Fifth Circuit held that Congress violated the separation of powers by providing no standard to guide the SEC's choice between an agency and Article III adjudicatory forum. The government does not contest that the Constitution requires Congress to provide at least an "intelligible principle," *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928), to guide the Executive Branch's exercise of delegated authority. Nor does the government suggest that Congress provided any such standard for the SEC here. See SEC Br. 34-44. Instead, the government asserts there is no delegation concern because the authority in question is *executive* in character. *Id.* at 34. That argument fails for numerous reasons, as Respondent explains. Resp. Br. 47-52. *Amicus* offers the following additional points.

1. First, the government's position—that Congress can give the Executive Branch unfettered discretion to assign claims to an Article I tribunal instead of Article III court—has no grounding in history or tradition. William Blackstone characterized the legislative power as the "power of making laws," a category he understood to include the power to "prescribe the rule of civil action." 1 William Blackstone, *Commentaries on the Laws of England* 52 (1753). And John Locke wrote that "the legislative can have no power to transfer their authority of making laws, and place it in other hands." John Locke, *Second Treatise of Government: An Essay Concerning the*

True Original, Extent and End of Civil Government § 141 (1690).

Furthermore, early nondelegation debates reflected a particular concern over the delegation of legislative authority involving matters of life, liberty, and property. For instance, the First Congress debated a nondelegation challenge to the Alien Friends Act, which would have given the President broad authority to deport "all such *aliens* as he shall judge dangerous to the peace and safety of the United States." See Act Concerning Aliens, § 1, 1 Stat. 570, 571 (1798). In discussing his opposition to the Act, James Madison argued that

> [t]o determine * * * whether the appropriate powers of the distinct departments are united by the act * * *, it must be enquired whether it contains such details, definitions, and rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.

James Madison, *The Report of 1800*, *in* 17 THE PAPERS OF JAMES MADISON 303, 325.

The government, however, has cited no historical examples or other evidence that Founding Era thinkers or lawmakers would have understood the Constitution to allow Congress to delegate to executive branch officials unfettered discretion to choose the venue for enforcement actions affecting core property interests. Founding-era history provides various ex-

amples of Congress delegating authority to the executive branch to engage in what might be understood as adjudicative tasks. See Philip Hamburger, *Is Administration Law Unlawful?* 191 (2014) (giving examples of "lawful executive acts adjacent to adjudication"). For instance, Congress authorized executive branch officials to make determinations relevant to certain tax cases, customs determinations, and foreign relations; to select locations of post offices and district boundaries; and to promulgate rules for the distribution of certain benefits and privileges. See Philip Hamburger, *Delegating or Divesting?*, 115 N.W. U. L. Rev. Online 88, 104-105 (2021).

But the government cites *no* evidence—nor do the leading historical accounts provide any—of Congress giving an Executive Branch actor completely unfettered discretion to assign a claim to an Article I adjudicator. See, *e.g.*, Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 Harv. L. Rev. 164 (2019); Christine Chabot, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002); Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021).

The "conspicuous absence" of such historical examples "militates strongly against [the government's] position." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015); see also *Free Enterprise Fund*, 561 U.S. at 505 ("lack of historical precedent"

for an asserted executive branch authority is "[p]erhaps the most telling indication of the severe constitutional problem").

Bereft of any historical analogue, the government attempts to argue from first principles that the power delegated to the SEC here is fundamentally executive in nature, akin to prosecutorial discretion. SEC Br. 36-44. But

> [t]he power of allotting to the different departments of government their appropriate functions is a legislative power, and in so far as the distribution is not made in the [C]onstitution, the power to make it is vested in the general assembly as the depositary of the legislative power of the commonwealth.

William Bondy, *The Separation of Governmental Powers in History, in Theory, and in the Constitutions* 79 (1896).

2. As the government concedes, the nondelegation issue presented here is replicated in the enforcement schemes of other agencies. See SEC Br. 32-33 n.3. For instance, similar concerns arise under the Natural Gas Act. In interpreting the Gas Act's civil penalty provisions, FERC takes the position that Congress's "grant of civil penalty authority * * * did not specify the process by which a penalty is to be assessed." *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, P 6. Indeed, FERC reads the relevant statutes as "*silent* with respect to procedures [for assessing penalties] under the NGA." *Enforcement of Statutes, Orders, Rules, and Regulations*, 113

FERC ¶ 61,068, P 16 (2005) (emphasis added). On that basis, FERC has chosen an agency forum as the sole venue available to the accused. *E.g.*, *Total Gas*, 176 FERC ¶ 61,026, PP 171-187.[17] That FERC and other federal agencies assert essentially unbounded discretion to route claims to their preferred in-house forums underscores the need for a meaningful application of the non-delegation doctrine here.

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[17] FERC has reached this interpretation notwithstanding that the Natural Gas Act vests federal district courts with "original and exclusive" jurisdiction for "violations" of that Act. 15 U.S.C. § 717u. See *Rover Pipeline, LLC*, 178 FERC ¶ 61,028, P 2 (2022). FERC's cramped reading, and insistence that it has unfettered discretion to route penalty claims to its in-house court, runs contrary to principles of constitutional avoidance, which this Court has applied to avoid nondelegation concerns. *E.g.*, *Nat'l Cable Television Ass'n, Inc.* v. *United States*, 415 U.S. 336, 342 (1974) (where party raised nondelegation concerns, reading statute "to avoid constitutional problems").

CONCLUSION

The Fifth Circuit's judgment should be affirmed.

Respectfully submitted.

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