22-859

In the Supreme Court of the United States

SECURITY AND EXCHANGE COMMISSION,
Petitioner,

v.

GEORGE R. JARKESY, JR., et al.,
Respondents.

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

BRIEF FOR *AMICUS CURIAE* AMERICA FIRST POLICY INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

(1) Whether statutory provisions that empower the Securities and Exchange Commission (SEC) to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment?

(2) Whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine?

(3) Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection?

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STATEMENT OF INTEREST[1]

America First Policy Institute ("AFPI") is a 501(c)(3) non-profit, non-partisan research institute dedicated to advancing policies that put the American people first. Its guiding principles are liberty, free enterprise, the rule of law, America-first foreign policy, and a belief that American workers, families, and communities are the key to our country's success.

AFPI's leadership includes many former leaders of the United States government. AFPI's leaders and members alike appreciate that bedrock principles of separation of powers, enshrined in the Nation's constitutional design from its birth, produce critical checks on government power while promoting accountability to the American people.

AFPI believes that the "substantial evidence" standard under 15 U.S.C. § 78y(a)(4) impermissibly restricts judicial review of administrative hearings. This provision vested paramount judicial powers in a non-judicial body immune from judicial scrutiny save for the most offending of circumstances. This Congressional bar of *de novo* review places substantial control over the judicial process outside the framework of protections envisioned by the Founders who crafted Article III. The "substantial evidence" standard impermissibly binds the judicial branch from reviewing findings of fact conducted by the executive branch.

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to find the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Founders specifically designed the language within Article III of the Constitution to shelter the judicial officers, and more broadly the judicial power of the United States from the consequences of faction. A body, vested with the authority to interpret the law and determine the rights of the parties properly before it, immune from political pressures. A body designed to be impartial, granted the safeguards necessary to best ensure that impartiality.

According to that Constitution, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. The officers of that body are appointed by the approval of its two political sisters, U.S. Const. art. II, § 2, cl. 2, and serve for life, on good behavior, for a commission that may not be diminished during their tenure. U.S. Const. art. III, § 1.

While certainly to the benefit of individual judicial officers, the safeguards of life tenure and salary security are designed as rights of the citizenry. Where life, liberty, or property are placed in jeopardy against the awesome and coercive power of the state, it is the Judiciary upon which a citizen may see the vindication of their rights and security in the due process of the law.

The Securities Exchange Act of 1934 created the Securities and Exchange Commission (the "Commission"), an Executive agency broadly designed to regulate the securities market. Under 17 C.F.R. § 201.110 the Securities and Exchange Commission may designate an administrative law judge to act as a presiding officer over a hearing regarding the particularized enforcement of the agency's rules. This administrative adjudicator has the "authority to do all things necessary and appropriate to discharge his or her duties" to ensure a "fair and orderly" adversarial proceeding. *Lucia v. Securities and Exchange Commission*, 138 S.Ct. 2044, 2049 (2018) (citing 17 C.F.R. §§ 201.111, 200.14(a)). Those powers include broad control over the record that is later preserved for appeal, including the supervision over discovery, the issuing, revoking, or modifying of subpoenas, decisions upon motions, rulings upon the admissibility of evidence, the administration of oaths, the hearing and examining of witnesses, and the imposition of sanction. *Id.* (citing 17 C.F.R. §§ 201.111, 201.180, 200.14(a), 201.230).

The Securities and Exchange Commission is vested with the authority to appoint administrative law judges, 15 U.S.C. § 78d(b)(1), who enjoy neither the salary protection nor the vested life tenure of Article III judges. Where it comes to the creation of an adjudicative record these administrative law judges have broad discretion over evidence, 17 C.F.R. § 201.320. And while Article III judges are bound to the formalized Federal Rules of Evidence, *see* 28 U.S.C. §§ 2071 et seq., the administrative law judges of the Securities and Exchange Commission consider

those same rules "as a guideline, but are not controlling," 17 C.F.R. § 204.38(b).

After an adjudication the administrative law judges submit an initial decision, 5 U.S.C. § 557(b), which the Security and Exchange Commission can review *de novo*, 5 U.S.C. § 557(c), order the administrative law judge to take additional evidence, 17 C.F.R. § 201.452, or it can make the decision final, 17 C.F.R. § 201.360(d). Under 15 U.S.C. § 78y, a final order of the Commission is appealable to the United States Court of Appeals for the circuit in which the litigant resides or has their principal place of business.

Congress has mandated that the reviewing Article III court consider the "findings of the Commissions as to the facts . . . [as] conclusive" unless they are not "supported by substantial evidence." 15 U.S.C. § 78y(a)(4). In doing so Congress has bound a litigant petitioning an Article III court for relief, to an adjudicative record, whose questions of fact have been resolved solely by non-Article III officers.

The "substantial evidence" standard closely mirrors the appellate model of cases originating in an Article III court. However, litigants appealing a Commission decision are deprived of their privilege to adjudicate their case before an adjudicator whose impartiality is constitutionally designed. While it is certainly true that an Article III appellate court may, upon application of a party, remand a case to the Commission for further fact finding, 15 U.S.C. § 78y(a)(5), under all circumstances, the litigant, who

has submitted himself to the judicial power of the United States is deprived of the opportunity to argue or establish a fact record before an Article III judge.

As such, the "substantial evidence" standard deprives litigants of a core element germane to the judicial power of the United States: findings of fact by an impartial Article III judge.

ARGUMENT

I. THE CONSTITUTIONAL STRUCTURE DEMANDS AN INDEPENDENT JUDICIARY.

On April 17, 1554, Sir Nicholas Throckmorton was put to trial on charges of treason against the crown. After the jury unanimously acquitted Throckmorton, the Queen's attorney sought to punish the jurors:

> And it please you my lords, forsomuch as it séemeth that these mene of the iurie which haue strangelie acquitted the prisoner of his treasons wherof he was indicted, will forthwith depart the court. I praie you for the the quéene, that they, and euerie of them maie bée bound in a recognizance of fiue hundred pounds a péece to answer to such matters as they shall be charged with in the quèenes behalf, whensoeuer they shall be charged or called.

Raphael Holinshed, *Chronicles of England, Scotland and Ireland*, 55 (1807-08), available at:

https://archive.org/details/chroniclesofengl04holiuoft/page/54/mode/2up?view=theater. Throckmorton was returned to prison, joined by the jury that had just acquitted him. While Throckmorton was later released on bond and fled to France, three jurors were later charged with fines of 2,000 pounds, and the other five were fined 220 pounds each; Throckmorton's case remains a prime example of the need for a strong and independent Judiciary. *Id.* At 64.

Rather than being subject to an impartial judiciary, Throckmorton and the finders of fact were subject to the whims of the Crown.

a. The Drafters of an Impartial and Independent Judiciary.

Judicial independence, as an integral aspect of American political identity, predates the Constitution itself. Amongst the grievances listed against King George in the Declaration of Independence was the accusation that "He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Declaration of Independence, ¶ 7 (1776). Amongst the litany of other grievances, the founders considered judicial independence sufficiently important to lay it as a charge against the impropriety of the Crown's governance.

The separation of the judicial power of the United States from the two political branches was thereafter integrated into the U.S. Constitution. As

Hamilton explained in Federalist 78, life tenure, upon good behavior, is a designed protection;

> [i]n a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton described the Judiciary as "in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches" but that "permanent in officer" was the strongest contributor "to its firmness and independence." *Id.* As such, the security of its independence was pivotal.

In Federalist Paper No. 79 Hamilton described the propriety of salary security, saying that "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . A POWER OF A MAN's SUBSISTANCE AMOUNTS TO A POWER OVER HIS WILL." The Federalist No. 79, at 742 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

This wholly separate judicial body was designed to the particular advantage of all those who would be subject to the judicial power of the United States. As Chief Justice John Marshall famously said,

in a series of debates regarding the Virginia State Convention:

> Does not every man feel that his own personal security and the security of his property depends on [judicial] fairness? The judicial department comes home in its effects to every man's fireside: it passess on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and Conscience? . . . I have always thought from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a *dependent Judiciary*.

Debates Va. Conv. 1829-1831, pp. 616, 619 (emphasis added). As Chief Judge Marshall acknowledges the advantages of an impartial judiciary though salary protection and life tenure are not to the boon of the adjudicators, but to the adjudicated – it is the privilege and right of a citizen seeking remedy, or contesting a claim, when submitting themselves to the judicial power of the United States, to present their grievances or their counter arguments before a true and neutral arbitrator. That neutrality is assured by the constitutional design of Article III, and where the government seeks to utilize its coercive power for the enforcement of its laws, it is that neutral arbitrator upon which the accused relies for the satisfaction of

due process. *See O'Donoghue v. United States*, 389 U.S. 516, 532-34 (1933); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

II. THE APPELLATE MODEL AND THE REASSIGNMENT OF FACT FINDING

In the Throckmorton case the Executive imposed its control upon the finders of fact ex-post; under the appellate model established in 15 U.S.C. § 78y(a)(4), the Executive may impose its control ex-ante. The appellate model for administrative hearings is directly at odds with the structure envisioned by Article III.

a. The Appellate Model in Article III.

For a case originating in an Article III court, the reviewing court makes a fact-law distinction, deciding the case based exclusively on the record established in the originating court. *See* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. Rev. 993 (1989); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Col. L. Rev. 940 (2011). A trial court, having control over both evidence admission and witnesses, is assumed to have superior competence to resolve questions of fact, while the reviewing court is presumed to have superior competence as to questions of law. *Salve Regina Coll. v. Russell*, 499 U.S. 25, 231-33 (1991) (summarizing the reasons for the distinction between questions of

law and questions of fact in civil litigation); Merrill, at 940.

The deference an appellate court pays to the fact finder extends even to findings that "do not rest on credibility determinations" but are merely based on inferences from other facts." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

b. The Appellate Model in Administrative Law.

This Court has acknowledged that the Commission "effectively fills in for the district court, with the court of appeals providing judicial review." *Axon Enterprise, Inc. v. Federal Trade Commission, et al.*, 143 S.Ct. 890, 900 (2023). Under 15 U.S.C. § 78y(a)(3), upon the appeal of final order of the Securities and Exchange Commission, Article III courts are empowered "to affirm or modify and enforce or to set aside the order in whole or in part." But "[t]he findings of the Commission as to the facts, if supported by substantial evidence, are conclusive." The Commissions' authority extends to the jeopardy of personal property, and the assessment of fines germane to their authority. *See e.g.,* 15 U.S.C. § 78u(d)(3). As such, Congress has vested the primary "authority to adjudicate core private rights" into an administrative agency, "with only deferential judicial review on the back end." *Axon Enterprise, Inc.* 143 S.Ct. at 906 (2023) (Thomas, J., Concurring). *See also,* G. Lawson, *The Rise of the Administrative State*, 107 Harv. L. Re. 1231, 1247 (1994) ("imposition of civil penalty of fine" implicates core Article III power).

In *Universal Camera Corp. v. NLRB*, this Court closely examined the "substantial evidence" standard concluding that such a standard requires the reviewing court to consider the whole record. 340 U.S. 474, 488 (1951). However, the Court warned that canvassing the whole record "does not mean that even as to matters not requiring expertise a court may displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Id.*

While this Court made clear that the "substantial evidence" standard is distinct from "clear error" standard under Fed. R. Civ. P. 52(a)(6), *see Dickenson v. Zurko*, 527 U.S. 150 (1999), both require that the reviewing court refrain from substituting its judgment over issues of fact settled by the lower adjudicative body. Thus, under the "substantial evidence" standard the reviewing Article III court effectively mirrors its practice under the "clear error" standard. Accordingly, this "substantial evidence" standard prevents litigants from establishing a fact record related to a core private right through an adjudicator whose impartiality is part of a deliberate constitutional design.

III. THE RESULTANT LOSS OF IMPARTIALITY.

It is certainly true that "parties to a case on appeal have already been forced to concentrate their energies and resources on persuading [their adjudicator] that their account of facts is the correct one." *Anderson*, 470 U.S. at 575. However, only in an Article III court have those facts and the resultant

record been adjudicated by a person whose impartiality is established under Article III. A litigant resolving a claim originating in an Article II tribunal enjoys no similar security that their record has been established by an equivalently impartial adjudicator. This is not to say that administrative adjudicators are as a default prejudiced, merely as function of their office. Nor is this to say that all Article III adjudicators are immune from bias or prejudice. Rather, this merely says that where a litigant is subject to, or avails themselves of, the adjudicative authority of the United States, their ability to establish a record should conform to the framework envisioned under Article III.

Where litigants such as Jarkesy contest the assessment of civil fines by the Security and Exchange Commission, such litigants are beholden to a record established by an arbitrator whose station may be revoked by another administrative agency, 5 U.S.C. § 7521, rather than by the heightened threshold of impeachment.

Under 15 U.S.C. § 78y(a)(4)'s substantial evidence standard, litigants in Article II tribunals are deprived of the right to a factual record developed by an Article III adjudicator. With 15 U.S.C. § 78y(a)(4) Congress unconstitutionally reserved into a non-adjudicative body the sole authority to establish the record on issues of fact, binding subsequent Article III adjudicators on appeal from considering such facts *de novo*. Insofar as the framers sought to ensure the impartiality of the judicial power of the United States, 15 U.S.C. § 78y(a)(4) serves as the equivalent of a law that declares only the constable has the sole discretion

to set the fact, with heightened judicial deference. Insofar as the framers were concerned that judicial power could be captured by either of the political branches, 15 U.S.C. § 78y(a)(4) submits a core element of the judicial process to the political body of government charged with enforcing the law.

If litigants have the Constitutional right to submit their claims to impartial adjudicators with life tenure and salary security, 15 U.S.C. § 78y(a)(4) encroaches upon that right. The statute declares that adjudicators without the Constitutionally designed protections of impartiality have broad control over an adjudicative fact record.

CONCLUSION

For the foregoing reasons, the Court should hold that 15 U.S.C. § 78y(a)(4) is an unconstitutional encroachment on the separation of powers.

Respectfully Submitted,

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