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**In the Supreme Court of the United States**

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SECURITIES AND EXCHANGE COMMISSION, PETITIONER

*v.*

GEORGE R. JARKESY, JR. AND PATRIOT28, L.L.C.

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

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**BRIEF FOR THE PETITIONER**

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## QUESTIONS 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.

**TABLE OF CONTENTS**

	Page
Opinions below .....	1
Jurisdiction.....	1
Constitutional and statutory provisions involved.....	2
Statement:	
A. Legal background .....	2
B. Factual background and proceedings below .....	6
Summary of argument .....	13
Argument:	
I. Congress acted constitutionally in empowering the SEC to adjudicate violations of the federal securities laws and to impose civil monetary penalties .....	17
A. An agency adjudication complies with Article III, and therefore with the Seventh Amendment, if it involves public rights .....	18
B. SEC proceedings seeking civil penalties for violations of federal securities laws involve public rights .....	21
C. The court of appeals’ Seventh Amendment holding is premised on a misreading of this Court’s decisions .....	25
II. The SEC’s decision whether to enforce the securities laws through a district court suit or through an agency adjudication does not implicate the nondelegation doctrine .....	34
A. When the SEC decides whether to bring particular enforcement proceedings in an administrative or judicial forum, it exercises a type of executive power that typically is not subject to any statutory constraint .....	34
B. In authorizing the Commission to choose between two available enforcement mechanisms in a particular case, Congress did not delegate its own legislative power .....	36

IV

Table of Contents—Continued:	Page
C. The court of appeals’ nondelegation holding is premised on a misunderstanding of “legislative power” .....	40
III. The tenure protection afforded to SEC ALJs complies with Article II.....	44
A. Congress may grant ALJs tenure protection .....	46
B. The existence of tenure protection for the heads of the appointing agency does not render its ALJs’ tenure protection unconstitutional .....	47
1. Congress has more leeway to grant tenure protection to adjudicators than to other executive officers .....	50
2. The SEC has adequate alternative mechanisms for controlling its ALJs’ exercise of executive power .....	56
3. The standard for removing ALJs is less demanding than the standard that governed removal of PCAOB members in <i>Free Enterprise Fund</i> .....	59
C. The tenure protection afforded to members of the MSPB does not render SEC ALJs’ tenure protection unconstitutional .....	61
1. Congress may empower the MSPB to determine whether good cause supports removal .....	61
2. An ALJ’s statutory entitlement to a hearing before the MSPB creates no constitutional infirmity.....	63
D. Holding Section 7521 unconstitutional as applied to ALJs in independent agencies would upset longstanding practice and thwart Congress’s efforts to promote the actual and perceived fairness of agency adjudications .....	65

Table of Contents—Continued:	Page
E. If this Court finds Section 7521 unconstitutional as applied to SEC ALJs, it should hold that the SEC may remove its ALJs at will, and it should remand the case to allow the Fifth Circuit to determine whether respondents were prejudiced by the removal restriction .....	66
Conclusion .....	68
Appendix — Constitutional and statutory provisions .....	1a

**TABLE OF AUTHORITIES**

Cases:

<i>A. L. A. Schechter Poultry Corp.</i>	
<i>v. United States</i> , 295 U.S. 495 (1935) .....	37
<i>Abrams v. SSA</i> , 703 F.3d 538 (Fed. Cir. 2012) .....	60
<i>Andrews v. King</i> , 77 Me. 224 (1885) .....	64
<i>Appeal of Willard</i> , 4 R.I. 597 (1857) .....	64
<i>Atlas Roofing Co. v. Occupational Safety &amp; Health Review Comm’n</i> ,	
430 U.S. 442 (1977).....	13, 18, 19, 21-25, 28, 31, 44
<i>Bakelite Corp., Ex parte</i> , 279 U.S. 438 (1929) .....	18, 23
<i>Baldwin v. New York</i> , 399 U.S. 66 (1970) .....	44
<i>Biggs v. McBride</i> , 21 P. 878 (Or. 1889) .....	64
<i>Block v. Hirsh</i> , 256 U.S. 135 (1921) .....	20, 28
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	35
<i>Butz v. Economou</i> , 438 U.S. 478 (1978) .....	53, 54, 66
<i>Chocallo, In re</i> , 1 M.S.P.R. 605 (1980) .....	60
<i>City of Arlington v. FCC</i> , 569 U.S. 290 (2013) .....	37
<i>City of Exeter v. Glide</i> ,	
(1691) 90 Eng. Rep. 992 (K.B.) .....	64
<i>Collins v. Yellen</i> , 141 S. Ct. 1761 (2021) .....	67
<i>Commodity Futures Trading Comm’n v. Schor</i> ,	
478 U.S. 833 (1986) .....	28

## VI

Cases—Continued:	Page
<i>Commonwealth v. Slifer</i> , 25 Pa. 23 (1855) .....	64
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932) .....	18, 28
<i>Department of Commerce v. New York</i> , 139 S. Ct. 2551 (2019) .....	51
<i>Dullam v. Willson</i> , 19 N.W. 112 (Mich. 1884) .....	64
<i>Edmond v. United States</i> , 520 U.S. 651 (1997).....	56
<i>Ernst &amp; Ernst v. Hochfelder</i> , 425 U.S. 185 (1976) .....	3, 31
<i>Flaherty &amp; Crumrine Preferred Income Fund</i> , <i>Inc. v. TXU Corp.</i> , 565 F.3d 200 (5th Cir.), cert. denied, 558 U.S. 873 (2009) .....	30
<i>Free Enter. Fund v. PCAOB</i> , 561 U.S. 477 (2010)..	2, 10, 16, 45, 47-52, 56, 57, 59, 60, 65, 66
<i>Freytag v. Commissioner</i> , 501 U.S. 868 (1991) .....	54
<i>Granfinanciera, S. A. v. Nordberg</i> , 492 U.S. 33 (1989) .....	9, 20, 26-28
<i>Gundy v. United States</i> , 139 S. Ct. 2116 (2019).....	15, 36, 37
<i>Ham v. Board of Police</i> , 7 N.E. 540 (Mass. 1886).....	64
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985).....	15, 34-36
<i>Helvering v. Mitchell</i> , 303 U.S. 391 (1938) .....	22
<i>Hennen, Ex parte</i> , 38 U.S. (13 Pet.) 230 (1839).....	46
<i>HHS v. Jarboe</i> , 2023 M.S.P.B. 22 (Aug. 2, 2023).....	60, 63
<i>Hughes v. SEC</i> , 174 F.2d 969 (D.C. Cir. 1949) .....	30
<i>Humphrey's Ex'r v. United States</i> , 295 U.S. 602 (1935).....	62
<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	9, 40-43
<i>Kokesh v. SEC</i> , 581 U.S. 455 (2017) .....	24
<i>Kollock, In re</i> , 165 U.S. 526 (1897).....	37
<i>Lloyd Sabaudo Societa Anonima Per Azioni</i> <i>v. Elting</i> , 287 U.S. 329 (1932) .....	23
<i>Loving v. United States</i> , 517 U.S. 748 (1996) .....	38
<i>Lucia v. SEC</i> , 138 S. Ct. 2044 (2018) .....	7, 49, 58

VII

Cases—Continued:	Page
<i>Lynch v. Chase</i> , 40 P. 666 (Kan. 1895).....	64
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803).....	54
<i>Marshall Field v. Clark</i> , 143 U.S. 649 (1892) .....	37
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989) .....	36, 37
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988).....	47, 50, 60-62
<i>Myers v. United States</i> , 272 U.S. 52 (1926) .....	46, 47, 50, 55
<i>N. Sims Organ &amp; Co. v. SEC</i> , 293 F.2d 78 (2d Cir. 1961), cert. denied, 368 U.S. 968 (1962).....	30
<i>NLRB v. Jones &amp; Laughlin Steel Corp.</i> , 301 U.S. 1 (1937) .....	19
<i>NLRB v. Noel Canning</i> , 573 U.S. 513 (2014) .....	65
<i>North Am. Co. v. SEC</i> , 327 U.S. 686 (1946) .....	24
<i>Oceanic Steam Navigation Co. v. Stranahan</i> , 214 U.S. 320 (1909).....	23
<i>Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC</i> , 138 S. Ct. 1365 (2018) .....	13, 18, 20, 21, 32, 33
<i>Panama Ref. Co. v. Ryan</i> , 293 U.S. 388 (1935) .....	36, 37
<i>Passavant v. United States</i> , 148 U.S. 214 (1893) .....	23
<i>People ex rel. Mayor v. Nichols</i> , 79 N.Y. 582 (1880) .....	64
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972) .....	63
<i>Ramspeck v. Federal Trial Exam’rs Conference</i> , 345 U.S. 128 (1953) .....	53, 60, 66
<i>Reagan v. United States</i> , 182 U.S. 419 (1901) .....	63
<i>Regina v. Ballivos</i> , (1705) 92 Eng. Rep. 313 (Q.B.) .....	64
<i>Rex v. Mayor</i> , (1759) 97 Eng. Rep. 533 (K.B.) .....	64
<i>SEC v. Blavin</i> , 760 F.2d 706 (6th Cir. 1985) .....	25, 30
<i>SEC v. Capital Gains Research Bureau, Inc.</i> , 375 U.S. 180 (1963).....	3, 31
<i>SEC v. Chenery Corp.</i> , 332 U.S. 194 (1947).....	52

VIII

Cases—Continued:	Page
<i>Seila Law LLC v. CFPB</i> , 140 S. Ct. 2183 (2020) ....	47, 50, 51
<i>Shurtleff v. United States</i> , 189 U.S. 311 (1903) .....	63, 64
<i>SSA v. Burris</i> , 39 M.S.P.R. 51 (1988) .....	60
<i>SSA v. Goodman</i> , 19 M.S.P.R. 321 (1984) .....	60
<i>SSA v. Levinson</i> , 2023 M.S.P.B. 20 (July 12, 2023) .....	63
<i>SSA v. Long</i> , 113 M.S.P.R. 190 (2010) .....	60
<i>SSA v. Mills</i> , 73 M.S.P.R. 463 (1996) .....	60
<i>SSA v. Steverson</i> , 111 M.S.P.R. 649 (2009) .....	60
<i>State ex rel. Attorney Gen. v. Hawkins</i> , 5 N.E. 228 (Ohio 1886) .....	64
<i>State ex rel. Hart v. Common Council</i> , 55 N.W. 118 (Minn. 1893) .....	64
<i>Stern v. Marshall</i> , 564 U.S. 462 (2011) .....	18
<i>Stoneridge Inv. Partners, LLC v. Scientific-Atlanta</i> , <i>Inc.</i> , 552 U.S. 148 (2008) .....	30
<i>The Cargo of the Brig Aurora v. United States</i> , 11 U.S. (7 Cranch) 382 (1813) .....	37
<i>Touby v. United States</i> , 500 U.S. 160 (1991) .....	37
<i>TransUnion LLC v. Ramirez</i> , 141 S. Ct. 2190 (2021) .....	35
<i>Tull v. United States</i> , 481 U.S. 412 (1987) .....	9, 19, 28, 29
<i>United States v. Arthrex, Inc.</i> , 141 S. Ct. 1970 (2021) .....	54, 56, 58, 59
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979) .....	11, 35, 38, 39, 43
<i>United States v. Germaine</i> , 99 U.S. 508 (1879) .....	48
<i>United States v. Gordon</i> , 548 F.2d 743 (8th Cir. 1977) .....	44
<i>United States v. Grimaud</i> , 220 U.S. 506 (1911) .....	37
<i>United States v. LaSalle Nat'l Bank</i> , 437 U.S. 298 (1978) .....	43
<i>United States v. Perkins</i> , 116 U.S. 483 (1886) ..	16, 46, 47, 62
<i>United States v. Texas</i> , 143 S. Ct. 1964 (2023) .....	34, 51



IX

Cases—Continued:	Page
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	5, 58
<i>Wayman v. Southard</i> , 23 U.S. (10 Wheat.) 1 (1825).....	36
<i>Weston v. City Council</i> , 27 U.S. (2 Pet.) 449 (1829).....	19
<i>Whitman v. American Trucking Ass'ns</i> , 531 U.S. 457 (2001).....	34, 36, 37
<i>Wiener v. United States</i> , 357 U.S. 349 (1958).....	62
<i>Wise v. Withers</i> , 7 U.S. (3 Cranch) 331 (1806).....	54
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975).....	53
<i>Wong Yang Sung v. McGrath</i> , 339 U.S. 33 (1950).....	53, 66
<i>Yakus v. United States</i> , 321 U.S. 414 (1944).....	37

Constitution, statutes, regulations, and rule:

U.S. Const.:

Art. I.....	15, 36
§ 1 .....	36, 1a
§ 8, Cl. 3 (Commerce Clause) .....	24
Art. II.....	8, 10, 12, 16, 34, 45, 47-50, 55-57, 65
§ 2, Cl. 2 (Appointments Clause).....	7, 46, 49, 50, 1a
§ 3 .....	14, 34, 1a
Art. III.....	13, 14, 17-21, 25, 26, 28, 33, 34, 43, 54
§ 1 .....	18, 54, 2a
Amend. VII.....	8, 10-14, 17, 19-21, 27-29, 32, 67, 2a
Amend. XIV (Due Process Clause) .....	53, 63
Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 107 .....	54
Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 .....	55
Act of June 30, 1906, ch. 3934, § 7, 34 Stat. 816 .....	55
Act of Mar. 27, 1908, ch. 205, § 3, 35 Stat. 406 .....	55
Act of June 2, 1924, ch. 234, § 900(b), 43 Stat. 336-337 .....	55
Act of June 17, 1930, ch. 497, 46 Stat. 590:	
§ 518, 46 Stat. 737-739.....	55

Statutes, regulations, and rule—Continued:	Page
§ 646, 46 Stat. 762 .....	55
Administrative Procedure Act, ch. 324,	
60 Stat. 237 (5 U.S.C. 551 <i>et seq.</i> , 701 <i>et seq.</i> ).....	4
§§ 5-8, 60 Stat. 239-242.....	4
§ 11, 60 Stat. 244 .....	4, 65
5 U.S.C. 554-557.....	4
5 U.S.C. 556(a) .....	57
5 U.S.C. 556(b).....	5
5 U.S.C. 556(c) .....	5, 57
5 U.S.C. 557(b).....	5, 45, 58
5 U.S.C. 701(a)(2).....	35
Civil Service Reform Act of 1978,	
§ 204, 92 Stat. 1134-1138 .....	65
Clean Water Act, 33 U.S.C. 1251 <i>et seq.</i> .....	28
Insider Trading Sanctions Act of 1984,	
Pub. L. No. 98-376, 98 Stat. 1264 .....	4
Investment Advisers Act of 1940,	
15 U.S.C. 80b-1 <i>et seq.</i> .....	2
15 U.S.C. 80b-1 .....	24
15 U.S.C. 80b-3 .....	3, 24, 7a
15 U.S.C. 80b-6(4).....	30
15 U.S.C. 80b-9 .....	3, 9a
Investment Company Act of 1940,	
15 U.S.C. 80a-1 <i>et seq.</i> .....	2
Occupational Safety and Health Act of 1970,	
29 U.S.C. 651 <i>et seq.</i> .....	21
Securities Act of 1933, 15 U.S.C. 77a <i>et seq.</i> .....	2
15 U.S.C. 77h-1 .....	3, 24, 3a
15 U.S.C. 77q(a).....	30
15 U.S.C. 77t .....	3, 4a

XI

Statutes, regulations, and rule—Continued:	Page
Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 .....	4
Securities Exchange Act of 1934, 15 U.S.C. 78a <i>et seq.</i> .....	2
15 U.S.C. 78b.....	3, 24, 30
15 U.S.C. 78d(a).....	2
15 U.S.C. 78d-1(a).....	4
15 U.S.C. 78j (1946).....	30
15 U.S.C. 78j (1958).....	30
15 U.S.C. 78u(d) (2018 & Supp. III 2021) .....	3, 5a
15 U.S.C. 78u-2 .....	3, 24, 6a
15 U.S.C. 78u-3 .....	3, 24
15 U.S.C. 78y(a)(1) .....	3
5 U.S.C. 1201 .....	5
5 U.S.C. 1202(d) .....	5, 10, 61
5 U.S.C. 1215 .....	6
5 U.S.C. 3105 .....	4, 5
5 U.S.C. 3502 .....	6
5 U.S.C. 7104(b) .....	64
5 U.S.C. 7521 .....	4, 5, 17, 45, 50, 53, 55, 60, 61, 65-67, 2a
5 U.S.C. 7521(a) .....	10, 45, 58, 60-62, 65, 2a
5 U.S.C. 7521(b)(A).....	6, 3a
5 U.S.C. 7521(b)(B).....	6, 60, 3a
5 U.S.C. 7521(b)(C).....	6, 3a
5 U.S.C. 7532(b) .....	6
5 U.S.C. 7703 .....	6
7 U.S.C. 9(4) .....	33
7 U.S.C. 9(10) .....	33
7 U.S.C. 13a-1(a) .....	33
7 U.S.C. 13a-1(d).....	33

XII

Statutes, regulations, and rule—Continued:	Page
7 U.S.C. 6992(b)(2).....	55
10 U.S.C. 942(c).....	55, 64
12 U.S.C. 5563(a) .....	33
12 U.S.C. 5564(a) .....	33
12 U.S.C. 5565(a)(1).....	33
12 U.S.C. 5565(a)(2)(H).....	33
16 U.S.C. 1852(b)(6)(B).....	64
21 U.S.C. 335b(b)(1) .....	33
22 U.S.C. 4106(e) .....	64
22 U.S.C. 4135(d) .....	64
26 U.S.C. 7443(f).....	64
28 U.S.C. 152(e) .....	54, 64
28 U.S.C. 157(b)(2)(H) (Supp. V 1987).....	26
28 U.S.C. 176(b) .....	64
28 U.S.C. 631(i) .....	54, 64
29 U.S.C. 153(a) .....	64
33 U.S.C. 1319(a) .....	33
33 U.S.C. 1319(b) .....	33
33 U.S.C. 1319(g) .....	33
35 U.S.C. 282(b)(2).....	33
35 U.S.C. 282(b)(3).....	33
38 U.S.C. 7101(b)(2).....	55, 64
38 U.S.C. 7253(f).....	55, 64
39 U.S.C. 3018(c).....	33
39 U.S.C. 3018(d) .....	33
39 U.S.C. 3018(g) .....	33
41 U.S.C. 7105(b)(3).....	55
48 U.S.C. 1424b(a) .....	54
48 U.S.C. 1614(a) .....	54
48 U.S.C. 1821(b)(1).....	54

XIII

Regulations and rule—Continued:	Page
17 C.F.R.:	
Section 200.30-9 .....	4, 52
Sections 201.200-201.360.....	4
Section 201.200(a).....	53
Section 201.410 .....	4
Section 201.411 .....	4
Section 201.411(a).....	5
Fed. R. Crim. P. 7(a) .....	44
Miscellaneous:	
Aditya Bamzai, <i>Taft, Frankfurter, and the</i>	
<i>First Presidential For-Cause Removal,</i>	
52 U. Rich. L. Rev. 691 (2018) .....	64
H.R. Rep. No. 616, 101st Cong., 2d Sess. (1990) .....	4
S. Rep. No. 337, 101st Cong., 2d Sess. (1990) .....	4, 31
3 Joseph Story, <i>Commentaries on the Constitution</i>	
<i>of the United States</i> (1833).....	47
U.S. Dep't of Justice:	
<i>Attorney General's Manual on the Administra-</i>	
<i>tive Procedure Act</i> (1947) .....	59
<i>Justice Manual</i> (June 2023) .....	43
2 Paul R. Verkuil et al., Administrative Conference of	
the United States, Recommendations and Reports,	
<i>The Federal Administrative Judiciary</i> (1992) .....	44, 45

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*v.*

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

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## **BRIEF FOR THE PETITIONER**

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### **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 34 F.4th 446. The order of the court of appeals denying rehearing en banc (Pet. App. 63a-70a) is reported at 51 F.4th 644. The opinion and order of the Securities and Exchange Commission (Pet. App. 71a-154a) is available at 2020 WL 5291417. The initial decision of the administrative law judge (Pet. App. 155a-225a) is available at 2014 WL 5304908.

### **JURISDICTION**

The judgment of the court of appeals was entered on May 18, 2022. A petition for rehearing was denied on October 21, 2022 (Pet. App. 63a-70a). On January 6, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 17, 2023. On January 30, 2023, Justice Alito

further extended the time to and including March 20, 2023. The petition was filed on March 8, 2023, and granted on June 30, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

Relevant constitutional and statutory provisions are reproduced in the appendix. App., *infra*, 1a-9a.

**STATEMENT**

**A. Legal Background**

1. In 1934, Congress established the Securities and Exchange Commission (SEC or Commission) to protect investors, to maintain fair, orderly, and efficient markets, and to facilitate capital formation. 15 U.S.C. 78d(a). The Commission consists of five members appointed by the President with the advice and consent of the Senate. *Ibid.* Although no statutory provision expressly addresses the circumstances under which SEC Commissioners may be removed, this Court decided *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), “with th[e] understanding” that the Commissioners are removable only for cause. *Id.* at 487. This case has been litigated on the same understanding. See Pet. 20; Pet. App. 143a-146a; Gov’t C.A. Br. 37-38.

The Commission administers a variety of federal statutes that together establish a comprehensive scheme for securities regulation. Those include the Securities Act of 1933 (Securities Act), 15 U.S.C. 77a *et seq.*; the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*; the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*; and the Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. 80b-1 *et seq.*

Congress found that securities transactions “are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto.” 15 U.S.C. 78b. The securities laws are principally designed to “eliminate \* \* \* abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930’s” by adopting a “philosophy of full disclosure” to “achieve a high standard of business ethics in the securities industry.” *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963); see *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). That “prophylaxis of disclosure” prevents “not only \* \* \* dishonor, but also \* \* \* conduct that tempts dishonor.” *Capital Gains Research Bureau*, 375 U.S. at 199 (citation omitted). The securities laws also “protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets.” *Ernst & Ernst*, 425 U.S. at 195.

The SEC may enforce the securities laws in two ways that are relevant here. First, it may bring civil actions in federal district court seeking civil penalties, injunctions, and other remedies. 15 U.S.C. 77t, 80b-9; 15 U.S.C. 78u(d) (2018 & Supp. III 2021). Second, it may institute administrative enforcement proceedings seeking civil penalties, cease-and-desist orders, and other remedies. 15 U.S.C. 77h-1, 78u-2, 78u-3, 80b-3. If the Commission institutes an administrative enforcement proceeding and issues a final order that is adverse to a respondent, that party may obtain judicial review by filing a petition in a court of appeals. 15 U.S.C. 78y(a)(1).

In 1984, Congress authorized the SEC to seek civil penalties in federal court for insider trading and related



violations. See The Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264. In 1990, Congress empowered the Commission to seek civil penalties for non-insider-trading violations in federal court and in administrative proceedings. See Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931. The Senate Report explained that “money penalties \* \* \* are needed to provide financial disincentive[] to \* \* \* violations” of the securities laws, particularly in cases where investors may “be exposed to significant risk of loss.” S. Rep. No. 337, 101st Cong., 2d Sess. 10 (1990) (Senate Report). The Report also concluded that civil penalties would help preserve “the integrity of the securities markets” by assuring “investors that those who participate in the markets will play by the same rules, [and] by ensuring that those who break the rules will be detected, prosecuted, and appropriately sanctioned.” *Id.* at 6; see H.R. Rep. No. 616, 101st Cong., 2d Sess. 13-23 (1990).

2. In 1946, Congress enacted the Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (5 U.S.C. 551 *et seq.*, 701 *et seq.*). The APA regulated agencies’ appointment, use, and removal of “hearing examiners”—now known as administrative law judges (ALJs). See §§ 5-8, 11, 60 Stat. 239-242, 244. The APA’s framework remains in place today, although many of its provisions have since been amended and recodified. See 5 U.S.C. 554-557, 3105, 7521. The SEC follows that framework in conducting administrative enforcement proceedings. See 15 U.S.C. 78d-1(a); 17 C.F.R. 200.30-9, 201.200-201.360, 201.410, 201.411.

Under the relevant APA provisions in their current form, each agency has the power to appoint ALJs. See

5 U.S.C. 3105. An agency may assign the initial hearing in an adjudication to the agency itself, to one or more members of the agency, or to an ALJ. See 5 U.S.C. 556(b). An ALJ who presides over a hearing may “administer oaths and affirmations,” “issue subpoenas,” “rule on offers of proof,” “receive relevant evidence,” “take depositions,” “regulate the course of the hearing,” “hold conferences,” and “dispose of procedural requests.” 5 U.S.C. 556(c). An ALJ’s exercise of those powers is “[s]ubject to published rules of the agency.” *Ibid.*

After conducting the hearing, the ALJ must make an initial decision, unless the agency reserves the making of the initial decision for itself. See 5 U.S.C. 557(b). A party may appeal the ALJ’s initial decision to the agency, and the agency also may review the decision on its own motion. See *ibid.* On review, “the agency has all the powers which it would have in making the initial decision.” *Ibid.*; see 17 C.F.R. 201.411(a). The agency may review *de novo* not only the ALJ’s legal conclusions, but also the ALJ’s factual findings. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492-497 (1951).

An agency may remove an ALJ “only for good cause established and determined by the Merit Systems Protection Board” (MSPB) “on the record after opportunity for hearing.” 5 U.S.C. 7521. The MSPB consists of three members who are appointed by the President with the advice and consent of the Senate, see 5 U.S.C. 1201, and who are removable by the President “only for inefficiency, neglect of duty, or malfeasance in office,” 5 U.S.C. 1202(d). An ALJ (like any other federal officer

or employee with similar removal protections) may obtain judicial review of the MSPB's decision in the Federal Circuit. See 5 U.S.C. 7703.

Congress has established three exceptions to that procedure for removing ALJs. First, an agency head may remove an ALJ without the involvement of the MSPB if "he determines that removal is necessary or advisable in the interests of national security." 5 U.S.C. 7532(b); see 5 U.S.C. 7521(b)(A). Second, an agency may release an ALJ as part of a reduction in force. See 5 U.S.C. 3502, 7521(b)(B). Third, ALJs are subject to disciplinary proceedings before the MSPB for violating certain civil-service laws, and the discipline imposed in those proceedings can include removal. See 5 U.S.C. 1215, 7521(b)(C).

#### **B. Factual Background And Proceedings Below**

1. Respondent George Jarkey launched two hedge funds with his advisory firm, respondent Patriot28, L.L.C., serving as the funds' investment adviser. Pet. App. 2a. The funds attracted approximately 120 investors and managed approximately \$24 million in assets. *Id.* at 2a, 72a.

Respondents violated the securities laws in multiple ways. Respondents represented to brokers and investors that a prominent accounting firm served as the funds' auditor and that a prominent investment bank served as their prime broker, even though the firm never audited the funds and the bank never opened a prime brokerage account for them. Pet. App. 80a. Respondents also misrepresented the funds' investment strategies—for example, by repeatedly telling investors that one of the funds would invest 50% of its capital in certain life-insurance policies, even though it invested

less than 20%. *Id.* at 82a-84a. And respondents overvalued the funds' holdings—for example, by arbitrarily inflating the value of certain holdings from \$0.30 per share to \$3.30 per share—so that they could charge higher management fees. *Id.* at 96a, 101a.

2. In 2013, the SEC brought an administrative proceeding against respondents under the Securities Act, Exchange Act, and Advisers Act. Pet. App. 2a. Respondents then sued the SEC in the United States District Court for the District of Columbia, seeking to enjoin the agency adjudication on various constitutional grounds. *Id.* at 3a. The court dismissed the suit for lack of jurisdiction, see 48 F. Supp. 3d 32, and the D.C. Circuit affirmed, see 803 F.3d 9. Those courts held that respondents' claims could be brought only in a court of appeals at the conclusion of the agency proceeding, not in a district court during the pendency of the SEC adjudication. Pet. App. 12a; 48 F. Supp. 3d at 40.

In the meantime, the SEC assigned the initial stages of the proceeding to an ALJ, who held an evidentiary hearing and issued a decision finding that respondents had violated the Securities Act, Exchange Act, and Advisers Act. Pet. App. 155a-225a. In *Lucia v. SEC*, 138 S. Ct. 2044 (2018), this Court subsequently held that the Commission's ALJs had not been appointed in accordance with the Appointments Clause, and that litigants whose cases had been heard by improperly appointed ALJs were entitled to new hearings before different, properly appointed ALJs. *Id.* at 2054-2055. But respondents waived a new hearing, and the Commission proceeded to review the original ALJ's decision. Pet. App. 3a.

The SEC determined that respondents had violated the Securities Act, Exchange Act, and Advisers Act.

Pet. App. 71a-152a. It also rejected respondents' arguments that the imposition of civil penalties in an agency adjudication violated the Seventh Amendment, *id.* at 146a-147a; that the Commission's authority to choose between judicial and administrative enforcement violated the nondelegation doctrine, *id.* at 140a-143a; and that statutory restrictions on the removal of ALJs violated Article II, *id.* at 143a-146a. The Commission ordered respondents to pay a civil penalty of \$300,000 and to cease and desist from their violations of the securities laws. *Id.* at 152a-154a. The SEC also barred Jarkesy from various activities in the securities industry and directed Patriot28 to disgorge nearly \$685,000 in illicit gains. *Id.* at 153a-154a.

3. A divided panel of the Fifth Circuit granted respondents' petition for review, vacated the SEC's decision, and remanded the matter to the Commission for further proceedings. Pet. App. 1a-62a.

a. The court of appeals first held that Congress had violated the Seventh Amendment by empowering the SEC to bring administrative proceedings seeking civil penalties. Pet. App. 5a-20a. The court recognized that, "[w]hen Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Id.* at 8a (citation omitted). The court also acknowledged that Congress may authorize administrative agencies to conduct adjudications involving "public rights." *Ibid.* (citation omitted).

The court of appeals concluded, however, that this Court had "refined the public-right concept as it relates to the Seventh Amendment in *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33 (1989)." Pet. App. 9a. The court

of appeals held that, under *Granfinanciera*, a court must first “determine whether an action’s claims arise ‘at common law’ under the Seventh Amendment.” *Ibid.* (quoting *Tull v. United States*, 481 U.S. 412, 417 (1987)). The court concluded that the Commission’s claims in this case “arise ‘at common law’” because “fraud actions under the securities statutes echo actions that historically have been available under the common law.” *Id.* at 10a, 14a. The court further found that, “if the action involves common-law claims,” a court must consider whether the case involves public rights by examining, among other factors, “whether ‘Congress created a new cause of action’” and “whether jury trials would ‘go far to dismantle the statutory scheme.’” *Id.* at 9a-10a (quoting *Granfinanciera*, 492 U.S. at 60-63) (brackets omitted). The court concluded that this case does not involve public rights because the SEC’s claims arose at common law (and were not created by Congress), and because the Commission could enforce the securities laws in federal district court, where juries are required. *Id.* at 12a-17a.

The court of appeals additionally held that Congress had improperly delegated legislative power to the SEC by giving the agency unconstrained authority to choose in particular cases to seek civil remedies by instituting administrative proceedings rather than by filing suit in district court. Pet. App. 21a-28a. The court stated that “the power to assign disputes to agency adjudication is ‘peculiarly within the authority of the legislative department.’” *Id.* at 25a (citation omitted). The court further held that “[g]overnment actions are ‘legislative’ if they have ‘the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.’” *Ibid.* (quoting *INS v. Chadha*, 462 U.S.

919, 952 (1983)). The court determined as well that, by “effectively [giving] the SEC the power to decide which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not,” Congress had delegated legislative power. *Id.* at 26a-27a. The court stated that “Congress may grant regulatory power to another entity only if it provides an ‘intelligible principle’ by which the recipient of the power can exercise it.” *Id.* at 25a (citation omitted). It concluded that Congress had provided no such principle to guide the Commission’s choice between the two available mechanisms for civil enforcement of the securities laws. *Id.* at 27a-28a.

The court of appeals finally held that the statutory restrictions on the removal of the Commission’s ALJs violated Article II. Pet. App. 28a-34a. The court read this Court’s decision in *Free Enterprise Fund, supra*, to mean that Congress may not grant executive officers “two layers of for-cause protection” from removal. Pet. App. 30a. The court of appeals concluded that Congress had violated that principle here. It noted Congress’s express directive that an agency may remove its ALJs only for cause found by the MSPB. *Id.* at 31a-32a (citing 5 U.S.C. 7521(a)). It stated that “the SEC Commissioners may only be removed by the President for good cause,” *id.* at 32a, and that “MSPB members ‘may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office,’” *id.* at 34a (quoting 5 U.S.C. 1202(d)). The court rejected the Commission’s argument that Congress’s grant of tenure protection to ALJs was permissible in light of their adjudicatory functions. *Id.* at 32a-33a.

The court of appeals concluded that its Seventh Amendment and nondelegation holdings each justified

vacatur of the Commission's order. Pet. App. 20a-21a & n.9. The court accordingly found it unnecessary to decide whether "vacating would be the appropriate remedy based on [the removal issue] alone." *Id.* at 29a n.17.

b. Judge Davis dissented. Pet. App. 36a-62a.

Judge Davis first concluded that the SEC adjudication complied with the Seventh Amendment. Pet. App. 36a-50a. He observed that "cases in which the Government sues in its sovereign capacity to enforce public rights" may be assigned "to an administrative forum with which the jury would be incompatible." *Id.* at 37a-38a (citation and emphasis omitted). He explained that an SEC enforcement proceeding involves public rights because it is brought by the government in its sovereign capacity to vindicate public interests. *Id.* at 41a-43a. And he criticized the majority for "overlook[ing] the fact that *Granfinanciera*[] \* \* \* applies only when the Government is not a party to the case." *Id.* at 46a.

Judge Davis also concluded that the Commission's latitude to choose between judicial and administrative enforcement in particular cases does not violate the nondelegation doctrine. Pet. App. 50a-54a. He explained that, by expressly authorizing the Commission to pursue enforcement actions "in Article III courts or in administrative proceedings," Congress had "fulfilled its duty of controlling the mode of determining public rights cases asserted by the SEC." *Id.* at 51a. He observed that, under *United States v. Batchelder*, 442 U.S. 114 (1979), a prosecutor bringing criminal charges against a defendant can sometimes choose between two criminal statutes that establish "different penalties for essentially the same conduct." Pet. App. 51a-52a (quoting *Batchelder*, 442 U.S. at 121). Judge Davis reasoned that, if the nondelegation doctrine does not preclude



Congress from allowing federal prosecutors “to decide between two criminal statutes that provide for different sentencing ranges,” it does not preclude Congress from allowing the Commission “to decide between two forums that provide different legal processes.” *Id.* at 53a.

Judge Davis finally concluded that the statutory restrictions on removal of ALJs comply with Article II. Pet. App. 54a-56a. He observed that the Court in *Free Enterprise Fund* “did not broadly declare all two-level for cause protections for inferior officers unconstitutional,” but rather “expressly declined to address” restrictions on the removal of ALJs. *Id.* at 56a (citation omitted). He concluded that Congress may properly grant ALJs two layers of removal protection because ALJs “perform solely adjudicative functions.” *Id.* at 58a.

4. The court of appeals denied the Commission’s petition for rehearing en banc by a vote of 10-6. Pet. App. 63a-64a.

Judge Haynes, joined by four other judges, dissented from the denial of rehearing en banc. Pet. App. 65a-70a. She observed that the panel’s Seventh Amendment holding was “in conflict with Supreme Court \* \* \* precedent”; that its nondelegation holding had wrongly treated an agency’s exercise of enforcement discretion “as an exercise of legislative power”; and that its Article II holding would improperly “threaten the independence” of ALJs. *Id.* at 66a, 68a-69a (brackets and citation omitted). Judge Haynes further concluded that the panel decision “deviated from over eighty years of settled precedent”; that it would have “massive impacts on the directly involved statutes”; and that its “potential application to agency adjudication more broadly raises questions of exceptional importance.” *Id.* at 69a-70a.

**SUMMARY OF ARGUMENT**

I. Congress did not violate the Seventh Amendment by empowering the Commission to adjudicate enforcement proceedings in which the government seeks civil penalties from private parties.

Article III generally permits Congress to assign the adjudication of claims involving “public rights” to non-Article III tribunals. Whatever its outer limits may be, the public-rights doctrine clearly permits Congress to create “new statutory obligations,” impose “civil penalties for their violation,” and commit “to an administrative agency the function of deciding whether a violation has in fact occurred.” *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 450 (1977). And when Congress “properly assigns a matter to adjudication in a non-Article III tribunal, ‘the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.’” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (citation omitted).

*Atlas Roofing* is the latest in a long and unbroken line of decisions that have relied on the public-rights doctrine in upholding such statutory schemes against Article III and Seventh Amendment challenges. Those precedents resolve this case. In enacting the securities laws, Congress sought to better protect the investing public by imposing new statutory obligations on regulated parties, and by authorizing the Commission to adjudicate enforcement proceedings in which the government seeks civil penalties and other remedies for violations of those laws. Those provisions are consistent with Article III—and thus also with the Seventh Amendment.

The court of appeals reached a contrary conclusion by overreading decisions of this Court that did not address the aspect of the public-rights doctrine that is applicable here. Because the court of appeals relied on inapposite decisions, it erred in considering whether claims under the securities laws are similar to common-law claims. In any event, the securities laws are distinct from the common law because they authorize the government to seek civil penalties even if no private person has yet suffered harm from the defendant's violation (and therefore no person could obtain damages). In that respect the securities laws are similar to the statutory scheme at issue in *Atlas Roofing*, which targeted conduct (the maintenance of unsafe and unhealthy working conditions) that had an evident *potential* to cause harm to employees, but which authorized awards of civil penalties without a showing of *actual* injury to any worker. Congress's decision to give the SEC the additional option of seeking civil penalties in federal district court does not create an Article III or Seventh Amendment problem when the Commission elects to seek penalties through agency proceedings instead.

II. Congress did not violate the nondelegation doctrine when it permitted the Commission to decide in each case whether to bring a civil enforcement action in federal district court, an enforcement action within the agency, or no enforcement action at all.

When the SEC makes such decisions, it exercises only enforcement discretion, a core executive power that stems from the President's authority to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. "This Court has recognized on several occasions over many years that an agency's decision not to prose-

cute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). And there is no constitutional difference between the power to decide *whether* to bring an enforcement proceeding and the power to choose *where* to bring it; both are executive powers.

The nondelegation doctrine recognizes that Article I bars Congress from impermissibly delegating to the Executive Branch "powers which are strictly and exclusively legislative." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (citation omitted). The Court has considered whether Congress permissibly granted power to the Executive Branch only in cases where federal law authorized executive agencies to adopt broadly applicable rules governing private conduct. The statutory provisions at issue here do not authorize the SEC to adopt such general rules. Rather, they authorize the Commission to initiate particular enforcement proceedings in either of two venues. In electing an administrative forum in this case, the SEC exercised a type of enforcement power that has traditionally been entrusted to executive discretion.

The court of appeals' contrary conclusion rests on a misunderstanding of what constitutes "legislative power." The court also conflated (a) Congress's legislative power to determine the range of enforcement mechanisms that should be available to the agency in particular *categories* of cases with (b) the executive power to choose among permissible enforcement mechanisms in individual cases. The court observed that the Commission's enforcement decisions might affect the legal process that a particular defendant receives. But that is a typical consequence of a variety of routine Executive

Branch enforcement decisions, and it does not suggest an impermissible delegation of legislative power.

III. Congress did not violate Article II in granting tenure protection to the SEC's ALJs.

When Congress vests the appointment of an inferior officer in a department head, "it may limit and restrict the power of removal as it deems best for the public interest." *United States v. Perkins*, 116 U.S. 483, 485 (1886). An SEC ALJ is an inferior officer. Congress therefore may require good cause for the Commission to remove an ALJ.

The fact that the heads of a particular appointing agency have their own tenure protection does not warrant a different result. This Court previously held that Congress had violated Article II by granting two layers of tenure protection to members of the Public Company Accounting Oversight Board. See *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010). But *Free Enterprise Fund* dealt with policymakers, not with adjudicators. Because adjudicators have a distinctive need for decisional independence, Congress has more leeway to grant tenure protection to them than to other executive officers. *Free Enterprise Fund* also indicates that Congress may provide an inferior officer with more than one level of tenure protection if the agency has alternative means of controlling the officer's exercise of executive power. Such an alternative mechanism is available here: The APA allows agencies to assign hearings to themselves rather than to ALJs, to regulate ALJs' functions, to decide whether to allow ALJs to issue initial decisions, and to review any such decisions *de novo*.

The MSPB's role in the removal process does not render ALJs' tenure protection unconstitutional. The agency, not the MSPB, decides whether to remove an

ALJ. The MSPB's role is solely to review the agency's "good cause" determination. The MSPB thus does not add to ALJs' tenure protection; it simply enforces the removal standard established by the statute.

Congress has protected ALJs from removal at will since it enacted the APA more than 77 years ago. Holding Section 7521 unconstitutional as applied to ALJs in independent agencies would upset longstanding practice and would undermine Congress's efforts to promote the actual and perceived fairness of agency hearings.

#### **ARGUMENT**

##### **I. CONGRESS ACTED CONSTITUTIONALLY IN EMPOWERING THE SEC TO ADJUDICATE VIOLATIONS OF THE FEDERAL SECURITIES LAWS AND TO IMPOSE CIVIL MONETARY PENALTIES**

The court of appeals held that Congress violated the Seventh Amendment by empowering the Commission to conduct administrative enforcement proceedings in which the agency seeks civil penalties. That holding was incorrect. If a particular agency adjudication involves public rights and therefore complies with Article III, the Seventh Amendment imposes no independent barrier to the use of an agency adjudicator rather than a jury. The Commission's administrative proceedings in this case involved the enforcement of public rights. The court's contrary conclusion was premised on a misapplication of decisions of this Court that addressed different Seventh Amendment questions.

**A. An Agency Adjudication Complies With Article III, And Therefore With The Seventh Amendment, If It Involves Public Rights**

1. Article III vests the “judicial Power” in the federal courts. U.S. Const. Art. III, § 1. “Consequently, Congress cannot confer the Government’s judicial Power on entities outside Article III.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1372-1373 (2018) (citation and internal quotation marks omitted). “When determining whether a proceeding involves an exercise of Article III judicial power, this Court’s precedents have distinguished between ‘public rights’ and ‘private rights.’ Those precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts.” *Id.* at 1373 (citations omitted); see *Stern v. Marshall*, 564 U.S. 462, 489-491 (2011).

Public-rights cases involve matters that “from their nature do not require judicial determination and yet are susceptible of it.” *Oil States*, 138 S. Ct. at 1373 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). More specifically, the public-rights doctrine “covers matters ‘which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.’” *Ibid.* (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). The doctrine includes situations “where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.” *Atlas Roofing Co. v. Occupational Safety & Review Commission*, 430 U.S. 442, 458 (1977).

2. By its terms, the Seventh Amendment preserves “the right of trial by jury” in “Suits at common law,

where the value in controversy shall exceed twenty dollars.” U.S. Const. Amend. VII (emphasis added). A “suit” is a “proceeding in a court of justice.” *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 464 (1829) (Marshall, C.J.). An agency hearing “is not a suit at common law or in the nature of such a suit.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). Under its plain text, the Seventh Amendment therefore “is not applicable to administrative proceedings.” *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987).

In *Atlas Roofing*, the Court noted the concern that, if the applicability of the Seventh Amendment “depend[s] on the identity of the forum to which Congress has chosen to submit a dispute,” then “Congress could utterly destroy the right to a jury trial by always providing for administrative rather than judicial resolution of the vast range of cases that now arise in the courts.” 430 U.S. at 457. The Court did not dispute that this would be a serious practical concern if Congress’s power to authorize agency adjudication was otherwise unconstrained. The Court explained, however, that its precedents “support[ed] administrative factfinding in only those situations involving ‘public rights,’” such that “[w]holly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.” *Id.* at 458.

In identifying the practical safeguards against unconstitutional incursions on the Seventh Amendment right to a jury trial, the Court thus referenced the “public rights” principles described above, which govern the determination whether Article III allows Congress to assign a particular dispute to an administrative forum. In circumstances where an “action must be tried under the auspices of an Article III court, \* \* \* the Seventh



Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature.” *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 53 (1989). But when a dispute involving “public rights” is permissibly adjudicated in an administrative forum, this Court’s precedents do not contemplate any further Seventh Amendment inquiry. Rather, the Court has repeatedly held that, “when Congress properly assigns a matter to adjudication in a non-Article III tribunal, ‘the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.’” *Oil States*, 138 S. Ct. at 1379 (quoting *Granfinanciera*, 492 U.S. at 53-54); see *Block v. Hirsh*, 256 U.S. 135, 158 (1921). As explained above, that rule follows logically from the Seventh Amendment’s reference to “Suits,” a term that does not encompass agency proceedings. U.S. Const. Amend. VII.

This Court’s decision in *Oil States* illustrates the relationship among Article III, the Seventh Amendment, and the public-rights doctrine. In *Oil States*, a party argued that Congress’s authorization of inter partes review—a mechanism by which the U.S. Patent and Trademark Office (USPTO) can reconsider and cancel a patent after an administrative hearing—violates Article III and the Seventh Amendment. See 138 S. Ct. at 1370-1372. The Court rejected the Article III challenge. *Id.* at 1372-1379. The Court explained that, because the USPTO’s decision to reconsider its prior issuance of a patent involved a matter of public rights, that decision could permissibly be entrusted to Executive Branch officials rather than to an Article III court. See *ibid.* The Court then concluded that its “rejection of [the] Article III challenge also resolves [the] Seventh Amendment challenge.” *Id.* at 1379.

**B. SEC Proceedings Seeking Civil Penalties For Violations Of Federal Securities Laws Involve Public Rights**

1. “This Court has not ‘definitively explained’ the distinction between public and private rights,” *Oil States*, 138 S. Ct. at 1373 (citation omitted), and the Court need not do so in order to resolve this case, cf. *ibid.* Whatever the full scope of the public-rights doctrine, it at a minimum allows Congress to create “new statutory obligations,” impose “civil penalties for their violation,” and then commit “to an administrative agency the function of deciding whether a violation has in fact occurred.” *Atlas Roofing*, 430 U.S. at 450.

*Atlas Roofing* involved a statutory scheme, the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. 651 *et seq.*, that authorized agency adjudicators to find violations and to award civil penalties.<sup>1</sup> In enacting OSHA, Congress found “the existing state statutory remedies as well as state common-law actions for negligence and wrongful death to be inadequate to protect the employee population from death and injury due to unsafe working conditions.” *Atlas Roofing*, 430 U.S. at 444-445. OSHA “created a new statutory duty to avoid maintaining unsafe or unhealthy working conditions”; “empower[ed] the Secretary of Labor to promulgate health and safety standards”; and “permitt[ed] the Federal Government, proceeding before an administrative agency, \* \* \* to impose civil penalties on any employer maintaining any unsafe working condition.” *Id.* at 445.

This Court upheld that statutory scheme, explaining that the public-rights doctrine allows Congress to “cre-

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<sup>1</sup> Although the Court in *Atlas Roofing* addressed OSHA under the Seventh Amendment, it applied the longstanding public-rights doctrine that arises out of Article III. See 430 U.S. at 449-457.

ate[] a new cause of action, and remedies therefor, unknown to the common law, and place[] their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved.” *Atlas Roofing*, 430 U.S. at 461. The Court explained that Congress may create public rights and assign them to agency adjudication “even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law.” *Id.* at 455. The employer in *Atlas Roofing* argued that Congress may authorize agency adjudications under the public-rights doctrine only when it is exercising powers, such as “the power over immigration, the importation of goods, and taxation,” that are “critical to [the] very existence” of the federal government. *Id.* at 456. The Court rejected that contention, noting that its prior decisions “did not appear to confine [their] holdings in th[at] manner.” *Id.* at 457.

In upholding OSHA’s remedial scheme, the *Atlas Roofing* Court built on longstanding precedent and congressional practice. The Court explained that “Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred.” *Atlas Roofing*, 430 U.S. at 450. Such enforcement regimes repeatedly “have been sustained by this Court.” *Ibid.*

For example, the Court has held that:

- Congress may empower the Internal Revenue Service to conduct adjudications in which it can impose penalties for underpayment of taxes. See *Helvering v. Mitchell*, 303 U.S. 391, 401-403 (1938).

- Congress may empower an administrative agency to conduct adjudications in which it fines individuals who have violated the immigration laws. See *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 334-335 (1932); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 331-332, 338-340 (1909).
- Congress may “delegate to administrative officers final and conclusive authority as to the valuation of imported merchandise, accompanied with the power to impose a penalty for undervaluation.” *Stranahan*, 214 U.S. at 339; see *Passavant v. United States*, 148 U.S. 214, 220 (1893); see also *Ex parte Bakelite*, 279 U.S. at 458 (upholding agency adjudications which “determin[ed] matters arising between the Government and others in the executive administration and application of the customs laws,” including “the provisions of the customs laws requiring duties to be paid”).

Those decisions reflect the same legal principle as *Atlas Roofing*: Congress may enact new statutory obligations enforceable through civil penalties and give administrative agencies the power to identify violations and impose those penalties. 430 U.S. at 450; see, e.g., *Elting*, 287 U.S. at 334 (Congress “may lawfully impose appropriate obligations, sanction their enforcement by reasonable money penalties, and invest in administrative officials the power to impose and enforce them.”); *Stranahan*, 214 U.S. at 339 (Congress may “impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.”).

2. The precedents discussed above are dispositive here. In the federal securities laws, Congress has created a host of “new statutory obligations,” *Atlas Roofing*, 430 U.S. at 450, to ensure disclosure, promote ethical business practices, and protect investors, see pp. 2-4, *supra*. And, as in *Atlas Roofing*, 430 U.S. at 456-457, Congress enacted those new statutory provisions pursuant to a valid exercise of its Commerce Clause powers. See *North Am. Co. v. SEC*, 327 U.S. 686, 707 (1946) (“Congress may deal with and affect the ownership of securities in order to protect the freedom of commerce.”); see also, *e.g.*, 15 U.S.C. 78b, 80b-1.

Congress has also entrusted to the SEC “the function of deciding” in agency enforcement proceedings “whether a violation has in fact occurred” and whether civil penalties should be imposed. *Atlas Roofing*, 430 U.S. at 450; see *e.g.*, 15 U.S.C. 77h-1, 78u-2, 78u-3, 80b-3. Such proceedings are brought by the government against a private party. A “violation” of the securities laws “is committed against the United States rather than an aggrieved individual,” so that when the Commission seeks penalties “it acts in the public interest, to remedy harm to the public at large.” *Kokesh v. SEC*, 581 U.S. 455, 463 (2017).

The fact that many violations of the federal securities laws could *also* give rise to common-law fraud claims does not alter that conclusion. In that respect the securities laws are analogous to OSHA’s “new statutory duty to avoid maintaining unsafe or unhealthy working conditions.” *Atlas Roofing*, 430 U.S. at 445. Both legal regimes focus on conduct that has an evident *potential* to cause injury to private persons, but neither makes the occurrence of that harm an element of a statutory violation. See *ibid.* (noting that “[e]ach remedy”

available under OSHA “exists whether or not an employee is actually injured or killed as a result of the [unsafe or unhealthy] condition”); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (per curiam) (explaining that, in contrast to the common law of fraud, federal securities laws do not require proof “that any investor actually relied on [a party’s] misrepresentations or that the misrepresentations caused any investor to lose money”).

The Court in *Atlas Roofing* found no constitutional infirmity in a federal agency’s imposition of civil penalties in OSHA proceedings against employers who maintained unsafe or unhealthy working conditions. That was so even though an employer’s maintenance of such conditions could give rise to common-law liability for negligence or wrongful death if an employee was injured or killed as a result of those conditions. *Atlas Roofing*, 430 U.S. at 444-446, 461. Similarly here, no Article III problem arises when the SEC imposes civil penalties in administrative proceedings against persons who violate the securities laws. That remains true even though private persons who establish the additional elements of common-law fraud (*e.g.*, reliance and injury) could bring their own suits against the violators.

**C. The Court of Appeals’ Seventh Amendment Holding Is Premised On A Misreading Of This Court’s Decisions**

The court of appeals did not suggest that Article III required the SEC to pursue its allegations against respondents in federal district court. In particular, the court did not suggest that the SEC would have violated the Constitution if it had used an agency adjudication to impose debarment and disgorgement remedies alone. Rather, the court acknowledged that those “elements of the action brought by the SEC against [respondents] are more equitable in nature,” but concluded that this

“fact does not invalidate the jury-trial right that attaches because of the civil penalties sought.” Pet. App. 12a; see *id.* at 17a.

In finding a Seventh Amendment violation, the court of appeals relied on inapposite decisions that addressed other aspects of the public-rights doctrine and therefore did not consider the specific Article III question that is dispositive here. And contrary to the court’s conclusion, neither the perceived similarity between the SEC’s statutory claims and pre-existing common-law remedies, nor the SEC’s statutory authority to seek relief in court, casts doubt on the propriety of the administrative adjudication in this case.

1. In rejecting the government’s arguments, the court of appeals relied heavily on this Court’s decisions in *Granfinanciera* and *Tull*. See, e.g., Pet. App. 8a-11a, 18a-20a. But *Granfinanciera* involved a dispute between private parties, and *Tull* involved a suit brought in federal district court. Neither case involved an agency adjudication commenced by the federal government.

a. “The question presented” in *Granfinanciera* was “whether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer.” 492 U.S. at 36. The Court “h[e]ld that the Seventh Amendment entitles such a person to a trial by jury, notwithstanding Congress’ designation of fraudulent conveyance actions as ‘core proceedings’” that could be resolved by non-Article III bankruptcy judges. *Ibid.* (quoting 28 U.S.C. 157(b)(2)(H) (Supp. V 1987)). *Granfinanciera* thus involved a dispute between two private parties, not an adjudication commenced by the federal government. In-

deed, the Court emphasized that its “prior cases support administrative factfinding” in “situations involving ‘public rights,’ *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.” *Id.* at 51 (citation omitted). The Court distinguished such cases from those involving “[w]holly private” disputes. *Ibid.*

The Court in *Granfinanciera* repeatedly stressed that its analysis was inapplicable to cases involving the federal government. For example, the Court stated that “[t]he crucial question, *in cases not involving the Federal Government*, is whether Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution.” *Granfinanciera*, 492 U.S. at 54 (emphasis added; brackets, citation, and internal quotation marks omitted). The Court also explained that, “[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right *neither belongs to nor exists against the Federal Government*, then it must be adjudicated by an Article III court.” *Id.* at 54-55 (emphasis added). And the Court observed that “Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right *if that statutory cause of action inheres in \* \* \* the Federal Government in its sovereign capacity.*” *Id.* at 53 (emphasis added). Because this case involves an administrative enforcement proceeding brought by a federal agency, the analysis



that *Granfinanciera* applied to “cases not involving the Federal Government,” *id.* at 54, is irrelevant.<sup>2</sup>

b. In *Tull*, the Court held that, when the government seeks civil penalties in federal district court under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the Seventh Amendment entitles the defendant “to a jury trial to determine his liability on the legal claims.” 481 U.S. at 425; see *id.* at 414-415. The court of appeals in this case viewed its Seventh Amendment holding as following naturally from the *Tull* Court’s holding and analysis. See Pet. App. 10a-12a.

In both *Atlas Roofing* and *Tull*, however, the Court emphasized the forum-specific nature of the Seventh Amendment inquiry. The Court in *Atlas Roofing* observed that Congress may assign enforcement of “new statutory ‘public rights’” to administrative adjudicators “even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency.” 430 U.S. at 455. Because *Tull* involved district court proceedings, the case did not present the question whether Article III or the Seventh Amendment forbids

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<sup>2</sup> In other cases, this Court has upheld statutory schemes that authorized administrative agencies to adjudicate disputes arising between two private parties. See, e.g., *Block*, 256 U.S. at 158 (statute requiring resolution of landlord-tenant disputes through a federal administrative system); *Crowell*, 285 U.S. at 37-45, 48-54 (statutory provisions authorizing an agency to adjudicate workers’ compensation claims between employees and their employers); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 835-837, 850-857 (1986) (regulation permitting the Commodity Futures Trading Commission to consider common-law counterclaims when customers bring federal statutory claims against commodity brokers). Like *Granfinanciera*, those cases involve variants of the public-rights doctrine that are not at issue here.

Congress from assigning an enforcement proceeding seeking penalties to an Executive Branch agency. But far from suggesting that its constitutional holding would carry over to administrative adjudications, the Court in *Tull* cited *Atlas Roofing* for the proposition that “the Seventh Amendment is not applicable to administrative proceedings.” 481 U.S. at 418 n.4; see *ibid.* (noting “the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law”). The fact that the government had sought penalties *in a district court action* was thus crucial to the *Tull* Court’s Seventh Amendment analysis.

c. Unlike *Granfinanciera* and *Tull*, *Atlas Roofing* directly presented the question whether the Seventh Amendment bars Congress from authorizing an agency to adjudicate federal statutory claims brought by the agency against a private party. The court of appeals therefore should have treated *Atlas Roofing* as the controlling precedent here. The court was also wrong to suggest that allowing the Commission to impose civil penalties would mean that whenever “the federal government sues, no jury is required.” Pet. App. 17a. As explained above, *Tull* establishes that the Seventh Amendment jury trial right applies when the federal government seeks civil penalties through a suit filed in court. But the proceedings here, in which the SEC sought federal statutory remedies in an administrative forum authorized by Congress, present a distinct scenario that is directly controlled by *Atlas Roofing* and its predecessors.

2. In holding that respondents were entitled to a jury trial on the Commission’s civil-penalty claims, the

court of appeals also relied on (a) the perceived similarity between those claims and common-law securities-fraud actions, Pet. App. 12a-14a, and (b) the fact that Congress has separately authorized the Commission to seek civil penalties in court, *id.* at 14a-16a. Those aspects of the court’s analysis were misconceived.

a. “Section 10(b) does not incorporate common-law fraud into federal law.” *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162 (2008). For example, as noted above, a defendant may be held liable for common-law securities fraud only if its misrepresentation was “relied upon by the other party” and “caus[ed] injury.” *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 212 (5th Cir.), cert. denied, 558 U.S. 873 (2009). By contrast, “the Commission is not required to prove that any investor actually relied on [a party’s] misrepresentations or that the misrepresentations caused any investor to lose money.” *Blavin*, 760 F.2d at 711; see *ibid.* (violations of 15 U.S.C. 80b-6(4) “do not depend on actual injury to any client”); *N. Sims Organ & Co. v. SEC*, 293 F.2d 78, 80 n.3 (2d Cir. 1961) (reliance not an element of 15 U.S.C. 77q(a) and 78j (1958)), cert. denied, 368 U.S. 968 (1962); *Hughes v. SEC*, 174 F.2d 969, 974 (D.C. Cir. 1949) (violations of 15 U.S.C. 77q(a) and 78j (1946) established even if clients “were satisfied with, and had profited by, petitioner’s method of doing business with them”).

That approach reflects Congress’s purpose in creating SEC enforcement mechanisms to supplement common-law claims brought by victims of securities fraud. In enacting the Exchange Act, Congress found that there is “a national public interest” in “provid[ing] for regulation and control of [securities] transactions.” 15 U.S.C. 78b. That interest is separate from a private

plaintiff's interest in obtaining redress for any losses he has suffered as a result of actionable fraud. To further the government's interests in ensuring disclosure, promoting ethical business practices, and protecting investors, the federal securities statutes prohibit not just "the elements of \* \* \* common-law fraud," but also actions that pose a "potential for abuse." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 200 (1963); see *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). And the civil penalties that the Commission can impose "provide a \* \* \* disincentive to violations" of the securities laws, including when investors are "exposed to significant risk of loss, even though the violations may not involve affirmative conduct to defraud investors." Senate Report 10.

As explained above, the mechanisms for SEC enforcement of the federal securities laws, and the relationship of those mechanisms to pre-existing common-law remedies, are analogous for these purposes to the OSHA enforcement mechanisms discussed in *Atlas Roofing* and their relationship to common-law negligence and wrongful-death suits. An employer's maintenance of unsafe working conditions can give rise to state-law liability when injury or death results, and "existing state statutory and common-law remedies for actual injury and death remain unaffected" by OSHA. *Atlas Roofing*, 430 U.S. at 445. Congress enacted OSHA, however, because it "found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women." *Id.* at 461. The federal securities laws, including their provisions authorizing agency enforcement, similarly reflect Congress's

determination that pre-existing common-law mechanisms were inadequate to safeguard markets and protect the investing public. And as in *Atlas Roofing*, the overlap between the federal statutory regime and pre-existing common-law remedies provides no basis for treating agency adjudications as “Suits at common law,” U.S. Const. Amend. VII.

b. The court of appeals also relied on the fact that the SEC has authority to bring enforcement actions either in administrative proceedings “or in Article III courts, where the jury-trial right would apply.” Pet. App. 14a. The court inferred from that aspect of the statutory scheme that “securities-fraud enforcement actions are not the sort that are uniquely suited for agency adjudication.” *Id.* at 15a. The court further suggested that use of an administrative forum is consistent with the Seventh Amendment only if Congress designates it as the “sole[]” mechanism for adjudicating particular claims. *Id.* at 14a (emphasis omitted).

That limitation has no basis in the Constitution or this Court’s precedents. “[M]atters governed by the public-rights doctrine \* \* \* can be resolved in multiple ways: Congress can \* \* \* ‘delegate that power to executive officers,’ or ‘commit it to judicial tribunals.’” *Oil States*, 138 S. Ct. at 1378 (citation omitted). And while some federal statutes give administrative tribunals sole authority to adjudicate particular claims, the Court has not described that sort of exclusivity as a prerequisite to the public-rights doctrine.<sup>3</sup> Rather, “the public-rights

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<sup>3</sup> Other statutes give various federal agencies—including the Commodity Futures Trading Commission, the Consumer Financial Protection Bureau, the Environmental Protection Agency, the Food and Drug Administration, and the Postal Service—the choice between pursuing civil remedies in district court and commencing

doctrine applies to matters arising between the government and others, *which from their nature do not require judicial determination and yet are susceptible of it.*” *Id.* at 1373 (emphasis added; citation and internal quotation marks omitted).

Congress evidently views the securities claims at issue here as “susceptible of” judicial resolution, because it has authorized the Commission to bring such claims in court. That does not preclude Congress from also authorizing administrative adjudication of the same claims. In *Oil States*, for example, the Court upheld Congress’s authorization of agency reconsideration of the validity of issued patents, see 138 S. Ct. at 1372-1379; p. 20, *supra*—even though challenges to patent validity may also be resolved by Article III courts, see 35 U.S.C. 282(b)(2) and (3), and even though “Congress left the job of invalidating patents at the federal level to courts alone” for most of the Nation’s history, 138 S. Ct. at 1384 (Gorsuch, J., dissenting). The same is true here: the SEC may adjudicate enforcement actions—even though such actions may be brought in federal court—without running afoul of Article III or the Seventh Amendment.

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agency enforcement proceedings. See 7 U.S.C. 9(4) and (10), 13a-1(a) and (d); 12 U.S.C. 5563(a), 5564(a), 5565(a)(1) and (2)(H); 33 U.S.C. 1319(a), (b), and (g); 21 U.S.C. 335b(b)(1); 39 U.S.C. 3018(c), (d), and (g).

**II. THE SEC’S DECISION WHETHER TO ENFORCE THE SECURITIES LAWS THROUGH A DISTRICT COURT SUIT OR THROUGH AN AGENCY ADJUDICATION DOES NOT IMPLICATE THE NONDELEGATION DOCTRINE**

If the SEC elects to commence enforcement proceedings in a given case, it may bring certain claims either within the agency or in an Article III court. When the Commission makes that choice, it does not exercise legislative power, but instead performs a function that has traditionally been left to Executive Branch discretion. That choice does not implicate the nondelegation doctrine, which prohibits Congress from “unlawful[ly] delegati[ng] \* \* \* legislative power.” *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (emphasis added). The court of appeals’ contrary conclusion has no basis in this Court’s nondelegation precedents and would severely cabin the Executive Branch’s ability to make routine Article II enforcement decisions.

**A. When The SEC Decides Whether To Bring Particular Enforcement Proceedings In An Administrative Or Judicial Forum, It Exercises A Type Of Executive Power That Typically Is Not Subject To Any Statutory Constraint**

Congress has left it to the Commission to decide in each case whether to bring a civil action, an agency proceeding, or neither. In making those choices, the Commission exercises only enforcement discretion, a classic executive power that stems from the President’s authority to “take Care that the Laws be faithfully executed.” U.S. Const. Art. II, § 3; see *United States v. Texas*, 143 S. Ct. 1964, 1971 (2023); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

“A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts” the “take Care” “responsibility.” *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (citation omitted). “[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). And for these purposes there is no salient difference between the decision *whether* to bring a particular enforcement proceeding and the decision *where* to bring it. Cf. *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (“Whether to prosecute and *what charge* to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.”) (emphases added).

In *Chaney*, this Court held that an agency’s decision not to pursue an enforcement action ordinarily is unreviewable under the APA because it is “committed to agency discretion by law” within the meaning of 5 U.S.C. 701(a)(2). See 470 U.S. at 830-832. The Court explained that, under Section 701(a)(2), “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Id.* at 830. The Court also observed that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Id.* at 831.

The Court in *Chaney* indicated that “Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.” 470 U.S. at



833. But in holding that an agency’s decision not to enforce is “presumptively unreviewable,” *id.* at 832, the Court recognized that statutes conferring enforcement authority on agency officials *typically* contain “no meaningful standard against which to judge the agency’s exercise of discretion” in a particular case, *id.* at 830. The court of appeals’ nondelegation holding here—*i.e.*, its determination that Congress violated the Constitution by failing to guide the SEC’s choice between legally available options—cannot be reconciled with that description of usual congressional practice.

**B. In Authorizing The Commission To Choose Between Two Available Enforcement Mechanisms In A Particular Case, Congress Did Not Delegate Its Own Legislative Power**

1. Article I vests the federal government’s legislative powers in Congress. See U.S. Const. Art. I, § 1. The nondelegation doctrine reflects the principle that Congress may not confer on the Executive Branch “powers which are strictly and exclusively legislative.” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825)); see *Whitman*, 531 U.S. at 472; *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 432 (1935). The nondelegation doctrine is satisfied when a statutory grant of authority sets forth an “intelligible principle” that “clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” *Mistretta v. United States*, 488 U.S. 361, 372-373 (1989) (citations omitted).

The Court has considered whether Congress impermissibly delegated legislative power only in cases where Congress had authorized executive agencies to adopt

general rules governing private conduct.<sup>4</sup> Congress may authorize Executive Branch officials “to fill up the details” of a statutory scheme “by the establishment of administrative rules and regulations.” *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (citation omitted). When agencies promulgate rules pursuant to authority conferred by Congress, they exercise executive rather than legislative power. See *City of Arlington v. FCC*, 569 U.S. 290, 304-305 n.4 (2013). For nondelegation purposes, however, “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.” *Whitman*, 531 U.S. at 475. Only in challenges to broadly applicable agency rules governing private conduct has the Court ever perceived a meaningful concern that Congress might have effectively authorized other actors to perform the legislative functions that the Constitution assigns to Congress.

2. The statutory provisions that allow the Commission to choose between judicial and administrative enforcement in particular cases do not delegate legislative

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<sup>4</sup> See, e.g., *Gundy*, 139 S. Ct. at 2129-2130 (plurality opinion) (rules governing registration of sex offenders); *Whitman*, 531 U.S. at 472-476 (environmental rules); *Touby v. United States*, 500 U.S. 160, 162-169 (1991) (temporary designation of controlled substances); *Mistretta*, 488 U.S. at 371-379 (sentencing guidelines); *Panama Refining*, 293 U.S. at 420-433 (rules governing commerce in petroleum); *Yakus v. United States*, 321 U.S. 414, 419-427 (1944) (fixing of commodity prices); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-542 (1935) (fair-competition code issued by the President); *In re Kollock*, 165 U.S. 526, 532-537 (1897) (regulations defining packaging requirements for food); *Marshall Field v. Clark*, 143 U.S. 649, 681-694 (1892) (tariffs contingent on presidential determinations); *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813) (presidential proclamation reviving an embargo).

powers to the Commission. The governing statutes constrain the SEC's ability to enforce the securities laws administratively by specifying the types of wrongdoing that may be pursued in agency proceedings and the forms of relief the Commission may order. See pp. 3-4, *supra*. Those statutes impose parallel limits on the SEC's ability to seek and obtain relief in court. See *ibid*. The court of appeals did not dispute that the relevant statutes define the chargeable violations and the available remedies for each with adequate specificity. Nor did the court dispute that the SEC was authorized to proceed administratively in the circumstances of this case.

Rather, the court below faulted Congress for failing to impose *additional* constraints on the SEC's choice between administrative and judicial enforcement mechanisms in circumstances where both are legally available. As discussed, however, the absence of any such constraints does not suggest a constitutional infirmity. To the contrary, it is the established norm. See pp. 35-36, *supra*. Because an agency's choice among legally available enforcement options is presumptively unconstrained and unreviewable, Congress had no constitutional duty to provide intelligible principles to guide the Commission's exercise of enforcement discretion here. Cf. *Loving v. United States*, 517 U.S. 748, 772 (1996) (“[T]he same limitations on delegation do not apply ‘where the entity exercising the delegated authority itself possesses independent authority over the subject matter.’”) (citation omitted).

This Court's decision in *United States v. Batchelder*—which rejected a nondelegation challenge closely analogous to respondents'—confirms that conclusion. *Batchelder* involved two federal criminal statutes with

“substantive elements” that were “identical as applied” to the defendant but allowed the imposition of “different penalties” “for essentially the same conduct”; one authorized a two-year term of imprisonment, and the other a five-year term. 442 U.S. at 116-117, 121. In enacting that statutory scheme, Congress left federal prosecutors with “discretion to choose between” the two statutory provisions, *id.* at 124, without providing any guidance for prosecutors making that choice, see *id.* at 124-126.

The *Batchelder* Court perceived “no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements.” 442 U.S. at 125. The Court rejected the suggestion that the overlapping criminal “statutes might impermissibly delegate to the Executive Branch the Legislature’s responsibility to fix criminal penalties.” *Id.* at 125-126. The Court observed that “[t]he provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose.” *Id.* at 126. “In light of that specificity,” the Court reasoned, “the power that Congress ha[d] delegated to those officials [wa]s no broader than the authority they routinely exercise in enforcing the criminal laws.” *Ibid.* The Court concluded that, “[h]aving informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each [statute], Congress ha[d] fulfilled its duty.” *Ibid.*

*Batchelder* controls this case. “If the Government’s prosecutorial authority to decide between two criminal statutes that provide for different sentencing ranges for

essentially the same conduct does not violate the non-delegation doctrine, then surely the SEC’s authority to decide between two forums that provide different legal processes does not violate the nondelegation doctrine.” Pet. App. 53a (Davis, J., dissenting).

**C. The Court Of Appeals’ Nondelegation Holding Is Premised On A Misunderstanding Of “Legislative Power”**

In concluding that “Congress unconstitutionally delegated legislative power to the SEC,” Pet. App. 21a, the court of appeals relied on an out-of-context reference to “legislative” action, and it repeatedly conflated (a) Congress’s power to define offenses and the permissible enforcement options for each with (b) the Executive Branch’s usual prerogative to choose among whatever enforcement mechanisms Congress has made available in a particular case.

1. Relying on *INS v. Chadha*, 462 U.S. 919 (1983), the court of appeals found that “[g]overnment actions are ‘legislative’ if they have ‘the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.’” Pet. App. 25a (quoting *Chadha*, 462 U.S. at 952). The court determined on that basis that, by giving “the SEC the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not,” Congress had “delegat[ed] \* \* \* legislative power.” *Id.* at 26a. By plucking a reference to “legislative” action from an inapposite context, the court dramatically expanded the nondelegation doctrine.

In *Chadha*, the Court held unconstitutional a “one-House veto provision” that “authoriz[ed] one House of Congress, by resolution, to invalidate” the Attorney

General's decision "to allow a particular deportable alien [Chadha] to remain in the United States." 462 U.S. at 923, 929. In reaching that conclusion, the Court found that the one-House veto ran afoul of the constitutional "bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto." *Id.* at 957; see *id.* at 944-951. The Court based that conclusion on the "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *Id.* at 945.

The Court in *Chadha* recognized that "[n]ot every action taken by either House [of Congress] is subject to the bicameralism and presentment requirements of Art. I." 462 U.S. at 952. The Court identified several powers that, under the Constitution, may be exercised by a single House unilaterally. See *id.* at 955-956 & nn.20-21. In the specific passage on which the court of appeals relied, however, the Court concluded that the one-House veto at issue in *Chadha* "was essentially legislative" because it "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch." *Id.* at 952; see Pet. App. 25a. The Court thus used the term "legislative" to distinguish the congressional actions that require bicameralism and presentment from the actions that a single House of Congress may undertake, not to delimit the powers of the Executive Branch.

Indeed, on the next page of its opinion, the Court specifically *rejected* the argument that the *Attorney General* had exercised "legislative" power when he previously suspended Chadha's deportation pursuant to authority conferred by statute. *Chadha*, 462 U.S. at 953

n.16. The Court explained that, “[w]hen the Attorney General performs his duties pursuant to” the statutory provision that authorized suspension of deportation, “he does not exercise ‘legislative’ power. The bicameral process is not necessary as a check on the Executive’s administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it.” *Ibid.* (citation omitted). The Court found it “clear \* \* \* that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act.” *Ibid.*

Taken at face value, the court of appeals’ understanding of “legislative power” would swallow core executive and judicial functions. When the Executive Branch brings civil suits and criminal prosecutions, its actions have “the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.” Pet. App. 25a (citation omitted). That was likewise true when the Attorney General exercised his statutory authority to suspend Chadha’s deportation, thereby declining to effect Chadha’s removal from the country. The Judicial Branch does the same when it issues pretrial rulings, decides cases, and enters judgments. Those effects do not render such actions exercises of “legislative power.”

2. The court of appeals also erred in concluding that, because “the power to assign disputes to agency adjudication is ‘peculiarly within the authority of the legislative department,’” Congress had “delegated \* \* \* legislative power” when it “gave the SEC the ability” to choose between federal-court and agency enforcement proceedings. Pet. App. 25a-26a (citation omitted). That analysis ignores the difference between the legislative

task of identifying permissible enforcement mechanisms for *a category* of claims, and the executive task of deciding which mechanism to invoke in a particular case. Congress no doubt has the power to specify whether a given class of claims may be adjudicated by the federal courts, by an Executive Branch agency, or by both. Congress has exercised that power here, however, by authorizing both the courts and the Commission to resolve certain securities claims. “Having informed” the courts, the agency, and private parties of “the permissible \* \* \* alternatives[,] \* \* \* Congress has fulfilled its duty.” *Batchelder*, 442 U.S. at 126. And in choosing which of the available alternatives to pursue in a given case, the Commission does not exercise legislative power, but simply executes the laws that Congress previously enacted. See *id.* at 125-126; *Chadha*, 462 U.S. at 953 n.16.

3. The court of appeals also observed that, in choosing between administrative and judicial enforcement mechanisms, the Commission effectively “decide[s] which defendants should receive certain legal processes (those accompanying Article III proceedings) and which should not.” Pet. App. 26a-27a (emphasis omitted). The court viewed that as “a power that Congress uniquely possesses.” *Id.* at 27a. But case-specific Executive Branch enforcement choices often affect the “legal processes,” *ibid.* (emphasis omitted), that particular defendants receive.

For example, the Executive Branch may choose between bringing criminal prosecutions and bringing civil suits. See U.S. Dep’t of Justice, *Justice Manual* § 9-27.250 (June 2023) (listing various “civil and administrative remedies” that may be pursued instead of criminal penalties); see also, *e.g.*, *United States v. LaSalle Nat’l*



*Bank*, 437 U.S. 298, 308 (1978) (noting that “[t]he willful submission of a false or fraudulent tax return may subject a taxpayer” to civil or criminal penalties). The Executive Branch may choose between bringing felony charges (which would entitle the defendant to indictment by a grand jury and to trial by jury) and bringing petty-misdemeanor charges (which would not). See *Baldwin v. New York*, 399 U.S. 66, 69-70 (1970) (plurality opinion); *United States v. Gordon*, 548 F.2d 743, 744-745 (8th Cir. 1977); Fed. R. Crim. P. 7(a). Similarly, if the SEC had filed a civil suit against respondents rather than proceeding administratively, respondents’ right to a jury trial would have depended on the agency’s further choice whether to seek civil penalties or instead to request only equitable relief. See *Atlas Roofing*, 430 U.S. at 449.

All those traditional executive decisions affect the legal processes that particular defendants receive. But that fact has never been thought to transform such decisions into legislative acts. The court of appeals’ characterization of this routine enforcement prerogative as “a power that Congress uniquely possesses,” Pet. App. 27a, expands the nondelegation doctrine beyond any recognizable bounds.

### III. THE TENURE PROTECTION AFFORDED TO SEC ALJS COMPLIES WITH ARTICLE II

In enacting the APA provisions concerning ALJs, Congress balanced two competing objectives. On the one hand, Congress sought to enable ALJs to “perform their evidentiary factfinding function free from agency coercion.” 2 Paul R. Verkuil et al., *Administrative Conference of the United States, Recommendations and Reports, The Federal Administrative Judiciary* 803 (1992). To that end, Congress directed that an agency

may remove an ALJ “only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.” 5 U.S.C. 7521(a).

On the other hand, Congress sought to ensure that “the agency retains full power over policy.” Verkuil 803. The APA accordingly gives agencies plenary power to review and reverse ALJs’ initial decisions. See 5 U.S.C. 557(b). And even under Section 7521(a)’s “good cause” standard, an ALJ can be removed for refusing to follow binding legal or policy judgments announced by the agency, as well as for misconduct or substantially deficient job performance. Under that arrangement, “policy responsibility remains exclusively with the agency while the public has assurance the facts are found in the first instance by an official not subject to agency coercion.” Verkuil 803.

The court of appeals held that Section 7521, as applied to the SEC’s ALJs, violates Article II. See Pet. App. 28a-34a. The court appeared to construe *Free Enterprise Fund v. PCAOB*, 561 U.S. 447 (2010), as establishing a categorical rule that Congress may not grant any inferior executive officer more than one layer of tenure protection. Pet. App. 30a. The court concluded that “SEC ALJs are insulated from the President by at least two layers of for-cause protection” because “SEC Commissioners and MSPB members can only be removed by the President for cause.” *Ibid.*

The court of appeals erred in finding a constitutional violation here. Congress acted permissibly in requiring agencies to establish cause for their removal of ALJs. Neither the tenure protections accorded to the heads of some agencies, nor those accorded to the MSPB’s members, render that requirement unconstitutional.

### A. Congress May Grant ALJs Tenure Protection

The Appointments Clause requires the President to appoint officers with the advice and consent of the Senate, but allows Congress to vest the appointment of inferior officers in the President alone, the heads of departments, or the courts of law. See U.S. Const. Art. II, § 2, Cl. 2. When Congress vests the appointment of an inferior officer in a department head, it generally “may limit and restrict the power of removal as it deems best for the public interest.” *United States v. Perkins*, 116 U.S. 483, 485 (1886).

The “legislative power” to regulate “removals in the case of inferior executive officers” flows from the Appointments Clause itself. *Myers v. United States*, 272 U.S. 52, 127 (1926). Just as the “power to remove” is traditionally considered “an incident of the power to appoint,” so also “the power of Congress to regulate removals” is “incidental to the exercise of its constitutional power to vest appointments.” *Id.* at 161; see *Perkins*, 116 U.S. at 485 (“The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal.”).

History confirms Congress’s authority to regulate department heads’ removal of inferior officers. The First Congress recognized the President’s removal power in a debate and vote that have come to be known as the Decision of 1789. See *Myers*, 272 U.S. at 145. But that decision concerned the President’s power to remove his own appointees, not department heads’ power to remove theirs. See *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259-260 (1839). Justice Story, for example, wrote that the decision covered only cases “where the power to appoint was not subject to legislative delega-

tion”; that it did not apply “in regard to ‘inferior officers’”; and that, when Congress chooses to “delegate the appointment,” it may determine “the manner in which, and the persons by whom, the removal” may be made. 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1531 & n.1, 1538, at 388, 390, 397 (1833).

This Court has consistently recognized that Congress may regulate removals by department heads. In *Perkins*, the Court upheld a restriction on the Secretary of the Navy’s power to remove a naval officer. See 116 U.S. at 484-485. And in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld a restriction on the Attorney General’s power to remove the independent counsel. See *id.* at 685-693. Other decisions have likewise acknowledged Congress’s power to regulate department heads’ removal of inferior officers. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199 (2020); *Free Enter. Fund*, 561 U.S. at 493-495; *Myers*, 272 U.S. at 161, 170-171. The idea that department heads must have the authority to remove inferior officers at will “has never been the law.” *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting).

**B. The Existence Of Tenure Protection For The Heads Of The Appointing Agency Does Not Render Its ALJs’ Tenure Protection Unconstitutional**

Congress’s power to regulate department heads’ removal of inferior officers is not unbounded. A removal restriction violates Article II if it “impermissibly burdens the President’s power to control or supervise” the Executive Branch. *Morrison*, 487 U.S. at 692. In *Free Enterprise Fund*, this Court held that Congress had overstepped that limit by making members of the Public Company Accounting Oversight Board (PCAOB or

Board) removable for cause by the SEC, whose Commissioners were in turn understood to be removable for cause by the President. See 561 U.S. at 492-508. The Court held that the PCAOB members' two layers of tenure protection "deprive[d] the President of adequate control over the Board." *Id.* at 508.

In reaching that conclusion, the *Free Enterprise Fund* Court did not adopt a categorical rule that multiple layers of tenure protection *always* violate Article II. The "only issue" before the Court was whether Congress could grant such protection to "the Board," 561 U.S. at 508, and the Court viewed the "size and variety" of the federal government as discouraging "general pronouncements" about other officials, *id.* at 506. The Court explained in particular that its holding did not address those federal workers who are "employees" rather than "'Officers of the United States.'" *Ibid.* The Court noted its 19th-century estimate that "nine-tenths of the persons rendering service to the government" are employees rather than officers, *id.* at 506 n.9 (quoting *United States v. Germaine*, 99 U.S. 508, 509 (1879)), and stated that "[t]he applicable proportion has of course increased dramatically since" then, *ibid.* The Court thus left open the possibility that, even within agencies whose heads are removable only for cause, the vast majority of subordinate workers may be given their own protections from removal.

The *Free Enterprise Fund* Court also specifically noted that its holding did "not address that subset of independent agency employees who serve as administrative law judges." 561 U.S. at 507 n.10. The Court observed that "[w]hether administrative law judges are necessarily 'Officers of the United States' is disputed."

*Ibid.* The Court further explained that, “unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions.” *Ibid.*

Eight years after deciding *Free Enterprise Fund*, this Court held that the SEC’s ALJs are “Officers of the United States” rather than employees. *Lucia v. SEC*, 138 S. Ct. 2044, 2051-2055 (2018). The court of appeals in this case treated that determination as effectively resolving the Article II removal question as well. The court reasoned that, “if SEC ALJs are ‘inferior officers’ of an executive agency, \* \* \* they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions.” Pet. App. 31a. The court viewed the existence of “good cause” removal protection for the ALJs, in combination with the removal protections accorded to the SEC Commissioners and the Members of the MSPB, as unconstitutionally preventing the President from exercising the requisite control. See *id.* at 31a-34a. The court thus appeared to read *Free Enterprise Fund* as categorically foreclosing two layers of tenure protection for any “inferior officer.”

The Court in *Free Enterprise Fund* did not announce any such per se rule, and neither logic nor constitutional text supports it. Because the Appointments Clause refers specifically to “Officers of the United States,” U.S. Const. Art. II, § 2, Cl. 2, its applicability to a particular Executive Branch worker necessarily turns on whether that worker is an “officer[.]” or a “non-officer employee[.]” *Lucia*, 138 S. Ct. at 2051. But neither the Appointments Clause nor any other discrete constitutional provision specifically addresses the terms on which particular workers may be removed.

The Court therefore has looked to history and constitutional structure in determining the limits on Congress’s power to restrict removal. See, e.g., *Seila Law*, 140 S. Ct. at 2205; *Free Enter. Fund*, 561 U.S. at 483. To be sure, the Appointments Clause and removability inquiries overlap, in the sense that certain subsidiary factors (in particular, the significance of the worker’s federal duties) will be relevant to each. But there is no sound reason to believe that the two inquiries must produce the same answer with respect to every Executive Branch official.

For three reasons, tenure protection for the SEC’s ALJs comports with Article II under the principles articulated in *Free Enterprise Fund*. First, because the sole function of SEC ALJs is to adjudicate individual cases, Congress could permissibly conclude that a degree of independence from the Commission would enhance the actual and perceived fairness of the relevant agency proceedings. Second, the APA leaves the Commission (and through it, the President) with adequate alternative mechanisms to control an ALJ’s exercise of executive power. Third, Section 7521’s good-cause standard is significantly less restrictive than the unusually rigorous standard that governed removal of the PCAOB members in *Free Enterprise Fund*.

***1. Congress has more leeway to grant tenure protection to adjudicators than to other executive officers***

The scope of the President’s power to control inferior officers (and thus the scope of Congress’s power to limit their removal) depends in part on “the functions of the officials in question.” *Morrison*, 487 U.S. at 691; see *Myers*, 272 U.S. at 132 (“The degree of guidance \* \* \* that the President may exercise over executive officers

varies with the character of their service.”). *Free Enterprise Fund* involved inferior officers with substantial policymaking and law-enforcement functions, and the Court framed the question presented as follows: “May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, *even though that inferior officer determines the policy and enforces the laws of the United States?*” 561 U.S. at 483-484 (emphasis added). The Court also stated that the “only issue” before it was “whether Congress may deprive the President of adequate control over the Board, *which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy.*” *Id.* at 508 (emphasis added).

The *Free Enterprise Fund* Court cautioned that its “holding d[id] not address” ALJs, who often “perform adjudicative rather than enforcement or policymaking functions.” 561 U.S. at 507 n.10. Logic, history, and precedent all establish that Congress has more leeway to grant tenure protection to adjudicators than to other officers.

a. The principal rationale for the President’s removal power—ensuring that officers “remain dependent on the President, who in turn is accountable to the people,” *Seila Law*, 140 S. Ct. at 2211—applies with greater force to policymakers and law-enforcement officials than to adjudicators. Officers who set policy and enforce the law routinely make value-laden judgments about which policies to adopt and which enforcement actions to prioritize, and their decisions can have significant political, social, and economic consequences. See *Texas*, 143 S. Ct. at 1971-1972; *Department of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019). The



sole function of SEC ALJs, in contrast, is to determine the liability of the particular parties before them by finding facts and applying the law to those facts. Tenure protection for those adjudicators accordingly does not raise the concern that the power to make important policy decisions “may slip from the Executive’s control, and thus from that of the people.” *Free Enter. Fund*, 561 U.S. at 499.<sup>5</sup>

To be sure, agency adjudication and policy-making are not hermetically sealed. In particular, an agency may choose to announce a new rule of general applicability in the course of an adjudication. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 201-203 (1947). As we explain below, however, an SEC ALJ’s refusal to follow established agency policy would constitute “good cause” for removal. See p. 61, *infra*. And if an ALJ’s decision in an adjudication reflects a new policy judgment with which the SEC disagrees, the Commission has plenary power to replace that decision with its own ruling. See pp. 58-59, *infra*. The APA’s “good cause” standard thus leaves SEC ALJs with significant decisional independence in performing their core functions—finding the facts in individual cases and applying established legal principles to those facts—while giving the Commission ultimate control over matters of agency policy.

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<sup>5</sup> The court of appeals did not identify, and we are not aware of, any instance in which an SEC ALJ has performed a function other than presiding over and issuing rulings in individual enforcement actions. See 17 C.F.R. 200.30-9. The functions of Commission ALJs appear to be generally consistent with those performed by ALJs across the government. Agency-by-agency variations do exist, however, so this brief focuses on the role played by SEC ALJs.

The current statutory framework governing ALJs, including Section 7521's "good cause" removal standard, reflects the adjudicative character of the duties that ALJs perform. See *Butz v. Economou*, 438 U.S. 478, 512-513 (1978) (noting that "the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge"); *id.* at 514 (identifying Section 7521 among "a number of provisions designed to guarantee the independence of hearing examiners"). The Due Process Clause requires adjudicators to hear and decide disputes fairly and impartially. See *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). "Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate" matters that affect private persons. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 42 (1950) (citation omitted).

The potential for actual or perceived undue influence is increased by the fact that SEC ALJs typically resolve disputes between regulated parties and the agency itself. Indeed, an ALJ proceeding can commence only after the Commission affirmatively authorizes it. See 17 C.F.R. 201.200(a). Tenure protection for such officials is not constitutionally required. See *Ramspeck v. Federal Trial Exam'rs Conference*, 345 U.S. 128, 133 (1953) (noting that "[t]he position of hearing examiners is not a constitutionally protected position" and that hearing examiners "hold their posts by such tenure as Congress sees fit to give them"). Congress could reasonably conclude, however, that requiring "good cause" for removal of SEC ALJs will contribute to both the fact and appearance of fairness in agency proceedings.

“[A]djudication within a federal administrative agency shares \* \* \* characteristics of the judicial process,” including the need for adjudicators to “exercise independent judgment.” *Economou*, 438 U.S. at 512-513. Our legal system has traditionally encouraged judges to exercise independent judgment by protecting them from removal at will. The Constitution grants Article III judges tenure during good behavior, see U.S. Const. Art. III, § 1, and federal statutes likewise grant tenure protection to many non-Article III judges, such as bankruptcy judges, see 28 U.S.C. 152(e); magistrate judges, see 28 U.S.C. 631(i); and territorial judges, see 48 U.S.C. 1424b(a), 1614(a), 1821(b)(1). Congress may likewise grant tenure protection to ALJs in order to promote both the fact and appearance of fairness and impartiality.

b. History confirms that Congress has greater latitude to grant tenure protection to adjudicators than to other executive officers. In 1801, Congress empowered the President, with the advice and consent of the Senate, to appoint justices of the peace for the District of Columbia. See Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 107. Even though those justices qualified as officers of the United States, see *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 336 (1806), and even though their duties were “partly executive,” *ibid.*, Congress protected them from removal at will, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803).

Congress continued that practice when it began to create so-called “legislative courts”—non-Article III tribunals that, for constitutional purposes, form part of the Executive Branch, see *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1984-1985 (2021); *Freytag v. Com-*

*missioner*, 501 U.S. 868, 908-914 (1991) (Scalia, J., concurring in part and concurring in the judgment). In the 19th and early 20th centuries, Congress granted good-behavior tenure to some executive adjudicators,<sup>6</sup> and for-cause tenure to others.<sup>7</sup> Good-behavior tenure, the same level of protection enjoyed by federal judges, provides even more insulation from presidential control than two layers of for-cause protection.

For-cause tenure protection for Executive Branch adjudicators remains commonplace today.<sup>8</sup> Section 7521 comports with that tradition.

c. This Court's precedents interpreting Article II recognize that adjudicators differ from other executive officers. Article II generally empowers the President to "supervise and guide" executive officers' discharge of their duties. *Myers*, 272 U.S. at 135. The Court has recognized, however, that "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control." *Ibid.*

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<sup>6</sup> See Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (Court of Claims); Act of June 17, 1930, ch. 497, §§ 518, 646, 46 Stat. 737-739, 762 (Customs Court and Court of Customs and Patent Appeals).

<sup>7</sup> See Act of June 30, 1906, ch. 3934, § 7, 34 Stat. 816 (U.S. Court for China); Act of Mar. 27, 1908, ch. 205, § 3, 35 Stat. 406 (Board of General Appraisers); Act of June 2, 1924, ch. 234, § 900(b), 43 Stat. 336-337 (Board of Tax Appeals).

<sup>8</sup> See, *e.g.*, 7 U.S.C. 6992(b)(2) (Director of Department of Agriculture's National Appeals Division); 10 U.S.C. 942(c) (Court of Appeals for the Armed Forces); 38 U.S.C. 7101(b)(2) (Chairman of Board of Veterans' Appeals); 38 U.S.C. 7253(f) (Court of Appeals for Veterans Claims); 41 U.S.C. 7105(b)(3) (Civilian Board of Contract Appeals).

Article II also generally requires inferior executive officers to be subject to the direction and supervision of their superiors. See *Arthrex*, 141 S. Ct. at 1980. But a superior officer’s authority to supervise an adjudicator can be constitutionally adequate even if the statute forbids using the “threat of removal” to “attempt to influence \* \* \* the outcome of individual proceedings.” *Edmond v. United States*, 520 U.S. 651, 664 (1997).

Thus, in a variety of contexts, this Court has treated adjudicators differently from other executive officers in order to accommodate adjudicators’ special need for decisional independence. *Free Enterprise Fund*’s distinction between “adjudicati[on]” and “enforcement or policymaking,” 561 U.S. at 507 n.10, is consistent with those precedents. Because SEC ALJs “perform only adjudicative functions,” *ibid.*, Congress may protect them from removal at will.

**2. The SEC has adequate alternative mechanisms for controlling its ALJs’ exercise of executive power**

a. Removal is not an end in itself; it is instead a “tool of supervision” that enables the President to take care that the laws are faithfully executed. *Free Enter. Fund*, 561 U.S. at 499; see *Edmond*, 520 U.S. at 664 (“The power to remove \* \* \* is a powerful tool for control.”). Under Article II, the ultimate question therefore is not how many levels of removal protection a subordinate official enjoys, but whether the statutory scheme as a whole “deprive[s] the President of adequate control” over the official’s exercise of executive power. *Free Enter. Fund*, 561 U.S. at 508.

The statute at issue in *Free Enterprise Fund* was held to deprive the President of adequate control over the PCAOB’s exercise of executive power, not only because it granted the Board members “two layers of for-

cause tenure,” but also because the PCAOB had “significant independence in determining its priorities and intervening in the affairs of regulated firms,” and because the Commission had no “effective power to start, stop, or alter individual Board investigations.” 561 U.S. at 501, 504-505. The *Free Enterprise Fund* Court added, however, that other statutes granting multiple layers of tenure protection did not necessarily violate Article II. The Court declined to question statutes granting multiple layers of tenure protection to military officers, observing that military officers “are broadly subject to Presidential control through the chain of command.” *Id.* at 507. It also emphasized that “[n]othing in [its] opinion \* \* \* should be read to cast doubt” on “the civil service system within independent agencies,” noting that certain civil servants “may be excepted from the [system] to ensure Presidential control” and that others “may be reassigned or reviewed by agency heads.” *Id.* at 506-507. As those examples show, alternative means of control can compensate for multiple layers of tenure protection.

b. The APA grants the SEC—and, through the agency, the President—adequate means of controlling Commission ALJs’ exercise of executive power. The Commission has no obligation to use ALJs, but instead may preside over the initial hearing itself or assign the hearing to one or more of its members. See 5 U.S.C. 556(a). The SEC also may regulate its ALJs’ functions. Although the APA lists various tasks that ALJs may perform—for example, administering oaths, issuing subpoenas, and receiving evidence—those tasks remain “[s]ubject to published rules of the agency.” 5 U.S.C. 556(c). And although the APA empowers ALJs to issue initial decisions, the agency may, “in specific cases or by

general rule,” reserve the making of the initial decision for itself. 5 U.S.C. 557(b).

Even when the SEC elects to use an ALJ as the initial decisionmaker in a particular case, the ALJ’s decision does not bind it. A party may appeal the initial decision to the agency, and the agency may review it on its own motion. See 5 U.S.C. 557(b). On review, “the agency has all the powers which it would have in making the initial decision.” *Ibid.* An agency accordingly is not confined to the record developed by the ALJ; rather, it may accept new evidence. See *Lucia*, 138 S. Ct. at 2066 (Sotomayor, J., dissenting). Nor is the SEC limited to clear-error review of its ALJs’ factual findings; rather, it may make its own findings. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492 (1951).

In *Lucia*, the Court noted that the SEC often accords deference to its ALJs’ factual findings, particularly when credibility determinations are involved, and the Court treated that practice as relevant to the determination whether those ALJs are inferior officers or employees. 138 S. Ct. at 2054-2055. The Court appeared to recognize, however, that no statute or regulation *requires* the Commission to apply a deferential standard of review. See *id.* at 2054. In determining whether Section 7521(a)’s requirement of “good cause” for removal prevents the Commission (and thus the President) from adequately controlling SEC ALJs, the salient point is that the Commission remains legally free to review the ALJs’ factual findings *de novo* whenever it deems that course appropriate. Cf. *Arthrex*, 141 S. Ct. at 1987-1988 (plurality opinion) (concluding as part of remedial analysis that the USPTO Director would have constitutionally sufficient control over the agency’s administrative patent judges (APJs) so long as APJs’ decisions were

subject to Director review); *id.* at 1988 (emphasizing that “the Director need not review every decision of the [APJs],” and that “[w]hat matters is that the Director have discretion to review decisions rendered by APJs”); *id.* at 1997 (Breyer, J., concurring in the judgment in part and dissenting in part) (agreeing with the plurality’s choice of remedy).

The SEC thus “is in no way bound” by its ALJs’ decisions, but instead “retains complete freedom of decision—as though it had heard the evidence itself.” U.S. Dep’t of Justice, *Attorney General’s Manual on the Administrative Procedure Act* 83 (1947). In this case, for example, the Commission disagreed with the ALJ’s factual findings, Pet. App. 121a n.107; evidentiary rulings, *id.* at 100a n.54; calculation of civil penalties, *id.* at 115a n.87; and calculation of disgorgement, *id.* at 117a n.96. The statutory scheme gives the SEC adequate means of controlling its ALJs’ exercise of executive power.

**3. *The standard for removing ALJs is less demanding than the standard that governed removal of PCAOB members in Free Enterprise Fund***

The *Free Enterprise Fund* Court also emphasized that, under the applicable statute, an “unusually high standard” governed the removal of PCAOB members. 561 U.S. at 503. The Commission could remove members only for “willful violations” of certain laws and rules, “willful abuse of authority,” or “unreasonable failure to enforce compliance.” *Ibid.* The Commission could not even remove members “for violations of *other* laws.” *Ibid.* The Court observed that “[t]he President might have less than full confidence in, say, a Board member who cheats on his taxes; but that discovery [wa]s not listed among the grounds for removal.” *Ibid.* The agency’s structure therefore posed a “more serious



threat to executive control than an ‘ordinary’ dual-for-cause standard.” *Id.* at 502.

Section 7521, in contrast, allows an agency to remove an ALJ for “good cause.” 5 U.S.C. 7521(a). Applying an earlier version of Section 7521, this Court held that a “reduction in force \* \* \* is good cause.” *Ramspeck*, 345 U.S. at 143.<sup>9</sup> And applying the current version, the MSPB has determined, and the Federal Circuit has agreed, that the “good cause standard must be construed as including all matters which affect the ability and fitness of the ALJ to perform the duties of office.” *Abrams v. SSA*, 703 F.3d 538, 543 (2012) (citation omitted).<sup>10</sup>

Properly construed, Section 7521’s “good cause” standard gives the Commission (and through it the President) constitutionally sufficient control over its ALJs. The “good cause” standard encompasses significant misconduct, including off-the-job violations of non-securities laws. *Cf. Morrison*, 487 U.S. at 692 (opining that, under the statutory “‘good cause’” standard that

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<sup>9</sup> The current version of the statute produces the same substantive result through a different textual route. Section 7521 states that “[a]n action may be taken against an administrative law judge \* \* \* only for good cause,” 5 U.S.C. 7521(a), but provides that “[t]he actions covered by this section \* \* \* do not include \* \* \* a reduction-in-force action,” 5 U.S.C. 7521(b)(B).

<sup>10</sup> See, e.g., *HHS v. Jarboe*, 2023 M.S.P.B. 22, ¶ 3 (Aug. 2, 2023) (“failure to follow instructions”); *SSA v. Long*, 113 M.S.P.R. 190, 210 (2010) (“conduct unbecoming an ALJ”); *SSA v. Steverson*, 111 M.S.P.R. 649, 656 (2009) (“misconduct”); *SSA v. Mills*, 73 M.S.P.R. 463, 469 (1996) (“physical incapacitation”); *SSA v. Burris*, 39 M.S.P.R. 51, 57 (1988) (“disrespectful conduct”); *SSA v. Goodman*, 19 M.S.P.R. 321, 328 (1984) (“poor performance”); *In re Chocallo*, 1 M.S.P.R. 605, 610 (1980) (“incompetence”).

governed removal of an independent counsel, “the Attorney General may remove an independent counsel for ‘misconduct’”). It encompasses an ALJ’s disregard for binding Commission legal and policy judgments, as when an ALJ substitutes his own interpretation of a pertinent securities-law provision for the construction previously adopted by the agency. Cf. *id.* at 724 n.4 (Scalia, J., dissenting) (noting that “cause” for removal of an inferior officer includes “the failure to accept supervision”) (emphasis omitted). And it encompasses substantially deficient job performance, even absent any breach of a specific Commission directive. Section 7521 thus does not raise the same concerns as the unusually high removal standard in *Free Enterprise Fund*.

**C. The Tenure Protection Afforded To Members Of The MSPB Does Not Render SEC ALJs’ Tenure Protection Unconstitutional**

Section 7521 allows an agency to remove an ALJ only for good cause “established and determined by” the MSPB, and only after “opportunity for hearing” before the MSPB. 5 U.S.C. 7521(a). MSPB members in turn are removable “only for inefficiency, neglect of duty, or malfeasance in office.” 5 U.S.C. 1202(d). Contrary to the court of appeals’ suggestion (Pet. App. 33a-34a), however, the MSPB’s role in the removal process does not render SEC ALJs’ tenure protection unconstitutional.

***1. Congress may empower the MSPB to determine whether good cause supports removal***

When Congress requires cause for a department head’s removal of an inferior officer, it may empower a court or other tribunal to enforce that restriction. The statute at issue in *Morrison*, for example, authorized a

federal court to review the Attorney General's determination that good cause supported an independent counsel's removal. See 487 U.S. at 687-693 & n.33. The Court perceived "no constitutional problem in the fact that the Act provides for judicial review of the removal decision." *Id.* at 693 n.33. Because "[t]he purpose of such review [wa]s to ensure that an independent counsel [wa]s removed only in accordance with" the statute, the court's involvement neither "inject[ed] the Judicial Branch into the removal decision" nor "put any additional burden on the President's exercise of executive authority." *Ibid.*

Other precedents point the same way. This Court has frequently enforced restrictions on the removal of executive officers. See *Wiener v. United States*, 357 U.S. 349, 356 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 621-632 (1935); *Perkins*, 116 U.S. at 484-485. Where the Court has found particular substantive restrictions on removal to be lawful, it has never suggested that, by reviewing removal decisions for compliance with the statute, a court had imposed an unconstitutional burden on the President's exercise of executive power.

Section 7521's requirement that good cause for an ALJ's removal be "established and determined by the Merit Systems Protection Board," 5 U.S.C. 7521(a), complies with those principles. The statutory text makes clear that the decision to remove an ALJ must be made "by the agency." *Ibid.* Like the reviewing court in *Morrison*, the MSPB simply verifies that the agency has good cause for removal. Although imprecise language in earlier MSPB decisions could be read to suggest that the MSPB itself decides whether removal is appropriate, see Gov't Br. at 46-47, *Lucia*, *supra* (No.

17-130), the MSPB has overruled those decisions and has clarified that its role is limited to reviewing the agency’s good-cause determination, see *HHS v. Jarboe*, 2023 M.S.P.B. 22, ¶ 6 (Aug. 2, 2023); *SSA v. Levinson*, 2023 M.S.P.B. 20, ¶¶ 37-38 (July 12, 2023). The MSPB’s performance of that function accordingly does not add to the tenure protection enjoyed by an ALJ; rather, the MSPB simply enforces the protection separately provided by the statute.

The permissibility of MSPB review thus follows *a fortiori* from the Court’s holding in *Morrison*. The President has no control whatever over federal judges, who make up an independent branch of government. The President does, however, supervise and control MSPB members, who are removable for cause and who form part of the Executive Branch. If Congress could empower a federal court to review the Attorney General’s judgment that good cause exists for firing an independent counsel, it may empower the MSPB to review an agency’s judgment that good cause exists for firing an ALJ.

**2. An ALJ’s statutory entitlement to a hearing before the MSPB creates no constitutional infirmity**

“[N]otice and hearing” have long been regarded as “essential” “where causes of removal are specified by constitution or statute.” *Reagan v. United States*, 182 U.S. 419, 425 (1901). If “a removal is made without such notice, there is a conclusive presumption that the officer was not removed for any of those causes.” *Shurtleff v. United States*, 189 U.S. 311, 317 (1903); cf. *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972) (holding that the Due Process Clause requires notice and a hearing before the removal of a tenured professor at a public college).

History confirms the constitutionality of such hearing requirements. Before the Founding, English courts held that removal of an officer for cause required notice and a hearing.<sup>11</sup> In the 19th century, many state courts “held that where an officer may be removed for certain causes, he is entitled to notice and a hearing.” *Shurtleff*, 189 U.S. at 314.<sup>12</sup> In enacting laws to govern the federal workforce, Congress has frequently required hearings before particular public officials could be removed for cause.<sup>13</sup> And before President Taft made the first presidential for-cause removals in 1913, he notified the officers in question and allowed them to defend themselves at hearings. See Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*,

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<sup>11</sup> See, e.g., *Rex v. Mayor*, (1759) 97 Eng. Rep. 533 (K.B.) 539; *Regina v. Ballivos*, (1705) 92 Eng. Rep. 313 (Q.B.) 317; *City of Exeter v. Glide*, (1691) 90 Eng. Rep. 992 (K.B.) 992.

<sup>12</sup> See, e.g., *Lynch v. Chase*, 40 P. 666, 666-667 (Kan. 1895); *State ex rel. Hart v. Common Council*, 55 N.W. 118, 119 (Minn. 1893); *People ex rel. Mayor v. Nichols*, 79 N.Y. 582, 588-589 (1880); *Biggs v. McBride*, 21 P. 878, 881 (Or. 1889); *Ham v. Board of Police*, 7 N.E. 540, 543 (Mass. 1886); *State ex rel. Attorney Gen. v. Hawkins*, 5 N.E. 228, 236 (Ohio 1886); *Andrews v. King*, 77 Me. 224, 234 (1885); *Dullam v. Willson*, 19 N.W. 112, 116-119 (Mich. 1884); *Appeal of Willard*, 4 R.I. 597, 601 (1857); *Commonwealth v. Slifer*, 25 Pa. 23, 28 (1855).

<sup>13</sup> See, e.g., 5 U.S.C. 7104(b) (Federal Labor Relations Authority); 10 U.S.C. 942(c) (Court of Appeals for the Armed Forces); 16 U.S.C. 1852(b)(6)(B) (Regional Fishery Management Councils); 22 U.S.C. 4106(e) (Foreign Service Labor Relations Board); 22 U.S.C. 4135(d) (Foreign Service Grievance Board); 26 U.S.C. 7443(f) (Tax Court); 28 U.S.C. 152(e) (bankruptcy judges); 28 U.S.C. 176(b) (Court of Federal Claims); 28 U.S.C. 631(i) (magistrate judges); 29 U.S.C. 153(a) (National Labor Relations Board); 38 U.S.C. 7101(b)(2) (Chairman of the Board of Veterans’ Appeals); 38 U.S.C. 7253(f) (Court of Appeals for Veterans Claims).

52 U. Rich. L. Rev. 691, 729-737 (2018). Section 7521's requirement of a "hearing before the Board," 5 U.S.C. 7521(a), accordingly complies with Article II.

**D. Holding Section 7521 Unconstitutional As Applied To ALJs In Independent Agencies Would Upset Longstanding Practice And Thwart Congress's Efforts To Promote The Actual And Perceived Fairness Of Agency Adjudications**

Invalidating tenure protection for ALJs in independent agencies would upset longstanding practice. As enacted in 1946, the APA provided that "[e]xaminers shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission \* \* \* after opportunity for hearing and upon the record thereof." APA § 11, 60 Stat. 244. That provision encompassed ALJs in agencies whose heads had their own tenure protections.

In 1978, Congress replaced the Civil Service Commission with the MSPB, see Civil Service Reform Act of 1978, § 204, 92 Stat. 1134-1138, but the APA's framework otherwise remains in place today. That "three-quarters of a century of settled practice is long enough to entitle [the] practice to 'great weight'" in the interpretation of Article II. *NLRB v. Noel Canning*, 573 U.S. 513, 533 (2014) (citation omitted). That history also distinguishes Section 7521 from the "novel structure" that the Court found unconstitutional in *Free Enterprise Fund*. 561 U.S. at 496.

Holding Section 7521 unconstitutional would also subvert Congress's efforts to promote the actual and perceived fairness of agency hearings. Before the APA's enactment, "[m]any complaints were voiced against the actions of the hearing examiners, it being

charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations.” *Ramspeck*, 345 U.S. at 131. The APA’s good-cause provision addresses those complaints and reflects Congress’s intent that agency hearings be conducted by “fair and competent hearing personnel” exercising “independent judgment on the evidence,” “free from pressures by the parties or other officials within the agency.” *Economou*, 438 U.S. at 513-514. Invalidating the provision here could recreate the problems that the APA was meant to solve, thereby undermining both the “fairness” of agency hearings and “public confidence in that fairness.” *Wong Yang Sung*, 339 U.S. at 42 (citation omitted).

**E. If This Court Finds Section 7521 Unconstitutional As Applied To SEC ALJs, It Should Hold That The SEC May Remove Its ALJs At Will, And It Should Remand The Case To Allow The Fifth Circuit To Determine Whether Respondents Were Prejudiced By The Removal Restriction**

“Under the traditional default rule, removal is incident to the power of appointment.” *Free Enter. Fund*, 561 U.S. at 509. “Concluding that the removal restrictions [in Section 7521] are invalid” as applied to SEC ALJs would thus leave SEC ALJs “removable by the Commission at will.” *Ibid.* This Court resolved the constitutional problem in *Free Enterprise Fund* by holding that the Commission could remove PCAOB members at will, see *id.* at 508-509, and no good reason would exist to adopt a different solution with respect to SEC ALJs.

Because the court of appeals found the perceived Seventh Amendment and nondelegation-doctrine violations to be independent grounds for vacating the SEC’s final order, the court did “not address whether vacating would be appropriate based on [the good-cause removal restriction] alone.” Pet. App. 34a. If this Court affirms the court of appeals’ Seventh Amendment or nondelegation holding, we agree that vacatur of the Commission’s final order would be appropriate. In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), however, the Court held that, when a federal officer is found to have been unconstitutionally insulated from removal, that defect does not render any of his prior actions “void.” *Id.* at 1787. Rather, a litigant who seeks to have prior actions set aside must demonstrate some prejudice resulting from the invalid removal restriction. See *id.* at 1788-1789. If this Court decides the first two questions presented in the government’s favor, but agrees with the Fifth Circuit that Section 7521 is unconstitutional as applied to SEC ALJs, it therefore should remand the case for the court of appeals to perform the prejudice inquiry required by *Collins*.



**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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# APPENDIX

## TABLE OF CONTENTS

	Page
Constitutional provisions:	
U.S. Const. Art. I, § 1.....	1a
U.S. Const. Art. II, § 2, Cl. 2.....	1a
U.S. Const. Art. II, § 3.....	1a
U.S. Const. Art. III, § 1.....	2a
U.S. Const. Amend. VII.....	2a
Statutory provisions:	
5 U.S.C. 7521.....	2a
15 U.S.C. 77h-1(g)(1).....	3a
15 U.S.C. 77t(d)(1).....	4a
15 U.S.C. 78u(d)(3)(A) (2018 & Supp. III 2021).....	5a
15 U.S.C. 78u-2(a)(1).....	6a
15 U.S.C. 80b-3(i)(1)(A).....	8a
15 U.S.C. 80b-9(e)(1).....	9a

## APPENDIX

1. U.S. Const. Art. I, § 1 provides:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. U.S. Const. Art. II, § 2, Cl. 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. U.S. Const. Art. II, § 3 provides:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care

that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

4. U.S. Const. Art. III, § 1 provides:

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

5. U.S. Const. Amend. VII provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

6. 5 U.S.C. 7521 provides:

**Actions against administrative law judges**

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are—

- (1) a removal;
- (2) a suspension;
- (3) a reduction in grade;
- (4) a reduction in pay; and
- (5) a furlough of 30 days or less;

but do not include—

- (A) a suspension or removal under section 7532 of this title;
- (B) a reduction-in-force action under section 3502 of this title; or
- (C) any action initiated under section 1215 of this title.

7. 15 U.S.C. 77h-1(g)(1) provides:

**Cease-and-desist proceedings**

**(g) Authority to impose money penalties**

**(1) Grounds**

In any cease-and-desist proceeding under subsection (a), the Commission may impose a civil penalty on a person if the Commission finds, on the record, after notice and opportunity for hearing, that—

- (A) such person—
  - (i) is violating or has violated any provision of this subchapter, or any rule or regulation issued under this subchapter; or

(ii) is or was a cause of the violation of any provision of this subchapter, or any rule or regulation thereunder; and

(B) such penalty is in the public interest.

8. 15 U.S.C. 77t(d)(1) provides:

**Injunctions and prosecution of offenses**

**(d) Money penalties in civil actions**

**(1) Authority of Commission**

Whenever it shall appear to the Commission that any person has violated any provision of this subchapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 77h-1 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

9. 15 U.S.C. 78u(d)(3)(A) (2018 & Supp. III 2021) provides:

**Investigations and actions**

**(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions**

(3) CIVIL MONEY PENALTIES AND AUTHORITY TO SEEK DISGORGEMENT—

(A) Authority of commission.—Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to—

(i) impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation; and

(ii) require disgorgement under paragraph (7) of any unjust enrichment by the person who received such unjust enrichment as a result of such violation.

10. 15 U.S.C. 78u-2(a)(1) provides:

**Civil remedies in administrative proceedings**

**(a) Commission authority to assess money penalties**

**(1) In general**

In any proceeding instituted pursuant to sections 78o(b)(4), 78o(b)(6), 78o-6, 78o-4, 78o-5, 78o-7, or 78q-1 of this title against any person, the Commission or the appropriate regulatory agency may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person—

(A) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 et seq.], or this chapter, or the rules or regulations thereunder, or the rules of the Municipal Securities Rulemaking Board;

(B) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;

(C) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission or with any other appropriate regulatory agency under this chapter, or in any proceeding before the Commission with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report



any material fact which is required to be stated therein; or

(D) has failed reasonably to supervise, within the meaning of section 78o(b)(4)(E) of this title, with a view to preventing violations of the provisions of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision;<sup>1</sup>

11. 15 U.S.C. 80b-3(i)(1)(A) provides:

**Registration of investment advisors**

**(i) Money penalties in administrative proceedings**

**(1) Authority of Commission**

**(A) In general**

In any proceeding instituted pursuant to subsection (e) or (f) against any person, the Commission may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person—

(i) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], subchapter I of this chapter, or this subchapter, or the rules or regulations thereunder;

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<sup>1</sup> So in original. The semicolon probably should be a period.

(ii) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;

(iii) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which was required to be stated therein; or

(iv) has failed reasonably to supervise, within the meaning of subsection (e)(6), with a view to preventing violations of the provisions of this subchapter and the rules and regulations thereunder, another person who commits such a violation, if such other person is subject to his supervision;<sup>3</sup>

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<sup>3</sup> So in original. The semicolon probably should be a period.

12. 15 U.S.C. 80b-9(e)(1) provides:

**Enforcement of subchapter**

**(e) Money penalties in civil actions**

**(1) Authority of Commission**

Whenever it shall appear to the Commission that any person has violated any provision of this subchapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 80b-3(k) of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.