No. 22-859

# In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

*v.*

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

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

## REPLY BRIEF FOR THE PETITIONER


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## TABLE OF CONTENTS

Page


I. The statutes authorizing the SEC to adjudicate violations of the securities laws and to impose civil monetary penalties are consistent with the Seventh Amendment ........ 3

A. When an agency adjudication complies with Article III, no further Seventh Amendment inquiry is necessary ........ 3

B. The SEC's adjudications comply with Article III and the Seventh Amendment because they involve public rights ........ 6

C. Respondents provide no sound basis for upending this Court's longstanding public-rights doctrine ........ 11

II. The SEC's decision whether to proceed against particular violators in court or through an agency adjudication does not implicate the nondelegation doctrine ........ 14

III. The for-cause removal protection afforded to SEC ALJs complies with Article II ........ 17

A. Congress permissibly determined that the SEC's ALJs should be removable only for good cause established before the MSPB ........ 18

B. The remedies that respondents advocate do not fit the constitutional violations they assert ........ 27


## TABLE OF AUTHORITIES

Cases:


*Abrams* v. *SSA*, 703 F.3d 538 (Fed. Cir. 2012) ........ 24

*Absolute Potential, Inc., In re*, Exchange Act Release No. 71,866, 2014 WL 1338256 (Apr. 4, 2014) ........ 20

*Allen* v. *Cooper*, 140 S. Ct. 994 (2020) ........ 5, 12

Cases—Continued: Page

*Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) ........................ 3, 6-10
*Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) ........................ 28
*Butz* v. *Economou*, 438 U.S. 478 (1978) ........................ 27
*CFTC* v. *Schor*, 478 U.S. 833 (1986) ........................ 7
*Chocallo, In re*, 1 M.S.P.R. 605 (1980) ........................ 24
*City of Arlington* v. *FCC*, 569 U.S. 290 (2013) ........................ 4
*Collins* v. *Yellen*, 141 S. Ct. 1761 (2021) ........................ 24, 26, 29, 30
*Crowell* v. *Benson*, 285 U.S. 22 (1932) ........................ 16
*Free Enter. Fund* v. *PCAOB*:
537 F.3d 667, (D.C. Cir. 2008), aff'd in part rev'd in part and remanded, 561 U.S. 447 (2020) ........................ 23
561 U.S. 477 (2010) ........................ 11, 18, 23-28
*Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989) ........................ 7, 8
*HHS* v. *Jarboe*, 2023 M.S.P.B. 22 (Aug. 2, 2023) ........................ 21
*Haaland* v. *Brackeen*, 599 U.S. 255 (2023) ........................ 14
*Heckler* v. *Chaney*, 470 U.S. 821 (1985) ........................ 15
*Herman & MacLean* v. *Huddleston*, 459 U.S. 375 (1983) ........................ 9
*Kokesh* v. *SEC*, 581 U.S. 455 (2017) ........................ 9
*Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367 (2020) ........................ 30
*Lucia* v. *SEC*, 138 S. Ct. 2044 (2018) ........................ 22, 29
*Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892) ........................ 17
*Mistretta* v. *United States*, 488 U.S. 361 (1989) ........................ 17
*Morrison* v. *Olson*, 487 U.S. 654 (1988) ........................ 18, 19, 21
*Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) ........................ 6, 7, 11

Cases—Continued: Page

*Myers* v. *United States*, 272 U.S. 52 (1926) ...... 18, 19, 24, 26
*NLRB* v. *Noel Canning*, 573 U.S. 513 (2014) ..................... 13
*Northwest Airlines, Inc.* v. *County of Kent*,
510 U.S. 355 (1994)............................................................. 30
*Oceanic Steam Navigation Co.* v. *Stranahan*,
214 U.S. 320 (1909).................................................... 7, 13, 16
*Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018).............................. 4, 5, 11
*Ramspeck* v. *Federal Trial Exam'rs Conference*,
345 U.S. 128 (1953)........................................................ 26, 27
*Rapoport* v. *SEC*, 682 F.3d 98 (D.C. Cir. 2012) .................. 20
*SSA* v. *Levinson*, 2023 M.S.P.B. 20 (July 12, 2023) ........... 22
*Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020) ... 19, 26, 28
*Thomas* v. *Union Carbide Agric. Prods.*,
473 U.S. 568 (1985)............................................................ 7, 8
*Tull* v. *United States*, 481 U.S. 412 (1987) .................. 4, 5, 12
*United States* v. *Arthrex, Inc.*,
141 S. Ct. 1970 (2021) ............................................. 20, 25, 28
*United States* v. *Batchelder*, 442 U.S. 114 (1979)............... 16
*United States* v. *Grimaud*, 220 U.S. 506 (1911) ................. 17
*United States* v. *Perkins*, 116 U.S. 483 (1886).................... 18

Constitution, statutes, and regulations:

U.S. Const.:
Art. II ........................................2, 17-19, 21, 22, 25, 28, 29
§ 2, Cl. 2 (Appointments Clause)............................. 20
Art. III.......................................1, 3-6, 8, 11, 13, 15, 16, 21
Amend. VII ...............................................1, 3-6, 11-16, 29
Administrative Procedure Act, ch. 324,
60 Stat. 237 (5 U.S.C. 551 *et seq.*, 701 *et seq.*)..................... 3
§ 11, 60 Stat. 244 ............................................................. 27
5 U.S.C. 706..................................................................... 30

Statutes and regulations—Continued: Page

Occupational Safety and Health Act of 1970,
29 U.S.C. 651 *et seq.* ........ 8
29 U.S.C. 654 ........ 10
5 U.S.C. 1202(d) ........ 21
5 U.S.C. 3105 ........ 21
5 U.S.C. 7513(a) ........ 20
5 U.S.C. 7521 ........ 18, 21, 22, 24-26, 29
5 U.S.C. 7521(a) ........ 17, 21, 27, 28
15 U.S.C. 77h-1(f) ........ 9
15 U.S.C. 77h-1(g) ........ 9
15 U.S.C. 78u-2 ........ 9
15 U.S.C. 78u-3(f) ........ 9
28 U.S.C. 594(a) (Supp. V 1987) ........ 19
17 C.F.R.:
Pt. 201:
Section 201.411(b)(2) ........ 25
Pt. 275:
Section 275.206(4)-1(b) ........ 9
Section 275.206(4)-2(a) ........ 9

Miscellaneous:

*Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure, Appointed by the Attorney General*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) ........ 27
1 Annals of Cong. 435 (1789) ........ 12
William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511 (2020) ........ 4
2 Bernard Schwartz, *The Bill of Rights: A Documentary History* (1971) ........ 12

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Each of the Fifth Circuit's holdings declared a federal statute invalid, rejected longstanding practice, and contradicted or misapplied this Court's precedents. Respondents fail to justify those disruptive results. To the contrary, their brief further underscores the Fifth Circuit's errors.

First, respondents have not demonstrated that Congress violated the Seventh Amendment by authorizing the Securities and Exchange Commission (SEC or Commission) to adjudicate violations of the securities laws and impose civil penalties. If a matter involves "public rights" and can therefore be assigned to an agency without violating Article III, the Seventh Amendment imposes no independent barrier to agency adjudication. The SEC actions at issue here fall within the heartland of the public-rights doctrine because they are brought by the government in its sovereign capacity

to enforce public rights created by a federal statute. Respondents' contrary arguments are foreclosed by more than a century of this Court's precedent.

Second, respondents barely address—and fail to justify—the Fifth Circuit's nondelegation holding. Respondents emphasize that defining the permissible enforcement mechanisms for a category of claims is a legislative function. But Congress performed that function when it authorized the SEC to bring agency or federal-court enforcement actions for the class of cases at issue here. Respondents do not seriously dispute that deciding which available enforcement mechanism to pursue in a particular case is a quintessentially executive function.

Third, respondents have not established that the for-cause removal protection afforded to the SEC's administrative law judges (ALJs) violates Article II. Respondents argue that Article II precludes Congress from granting ALJs even a single layer of protection against removal without cause. But under this Court's longstanding precedents, Congress may require a showing of cause before a department head removes an inferior officer such as an ALJ.

Respondents also argue that Congress improperly granted the Commission's ALJs two layers of removal protection by empowering the Merit Systems Protection Board (MSPB) to determine whether good cause supports an ALJ's removal. But the MSPB's role does not give ALJs a second layer of protection; it simply verifies compliance with the first. And in any event, a modest second layer of removal protection for inferior officers performing purely adjudicative functions does not violate Article II. Respondents' contrary view would upend three-quarters of a century of settled

practice embodied in the Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (5 U.S.C. 551 *et seq.*, 701 *et seq.*). It would also subvert Congress's efforts to promote the actual and perceived fairness of agency adjudications.

## I. THE STATUTES AUTHORIZING THE SEC TO ADJUDICATE VIOLATIONS OF THE SECURITIES LAWS AND TO IMPOSE CIVIL MONETARY PENALTIES ARE CONSISTENT WITH THE SEVENTH AMENDMENT

In *Atlas Roofing Co.* v. *Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977), this Court unanimously held that, "when Congress creates new statutory 'public rights,' it may assign their adjudication"—including the imposition of civil penalties—"to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" *Id.* at 455. That holding squarely controls here. Respondents assert that *Atlas Roofing* departed from the original understanding of the Seventh Amendment. But respondents do not ask this Court to overrule its precedent, and their arguments lack merit in any event. Respondents also fail to identify any relevant distinction between this case and *Atlas Roofing*.

### A. When An Agency Adjudication Complies With Article III, No Further Seventh Amendment Inquiry Is Necessary

Respondents assert (Br. 27) that *Atlas Roofing* impermissibly "blend[ed] [the] Article III and Seventh Amendment analysis." That argument ignores the Seventh Amendment's text and this Court's repeated holdings that when an agency adjudication is consistent with

Article III, no further Seventh Amendment inquiry is necessary or appropriate.

1. 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). Because a "suit" is a proceeding in a court of law, an agency adjudication is not a "suit." Gov't Br. 18-19; William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1570-1571 (2020). By its plain terms, therefore, the Seventh Amendment "is not applicable to administrative proceedings." *Tull* v. *United States*, 481 U.S. 412, 418 n.4 (1987).

Instead, when Congress authorizes agencies to conduct adjudications, the relevant constitutional question is whether Congress has impermissibly "confer[red] 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 omitted). For many disputes, the only permissible federal adjudicator is an Article III court. But Executive Branch agencies also "conduct adjudications * * * and have done so since the beginning of the Republic." *City of Arlington* v. *FCC*, 569 U.S. 290, 304 n.4 (2013). In particular, Congress has "significant latitude to assign adjudication of public rights to entities other than Article III courts." *Oil States*, 138 S. Ct. at 1373.

This Court's decision in *Oil States* reconfirmed the settled principle that those agency adjudications do not violate the Seventh Amendment. Gov't Br. 22. The Court held that Congress had permissibly authorized Executive Branch adjudicators to cancel an issued patent, rejecting the patent owner's contention that only an Article III court can perform that function. See 138

S. Ct. at 1373-1378. The Court then explained that its "rejection of [the patent owner's] Article III challenge also resolve[d] its Seventh Amendment challenge," because "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.'" *Id.* at 1379 (citation omitted).[1]

2. Respondents question (Br. 26-27, 29-30) this Court's holdings that no further Seventh Amendment inquiry is required when Congress permissibly authorizes an agency to adjudicate matters involving public rights. But respondents make no attempt to offer the sort of "special justification" this Court demands before overruling precedent. *Allen* v. *Cooper*, 140 S. Ct. 994, 1003 (2020) (citation omitted). To the contrary, respondents ultimately appear to disclaim (Br. 26-27) any request that the Court "abandon the public rights doctrine," and they acknowledge that this case should be decided under "the Court's modern Seventh Amendment jurisprudence." Accordingly, respondents can prevail on their Seventh Amendment claim only if Congress violated Article III by authorizing the SEC to adjudicate violations of the securities laws and assess civil penalties.

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[1] The analysis proceeds differently when Congress assigns a claim to an Article III court. In such cases, the Court determines whether the Seventh Amendment requires a jury trial by "examin[ing] both the nature of the action and of the remedy sought" and asking whether the suit "is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty." *Tull*, 481 U.S. at 417.

### B. The SEC's Adjudications Comply With Article III And The Seventh Amendment Because They Involve Public Rights

This Court has made clear that, whatever the full scope of the public-rights doctrine, it 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*, 430 U.S. at 450. Respondents proceed as though that holding was an innovation, but they ignore its deep historical roots. Respondents also assert that this Court's subsequent decisions have circumscribed *Atlas Roofing*, but the decisions on which they rely in fact reaffirmed it. And respondents' attempts to distinguish the securities laws from the statutory scheme at issue in *Atlas Roofing* are unpersuasive.

1. Respondents assert (Br. 31-32) that the public-rights doctrine does not encompass matters involving civil penalties or otherwise affecting private property. Respondents do not dispute that *Atlas Roofing* squarely rejected that argument. See 430 U.S. at 449-450. And in seeking to minimize that holding, respondents ignore its grounding in a line of precedent dating back more than a century.

For example, *Atlas Roofing* relied on this Court's seminal public-rights decision, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), which upheld an 1820 law authorizing the Treasury Department to determine a debt owed by a customs collector and issue a warrant authorizing the seizure of the collector's property. *Id.* at 274-275, 282-286; see *Atlas Roofing*, 430 U.S. at 450-451. The Court in *Murray's Lessee* described the assessment and collection of

that debt as an example of a matter "involving public rights" that Congress "may or may not bring within the cognizance of the courts of the United States, as it may deem proper." 59 U.S. (18 How.) at 284.

This Court has long recognized that the public-rights matters that can be "committed to an administrative officer without the necessity of resorting to the judicial power" include the imposition of a civil "penalty" for violating a federal statute. *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 338 (1909). As early as 1909, the Court deemed the matter "settled," explaining that the contrary argument "disregards many previous adjudications of this court and ignores practices often manifested and hitherto deemed to be free from any possible constitutional question." *Id.* at 338-339.

In *Atlas Roofing*, the Court relied on *Murray's Lessee*, *Stranahan*, and a long line of other decisions upholding federal laws "creat[ing] new statutory obligations, provid[ing] for civil penalties for their violation, and committ[ing] exclusively to an administrative agency the function of deciding whether a violation has in fact occurred." 430 U.S. at 450; see *id.* at 450-451 (collecting cases). Our opening brief (at 22-23) highlighted many of the same precedents. But respondents simply ignore them.

2. Respondents assert that this Court's "subsequent cases have substantially overruled *Atlas Roofing*." Resp. Br. 38 (capitalization and emphasis omitted). But the decisions respondents cite did no such thing. Each of them addressed a dispute between two private parties rather than a case "where the Government is involved in its sovereign capacity." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 51 (1989); see *CFTC* v. *Schor*, 478 U.S. 833, 836-839 (1986); *Thomas* v. *Union Carbide*

*Agric. Prods.*, 473 U.S. 568, 582-583 (1985). The Court's analysis thus focused on whether and under what circumstances Congress may assign "cases not involving the Federal Government" to non-Article III tribunals. *Granfinanciera*, 492 U.S. at 54. And in resolving that distinct question, the Court reaffirmed that the public-rights doctrine authorizes Congress to assign adjudication to an administrative agency when it creates a "statutory cause of action" that "inheres in, or lies against, the Federal Government in its sovereign capacity." *Id.* at 53.[2]

3. Respondents maintain (Br. 34) that the principle recognized in *Atlas Roofing* does not control here because the federal securities laws serve "the same essential function" as the common law of fraud and have some overlapping elements. But Congress's power to authorize the government to enforce public rights in administrative proceedings applies even when Congress creates a cause of action that is "closely *analogous* to common law claims." *Granfinanciera*, 492 U.S. at 52. In *Atlas Roofing*, for example, the Court upheld an agency's imposition of civil penalties under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, against employers that maintained unsafe working conditions. Gov't Br. 21-22, 25, 31-32. In so doing, the Court recognized that the same employer conduct could

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[2] Respondents invoke (Br. 31 n.52, 38-39) the Court's observation in *Thomas* that it has not held that "Article III has no force simply because a dispute is between the government and an individual." 473 U.S. at 586. That statement is entirely consistent with the principle recognized in *Atlas Roofing*, which allows Congress to authorize administrative adjudication when the government acts "in its sovereign capacity to enforce public rights created by statutes." 430 U.S. at 450. That principle does not apply if, for example, the government brings a common-law claim in a proprietary capacity.

give rise to "state common-law actions for negligence and wrongful death." *Atlas Roofing*, 430 U.S. at 445.

Here, as in *Atlas Roofing*, Congress "found the common-law and other existing remedies" to be "inadequate" and responded by establishing "a new cause of action, and remedies therefor, unknown to the common law." 430 U.S. at 461. The federal securities laws are not limited to actual fraud; they establish a comprehensive regulatory scheme including registration, disclosure, and various other requirements. Gov't Br. 2-3. Even "the antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 388-389 (1983). Violations are "committed against the United States rather than an aggrieved individual," and the Commission's enforcement actions thus "'remedy harm to the public at large.'" *Kokesh* v. *SEC*, 581 U.S. 455, 463 (2017) (citation omitted); see Gov't Br. 31-32. And the securities laws authorize remedies unknown to the common law, such as civil penalties and orders disqualifying violators from holding positions in the securities industry. See, *e.g.*, 15 U.S.C. 77h-1(f) and (g), 78u-2, 78u-3(f).

Seeking to distinguish *Atlas Roofing*, respondents observe (Br. 37-38) that the agency in that case was enforcing regulations that established specific standards for unsafe working conditions. See 430 U.S. at 447. But the SEC has also promulgated regulations implementing the statutory antifraud provisions, many of which likewise impose granular requirements. See, *e.g.*, 17 C.F.R. 275.206(4)-1(b) (banning testimonials and endorsements that do not comply with particular requirements); 17 C.F.R. 275.206(4)-2(a) (barring investment

advisors from taking custody of client property unless certain conditions are met).

In any event, nothing in *Atlas Roofing* suggests that Congress's power to authorize agency adjudications turns on the specificity of the rules those agencies later adopt. Rather, the Court stressed *Congress's* power to "create[] new statutory obligations, provide[] for civil penalties for their violation, and commit[] exclusively to an administrative agency the function of deciding whether a violation has in fact occurred." *Atlas Roofing*, 430 U.S. at 450. And the statute at issue in *Atlas Roofing* itself defined the duty it imposed in very general terms. See *id.* at 445 n.2 (quoting 29 U.S.C. 654).[3]

4. Finally, respondents emphasize (Br. 45-47) that the SEC may bring enforcement actions either by commencing an agency adjudication or by filing suit in federal court. Respondents assert that by allowing the Commission to proceed in either forum, Congress violated a "requirement" that "public rights claims" include only matters that "are 'uniquely' or 'peculiarly suited for agency adjudication.'" Resp. Br. 45 (citations omitted). No such requirement exists: Respondents purport to be quoting *Granfinanciera* and *Atlas Roofing*, but that language does not appear in the cited decisions—or in any other decision of this Court.

Respondents also invoke (Br. 46) this Court's observation that "[g]enerally, when Congress creates procedures 'designed to permit agency expertise to be

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[3] Respondents briefly assert (Br. 33) that the public-rights doctrine applies only when agency adjudications will proceed expeditiously and the adjudication of new claims would otherwise burden the courts. But *Atlas Roofing* simply described those potential policy advantages of agency adjudication; it did not suggest that they are constitutional prerequisites. See 430 U.S. at 455, 461.

brought to bear on particular problems,' those procedures 'are to be exclusive.'" *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 489 (2010) (citation omitted). But the quoted passage was not announcing any constitutional rule. Instead, it was discussing principles that guide courts in determining, as a matter of statutory construction, whether Congress's specification of one mechanism for review precludes alternative remedies. *Ibid.*

Respondents' assertion that public rights include only matters "uniquely" suited to administrative adjudication, Resp. Br. 45 (citation omitted), also contradicts this Court's precedents dating back to *Murray's Lessee*, which defined "public rights" as matters that "congress may or may not bring within the cognizance of the courts of the United States," 59 U.S. (18 How.) at 284. In *Oil States*, for example, the Court held that Congress acted constitutionally in authorizing agency reconsideration of the validity of issued patents, even though Article III courts also resolve challenges to patent validity. 138 S. Ct. at 1378; see Gov't Br. 32-33. Congress likewise acted permissibly in allowing the SEC to enforce the securities laws through either administrative or judicial proceedings.

### C. Respondents Provide No Sound Basis For Upending This Court's Longstanding Public-Rights Doctrine

1. Respondents assert (Br. 13-32) that this Court's public-rights jurisprudence is inconsistent with the original understanding of the Seventh Amendment. But again, respondents appear to have disclaimed (Br. 26-27) any request that the Court overrule its long and unbroken line of precedents holding that Congress may create public rights and assign their enforcement, including the imposition of civil penalties, to agency

adjudication. See p. 5, *supra*. Respondents certainly have not attempted to establish the sort of "special justification," *Allen*, 140 S. Ct. at 1003 (citation omitted), required to justify overruling such an established body of law—particularly one on which Congress has repeatedly relied by authorizing agencies to impose civil penalties. See, *e.g.*, Gov't Br. 32 n.3.

In any event, respondents' arguments about original meaning fail on their own terms. Respondents cite sources establishing the uncontroversial proposition that the Founding generation prized the right to trial by jury. But respondents err in asserting that the primary motivation for codifying that right was to ensure a jury in civil suits by the government. For example, respondents highlight (Br. 19-23) the demands for a bill of rights that emerged from state ratifying conventions. But five of the seven conventions that proposed a civil-jury amendment limited the right to suits "between citizens of different states" or to suits "between man and man" and "controversies respecting property" (that is, *in rem* actions)—thus generally excluding suits brought by the government. 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 658, 713, 761, 841, 967 (1971) (proposals from Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia).

James Madison's original draft of the Seventh Amendment similarly applied only to suits "between man and man." 1 Annals of Cong. 435 (1789). That language was dropped during the drafting process, and this Court has held that the Seventh Amendment applies in suits brought by the United States. See, *e.g.*, *Tull*, 481 U.S. at 417-425. But the development of the Seventh Amendment refutes respondents' assertion

that it was principally directed at ensuring a jury trial in government actions seeking civil penalties.

Even more to the point, respondents' historical sources focus on the right to trial by jury in suits heard by courts. None of them address the circumstances under which Congress may provide for matters to be adjudicated by executive officials. The Seventh Amendment does not address that question because it applies only "[i]n Suits at common law." U.S. Const. Amend. VII. And this Court has recognized that "the legislation of Congress from the beginning" has reflected the understanding that "it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable monetary penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." *Stranahan*, 214 U.S. at 339. That "longstanding 'practice of the government'" spanning most of our Nation's history has "'liquidate[d] & settle[d]'" the meaning of the Constitution. *NLRB* v. *Noel Canning*, 573 U.S. 513, 525 (2014) (citations omitted).

2. Respondents offer no viable alternative account of the Seventh Amendment and Article III. They assert (Br. 32, 43 n.67) that the public-rights doctrine should be limited to "claims to which the government is the real party in interest"; situations where "the government itself was victimized"; and controversies "involving public benefits, privileges or franchises granted by the government." But respondents do not attempt to ground those limits in the Constitution's text, original understanding, historical practice, or this Court's precedents, which have long permitted agency adjudication of civil penalties in circumstances where the government was

injured only in its sovereign capacity. See Gov't Br. 23 (citing decisions issued in 1909 and 1932 in which this Court upheld use of agency adjudications to impose fines for immigration-law violations).

Respondents' proposed limitations also have no sound theoretical basis. An administrative proceeding in which the government seeks to protect the Nation's securities markets and the investing public is even *less* like a "Suit[] at common law," U.S. Const. Amend. VII, than is a proceeding in which the government appears as the "victimized" party or the "real party in interest," Resp. Br. 32, 43 n.67. The hallmark of a common-law action, after all, is that an injured party seeks compensation for harm done to itself.

3. At bottom, although respondents "criticiz[e] [this Court's] precedent as inconsistent with the Constitution's original meaning," they fail to offer any viable "theory for rationalizing this body of law." *Haaland* v. *Brackeen*, 599 U.S. 255, 279 (2023). They "neither ask [the Court] to overrule the precedent they criticize nor try to reconcile their approach with it." *Ibid.* And they also do not grapple with the "consequences of their position," including its threat to "undermine established cases and statutes." *Ibid.* As in *Brackeen*, the Court should decline respondents' invitation to unsettle an important and established body of law based on such underdeveloped arguments.

## II. THE SEC'S DECISION WHETHER TO PROCEED AGAINST PARTICULAR VIOLATORS IN COURT OR THROUGH AN AGENCY ADJUDICATION DOES NOT IMPLICATE THE NONDELEGATION DOCTRINE

When the SEC chooses in a particular matter to commence a civil action, an agency adjudication, or neither, it exercises only enforcement discretion—a core

executive power. Gov't Br. 34-40. In holding that Congress impermissibly delegated legislative power to the Commission, the Fifth Circuit misread this Court's decisions and misunderstood the distinction between executive and legislative power. *Id.* at 40-44. Respondents make little effort to defend the Fifth Circuit's reasoning. They instead conflate legislative judgments about categories of claims with Executive Branch decisions in individual cases; rehash their Seventh Amendment and Article III contentions; and question the foundations of this Court's modern nondelegation precedents. All of those arguments lack merit.

This Court has never suggested that an agency's choice among available enforcement options in a particular case could be a forbidden exercise of legislative power, or that Congress must establish criteria to guide that choice in order to prevent such a delegation from occurring. To the contrary, statutes that confer enforcement authority on agency officials *typically* contain "no meaningful standard against which to judge the agency's exercise of discretion" in a particular case. *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). The Court has viewed the usual absence of statutory constraints not as a potential nondelegation problem, but as a settled feature of the legal landscape that supports treating Executive Branch enforcement decisions as "presumptively unreviewable." *Id*. at 832.

Respondents assert (Br. 50) that the power "to assign claims to Article I tribunals" is "quintessentially legislative in nature" and infer that the SEC exercises legislative power when it commences an agency adjudication. Respondents are correct that determining what range of enforcement mechanisms will be available in a class of controversies is a core legislative power. But

once Congress delineates the available enforcement options, an Executive Branch official's choice among them in a particular case is a routine exercise of executive power. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 125-126 (1979).

Both *Crowell* v. *Benson*, 285 U.S. 22 (1932), and *Stranahan*, *supra*—the decisions on which respondents rely (Br. 50)—support that conclusion. The Court in *Crowell* sustained, against an Article III challenge, statutory provisions that authorized an agency to adjudicate workers'-compensation claims. 285 U.S. at 36, 48-54. In *Stranahan*, the Court found that Congress had permissibly empowered the Executive Branch to conduct adjudications in which the agency could fine individuals who had violated certain immigration laws. 214 U.S. at 329-335, 338-340. In each case, the Court simply held that Congress had power to authorize agency adjudication in a particular *category* of claims.

Respondents allude only briefly to the crucial distinction, emphasized in our opening brief (*e.g.*, at 42-43), 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. Resp. Br. 51. Respondents' only rejoinder is to cross-reference their argument that Article III and the Seventh Amendment bar Congress from authorizing the SEC to choose between administrative and judicial enforcement in particular cases. *Ibid.* Respondents thus make no meaningful effort to articulate a nondelegation argument that is independent of their other constitutional challenges.

Respondents also assert (Br. 51) that "[t]he power to strip away unilaterally an enforcement target's Seventh Amendment and Article III rights bears no relationship

to the everyday decisions criminal prosecutors make." But where Congress has permissibly authorized agency adjudication of a particular claim, the agency does not "strip away" a defendant's rights by initiating such proceedings. And when the SEC decides between bringing enforcement proceedings before the agency or in court, that choice has the same ramifications as case-specific choices the Executive Branch makes in a variety of other contexts. Gov't Br. 43-44.

Finally, to the extent that respondents broadly fault this Court for upholding what they assert were impermissible delegations of Congress's legislative power "during the New Deal era," Resp. Br. 49; see *id.* at 47-49, this case does not present high-level questions about the foundations of the modern nondelegation doctrine. In any event, that argument is misplaced. "From the beginning of the Government," Congress has enacted, and this Court has upheld, statutes "conferring upon executive officers power to make rules and regulations" that bind the public. *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911). And when Congress confers rulemaking authority upon an agency and provides constitutionally sufficient standards to cabin the agency's discretion, the agency's promulgation of rules is a permissible exercise of executive power, not of delegated legislative power. Gov't Br. 37; see *Mistretta* v. *United States*, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting); *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 692 (1892).

### III. THE FOR-CAUSE REMOVAL PROTECTION AFFORDED TO SEC ALJS COMPLIES WITH ARTICLE II

Respondents offer no sound reason to hold that Congress violated Article II by making the Commission's ALJs removable "only for good cause established and determined by the [MSPB]." 5 U.S.C. 7521(a).

Respondents also identify the wrong remedy for that purported constitutional violation.

**A. Congress Permissibly Determined That The SEC's ALJs Should Be Removable Only For Good Cause Established Before The MSPB**

The Fifth Circuit reasoned that Section 7521 violates Article II as applied to ALJs at independent agencies—that is, ALJs at agencies whose heads are removable only for cause. Pet. App. 30a-31a. Respondents, however, disclaim (Br. 53 n.74) reliance on that theory. They instead advance two broader theories that would potentially invalidate for-cause removal protection for ALJs in *all* agencies. Specifically, they argue that (a) Congress may not grant ALJs even a single layer of removal protection, and (b) in any event, the MSPB's role in the removal process creates an "additional robust layer[] of tenure protection" that violates Article II. *Ibid.*; see *id.* at 52-64. Each of those theories is incorrect.

1. Contrary to respondents' argument (Br. 54-60), Article II does not preclude Congress from granting ALJs a single layer of for-cause protection. This Court has repeatedly recognized that Article II allows Congress to regulate department heads' removal of inferior officers by requiring a showing of cause. See, *e.g.*, *Free Enter. Fund*, 561 U.S. at 493-495; *Morrison* v. *Olson*, 487 U.S. 654, 685-693 (1988); *Myers* v. *United States*, 272 U.S. 52, 160-161 (1926); *United States* v. *Perkins*, 116 U.S. 483, 485 (1886). Respondents do not ask the Court to overrule those precedents. Nor do they dispute that SEC ALJs are inferior officers or that the Commission is a department head.

Respondents invoke (Br. 56) this Court's statement that it has recognized only "two exceptions" to the

President's power to remove executive officers at will: "one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority." *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2199-2200 (2020). But the Court has never suggested that for-cause removal protection for inferior officers appointed by department heads is presumptively invalid. To the contrary, although Chief Justice Taft's landmark opinion for the Court in *Myers* "recognized the President's prerogative to remove executive officials," *id.* at 2197, it also reaffirmed that when Congress "commit[s] the appointment of such inferior officers to the heads of departments," it may "prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal," *Myers*, 272 U.S. at 161. Justice Scalia's dissent in *Morrison* similarly recognized that Article II "does not require that [the President] have plenary power to remove inferior officers." 487 U.S. at 724 n.4. He explained that because inferior officers are "subject to the supervision of" principal officers, Article II requires only that they be "removable *for cause*, which would include, of course, the failure to accept supervision." *Ibid.*

Respondents' argument also fails on its own terms. In *Morrison*, this Court upheld restrictions on the removal of the independent counsel, characterizing her duties as "limited" even though she possessed " 'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice.' " 487 U.S. at 671 (quoting 28 U.S.C. 594(a) (Supp. V 1987)); see *id.* at 685-693. SEC ALJs exercise far less power. An ALJ may conduct an adjudication only if the Commission chooses to bring an

administrative enforcement proceeding and to assign it to an ALJ. Gov't Br. 57-58. The Commission retains plenary power to review the ALJ's initial decision. *Id.* at 58-59. And contrary to respondents' assertion (Br. 59), an ALJ's decision does not set "intra-agency" "precedent" that binds the Commission in future cases. See *Rapoport* v. *SEC*, 682 F.3d 98, 105 (D.C. Cir. 2012); *In re Absolute Potential, Inc.*, Exchange Act Release No. 71,866, 2014 WL 1338256, at *8 n.48 (Apr. 4, 2014).

SEC ALJs, unlike the independent counsel, also perform purely adjudicative functions—which means that Congress had particularly strong reasons to grant them protection from removal without cause. Gov't Br. 51-56. This Court's remedial analysis in *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970 (2021), illustrates the point. The Court held that Congress had violated the Appointments Clause by granting administrative patent judges (APJs) both (a) protection from removal except "for such cause as will promote the efficiency of the service" and (b) the power to issue decisions that could not be reviewed by a principal officer. 5 U.S.C. 7513(a); see *Arthrex*, 141 S. Ct. at 1985-1986. The Federal Circuit had cured that problem by invalidating APJs' removal protection, but a majority of this Court held that authorizing the Director of the Patent and Trademark Office (PTO) to review their decisions would "better reflect[] the structure of supervision within the PTO and the nature of APJs' duties." *Arthrex*, 141 S. Ct. at 1987 (plurality opinion); see *id.* at 1997 (Breyer, J., concurring in the judgment in part and dissenting in part). The Court thus preserved APJs' removal protection while giving the Director the same power of review that the Commission possesses over its ALJs' decisions. The

Court's choice of remedy suggests that Congress can likewise confer removal protection on ALJs.

2. Respondents argue (Br. 63-64) that Section 7521 improperly grants the Commission's ALJs two layers of removal protection by empowering the MSPB—whose members are removable only for "inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. 1202(d)—to judge whether good cause supports an ALJ's removal. That is incorrect.

a. The relevant statutory provisions make clear that the agency, not the MSPB, hires and fires ALJs. See 5 U.S.C. 3105 (empowering the "agency" to appoint ALJs); 5 U.S.C. 7521(a) (providing that "the agency" may remove ALJs for good cause). The MSPB simply reviews the agency's removal decision to verify that good cause supports it. The MSPB's role thus does not give ALJs a second layer of protection from removal; the MSPB simply enforces the first layer. Respondents do not dispute that Congress could empower an Article III court to review removals for compliance with statutory good-cause requirements. Gov't Br. 61-62; *Morrison*, 487 U.S. at 693 n.33. And they do not explain how entrusting the same task to an Article II tribunal could more seriously impinge on the President's control over subordinate agency officials.

Relying on MSPB decisions from the 1980s, respondents assert that the MSPB "reserves to itself the power to determine 'the appropriate penalty if it finds good cause.'" Resp. Br. 64 (citation omitted). But as our opening brief explains (at 62-63), the MSPB has overruled those decisions, clarifying that the employing agency decides whether to remove an ALJ and that the MSPB decides only whether good cause supports that agency action. See *HHS* v. *Jarboe*, 2023 M.S.P.B. 22,

¶ 9 (Aug. 2, 2023) ("We have, in certain cases, wrongly suggested that the [MSPB] 'selects' or makes the 'choice' of penalty in a case arising under 5 U.S.C. § 7521. * * * [W]e hereby overrule those decisions.") (citation omitted); *SSA* v. *Levinson*, 2023 M.S.P.B. 20, ¶ 38 (July 12, 2023) ("To the extent any of our prior decisions have suggested that the [MSPB] * * * [removes] an ALJ under 5 U.S.C. § 7521, they are overruled.").

b. Respondents assert (Br. 53-54) that the government's position in this case is inconsistent with its position in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018). But there, as here, the government argued that Section 7521, properly read, "comports with constitutional requirements." Gov't Br. at 48, *Lucia*, *supra* (No. 17-130) (*Lucia* Br.). The government also argued that Section 7521, as construed by the MSPB at that time, raised "serious constitutional concerns." *Ibid.*; see *id.* at 46-48. Since then, however, the Board has cured the central constitutional problem that the government identified by overruling its decisions asserting "the right to determine 'the appropriate penalty if it finds good cause.'" *Id.* at 47 (citation omitted); see pp. 21-22, *supra*.[4]

3. Even if the MSPB's role gave ALJs a second layer of removal protection, Section 7521 would comply with Article II. And for the same reason, Section 7521 is constitutional as applied to ALJs in agencies headed by

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[4] The government's position here differs from its position in *Lucia* only in one respect. In *Lucia*, the government further argued that Section 7521 should be read to empower the MSPB to determine only whether "factual evidence exists to support" the agency's asserted grounds for dismissal, not to determine whether those grounds "amount to 'good cause.'" *Lucia* Br. at 52. The government does not rely on that argument here.

principal officers removable only for cause—contrary to the Fifth Circuit's reasoning below.

Respondents err in asserting (Br. 57) that this Court in *Free Enterprise Fund* drew "a bright line prohibiting more than one layer of tenure protection" for inferior officers. The Court stated that the "only issue" before it was whether Congress could grant such protection to the members of the Public Company Accounting Oversight Board (PCAOB), which was an independent subagency exercising substantial regulatory and enforcement powers. 561 U.S. at 508; see *Free Enter. Fund* v. *PCAOB*, 537 F.3d 667, 686 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), aff'd in part, rev'd in part, and remanded, 561 U.S. 447 (2020). The Court added that the "size and variety" of the federal government "discourage[d] general pronouncements." 561 U.S. at 506. It specifically stated that its decision did not address federal workers who are employees rather than officers of the United States, *ibid.*; "the civil service system within independent agencies," *ibid.*; "military officers," *id.* at 507; or, most relevant here, an independent agency's "administrative law judges," *id.* at 507 n.10. And the constitutional problems the Court identified in *Free Enterprise Fund* do not exist here because the Commission's ALJs differ in meaningful ways from the members of the PCAOB.

First, the ALJs perform purely adjudicative functions. Respondents dismiss (Br. 61) that distinction as immaterial. But *Free Enterprise Fund* framed the question in that case as one concerning the removability of an "inferior officer [who] determines the policy and enforces the laws of the United States," 561 U.S. at 484, and it distinguished ALJs on the ground that they "perform adjudicative rather than enforcement or

policymaking functions," *id.* at 507 n.10. More broadly, an "adjudicatory body" in the Executive Branch has "a unique need" for decisional independence, *Collins* v. *Yellen*, 141 S. Ct. 1761, 1783 n.18 (2021), and Congress has long met that need by protecting adjudicators from removal at will, Gov't Br. 54-55.

Respondents cite (Br. 61) this Court's observation in *Myers* that, although the President may not "properly influence" an executive adjudicator's decisions "in a particular case," "he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." 272 U.S. at 135. But Section 7521 comports with that principle. 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 the office." *Abrams* v. *SSA*, 703 F.3d 538, 543 (Fed. Cir. 2012) (citation omitted). An agency thus may remove ALJs for "incompetence or other failings in the performance of [their] duties," *In re Chocallo*, 1 M.S.P.R. 605, 610 (1980), including "disregard for binding Commission legal and policy judgments" or "substantially deficient job performance," Gov't Br. 61.

Second, the SEC retains other means of controlling ALJs' exercise of executive power, including deciding whether to use ALJs in the first place, what cases to assign to ALJs, what functions the ALJs should perform in those cases, and whether to accept or reject the ALJs' initial decisions. Gov't Br. 57-59. In *Free Enterprise Fund*, by contrast, the Court observed that "the [PCAOB] is empowered to take significant enforcement actions, and does so largely independently of the Commission," and that the governing statute "nowhere gives

the Commission effective power to start, stop, or alter individual [PCAOB] investigations." 561 U.S. at 504. Respondents note (Br. 62) that the SEC may decline to review any particular ALJ decision. See 17 C.F.R. 201.411(b)(2). But under Article II, a department head "need not review every decision" by an inferior officer; "[w]hat matters is that the [department head] have the discretion to review decisions." *Arthrex, Inc.*, 141 S. Ct. at 1988 (plurality opinion); see Gov't Br. 58-59. The SEC retains such discretion here.

Respondents assert (Br. 62) that *Free Enterprise Fund* has "already rejected the argument" that alternative mechanisms of control can compensate for removal restrictions. That is incorrect. In that case, the Court focused on whether Congress had "deprive[d] the President of adequate control" over the PCAOB, 561 U.S. at 508; described removal as a "'tool for control,'" *id.* at 510 (citation omitted); and distinguished multiple layers of tenure protection for military officers because such officers are "broadly subject to Presidential control through the chain of command," *id.* at 507. The answer to the constitutional question presented here thus turns not on how many layers of tenure protection SEC ALJs enjoy, but on whether the statutory scheme as a whole preserves the Commissioners' control of their subordinates' exercise of executive power. It does.

Finally, Section 7521's good-cause standard sets a lower bar for removal of ALJs than the "unusually high" bar set by the statute at issue in *Free Enterprise Fund*. 561 U.S. at 503. To be sure, as respondents observe (Br. 63), the good-cause standard imposes meaningful restrictions on the removal of ALJs. For example, it prevents an agency from firing an ALJ arbitrarily, or based on political affiliation. It also precludes an

agency from threatening to fire an ALJ in order to "influence or control" the ALJ's decision in "a particular case." *Myers*, 272 U.S. at 135. But Section 7521 still provides agencies with significantly more flexibility than the "rigorous standard" in *Free Enterprise Fund*, which permitted removal only for "willful violations" of some (but not all) laws or regulations, "willful abuse" of power, or "unreasonable failure to enforce compliance." 561 U.S. at 503.

4. This case also differs from *Free Enterprise Fund* for a more fundamental reason. There, the Court identified "the lack of historical precedent" for the PCAOB as "perhaps the most telling" indication of a constitutional problem. 561 U.S. at 505 (citation omitted). The Court's recent decisions invalidating removal protection for the heads of agencies "led by a single Director" likewise emphasized that such a structure "is almost wholly unprecedented." *Seila Law*, 140 S. Ct. at 2201; see *Collins*, 141 S. Ct. at 1783-1784.

This case is entirely different: For-cause removal protection for ALJs—including ALJs within independent agencies—has been a feature of our system of government since the enactment of the APA in 1946. Gov't Br. 4-6. That approach was not an incidental or little-noticed feature of the statute, but rather a carefully considered judgment. Before the APA, regulated parties complained that agency adjudicators "were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Ramspeck* v. *Federal Trial Exam'rs Conference*, 345 U.S. 128, 131 (1953). After considering a variety of potential approaches, Congress addressed those concerns by adopting the recommendation of the Attorney General's Committee on

Administrative Procedure that ALJs be made removable only for good cause, as determined by an executive tribunal outside the employing agency (originally the Civil Service Commission, now the MSPB). See APA § 11, 60 Stat. 244; see also *Ramspeck*, 345 U.S. at 131-132; *Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedures, Appointed by the Attorney General*, S. Doc. No. 8, 77th Cong., 1st Sess., 49 (1941).

For more than 75 years, that scheme has allowed "fair and competent" ALJs to exercise "independent judgment on the evidence" before them, "free from pressures by the parties or other officials within the agency," *Butz* v. *Economou*, 438 U.S. 478, 513-514 (1978), while ensuring that department heads retain ultimate control over agency policy, Gov't Br. 45, 51-52, 58-59. Invalidating that scheme would upend more than three-quarters of a century of practice, would threaten to recreate the problems that the APA was meant to solve, and would undermine Congress's efforts to promote the actual and perceived fairness of agency adjudications.

### B. The Remedies That Respondents Advocate Do Not Fit The Constitutional Violations They Assert

1. "[W]hen confronting a constitutional flaw in a statute," this Court generally "limit[s] the solution to the problem," severing the "problematic portions while leaving the remainder intact." *Free Enter. Fund*, 561 U.S. at 508 (citation omitted). As the government's opening brief explains (at 66), if the Court agrees with the Fifth Circuit that Congress may not grant tenure protection to ALJs in independent agencies, it should hold that such agencies may remove their ALJs even without "good cause." 5 U.S.C. 7521(a). If the Court

instead agrees with respondents that the *MSPB's* role creates a constitutional defect, it should hold that agencies still need "good cause" to remove their ALJs, but that good cause need not be "established and determined by the Merit Systems Protection Board." *Ibid.*

Respondents argue (Br. 67-69) that, instead of simply disregarding any portion of the statute that creates a constitutional violation, this Court should hold that the Commission may not use ALJs at all. But that remedy would exceed "the Judiciary's 'negative power to disregard an unconstitutional enactment' in resolving a legal dispute." *Arthrex*, 141 S. Ct. at 1986 (plurality opinion) (citation omitted). It would improperly treat constitutional litigation as "a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute." *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2351 (2020) (plurality opinion). And it would conflict with this Court's decisions, which have consistently cured Article II violations by disregarding particular defective provisions rather than by jettisoning entire statutory schemes. See, *e.g.*, *Arthrex*, 141 S. Ct. at 1986 (plurality opinion); *Seila Law*, 140 S. Ct. at 2208 (plurality opinion); *Free Enter. Fund*, 561 U.S. at 508.

When severance of a discrete statutory provision will cure a constitutional violation, while leaving in place a statutory scheme that "remain[s] fully operative" and "capable of functioning independently," the Court has consistently declined to adopt a broader remedy absent weighty evidence that such was Congress's intent. *Seila Law*, 140 S. Ct. at 2209 (plurality opinion); see, *e.g.*, *Free Enter. Fund*, 561 U.S. at 509. Congress's evident preference that ALJs would have tenure

protection, as reflected in Section 7521, provides no basis for respondents' speculation (Br. 69) that Congress "would have preferred" "no ALJs at all" to "unprotected ALJs."

2. If this Court reverses the Fifth Circuit's Seventh Amendment and nondelegation holdings but affirms its Article II holding, the Court should remand the case to the Fifth Circuit to determine whether the Article II violation justifies vacatur of the SEC's final order. Gov't Br. 67. Respondents assert (Br. 65-67) that vacatur would be required if the restrictions on removal of SEC ALJs are held invalid. They rely (Br. 65-66) on decisions holding that a party who successfully challenges the constitutionality of an adjudicator's appointment is entitled to a new hearing before a different, validly appointed adjudicator. See, *e.g.*, *Lucia*, 138 S. Ct. at 2055.

That argument is misconceived, because a defect in an officer's appointment differs fundamentally from a defect in the provisions governing an officer's removal. See *Collins*, 141 S. Ct. at 1788; *id.* at 1793 (Thomas, J., concurring); *id.* at 1801 (Kagan, J., concurring in part and concurring in the judgment in part). A person who lacks a valid appointment possesses no lawful governmental power in the first place. See *id.* at 1787 (opinion for the Court). But "there is no basis for concluding that [an officer whose removal has been unlawfully restricted] lacked the authority to carry out the functions of the office." *Id.* at 1788. A party alleging a removal defect therefore must show that "the unconstitutional removal provision inflicted harm." *Id.* at 1789.

Contrary to respondents' assertion (Br. 66), it is not "inherent[ly] impossib[le]" for a party to prove that a removal restriction has caused harm. For example, a party might show that an agency "had attempted to

remove [an ALJ] but was prevented from doing so." *Collins*, 141 S. Ct. at 1789. But granting relief without proof of such harm would, "contrary to usual remedial principles, put [respondents] 'in a better position' than if no constitutional violation had occurred." *Id.* at 1801 (Kagan, J., concurring in part and concurring in the judgment in part) (citation omitted). It would also contravene the APA, which specifically directs courts to apply "the rule of prejudicial error." 5 U.S.C. 706; see *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2385 (2020).

3. Finally, respondents argue (Br. 69-73) that the Fifth Circuit lacked authority to remand this matter to the Commission, and they ask this Court (Br. 73) to "reverse [the] order of remand." But "when [a] respondent seeks to alter the judgment below," a "cross-petition is required." *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). Because the Court denied respondents' cross-petition, see 143 S. Ct. 2690 (2023) (No. 22-991), respondents' objections to the Fifth Circuit's remand are not properly presented. And for the reasons given in the government's response to the cross-petition (at 5-10), respondents' arguments lack merit in any event.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
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