No. 22-859

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

GEORGE R. JARKESY, JR., ET AL.

ON PETITION FOR A 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 AUTHORITIES

Cases: Page

Constitution and statutes:

Miscellaneous:

Miscellaneous—Continued: Page

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In the decision below, the Fifth Circuit held that the statutory scheme under which the Securities and Exchange Commission (SEC or Commission) enforces the federal securities laws violates the Seventh Amendment and the nondelegation doctrine. The court further held that the tenure protections that Congress has accorded to the SEC's administrative law judges (ALJs) violate Article II.

Respondents make no meaningful effort to dispute that the questions presented in the petition for a writ of certiorari warrant this Court's review. They acknowledge (Br. in Opp. 24) that "the impact of the [court of appeals'] decision goes beyond the parties to the case." They also accept (*ibid.*) that the court "upend[ed]" "several acts of Congress," and that its decision "potentially affect[s] the operations of multiple agencies." And they

agree (*ibid.*) that "such factors often lead the Court to grant certiorari, whether or not a circuit split exists."

Respondents instead principally argue (Br. in Opp. 8-23) that the court of appeals correctly decided the questions presented here. But those merits arguments provide no reason for this Court to deny review. The Court applies a strong presumption in favor of certiorari when a court of appeals strikes down an Act of Congress, see Pet. 21-22, and the Fifth Circuit struck down several. And respondents' merits contentions are in any event unsound.

1. The court of appeals first held that Congress violated the Seventh Amendment by empowering the SEC to institute administrative enforcement proceedings seeking civil penalties. Pet. App. 4a-20a. As the petition for a writ of certiorari explains (at 9-13), that holding conflicts with the public-rights doctrine, under which this Court has long upheld Acts of Congress that create "new statutory obligations," impose "civil penalties for their violation," and entrust an administrative agency rather than a civil jury with "the function of deciding whether a violation has in fact occurred." *Atlas Roofing Co.* v. *Occupational Safety & Health Review Commission*, 430 U.S. 442, 450 (1977). Respondents' contrary arguments lack merit.

Respondents principally rely (Br. in Opp. 12-14) on this Court's holding in *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), that Congress had violated the Seventh Amendment by empowering a bankruptcy court, sitting without a jury, to resolve a bankruptcy's trustee's suit against a bankruptcy estate to recover an allegedly fraudulent conveyance. But respondents overlook the crucial difference between *Granfinanciera* and this case: *Granfinanciera* involved a dispute be-

tween two private parties, while this case involves an enforcement action commenced by the government. *Id.* at 51. The *Granfinanciera* Court explained that it had previously applied the public-rights doctrine to sustain "administrative factfinding" in cases "where the Government is involved in its sovereign capacity," but the Court distinguished such cases from "[w]holly private" disputes. *Ibid.* (citation omitted).

Although Justice Scalia argued in *Granfinanciera* that the public-rights doctrine *never* allows administrative resolution of a wholly private dispute, see 492 U.S. at 65-71 (Scalia, J., concurring in part and concurring in the judgment), the Court did not go that far, see *id.* at 54 (majority opinion). The Court instead 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.'" *Ibid.* (emphasis added; brackets and citation omitted). The Court further 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). This case, of course, involves an administrative enforcement proceeding brought by a federal agency. The test that *Granfinanciera* set forth for "cases not involving the Federal Government," *id.* at 55, is therefore beside the point.

Respondents also argue (Br. in Opp. 14) that the public-rights doctrine does not authorize statutory

schemes under which an agency may choose to enforce its claims in administrative proceedings or in an Article III court. Respondents suggest (*id.* at 13-14) that, in order to invoke the public-rights doctrine, Congress must designate an administrative forum as the "exclusive" mechanism for adjudicating particular claims. And respondents assert that the public-rights doctrine is inapplicable here because Congress's authorization for the SEC to seek judicial relief "cannot be reconciled with the requirement that public rights claims are those which are 'uniquely' or 'peculiarly suited for agency adjudication.'" *Id.* at 14 (quoting Pet. App. 15a).

That limitation has no sound basis either in the Constitution or in 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 Energy Services, LLC* v. *Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1378 (2018) (citation omitted). And while some federal statutes have given 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. Rather, "the public-rights 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's view that the securities claims at issue here are *susceptible of* judicial resolution, as evidenced by its authorization for the SEC to bring such claims in court, thus does not preclude Congress from authorizing administrative adjudication of the same claims as well. In *Oil States*, for example, the Court up-

held Congress's authorization for agency reconsideration of the validity of issued patents, see *id.* at 1372-1379, even though challenges to patent validity may also be resolved by Article III courts, see 35 U.S.C. 282(b)(2) and (3).

2. The court of appeals also held that Congress had violated the nondelegation doctrine by authorizing the SEC "to bring securities fraud actions for monetary penalties within the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so." Pet. App. 26a. That holding is wrong, because the Commission's decision whether to pursue an administrative or judicial remedy in a particular case involves an exercise of executive rather than legislative power. See Pet. 13-17. Respondents' contrary arguments lack merit.

Respondents contend (Br. in Opp. 17) that the "prerogative to assign claims adjudication either to an administrative tribunal or to Article III courts constitutes legislative power." That argument ignores the difference between the legislative task of identifying available enforcement mechanisms for a *category* of claims, and the executive task of determining which mechanism to invoke in a *particular case*. Congress no doubt has the power to prescribe rules governing the adjudication of federal claims, and to specify whether a given class of claims may be adjudicated by the federal courts, by an Executive Branch agency, or by both. The statutes at issue here provide that either the courts or the Commission may resolve certain securities claims. "Having informed" the courts, the agency, and the private parties of "the permissible * * * alternatives," Congress has "fulfilled its duty." *United States* v. *Batchelder*, 442 U.S. 114, 126 (1979). In choosing which of the available

alternatives to pursue in a given case, the Commission is simply executing the law that Congress previously enacted—not adopting new legal rules in violation of Article I and the nondelegation doctrine.

Quoting *INS* v. *Chadha*, 462 U.S. 919 (1983), respondents also argue that "government actions are 'legislative' if they have 'the purpose and effect of altering the legal rights, duties and relations of persons outside the [L]egislative [B]ranch.'" Br. in Opp. 17 (quoting *Chadha*, 462 U.S. at 952) (ellipsis omitted). But in the quoted passage, the *Chadha* Court was distinguishing between the power of the whole Congress to *legislate*, which requires bicameralism and presentment to the President, and other prerogatives that a single House of Congress may exercise unilaterally. See 462 U.S. at 952, 955-956 & nn.20-21. The Court was not distinguishing between legislative power on the one hand, and executive or judicial power on the other. The Executive Branch affects the "legal rights" of "persons * * * outside the Legislative Branch," *id.* at 952, when it brings civil suits and criminal prosecutions; and the Judicial Branch does so when it decides cases and enters judgments. Those impacts do not render such actions "legislative." Br. in Opp. 17 (citation omitted).

3. Finally, the court of appeals held that Congress had violated Article II by granting two layers of removal protection to the SEC's ALJs. See Pet. App. 28a-34a; 5 U.S.C. 7521(a) (providing that agency ALJs may be removed only for "good cause"). Respondents' defenses of that holding are unsound.

Respondents interpret this Court's decision in *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477 (2010), as establishing a categorical "rule" that Congress may not accord inferior officers in the Executive Branch "more

than one layer" of tenure protection. Br. in Opp. 19-20 (emphasis omitted). But *Free Enterprise Fund* does not establish any such absolute rule. To the contrary, the Court expressly declined to "address that subset of independent agency employees who serve as administrative law judges." 561 U.S. at 507 n.10. It also emphasized that ALJs "perform adjudicative rather than enforcement or policymaking functions." *Ibid.* This Court's precedents have long distinguished between tenure protections accorded to adjudicators and tenure protections accorded to policymakers. See Pet. 18.

Respondents also argue (Br. in Opp. 21) that the ALJs' tenure protections are invalid because the Merit Systems Protection Board (MSPB) "has the sole authority to fire the SEC's ALJ's, but the MSPB members themselves are vested with for-cause tenure protection." That argument misconceives the MSPB's role in the removal process. An ALJ is removable not by the MSPB, but "*by the agency* in which the [ALJ] is employed." 5 U.S.C. 7521(a) (emphasis added). The MSPB's role in that process is to hold a hearing and determine whether the requisite "good cause" exists if the agency removes an ALJ and the ALJ challenges that decision. See *ibid.* The MSPB's involvement thus does not, "by itself, put any additional burden on the President's exercise of executive authority"; rather, it simply "ensure[s] that an [ALJ] is removed only in accordance with" the good-cause standard prescribed by Congress. *Morrison* v. *Olson*, 487 U.S. 654, 693 n.33 (1988).

Respondents assert (Br. in Opp. 19, 23) that the government "essentially confessed error on this issue" in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), and that its current position "cannot be reconciled" with that earlier brief. That argument is mistaken. In *Lucia*, the government

contended that the provision granting tenure protections to ALJs, if read too broadly, would raise "serious constitutional concerns." Gov't Br. at 48, *Lucia*, *supra* (No. 17-130). But the government argued that the statute, properly construed, "comports with constitutional requirements" even though it "results in a structure involving more than one layer of tenure protection." *Id.* at 51.*

4. In April 2022, before the court of appeals decided this case, the SEC had issued a statement acknowledging a deficiency in certain administrative adjudications. SEC, *Commission Statement Relating to Certain Administrative Adjudications* 1 (Apr. 5, 2022). The Commission determined that administrative staff responsible for maintaining the Division of Enforcement's case files had, for a period of time, accessed memoranda written for the Commission by the Office of General Counsel's Adjudication Group, including in this case. *Id.* at 3-4. After conducting an initial review, the Commission "found no evidence that the Enforcement staff investigating and prosecuting this matter accessed the Adjudication memorandum or took any action based on th[at] memorand[um]." *Id.* at 4.

On June 2, 2023, the SEC issued an additional statement and an accompanying set of orders. See SEC, *Second Commission Statement Relating to Certain Ad-*

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* Respondents are mistaken in arguing (Br. in Opp. 23) that, given the government's brief in *Lucia*, the "doctrine of judicial estoppel" precludes the government from defending the constitutionality of ALJs' tenure protections in this case. Judicial estoppel is plainly inapplicable because, among other things, this is a distinct case from *Lucia*, not a different phase of the same case, and the government's position is not inconsistent (much less clearly inconsistent) with its previous position. See *New Hampshire* v. *Maine*, 532 U.S. 742, 749-751 (2001).

ministrative Adjudications. Based on a full review of this and several other cases, the Commission found "no evidence that the control deficiency resulted in harm to any respondent or affected the Commission's adjudication in any proceeding." SEC, *In re Pending Administrative Proceedings*, Order Dismissing Proceedings 2 (June 2, 2023). The SEC nonetheless decided—"as a matter of discretion," and in order to "preserve the Commission's resources"—to dismiss certain "pending proceedings" in which the Commission has not yet entered a "final order." *Id.* at 2-3.

By its terms, the SEC's dismissal order does not encompass this case, in which the administrative proceeding against respondents has been resolved and the Commission has already entered its final order. The SEC's dismissal order accordingly does not pose any obstacle to this Court's review of the court of appeals' decision or its consideration of the questions presented.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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