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.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF ANTHONY MICHAEL SABINO IN SUPPORT OF RESPONDENTS AND THE FIFTH CIRCUIT'S RULING ON FOR-CAUSE REMOVAL PROTECTION

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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.

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* is a law professor with expertise in constitutional law, securities regulation, and securities litigation. Furthermore, this *amicus curiae* has represented parties in proceedings before the Securities and Exchange Commission (the "SEC" or the "Commission"), and regularly lectures on the precise topics found in the pending controversy. This case addresses, *inter alia*, the interpretation of the Appointments Clause of Article II of the Constitution, and implicates the proper conduct of enforcement proceedings before the SEC and other federal agencies. This *amicus curiae* has a professional and scholarly interest in the proper application and development of the law in these domains.[1]

STATEMENT

This *amicus curiae* respectfully adopts, in relevant part, the Statement set forth by the Petitioner SEC in its Petition for a Writ of Certiorari at p. 2-9.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Supreme Court Rule 37.6.

SUMMARY OF ARGUMENT

This argument is respectfully limited to supporting the Respondents and the ruling of the United States Court of Appeals for the Fifth Circuit that for-cause removal protection violates Article II, and is therefore respectfully confined to addressing the instant controversy's Third Question Presented. This question has now been extant for at least five years. Properly resolving whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection shall achieve a number of laudable goals. It shall perpetuate the Court's Appointments Clause jurisprudence, as exemplified in several landmark decisions, some of them quite recent. The appropriate resolution of the Third Question Presented shall assure that the lower courts correctly apply those same precedents. The methodology for the constitutional removal of administrative law judges across a wide range of administrative agencies shall be clarified. Finally, and most important for our ordered system of liberty, the proper resolution of the Third Question Presented shall effectively and constitutionally cabin executive power, affirm axioms of checks and balances, and safeguard the separation of powers, particularly Article II's structural constraints against excessive and unaccountable exercises of executive authority. For all these reasons, this *amicus curiae* respectfully suggests that the Court resolve the Third Question Presented by holding for the Respondents,

and affirming the Fifth Circuit's ruling that for-cause removal protection violates Article II.

ARGUMENT

I. *LUCIA* REQUIRES HOLDING FOR THE RESPONDENTS, AND AFFIRMING THE FIFTH CIRCUIT'S RULING THAT FOR-CAUSE REMOVAL PROTECTION VIOLATES ARTICLE II.

Whether for-cause removal protection violates Article II is not an isolated question. Rather, the issue inexorably evolved from, among other sources, numerous and mostly recent constitutional challenges to the authority exercised by administrative law judges, particularly those in the employ of the SEC. In the main, this antecedent litigation focused upon the allegation that the Commission's ALJs had taken office in violation of the Appointments Clause of Article II. U.S. Const. art. II, § 2, cl. 2. *See generally* Michael A. Sabino & Anthony Michael Sabino, "Challenging the Power of SEC ALJs: A Constitutional Crisis or a More Nuanced Approach?" 43 *Securities Regulation Law Journal* 369 (2015) (analyzing the then-extant cases).

Ultimately, *Lucia v. SEC*, 585 U.S. ___, 138 S. Ct. 2044 (2018), brought an end to at least that part of the constitutional furor. Confining itself to the "sole question" of whether the SEC's in-house jurists were "Officers of the United States" or simply government employees, *id*. at 2051, *Lucia* classified the

Commission's internal adjudicators as the former, for reason that they exercised significant discretion and performed important functions. *Id*. at 2053-54 (quotations omitted), *citing Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991). The Appointments Clause "prescribes the exclusive means" by which these "'Officers of the United States'" may take office, *Lucia*, 138 S. Ct. at 2051, and since SEC ALJs had assumed their duties "without the kind of appointment the Clause requires," Article II had been violated. *Id*. at 2051 and 2055. *See also Carr v. Saul*, 593 U.S. ___, ___, 141 S. Ct. 1352, 1357 (2021).

Lucia deliberately left unanswered the concomitant question extant in the matter at hand; whether statutory restrictions upon the President's power to remove administrative law judges violates the Appointments Clause. *Lucia*, 138 S. Ct. at 2059-60 (Breyer, J., dissenting). *See also id*. at 2050 n. 1. Some predicted that this would precipitate the next constitutional crisis. *See* Michael A. Sabino, "'Liberty Requires Accountability': The Appointments Clause, *Lucia v. SEC*, and The Next Constitutional Crisis," 11 *William & Mary Business Law Review* 173, 212, 241-42 (2019) ("Sabino, 'Liberty Requires Accountability'"). And so it has, as the instant controversy evinces.

It is respectfully suggested that *Lucia* requires a holding parallel to itself in the case at bar. There are several reasons justifying such congruency.

First, removal from office is the omega to the alpha of appointment to office. Appointment and removal are

two sides of the same coin. Consistency with *Lucia* requires that if the Appointments Clause dictates the sole procedure by which SEC ALJs may take office, then Article II, and only Article II, provides the solitary means for their removal. For-cause removal protection must therefore be set aside.

Second, *Lucia*'s centerpiece is its categorization of the Commission's in-house jurists as "Officers of the United States." That classification has not changed in the mere handful of years which have elapsed since *Lucia* was issued. Nor could it; the SEC's internal adjudicators continue to exercise significant discretion and perform important functions. *Lucia* tells us that the Appointments Clause alone prescribes the way in which these "Officers of the United States" may assume their duties. It follows, then, that Article II, and only Article II, establishes the appropriate methodology for their removal. For-cause removal protection must thereby be excluded.

Third, *Lucia* explains that the Appointments Clause "maintains clear lines of accountability – encouraging good appointments and giving the public someone to blame for bad ones." *Lucia*, *supra*, 138 S. Ct. at 2056 (Thomas, J., concurring). *See also THE FEDERALIST* No. 76 at 483 (Benjamin Wright ed. 1961) (Hamilton). *Lucia* safeguards accountability by commanding that Article II, and only Article II, regulates the appointment of SEC administrative law judges. Applying *Lucia* to the case at bar shall maintain those same clear lines of accountability when such office holders are removed. For reason that it

diminishes accountability, for-cause removal protection must be discarded.

Lastly, just as "*Freytag* says everything necessary to decide [*Lucia*]," *Lucia*, *supra*, 138 S. Ct. at 2053, the latter says everything required to resolve the instant controversy. *See* Sabino, "'Liberty Requires Accountability,'" *supra*, 11 *William & Mary Business Law Review* at 246 (*Lucia* "will unequivocally shape . . . Appointments Clause jurisprudence" regarding for-cause removal protection).

In sum, *Lucia* requires a holding parallel to itself in the case at bar. The appointment and, conversely, the removal of the SEC's in-house jurists are inextricably linked. *Lucia* ruled that the first is regulated by the Appointments Clause; sensibly, then, the second must be defined by the same Article II proviso. *Lucia* determined that the Commission's internal adjudicators are "Officers of the United States," and thus Article II prescribes the manner of their appointment. *A fortiori* Article II must likewise dictate the procedure by which these "Officers of the United States" are removed from their posts. *Lucia* describes the importance of clear lines of accountability to the People; hence, its mandate that the Appointments Clause be followed when raising SEC administrative law judges to office. It follows from *Lucia*, then, that accountability can only be maintained by adhering to Article II when removing such officials. For these reasons, *Lucia* says all that needs to be said to decide the matter at hand. Finally, a holding in the instant controversy which is consistent with *Lucia* shall perpetuate the

teachings of the latter, assure its proper application by the lower courts, and, lastly, complete the virtuous circle which *Lucia* initiated some five years ago.

For all these reasons, this *amicus curiae* respectfully suggests that the Court resolve the Third Question Presented by holding for the Respondents, and affirming the Fifth Circuit's ruling that for-cause removal protection violates Article II.

II. *FREE ENTERPRISE* REQUIRES HOLDING FOR THE RESPONDENTS, AND AFFIRMING THE FIFTH CIRCUIT'S RULING THAT FOR-CAUSE REMOVAL PROTECTION VIOLATES ARTICLE II.

In the pantheon of separation of powers and checks and balances landmarks, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), occupies a position of high eminence. For well over a decade now, it has played a pivotal role in contemporary Appointments Clause controversies. *Free Enterprise* has been recognized as constituting a significant portion of "the best guidance we have about the original and enduring meaning of Article II." *PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75, 155 n. 13 (D.C. Cir. 2018) (*en banc*) (Henderson, J., dissenting) ("*PHH II*"), *vacating*, *reinstating in part*, *and remanding* 839 F.3d 1, 7 (D.C. Cir. 2016) (Kavanaugh, J.) ("*PHH I*") (same).

Free Enterprise is probably best known for proclaiming, without equivocation, that "multilevel protection

from removal" violates Article II's vesting of the executive power in the President, for reason that the Chief Executive cannot "'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officials who execute them." *Free Enterprise*, 561 U.S. at 484, *quoting* U.S. Const. art. II, § 3. *See also Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. ___, ___, 140 S. Ct. 2183, 2191 (2020) (quotations and citations omitted) (as a general matter, the Constitution gives the President the authority to remove those who assist him in carrying out his duties).

Free Enterprise confronted the following constitutional dilemma. The five heads of the Public Company Accounting Oversight Board ("PCAOB") could only be removed "for cause" by the full Securities and Exchange Commission, and those same securities commissioners could only be dismissed by the Chief Executive "for cause." *Free Enterprise* determined that this "added layer of tenure protection" for the PCAOB's ruling council violated Article II, as it engendered a fundamentally untethered agency, one "not accountable to the President, and a President who is not responsible" for the regulators' actions. *Id*. at 495. Furthermore, these two levels of for-cause removal protection unconstitutionally transmogrified the board's independence, denied the Chief Executive full control over the PCAOB's actions, and foreclosed the President from competently executing the laws by the traditional method of "holding his subordinates accountable for their conduct." *Id*. at 496.

Free Enterprise forcefully exposited that the Appointments Clause is predicated upon the axiom (as articulated by Founder James Madison while serving in the First Congress) that only the Chief Executive holds the executive power bestowed by the Constitution. *Id*. at 492. In exercising that authority, part and parcel of the supreme magistrate's accountability to the People is the unrestricted ability to dismiss appointees who are inadequate to the task of executing the Nation's laws. *Id*. Stated another way, this linchpin of Article II assures that officeholders within the Executive Branch shall always remain accountable to the President who commissioned them, and, *ergo*, the citizens who elected the Chief Executive. *Id*. *See also id*. at 497-98.

It is respectfully asserted that *Free Enterprise* "all but resolves" the instant controversy. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 238 (2013).

For-cause removal protection in the matter at hand and the multilevel tenure protection struck down by *Free Enterprise* are indistinguishable. The case at bar and *Free Enterprise* each exemplify officials who are not accountable to the President, and a President who is not responsible for their actions. Characteristics likewise shared are the magnified independence of officeholders, a Chief Executive lacking full control over ostensible subordinates, and a President without the power – and the responsibility – to take care that the laws are faithfully executed. Given this close identity,

Free Enterprise requires a corresponding result in the instant controversy.

For all these reasons, this *amicus curiae* respectfully suggests that the Court resolve the Third Question Presented by holding for the Respondents, and affirming the Fifth Circuit's ruling that for-cause removal protection violates Article II.

III. *MYERS* REQUIRES HOLDING FOR THE RESPONDENTS, AND AFFIRMING THE FIFTH CIRCUIT'S RULING THAT FOR-CAUSE REMOVAL PROTECTION VIOLATES ARTICLE II.

Thus far, the points argued by this *amicus curiae* have respectfully emphasized the most recent exemplars of Appointments Clause jurisprudence; *Lucia* was issued a little more than five years ago, and *Free Enterprise* is less than a decade and a half old. A benefit of this approach is that *Lucia*, *Free Enterprise*, and the instant controversy share essentially the same historical context, as all three contemplate administrative agencies and their respective ALJs in contemporary settings.

Yet the argument made herein would be incomplete without reference to the seminal landmark of *Myers v. United States*, 272 U.S. 52 (1926). As it rapidly approaches its centennial, this august precedent reminds us that it is a "well-approved principle of constitutional and statutory construction that the power of

removal of executive officers [is] incident to the power of appointment." *Id*. at 119.

Myers stipulated that such an axiom is "not incompatible with our republican form of government." *Id*. at 118. Our ordered system of liberty is founded, in significant part, upon the belief "that those in charge of and responsible for administering functions of government, who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint." *Id*. at 119. *See also id*. at 164 (the power of removal is "confirmed by [the President's] obligation to take care that the laws be faithfully executed"). Therefore, the power to remove is coextensive with the power to appoint; to hold otherwise would "go beyond the words and implications" of Article II, and furthermore "infringe the constitutional principle of the separation of powers." *Id*. at 161. *See also id*. at 167 (the power to remove is "essential" to separation of powers).

One of the more prominent features of *Myers* is its exhaustive analysis of the genesis of Article II. That in-depth examination reveals that the Appointments Clause was deliberately crafted to lodge the "advise and consent" power in the Senate, U.S. Const. art. II, § 2, cl. 2, where the less populous states have equal representation, and thus could "prevent the President from making too many appointments from the larger states." *Myers*, *supra*, 272 U.S. at 119-20. "[T]he fact that no express limit was placed on the power of removal by the executive was convincing indication that none was intended," *id*. at 118, supporting *Myers*'

conclusion that, in configuring Article II, the Founders were unconcerned with limiting the Chief Executive's removal power. *Id*. at 119. Based upon this historical foundation, *Myers* embraced as "a constitutional principle the power of appointment carried with it the power of removal." *Id*. (citation omitted).

Myers therefore speaks directly to the matter at hand. Its comprehensive exposition of the history underlying this segment of Article II makes it plain that the formulation of the Appointments Clause was not an accident, but rather came about after much debate and careful deliberation. *Myers* unmistakably enunciates as a bedrock maxim that the power of removal goes hand in hand with the power to appoint, and that these prerogatives are conjoined to serve the same imperative: to safeguard accountability to the People. And this longstanding precedent gives no indication whatsoever that said principle should ever be diminished, let alone abandoned. *Myers* adeptly demonstrates that for-cause removal protection is antithetical to the constitutional tenet that the power of removal accompanies the power of appointment, and, furthermore, that such contrivances confound the guarantee of accountability to the People.

Without a doubt, *Myers* has withstood the test of time, and withstood it well. Nearly a century after *Myers* was promulgated, its continued efficacy was recently verified in *Seila Law*, *supra*, 140 S. Ct. 2183. While confronting an unprecedented investiture of authority and tenure protection in the solitary head of a powerful executive agency, *Seila Law* was quick to call

upon *Myers* in reiterating that the Chief Executive's "power to remove – and thus supervise" those who wield executive power "follows from the text of Article II, was settled by the First Congress, and was confirmed in the *landmark* decision *Myers v. United States*." *Id*., 140 S. Ct. at 2191-92 (citation omitted) (emphasis supplied). *See also id*. at 2197-98 (*Myers* conducted an "exhaustive examination" of the powers of appointment and removal).

The ongoing vitality of *Myers* was furthermore confirmed by *Seila Law* in the latter's circumspect notation that there are only two exceptions to *Myers* and its progeny. *Id*. at 2192, *citing Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (Congress may create expert agencies led by a panel of principal officers removable only for good cause), *and Morrison v. Olson*, 487 U.S. 654 (1988) (Congress may provide tenure protections to certain inferior officers with narrowly defined duties). Respectfully, it is beyond peradventure that the two exceptions to *Myers*, as articulated in *Seila Law*, have no bearing upon the matter at hand. Therefore, nearly a century after it was decided, *Myers*' guidance remains sound, and has unquestioned relevance to the case at bar.

For reason that *Myers* figured so prominently in the reasoning of *Seila Law*, this would be an appropriate juncture to relate that more recent holding to the instant controversy. As already stated, *Seila Law* was decided in the "novel context of an independent agency led by a single [d]irector," *Seila Law*, *supra*, 140 S. Ct.

at 2192, a factual scenario quite different from the matter at hand (and most others, certainly).

Nonetheless, the newer precedent reaffirmed several touchstones pertinent to the case at bar, among them, that the Chief Executive could not be held fully accountable to the People without the authority to remove subordinates. *Id*. at 2191 and 2197 (citations and quotations omitted). *See also id*. at 2203 (describing the dependence of every level of executive officialdom to the President, and the President's dependence upon the People). *Seila Law* went on to proclaim that abrogating the power of removal would contravene the clear intent of the Appointments Clause, as well as compromise the President's corresponding obligation to take care that the laws are faithfully executed. *Id*. at 2191 and 2197 (citations and quotations omitted). *See also Free Enterprise*, *supra*, 561 U.S. at 513-14.

As afore discussed, *Seila Law* acknowledged the two exemptions subsequently carved out from *Myers*. Yet it bears mentioning that *Seila Law* made sure to point out that at least one of those exceptional rulings "reaffirmed the core holding of *Myers*," to wit, that the Chief Executive enjoys a generalized power of removal. *Seila Law*, *supra*, 140 S. Ct. at 2199.

Seila Law is also remarkable for its pungent observation that, while there is, admittedly, no explicit removal clause within the Constitution, "neither is there a 'separation of powers clause' or a 'federalism clause.'" *Id*. at 2205. These "foundational doctrines are instead evident" from the text of the Founding

Document; the Chief Executive's removal authority is yet another example, in this instance manifest from Article II's vesting of executive power in the President. *Id*.

Little wonder that, nearing its conclusion, *Seila Law* marshalled constitutional text, prime maxims, history, and *Myers*, among others, to proclaim that the Chief Executive's removal power "is the rule, not the exception." *Id*. at 2206. And the parenthetical accompanying that declaration provides some supplemental justification, solemnly warning that the growth of vast government power increases the concern that accountability to the People is at risk. *Id*. at 2206 n. 11 (quotation and citation omitted).

Lastly, while the regulator in *Seila Law* was, taken as a whole, very much factually distinct from the Commission administrative law judges at the center of the instant controversy, it is equally beyond refutation that they all share one key characteristic: "extensive adjudicatory authority." *Id*. at 2193 (describing Consumer Financial Protection Bureau "hearing officers" as presiding over proceedings, issuing subpoenas, and deciding motions).

In sum, *Myers* proclaims that the power of removal is deeply rooted in constitutional text, first principles, and history. It is deliberately linked to the appointive power, as together they endeavor to assure accountability to the Chief Executive, and of the President to the People. As such, it is not only compatible with, but essential to, our republican form of government,

wherein all sovereign power is derived from the People. *Seila Law*, in turn, exemplifies that *Myers* remains vital and essential to our ordered system of liberty. While *Seila Law* confronted a unique circumstance, and in a present-day setting, it nevertheless powerfully reaffirmed the core holdings of *Myers*: the power of removal assures accountability to the People; appointment and removal are concomitant prerogatives, which cannot be separated without endangering the aforementioned accountability to the People; the few exceptions to the aforementioned postulation are sharply circumscribed; and, lastly, the power of removal remains the general rule. Against all this, for-cause removal protection simply cannot survive.

For all these reasons, this *amicus curiae* respectfully suggests that the Court resolve the Third Question Presented by holding for the Respondents, and affirming the Fifth Circuit's ruling that for-cause removal protection violates Article II.

IV. *AXON* SUPPORTS HOLDING FOR THE RESPONDENTS, AND AFFIRMING THE FIFTH CIRCUIT'S RULING THAT FOR-CAUSE REMOVAL PROTECTION VIOLATES ARTICLE II.

Axon Enterprise, Inc. v. FTC, 598 U.S. ___ (No. 21-86) (April 14, 2023), lends support to the Fifth Circuit's ruling that for-cause removal protection violates Article II. To be sure, *Axon* did not decide that precise question; rather, its decree was limited to holding that

constitutional challenges to regulatory power need not be determined by agency administrative law judges, but rather are cognizable before the district courts. *Id.*, *slip op*. at 2. Nevertheless, in deciding where such controversies could be heard, *Axon* is instructive and relevant to the matter at hand, as the following illustrates.

Axon and the case at bar share a point of origin: litigants opposing some aspect of the authority exercised by the SEC's in-house jurists. Accurately portrayed, *Axon* is less about the titular petitioner, and more about the conjoined action, *SEC v. Cochran* (No. 21-1239). *Axon*, *slip op*. at 4. Therein Michelle Cochran, a certified public accountant, having already received an adverse ruling from a Commission internal adjudicator, was about to be subjected to a fresh enforcement action by the securities regulators, as a direct result of *Lucia*'s holding that the agency's administrative law judges held office in violation of the Appointments Clause. *Id.*, *slip op*. at 4. *See also* Anthony Michael Sabino, "Challenging Agency Power: '*Axon*,' Part 2," 269 *New York Law Journal* p. 4, cl. 4 (June 2, 2023) (analyzing *Axon*). *Axon* and the instant controversy thus feature parties similarly situated, and with comparable predicates.

Assertions that for-cause removal protection violates Article II are integral parts of both the case at bar and *Axon*. While the latter did not decide the question, *Axon*, *supra*, *slip op*. at 2, it described how the respondent C.P.A. therein had averred, *inter alia*, that the double layer of tenure shielding the Commission's in-house jurists from dismissal "so greatly insulate[d]

ALJs from presidential supervision as to violate the separation of powers." *Id.*, *slip op*. at 4. Thus, *Axon* and the instant controversy exemplify kindred allegations.

Reminiscent of the matter at hand, *Axon* encompassed "fundamental, even existential" challenges to the very constitutionality of much of the work of the SEC, *id.*, *slip op*. at 1, and, consequently, the power enjoyed by that body's administrative law judges.

The fact that *Axon* demonstrates allegiance to the precepts of *Free Enterprise* fortifies a point already made herein above; the instant controversy should be decided in accordance with *Free Enterprise*'s tenets. There is consistency in how *Free Enterprise*, *Axon*, and the case at bar each confront challenges to "the structure or very existence of an agency," as well as charges that a regulatory body was "wielding authority unconstitutionally in all or a broad swath of its work." *Id.*, *slip op*. at 11.

Axon found it "not very hard" to adhere to the maxims espoused in *Free Enterprise*, that the issues present in *Axon* and *Free Enterprise* were of "the same ilk," *id.*, *slip op*. at 10, and that commonalities are evident when the two are viewed from 30,000 feet. *Id.*, *slip op*. at 11. This more than handily explains why *Axon* ended "in the same place as *Free Enterprise*." *Id*. Moreover, it suggests that the instant controversy should come to rest alongside these two antecedents.

Shared objectives demonstrate the relevancy of *Axon* to the matter at hand: the "cabining of regulatory authority, . . . separation of powers, and preserv[ing]

accountability, the very lifeblood of our ordered system of liberty." Anthony Michael Sabino, "Challenging Agency Power: '*Axon*,' Part 2," 269 *New York Law Journal* p. 4, cl. 4, p. 7, cl. 3 (June 2, 2023). *Axon*'s foremost achievement may be "confining the power of administrative agencies," *id*., a point of great significance to the case at bar.

It has been suggested that *Axon* was the "inevitable" product of *Lucia* and *Free Enterprise*, and that it now joins its progenitors in forming a new triumvirate "uphold[ing] the sanctity of the separation of powers, and the concomitant lack of tolerance for Appointments Clause violations. . . . guardians for the principle of accountability to the Chief Executive, and, therefore, to the People." Anthony Michael Sabino, "Challenging Agency Power: '*Axon*': Part 1," 269 *New York Law Journal* p. 4, cl. 4, p. 8, cl. 6 (May 26, 2023). Just as *Free Enterprise* was the guidepost for *Axon*, *Axon* must now help steer the matter at hand to a resolution consistent with this fresh triad.

For all these reasons, this *amicus curiae* respectfully suggests that the Court resolve the Third Question Presented by holding for the Respondents, and affirming the Fifth Circuit's ruling that for-cause removal protection violates Article II.

V. THE ORIGINAL INTENT OF THE APPOINTMENTS CLAUSE REQUIRES HOLDING FOR THE RESPONDENTS, AND AFFIRMING THE FIFTH CIRCUIT'S RULING THAT FOR-CAUSE REMOVAL PROTECTION VIOLATES ARTICLE II.

From the very inception of the Republic, one of the paramount motivations of the Founders was a justifiable concern for power concentrated in the hands of the one or the few, and, worse yet, such authority lacking accountability to the political will of the citizenry. It was this "fear that prompted the Framers to build checks and balances into our constitutional structure." *Dep't of Transportation v. Association of American Railroads*, 575 U.S. 43, 74 (2015) (Thomas, J., concurring in the judgment).

Precisely to preserve our ordered system of liberty from the excesses of executive power, the Founders acted upon a fundamental and inarguable precept. "Liberty requires accountability." *Id*. at 57 (Alito, J., concurring). In recognition of that basic truth, the Framers incorporated several "accountability checkpoints" into the Constitution, *id*. at 61 (Alito, J., concurring), each one securing separation of powers and checks and balances.

Several of these guardians of our precious liberty are found within Article II. U.S. Const. art. II, § 2, cl. 2, *et seq*. Concurrent with establishing the duties and responsibilities of the Executive Branch, and empowering the office of the Chief Executive, the Article equally

restrains presidential ambitions, by assuring that the chief magistrate remains responsive to the popular will. Both courts and commentators have lauded Article II as one of the Constitution's most noble provisions guaranteeing accountability to the People. *See PHH II*, *supra*, 881 F.3d at 164 (Henderson, J., dissenting), *quoting* Saikrishna Prakash, "The Essential Meaning of Executive Power," 2003 *U. Ill. L. Rev*. 701, 705 (quotations and brackets omitted).

Prominent among Article II's critical subcomponents is the Appointments Clause, a "structural safeguard" which tethers federal officers to the "sovereign power of the United States, and thus to the people." *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016) (Briscoe, J., concurring), *certiorari denied*, 585 U.S. ___, 138 S. Ct. 2706 (2018). The Appointments Clause inexorably demands that all who assert the authority of the Executive Branch remain "accountable to political force and the will of the people." *Freytag*, *supra*, 501 U.S. at 884.

According to those who devised the constitutional plan of government, dependence upon the People is a primary means of controlling the federal government from committing excess. *See THE FEDERALIST* No. 51 at 356 (Benjamin Wright ed. 1961) (Madison). *See also* Alexis de Tocqueville, 1 *DEMOCRACY IN AMERICA* 136 (2004 Goldhammer translation) ("In order to maintain the republican form of government, it was essential that the [President] . . . be subject to the national will."). Accordingly, the Chief Executive, as the head of the Article II Branch, "ought to be left as free

as possible to choose his own agents *and to dismiss them at will*." *DEMOCRACY IN AMERICA*, *supra*, at 146 (emphasis supplied).

The requirements of the Appointments Clause are "among the significant structural safeguards of the constitutional scheme," and are "designed to preserve political accountability relative to important Government assignments." *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997). In explicitly regulating the manner of taking office, the proviso assures that appointees are "accountable to the President, who himself is accountable to the people." *Dep't of Transportation*, *supra*, 575 U.S. at 63 (Alito, J., concurring).

Implicitly, the Appointments Clause likewise regulates the manner of removal from office, by establishing the following safeguard. When the electorate takes exception to the actions of an Officer of the United States, they protest to the Chief Executive whom they elected, who then must inquire of the appointee, and, thereafter, must decide if removal from office is warranted. This is how the chain of responsibility operates to secure the uniform execution of the law, consistent with the precept of the unitary executive. *See PHH II*, *supra*, 881 F.3d at 142 (Henderson, J., dissenting) (quotations and citations omitted), *cited by* Sabino, "'Liberty Requires Accountability,'" *supra*, 11 *William & Mary Business Law Review* at 183.

For-cause removal protection directly contravenes all of the foregoing. It effectively avoids the "accountability checkpoint" erected by the Appointments Clause,

thereby condoning excesses of government power. For-cause removal protection excuses government from being accountable to the governed. *See* Sabino, "'Liberty Requires Accountability,'" *supra*, 11 *William & Mary Business Law Review* at 248 (the erosion of accountability "is no less dangerous than the accretion of power"). It is antithetical to separation of powers and checks and balances. Most of all, for-cause removal protection violates Article II's fundamental precept; "liberty requires accountability."

In sum, the Founders were gravely concerned with the threat unrestrained government power posed to our freedoms. Accordingly, they animated Article II with the maxim that "liberty requires accountability," and then infused its provisos with "accountability checkpoints." These bulwarks of liberty explicitly addressed the appointment of Officers of the United States, and, by implication, their removal. The Framers took these momentous steps to assure that unelected officeholders would always remain accountable to the President, and that the Chief Executive would always remain responsible to the People.

For all these reasons, this *amicus curiae* respectfully suggests that the Court resolve the Third Question Presented by holding for the Respondents, and affirming the Fifth Circuit's ruling that for-cause removal protection violates Article II.

VI. THE NEED TO CABIN EXECUTIVE POWER, AND CLARIFY THE CONSTITUTIONALITY OF THE REMOVAL PROCESS FOR ALL ALJs ACROSS A WIDE RANGE OF ADMINISTRATIVE BODIES, REQUIRES HOLDING FOR THE RESPONDENTS, AND AFFIRMING THE FIFTH CIRCUIT'S RULING THAT FOR-CAUSE REMOVAL PROTECTION VIOLATES ARTICLE II.

While the Third Question Presented is limited to whether the for-cause removal protection afforded SEC ALJs violates Article II, the resolution of the instant controversy shall have decisive ramifications for the constitutionality of the removal process for all administrative adjudicators and their respective agencies. Moreover, the ruling in the case at bar represents an opportunity to appropriately cabin executive power, consistent with the mandates of the Appointments Clause of Article II. U.S. Const. art. II, § 2, cl. 2.

An undeniable aspect of America today is its modern administrative state. This extraconstitutional body wields great power, in large part by means of what commentators have labeled a "hidden judiciary." *See* Kent Barnett, "Against Administrative Judges," 49 *UC Davis Law Review* 1643, 1645 (2016) (quotations and citations omitted). There are reportedly a total of 1,792 administrative law judges in service to federal agencies today. 1,537 Social Security Administration in-house jurists "collectively handle hundreds of

thousands of hearings a year." *Bandimere*, *supra*, 844 F.3d at 1199 and 1199 n. 5 and n. 6 (McKay, J., dissenting).

Such facts are already well known. *See Free Enterprise*, *supra*, 561 U.S. at 586 app. C (Breyer, J., dissenting) (noting in excess of 1,500 ALJs in the employ of the federal government at that time). The above statistics regarding Social Security Administration ALJs provide but one pungent example of the pervasive influence of internal adjudicators over the everyday lives of ordinary Americans. This lends credence to the statement that "[t]oo many important decisions of the Federal Government are made nowadays by unelected officials." *Environmental Protection Agency v. EME Homer City Generation, L.P.*, 572 U.S. 489, 525 (2014) (Scalia, J., dissenting).

Equally so, today's regulatory bodies are rightly said to comprise the "fourth branch of the U.S. Government," exerting significant power over the economic and social life of the Nation. *PHH I*, *supra*, 839 F.3d at 6. Agencies and their administrative law judges represent one side of a conflict between "executive power and individual liberty." *Id*. at 5. If ALJs at the SEC and elsewhere within the colossal federal construct are left unrestrained, they can pose a "significant threat" to bedrock principles of separation of powers and checks and balances. *Id*. at 6.

The drafters of the Founding Documents could not have foreseen modern day Commission administrative law judges, *Bandimere*, *supra*, 844 F.3d at 1170, nor, in

all likelihood, the latter's numerous peers presently at work within the far-flung bureaucracy extant today. It is equally unlikely the Framers envisioned that these internal adjudicators would one day outnumber the Article III bench by a ratio of two to one. *See* http://www.uscourts.gov/judges-judgeships-authorized-judgeships (last visited July 16, 2023) (860 authorized judgeships for 2022).

The case at bar encompasses a potential and familiar threat to accountability, and, consequently, individual liberty. Once more, the "wolf comes as a wolf." *Morrison*, *supra*, 487 U.S. at 699 (Scalia, J., dissenting), *quoted by PHH I*, *supra*, 839 F.3d at 8. The resolution of the instant case shall forge yet another adamantine link in the chain of precedents upholding inviolate axioms of separation of powers and checks and balances. *See Morrison*, *supra*, 487 U.S. at 697 (1988) (Scalia, J., dissenting).

It is a constitutional imperative that the removal of *all* ALJs at *all* administrative agencies conform to the edicts of the Appointments Clause, and thereby honor the Framers' "dedication" and "devotion to the separation of powers." *Dep't of Transportation*, *supra*, 575 U.S. at 74 (Thomas, J., concurring in the judgment). That is why the matter at hand is not necessarily delimited to the SEC or its administrative law judges. Whenever the Appointments Clause is called into question, there are unavoidable "systemic ramifications" for all regulatory agencies. *PHH I*, *supra*, 839 F.3d at 9 n. 5.

In sum, a robust and definitive interpretation of Article II in the case at bar shall clarify the constitutionality of the removal process for all ALJs across all federal agencies, and thereby cabin executive power in accordance with fundamental precepts of separation of powers and checks and balances.

For all these reasons, this *amicus curiae* respectfully suggests that the Court resolve the Third Question Presented by holding for the Respondents, and affirming the Fifth Circuit's ruling that for-cause removal protection violates Article II.

VII. SHOULD THE COURT HOLD FOR THE RESPONDENTS, AND AFFIRM THE FIFTH CIRCUIT'S RULING THAT FOR-CAUSE REMOVAL PROTECTION VIOLATES ARTICLE II, THEN *FREE ENTERPRISE*, *SEILA LAW*, AND *LUCIA* ALL SUGGEST SEVERANCE IS THE PROPER REMEDY.

In the event that the case at bar holds for-cause removal protection violates Article II (or if such is ruled unconstitutional upon some other ground), the weight of authority and experience suggests that severance is the most appropriate remedy.

First, consider that *Free Enterprise* neatly severed the PCAOB's problematic multilevel removal protection, while allowing that agency to function independently on the surviving provisions of its authorizing legislation. *Free Enterprise*, *supra*, 561 U.S. at

508-09. Second, and following *Free Enterprise* with unrestrained approval, *Seila Law* did precisely the same, excising the "offending tenure restriction," and permitting the Consumer Financial Protection Bureau to remain "fully operative" and "functioning independently," only now with a head without for-cause removal protection. *Seila Law*, *supra*, 140 S. Ct. at 2209 (citations and quotations omitted).

Third, *Lucia* similarly implemented severance, albeit indirectly. *Lucia*'s solution was to order a new hearing before a constitutionally appointed SEC administrative law judge. *Lucia*, *supra*, 138 S. Ct. at 2055. This was equivalent to severance, as it ousted from future proceedings any Commission internal jurist not so appointed; all else was left undisturbed. This interpretation is further supported by the fact that, prior to *Lucia* being decided, the SEC revised the process of appointing its in-house adjudicators, apparently in an effort to foreclose allegations of constitutional infirmities. *See* Sabino, "'Liberty Requires Accountability,'" *supra*, 11 *William & Mary Business Law Review* at 211 and 211 n. 274 (analyzing the full Commission's decision to ratify the appointment of all agency ALJs).

In sum, three landmarks which already figure prominently in this argument also demonstrate that severance is a proven and efficacious remedy in like situations. Should the case at bar resolve that for-cause removal protection violates Article II, these precedents clearly point to severance as an appropriate solution.

For all these reasons, this *amicus curiae* respectfully suggests that, should the Court resolve the Third Question Presented by holding for the Respondents, and affirming the Fifth Circuit's ruling that for-cause removal protection violates Article II, then severance would be the proper solution.

CONCLUSION

For all the reasons set forth herein above, this *amicus curiae* respectfully suggests that the Court resolve the Third Question Presented by holding for the Respondents, and affirming the Fifth Circuit's ruling that for-cause removal protection violates Article II.

Respectfully submitted,

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