No. 22-859

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,
PETITIONER

v.

GEORGE R. JARKESY, ET AL.,
RESPONDENTS

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

BRIEF OF AMICUS CURIAE PROFESSOR ILAN WURMAN IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

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

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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[*]

Amicus is a law professor at the Sandra Day O'Connor College of Law at Arizona State University, where he teaches and writes about executive power, administrative law, constitutional law, and the separation of powers. He is the author of the casebook Administrative Law Theory and Fundamentals: An Integrated Approach (Foundation Press 2021) and articles on the nondelegation doctrine, executive power and removal, and public and private rights. He is interested in the sound development of these fields and writes this brief to make three moderate interventions with respect to the questions presented. Arizona State University is mentioned for identification purposes only.

SUMMARY OF THE ARGUMENT

1. Recent scholarship has suggested that there is essentially no historical evidence for a nondelegation doctrine. That is wrong. There is abundant evidence for a nondelegation doctrine, although the precise contours of the doctrine are less clear. Both an "intelligible principle" test and an "important subjects" test are plausible candidates to effectuate the doctrine. The regulation of private rights and conduct may be a factor in the analysis, but so is the breadth of the subject matter over which the agency is empowered to act. Here, the Court should consider that the delegation as to adjudicatory forum at least theoretically relates to public rights (otherwise there would be a

[*] In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission.

separate Article III and Seventh Amendment problem) and the scope of subject matter is narrow. Additionally, a choice of forum, at least among constitutional fora, seems to fit comfortably within definitions of "executive power."

2. Recent scholarship has also questioned whether the President is constitutionally vested with a removal power. The best reading of the historical record, however, is that the executive power includes the power to appoint officers, while the power to appoint incidentally includes the power to remove. This power over principal officers is particularly important because the President cannot interfere directly with their statutory duties in the absence of statutory authority to do so; the threat of removal is the only inducement. That makes sense of the Opinions Clause: There is no constitutional obligation on the part of principal officers to obey the President, but the Opinions Clause guarantees that in at least one respect they must always obey, giving the President information necessary to oversee the execution of the laws and exercise the removal power. Inversely, inferior officers may be granted removal protections because they must follow orders, or principal officers must be able to reverse their decisions. These principles apply even if—or particularly when—the agency's functions are adjudicatory.

The proper outcome in this case therefore depends on whether the first layer protects the SEC or the Merit Systems Protection Board (MSPB). If the former, the proper result is to hold that SEC Commissioners are removable at will (the statute says nothing to the contrary), while the agency's adjudicators may be protected from at-will removal so long as the

SEC has a revisionary power over their decisions (it does). If the latter, the Court should hold that because removal follows appointment, Congress's vesting of the ALJs' appointments in the agency heads requires that those agency heads be responsible for removal.

3. Article III and the Seventh Amendment overlap. If private rights are at stake, a proper Article III court is required; administrative agencies may only theoretically hear matters involving "public rights." In cases involving private rights, a jury would then be available unless the relief sought is equitable in nature. In several twentieth-century precedents, this Court held that whether a right is created by federal statute is an important and sometimes determinative factor in describing a right as public. But whether a right is private depends on the nature of the right and the parties, not on the source of law.

ARGUMENT

I. There is abundant historical support for a nondelegation doctrine, but here the nature of the right and scope of the subject matter suggest that Congress can grant the agency correspondingly greater discretion.

In a series of recent articles, scholars have cast doubt on originalist efforts to revive the nondelegation doctrine. *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288 (2021); Christine Kexel Chabot,

The Lost History of Delegation at the Founding, 56 Geo. L. Rev. 81 (2021); Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 Notre Dame L. Rev. 243 (2021).

In the most provocative of these, Mortenson and Bagley argue that there was no nondelegation doctrine at the Founding. Rather, the Founding generation recognized governmental power to be "nonexclusive"; so long as Congress has authorized some action, that action could be characterized as executive. Mortenson & Bagley, *supra* at 324–32. Further, they argue, legislation from the First Congress demonstrates that the Founding generation routinely delegated vast powers. *Id.* at 332–56. Summarizing their findings, they write, "There was no nondelegation doctrine at the Founding, and the question isn't close." *Id.* at 367.

Nicholas Parrillo more narrowly argues that there may have been a nondelegation doctrine at the Founding but that it cannot have been particularly robust. Parrillo analyzes the direct-tax legislation of 1798. It reveals, he argues, that Congress delegated discretion over private rights. Chabot and Arlyck argue that early borrowing, patent, and remission legislation suggest that Congress often delegated important policy questions.

The evidence does not support the strong versions of these claims. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021). There is significant evidence that the Founding generation adhered to a nondelegation doctrine, and little that clearly supports the proposition that Congress could freely delegate its legislative power.

First, there are many explicit arguments in favor of a nondelegation doctrine made over the course of several early debates in the first decade following ratification. *See* Wurman, *supra* at 1503–18. For example, in the 1791 post-roads debate Representative Sedgwick introduced an amendment to strike the enumerated routes and replace them with the provision "by such route as the President of the United States shall, from time to time, cause to be established." 3 Annals of Cong. 229 (1791) (Gales & Seaton 1849). The amendment was rejected. *Id.* at 241. Representatives Livermore, Hartley, Page, White, Vining, Gerry, and Madison all seem to have thought the motion unconstitutional because it would be transferring, alienating, or delegating the House's legislative power. Page argued, for example, that "if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation. . . . I look upon the motion as unconstitutional." *Id.* at 233–34.

Another example: In Madison's *Report of 1800*, he argued against the Alien Friends Act partly on nondelegation grounds. "[A]ll will agree, that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of an executive or judicial nature; and may for that reason be unconstitutional." Certain details "are essential to the nature and character of a law; and, on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law." If merely a "general conveyance of authority, without laying down any precise rules," were allowed, then "it would follow, that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become

substitutes for laws." Madison added that the inquiry is whether the delegation "contains such details, definitions, and rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger." James Madison, *The Report of 1800*, *in* 17 The Papers of James Madison 303, 324 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991).

Madison's statement points to the importance of both the nondelegation doctrine and the nature of the right. His view was not idiosyncratic; in addition to the representatives who supported this view in the postal debate, Representatives Williams, Livingston, Nicholas, Gallatin, McDowell, Key, Rowan, John Jackson, Alexander Smyth, and finally John Quincy Adams and John Marshall, all agreed that there was a nondelegation principle. *See* Wurman, *supra* at 1514–18. Against all this evidence, the historical record contains only one statement that can be interpreted to the effect that there are no limits on what Congress can delegate. 3 Annals of Cong. 232 (Bourne) ("The Constitution meant no more than that Congress should possess the exclusive right of doing that, by themselves or by any other person, which amounts to the same thing.").

Second, there are many implicit statements supporting a nondelegation doctrine. Time and again, the Constitution's Framers and ratifiers argued that each department was structured so that it could exercise its function well. *See, e.g.*, The Federalist Nos. 53, 55, 62 (advantages of the legislature's structure); The Federalist No. 70 (importance of executive's struc-

ture); The Federalist No. 78 (judiciary's structure). These and similar statements at least imply that the vested powers must be exercised by their respective departments to obtain the benefits of this structure. Wurman, *supra* at 1523–26.

Third, many of the examples from Mortenson and Bagley occurred under the British Constitution. But these are inapposite. Parliament was not limited under the British constitution; that constitution was whatever institutions of governance happened to exist. *See, e.g.*, Bernard Bailyn, The Ideological Origins of the American Revolution 179 (enlarged ed. 1992). The point is best made by James Wilson, who contrasted the two systems specifically in the context of delegation. Because supreme power was lodged in Parliament, "the parliament may alter the form of the government," and the "idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain." That is why "[w]hen parliament transferred legislative authority to Henry the eighth [in the Statute of Proclamations], the act transferring it could not, in the strict acceptation of the term, be called unconstitutional." In contrast, Wilson added, "To control the power and conduct of the legislature by an overruling constitution, was an improvement in the science and practice of government reserved to the American States." James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 24, 1787). The implication is unmistakable: the delegation in the detested Statute of Proclamations—which William Blackstone wrote "was calculated to introduce the most despotic tyranny," 1 William Blackstone, Commentaries on the Laws of England *261 (1765)—was constitutional because Parliament could do

whatever it pleased. But such a delegation would be unconstitutional under the American systems of government.

Fourth, the Founding generation did, of course, recognize that some governmental power was not exclusive to any branch. *See Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative," but "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."). And it is a widely shared understanding that the legislative veto exercised in *INS* v. *Chadha*, 462 U.S. 919 (1983), could be characterized as legislative, executive, or judicial. The notion of both *exclusive* and *nonexclusive* powers—or at least the idea of exclusive powers with some functional overlap—has significant textual, structural, and historical support. Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 Minn. L. Rev. 735 (2022). But just because the Constitution's vested powers are functionally overlapping in certain cases does not mean they are in all cases or that they overlap in any particular case.

Fifth, most of the early legislation was not nearly as broad as the several scholarly critics suggest; it is often hard to imagine what more Congress could have decided. Wurman, *Nondelegation*, *supra* at 1541–42 (discussing, among other statutes, one that authorized collectors to conduct searches and seizures when they were "suspicious of fraud" or had "cause to suspect a concealment"). Others did not delegate "exclusively legislative" functions; many involved nonexclusive functions such as administering public rights,

resolving claims against the government, or those already within the constitutional power of another branch. *Id.* at 1540 (military pensions); *id.* at 1542 (naturalization); *id.* at 1544 (judicial procedures); *id.* at 1548–49 (patent grants). And several involved delegations of local legislative power to the District of Columbia or the territories. *Id.* at 1543–44. Just as these governments do not exercise the judicial power "of the United States," they do not exercise the legislative power "of the United States."

The direct-tax legislation of 1798 is the strongest evidence in favor of a weak nondelegation doctrine, but even then Congress resolved all the important policy questions. It decided not only the amount to be raised, but also how each state was to contribute its share: first by a 50-cent head tax on every slave; next, by a valuation of houses, which were to be taxed at a rate fixed by Congress, depending on the valuation; and finally, any shortfall was to be made up by a tax on land at a rate necessary to achieve the state's proportional amount of the tax. Congress also resolved the most politically controversial issue: whether houses should be taxed separately from land so that most of the tax burden would fall upon wealthy city dwellers with large houses rather than rural farmers with large tracts of land but modest accommodations. Wurman, *Nondelegation*, *supra* at 1550.

True, Congress's instruction to value houses and land based on what they were "worth in money" gave discretion to the tax boards, but arguably that is nothing more than a factual question. And higher-level commissioners could make adjustments, on a district-wide scale, if they believed such adjustments were "just and equitable." But this was the last of

three layers of review that ensured the final valuations were as close as possible to the actual value "in money." The motivating concern was that local assessors might favor their local area by reducing the overall valuations to lower the tax burden. The inclusion of the just and equitable adjustment standard was intended to reduce discretion. The Treasury Secretary believed the statute required the boards to "equalize" the assessments to protect against local partiality. Wurman, *Nondelegation*, *supra* at 1551–53 (citing sources).

Overall, the picture the Founding-era history paints is one of a nondelegation doctrine, although there were lower-order disagreements over its scope. On this score, the historical record and the insight about exclusive and nonexclusive functions casts some doubt on prominent defenses of the nondelegation doctrine that apply primarily to regulations of private conduct. Such accounts of the doctrine have focused on definitions of legislative power as the power to "prescribe rules for the regulation of the society." Wurman, *Nonexclusive Functions*, *supra* at 795–96 & n.294 (citing cases and literature). But the legislative power is the power to alter any legal relations, including those involving public rights and those involving government conduct. *Chadha*, 462 U.S. at 952. Thus, establishing post roads can be reached by the legislative power, as can structuring the government departments and creating programs for the distribution of welfare benefits (a classic public right).

Therefore, if only the legislative power can reach generally applicable rules of private conduct, it must be because the definitions of executive and judicial power do not extend to those functions. The pri-

vate/public rights distinction is certainly relevant when thinking about executive power: Administration and distribution of government resources fall comfortably within any definition of executive power; making rules concerning private rights and conduct less so. Because establishing and distributing public rights is within the definition of legislative power, however, it also follows that Congress cannot freely delegate those matters merely because they involve public rights. Thus, the nondelegation doctrine should turn on whether "important subjects" have been addressed by the legislature, not merely on whether the matter involves private or public rights. *Wayman*, 23 U.S. at 42–43 (noting that resolution of "important subjects" is a "strictly and exclusively legislative" function).

Under this approach, Congress, as noted, cannot freely delegate over public rights, but it is also not totally prohibited from delegating authority over private rights. The scope of the subject matter over which Congress has empowered the agency to regulate matters to the question of importance. *See, e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' . . . it must provide substantial guidance on setting air standards that affect the entire national economy."); *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388, 435 (1935) (Cardozo, J., dissenting) (distinguishing a "roving commission to inquire into evils" from a narrow delegation over a specific question).

For example, a delegation to make codes of fair competition for the entire might be invalid, *see A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), but a narrow delegation to equalize valuations across tax districts might be valid even if it affects private rights. Or a delegation, as in the 1852 steamboat legislation, to make rules imposing passenger limits on ships and rules for the passing of ships—rules that would have altered private rights and obligations—may also be sufficiently narrow in scope. §§ 10, 29, 10 Stat. 61, 69, 72 (1852).

In this case, on the assumption that the SEC's ALJs only hear public rights cases (otherwise it could be problematic under Article III and the Seventh Amendment), the delegation to choose the adjudicatory forum would seem to involve public rather than private rights. Also on that assumption, the choice among constitutional fora would seem to fit comfortably within common notions of enforcement discretion and thus executive power. Further, the granted discretion is over a relatively narrow decision—not quite "country elevators," but closer to that than to codes of fair competition for an entire industry. For these reasons, Congress can likely leave correspondingly larger discretion to the agency.

II. The correct result under Article II is to hold that SEC Commissioners are removable at will, but Congress can secure ALJs against at-will removal by the heads of department in whom it has vested their appointments.

In *Free Enterprise* v. *PCAOB*, this Court resolved the problem of dual for-cause removal provisions by invalidating the second layer of removal protection—the layer enjoyed by the inferior officers. 561 U.S.

477, 508–09 (2010). There may have been good reasons to do so given the limited authority the SEC had over the PCAOB. Here, however, on the assumption that the first layer protects the SEC Commissioners, repeating that remedy would invalidate a constitutional removal protection (the second layer) to perpetuate an unconstitutional one (the first layer). Alternatively (or additionally), on the assumption that the first layer protects the MSPB, the Court should conclude that vesting the appointment of ALJs in the SEC but their removal in the MSPB violates the inferior officer portion of the Appointments Clause.

The constitutional solution most consonant with text, structure, and history is to permit for-cause protection for inferior officers but to hold that principal officers must be removable at will. In short—and contrary to the claims of some recent scholarship—principal officers must be removable by the President. That is because in the absence of statutory authorization, the President cannot personally execute the law and cannot directly interfere with the duties of those officers; his only power of control is the threat of removal. The relationship of inferior officers to principal officers is the inverse: their tenure can be secured because they in any event must follow direction or the principals must be able to reverse their decisions.

1. The importance of maintaining the President's power to remove principal officers follows from a few propositions. First is that the President cannot personally execute the law absent statutory authorization. This follows from the meaning of executive power. The British monarch, the starting point of analysis, could not personally execute the laws. When King

James I sought to adjudicate cases personally, the common law judges, led by Sir Edward Coke, maintained that "the King in his own Person cannot adjudge any Case," and that "the King cannot arrest any Man . . . for the Party cannot have Remedy against the King." 7 The Reports of Sir Edward Coke *64–65 (George Wilson ed., 5th ed. 1777). Importantly, the judicial power was not distinct from the executive power in this period and so the principle at issue applies to executive power under the American Constitution. M.J.C. Vile, Constitutionalism and the Separation of Powers 31–33 (2d ed. 1997). In any event, Coke's report goes beyond the narrow "judicial" piece of the executive power, citing cases for the proposition that the king cannot personally make an arrest because if the king does so wrongfully, sovereign immunity would bar recovery. The king's officers, who could be held liable for errors, executed the laws affecting the life, liberty, and property of the subject.

William Blackstone's eighteenth-century commentaries are consistent with Coke's account. He summarized that although the king has "the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust." 1 Blackstone, *supra* at *257. Blackstone further agreed that although "the king himself can do no wrong," ministers and other officers "may be examined and punished," otherwise the law would "define a[] possible wrong, without a[] possible redress." *Id.* at *237.

Although there is little in the historical record on the precise question of the President's ability personally to execute the law, the available historical

sources suggest that outside of impeachment the President's public acts would be similarly immune. For example, at the Pennsylvania Ratifying Convention James Wilson explained that the President was amenable to the law "in his private character as a citizen, and in his public character by impeachment." James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787). This suggests a similar conclusion about the ability of personal execution as under the British Constitution. And, as Judge Neomi Rao has written, "presidential control" need not "include the ability to act in the place of a subordinate or to nullify actions of subordinates" because a contrary claim would "render meaningless Congress's ability to assign statutory duties to other officers." Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1210 n.19 (2014).

Although the monarch (and the President) could not personally execute the laws, they were charged with overseeing their execution. The principal mechanism for this oversight was the power to appoint and remove officers. Beginning with appointment, and again with the British arrangement, Blackstone wrote that because it was impossible for the king personally to execute the laws, it was "necessary, that courts should be erected, to assist him in executing this power." Blackstone, *supra* at *257. The king nominated the judges who were to do this assisting. *Id.* at *259. As to other "officers," Blackstone wrote that "the law supposes, that no one can be so good a judge of their several merits and services, as the king himself who employs them," from which principle "arises the prerogative of erecting and disposing of offices." *Id.* at *262. This appointment power was so critical that Charles I argued that "[h]e cannot per-

form the Oath of protecting His people if He abandon this power, and assume others into it." Henry Parker, Observations Upon Some of His Majesties Late Answers and Expresses 38 (1642).

Giles Jacob was a British writer particularly influential in America. He wrote a law dictionary in 1729, with several editions including one in 1782. Giles Jacob, A New Law-Dictionary (10th ed., London 1782). The law dictionary was the "fourth most popular of all law books available" in colonial Virginia. Gary McDowell, The Language of Law and the Foundations of American Constitutionalism 172 (2010) (citing Herbert A. Johnson, Imported Eighteenth-Century Law Treatises in American Library 1700-1799, at 61 (1978); and William Hamilton Bryson, Census of Law Books in Colonial Virginia, at xvii (1978)). It appears to have been the "most widely used English law dictionary" of the period. Leonard W. Levy, *Origins of the Fifth Amendment and its Critics*, 19 Cardozo L. Rev. 821, 854 (1997); Bryson, *supra* at xvi, xvii; Johnson, *supra* at 33. In the 1782 edition (as well as editions dating back at least to 1736), Jacob wrote that the king "names, creates, makes and removes the great officers of the government." Jacob, *supra* at 544.

The same was true of the appointment power in America. Professor Julian Mortenson has canvassed numerous early American sources to conclude that "the executive power was often viewed as either logically entailing or functionally implying the appointment of 'assistances.'" Julian Davis Mortenson, *The Executive Power Clause*, 168 U. Pa. L. Rev. 1269, 1325 (2020). For example, George Mason thought that the Senate should have no role in "the appoint-

ment of publick officers" because it was an executive power. 4 Documentary History of the Ratification of the Constitution 287, 289 (John P. Kaminski et al. eds., 1997) [hereinafter DHRC]. James Wilson argued that "there can be no good Executive without a responsible appointment of officers to execute." 2 The Records of the Federal Convention of 1787, at 538–39 (Max Farrand ed., Yale Univ. Press 1911). In the Constitutional Convention, Wilson and Madison both argued that the "extent of the Executive authority" was the "power to carry into effect[] the national laws" and "to appoint to offices in cases not otherwise provided for." *Id.* at 67, 70. The Antifederalist writer Hampden wrote that "the most important and most influential portion of the executive power" was "the appointment of all officers." 2 DHRC at 663, 667 (1976). Brutus, Centinel, and Richard Henry Lee, among others, also argued that the appointment of officers was an executive function. Mortenson, *supra* at 1329–30 & nn.315–20. Publius agreed: "the appointment to offices . . . is in its nature an executive function." The Federalist No. 47.

The more controversial proposition is that the executive power included the power to remove, but recall the statement from Giles Jacob's prominent law dictionary: the king "names, creates, makes *and removes* the great officers of the government." Jacob, *supra* at 544. Even more important for this case, it was a common law maxim that the power to remove was incident to the power to appoint. Professor Jed Shugerman has canvassed numerous authorities for this proposition. Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. Pa. L. Rev. 753, 820 (2023). As Shugerman explains, this tradition was "enshrined in

Latin" maxims, "[u]numquoque dissolvitur, eodem modo, quo ligatur" and "[c]ujus est instituere ejus abrogare," translating to "[e]very obligation is dissolved by the same method with which it is created" and "whose right it is to institute, his right it is to abrogate." *Id.* at 820 (quoting sources). Shugerman found the former formulation or closely related phrases "in many eighteenth-century legal sources"; the latter formulation "is in dozens of eighteenth-century treatises, including works by the famous republican Algernon Sidney." *Id.* at 820 & nn.373–74. Dalton's treatise on Justices of the Peace, widely distributed in founding-era America, Bryson, *supra* at xvii, similarly provided as to high constables that "[a]lso in such manner as they are to be chosen, in the same manner, and by the like Authority are they to be removed; for, *eodem modo quo quid constituitur, dissolvitur*." Michael Dalton, The Countrey Justice: Containing the Practice of the Justices of the Peace 49 (1666).

This maxim was so well established that in 1780 Thomas Jefferson wrote in a private note: "The power of appointing and removing executive officers inherent in Executive. Executive inadequate to every thing. Appoint deputies . . . . He who appoints may remove." Note Concerning the Right of Removal from Office (1780), *in* 4 The Papers of Thomas Jefferson: Main Series 281, 281 (Julian P. Boyd ed., 1951). On this point Alexander Hamilton agreed. When he appointed Tench Coxe as the assistant secretary of the Treasury pursuant to the act establishing the Treasury Department, he noted in the commission that he could remove Coxe even though the statute was silent. Appointment of Tench Coxe as Assistant Secretary of the Treasury (May 10, 1790), *in* 6 The Papers

of Alexander Hamilton 411, 411 (Harold C. Syrett & Jacob E. Cooke eds., 1962); *see also* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1834 (2023) (citing that and related examples).

In the famous debates over the removal power in 1789, several Representatives believed because of this maxim that the President and Senate together had the power to remove. Shugerman, *supra* at 820–21. Others agreed with the maxim but maintained that it was the President who did the appointing; the Senate merely advised and consented to that act. Bamzai & Prakash, *supra* at 1775. Even James Madison agreed that in general "the power to annul an appointment is, in the nature of things, incidental to the power which makes the appointment." 1 Annals of Cong. 496 (1789) (Gales & Seaton, 1849). He argued that if all the Constitution had said was that the President and Senate shall appoint, then he would agree that the President and Senate together must remove. Because the Constitution included both the Executive Vesting Clause and the Take Care Clause, however, he thought otherwise: The power to remove may follow from the power to appoint, but the power to appoint, and therefore the power to remove, are ultimately incidents of the executive power. And the "association of the Senate with the President in exercising" the appointment function "is an exception to this general rule" that the executive power is vested in the President, which exception does not apply to removal. *Id.* The Take Care Clause further supports this proposition, implying the President has the power "necessary to accomplish" the duty of faithful execution. *Id.*

In short, in 1789 there was general agreement that the power to execute the laws included the power to appoint officers, and that power included the ability to remove. But one could draw two different conclusions: the "senatorial" view or the "presidentialist" view. The latter view makes sense if "the executive power" was understood to include the power to appoint and remove; the Senate had to advise and consent to the former but not the latter. That view also makes good sense of the remainder of the constitutional text because the senatorial view would seem to give the Senate a legislative veto over the President's duty of faithful execution.

2. The power to remove is critical because it is the only constitutionally guaranteed mechanism the President has at his disposal for overseeing law execution. Although some scholars disagree, there was a widely held view that the President could not directly control or interfere with the individual decisions of officers to whom Congress had granted discretion. This view was held by characters as varied as James Madison, William Wirt, Daniel Webster, and William Howard Taft. The Opinions Clause, however, guarantees that in at least one respect the principal officers must obey the President, giving him information so that he can intelligently exercise the removal power.

The question arose particularly with respect to the adjudicatory functions of the Comptroller of the Treasury. Madison "question[ed] very much whether [the President] can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States," and so proposed that the Comptroller have a short tenure to allow the Senate to consider his performance every few years. 1

Annals of Cong. 614 (1789). Contrary to what some scholars have suggested, Madison did not propose restricting the President's removal power. *Id.* at 613–14. Attorney General William Wirt also wrote an oft-cited opinion for President James Monroe on his power to interfere with the Comptroller's duties, and concluded, "If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law." The President & Acct. Offs., 1 U.S. Op. Atty. Gen. 624, 625 (1823). The President "is to see that they do their duty faithfully; and on their failure, to cause them to be displaced." *Id.*

Daniel Webster similarly argued, in opposition to Andrew Jackson's having effectively fired two Treasury Secretaries and induced Acting Secretary Roger Taney to remove Treasury deposits from the Bank of the United States, that the removal of funds "was a trust confided to the discretion of the Secretary, and to his discretion alone." Mr. Webster's Speech on the President's Protest: Delivered in the Senate of the United States, May 7, 1834, at 4–5 (Gales and Seaton, 1834). He then drew a critical distinction: "All are able to see the difference between the power to remove the Secretary from office, and the power to control him, in all or any of his duties, while in office. The law charges the officer, whoever he may be, with the performance of certain duties. . . . The President, it is true, may terminate his political life; but he cannot control his powers and functions, and act upon him as a mere machine, while he is allowed to live." *Id.* at 5–6.

Finally, two years prior to *Myers* v. *United States*, 272 U.S. 52 (1926), Chief Justice Taft wrote a book on presidential powers, a collection of lectures that he delivered a decade earlier after he had been President. In that work, Taft wrote that the President may remove the Comptroller of the Treasury, "but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer." William Howard Taft, Our Chief Magistrate and His Powers 81, 125–26 (1916). Taft's language in *Myers* similarly suggests that, although Congress cannot restrict the President's removal power over officers appointed by and with advice and consent, Congress can prevent the President from controlling and revising the decisions of officers. "Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." 272 U.S. at 135. And, Taft added for the Court in a passage particularly relevant to this case, "there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." *Id.* But, he explained, "even in such a 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." *Id.*

To summarize: The President cannot personally execute the law, and probably cannot directly interfere with statutory duties assigned to officers absent

statutory authority to do so. The President has a removal power, however, and can control officers through threats of removal. These principles apply regardless of the nature of the duties, but the rule against direct interference is particularly important for adjudicatory functions. Finally, it should be added that this account makes sense of the Opinions Clause: principal officers must always obey the President in at least that respect (giving their opinions in writing), so that the President may intelligently exercise the power to remove.

3. Critically for this case, the relationship of inferior officers to principal officers is the inverse: the principals can always control, but Congress can restrict their ability to remove. Inferior officers can be protected against removal, to a certain extent at least, for two reasons. First, as noted above, the power to remove is incident to the power to appoint; thus, Congress's power to vest the appointment of inferior officers in the heads of department would allow those department heads to remove them. However, Congress's greater power to vest this power has been thought to include lesser power to restrict the incidental power of removal. *See United States* v. *Perkins*, 116 U.S. 483, 485 (1886) ("The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.").

Whether or not that reasoning is sound does not much matter because removal restrictions would seem to be appropriate for a second reason: inferior officers must obey their superiors, or their superiors

at least must have the ability to countermand their decisions. The historical record supports this Court's recent conclusion that "[s]ince the founding, principal officers have directed the decisions of inferior officers on matters of law as well as policy" and that to be an inferior officer, another officer must have a "means of countermanding the final decision" of that inferior officer. *United States* v. *Arthrex*, 141 S. Ct. 1970, 1982–83 (2021).

For example, Bouvier's prominent law dictionary defined "inferior" as "[o]ne who in relation to another has less power and is below him; one who is bound to obey another." 1 John Bouvier, Law Dictionary 630 (1855). Noah Webster's prominent 1828 dictionary of the English language distinguished between "great officers of state, and subordinate officers." 2 Noah Webster, An American Dictionary of the English Language, at cxcvi (S. Converse, New York 1828). Subordinate was defined as "[i]nferior in order, in nature, in dignity, in power, importance, etc.; as *subordinate* officers." *Id.* at dclxviii. "Inferior" was then defined as lower in place, station, age, or rank; or "subordinate," that is, "of less importance." 1 Webster, *supra* at dccclxx. More instructively, the dictionary defined "insubordinate" as "[n]ot submitting to authority" and "insubordination" as "disobedience to lawful authority." *Id.* at dccclxxxv.

In the military context the relationship of an inferior to a superior officer was one of control; an inferior military officer had to obey any lawful commands. For example, General Washington issued an order explaining that "[o]pen defiance and opposition from an inferior to his superior officer upon a parade must in every well regulated army be deemed a breach of

order and discipline." 22 The Papers of George Washington, Revolutionary War Series 352–54 (Benjamin L. Huggins ed., 2013). And in another letter to the Board of War, Washington explained that the Commissary General of Military Stores had "a right to direct in every thing relative to the execution of the public works, under his care," that "every Officer stationed at the Laboratories is bound so far, to follow his directions" with respect to those matters, and that his rank "entitles him to command in all respects over every Inferior Officer acting with him." 20 The Papers of George Washington, Revolutionary War Series 482–84 (Edward G. Lengel ed., 2010).

4. The upshot is that it is almost certainly constitutional to secure inferior officers against at-will removal at the hands of their principals because—or at least if—the principals can still direct the outcomes in matters over which the inferior officers have discretion. Inversely, the President must retain at-will removal over principal officers because that is his only power to supervise the execution of the laws. The historical record, and the Opinions Clause, strongly suggest that in the absence of statutory authority, there is no constitutional obligation on the part of the principal officers to obey the President. The only inducement is the threat of removal.

The result in this case most consonant with the text and historical record, in other words, would be to uphold the second layer of removal protections because the SEC can in any event countermand and otherwise review decisions of the ALJs, so the principal-inferior relationship remains intact. But the Court should hold that if the first layer exists and

protects the SEC's Commissioners, to that extent the statute may be unconstitutional.

Alternatively (or additionally), if the first layer protects the MSPB, then it is likely unconstitutional because, as described above, the power to remove is incident to the power to appoint. Congress's power to restrict a department head's removal power derives from its greater power to vest the appointment of inferior officers in that department head. *Perkins*, 116 U.S. at 485. In other words, Congress's power to vest the appointment of inferior officers brings with it the removal power, and whatever restrictions that Congress wishes to impose upon it. But Congress has no power to vest an officer's removal in a department head in whom it has not vested the power to appoint.

III. Whether this case involves public rights exempt from Article III and the Seventh Amendment has nothing to do with the source of law.

Despite the language of Article III, not all cases arising under the laws of the United States must be heard by federal courts. "[C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper," matters "involving public right." *Murray's Lessee* v. *Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1856). This Court's cases are not always clear, unfortunately, on the distinction between private and public rights. *Compare Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 54 (1989) (majority opinion), *with id.* at 65 (Scalia, J., concurring in part and concurring in the judgment).

Returning to first principles, "private rights" are those persons would have had in the state of nature,

as modified by the civil law, such as the rights to life, liberty, and to acquire and possess property; "public rights" are rights belonging to the public or are entitlements private individuals can claim from the government. The classic examples of public rights are rights of way, such as public roads and waterways; and public privileges like welfare benefits, public employment, and public land grants. Caleb Nelson, *Adjudication in the Political Branches*, 107 Va. L. Rev. 559, 565–68 (2007); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 Geo. L.J. 1015, 1020–21 (2006).

Historically, public rights could be determined by the executive branch for at least two reasons. First, as noted previously, adjudication of such rights fits comfortably within definitions of "executive power." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1246 (1994). Second, sovereign immunity: The judicial power extends only to certain "cases" and "controversies," and to be either, one needs a proper plaintiff and defendant. But in matters involving public rights such as wrongfully withheld welfare benefits, a defendant cannot hale the government into court unless the government consents to suit. Without a waiver of sovereign immunity, there is no "case" within the meaning of Article III. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1565 (2002); *N. Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982) (the public rights doctrine "may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued").

If this case involves private rights, it must be heard in Article III courts. The Seventh Amendment would then apply if the relief sought is legal rather than equitable. *Granfinanciera*, 492 U.S. at 41 (quoting *Parsons* v. *Bedford*, 3 Pet. 433, 447 (1830)). The key distinction between law and equity is that legal remedies do not require the defendant to do anything: the defendant can merely pay, or if the defendant does not pay, the sheriff can attach defendant's property and obtain the money sufficient for the judgment. Equitable remedies operate on the body of the defendant—compelling defendants to take action (or inaction). Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 551–58 (2016). Civil monetary penalties do not compel the defendant to take action (or inaction), and the judgment can be satisfied entirely by attachment of property. *See Tull* v. *United States*, 481 U.S. 412, 418 (1987).

This case therefore depends on whether the rights at issue are private or public. In *Atlas Roofing Co.* v. *Occupational Safety and Health Rev. Comm'n*, 430 U.S. 442, 450 (1977), the Supreme Court held that the Occupational Safety and Health Act involved "public rights created by statute[]." In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937), the Court similarly held that the case did not require a jury (or Article III court) because it was a "statutory proceeding" and therefore a public right—even though the issue involved was the liability of employer to employee. Even *Crowell* v. *Benson*—this Court's seminal decision approving administrative tribunals—recognized that a federal workers' compensation scheme that determined the liability of an employer to employee was a matter of private right. 285 U.S. 22, 51 (1932). The source of law had nothing to

do with the nature of the right; the case involved a "private right" because it concerned "the liability of one individual to another under the law as defined." *Id.* Congress cannot convert matters of private right simply by passing a statute; that would allow it to write Article III out of the Constitution. What matters is the nature of the right and the identity of the parties.

In summary, Article III and the Seventh Amendment overlap. If this is a matter of public rights, then neither applies. If this is a matter of private right, then an Article III court is required but a jury is only required if the remedy sought is legal rather than equitable; whether the right involved is a "public right" goes only to the Article III question. But the source of law almost certainly has nothing to do with whether a right is public or private. Most public rights are created by statute, but that does not mean that most statutorily created rights are public rights.

CONCLUSION

There is abundant historical support for a nondelegation doctrine, but the relevant factors seem to suggest that here Congress might be able to give the agency correspondingly more discretion. There is also abundant historical support for a presidential removal power over principal officers, but Congress may secure inferior officers against at-will removal by the heads of department in whom it has vested their appointments. The correct constitutional result under Article II is therefore to hold that the SEC Commissioners are removable at will but that Congress may insulate ALJs from removal, as long as the SEC can reverse ALJ decisions; further, Congress cannot vest the appointment and removal of the same inferior of-

ficer in different heads of department. Finally, whether this case involves public rights has nothing to do with the source of law.

Respectfully submitted,

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