NO. 22-859

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

GEORGE R. JARKESY, JR., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE THE FORUM OF UNITED STATES ADMINISTRATIVE LAW JUDGES IN SUPPORT OF NEITHER PARTY

Steven A. Glazer
Counsel of Record
THE FORUM OF UNITED STATES ADMINISTRATIVE LAW JUDGES
P.O. Box 14076
Washington, D.C. 20044
(301) 332-9214
forumalj@gmail.com

August 28, 2023 *Counsel for Amicus Curiae*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE SEVENTH AMENDMENT DOES NOT APPLY TO THIS SEC PROCEEDING 3

A. SEC Actions for Securities Fraud Vindicate "Public Rights." 3

1. *Jarkesy*'s Take on the "Public Rights" Doctrine 4

2. *Jarkesy's* Misquote of Blackstone's COMMENTARIES Is Fatal to Its Holding 6

B. History and Tradition Supports SEC Administrative Enforcement Actions Without Juries 9

II. ALJ "FOR-CAUSE" REMOVAL PROTECTIONS ARE CONSTITUTIONAL 11

A. The Fifth Circuit Misapplies *Free Enterprise Fund* 12

1. The Place of ALJs in the Hierarchy of Removal Layers Is Irrelevant 13

a. The "Upper Layer" of Protection for Heads of Departments Does Not Weaken Executive Removal Power ... 14

b. The "Lower Layer" of Protection for ALJs Does Not Weaken Executive Removal Power 17

TABLE OF CONTENTS – Continued

Page

2. The MSPB's Standard for ALJ Removal Does Not Weaken Executive Removal Power 19

B. Far from Interfering with Executive Power, ALJ Removal Protections Are a Constitutional Expression of It 20

III. RESPONDENTS ARE NOT HARMED BY ALJ REMOVAL PROTECTIONS 22

IV. THIS COURT SHOULD NOT ENTERTAIN FATUOUS COLLATERAL ATTACKS INTENDED TO SABOTAGE SEC ENFORCEMENT 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442 (1977) 2, 4

Butz v. Economou, 438 U.S. 478 (1978) 11

Calcutt v. FDIC, 37 F.4th 293 (6th Cir. 2022)..... 2, 12, 23

Collins v. Yellen, 141 S. Ct. 1761 (2021)..... 23

Cunningham v. Brown, 265 U.S. 1 (1924) 9

Decker Coal Co. v. Pehringer, 8 F.4th 1123 (9th Cir. 2021)..... 2, 12, 13, 14, 15

Dep't of Labor v. Avery, 120 M.S.P.R. 150 (2013)..... 19

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 9

Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) 2, 12, 13, 15, 16, 18

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 2, 4, 5

Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) 16, 17, 18, 21

Jarkesy v. Securities and Exchange Comm'n, 34 F.4th 446 (5th Cir. 2022) .. 1, 3-6, 10, 13, 14, 16

Jarkesy v. Securities and Exchange Comm'n, *reh'g en banc denied*, 51 F.4th 644 (5th Cir. 2022)..... 1, 5

TABLE OF AUTHORITIES – Continued

Page

Lucia v. SEC,
138 S. Ct. 2044 (2018) 11

Myers v. United States,
272 U.S. 52 (1926) 16, 17, 21, 22

Obergefell v. Hodges,
576 U.S. 644 (2015) 9

Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961) 3

Tull v. United States,
481 U.S. 412 (1987) 4, 5

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 20

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VII..... 3, 4, 8

U.S. Const. art. II, § 2, cl. 1 10

U.S. Const. art. II, § 3..... 2, 20

STATUTES

5 U.S.C. § 556..... 21

5 U.S.C. § 1202(d) 19

5 U.S.C. § 7521..... 17, 19

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Corpus Juris Secundum,
Vol. 87, *Trespass* (2023) 7

Ron Chernow,
THE HOUSE OF MORGAN (1990)..... 9

U.S. Electoral Commission,
Proceedings of the Electoral Commission,
44th Cong. 20 (1877) 11

WEBSTER'S NEW WORLD DICTIONARY
(2d coll. ed. 1974) 11

William Blackstone,
3 COMMENTARIES ON THE LAWS OF ENGLAND
(1768) 4, 5, 6, 7, 8

William Shakespeare,
HAMLET 24

INTEREST OF THE AMICUS CURIAE

The Forum of United States Administrative Law Judges (FORUM) is a professional organization of federal administrative law judges (ALJs) which was founded in 1983. FORUM's membership is made up of active and retired ALJs who have been appointed by approximately 30 federal agencies.[1]

This Court's grant of *certiorari* in *Jarkesy v. Securities and Exchange Commission*, 34 F.4th 446 (5th Cir. 2022) (*Jarkesy I*), *reh'g en banc denied*, 51 F.4th 644 (5th Cir. 2022) (*Jarkesy II*), will significantly affect the judicial functions of ALJs if the rulings of the Fifth Circuit are upheld by this Court. Of the three Questions Presented by this case, Questions I and III directly concern the work of ALJs.

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[1] No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. FORUM has authored this brief and fully funded the preparation and submission of this brief. The views expressed here are the views of individual citizens; they are not the views of any agency that employs FORUM members.

SUMMARY OF ARGUMENT

FORUM's answer to both Questions I and III is "No." As to Question I, the acts authorizing the Securities and Exchange Commission (SEC) to conduct non-jury administrative enforcement proceedings seeking civil penalties, which for the most part are presided over by ALJs, are consistent with this Court's expressed view that Congress may assign factfinding functions and initial adjudications to such proceedings in cases involving "public rights"; that is, "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact." *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 450 (1977); *accord Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989).

As to Question III, the law delineating the President's power to remove ALJs of the SEC from office only "for good cause," by means of an action brought by the SEC pursuant to the Administrative Procedure Act (APA) before the Merit Systems Protection Board (MSPB), when the members of both the SEC and the MSPB may themselves only be removed from their offices "for cause," does not violate the Executive's power pursuant to Article II of the Constitution to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 507 n.10 (2010); *accord Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1135 (9th Cir. 2021); *Calcutt v. FDIC*, 37 F.4th 293, 319-20 (6th Cir. 2022), *rev'd on other grounds*, 598 U.S. 623 (2023).

ARGUMENT

I. THE SEVENTH AMENDMENT DOES NOT APPLY TO THIS SEC PROCEEDING.

A. SEC Actions for Securities Fraud Vindicate "Public Rights."

The Seventh Amendment to the U.S. Constitution guarantees that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. As the Fifth Circuit in *Jarkesy* acknowledges, not all "Suits" at the time of the framing of the Constitution were "at common law." Some were "suits in equity," which did not have juries. *See Jarkesy I*, 34 F.4th at 452 ("The Supreme Court has interpreted 'Suits at common law' to include all actions akin to those brought at common law as those actions were understood at the time of the Seventh Amendment's adoption."); *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 488 (5th Cir. 1961) ("Of course, at common law a jury trial was available as of right in any action brought at law; in suits in equity, on the other hand, questions of fact were determined by the court sitting without a jury.").

In the modern day, this "law-equity" distinction has transformed into a distinction between "private rights," *i.e.*, suits legal in nature for which the right to a jury trial is guaranteed; and "public rights," *i.e.*, "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes

within the power of Congress to enact." *Atlas Roofing*, 430 U.S. at 450. "[I]n cases in which 'public rights' are being litigated," *Atlas Roofing* holds, "the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." *Id.*

1. *Jarkesy*'s Take on the "Public Rights" Doctrine.

In concluding that the public rights doctrine does not apply to SEC administrative enforcement proceedings, the *Jarkesy* panel employs a familiar two-part analysis: "First, a court must determine whether an action's claims arise 'at common law' under the Seventh Amendment. Second, if the action involves common-law claims, a court must determine whether the Supreme Court's public-rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial." *Jarkesy I*, 34 F.4th at 453 (citing *Tull v. United States*, 481 U.S. 412, 417 (1987)); *see also Granfinanciera,* 492 U.S. at 54-55; *Atlas Roofing*, 430 U.S. at 455.

For the first test, the Fifth Circuit rejects the applicability of the "public rights" doctrine to the long-standing, statutorily-enacted administrative enforcement process of the SEC because (it says) "[f]raud prosecutions were regularly brought in English courts at common law." *Jarkesy I*, 34 F.4th at 453. The panel cites as support its interpretation of a passage from the third book of William Blackstone's four-volume treatise, COMMENTARIES ON THE LAWS OF ENGLAND, which were published between 1765 and 1769; and its interpretation of *Tull* that Clean Water Act

enforcement actions seeking civil penalties "are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims." *Id.* at 453-54 (first citing 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *42 (1768); then citing *Tull*, 481 U.S. at 418-19).

Under the second test, the relevant considerations include: (1) whether Congress created a new cause of action, and remedies for it, unknown to the common law "because traditional rights and remedies were inadequate to cope with a manifest public problem;" (2) whether jury trials would "go far to dismantle the statutory scheme" or "impede swift resolution" of the claims created by statute; and (3) whether such proceedings are "uniquely suited for agency adjudication." *Jarkesy I*, 34 F.4th at 453, 455 (internal punctuation omitted) (citing *Granfinanciera,* 492 U.S. at 60-63).

It is FORUM's view that the panel misapplies this Court's precedent, for the reasons aptly stated in the dissents below, when holding that SEC proceedings do not satisfy the second test. *See Jarkesy I*, 34 F.4th at 466-74 (Davis, J., dissenting); *Jarkesy II*, 51 F.4th at 646 (Haynes, J., joined by Stewart, Dennis, Graves, and Higginson, JJ., dissenting). Reaching this conclusion is unnecessary, however, because the *Jarkesy* analysis falls at the first hurdle: the proceedings in question do not arise at common law as a historical matter.

2. *Jarkesy's* Misquote of Blackstone's COMMENTARIES Is Fatal to Its Holding.

Jarkesy is dispositively wrong on the first "public rights" test because its own historical support shows that fraud prosecutions in English courts were principally matters in equity, not common law, and therefore did not require juries. The Fifth Circuit misreads Book III of Blackstone's COMMENTARIES for its contrary premise. *Jarkesy I*, 34 F.4th at 453-54 (citing 3 *Blackstone* at *42).

The original 1768 version of Book III, page *42 of Blackstone's COMMENTARIES, is publicly available on the internet.[2] Unlike the Fifth Circuit's version, the passage in the original COMMENTARIES does not mention "fraud" or "juries" at all. The following table (with modifications for unnecessary punctuation and archaic spelling, and with conflicting passages highlighted in bold) illustrates the panel's mistake:

3 *Blackstone* at *42 (1768)	*Jarkesy I*, 34 F.4th at 453-54 (Court's Version of 3 *Blackstone* at *42)
"[The Court of King's Bench] *has* ***an original jurisdiction and cognizance of all trespasses, and other injuries, alleged to be committed vi et armis: which, being a breach of the peace***,	"[T]he common-law courts' jurisdiction over '***actions on the case which allege any falsity or fraud; all of which*** savour of a criminal nature, although the action is brought for a civil

[2] *See* https://pennlawdigital.contentdm.oclc.org/digital/collection/p17083coll7/id/55 (last visited Aug. 3, 2023).

savour of a criminal nature, although the action is brought for a civil remedy; and ***for which the defendant ought*** in strictness to pay a fine to the king, as well as damages to the injured party."	remedy; and ***make the defendant liable*** in strictness to pay a fine to the king, as well as damages to the injured party.'"

By substituting "falsity or fraud" for "trespass" in the passage and by implying that a fine is mandatory, the Fifth Circuit evades the real passage's purpose of defining the original jurisdiction of the English law courts over actions for trespass *vi et armis* ("with immediate force"). This term was the "name given to an action for injury committed with direct or immediate force or violence against the plaintiff's person or property." 87 C.J.S. *Trespass* § 65 (2023).

Trespass *vi et armis* is *not* an action akin to SEC administrative enforcement proceedings for securities fraud. Causes of action for trespass have to do with unlawful entry onto property and theft of goods, not fraud. *See id.* §§ 66-68.

Had the Fifth Circuit read Blackstone a little further, it would have discovered a more relevant passage in Book III (again, with modifications for unnecessary punctuation and archaic spelling): "***AGAIN, it hath been said, that fraud, accident, and trust are the proper and peculiar objects of a court of equity.***" 3 *Blackstone* at *431 (emphasis in bold added). In yet another passage ignored by the Fifth Circuit, Blackstone writes:

> ***From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud; all matters in the private knowledge of the party, which, though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment.***

Id. at *437-38 (punctuation and archaic spelling modified) (emphasis in bold added) (footnote omitted).

The original version of Blackstone thus suggests, in several passages *not even mentioned* in the Fifth Circuit's erroneous version, that "fraud," "accident," and "trust" actions in eighteenth-century England were brought in courts of equity, and only certain specific issues were farmed out to law courts for adjudication. In courts of equity, cases were *not* tried by juries. Blackstone suggests, in fact, that courts of equity possessed *original jurisdiction* over fraud and trust actions. Blackstone also points out that the power of courts of equity to obtain testimony under oath was a useful tool for suppressing fraudulently-obtained judgments in courts of law, because of the power of the injunction to "prohibit[] the plaintiff from taking any advantage of a judgment, obtained by suppressing the truth; and which, had the same facts appeared on the trial, as now are discovered, he would never have obtained at all." *Id.* at *438 (footnote omitted).

Consequently, *Blackstone* does not support the Fifth Circuit's holding that SEC administrative enforcement actions arise at common law and thus does not support the application of the Seventh Amendment.

B. History and Tradition Supports SEC Administrative Enforcement Actions Without Juries.

In recent years, this Court has recognized the importance of legal "history and tradition" in reviewing the structure of our legal system. As it held in *Obergefell v. Hodges*, "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present." 576 U.S. 644, 664 (2015) (citation omitted).

It is undisputed that, for nearly a century, the administrative proceedings of the SEC have promoted an important national interest in protecting the integrity of financial markets, products, and services. As this Court has held, in enacting the securities laws, Congress sought to "protect investors against fraud" and to "promote ethical standards of honesty and fair dealing." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). These efforts do not violate this Nation's historical tradition of financial regulation in any way, shape, or form. Rather, they define it.

In its first century, the federal government had no role in the regulation of financial markets. It took the Great Depression of the 1930s, the revelations of the "Pecora Hearings" before the Senate Banking and Currency Committee of 1932-1933, and the advent of "Ponzi schemes" and market manipulations to induce the Government to act more boldly. *See* Ron Chernow, THE HOUSE OF MORGAN 352-74 (1990); *Cunningham v. Brown*, 265 U.S. 1, 7-8 (1924).

Although the panel holds that fraud prosecutions seek civil penalties akin to ancient English actions at law, it nevertheless admits that "[h]ere, the SEC sought to ban Jarkesy from participation in securities industry activities and to require Patriot28 to disgorge ill-gotten gains—*both equitable remedies*." *Jarkesy I*, 34 F.4th at 454 (emphasis added). At the very least, then, an administrative proceeding before an ALJ that determines whether such "equitable" remedies are warranted does not require a jury.

The risk of civil penalties, to the fraudster, is merely a cost of doing business that is well worth taking on, given the enormous financial gain that the fraudster expects to acquire. The more important equitable remedy of injunction against future practice in the securities industry and seeking retrieval of ill-gotten gains is an effective method for policing such industry actors.

Moreover, making decisions about individual cases has been an administrative function of the federal government since the founding of the Republic. In the statement in our Constitution that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," the antecedent usage of the word "Departments" illustrates that the administrative state existed even as early as 1787.[3] U.S. Const. art. II, § 2, cl. 1.

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[3] A good description of the adjudicative functions of such officers in our history is found in the testimony of a Pensacola, Florida attorney that appears in the record of the Congressional Electoral Commission of 1877. It describes the "judicial" functions of a federal "shipping commissioner" at that port, including presiding over "[t]he ordinary questions of difference between seamen and

II. ALJ "FOR-CAUSE" REMOVAL PROTECTIONS ARE CONSTITUTIONAL.

Just as such federal officers did in the past, ALJs today are tasked with taking evidence and deciding cases that arise in their agency's pursuit of its statutory mission. The primary job of the ALJ is to make independent initial or recommended decisions on the cases.

"Independent," in plain English, means "free from influence, persuasion, or bias; objective." WEBSTER'S NEW WORLD DICTIONARY 714 (2d coll. ed. 1974). In order for ALJs to decide agency cases, their independence is crucial to assuring the public of the due process to which it is entitled to receive from the agency. This assurance is damaged – indeed, irreparably impaired – when the ALJ is not independent because the agency is empowered to fire an ALJ at will, for any reason or no reason. Thus, as Congress unanimously concluded by enacting the APA in 1946, there must be mechanisms in place to shield ALJs from influence, persuasion, or bias. *See Butz v. Economou*, 438 U.S. 478, 514 (1978) ("Since the securing of fair and competent hearing personnel was viewed as 'the heart of formal administrative adjudication,' the [APA] contains a number of provisions designed to guarantee the independence of [ALJs].") (citation omitted). Indeed, as Justice Breyer observed in his partial concurrence in *Lucia v. SEC*, 138 S. Ct. 2044, 2060 (2018), "[t]he substantial independence that the [APA's] removal protections

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masters of vessels; questions of the right to their discharge and the right to receive their wages" in an "informal court" in which testimony was taken and arguments heard. *Proceedings of the Electoral Commission*, 44th Cong. 20, at *38-39 (1877).

provide to administrative law judges is a central part of the Act's overall scheme."

A. The Fifth Circuit Misapplies *Free Enterprise Fund*.

> ALJs are judges who make decisions that are subject to vacatur by people without tenure protection. With this structure, the President continues to enjoy an "ability to execute the laws—by holding his subordinates accountable for their conduct," especially because these ALJs exercise only adjudicative power in the first instance and are not imposed on the President in this context.

Decker, 8 F.4th at 1135 (quoting *Free Enter. Fund*, 561 U.S. at 496); *see also Calcutt*, 37 F.4th at 319.

The Ninth Circuit, in this passage examining the removal issue in a case before the Department of Labor, correctly describes the President's control over ALJs. *Decker* noted that "*Free Enterprise Fund* is the last [Supreme Court] case addressing two-layer removal protections for an inferior officer." *Id.* at 1131-32. The *Jarkesy* case is the first opportunity for this Court to offer guidance on whether and how *Free Enterprise Fund* applies to ALJs.

This Court should not interpret *Free Enterprise Fund* to alter ALJ tenure protections important to performing their statutory functions. *Free Enterprise Fund* expressly noted that its holding on the unconstitutional dual protection afforded to the Public Company Accounting Oversight Board (PCAOB) "does not address that subset of independent agency employees who serve as administrative law judges,"

in part because it recognized that ALJs exercise purely adjudicative powers that are far different from the significant "enforcement or policymaking functions" exercised by PCAOB members. 561 U.S. at 507 n.10.

1. The Place of ALJs in the Hierarchy of Removal Layers Is Irrelevant.

The contrast between the views of the Fifth and Ninth Circuits, evaluating two different agencies, derives from the different ways in which each perceives the structure of the agency involved. The number of protective "layers" that the Ninth Circuit perceives is smaller than the number that the Fifth Circuit sees. Unlike the Fifth Circuit, the Ninth Circuit in *Decker* deems the "upper" layer, made up of the heads of agencies who are appointed by the President with the advice and consent of the Senate, to be directly answerable to the President because he or she is the one who *personally decides* whether those agency heads demonstrate "good cause" to be fired. The President may be required to furnish a statutory reason for such dismissal, but no one can question it. That fact leaves an ALJ with only *one* layer of removal protection between the ALJ and the President, which is vested in the MSPB, whose members are similarly answerable to the President *directly*. In evaluating the power of the Executive Branch to remove ALJs, "*the function performed by the officer is critical to the analysis*," as Judge Davis points out in his dissent. *Jarkesy I*, 34 F.4th at 477 (Davis, J., dissenting) (emphasis added).

a. The "Upper Layer" of Protection for Heads of Departments Does Not Weaken Executive Removal Power.

Jarkesy and cases like it are based on the incorrect perception that "at least two layers of for-cause protection stand in the President's way" of firing an ALJ. *Jarkesy I*, 34 F.4th at 465. This Court must put an end to this destructive myth.

The Fifth Circuit's structural view in *Jarkesy* opines that there are at least two layers of removal protection between the President and an ALJ. Within the "lower" layer, the MSPB must decide whether "good cause" exists to remove an ALJ and the SEC must decide whether to act on that finding. Within the "upper" layer, members of both the MSPB and the SEC are presumed by the Fifth Circuit to have "for-cause" protection from removal by the President. *Jarkesy I*, 34 F.4th at 465. The mere existence of these back-to-back layers is enough, in the view of the Fifth Circuit, to render the entire structure unconstitutional.

The Ninth Circuit in *Decker*, by contrast, looks at process, not structure. The Ninth Circuit finds that once an ALJ has adjudicated a claim, the Benefits Review Board (BRB) of the Department of Labor (DOL) can on appeal "readily overturn an ALJ's decision that is legally erroneous or unsupported by substantial evidence." *Decker*, 8 F.4th at 1134. It continues:

> BRB members serve at the pleasure of the Secretary of Labor. And because the Secretary of Labor is subject to at-will removal by the President, just like other department heads, the President has direct control over

> BRB members through the Secretary—his "alter ego." Thus, the President could at any time order the Secretary of Labor to replace members of the BRB. . . . In sum, we think the BRB has ample control over DOL ALJs and the President, in turn, has direct control over BRB members through the Secretary of Labor.

Id. at 1135 (citations omitted).

The supposed presence of an "upper layer" of protection for SEC and MSPB members, therefore, does not lessen Executive power over the functions that ALJs perform. All initial and recommended decisions issued by ALJs go through "Heads of Departments," as the Constitution refers to them, who may approve, modify, or reject those opinions in whole or in part.

There are no "positions for life" among the Heads of Article II Departments. All such positions have set terms of appointment, and all Heads of Departments submit their resignations to the President when an Administration changes hands. Appointments are renewable at the pleasure of the President with the Senate's advice and consent. The President may ask for the resignation of any Head of a Department that he wishes to remove.

But who makes the determination of "cause" that permits the President to fire a Head of Department in mid-term? In *Free Enterprise Fund*, the Supreme Court found that, at the lower layer, the members of the PCAOB answered to the SEC Commissioners, and could be removed only for "willful violations of the [Sarbanes–Oxley] Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure

to enforce compliance–as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing." 561 U.S. at 503.

At the upper layer, *Free Enterprise Fund* observed that the President could remove SEC Commissioners for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 487 (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935)). But there is no *intervening layer a step away from the President* that makes that call. Hence, as the President is the one who determines whether "inefficiency, neglect of duty, or malfeasance in office" has been exhibited by an SEC Commissioner, nothing precludes him or her from firing an SEC Commissioner personally and directly. The President has the authority to do so whenever, as the Fifth Circuit in *Jarkesy* quotes, "the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." *Jarkesy I*, 34 F.4th at 464 (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)).

The notion that the President is somehow "weakened" by statutory removal limitations should be of little concern to this Court. That the upper layer of protection afforded to a few Heads of Departments might trouble it to the point of upending the judicial independence of ALJs, as promulgated by a unanimous Congress in its 1946 passage of the APA, is tantamount to killing a fly with a sledgehammer.

b. The "Lower Layer" of Protection for ALJs Does Not Weaken Executive Removal Power.

The standard of protection to which ALJs are entitled under the federal personnel laws is set out as follows in 5 U.S.C. § 7521(a):

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

Is this "lower layer" of protection from removal possessed by ALJs an unconstitutional limitation on the Executive power? The Supreme Court's answer has long been "No."

Myers held that the Executive power conferred by the Constitution includes "the exclusive power of removal." 272 U.S. at 122. But only nine years later, in *Humphrey's Executor*, the Supreme Court limited *Myers* as it applied to "quasi-judicial officers" in agencies such as the Federal Trade Commission, the Interstate Commerce Commission, and the Court of Claims:

> We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. *The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently*

> *of executive control cannot well be doubted*; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, *and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.*

295 U.S. at 629 (emphases added).

This view was reaffirmed in *Free Enterprise Fund*:

> *Humphrey's Executor* did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. *If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal. This Court has upheld for-cause limitations on that power as well.*

561 U.S. at 493 (emphasis added) (citations omitted).

The Ninth Circuit's interpretation of the impact of Executive removal power on ALJs, therefore, is correct. This Court, like the Ninth Circuit, has focused on the *functions and duties* of "inferior officers," among whom are ALJs, rather than in which "layer" ALJs are found in the agency hierarchy. One cannot exercise the office of an ALJ without an assurance of judicial independence, and the power to terminate an ALJ at will is tantamount to no independence at all.

2. The MSPB's Standard for ALJ Removal Does Not Weaken Executive Removal Power.

The "for good cause" standard of ALJ removal protection was not promulgated by Congress in order to shield incompetence or contumacious behavior. Moreover, the MSPB's standard is nowhere nearly as impregnable as that of the PCAOB. To quote the MSPB itself:

> Congress has not defined the term "good cause" for purposes of section 7521, and the Board has adopted a flexible approach in which good cause is defined according to the individual circumstances of each case. However, the baseline for evaluating good cause in any action against an ALJ is whether the action improperly interferes with the ALJ's ability to function as an independent and impartial decision maker.

Dep't of Labor v. Avery, 120 M.S.P.R. 150, ¶ 5 (2013) (citations omitted).

The MSPB, in turn, consists of a Board of members who themselves "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Again, as with the members of the SEC, it is the *President* who makes this call, not an intervening layer one step away. Thus, as with the SEC, the President has the authority to dismiss an MSPB member on the statutory grounds whenever "the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." *Jarkesy I*, 34 F.4th at 464 (quoting *Myers*, 272 U.S. at 135).

The President is therefore fully empowered to terminate the Heads of the SEC and the MSPB—and the President, through these Heads, may demand the termination of an ALJ *for any reason* other than one that "improperly interferes with the ALJ's ability to function as an independent and impartial decision maker." This is precisely as it should be, in order to accede to Executive power as authorized by statute, while still protecting the ALJ's decisional independence, the essence of the job. The so-called "layers" of removal hierarchy do not stand in the way of an Executive power that is not at all weakened by these restraints.

B. Far from Interfering with Executive Power, ALJ Removal Protections Are a Constitutional Expression of It.

Congress makes laws that establish executive and independent agencies. The President is tasked with taking care that those laws are "faithfully executed." U.S. Const. art. II, § 3. If the agency official whose job it is to create a record of facts in individual agency cases and recommend a decision to the agency has no protection from removal and therefore cannot render an unbiased opinion untainted by politics, can it truthfully be said that the laws are being "faithfully executed?"

Justice Tom C. Clark, concurring in *Youngstown Sheet & Tube Co. v. Sawyer*, wrote:

> [W]here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to

> act depends upon the gravity of the situation confronting the nation.

343 U.S. 579, 662 (1952) (Clark, J., concurring).

Here, "Congress has laid down specific procedures to deal with the type of crisis confronting the President." Cases brought before executive and independent agencies must be heard; evidence must be gathered; and a recommended, initial, or final decision must be made, by either the agency itself, one or more members of the body that comprises the agency, or an ALJ. *See* 5 U.S.C. § 556. The President, and by extension the agency in question, "must follow those procedures in meeting the crisis." If this law requires, as part of its "specific procedures," a process whereby the ALJ is to be removed from office only for "good cause" in order to preserve that officer's judicial independence, a critical condition of the job, then where is the interference with Executive power? This procedure *is* the "Executive power."

It is the law, and only the law, that defines "Executive power." If faithful execution of the law requires the President to follow a certain removal procedure in order to protect the judicial independence of ALJs, then the President who abides by this procedure is, by definition, taking care that the laws are "faithfully executed" as the Constitution requires.

The so-called "Decision of 1789" discussed in *Myers* and *Humphrey's Executor*—whereby the First Congress acceded to the President's power to remove officers of agencies even though the new Constitution was silent on the subject—does not countervail this fact. Indeed, *Myers* recognized that the President's power to remove officers could be expressly limited by Congress, as

occurred with the passage of the APA. *Myers* states that as the President

> is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, *in the absence of any express limitation respecting removals*, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.

Myers, 272 U.S. at 117 (emphasis added).

III. RESPONDENTS ARE NOT HARMED BY ALJ REMOVAL PROTECTIONS.

In his reply to the SEC's petition for certiorari, Jarkesy says:

> Congress vested the SEC with the unconstrained and unreviewable power to pick and choose unilaterally whether to force its targets into an Article I administrative court or to prosecute its claims in an Article III court. And an enforcement target relegated to the administrative forum would be subjected to protracted proceedings over many years presided over by an inferior constitutional officer called an administrative law judge ("ALJ") who enjoyed multiple layers of for-cause tenure protection, as the Commission itself conceded in 2018.

Brief in Opposition to Solic. Gen. Petition for Certiorari at 1, *SEC v. Jarkesy*, No. 22-859 (U.S. May 23, 2023) (Opposition Brief).

This statement by Jarkesy contrives a "harm" to himself that does not exist. In *Collins v. Yellen*, 141 S. Ct. 1761, 1787-89 (2021), this Court explained that an unconstitutional limit on the removal of an official justifies undoing the officer's past actions only if the challenger shows, at minimum, that the provision "inflicted harm." *See also Calcutt*, 37 F.4th at 318, 320 (applying *Collins* to deny challenge to ALJ removal protections). Jarkesy shows no past, present, or future "harm" to himself from the tenure protections of an ALJ, any more than he shows "harm" from the tenure protections of a District Judge or Magistrate.

The Constitution's use of the words "inferior officer," which include ALJs, is not meant to demean. The words merely distinguish ALJs whose appointments are vested in "the President alone, in the Courts of Law, or in the Heads of Departments," from specifically-identified "officers" who are appointed by the President by and with the Senate's advice and consent. If, as Jarkesy says, an enforcement target "relegated to the administrative forum" would suffer "protracted proceedings" presided over by an "inferior" judicial officer "who enjoyed multiple layers of for-cause tenure protection," how is that any different from what he would experience in an Article III court?

District Court securities cases, like ALJ proceedings, may take years to litigate. Although District Court cases may or may not have juries, the presence of a jury adds to the time and expense necessary to litigate the case. Of course, a District Judge is entitled to tenure protection too. The District Judge may

be removed only upon impeachment by Congress, not by the President; therefore, he is not subject to removal at the pleasure of the Chief Executive at all. So where is the harm to Jarkesy if he faces an ALJ rather than a District Judge or Magistrate?

IV. THIS COURT SHOULD NOT ENTERTAIN FATUOUS COLLATERAL ATTACKS INTENDED TO SABOTAGE SEC ENFORCEMENT.

Jarkesy's reply to the SEC's petition for certiorari also complains:

> Following the trend experienced across the administrative state, the SEC's enforcement power has expanded exponentially since its creation in 1934, each new financial crisis propelling the accumulation of more and more executive, legislative and judicial authority for this "independent" agency. At some point the never-ending power creep was bound to crash headlong into the tripartite constitutional structure, and it did so here.

Opposition Brief at 2.

Jarkesy "doth protest too much, methinks."[4] FORUM respectfully reminds this Court that Jarkesy is not an innocent victim here. He is not a guileless target of injustice at the hands of a powerful, unconstrained "administrative state." He has been found by the SEC to be a fraudster, which he does not dispute.

This fraudster has brought his collateral attack solely to evade this Nation's securities laws. He tries to gum up the administrative works by attacking the

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[4] William Shakespeare, HAMLET, Act III, Scene 2.

ALJ who ruled against him, not by asserting his innocence on the merits. He does not even accuse the ALJ of committing any wrong against him.

The SEC, pursuant to its well-settled statutory authority and practice, found that Jarkesy had harmed investors. The fraudulent funds that Jarkesy set up attracted approximately 120 investors and mishandled approximately $24 million in assets. Petition for Writ of Certiorari at 3, *SEC v. Jarkesy*, No. 22-859 (U.S. Mar. 8, 2023).

For Jarkesy, this collateral attack is not an effort to answer the SEC's charges of fraud or explain why he did not violate the securities laws. Jarkesy has failed to prove how the tenure protections of an ALJ have affected the accuracy of the fraud findings against him.

CONCLUSION

ALJs have the authority to conduct non-jury administrative proceedings seeking civil money penalties because those cases involve public rights. ALJs primarily perform quasi-judicial functions; therefore, their removal protections do not violate Article II of the Constitution. No matter how the Court resolves the questions in this case, it should confirm and maintain the fundamental protections of federal ALJ independence that promote and ensure impartial adjudication in formal, adversarial, administrative proceedings.

Respectfully submitted,

Steven A. Glazer
Counsel of Record
THE FORUM OF UNITED STATES ADMINISTRATIVE LAW JUDGES
P.O. Box 14076
Washington, D.C. 20044
(301) 332-9214
forumalj@gmail.com

Counsel for Amicus Curiae

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