

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**

**AMICUS CURIAE BRIEF OF AMERICAN BAR
ASSOCIATION IN SUPPORT OF PETITIONER**

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***AMICUS CURIAE* BRIEF OF
THE AMERICAN BAR ASSOCIATION
IN SUPPORT OF PETITIONER**

The undersigned respectfully submits this *amicus curiae* brief in support of Petitioner on the third question presented: “Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.”¹

INTERESTS OF THE *AMICUS CURIAE*

The American Bar Association (ABA) is the largest voluntary association of attorneys and legal professionals in the world. Its members come from all fifty states, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments, as well as legislators, law professors, law students, and associates in related fields. It also includes approximately 500 judges and administrative law judges (ALJs).²

The for-cause removal protections granted by Congress to ALJs enhance the decisional independence of

¹ No counsel for any party authored this brief in whole or in part, no party or party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the *amicus curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief.

² No member of the ABA Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division Council before filing.

ALJs by insulating them from agency interference with their employment. The ABA has a “long history of supporting decisional independence for judges, including all administrative adjudicators.” Report accompanying ABA Resolution 200 (adopted Aug. 2022), at 1.³ The ABA has recognized decisional independence to be among the fundamental Principles of Judicial Independence and Fair and Impartial Courts, defining it as “judges [being allowed] to decide cases pursuant to the rule of law ... unaffected by personal interest or threats or pressure from any source.” ABA Resolution 110D (adopted Aug. 2007).⁴

The ABA played an active role in the passage of the Administrative Procedure Act (APA), which governs federal administrative law judges. “The provisions of the APA are intended to protect the decisional independence of ALJs by preventing discharge without good cause . . . and prohibiting command influence by requiring the separation of certain agency functions.” Report accompanying ABA Resolution 200 (adopted Aug. 2022), at 2. The ABA has since urged Congress, when it has considered legislation involving agency adjudication, to adopt the APA’s uniform structure to protect the independence of ALJs and contribute to the legitimacy, consistency, and acceptance of agency adjudications. ABA Resolution 113 (adopted Aug. 2000).⁵

³ Available at <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/200-annual-2022.pdf>.

⁴ Available at https://www.americanbar.org/content/dam/aba/directories/policy/annual-2007/2007_am_110d.pdf.

⁵ Available at https://www.americanbar.org/content/dam/aba/directories/policy/annual-2000/2000_am_113.pdf.

In particular, the ABA has supported grievance procedures for ALJs who feel that their independence has been infringed by the agencies whose regulations they adjudicate. *See* ABA Resolution 109 (adopted Aug. 1994).⁶ It has also specifically urged legislation to protect ALJs from removal or discipline without cause. ABA Resolution 114 (adopted Feb. 2005).⁷

The ABA has also extended its support for decisional independence to the state administrative adjudicative process. The ABA Model Code of Judicial Conduct for State Administrative Law Judges, adopted at the 2018 ABA Annual Meeting, states that “[a]n independent and honorable administrative law judiciary is indispensable to justice in our society.” Comment to Model Rule 1.2 (Promoting Confidence in the Judiciary).⁸ The Comment further explains that “[d]eference to the judgments and rulings in administrative proceedings depends upon public confidence in the integrity and independence of ALJs. The integrity and independence of ALJs depends in turn upon their acting without fear or favor.” *Id.*

Finally, as recently as last year, the ABA urged Congress to adopt merit-based hiring of ALJs and Administrative Judges (AJs), as well as to establish an

⁶ Available at https://www.americanbar.org/content/dam/aba/directories/policy/annual-1994/1994_am_109.pdf.

⁷ Available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2005/2005_my_114.pdf.

⁸ Available at <https://www.americanbar.org/content/dam/aba/directories/policy/2018-annual/2018-am-113.pdf>.

independent federal benefits tribunal. ABA Resolution 200 (adopted Aug. 2022).⁹ The Resolution grew out of a perceived urgent “need for strong action to protect decisional independence in administrative adjudication.” Report accompanying ABA Resolution 200, at 1, 3. These concerns arose out of the growth of agency-driven production quotas, unilateral docket management, and artificial time limits which have increasingly subjected ALJs “to improper agency pressure and influence.” *Id.*¹⁰

The ABA, therefore, has a longstanding interest in the independence of the judiciary, including ALJs.

SUMMARY OF ARGUMENT

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 514 (2010), this Court held that for-cause limitations on the removal of members of the Public Company Accounting Oversight Board were unconstitutional because they improperly insulated inferior officers, who exercised “significant executive power,” from the President’s control. This Court, however, stopped short of broadly declaring all two-layer for-cause protections for inferior officers unconstitutional, and acknowledged that “unlike members of the [PCAOB], many administrative law judges [] perform adjudicative rather than

⁹ Available at <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/200-annual-2022.pdf>.

¹⁰ The ABA had previously urged the establishment of an ALJ conference as an independent agency for the selection and appointment of all types of federal ALJs. See ABA Resolution 106A (adopted Aug. 2005), available at <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2005/2005-am-106a.pdf>.

enforcement or policymaking functions . . . or possess purely recommendatory powers.” *Id.* at 507 n.10.

In this case, the third issue on which the Court has granted certiorari concerns the constitutionality of dual for-cause removal provisions for ALJs. The ABA supplements Petitioner’s arguments on this question through three points. First, ALJs perform adjudicatory roles that are functionally comparable to federal district court judges. Second, whether the judicial process occurs before a federal district judge or an ALJ, decisional independence is essential to the integrity and public perception of that process. Third, limiting agency power to remove ALJs supports judicial independence and reinforces the legitimacy of ALJs’ decisions.

ARGUMENT

I. ALJs Perform Functions Comparable to Federal Trial Judges.

As this Court has recognized, federal ALJs are functionally comparable to federal trial judges. See *Butz v. Economou*, 438 U.S. 478, 513 (1978); *Federal Maritime Comm’n v. South Carolina State Ports Authority*, 535 U.S. 743, 756 (2002); *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018). There are “numerous common features” between administrative adjudications and judicial proceedings and “similarities between the role of an ALJ and that of a trial judge.” *Federal Maritime*, 535 U.S. at 756. ALJs “have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges.” *Lucia*, 138 S. Ct. at 2053.

Viewed at the highest level, ALJs “conduct[] [a] pivotal, first level of judicial review to determine whether an administrative agency really is carrying out its functions within the limits of the law.” W. Michael Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes*, 20 J. Nat’l Ass’n Admin. L. Judges 95, 113 (2000). “The first level of judicial review . . . is conducted by the first judge who sees a case. And who is the first judge to see a case? Very often, it is an administrative law judge.” *Id.* at 100.

Viewed at a more granular level, ALJs play a role similar to a trial judge, too. “ALJs have great discretion under the APA to assure that their proceedings are conducted efficiently and fairly through such means as pre-hearing conferences; clarifying and lim-

iting issues; limiting discovery; allowing pro se participants additional procedural latitude; maintaining time, witness and written submission limitations; encouraging settlement; and applying techniques of the Alternate Disputes Resolution Act.” Report accompanying ABA Resolution 113 (adopted Aug. 2000), at 3. As this court has recognized, Securities and Exchange Commission (SEC) ALJs, in particular, operate as neutral arbiters whose duties are distinctly adjudicatory, including receiving evidence and examining witnesses at hearings, administering oaths, ruling on motions and the admissibility of evidence, issuing subpoenas, and enforcing compliance with discovery orders. *Lucia*, 138 S. Ct. at 2053; *see also Fed. Maritime*, 535 U.S. at 758-59; *Butz*, 438 U.S. at 512.

ALJs within the SEC and other federal agencies play crucial and important roles within the larger judiciary system. Indeed, “[t]he traditional courts would be overwhelmed if those millions of [administrative] disputes also had to be decided in their courtrooms. Traditional courts have neither the time nor expertise to deal with specialized matters arising from claims or disputes within the jurisdictions of these agencies.” Report accompanying ABA Resolution 200 (adopted Aug. 2022), at 3.

In sum, ALJs play significant adjudicatory roles, and Congress recognized as much in granting ALJs for-cause protection against removal from those roles.

II. **Judicial Independence Fosters Public Trust and Ensures That Judicial Decisions Are Respected and Followed.**

This Court has recognized that judicial independence is foundational to the American system. *See Pulliam v. Allen*, 466 U.S. 522, 532 (1984). As explained in *Pulliam*, “[i]t is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear.” *Id.* (internal quotation marks omitted).

“Public acceptance of . . . adjudications hinges on maintaining the decisional independence of the judges who adjudicate them.” Report accompanying ABA Resolution 200 (adopted Aug. 2022), at 2-3 (internal quotation marks omitted). The perceived absence of judicial independence threatens the stability of our rules-based order. Without a policy favoring judicial independence, “no system of adjudication will enjoy the confidence, trust, and willingness of the participants to abide by administrative decisions as having been fairly determined on their merits.” *Id.*; *see also* Rebecca Love Kourlis, *Judicial Independence and Independent Judges*, 80 *Denv. U. L. Rev.* 746, 752-53 (2003) (“If judges are perceived as being unfair, political, or biased, the system begins to erode.”).

Decisional independence lies at the heart of judicial independence because “[d]ecisional independence allows fair and impartial judges to decide cases pursuant to the rule of law and the governing constitutions unaffected by personal interest or threats or pressure from any source.” ABA Principles on Judicial

Independence and Fair and Impartial Courts, ABA Resolution 110D (adopted Aug. 2007), at 2. Decisional independence “is critical . . . to ensuring public perception of both actual and perceived fairness in the federal administrative adjudication process.” Report accompanying ABA Resolution 200 (adopted Aug. 2022), at 2.

III. For-Cause Removal Provisions and Other Limits on Agency Removal of an ALJ Are Essential to Both the ALJ’s Decisional Independence and Adjudicative Function.

The “reasons for insulating ALJs from executive authority are exactly the same” as for other judges. *Jarkesy v. Sec. & Exch. Comm’n*, 51 F.4th 644, 647 (5th Cir. 2022) (Haynes, J., dissenting.), citing *Morrison v. Olson*, 487 U.S. 654 (1988). “Just as the traditional courts enjoy safeguards that preserve their impartiality in disputes that involve governmental bodies that seek to impose actions upon the governed, so must the administrative judiciary.” Report accompanying ABA Resolution 200 (adopted Aug. 2022), at 3. “Both the public and each agency benefit from recognition of the legitimate ability of administrative adjudicators to fairly, impartially, and dispassionately decide these disputes.” *Id.*

Safeguards are necessary in any judicial process to “assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.” *Butz*, 438 U.S. at 512. The APA recognizes this foundational truth by structuring the process of agency adjudication to allow an ALJ to “exercise[] his independent judgment on the evidence before him, free from pressures by the parties or other

officials within the agency.” *Id.* at 513; *see also* Thomas C. Rossidis, *Article II Complications Surrounding SEC-Employed Administrative Law Judges*, 90 St. John’s L. Rev. 773, 779 (2016) (“Congress passed the [APA] . . . in 1946 to further ensure the goals of due process in administrative proceedings. Congress emphasized and answered the concern that hearing officers should hold an independent status apart from the hiring and prosecuting agency.”) (footnote omitted).

The APA’s for-cause removal provisions “insulate and protect the judges from agency influence and manipulation.” *Vesser v. Office of Personnel Mgmt.*, 29 F.3d 600, 605 (Fed. Cir. 1994); *see also Butz*, 438 U.S. at 513-514 (describing the for-cause removal provisions as one of a number of APA provisions “designed to guarantee the independence of hearing examiners”). These provisions ensure that ALJs can exercise judgment independent of the executive officials within the agency, *Butz*, , and “maintain public confidence in the essential fairness” of agency administrative adjudications, *Nash v. Califano*, 613 F.2d 10, 16 (2d Cir. 1980); *see also Petr.’s Br.* 53-54, 65-66.¹¹

APA and agency removal restrictions give ALJs the decisional independence they need to maintain public confidence in their decisions. *Brennan v. Dep’t of Health and Human Services*, 787 F.2d 1559, 1562 (Fed. Cir. 1986); *D’Amico v. Schweiker*, 698 F.2d 903,

¹¹ Indeed, “good cause” has been interpreted “to encompass conduct that undermines public confidence in the administrative adjudicatory process, as informed by the ABA Model Code of Judicial Conduct. *Long v. Social Sec. Admin.*, 635 F.3d 526, 535 (Fed. Cir. 2011) (internal quotation marks omitted).

907 (7th Cir. 1983); *Nash*, 613 F.2d at 15. Without them, public confidence in ALJs' decisions will erode.

CONCLUSION

For the foregoing reasons and those set forth in Petitioner's briefs, this Court should hold that the APA's for-cause removal protections for federal ALJs are constitutional.

Respectfully submitted,

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