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 PUBLIC CITIZEN IN SUPPORT OF PETITIONER

ALLISON M. ZIEVE
Counsel of Record
NICOLAS A. SANSONE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization with members in all fifty states. Public Citizen regularly appears before Congress, administrative agencies, and courts to support the enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen has a longstanding interest in issues involving constitutional separation-of-powers principles and often participates as amicus in this Court and the courts of appeals in cases involving such issues. *See, e.g.*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020); *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc).

Public Citizen submits this amicus brief to explain that the civil enforcement scheme that Congress created to enable the executive to protect the investing public by fairly and effectively enforcing federal securities laws complies with the Constitution. Public Citizen believes that the position of the Securities and Exchange Commission (the Commission) is correct as to each of the questions presented in this case. Given space limitations, however, this brief addresses only two of the three questions: why statutory provisions authorizing the Commission to enforce the securities laws through either judicial or agency proceedings do not violate the nondelegation doctrine, and why Congress's grant of for-cause removal protection to the Commission's administrative law judges (ALJs) does not violate Article II.

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[1] This brief was not written in any part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

I. Congress did not delegate legislative power to the executive branch when it established overlapping judicial and administrative processes by which the Commission may enforce the securities laws and gave the Commission discretion to choose which process to use in a given case. This Court's precedents establish that case-specific decision-making regarding law-enforcement strategy is an *executive*, not a law-making, function. Where, as here, Congress empowers the executive branch to exercise discretion as to matters that fall within the executive's traditional sphere of power, there is no nondelegation problem.

Certainly, the Commission's decision as to which statutorily authorized enforcement mechanism to utilize in a given case has practical consequences for the party against whom enforcement is sought. The same is true for virtually all enforcement decisions, including the decision whether to take enforcement action at all. Contrary to the decision of the court of appeals, however, such consequences do not convert executive action into legislative action. Indeed, this Court has repeatedly upheld an agency's authority to issue binding regulations that *directly* govern private parties' substantive rights and duties, provided that the agency is acting in an executive capacity to implement an intelligible legislative policy set forth by statute. The incidental effects that case-specific decisions about enforcement procedure have on individual parties do not drain those decisions of their executive character.

II. A. Congress made a permissible legislative choice in requiring the Commission to have good cause before removing a Commission ALJ. This Court has

approved Congress's authority to grant an executive officer who plays an adjudicatory role a degree of independence from presidential control. And the Court has held that for-cause removal protections for inferior officers like ALJs do not unconstitutionally impede executive power, as long as the officer lacks policymaking or significant administrative authority. On this basis, the Court held that removal restrictions on an independent counsel posed no constitutional problem, even though the counsel possessed full and final decision-making authority over the conduct of civil and criminal prosecutions. This Court should reach the same conclusion with respect to Commission ALJs, who issue initial decisions that the Commission may adopt, modify, or disregard entirely.

This Court's opinion in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), on which the court of appeals relied, does not change the analysis. That case involved a novel statutory arrangement that conferred vast regulatory and policymaking authority on a body of tenure-protected inferior officers who operated largely independently within the Commission. In striking down the tenure protections, the Court explained that the Commission's inability to exercise oversight over the officers' use of their consequential powers left the President unable to hold the Commission accountable for the officers' activities. At the same time, though, the Court made clear that its holding did not extend to independent agencies' ALJs because they occupy an adjudicatory and often advisory role. *Free Enterprise Fund* thus reinforces this Court's longstanding recognition that Congress may constitutionally insulate executive adjudicators from at-will removal—

particularly where, as here, they wield no final authority to bind the executive.

B. Even if Commission ALJs' removal protections posed constitutional concerns, Respondents would not be entitled to vacatur of the Commission order they challenge. As this Court recently made clear, a properly appointed executive officer wields valid authority even if the officer is impermissibly shielded from removal. Agency action thus retains legal force notwithstanding unconstitutional tenure protections unless the action would have been different but for the protections. Here, there is no evidence that the Commission would have acted differently had it had unfettered power to remove the ALJ who issued the initial decision in this case, and there is strong contrary evidence: The Commission independently reviewed the decision and largely affirmed it.

ARGUMENT

I. Congress did not delegate legislative power when it empowered the Commission to exercise discretion in deciding which statutorily authorized enforcement method best suits a given case.

A. This Court has long recognized that the principle "[t]hat [C]ongress cannot delegate legislative power to the [P]resident" is "vital to the integrity and maintenance of the system of government ordained by the [C]onstitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). At the same time, the Court has distinguished "between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Id.* at 693–94 (quoting

Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm'rs, 1 Ohio St. 77, 88–89 (1852)). The former "cannot be done," but "to the latter no valid objection can be made." *Id.* at 694 (quoting *Cincinnati, Wilmington & Zanesville*, 1 Ohio St. at 89).

These principles establish that Congress's scheme empowering the Commission to enforce the securities laws poses no concern under the nondelegation doctrine. Respondents do not contend that Congress has granted the Commission an impermissible degree of discretion to define regulated parties' substantive legal duties and thereby to "make the law." Instead, they complain that Congress has delineated an overlapping set of alternative procedural mechanisms by which the Commission may *enforce* regulated parties' legal duties and that Congress has given the Commission discretion to determine which of those authorized mechanisms to utilize in a given case. But decisions about enforcement strategy pertain entirely to the law's "execution" and so have historically rested within the executive branch's "authority or discretion." *Id.* at 693–94 (quoting *Cincinnati, Wilmington & Zanesville*, 1 Ohio St. at 88); *see, e.g.*, *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958) (per curiam) (remarking that Congress may "empower[ ]" an executive agency "to develop th[e] enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically").

For example, Congress may—and generally does—"commit[ ] to an [executive] agency's absolute discretion" the decision whether or when "to prosecute or enforce, whether through civil or criminal process." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *cf.*

Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (explaining in the criminal context that "the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [a prosecutor's] discretion"). Congress's practice in this respect is consistent with nondelegation principles because "the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law" is an "aspect of the executive power." *United States v. Texas*, 143 S. Ct. 1964, 1975 (2023).

Just as the decision whether a particular situation merits enforcement action *at all* calls for the exercise of executive, rather than legislative, power, so too does the decision which among a variety of congressionally authorized enforcement mechanisms is best suited to a given case. Congress often provides more than one route by which the executive can address a legal violation. *See, e.g.*, *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948) (holding that a civil action by the Attorney General against a company did not require dismissal of a Federal Trade Commission proceeding against that company based on "the same misconduct" because Congress had permissibly chosen to "provide the Government with cumulative remedies"); *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (noting Congress's authority to empower the executive to pursue "both a criminal and a civil sanction in respect to the same act or omission"). The executive's choice to proceed by one route over the other can be broken into two parts: (1) the choice to take enforcement action under one route and (2) the choice *not* to take action under the other. Each of these two choices represents an exercise of the executive function, as explained

above, and making them simultaneously does not somehow convert them into a legislative matter.

Precedents acknowledging the executive's discretion with respect to all manner of enforcement decisions underscore the point. The Court, for example, has recognized that the executive may, in its discretion, bring related civil and criminal charges against a regulated party "simultaneously or successively." *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912). It has held that the decision whether to address multiple parties together "in a single [administrative] proceeding" or to give them "individualized treatment" is a matter that "call[s] for discretionary determination by the administrative agency." *Moog Indus.*, 355 U.S. at 413. It has spoken approvingly of Congress's choice to give executive agencies "freedom … to attain just results in diverse, complicated situations" by crafting appropriate remedies. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941). And it has explained that the decision whether to give a remedial order immediate effect or to hold it in abeyance falls "within the special competence" of the executive. *Moog Indus.*, 355 U.S. at 413. Like these other case-specific choices about how to deploy congressionally authorized procedures in service of fulfilling substantive statutory objectives, the selection of the appropriate forum in which to bring a particular case is a decision regarding how best to *execute* Congress's laws.

B. Rejecting this conclusion, the court of appeals emphasized that the power to choose whether to bring an enforcement action in federal court or in an administrative forum encompasses the "power to decide which defendants should receive *certain legal processes* (those accompanying Article III proceedings)

and which should not." Pet. App. 26a–27a. And because the power "to assign certain actions to agency adjudication … is a power that Congress uniquely possesses," the court of appeals concluded that giving the executive case-specific decision-making authority with respect to the choice of forum impermissibly delegates an inherently legislative decision. *Id.* at 27a.

The court's reasoning misapplies this Court's precedents. To be sure, this Court has held that addressing the proper "mode of determining" or adjudicating certain types of cases "is completely within congressional control." *Id.* at 26a (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). Critically, though, Congress *did* exercise that control by defining the forums in which the executive may enforce the securities laws. Having made that legislative choice as to the available enforcement options, Congress then permissibly left it to the executive's traditional discretion to make case-by-case judgment calls about how to utilize those options. *See Cement Inst.*, 333 U.S. at 694 (recognizing that Congress may confer "cumulative" enforcement powers on the executive).

While the executive's choice of forum does of course affect the "*legal processes*" that apply in any given case, Pet. App. 27a, the same is true of all manner of other enforcement decisions that rest squarely within the executive's discretion—including the preliminary decision whether to take enforcement action at all, in any forum. Indeed, virtually every act that the executive performs in carrying out its constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, holds consequences for the targets of governmental enforcement efforts. Treating such consequences as dispositive of whether the act is legislative or executive—instead of asking

whether the act entails "the exercise of a certain *type* of power," *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 69 (2015) (Thomas, J., concurring in the judgment) (emphasis added)—would remove most, if not all, case-specific enforcement decisions from the sphere of executive power.

This Court's nondelegation precedents take a far less restrictive view of the lawful scope of executive action. Where Congress has authorized the executive to create "binding rules of conduct" enforceable against private parties, this Court has recognized that such regulatory authority reflects executive power as long as the executive operates "within the framework of [a] policy which the Legislature has sufficiently defined." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 428–29 (1935). Because "no statute can be entirely precise, … some judgments, even some judgments involving policy considerations, must be left to the officers executing the law." *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). The Court has accordingly upheld Congress's grant of authority to the executive to regulate private conduct pursuant even to "sweeping regulatory schemes" that "affect the entire national economy," *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2001), provided that Congress supplies "an intelligible principle to which" the executive "is directed to conform," *id.* at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); *see Mistretta*, 488 U.S. at 372 (explaining that Congress fulfills its legislative role when it provides "broad general directives" as to substantive policy, even if it leaves the specifics of implementation to other branches' discretion).

If Congress's grant of wide-ranging authority to the executive branch to create substantive legal duties that bind regulated parties "confer[s] authority or discretion as to [the law's] execution" without impermissibly "delegat[ing] … power to make the law," *Marshall Field*, 143 U.S. at 693–94 (quoting *Cincinnati, Wilmington & Zanesville*, 1 Ohio St. at 88), the same must be true where Congress has authorized the executive to make case-by-case enforcement decisions that place no restrictions on private parties' primary conduct at all. Far from abdicating its law-making role in such circumstances, Congress has simply granted the executive "discretion … to be exercised over matters already within the scope of executive power." *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) (citation omitted). As this Court's longstanding precedent thus makes clear, Congress's decision to leave space for the executive to exercise discretion as to how best to use the enforcement tools Congress has given it raises "no separation-of-powers problem" under the nondelegation doctrine. *Id.*

II. Job protections Congress conferred on the Commission's ALJs do not nullify the legal force of the Commission's order.

Statutory provisions that bar the Commission from removing one of its ALJs without cause likewise pose no constitutional concern. What is more, any supposed legal problem with the protection that the ALJ who initially adjudicated this case enjoyed against at-will removal would not vitiate the legal force of her initial decision, let alone that of the superseding order that the Commission subsequently entered "[b]ased on [its] independent review of the record." Pet. App. 74a.

A. Congress does not unlawfully impede the executive by restricting an independent agency's ability to remove adjudicators who lack final decision-making authority.

1. In *Myers v. United States*, 272 U.S. 52 (1926), this Court recognized that the President's "power of removing those [administrative officers] for whom he cannot continue to be responsible" is "essential to the execution of the laws," such that the President enjoys presumptive authority to remove officers absent "any express limitation" from Congress. *Id.* at 117. *Myers* does not, however, suggest that the President's "inherent constitutional power to remove officials" applies "no matter what the relation of the executive to the discharge of [the officials'] duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure." *Wiener v. United States*, 357 U.S. 349, 352 (1958); *see Myers*, 272 U.S. at 132 ("The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service…."). Rather, statutory restrictions on the President's authority to remove executive officers are consistent with separation-of-powers principles unless they "interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II" of the Constitution. *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988).

For at least two reasons, Congress worked no such interference by providing that a Commission ALJ may be removed "only for good cause." 5 U.S.C. § 7521(a). First, this Court has approved for-cause removal protections for officers, like Commission ALJs, who must "act with entire impartiality" due to their "quasi

judicial" role. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935). While the Court has recognized that an administrative agency's adjudicatory activities are executive rather than judicial for purposes of separation-of-powers analysis, *see Morrison*, 487 U.S. at 689 n.28, it has nonetheless held firm to the view that Congress may "find that a degree of independence from the Executive … is necessary to the proper functioning of the agency" in carrying out those activities, *id.* at 691 n.30. Indeed, in *Wiener v. United States*, 357 U.S. 349 (1958), the Court unanimously held that the Constitution did not grant the President unfettered removal authority over "member[s] of an adjudicatory body" even though the statute establishing the body "said nothing" that expressly restricted the President's removal power. 357 U.S. at 356. The "intrinsic judicial character" of the body's statutorily defined duties, the Court explained, sufficiently demonstrated Congress's permissible intent to establish "a body that was 'entirely free from the control or coercive influence, direct or indirect,'" of the President. *Id.* at 355 (quoting *Humphrey's Ex'r*, 295 U.S. at 629).

Second, Commission ALJs are "inferior officers with limited duties and no policymaking or administrative authority." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200 (2020). By empowering Congress to "vest the Appointment of … inferior Officers … in the President alone, in the Courts of Law, or in the Heads of Departments," U.S. Const. art. II, § 2, cl. 2, the Constitution assigns Congress greater freedom to "limit and regulate removal of … inferior officers" than Congress enjoys with respect to principal officers. *Myers*, 272 U.S. at 127. Where, as here, Congress has committed an inferior officer's

appointment to an agency head, *see* 5 U.S.C. § 3105, there is "no doubt" that Congress "may limit and restrict the power of removal as it deems best for the public interest" because the agency head "has no constitutional prerogative of appointment to offices independently of the legislation of [C]ongress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto." *United States v. Perkins*, 116 U.S. 483, 485 (1886) (citation omitted); *see Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018) (noting that "the Commission itself" is an agency head for Appointments Clause purposes).

Although Congress's power to constrain the removal of inferior officers is not unlimited, "the President's need to control" at least those inferior officers who "lack[ ] policymaking or significant administrative authority" is not "so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the [officers] be terminable at will." *Morrison*, 487 U.S. at 691–92. Applying this principle, the Court in *Morrison* upheld the constitutionality of a statute restricting the Attorney General's ability to remove an independent counsel who was authorized to "investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws." *Id.* at 660; *see id.* at 685–93. The Court acknowledged that the counsel enjoyed "no small amount of discretion and judgment," *id.* at 691, in carrying out important statutory duties that included initiating and conducting civil proceedings, criminal prosecutions, and appeals on behalf of the United States, *id.* at 662–63. But the Court noted that the counsel lacked "authority to formulate policy for the Government or the Executive Branch" and had no

"administrative duties outside of those necessary to operate her office." *Id.* at 671–72. Relying on those features of the counsel's role, as well as her "limited jurisdiction and tenure," the Court approved Congress's decision to insulate her from removal absent "good cause." *Id.* at 691.

Commission ALJs hold even less authority than the independent counsel in *Morrison*. To begin, an ALJ presides over a given case only if the Commission, in its discretion, so orders. 17 C.F.R. § 201.110; *see also* 5 U.S.C. § 556(b). Once designated as a hearing officer, an ALJ produces only an "initial decision" that the Commission may review on appeal or "on its own initiative." 17 C.F.R. §§ 201.411(b)–(c); *see also* 5 U.S.C. § 557(b). On review, the Commission has plenary authority to "accept or hear" additional evidence, 17 C.F.R. § 201.452, and "make any findings or conclusions that in its judgment are proper and on the basis of the record," *id.* § 201.411(a); *see also* 5 U.S.C. § 557(b) (providing that an agency reviewing an ALJ's decision "has all the powers which it would have [had] in making the initial decision" itself). In contrast to *Morrison*'s independent counsel, who had final decision-making authority over the conduct of civil and criminal litigation, Commission ALJs are adjuncts whom the Commission may—or may not—choose to use to inform its own final decisions.

Below, the court of appeals invoked *Lucia v. SEC*, 138 S. Ct. 2044 (2018), to support its view that Commission ALJs "are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions." Pet. App. 31a. But *Lucia* casts little light on the removal issue. Certainly, *Lucia* held that the authority of Commission ALJs to employ "the tools of

federal trial judges" to "ensure fair and orderly adversarial hearings" is sufficiently substantial to render the ALJs executive officers rather than "mere employees." 138 S. Ct. at 2052–53. But as *Morrison* holds, an executive actor's duties may hold enough significance to render that actor an officer and, at the same time, not be of such a nature that protecting the actor against at-will removal would "impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691. Here, the ALJs' lack of final decision-making authority—while not dispositive of whether they are officers, *Lucia*, 138 S. Ct. at 2052 n.4—is highly relevant to the question whether their tenure protections unduly thwart the President's will or whether the President can exercise constitutionally sufficient control over the Commission's activities by influencing the Commissioners who are at liberty to ignore the ALJs' initial decisions entirely.

2. Relying on this Court's decision in *Free Enterprise Fund*, the court of appeals held that even if Commission ALJs' removal protections would not by themselves violate the Constitution, the fact that the *Commissioners* are insulated against at-will removal by the President renders the ALJs' protections unconstitutional. But *Free Enterprise Fund* addressed a situation where the President was "restricted in his ability to remove a principal officer, who [was] in turn restricted in his ability to remove an inferior officer, *even though that inferior officer determine[d] the policy and enforce[d] the laws of the United States*." 561 U.S. at 484 (emphasis added). The Court's holding that inferior officers' removal protections are unconstitutional under such conditions does not cover the case of inferior officers who, like ALJs, perform adjudicatory functions and wield no final decision-

making authority at all. Indeed, *Free Enterprise Fund* explicitly said so. *Id.* at 507 n.10.

Free Enterprise Fund considered the 2002 Sarbanes-Oxley Act, which created the Public Company Accounting Oversight Board (the Board), consisting of five members appointed by the Commission. *Id.* at 484. The Board held "expansive powers to govern an entire industry" and to "regulate every detail of an accounting firm's practice." *Id.* at 485. Among other things, the Board could create and enforce binding industry standards, initiate investigations and disciplinary proceedings, and impose "severe sanctions" for noncompliance, including monetary penalties of $15 million. *Id.* Despite these expansive powers, the Board operated "largely independently of the Commission" and was subject only to "some latent Commission control." *Id.* at 504; *see also* 15 U.S.C. § 7217(d)(2) (restricting the circumstances under which the Commission could "impose limitations upon the activities, functions, and operations of the Board"). Moreover, Congress had erected an "unusually high [removal] standard," barring the Commissioners from removing a Board member "except for willful violations of the [Sarbanes-Oxley] Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance." 561 U.S. at 503. The parties agreed, meanwhile, that the President could remove a Commissioner only for cause. *Id.* at 487.

The Court held that this arrangement violated the Constitution. *Id.* at 492. Because the Commissioners had sole authority to remove Board members, the President could not "oversee the Board" directly, and because the President could not exert control over the Commissioners by threatening to remove them at will,

he also could not "attribute the Board's failings to those whom he [*could*] oversee." *Id.* at 496. This Court accepted that, absent the Board members' own tenure protections, this arrangement would resemble the "restrictions on the President's removal power" that it had "previously upheld." *Id.* at 495. But the "second level of tenure protection change[d] the nature of the President's review" because it meant that the Commissioners were no longer "fully responsible for what the Board d[id]," leaving the President unable to "hold the Commission fully accountable for the Board's conduct, to the same extent that he [could] hold the Commission accountable for everything else that it d[id]." *Id.* at 495–96. The Court acknowledged that the Commission could exercise some oversight over the Board by controlling its budget or issuing regulations, but it emphasized that these powers were "poor means of micromanaging the Board's affairs" and that the Commission lacked authority to "supervise individual [Board] members" or "start, stop, or alter individual Board investigations." *Id.* at 504. As a result, the Court held, the "layer of insulation between the Commission and the Board" impermissibly infringed on executive power because it left the President unable to "hold the Commission to account for its supervision of the Board." *Id.* at 495.

Free Enterprise Fund does not support Respondents here. The Court expressly stated that its holding did not extend to ALJs serving in independent agencies because their positions were not "similarly situated" to the Board members' positions. *Id.* at 506; *see id.* at 507 n.10. As the Court explained, "unlike members of the Board, many [ALJs] … perform adjudicative rather than enforcement or policymaking functions … or possess purely recommendatory

powers." *Id.* at 507 n.10. Indeed, emphasizing that the "highly unusual" agency structure created by the Sarbanes-Oxley Act appeared to be without historical analogue insofar as it created "significant and unusual protections from Presidential oversight," the Court predicted that its holding would affect no more than "a handful of isolated [officer] positions." *Id.* at 505–06.

The Court's decision regarding the Sarbanes-Oxley Act's "novel [agency] structure," *id.* at 496, in other words, explicitly cast no doubt on removal protections that countless ALJs have enjoyed for almost eighty years. *See* Administrative Procedure Act, Pub. L. No. 79-404, § 11, 60 Stat. 237, 244 (1946); U.S. Off. of Personnel Mgmt., *ALJs by Agency* (Mar. 2017), (counting 1,931 ALJs who were active in the federal workforce as of March 2017).

3. Despite acknowledging that *Free Enterprise Fund* "does not resolve the issue presented here," Pet. App. 32a, the court of appeals based its ruling on "the fact … that two layers of insulation impedes the President's power to remove ALJs," *id.* at 33a. But as *Free Enterprise Fund* makes clear, 561 U.S. at 507 n.10, that fact is not dispositive here. If anything, *Free Enterprise Fund* reinforces that Congress may confer removal protections on officers who, like Commission ALJs, perform an adjudicatory role and wield limited authority, irrespective of whether Congress has also conferred such protections on the officers' superiors.

First, the agency structure at issue in *Free Enterprise Fund* "deprive[d] the President of adequate control over the Board, which [was] the regulator of first resort and the primary law enforcement authority for a vital sector of our economy." *Id.* at 508.

ALJs, however, serve in an *adjudicatory* role, and Congress may permissibly attempt to *free* adjudicators from "executive or political control." *Morrison*, 487 U.S. at 691 n.30; *see also Wiener*, 357 U.S. at 355 (holding that Congress may assign functions of an "intrinsic judicial character" to "a body that [is] 'entirely free from the control or coercive influence'" of the President (quoting *Humphrey's Ex'r*, 295 U.S. at 629)). Indeed, the opinion in *Free Enterprise Fund* highlights the distinction between an officer's "adjudicative" and "enforcement or policymaking" functions. 561 U.S. at 507 n.10.

The court of appeals quoted *Myers* for the proposition that an executive adjudicator "must … be removable by the President 'on the ground that the discretion regularly entrusted to that [adjudicator] by statute has not been on the whole intelligently or wisely exercised.'" Pet. App. 32a (quoting *Myers*, 272 U.S. at 135). But the Court has "explicitly 'disapproved' the expressions in *Myers* supporting the President's inherent constitutional power to remove members of quasi-judicial bodies." *Wiener*, 357 U.S. at 352 (quoting *Humphrey's Ex'r*, 295 U.S. at 626). To treat *Myers*'s dicta as controlling on this point would be to disregard subsequent holdings in *Wiener* and *Humphrey's Executor*. This Court did not do so in *Morrison* or *Free Enterprise Fund*, and it should not do so here.

Second, *Free Enterprise Fund*'s reasoning turned on the fact that the Commissioners' inability to remove Board members at will, together with their inability to exert control over the Board's activities, left the President unable to "hold the Commission fully accountable for the Board's conduct." 561 U.S. at 496; *see also id.* at 504–05. Here, though, the

Commissioners have plenary power to overturn each and every action of each and every ALJ, *see supra* at 14, such that the President may easily hold the Commissioners to account for their decisions to accept or undo ALJ actions. And because the ALJs lack "policymaking or significant administrative authority," *Morrison*, 487 U.S. at 691, the accountability concerns that drove the holding in *Free Enterprise Fund* are inapplicable here. Indeed, *Free Enterprise Fund* itself explained that its reasoning does not apply to ALJs, like the Commission's, who hold "purely recommendatory powers." 561 U.S. at 507 n.10; *see also id.* at 509 (suggesting that the constitutional problem in *Free Enterprise Fund* could have been cured by "restrict[ing] the Board's enforcement powers, so that [the Board] would be a purely recommendatory panel").

B. Even an unlawful tenure protection for the ALJ in this case would not have rendered the Commission's order invalid.

If the ALJ here had been impermissibly protected against removal, the proper remedy would be to hold the unlawful removal protection unenforceable going forward—not to invalidate the ALJ's initial decision or the Commission order that independently adopted the bulk of the ALJ's conclusions.

Free Enterprise Fund sets out the proper remedy for an unlawful removal provision. There, after holding that the Board members' removal protections were unconstitutional, the Court explained that its holding did not imply that "the existence of the Board" itself "violate[d] the separation of powers." 561 U.S. at 508; *see Seila Law*, 140 S. Ct. at 2208–09 (plurality opinion) (rejecting the idea that an unconstitutional

removal provision "means the entire agency is unconstitutional and powerless to act"). The Court accordingly held that the constitutional problem could be cured by severing and invalidating the statutory provision that limited the Commission's ability to remove a Board member. *Free Enter. Fund*, 561 U.S. at 508–10. This course of action, the Court explained, left the Board free to carry out its functions while ensuring that the Commission would be "fully responsible for the Board's [future] actions, which [would be] no less subject than the Commission's own functions to Presidential oversight." *Id.* at 509.

As for the *past* actions of an officer who has been unconstitutionally insulated from removal, this Court recently addressed the issue in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). There, the Court held that it is "neither logical nor supported by precedent" to deem those actions "void *ab initio*." *Id.* at 1787. In contrast to the actions of an officer who has not been "properly *appointed*," *Collins* explained, the actions of a duly appointed officer subject to an invalid removal restriction do not "involve[ ] a Government actor's exercise of power that the actor did not lawfully possess" because "there is no basis for concluding that [the officer] lacked the authority to carry out the functions of the office."[2] *Id.* at 1787–88; *see id.* at 1789 (Thomas, J., concurring) ("The Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract."). Because a properly appointed officer's actions are lawful

[2] Although the ALJ who issued the initial decision in this case had not been properly appointed, Respondents affirmatively waived the opportunity for a new hearing before a properly appointed officer. *See* Pet. App. 3a.

notwithstanding unconstitutional restrictions on the officer's removal, there is no basis for granting a remedy against those actions, at least absent a causal link with the removal restrictions themselves. *See id.* at 1788–89 (majority opinion); *id.* at 1801 (Kagan, J., concurring in part and concurring in the judgment) (agreeing that "plaintiffs alleging a removal violation are entitled to … a rewinding of agency action … only when the President's inability to fire an [officer] affected the complained-of decision"); *id.* at 1794 (Thomas, J., concurring) (questioning whether retrospective relief would be appropriate *even if* a regulated party could show that an unconstitutionally insulated officer "might have acted differently if he knew that he served at the pleasure of the President" (emphasis omitted)).

In this case, Respondents cannot draw a causal link between the ALJ's removal protections and the Commission order under review. After all, the order is based on a decision the Commission issued after its "independent review of the record." Pet. App. 74a. Respondents do not argue that the *Commissioners* were unlawfully insulated from removal, and it is unclear what causal nexus the *ALJ's* tenure protections bear to a decision she did not write and an order she did not issue. Of course, the ALJ's initial decision may have influenced the Commission's reasoning. But insofar as it did so, the logical inference is that the Commission agreed with her. Put simply, there is no basis for assuming, or even suggesting, that the Commission would have sought to alter the course of the case by removing the ALJ without cause, had it had the ability to do so.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

ALLISON M. ZIEVE
Counsel of Record
NICOLAS A. SANSONE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Attorneys for Amicus Curiae

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