No. 22-859

IN THE
Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,
v.
GEORGE R. JARKESY, JR., AND PATRIOT28 LLC,
Respondents.

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

BRIEF OF *AMICI CURIAE* ADMINISTRATIVE LAW SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors who teach, write, and litigate in the field of administrative law. Amici Alan B. Morrison and Richard J. Pierce, Jr., teach at The George Washington University Law School, as the Lerner Family Associate Dean for Public Interest and Public Service Law and the Lyle T. Alverson Professor of Law, respectively. Ronald M. Levin is the William R. Orthwein Distinguished Professor of Law at Washington University School of Law in St. Louis Missouri. Their only interests in this case are those of scholars.

They are submitting this brief because they wish to call to the Court's attention their experiences and scholarly backgrounds with regard to the Administrative Procedure Act (APA) as they bear on (i) the constitutionality of for-cause limitations on the removal of administrative law judges (ALJs), and (ii) the impact of the Seventh Amendment on the ability of administrative agencies to impose civil penalties and other forms of affirmative relief in agency proceedings.

Amici support petitioner on all of the questions presented. This brief discusses the first and third of those questions. On the removal issue, if the Court were to conclude that the current statutory scheme runs afoul of the prohibition on double for-cause removals, this brief, in contrast to the position of petitioner (Br. 66), suggests an alternative that would

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[1] Pursuant to Supreme Court Rule 37.6, undersigned counsel states that no party's counsel authored this brief in whole or in part and no person or entity other than the amici or their counsel contributed money to its preparation or submission.

solve that problem and still protect ALJs from removal except for cause, as the Congress that enacted the APA in 1946 expressly provided.

SUMMARY OF ARGUMENT

Removal. In enacting the provisions of the Administrative Procedure Act dealing with formal adjudication, Congress struck a balance that assured that ALJs, who hear the evidence and make recommended findings of fact and conclusions of law, were insulated from undue influence by the agency for which they worked. The goal was to preclude both actual bias against regulated parties and the appearance of such bias. Among the principal means Congress included to achieve that goal was to provide that ALJs could only be removed for good cause.

At the same time, Congress provided that the agency for which ALJs worked would have the authority to promulgate rules to circumscribe their decisions. Congress also specified that the agency would have the final say on questions of fact and law, by making ALJ decisions subject to de novo review by the agency. In this way, agencies, not ALJs, would determine agency policy, consistent with statutory directives and the requirements of the APA.

The decision below, striking down the for-cause restrictions on ALJ removal, strikes at the heart of this compromise, which this Court has long recognized as vital to the adjudication provisions of the APA. Amici recognize the right of the President, within limits prescribed by Congress, to set policy within the executive branch, but ALJs do not, and cannot, make policy for their agency, in this case the SEC. For that reason, this Court's decision in *Wiener*

v. United States, 357 U.S. 349 (1958), controls the outcome here. In that case, this Court rejected the efforts of the President to remove a member of the War Claims Commission who engaged solely in adjudications, who made no policy, and whose rulings were not subject to review by any authority in the executive or judicial branches of government. Given the much greater restrictions that the APA and the laws applicable to the SEC place on ALJs, this is a stronger case for upholding for-cause removal than was *Wiener*.

The court below relied on the fact that SEC Commissioners, like ALJs, may only be removed for cause, and it concluded that this Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), barred double for-cause removal regimes in all cases. It did so even though that question was specifically left open there because this Court recognized the difference between officials whose sole duty is to adjudicate, from those who set policy as did the Board in *Free Enterprise*.

If the Court should nonetheless conclude that the ban on double for-cause removals applies to ALJs, that ban could be eliminated in either of two ways: The Court could set aside the restriction as applied to *either* the members of the Commission *or* as to ALJs. Petitioner asserts that "no good reason would exist" for a different remedy than striking the for-cause limitation protecting ALJs (Br. 66), as the Court did for the Board members in *Free Enterprise*. Amici disagree. The tenure protection for ALJs has been in place for 77 years, and it was an essential part of the bargain for the adjudication provisions of the APA. Unlike Board members, ALJs make no policy, and

ALJs have statutory protections, whereas SEC Commissioners have only implied tenure. Retaining removal protections for ALJs at the SEC would also assure that ALJs there have the same protections as those at other agencies where the agency head is removable by the President at will.

Seventh Amendment. The Fifth Circuit also went astray when it ruled that administrative litigation of the kind that federal agencies conduct every day is precluded by the Seventh Amendment's right to trial by jury because the claims brought by the SEC here were "akin" to claims of fraud brought in common law courts in 1789. That decision was not only wrong, but it also would have devastating impacts on many agencies beside the SEC. In particular, it was made without proper appreciation of the need for Congress to have flexibility when it seeks to solve important problems by making use of agency adjudication in today's regulatory framework. This Court has long recognized the ability of Congress to authorize the government to bring administrative proceedings without regard for whether the problem being solved was "akin" to matters that the common law had previously addressed.

The decision below is also wrong because it failed to take proper account of the "public rights" doctrine which allows Congress to create new causes of action, such as those under the Investment Company Act here, which can be enforced by the government in proceedings brought by and within federal agencies. In that situation, as this Court has recognized on many occasions, neither the Seventh Amendment nor Article III requires that those claims be determined by a jury. Moreover, the right to a jury trial applies

only to legal claims. Most of the remedies sought in this case—including cease and desist orders, a ban on future work as an investment adviser, and disgorgement of unlawful gains—would be classified as equitable relief even in a district court proceeding. While civil penalties would be legal relief in court, this Court has expressly recognized them as appropriate for administrative adjudications, without offending the Seventh Amendment or Article III.

If upheld, the result of this jury trial ruling would be to curtail much agency litigation without any basis to conclude that the current system is not working fairly and efficiently, and it will eliminate the many advantages of agency litigation that Congress and this Court have long recognized. These other benefits include agency expertise and familiarity with the subject matter; reasoned decision making; consistency; and accountability—none of which are readily attainable in a jury trial. Whether those advantages outweigh those available in court is a matter for Congress to determine. Except in the most extraordinary case, the Seventh Amendment should not be interpreted to constrict Congress' decision to have an adjudication heard by an agency, particularly where the alternative would add massively to the workload of the federal courts.

ARGUMENT

I. THE FIFTH CIRCUIT ERRED IN SETTING ASIDE THE FOR-CAUSE LIMITATIONS ON REMOVAL OF ALJs AT THE SEC.

The Fifth Circuit held that the for-cause limit on the power of the SEC to remove an ALJ violates the constitutionally based prohibition on two or more layers of insulation from presidential control that the Court announced in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). In that opinion, the Court correctly distinguished ALJs from the members of the Board for the reason stated: "[M]any administrative law judges of course perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10.

The members of the Board at issue in *Free Enterprise Fund* have the power to make legally binding policy decisions on behalf of the federal government. ALJs have no power to make policy decisions. As amici demonstrate below, Congress was careful to give ALJs only the power to adjudicate cases and at the same time to ensure that the agency where the ALJ presides has exclusive power to make policy decisions. The Court should respect and uphold that decision.

A. Congress Designed the APA to Assure That ALJs Have an Appropriate Degree of Decisional Independence.

During the 1930s and 1940s, Congress devoted a great deal of time and effort to crafting legislation to govern actions taken by federal agencies. After fifteen years of debates and studies, Congress unanimously enacted the Administrative Procedure Act of 1946, 5 U.S.C. §§ 551 et seq. (APA). *See* KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.4 (6th ed. 2019); George W. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

The core issues that Congress resolved when it enacted the APA included the status and powers of the hearing examiners who were authorized to preside over oral evidentiary hearings in agency adjudications. That issue was challenging because Congress had to accomplish two potentially competing goals.

Members of Congress had received many complaints that the hearing examiners who presided in agency hearings prior to enactment of the APA were biased in favor of the agency and against the private parties who participated in those hearings. *See Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131–32 (1953). Congress responded to that concern by conferring on the new hearing examiners who would preside after enactment of the

APA a significant degree of independence from the agencies for which they worked. *See id.* at 132–34.

Congress also sought to further the potentially conflicting goal of ensuring that the agencies themselves would retain control of policy decisions in implementing their statutory directives. Congress recognized that hearing examiners, who were sufficiently independent of the agency that employed them to reduce concerns of bias, had the potential to usurp some of the policymaking power Congress had conferred on their agencies. Congress responded by including in the APA provisions that ensure that agencies retain the ability to make all of the policy decisions that might be raised in an adjudication in which a hearing examiner presides. *See* Paul Verkuil et al., *The Federal Administrative Judiciary*, ADMIN. CONF. OF THE UNITED STATES, II RECOMMENDATIONS AND REPORTS 770, 801-802 (1992).

During its fifteen years of deliberation over what became the APA, Congress considered many potential ways of reconciling the tension between those two potentially conflicting goals. Congress eventually settled on a combination of statutory provisions that are designed to further both goals simultaneously. On the other hand, the APA includes provisions that are designed to confer a degree of independence on hearing examiners by regulating the agency processes of managing and removing hearing examiners. But it also includes two provisions that ensure that agencies retain complete control of the policy implications of adjudicatory hearings. First, it recognized that agencies have the power to issue rules

that bind ALJs. *See* 5 U.S.C. § 556(c). Second, it conferred on the agency the authority to substitute the agency's decision for the initial decision of the hearing examiner. Except for some changes in terminology and compensation, Congress has not made material changes to those provisions since Congress enacted them in 1946.

In the APA, Congress gave agencies the power to appoint their own hearing examiners from among those found qualified by the Civil Service Commission. *See* 5 U.S.C. § 3105. In 1972, the Commission changed the name of hearing examiners to administrative law judges (ALJs). *See* Change of Title to Administrative Law Judge, 37 Fed. Reg. 16,787 (Aug. 19, 1972). In 1978, Congress ratified that decision by statute. *See* Pub. L. No. 95-251, 92 Stat. 183 (1978). In that Act, Congress also reallocated the responsibilities of the Commission among three new agencies—the Office of Personnel Management (OPM), the Federal Labor Relations Authority (FLRA), and the Merit Systems Protection Board (MSPB). Members of the MSPB (and FLRA) can only be removed for cause. *See* 5 U.S.C. §§ 1202(d), 7104(b).

Congress limited agency power to manage hearing examiners in several ways that are designed to confer a degree of independence on them, thereby protecting the due process rights of the regulated entities involved in adjudications. Congress' goal was to reduce the risk of pro-agency bias by the person presiding at an adjudicatory hearing, by precluding agencies from using managerial tools as a means of

inducing hearing examiners to conduct hearings in ways that favor the agency and disfavor the private parties who are on the other side. Thus, the employing agency cannot determine the compensation of a hearing examiner, *see* 5 U.S.C. § 5372; cannot assign a case to a hearing examiner except in rotation, *see* 5 U.S.C. § 3105; cannot assign a hearing examiner any duties that are inconsistent with the duties and responsibilities of a hearing examiner, *see* 5 U.S.C. § 3105; and cannot subject a hearing examiner to supervision or direction by any agency employee who engages in "the performance of investigative or prosecuting functions for an agency." 5 U.S.C. § 554(d). Finally, and most importantly, a disciplinary action can be taken against an ALJ "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a).

At the same time that Congress protected the integrity of the hearing process by conferring a degree of independence on hearing examiners, Congress ensured that agencies retained complete control over the legal basis and policy content of any decision in an adjudication. Congress accomplished that goal in two ways. First, it recognized that agencies have the power to make rules that bind ALJs. Specifically, an ALJ's authority to "make or recommend decisions" is "[s]ubject to published rules of the agency," 5 U.S.C. § 556(c)(10), and the term "rules" is not limited to rules that have the force of law. *Id.* § 551(4).

Second, Congress provided that a hearing examiner can make only an initial decision and that the agency has complete discretion to replace it: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b). According to the Court's classic decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494 n.27 (1951) (emphasis added),

> "[i]t is likely that the sentence was intended to embody a clause in the draft prepared by the Attorney General's Committee, which provided that on review of a case decided initially by an examiner an agency should have jurisdiction to remand or to 'affirm, reverse, modify, or set aside in whole or in part the decision of the hearing commissioner, *or itself to make any finding which in its judgment is proper upon the record*.'"

The Court reinforced that congressional decision by holding that the ALJ's initial decision qualifies only as part of the record on which the court must base its review. *See id.* at 496–97. In short, the agency head (or other official to whom the responsibility for decision may have been delegated) can review the ALJ's decision de novo, and a reviewing court will consider whether the agency's decision—not the ALJ's—is supported by substantial evidence.

Implicit in these principles is that the purpose of ALJ independence, which is protected by the APA's good-cause removal standard and other APA

provisions, is not to displace the agency head's authority, but rather to enable the ALJ to render a disinterested evaluation of the evidence that the agency decisionmaker will have to take into account. The existence of these ALJ findings enhances the agency head's accountability for his or her decision. Of course, ALJs make normative judgments on interstitial issues that arise in the course of deciding cases. But this inescapable aspect of the decisional process is not policy *making*, in the sense of creating norms that will have staying power. On the contrary, the agency head is the authoritative source of policy within the agency. *See generally* Ronald M. Levin, *Administrative Judges and Agency Policy Development: The Koch Way*, 22 WM. & MARY BILL RTS. J. 407, 410–11 (2013) (elaborating on ALJs' lack of policymaking role).

In practice, the manner in which agencies utilize, or refrain from utilizing, the oversight authority that the APA preserves for them will vary from one regulatory scheme to another, depending on the magnitude of the caseload, the agency's other responsibilities, etc. In the case of the SEC in particular, this Court in *Lucia v. SEC,* 138 S. Ct. 2044 (2018), explained that the Commission has the option of letting an ALJ's initial decision stand as the action of the Commission, or it can hear the case, either on request or sua sponte, and overrule or modify the ALJ's ruling. The fact that the Commission does not review every case does not mean it lacks effective control over its ALJs, just as this Court maintains a high degree of control over the lower federal courts

even though it denies certiorari in the great majority of cases offered to it.

The end result of the APA's compromise on the role of ALJs is that they retain independence to make their recommendations, without agency interference, while the agency retains the ultimate power to decide the case and to make all policy determinations.

B. This Court Has Reviewed and Endorsed the Authority Congress Gave to ALJs.

Shortly after Congress enacted the APA, this Court issued a series of decisions regarding the qualified independence of hearing examiners in which it praised the APA and urged Congress to use it as a model for all agency decision making. In *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953), the Court upheld the initial rules issued by the Civil Service Commission to govern the compensation and tenure of hearing examiners, and the rules governing assignment of cases to hearing examiners. It did so over an objection by an association of hearing examiners that the rules were not adequately protective of their independent status that the APA was enacted to protect.

The six-Justice majority described the reasons Congress conferred qualified independence on hearing examiners in the APA: "Many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and

recommendations." *Id.* at 131. The majority described studies that supported the complaints of bias and that urged Congress to make hearing examiners "partially independent of the agency by which they were employed." *Id.* The majority then reviewed the congressional deliberations about the best ways of accomplishing that agreed-upon goal: "Several proposals were considered, and in the final bill Congress provided that hearing examiners should be given independence and tenure within the existing Civil Service system." *Id.* at 131–32.

The majority's description of the APA's treatment of hearing examiners and its characterization of the status of hearing examiners left no doubt that the majority understood the congressional decision to confer qualified independence on hearing examiners:

> Congress intended to make hearing examiners 'a special class of semi-independent subordinate hearing officers' by vesting control of their compensation, promotion and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees.

Id. at 132.

The three dissenting Justices also implicitly approved of the congressional decision to confer qualified independence on hearing examiners. However, they would have held the rules invalid because of their belief that the rules should have gone

even further in conferring qualified independence on hearing examiners:

> The Administrative Procedure Act was designed to give trial examiners in the various administrative agencies a new status of freedom from agency control. Henceforth they were to be 'very nearly the equivalent of judges even though operating within the Federal system of administrative justice.'

Id. at 144 (Black, J., dissenting) (citation omitted).

The Court was even more forceful in its approval of, and praise for, the congressional decision to confer qualified independence on hearing examiners in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). The question before the Court was whether the APA provisions applicable to hearing examiners applied to deportation proceedings. The Court held that they did, even though no statute explicitly made the APA applicable to those hearings.

The Court began by describing the widespread complaints of bias that led to the enactment of the APA and to its treatment of hearing examiners as independent of the agencies at which they preside. It also cited to the many studies that had substantiated those complaints and that had urged statutory changes to reduce the pro-agency bias. It then described the years of study and deliberation that led to the enactment of the APA by unanimous votes in both Houses of Congress. *See id.* at 37–45. The Court summarized the process through which the APA was enacted: "The Act thus represents a long period of

study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." *Id.* at 40.

The Court concluded that the APA represented an effort by Congress to set forth the "currently prevailing standards of impartiality" and thereby to codify the minimum requirements of due process. *Id.* at 50. Based on that conclusion, the Court held that the provisions in the APA relating to hearing examiners applied to deportation proceedings. *See id.* at 51. In later cases, the Court relied on the reasoning in *Wong Yang Sung* as the basis to hold that the APA applies to hearings under the Interstate Commerce Act, *Riss & Co. v. United States*, 341 U.S. 907 (1951), and to Post Office fraud hearings, *Cates v. Haderlein*, 342 U.S. 804 (1951).

The Court eventually retreated from its suggestion that the APA codified due process when Congress explicitly rejected that interpretation of the Act in the process of enacting a deportation statute that authorized hearings that fell short of the procedural safeguards reflected in the APA. *See Marcello v. Bonds*, 349 U.S. 302 (1955). But the Court never retreated from its belief that the APA adjudication provisions created a model of fairness by which all other agency adjudicatory procedures should be judged. Indeed, the Court upheld the procedures Congress authorized in deportation proceedings largely because it believed that Congress was "drawing liberally on the analogous provisions of the Administrative Procedure Act and adapting them

to the particular needs of the deportation process." *Id.* at 310.

Recent studies of adjudication at agencies where administrative judges lack the APA's safeguards of decisional independence demonstrate the continued need for those safeguards. Thus, in 2022 the Government Accountability Office found that 67% of Administrative Patent Judges reported that they felt pressure from management to change their decisions. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105336, PATENT TRIAL AND APPEAL BOARD: INCREASED TRANSPARENCY NEEDED IN OVERSIGHT OF JUDICIAL DECISION-MAKING 23–33 (2022). The unanimous views of Congress and the strong endorsement of this Court on the importance of ALJ independence are important reasons why this Court should uphold the statutory limit on the power to remove ALJs as an appropriate means of protecting the due process rights of parties to adjudications conducted by agencies.

C. The Decision Below Unnecessarily Undermines the Principle of ALJ Independence in the APA.

If the Court holds that purely adjudicative officers like ALJs cannot be subject to for-cause limits on their removal, the Court will have effectively overruled its decision in *Wiener v. United States*, 357 U.S. 349 (1958). Indeed, ALJs have an even stronger case for independence from presidential and other control than did the members of the War Claims Commission, because the latter's rulings were not

subject to review by anyone in the executive or judicial branches of the federal government.

The status of a number of other entities could also be threatened. An example is the Occupational Safety and Health Review Commission (OSHRC), whose members are appointed by the President and are removable only for cause. *See* 29 U.S.C. § 661(b). That body reviews cases initiated by the Occupational Safety and Health Administration (OSHA), and in *Martin v. OSHRC*, 499 U.S. 144, 155 (1991), this Court concluded that Congress intended for OSHA to be the policymaking body—not the Commission. OSHRC does not have the sort of powers that the President should be expected to oversee. The same reasoning would apply to OSHRC's companion agency, the Mine Safety and Health Review Commission, which reviews the decisions of the Mine Safety and Health Administration and whose members are also removable only for cause. *See* 30 U.S.C. § 823(b). In addition, the ruling sought by respondents could call into question the for-cause removal protections for other non-Article III judges, such as those at the Tax Court, *see* 26 U.S.C. § 7443(f), and the Court of Federal Claims, *see* 28 U.S.C. § 176.

There is an alternative basis for upholding the removal restrictions on the ALJs at the SEC, notwithstanding the prohibition on two layers of for-cause insulation between the President and an officer of the United States that the Court announced in *Free Enterprise*. As this Court recognized there, its holding does not necessarily apply to ALJs, *see* 561 U.S. at 507

n.10, and it should not apply because ALJs cannot make policy decisions on behalf of the SEC and even their adjudicative rulings are fully reviewable by the SEC.

However, if the Court concludes that the limit on double for-cause removals applies to ALJs at the SEC, that prohibition can be avoided by eliminating *either* of the two limitations here—that on SEC members or that on the ALJs at the SEC. *Cf. Craig v. Boren,* 429 U.S. 190, 210 n.24 (1976) (gender discrimination in age restriction for purchasing alcohol can be cured by raising age for women or lowering it for men). In making that choice, the Court should keep prominently in mind, as detailed above, that Congress expressly afforded ALJs protection against removal for cause, whereas the protection for SEC Commissioners is implied and not contained in any statute.[2] Moreover, that protection was an essential component of the adjudication provisions of the APA when it was enacted in 1946, whereas there is no indication that for-cause removal of Board members was even considered a significant part of the law that created the Board.

There are additional reasons that would support this result. ALJs also work at Departments

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[2] *Cf.* Brief of Amicus Curiae Andrew N. Vollmer in Support of Neither Party in 22-859, https://www.supremecourt.gov/DocketPDF/22/22-859/272456/20230720123401738_Jarkesy%2022-859%20amicus%20final.pdf (arguing that SEC Commissioners can be removed without cause as a matter of statutory law).

such as Labor and Agriculture which are headed by a single Secretary who is subject to at-will removal. *Free Enterprise* does not apply to them, but if the remedy in this case causes SEC ALJs to lose their for-cause removal status, the federal government would then have two classes of ALJs, some protected by removal restrictions and some not, which is hardly what Congress would have wanted. Moreover, ALJs move between agencies, and so their protective status might change depending on where they are working, another anomaly that Congress likely did not intend. Similarly, two terms ago in *United States v. Arthrex Inc.*, 141 S. Ct 1970, 1987 (2021), the Court rejected a remedy that would have made Administrative Patent Judges (APJs) subject to at-will removal. Although ALJs and APJs are not interchangeable, they are entitled to the same removal protections, so that treating ALJs differently here than the Court treated APJs in *Arthrex* would create still another anomaly.

Accordingly, for all these reasons, the Court should reverse the Fifth's Circuit's conclusion that the ALJs at the SEC may not retain their protection against removal except for good cause.

II. THE SEVENTH AMENDMENT DOES NOT PREVENT THE SEC FROM ADJUDICATING THE CLAIMS IN THIS CASE WITHOUT A JURY.

The Fifth Circuit held that the SEC's administrative proceedings against respondents for securities fraud violated the Seventh Amendment, because the fraud allegations were akin to a suit at common law, to which the Seventh Amendment would apply, and the "public rights" exception did not shield it from the requirements of that constitutional provision. That holding was at odds with both the case law and sound policy.

A. The Fifth Circuit's Decision Is Inconsistent with Settled Law.

The Court has long distinguished "between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. . . . '[T]he mode of determining matters of this [latter] class is completely within congressional control.'" *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (citation omitted). Indeed, "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." *Pernell v. Southall Realty,* 416 U.S. 363, 383 (1974). Thus, as the Court held in the leading case of *Atlas Roofing Co. v. OSHRC,* 430 U.S. 442, 455 (1977), "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would

be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'"

These propositions are settled law. The Fifth Circuit's failure to follow them resulted in a mistaken analysis in at least three respects.

1. Agencies in court. The Fifth Circuit recognized that, when the United States brings suit *in court*, the Seventh Amendment applies to claims for legal, as opposed to equitable, relief. The leading case is *Tull v. United States*, 481 U.S. 412 (1987), in which the Court held that a developer whom the United States had sued for injunctive relief and civil penalties under the Clean Water Act had a right to a jury trial.

The SEC did not, of course, bring this case in court. Even if it had done so, most of what the Commission is seeking in the present case would not trigger the Seventh Amendment. Injunctive relief, for example, is an equitable remedy, to which that amendment is inapplicable. Accordingly, the Commission's cease and desist order and its bar on respondent Jarkesy serving as an investment advisor would obviously qualify as equitable. Its claim for disgorgement relief would also fit that description, as the Fifth Circuit recognized, App. 12a, and as a long line of this Court's precedents has established. *See Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 571 (1990) (citing *Tull*, 481 U.S. at 424; *Curtis v. Loether*, 415 U.S. 189, 197 (1974); and *Porter v. Warner Holding Co.,* 328 U.S. 395, 402 (1946)) ("[W]e have characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits'").

Amici are not aware of any situations in which the SEC has authority to sue in court for the equivalent of common law damages—the hallmark of "legal" relief. However, an agency that does have such authority would have to choose in a given court case whether to seek that relief, knowing that such a claim would trigger the right to jury trial. Similarly, if the SEC seeks a civil penalty in a court proceeding, then, as in *Tull*, the defendant would be entitled to a jury trial for any "legal" relief that the complaint sought.

In this case, however, none of this parsing of legal and equitable claims is necessary, because under *Atlas Roofing* an agency *may* impose civil penalties in an administrative adjudication—as *Tull* itself recognized. *See* 481 U.S. at 418 n.4 (citing *Atlas Roofing* and *Pernell*). The Fifth Circuit's reliance on *Tull* and similar precedents was, therefore, mistaken. *See* App. 10a–12a.

2. *Resemblance to common law claims*. The Fifth Circuit considered the *Atlas Roofing* line of decisions distinguishable in this case, because it interpreted those decisions as applicable only to "new and somewhat unusual . . . claims that likely could not have been brought in legal actions before that point," App. 15a, whereas "[c]ommon-law courts have heard fraud actions for centuries." App. 13a. In other words, in the court's view, "[t]he 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." App. 8a (emphasis added).

In this regard the court considerably overstated the similarity between a common law fraud action and an SEC proceeding under the

securities laws (particularly one under the Investment Company Act of 1940, which prohibits much more than common law fraud). The former is primarily concerned with vindicating the interests of one or more plaintiffs, whereas the purpose of the latter is to root out fraud in order to uphold the public's interest in a securities market in which investors will be willing to participate. As Judge Davis noted in his dissent below, "[t]he SEC may impose civil penalties on a person who made a material misrepresentation even if no harm resulted from the misrepresentation." App. 48a. The majority supported its position by stating that, unlike the "new" claims and remedies involved in *Atlas Roofing*, "fraud claims, including the securities-fraud claims here, are quintessentially about the redress of private harms." App. 20a. As it pertains to SEC regulation and this case in particular, however, the court was plainly wrong. When the Commission sues to obtain injunctive relief, sometimes together with a civil penalty, it does not necessarily seek redress for injured parties at all. And even when it does, a claim for disgorgement of ill-gotten gains, such as the Commission asserted in this case, is *equitable* rather than legal, so that it could hardly be the basis for bringing the Seventh Amendment into play when a case is filed before an administrative agency.

More fundamentally, however, the lower court's focus on whether the SEC's claim was "akin" to a common lawsuit was beside the point. Congress typically creates administrative agencies because it believes that existing institutions, including common law courts, are not coping effectively with particular social problems. As the Court wrote in *Atlas Roofing*, "[w]e cannot conclude that the [Seventh] Amendment

rendered Congress powerless when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law such as an administrative agency in which facts are not found by juries." 430 U.S. at 460. It would hardly make sense for the Court to hold that the similarity between a common law action and a statutory scheme that is intended to supplement or improve the law should have the effect of undermining the latter remedy by triggering the Seventh Amendment. Responsibility for determining whether there is a need for such supplementation should rest with the legislature, not the judiciary.

3. *Rights as between private parties.* A third respect in which the Fifth Circuit went astray in this case grew out of its erroneous use of precedents that have applied the Seventh Amendment to disputes between private parties. The case law dealing with these situations is diffuse and conflicting.[3] One source

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[3] *See generally* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1129–39 (2022) (surveying the case law). Some of the cases under discussion actually dealt more directly with the question of whether the Constitution required that a claim be heard by an Article III court. These two issues are governed by the same doctrinal principles. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018). Although it may be more precise to say that the issue in a case like the present one is whether it must be heard in an Article III court—a conclusion that would then trigger the Seventh Amendment with regard to "legal" relief—the court below and the parties have generally

of confusion is that the decisions say that the Seventh Amendment applies to disputes that involve "private rights" as opposed to "public rights," but they do not always define those two terms in a consistent manner. Some cases define "public rights" narrowly, such that it applies exclusively to disputes between the government and private parties. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982); *Crowell v. Benson*, 285 U.S. at 50–51; *see also Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 65–70 (1989) (Scalia, J., concurring) (arguing that only the narrow definition is valid, and the Court should return to following it consistently). Other cases conceive of "public rights" more broadly, so that it encompasses some disputes between private parties.

Cases in this latter category have never arrived at a precise definition of "public rights." Sometimes the Court concludes that a dispute between private persons has enough of a "public" character to qualify as a matter of public rights, thus being susceptible to resolution in a non-Article III forum that lacks a jury. *See, e.g.*, *CFTC v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985). The most recent such case was *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1374 (2018), in which this Court upheld an "inter partes" proceeding before the Patent Trial and Appeal Board, in which private interests were litigating the validity of a patent, an issue that could also be decided in the federal courts. It did so because the goal of the agency proceeding was, in

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framed the issue as being simply whether the Seventh Amendment applies. This brief will follow the same usage.

effect, to obtain reconsideration of an administrative determination—the Patent Office's grant of the patent. On the other hand, in a series of cases arising in a bankruptcy court context, the Court has found that a dispute between private litigants had to be resolved by a jury. *See, e.g.*, *Stern v. Marshall*, 564 U.S. 462 (2011); *N. Pipeline*, 458 U.S. at 87. Thus, *Granfinanciera* held that a fraudulent conveyance claim that fell within a bankruptcy court's ancillary jurisdiction required a jury trial. The example of these bankruptcy precedents could potentially be understood as implying, by analogy, that the Seventh Amendment might prevent the resolution of certain disputes in an *administrative* forum, although no case has yet so held.

The Fifth Circuit relied heavily on cautionary language in *Granfinanciera*: "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." App. 16a, 18a (quoting 492 U.S. at 61). What the Fifth Circuit overlooked, however, is that *Granfinanciera* used these cautionary words in the context of articulating the boundaries of the *broad* approach to defining public rights.

The SEC proceeding here, however, falls squarely within the *narrow* definition of public rights, *i.e.*, a dispute between the government and a private litigant in an administrative forum. The Court has never disputed the longstanding principle that such disputes involve public rights, to which the Seventh Amendment does not apply. *Granfinanciera* recognized as much: "In *Atlas Roofing*, we noted that

Congress may effectively supplant a common law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity." 492 U.S. at 53 (citing 430 U.S. at 458); *see also* 492 U.S. at 51 (citing 430 U.S. at 458) ("Our prior cases support administrative factfinding in only those situations involving 'public rights,' *e.g.,* where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.").

The bottom line is that the Fifth Circuit was unable to cite a single case in which the Court has found that an administrative proceeding in which the government is a party violated the Seventh Amendment. There is no such case, and that court's misreading of precedent provides no reason why *Jarkesy* should become the first.

B. There Is No Reason to Change the Settled Law, and There Are Many Reasons to Retain It.

The court below identified no concrete reason why this Court should overrule its past case law, apart from that court's (mis)readings of those cases. Nor did the respondents do so in their brief in opposition to certiorari. The absence of such an account is telling. The usual rule is that, "even in constitutional cases, a departure from precedent 'demands special justification.'" *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (citation omitted). Here, amici argue the converse, explaining several reasons why the Court should *not* alter its

longstanding teaching that a jury has no place in administrative agency proceedings. Before doing so, amici note that the choice for the SEC does not always favor an agency adjudication: If the defendant is engaging in a large-scale scheme to defraud, the agency can obtain immediate injunctive relief only by filing in the district court.

Workload factors constitute an important reason to adhere to precedent. If this Court agrees with the holding below, Congress will encounter massive problems in its attempts to choose an appropriate remedy for that supposed constitutional flaw. A high proportion of the claims that agencies resolve today are arguably "akin to" claims that could have been resolved at common law in 1791. A decision that would require transferring all of that business to federal district courts would enormously expand the dockets of those courts.

To mention just one example of this sort of burden, consider the thousands of claims that agencies are authorized to resolve through application of the ubiquitous "just and reasonable" standard. That standard does have common law roots. Many states adopted it in their constitutions and statutes during the 1800s. *See Atchison, Topeka & Santa Fe R.R. Co. v. Denver & New Orleans R.R. Co.*, 110 U. S. 667, 678–79 (1884). In doing so, they borrowed it from the common law that colonial, and British courts had applied to innkeepers for centuries. *See Scofield v. Lake Shore & M. S. Ry. Co.*, 3 N.E. 907, 929 (Ohio 1885). Congress first instructed a federal agency to apply the "just and reasonable" standard in the Interstate Commerce Act of 1887, 24 Stat. 379, and it has since included it as a decisional standard

in many other statutes, such as the Natural Gas Act, 15 U.S.C. § 717, and the Federal Power Act, 16 U.S.C. § 824d. As of 2023, it appears in the United States Code 180 times. If the Court upholds the Fifth Circuit's Seventh Amendment ruling, Congress will have to devise some means through which federal courts can accommodate a massive increase in the number of cases in which they provide jury trials.

In addition, agency adjudication has, in several respects, inherent advantages over jury determination. These are characteristics and expectations that may, to some degree, lie behind this Court's frequent declarations that jury trials would be "incompatible with the whole concept of administrative adjudication." *Granfinanciera*, 492 U.S. at 51; *Atlas Roofing*, 430 U.S. at 448; *Pernell*, 416 U.S. at 383; *Curtis v. Loether*, 415 U.S. at 194. Insofar as the Fifth Circuit's holding would require agencies to pursue enforcement actions in court rather than internally, it would force the agency to forego these advantages. Here are a few examples.

(a) *Familiarity with the subject matter*. Agencies frequently have deep knowledge about the underlying context of the regulatory program in which a given adjudicative case arises, including technical issues that are unfamiliar to lay juries.[4] As Professor Jaffe wrote long ago, "the concept of

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[4] *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (Kagan, J., plurality opinion) (agencies "have 'unique expertise,' often of a scientific or technical nature, relevant to applying a regulation 'to complex or changing circumstances'"); *id*. at 2442 (Gorsuch, J., dissenting) ("no one doubts that courts should pay close attention to an expert agency's views on technical questions in its field").

expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder." LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 90 (1965).

(b) *Reasoned decision making*. In administrative proceedings, courts expect an agency to explain its findings, including its analysis of technical material and its reasons for rejecting inconvenient facts.[5] Such explanations help to ensure that the agency has considered the statutory factors and paid attention to the parties' arguments, and these findings also facilitate judicial review. But a jury verdict is essentially opaque on these details, so there is more room for mistaken findings, illogical compromises, or private agendas to distort the outcome.

(c) *Consistency*. An agency typically builds up a body of precedents that it is expected to follow—or at least it must explain why it is departing from precedent. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) ("an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice'"); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2016) (an agency must "display awareness that it *is* changing position" and "show that there are good reasons for the new policy"). This practice gives rise to a relatively stable case law gloss, and regulated entities can and do rely

[5] *See, e.g.*, *FCC v. Prometheus Radio Project,* 141 S. Ct. 1150, 1158 (2021) (a court "ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision").

on that case law in making private decisions. In contrast, juries are not static bodies, and so any consistency is attainable only through the instructions and rulings of the trial judge. A judge presumably would not instruct a jury to adhere to agency precedents (nor to internal agency guidance documents). Jury decision making in the absence of such agency "internal law" would make the regime much less predictable than it is now.

(d) *Political accountability*. The public and the courts can hold an agency accountable for its decisions, but it cannot expect such accountability from citizens who briefly compose a jury and then return to private life.

The Fifth Circuit did not even examine the question of whether the sizable body of precedent supporting administrative adjudication, without being constrained by the Seventh Amendment, has served the public well. Nor did respondents in their brief in opposition. But a longstanding legal regime should not be overturned without serious inquiry into the consequences of doing so. Here, the reasons to adhere to precedent are compelling, and the strength of that precedent confirms that the jury trial ruling below cannot stand.

CONCLUSION

For the foregoing reasons and those set forth in the briefs of petitioner, the judgment below should be reversed, and the case remanded to the Fifth Circuit for the entry of judgment in favor of petitioner.

Respectfully Submitted,

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