No. 22-859

IN THE

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

GEORGE R. JARKESY, JR. AND PATRIOT28, L.L.C.,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

This amicus brief addresses the following question only:

Whether administrative law judges who adjudicate claims for civil penalties may enjoy three levels of for-cause removal protection.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus opposing the accumulation of power in any one governmental branch, contrary to the Constitution's careful separation of powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

WLF's Legal Studies Division also regularly publishes papers highlighting unconstitutional agency structures. *See, e.g.*, Steven Cernak, *FTC's Challenge To Altria-JUUL Transaction: Antitrust And Constitutional Issues Hiding In Plain Sight*, WLF LEGAL BACKGROUNDER (Sept. 7, 2022); Lawrence S. Ebner, *Unconstitutionally Appointed Administrative Law Judges Continue To Haunt SEC*, WLF LEGAL BACKGROUNDER (Feb. 24, 2017). WLF believes that this Court should rein in these unconstitutional agency structures.

INTRODUCTION

At the early stages of this saga, both the Securities and Exchange Commission and the District of Columbia Circuit ignored the Constitution's provisions demanding a clear separation of powers. First, the SEC followed an unconstitutional method for appointing administrative law judges. Then, the

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* No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission.

D.C. Circuit held that Respondents could not challenge the structure of the SEC or its procedures through suit in district court. Rather, the D.C. Circuit said that such challenges must be brought only on petition for review. This Court later reversed those decisions and reminded the SEC and the D.C. Circuit that the separation of powers is key to our constitutional republic and those principles cannot be ignored for the sake of convenience.

The Fifth Circuit, of course, was on the correct side of the split in authority that this Court resolved when permitting challenges to the SEC's and Federal Trade Commission's structures and procedures in district court. The en banc Fifth Circuit realized that the Constitution gives only federal courts the power to say what the law is, not unelected federal bureaucrats in Washington. Yet the SEC did not learn its lesson after losing before this Court in *Axon Enter. Inc., v. FTC*, 598 U.S. 175 (2023). Rather, it continues to defend statutes that blatantly violate the Constitution's careful separation of powers.

Here, the Fifth Circuit found three constitutional defects with the SEC's structure and procedures. To prevail, the SEC must show that all three holdings are wrong. If even one is correct, this Court should affirm the Fifth Circuit's order vacating the SEC's order and remand for further proceedings consistent with the Constitution.

One of the three questions presented is very straightforward and this Court can easily affirm the Fifth Circuit's holding without breaking any new ground. This Court's precedent makes clear that multiple levels of for-cause removal protection violate

Article II; the President must be able to control officers of the United States during their tenure in office. But SEC ALJs—who this Court held are officers of the United States—enjoy at least three levels of for-cause removal protection. They therefore lack any meaningful presidential oversight. This Court's removal-power precedent, along with its appointments-power precedent, thus confirms that the current SEC structure violates Article II. This Court can affirm the Fifth Circuit's decision on that ground.

This Court should start and stop with that question presented. There is no need for the Court to delve into the complicated questions presented about the Seventh Amendment and the nondelegation doctrine. Affirming the Fifth Circuit's decision on the three levels of for-cause removal protection that SEC ALJ's enjoy suffices to dispose of the controversy before the Court.

This Court often considers cases in which there are multiple questions presented. Yet it rarely answers all those questions when resolving one suffices to resolve the case before the Court. Bluntly, the briefing before this Court is inadequate to resolve the other two questions in a way that would clarify the law. Those questions are complex and raise too many issues about the structure of federal agencies to answer without proper briefing. What's more, Respondents did not preserve those issues, the Fifth Circuit did not rule on those issues, and the SEC knows that exploiting the procedural posture of this case is its only chance at prevailing.

In short, it is hard to imagine an opinion answering all three questions presented that does not cause confusion in the lower courts about the constitutionality of some administrative procedures. Thus, discretion is the better part of valor when deciding the scope of this Court's decision affirming the Fifth Circuit's correct decision to vacate the SEC's order.

STATEMENT

I. STATUTORY BACKGROUND

The SEC consists of five members appointed by the President with the advice and consent of the Senate. No statutory provision outlines when SEC Commissioners may be removed, but this Court has assumed that they may be removed only for cause. *Free Enter. Fund*, 561 U.S. at 487. The SEC may enforce securities laws by bringing civil actions in federal district court, 15 U.S.C. §§ 77t, 78u(d), 80b-9, or by instituting in-house proceedings. *Id.* §§ 77h-1, 78u-2, 78u-3, 80b-3. Parties that lose before the SEC may challenge that result only by petitioning for review in a court of appeals. *Id.* § 78y(a)(1).

When instituting in-house proceedings, the SEC may have an ALJ conduct the initial hearing. *See* 5 U.S.C. § 556(b). These ALJs may be removed from office only (1) "for good cause established and determined by the Merit Systems Protection Board," *Id.* § 7521, (2) for national-security reasons, *id.* § 7532(b), or (3) as part of a reduction in force. *See generally id.* § 3502. MSPB members, in turn, are removable "only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202(d).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

George Jarkesy launched two hedge funds with Patriot28, L.L.C. serving as the funds' investment adviser. The funds managed about $24 million in assets. In 2013, the SEC began in-house proceedings against Respondents, who sought to enjoin the proceedings by suing in the District Court for the District of Columbia. The case was dismissed, and the D.C. Circuit affirmed, erroneously holding that Respondents could bring their claims only through a petition for review.

An SEC ALJ then held an evidentiary hearing and found that Respondents violated various securities laws. After *Lucia* held that SEC ALJs were not properly appointed, Respondents waived a new hearing, and the SEC upheld the ALJ's decision. The Fifth Circuit granted Respondents' petition for review, vacated the SEC's decision, and remanded for further proceedings. The Fifth Circuit held that (1) SEC ALJs' multiple layers of for-cause removal protection violate Article II; (2) the SEC's ability to choose whether to bring cases in-house or in district court violates the nondelegation doctrine; and (3) the SEC's bringing administrative proceedings seeking civil penalties violates the Seventh Amendment. This Court granted the SEC's certiorari petition on all three of those questions.

SUMMARY OF ARGUMENT

I. This Court has recently recognized that Article II gives the President the power to supervise both principal officers and inferior officers. The ability

to remove ineffective officers is at the core of the President's ability to supervise officers. That is why in *Free Enterprise Fund* this Court found that two layers of for-cause removal protection for Public Company Accounting Oversight Board (PCAOB) members violated Article II.

The statutory framework for removing SEC ALJs provides them with more for-cause removal protection than the statutory scheme in *Free Enterprise Fund*. There, SEC commissioners and PCAOB members both enjoyed for-cause removal protection. Here, SEC commissions, MSPB members, and SEC ALJs all enjoy for-cause removal protection. That means that there are at least three layers of for-cause removal protection. This inhibits the President's ability to supervise officers of the United States. Thus, the statutory scheme is unconstitutional, and this Court can affirm the Fifth Circuit's decision on that basis alone.

II. When Congress provided tenure protections for SEC commissioners, MSPB members, and SEC ALJs, it decided not to include a severability clause allowing this Court to sever those protections from the rest of the statutory scheme. This was a conscious decision. Congress did not want to return to the days where ALJs knew that a ruling against their agency was a sure way to get a pink slip the next day.

Given that deciding whether ALJs can be removed from office is a small part of the MSPB's docket, it would also make little sense to sever the tenure protections for MSPB members. Most of the MSPB's work involves other areas of federal

employment law. So severing those tenure protections would be an overbroad remedy.

Congress wanted to choose the remedy if the three levels of for-cause removal protection for SEC ALJs were found to be unconstitutional. And that is its prerogative as the body charged with making our laws. This Court should not overstep its duty of saying what the law is by rewriting the statutes in a way that conflicts with Congress's wishes.

ARGUMENT

I. THREE LAYERS OF FOR-CAUSE REMOVAL PROTECTION FOR SEC ALJS VIOLATES THE CONSTITUTION.

Free Enterprise Fund is dispositive and requires finding that SEC ALJs enjoy unconstitutional removal protection. Again, with rare exceptions tied to national security or a reduction in force, SEC ALJs may be removed "only for good cause established and determined by the [MSPB]." 5 U.S.C. § 7521(a). This is one level of for-cause removal protection. There are, however, at least two more levels of for-cause removal protection. The President may remove MSPB members "only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202(d). This is the second level of for-cause removal protection. The President may also remove SEC commissioners only for cause. *See Free Enter. Fund*, 561 U.S. at 487. This is the third level of for-cause removal protection.

So this case is even easier than *Free Enterprise Fund*. There, an accounting firm challenged the

PCAOB's structure. The PCAOB included five members, appointed by the SEC to staggered five-year terms. *Free Enter. Fund*, 561 U.S. at 484. PCAOB members were inferior officers under the Appointments Clause. *Id.* at 510. As the SEC concedes (at 16), its ALJs are also inferior officers. The SEC could remove PCAOB members only for cause. *Id.* at 486 (citation omitted). This was the first level of for-cause removal protection and is also present here.

That was not the only protection PCAOB members enjoyed. The President could not remove SEC commissioners without cause. *Free Enter. Fund*, 561 U.S. at 487 (citations omitted). This was the second level of for-cause removal protection and is also present here.

But SEC ALJs enjoy more protection than did PCAOB members. MSPB members also have for-cause removal protection. *See* 5 U.S.C. § 1202(d). This is the third level of for-cause removal protection that SEC ALJs enjoy. (The Fifth Circuit declined to decide exactly how many levels of for-cause removal protection SEC ALJs enjoy; it found it sufficient that they have at least two layers of for-cause removal protection. *See* Pet. App. 30a-31a.)

Some scholars suggest that SEC ALJs enjoy four layers of for-cause removal protection. *See* Linda D. Jellum, *"You're Fired!" Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 Geo. Mason L. Rev. 705, 714 (2019) (graphic showing this). But for simplicity, this brief assumes that there are "only" three layers of for-cause removal protection.

"[T]he dual for-cause limitations on the removal of [PCAOB] members," the Court explained, "contravene[d] the Constitution's separation of powers." *Free Enter. Fund*, 561 U.S. at 492. The two levels of protection "transform[ed]" the PCAOB's independence. *Id.* at 496. And they deprived the President—and those he supervised—of "full control over the" PCAOB. *Id.* This "stripped" the President of "his ability to execute the laws—by holding his subordinates accountable for their conduct." *Id.*

The three layers of for-cause removal protection for SEC ALJs similarly strips the President of the ability to hold inferior officers accountable. He cannot remove the ALJs directly. Nor can he remove them indirectly by demanding that the MSPB or SEC remove them. So the President cannot execute the securities laws under this structure.

This "arrangement is contrary to Article II's vesting of the executive power in the President." *Free Enter. Fund*, 561 U.S. at 496. The President cannot decide whether SEC ALJs "are abusing their offices or neglecting their duties." *Id.* SEC and MSPB members—whom the President can remove only for cause—make that call. This lack of oversight violates the principle that there is a single President who must take care that the laws be faithfully executed. *See id.* at 496-97 (citing *Clinton v. Jones*, 520 U.S. 681, 712-13 (1997) (Breyer, J., concurring)).

Free Enterprise Fund also distinguished prior cases that upheld some for-cause removal protections. For example, *Humphrey's Ex'r v. United States* upheld for-cause removal protection for FTC commissioners. 295 U.S. 602, 621-32 (1935). The

Court explained that Congress can allow "quasi-legislative and quasi-judicial" multi-member agencies to operate independently. *Free Enter. Fund*, 561 U.S. at 493 (quotation omitted). In other limited circumstances, the Court held that "Congress [can] provide tenure protections to certain inferior officers with narrowly defined duties." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020) (citations omitted).

In *Free Enterprise Fund*, the Court found inapposite cases in which it had upheld for-cause removal protections because the PCAOB's dual for-cause removal protection was "novel." *Free Enter. Fund*, 561 U.S. at 496. Such dual-layer protection does "not merely add" to an officer's agency. *Id.* Rather, it makes officers unaccountable to anyone—including the President. Article II does not permit that structure.

Put differently, the "narrow exception[s]" the Court has recognized do "not extend to two layers of for-cause tenure protection." *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1117 (D.C. Cir. 2021) (Rao, J., concurring and dissenting). So "statutory insulation of ALJs with two layers of for-cause removal protection impedes the President's control over execution of the laws and violates the Constitution's structure of separate and independent powers." *Id.* at 1117-18.

Again, here SEC ALJs enjoy three layers of for-cause removal protection. That is a 50% increase in the protection that PCAOB members enjoyed in *Free Enterprise Fund* and that, as Judge Rao explained in *Fleming*, violates Article II. If two layers of for-cause

removal protection falls outside the narrow tenue protections that the Constitution permits, three layers of for-cause removal protection does also.

Accepting three layers of for-cause removal protection could "multipl[y]" the "dispersion of responsibility." *Free Enter. Fund*, 561 U.S. at 497. There would be no stopping at even ten levels of for-cause removal protection. This would essentially eliminate the President's supervision of officers. Once appointed, an officer could stay for life. If the Framers wanted this structure, they knew how to establish it. *See* U.S. Const. art. III, § 1 (judges "hold their Offices during good Behaviour"). They chose a different path.

This case shows the potential for creep towards ten-level for-cause removal protection. As the former chair of the American Bar Association's Section of Administrative Law and Regulatory Practice notes, SEC ALJs may enjoy four layers of for-cause removal protection. *See* Jellum, 26 Geo. Mason L. Rev. at 714 (including the for-cause removal protection that MSPB ALJs have as the fourth level of for-cause removal protection). It is not hard to envision adding layers to the chart that she provides, each representing another level of for-cause removal protection. This Court should stop inferior officers from enjoying multiple levels of for-cause removal protection and affirm the Fifth Circuit's decision on that basis.

II. THE REMOVAL PROTECTIONS ARE NOT SEVERABLE.

After declaring a removal restriction unconstitutional, this Court conducts a severability

analysis to determine the "appropriate remedy." *Seila Law*, 140 S. Ct. at 2207. Here, the appropriate remedy is to vacate the SEC's order and remand for proceedings consistent with the Constitution. That route better recognizes the critical role that three layers of for-cause removal protection play in the statutory scheme rather than the alternative of rewriting the statutory scheme that Congress devised.

The "inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress" if the unconstitutional provision is excised. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). A statutory provision is not severable "unless it appears both that, standing alone, legal effect can be given to it and that [Congress] intended the provision to stand" if other statutory provisions were declared unconstitutional. *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924).

Just because a statute may be "fully operative" without the unconstitutional provisions, they are not severable if "rewrit[ing]" the statutory scheme in a constitutional manner would give the statutory scheme an effect different than that Congress intended. *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018). To make this determination, courts do not look at the statutory provision in isolation. Rather, they must look at the whole statutory scheme. *See id.*

When courts rewrite a statute to have a different effect than the purpose that Congress intended, they are acting as superlegislatures by making new laws that substitute the courts' judgment for the judgment of the political branches. *See United*

States v. Reese, 92 U.S. 214, 221 (1875). This conflicts with the careful separation of powers, under which Congress makes the laws and courts "say what the law is." *Moore v. Harper*, 600 U.S. 1, 19 (2023) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). In other words, courts cannot use their "remedial powers to circumvent the intent of the legislature." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (cleaned up).

Justice Breyer has already said what Congress intended by enacting this statutory scheme. "The substantial independence that the Administrative Procedure Act's removal protections provide to [ALJs] is a central part of the [APA's] overall scheme." *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring). Before the APA's passage, in-house adjudicators were agency employees under the Classification Act of 1923. *Ramspeck v. Fed. Trial Examiners Conf.*, 345 U.S. 128, 130 (1953) (citation omitted). Each agency rated the employees, and those ratings determined the employees' classifications. *Id.* This meant that the employees' salaries and promotion potential were also determined by their agency rating. *Id.*

Many people did not like this system. They believed that the process made the employees "mere tools of the agenc[ies] and subservient to the agency heads." *Ramspeck*, 345 U.S. at 131. Thus, the opponents of the system argued that the employees lacked the "independent judgment" necessary for a "fair and competent hearing." *Butz v. Economou*, 438 U.S. 478, 513-14 (1978).

By passing the APA, Congress "vest[ed] control of [in-house adjudicators'] compensation, promotion

and tenure in the Civil Service Commission" so they could be "semi-independent." *Ramspeck*, 345 U.S. at 132. So, originally, the employees could be removed "by the agency in which they are employed only for good cause established and determined by the Civil Service Commission." Administrative Procedure Act, Pub. L. No. 79-404, § 11, 60 Stat. 237, 244 (1946). That does not mean, however, that the employees enjoyed multiple levels of for-cause removal protection. At the time, the President could remove members of the Civil Service Commission at will. *See* 5 U.S.C. § 632 (1946).

That regime lasted for about three decades. In 1978, however, Congress dissolved the Civil Service Commission. Three new agencies—the Office of Personnel Management, the Federal Labor Relations Authority, and the MSPB—were given the powers formerly held by the Civil Service Commission. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 201, 202, 701, 92 Stat. 1111, 1118-31, 1191-216.

In creating the MSPB, Congress intended to "confer upon its members a tenure akin to that of the Federal judiciary." Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 Colum. L. Rev. 1, 66 (2021) (quoting Civil Service Reform: Hearings on H.R. 11280 Before the H. Comm. on Post Off. & Civ. Serv., 95th Cong. 824 (1978)); *see also* 5 C.F.R. § 1200.1 (The MSPB "operates like a court."). That explains why the President may remove MSPB members only for "inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d). It also explains why agencies may remove ALJs "only for good cause established and determined by the [MSPB]." *Id.* § 7521(a).

Thus, Congress thought that the removal protections for ALJs and MSPB members were critical to advancing its purpose. Congress wanted the public to view ALJs as neural arbiters who were not subject to pressure by agency heads. It also wanted MSPB members to have tenure protection like that provided to Article III judges. That helps explain why the Civil Service Reform Act is missing a severability clause. If this Court were to sever the removal protections, it would be "tamper[ing] with" the statutory scheme that Congress carefully crafted when it abolished the Civil Service Commission. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995).

Eliminating removal protection for ALJs would lead to their being more beholden to their agencies. Some recent high-profile examples show that ALJs are sometimes able to act independently because of the removal protection. For example, one FTC ALJ twice ruled against the FTC in high-profile cases. *See generally In re Illumina, Inc.*, 2022 WL 4199859 (FTC Sept. 9, 2022); *In re Altria Group, Inc.*, 2022 WL 622476 (FTC Feb. 15, 2022). These decisions suggest that at least some ALJs fairly adjudicate agencies' in-house proceedings against regulated parties.

But if the Court were to say that ALJs are removable without cause by agencies, decisions adverse to agencies will disappear. ALJs will understand that if they rule against their bosses even once, they could be fired. So even if the evidence supports an ALJ's decision favoring the agency, the appearance of a conflict will remain.

The statutory history shows that Congress does not want this Court adopting a remedy if the removal protection for ALJs were held to be unconstitutional. Rather, Congress wanted the opportunity to choose which remedy to adopt if the Court deems the removal protection unconstitutional. This could include requiring agencies to sue in federal court. It also could include establishing an independent adjudicative body. *See, e.g.*, D.C. Code § 2–1831.02.

Congress considered this latter option when it provided ALJs' predecessors with for-cause removal protection. *Ramspeck*, 345 U.S. at 132 n.2. But it chose a different path, that of for-cause removal protection. Nothing in the APA's history, other statutes, or legislative history suggests that Congress's second choice was to have no tenure protections for ALJs. Again, that is why a severability clause is lacking from the relevant statutes. Congress wanted to give itself the option of choosing the appropriate remedy if this Court were to declare the removal protection unconstitutional. What it did not want—but would happen if this Court severed the ALJ removal protection—is for ALJs to revert to being agency pawns.

Eliminating the removal protection for MSPB members makes even less sense under this Court's severability principles. First, it would not solve the constitutional defect because even two levels of for-cause removal protection would violate the Constitution. But even if it were to solve the constitutional issue, allowing the President to remove MSPB members at will would not be narrowly tailored to the constitutional problem. *See United*

States v. Arthrex, Inc., 141 S. Ct. 1970, 1986 (2021) (citation omitted). Besides deciding whether an agency can fire ALJs, the MSPB (at least when it has a quorum) performs many other adjudicatory functions. For example, it decides appeals from civil-service disputes and tries cases brought by the Office of Special Counsel. *See* 5 C.F.R. § 1201.1 *et seq*. So giving the President unlimited power to remove MSPB members would be overbroad given the constitutional issues with SEC ALJs enjoying three levels of for-cause removal protection.

Thus, this case is not like removal-restriction cases in which "Congress, faced with the limitations imposed by the Constitution, would have preferred" an officer "removable at will" to "no [officer] at all." *Seila Law*, 140 S. Ct. at 2209 (quoting *Free Enter. Fund*, 561 U.S. at 509). Rather, the Congresses that passed the relevant statutes would have thought it "backwards" to hold that the removal protection provisions were severable. *Murphy*, 138 S. Ct. at 1483.

Because the removal protections are not severable from the rest of the statutory scheme, the Court should affirm the Fifth Circuit's order vacating the SEC's order and remand for proceedings consistent with the Constitution. It should decline to address whether potential actions on remand would violate the Seventh Amendment, the nondelegation doctrine, the Due Process Clause, or other constitutional provisions. Those issues can wait for a future case.

CONCLUSION

This Court should affirm because SEC ALJs enjoy unconstitutional removal protection and should not answer the other questions presented.

Respectfully submitted,

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