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 *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE NATIONAL FEDERATION OF INDEPENDENT SMALL BUSINESS LEGAL CENTER, INC., AND BUSINESS ROUNDTABLE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the Nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, NFIB Legal Center frequently files *amicus curiae* briefs in cases that will impact small businesses.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

Business Roundtable represents the chief executive officers ("CEOs") of America's leading companies. The CEO members lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. gross domestic product. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and Business Roundtable members develop and advocate for policies to promote a thriving U.S. economy and expanded opportunity for all. Business Roundtable participates in litigation as *amicus curiae* when important business interests are at stake.

Businesses, and corporate officers and directors, are frequent respondents in administrative enforcement actions brought by the Securities and Exchange Commission ("SEC") and by other federal agencies that regulate their day-to-day activities nationwide. As advocates for businesses large and small, the Chamber, NFIB Legal Center, and Business Roundtable have a significant interest in ensuring that those proceedings respect the Constitution's structural limitations. Specifically, they submit this brief to ensure that Respondents are afforded their Seventh Amendment right to a jury trial and that the agency officials who conduct such proceedings remain accountable to the President under Article II of the Constitution.[2]

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[2] The Chamber, NFIB Legal Center, and Business Roundtable take no position on whether the statutory scheme violates the nondelegation doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case provides the Court with another opportunity to reaffirm the structural limitations of the Constitution. The Framers recognized that "structural protections against abuse of power [are] critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). To them, the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003). Accordingly, they separated the legislative and executive powers from the judicial; devised a system in which a unitary executive would remain accountable to the people; and granted the right to trial by jury as a further check against government overreach.

The growth of the administrative state has eroded these safeguards. Like other financial regulatory agencies, the SEC "acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2202 n.8 (2020). Yet the Constitution prevents one branch of government from exercising such a conflation of powers, no matter whether the political branches believed, at one time or another, that such an administrative arrangement might prove more efficient than what the Constitution requires. *See Bowsher*, 478 U.S. at 736.

In the decision below, the Fifth Circuit properly held that the SEC's in-house proceeding was riddled with constitutional infirmities. Most glaringly, the SEC's jury-less enforcement action violated the Seventh Amendment. Since the Founding, the "fundamental" right to trial by jury has served as "one of our most vital barriers to governmental arbitrariness." *Reid v. Covert*, 354 U.S. 1, 9–10 (1957) (plurality op.). Indeed, the American people insisted upon the Seventh Amendment precisely because they feared that the federal government might dispense with the jury in seeking to enforce federal law.

That fear was born from experience. In the 1760s, British authorities expanded admiralty jurisdiction to enforce unpopular Acts of Parliament without the juries that served as a valuable check against government overreach. The Declaration of Independence identified that deprivation of the jury right among its grievances against the Crown, and the Constitution secured that right in criminal cases. *See* U.S. Const. art. III, § 2, cl. 3. But the people demanded more. They refused to tolerate the risk that the federal government might pursue enforcement actions for monetary penalties before jury-less tribunals—just as the British had done in the past. The Seventh Amendment provided that guarantee.

Nevertheless, the SEC here did precisely what the Seventh Amendment said could not be done. That is, it imposed civil penalties upon Respondents without affording them the opportunity for the judgment of a jury of their peers. It is for Respondents—not the SEC—to choose whether a jury or an administrative law judge ("ALJ") should decide their fate. By

vacating the SEC's jury-less order, the decision below vindicated that right and honored the original public meaning of the Seventh Amendment.

The Fifth Circuit also correctly held that the multi-layer removal restrictions for SEC ALJs violate the limits of Article II. Under the Constitution, "the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law*, 140 S. Ct. at 2191 (quoting U.S. Const. art. II, § 1, cl. 1, and U.S. Const. art. II, § 3). That power includes the general "prerogative to remove executive officials" who wield the President's authority. *Id.* at 2197. SEC ALJs qualify as such "Officers of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (quoting U.S. Const. art. II, § 2, cl. 2). Yet Congress has insulated those executive officers from presidential supervision by at least two levels of for-cause tenure protection. That statutory scheme unconstitutionally "subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010). It is therefore "incompatible with the Constitution's separation of powers" and cannot stand. *Id.*

In short, the Constitution entitles Respondents to an adjudication overseen by an accountable executive officer and the right to submit the matter to a jury of their peers. In so holding, the Fifth Circuit faithfully applied this Court's precedents and the original public meaning of the Constitution. This Court should affirm both conclusions.

ARGUMENT

I. The Decision Below Enforces The Original Public Meaning Of The Seventh Amendment.

The Fifth Circuit properly concluded that the structure of the SEC's enforcement scheme denied Respondents their Seventh Amendment right of trial by jury. That decision flows from this Court's precedents and the original public meaning of the Seventh Amendment, which preserves the people's traditional role in checking the government's exercise of coercive power. Indeed, the SEC's effort to levy a significant monetary penalty against Respondents without the jury resembles the very practice that the Crown employed when it expanded the jurisdiction of colonial admiralty courts in the 1760s. The expansion of those jury-less tribunals helped trigger the American Revolution, and it ultimately resulted in the preservation of the civil jury in the Bill of Rights.

A. Compelled Adjudication In The SEC's Jury-Less Administrative Courts Violates The Seventh Amendment.

1. For Centuries, The Right To A Jury At Common Law Has Served As An Essential Check On Government Overreach.

The common law jury dates back to at least the twelfth century, originating when "Henry II introduced the principle that 'instead of the judicial combat [the accused] might put himself upon the grand assize,' a forerunner of jury trial." John H. Langbein et al., *History of the Common Law: The Development of Anglo-American Legal Institutions* 100

(2009) (quoting F. W. Maitland, *The Forms of Actions at Common Law* 22 (A. H. Chaytor & W. J. Whittaker eds., 1909)). Not long after, that principle made its way into Magna Carta itself. *See United States v. Booker*, 543 U.S. 220, 239 (2005). Clause 39 of Magna Carta declares that "[n]o free man shall be seized, imprisoned, dispossessed, outlawed, exiled or ruined in any way, nor in any way proceeded against, except by the lawful judgement of his peers." *The contents of Magna Carta*, UK Parliament, https://bit.ly/3LZONgP (last visited Oct. 17, 2023). It was from that Clause that the "modern model of trial by jury" developed by the sixteenth century. James Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* 3 (2006).

Though civil juries became accepted practice in common law courts, that practice did not extend to the courts of equity or to the infamous Star Chamber. *See* Philip Hamburger, *Is Administrative Law Unlawful?* 148–49 (2014). But that reality did little to diminish the jury's central role in the minds of Englishmen. To William Blackstone, the right to a jury trial at common law ranked sacrosanct because a person's rights and property hinged on "the unanimous consent of twelve of his neighbours and equals," not just government functionaries. 3 William Blackstone, *Commentaries on the Laws of England* 379 (1768); *see also Blakely v. Washington*, 542 U.S. 296, 306 (2004) (recognizing the jury as the "circuitbreaker in the State's machinery of justice"). The English courts similarly recognized that common-law suits—including those for civil penalties—were tried before juries. *See, e.g.*, *Isabell Fortescue's Case*, 145 Eng. Rep. 324, 324–25 (Ct. Exch. 1611); *Calcraft v. Gibbs*, 101 Eng. Rep. 11, 11–12 (K.B.

1792); *Att'y Gen. v. Brewster*, 145 Eng. Rep. 966, 966–67 (Ct. Exch. 1795); *see also Atcheson v. Everitt*, 98 Eng. Rep. 1142, 1142–43 (K.B. 1775) (characterizing civil penalty suit as an "action of debt," which was traditionally tried in the courts of law).

Like their British brethren, the American colonists viewed civil juries as essential to safeguard their fundamental rights. The Plymouth Colony included the right to trial by jury in its early laws. *See Records of the Colony of New Plymouth in New England: Laws, 1623–1682*, at 3 (David Pulsifer ed., 1861). Virginia also provided the right to a jury in civil cases. *See* Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, in *The Jury System in America: A Critical Overview* 23, 24 (Rita J. Simon ed., 1975). And other colonies followed suit. *See id.* at 25. Such widespread adoption of the civil jury reinforced the Anglo-American principle that the jury served as a central check against government overreach.

2. The Crown's Decision To Expand Jury-Less Admiralty Courts Sparked Fierce Resistance In The Colonies.

As the Thirteen Colonies approached independence, the Crown understood that the jury system threatened the efficient enforcement of unpopular parliamentary edicts. In the 1760s, Parliament responded to adverse verdicts by expanding the jurisdiction of the jury-less admiralty courts—which had traditionally addressed maritime affairs—to a range of cases traditionally tried in common law courts. *See* Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 12–13, 63, 145–46, 206–08 (1960). The Stamp Act of 1765, for

instance, required certain printed documents in the colonies to bear a revenue stamp, with violations to be tried in the admiralty courts. *See* Hamburger, *supra*, at 150. These admiralty proceedings were designed to "circumvent the right" to a civil jury trial, *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 420 (9th Cir. 1979), and to deprive colonists of that right in cases where Crown prosecutors sought significant penalties, including monetary fines, *see* Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 151 n.28 (1996) (noting that admiralty court proceedings resulted in "forfeitures and fines").

In response, the voters of Boston ranked "the Jurisdiction of the Admiralty"—next to taxation without representation—as their "greatest Grievance." 1 John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* 177 (1986) (citation omitted). John Adams captured that mood, declaring that "the most cruel" and "unjust Innovation" of the Stamp Act was "the alarming Extension of the Powers of Courts of Admiralty . . . . In these Courts, one Judge alone, presides. No Juries, have any Concern there." *Letter from John Adams to Ebenezer Thayer* (Sept. 24, 1765), bit.ly/3zl0Ezn (last visited Oct. 17, 2023).

Other colonial leaders harbored similar feelings toward the jury-less tribunals. Pennsylvania's Assembly, for instance, protested that "the vesting and Authority in the Courts of Admiralty to decide in Suits relating to the Stamp Duty, and other Matters, foreign to their proper Jurisdiction, is highly dangerous to the Liberties of his Majesty['s] American Subjects,

contrary to Magna Charta, the great Charter and Fountain of English Liberty, and destructive of one of their most darling and acknowledged Rights, that of Trials by Juries." *Resolves of the Pennsylvania Assembly on the Stamp Act*, Sept. 21, 1765, bit.ly/3ZJrjAp (last visited Oct. 17, 2023). Maryland's legislature echoed that view, declaring that the expansion of admiralty jurisdiction "render[ed] the Subject insecure in his Liberty and Property." Reid, *supra*, at 48–49 (quoting *Maryland Resolves*, Sept. 28, 1765). The legislatures of New York and Virginia issued similar resolutions. *See id.* at 49. And a Massachusetts-based newspaper essayist asked: "[h]ow are our new laws to be adjudged and executed? Is not our property . . . to be thrown into a prerogative court? a court of admiralty? and there to be adjudged, forfeited, and condemned without a jury?" Hamburger, *supra*, at 151 (alterations in original) (quoting "To the Printers," Boston Gazette and Country Journal (July 15, 1765)). Colonial leaders would not accept the Crown's efforts to encroach on what they regarded as a protection essential to their liberty.

In the first collective action against British policy, nine colonies formed the Stamp Act Congress of 1765 in protest. That Congress objected to the jury-less admiralty courts, resolving that "trial by jury is the inherent and invaluable right of every British subject in these colonies," and "by extending the jurisdiction of the courts of Admiralty beyond its ancient limits," the Stamp Act and similar acts "have a manifest tendency to subvert the rights and liberties of the colonists." *Resolutions of the Stamp Act Congress* (Oct. 19, 1765).

As the unrest in the colonies persisted, the Crown's continued reliance on admiralty courts pushed the colonists toward declaring independence. The First Continental Congress, for instance, raised formal objections to the Crown's jury-less tribunals. *See* 1 *Journals of the Continental Congress 1774–1789*, at 69 (Oct. 14, 1774). The Second Continental Congress did the same, complaining that colonists were deprived "of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property." *The Declaration of the Causes and Necessity of Taking Up Arms* (1775), reprinted in *Select Charters and other Documents Illustrative of American History 1606–1775*, at 374, 376 (William MacDonald ed., 1904). And the Declaration of Independence identified "depriving [the colonists] in many cases, of the benefits of Trial by Jury," among its list of grievances against the King. *The Declaration of Independence* para. 20 (U.S. 1776). Americans thus understood the vital importance of the jury, and the Crown's decision to channel enforcement actions away from them served as a major catalyst for the Revolutionary War. *See* Ubbelohde, *supra*, at 209.

3. At The Founding, The People Insisted On The Civil Jury Right's Inclusion In The Bill of Rights.

Despite this history, the civil jury right was not initially included in the Constitution. Several Framers proposed such a guarantee at the Convention, but they could not agree how to phrase it, given local variation among the States. *See Colgrove v. Battin*, 413 U.S. 149, 153 & n.8 (1973) (summarizing the history). According to George Washington, the Convention left the issue "as a matter of future

adjustment" because of "the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States." *Letter from George Washington to the Marquis de Lafayette* (Apr. 28, 1788), https://bit.ly/46i0SWo (last visited Oct. 17, 2023).

The Constitution's omission of the civil jury right proved a stumbling block for ratification. As Alexander Hamilton admitted, "[t]he objection to the plan of the convention, which has met with most success in [New York], and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases." The Federalist No. 83, at 494 (Alexander Hamilton) (emphasis omitted). The people, through their delegates to the ratifying conventions, recalled the Crown's efforts to circumvent civil juries for administrative forums to deprive them of their property, and they feared that, without an express constitutional constraint, the federal government might be tempted to follow suit.

Concern over the lack of civil-jury protections rang loud in the Anti-Federalist charge. For instance, in a speech before the Maryland House of Delegates, Luther Martin explained that jury trials had "long been considered the surest barrier against arbitrary power, and the palladium of liberty." Luther Martin, *Genuine Information* (1787), reprinted in 3 *The Records of the Federal Convention of 1787*, at 172, 221 (Max Farrand ed., 1911) (italics omitted). Martin thus faulted the proposed Constitution for stripping the citizenry of that right, "not only in a great variety of questions between individual and individual," but also

in cases "arising under the laws of the United States, or the execution of those laws." *Id.* at 222 (italics omitted). The latter disputes—those "between government and its officers on the one part, and the subject or citizen on the other"—were the "very cases where, of all others, [the jury trial] was most essential for [the people's] liberty." *Id.* (italics omitted). Accordingly, Martin called on the House of Delegates not to adopt the proposed federal Constitution that had failed to "sacredly guard[] and preserve[]" that fundamental right which the "several State constitutions so cautiously secured." *Id.* at 221–22 (italics omitted).[3]

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[3] By the Founding, at least ten of the thirteen States had explicitly secured the right to trial by jury in their respective constitutions. *See* N.J. Const. art. XXII (1776); Md. Const. art. III (1776); Pa. Const., Declaration of Rights, art. XI (1776); Va. Const., Bill of Rights, § 11 (1776); N.C. Const., Declaration of Rights, art. XIV (1776); N.Y. Const. art. XLI (1777); S.C. Const. art. XLI (1778); Ga. Const. art. LXI (1777); Mass. Const. art. XV (1780); N.H. Const., Bill of Rights, art. XX (1784). Delaware had similarly imported the "common law of England," Del. Const. art. 25 (1776), and exalted the right of "trial by jury" as "one of the greatest securities of the lives, liberties and estates of the people," Del. Declaration of Rights, § 13 (1776). The jury-trial right was also protected in Rhode Island, which declared in its ratification of the Constitution that "the ancient trial by jury, as hath been exercised by us and our ancestors," ought "to remain sacred and inviolable." *Ratification of the Constitution by the Convention of the State of Rhode Island and Providence Plantations* (1790), reprinted in 1 *Debates on the Federal Constitution* 334, 334 (J. Elliot ed., 1836). And in Connecticut, "the trial by jury extend[ed] in practice further" even than in most of the States that had constitutionalized the right. The Federalist No. 83, at 502 (Alexander Hamilton) (italics omitted).

Others similarly lamented that "the trial by jury" had ostensibly been "taken away in civil cases." *Cincinnatus II: To James Wilson, Esquire* (Nov. 8, 1787), bit.ly/3Glv74b (last visited Oct. 17, 2023). And they viewed this deprivation as no small matter. Like Martin, the Anti-Federalists regarded "trial by jury" as "the democratic branch of the judiciary power—more necessary than representatives in the legislature." *Essays by a Farmer, No. 4* (Mar. 21, 1788), reprinted in 5 *The Complete Anti-Federalist* 36, 38 (Herbert J. Storing ed., 1981) (emphasis omitted). The Anti-Federalists averred that trial by jury helped ensure "that common people should have a part and share of influence in the judicial, as well as the legislative department." *Letter from the Federal Farmer, No. 4* (Oct. 12, 1787), https://bit.ly/40rtjP0 (last visited Oct. 17, 2023). And it simultaneously helped "shelter [the people] from the iron hand of power." *A Democratic Federalist*, Pennsylvania Herald, Oct. 17, 1787, bit.ly/46idnBc.

Thus, several States conditioned ratification on the understanding that a civil jury-trial right would be recognized by amendment. *See* Akhil Reed Amar, *The Bill of Rights: Creation And Reconstruction* 83 (1998). As then-Justice Rehnquist recounted, the Anti-Federalists' "pleas struck a responsive chord in the populace, and the price exacted in many States for approval of the Constitution was the appending of a list of recommended amendments, chief among them a clause securing the right of jury trial in civil cases." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 342 (1979) (Rehnquist, J., dissenting). In introducing the Bill of Rights in the House, James Madison heeded those calls. He described the "[t]rial by jury . . . as

essential to secure the liberty of the people as any one of the preexistent rights of nature." 1 Annals of Congress 454 (1789) (Joseph Gales ed., 1834) (statement of James Madison). Soon after, the First Congress proposed the Seventh Amendment and submitted it to the States without debate. *See Heritage Guide to the Constitution* 464 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

4. This Court Has Interpreted The Seventh Amendment Consistent With Its Original Public Meaning.

The Seventh Amendment prescribes: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. The People understood this language to refer to "the common law of England, the grand reservoir of all our jurisprudence." *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (Story, J.). And, in that way, the text preserved the "traditional distinction between cases at law and those in equity or admiralty, where there normally was no jury." Heritage Guide, *supra*, at 464. The Judiciary Act of 1789 made the same distinction. *See* Judiciary Act of 1789, § 9, 1 Stat. 73, 77. But that line was to be enforced rigorously: The public refused to accept the federal government "shifting proceedings from the courts to administrative hearings" when the government targeted the life, liberty, or property of citizens. Hamburger, *supra*, at 154.

This Court has similarly respected that line, and it has consistently interpreted the Seventh Amendment to preserve the jury trial right as it existed in 1791. As Justice Story wrote, the Seventh Amendment is "most important and valuable" and "places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." 3 Joseph Story, *Commentaries on the Constitution of the United States* 633 (1833). His pronouncement captures just a snippet of this Court's steadfast commitment to safeguarding the Seventh Amendment.

Starting in *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830), the Court explained that suits "at common law" involved "legal rights" as opposed to those involving "equitable rights alone." *Id.* at 446–47. The Seventh Amendment thus preserves a right to a civil jury where a lawsuit implicates legal rights. *See id.* at 447; *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) ("The aim of the amendment . . . is to preserve the substance of the common-law right of trial by jury . . . ."). And, historically, whether a suit implicated legal rights turned primarily on the "remedy sought" by the plaintiff. *Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

This Court has accordingly applied a "historical test" to Seventh Amendment claims. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (citation omitted). That test considers both (1) the nature of the claim as compared to eighteenth-century

actions brought in the English courts, and (2) the remedy sought, to determine whether a jury is required. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). The latter consideration is "more important." *Id.* Applying this test, the Court has confirmed that a government action seeking to impose civil penalties for a statutory violation is the kind of suit that historically would have been heard before a jury. *See Tull v. United States*, 481 U.S. 412, 422 (1987) ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law."). Indeed, given the strong objections to the Stamp Act, it could hardly be otherwise.

5. The Decision Below Faithfully Applied The Original Public Meaning Of The Seventh Amendment.

The decision below honored the original public meaning of the Seventh Amendment in concluding that the SEC violated Respondents' right to a civil jury. As the Fifth Circuit explained: "[T]he securities statutes at play in this case created causes of action that reflect common-law fraud actions." Pet.App.13a. Such "[f]raud prosecutions were regularly brought in English courts at common law," and "[c]ommon-law courts have heard fraud actions for centuries, even actions brought by the government for fines." Pet.App.10a, 13a (citing 3 Blackstone, *supra*, at 42). History, in other words, demonstrates that fraud claims like the ones at issue, which "are quintessentially about the redress of private harms," represent "'traditional legal claims' that arose at common law." Pet.App.19a. Based on that analysis, the Fifth Circuit rightly concluded that the "Seventh

Amendment guarantees [Respondents] a jury trial because the SEC's enforcement action is akin to traditional actions at law to which the jury-trial right attaches." Pet.App.5a.

Indeed, the SEC's pursuit of civil enforcement penalties in a jury-less administrative tribunal is strikingly similar to the Crown's use of admiralty courts to deprive colonists of their legal rights. Allowing the SEC to mandate jury-free adjudication of classically private rights is akin to reviving "the prerogative exercise of judicial power—the imposition of binding adjudication outside the courts"—which the Constitution's ratifying public viewed as a great affront to fundamental liberties. *See* Hamburger, *supra*, at 228, 248. The federal government may not compel individuals to suffer the very jury-less proceedings that our forebearers fought a revolution to abolish. *See Hester v. United States*, 139 S. Ct. 509, 511 (2019) (Gorsuch, J., dissenting from the denial of certiorari) ("[I]t's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption.").

B. The SEC Cannot Rely On The "Public Rights" Exception Where Respondents' Private Rights Are At Stake.

The SEC leans heavily on the "public rights" exception to justify its admiralty-court-like deprivation of Respondents' jury trial right. *See* Pet.Br.17–22. As the SEC sees it, "[i]f a particular agency adjudication involves public rights and therefore complies with Article III, the Seventh Amendment imposes no independent barrier to the

use of an agency adjudicator rather than a jury." *Id.* at 17. But this case does not involve public rights, such as the collection and disbursement of tax revenues from a customs agent or the granting of land patents. *See Murray's Lessee v. Hoboken Land Co.*, 59 U.S. (18 How.) 272, 281–85 (1856). Rather, the SEC seeks to impose civil penalties directly upon Respondents, and those penalties "implicate the core private right to property." *Axon Enter. v. FTC*, 143 S. Ct. 890, 911 (2023) (Thomas, J., concurring).

This Court's precedent involving so-called "statutory 'public rights'" does not suggest otherwise. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 (1977). The Court has applied that exception only where the cause of action and its remedies were "unknown to the common law," and where a jury trial would be "incompatible" with and effectively "dismantle the statutory scheme." *Id.* at 454–55 & n.11, 461; *see Granfinanciera*, 492 U.S. at 60–61. Neither criterion applies here. A jury trial would not "dismantle the statutory scheme." In fact, the Dodd-Frank Act permits the SEC "to bring enforcement actions either in-house or in Article III courts, where the jury-trial right would apply." Pet.App.14a (citing 15 U.S.C. § 78u-2(a)); *see* Pet.Br.3. Nor is a cause of action like this one for civil penalties "unknown to the common law." As this Court has put it: "A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Tull*, 481 U.S. at 422. And a statutory cause of action seeking civil

monetary penalties is akin to a common-law "action in debt," thereby "requiring a jury trial." *Id.* at 418.

The SEC nonetheless seeks to avoid a civil jury by arguing that an administrative hearing is not a "Suit" within the meaning of the Seventh Amendment. Pet.Br.19. But the Framers did not construe that term so narrowly. The ratifying public understood a "Suit" to include any "action or process for the recovery of a right or claim," and that action could take place "before *any* tribunal." *Suit*, 2 Noah Webster, *An American Dictionary of the English Language* (1828) (emphasis added). Thus, "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 . . . jurisdiction in an administrative agency or a specialized court of equity." *Granfinanciera*, 492 U.S. at 61. The phrase "Suits at common law" refers to actions "in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Id.* at 41 (emphasis omitted) (quoting *Parsons*, 28 U.S. (3 Pet.) at 447).

The critical question, then, is whether the cause of action sounds in equity or in law, not whether Congress chose to task an administrative agency or an Article III court with adjudication. This distinction is drawn by the Constitution, and not reserved to the judgment of legislators. Here, the SEC seeks monetary relief that does not require Respondents to take any action in the classic equitable sense. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 553–58 (2016). The SEC does not

contend otherwise. And to the extent that it seeks additional, equitable remedies, such remedies do not deprive Respondents of their rights to a jury trial with respect to facts relevant to the claims against them for civil penalties. *See Ross v. Bernhard*, 396 U.S. 531, 537–38 (1970).

The Fifth Circuit thus correctly concluded that this case does not implicate the "public rights" exception and constitutes a "Suit" within the meaning of the Seventh Amendment. *See* Pet.App.12a–17a. This Court should do the same.

C. Respondents May Choose Whether To Invoke Their Right To A Trial By Jury Or Whether To Waive It.

Although Respondents have a constitutional right to a civil jury, that does not mean that administrative agencies may never adjudicate claims implicating private rights. Rather, the target of an administrative proceeding has the right to demand a trial by jury in an Article III court or to waive that right (knowingly and voluntarily) and have the matter heard before an ALJ in an agency tribunal. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848–49 (1986); *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1563 (Fed. Cir. 1990) ("The Supreme Court has long recognized that a private litigant may waive its right to a jury and to an Article III court in civil cases."). Just like a target may "choose to submit his case to a magistrate, arbitrator, or other non-Article III tribunal," *In re Clay*, 35 F.3d 190, 196 (5th Cir. 1994), the target may choose to proceed before an SEC ALJ.

Here, then, Respondents could have knowingly and voluntarily elected to try the matter before the SEC's administrative tribunal. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 668–69 (2015). But Respondents did not do so. They instead objected to the agency proceeding and invoked their right to a trial by jury. Pet.App.3a–4a. Consequently, the Seventh Amendment requires the SEC to convince a jury of Respondents' peers to enforce a monetary penalty against them.

II. The Multi-Layer Removal Restrictions For SEC ALJs Are Unconstitutional.

As the Fifth Circuit recognized, even if the SEC could seek civil penalties in a jury-less enforcement proceeding, its action was tainted by an independent constitutional infirmity. Specifically, Respondents were entitled to have their case handled by a constitutionally accountable officer. Pet.App.28a–34a.

Article II provides that "[t]he executive Power shall be vested in a President." U.S. Const. art. II, § 1, cl. 1. "The entire 'executive Power' belongs to the President alone." *Seila Law*, 140 S. Ct. at 2197. But because the President "alone and unaided" cannot perform all the Nation's executive functions, he necessarily must rely on "the assistance of subordinates." *Myers v. United States*, 272 U.S. 52, 117 (1926).

At the same time, "[t]hese lesser officers must remain accountable to the President, whose authority they wield." *Seila Law*, 140 S. Ct. at 2197. After all, it is the President's solemn duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. And because "[t]he buck stops with the President," he

"must have some 'power of removing those for whom he can not continue to be responsible.'" *Free Enter. Fund*, 561 U.S. at 493 (quoting *Myers*, 272 U.S. at 117). To hold otherwise "would make it impossible for the President" to fulfill his constitutional prerogative, and to "keep [his] officers accountable" to the law and the people whom he serves. *Seila Law*, 140 S. Ct. at 2198 (citations omitted); *see* 1 Annals of Cong. 518 (1789) (statement of James Madison) (explaining that the President's removal power is necessary to preserve "the chain of dependence" and to ensure that "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community").

As a result, this Court's precedent makes clear that Congress may not confer "two levels of protection from removal for those who nonetheless exercise significant executive power." *Free Enter. Fund*, 561 U.S. at 514. That principle suffices to resolve the final question presented.

A. SEC ALJs Wield Significant Executive Power As Officers Of The United States.

This Court has already determined that SEC ALJs qualify as "Officers of the United States." *Lucia*, 138 S. Ct. at 2049 (quoting U.S. Const. art. II, § 2, cl. 2). They "hold a continuing office established by law," and they exercise "'significant discretion'" in carrying out the "'important functions'" entrusted to them by law. *Id.* at 2053 (quoting *Freytag v. Commissioner*, 501 U.S. 868, 882 (1991)).

Those functions are wide-ranging. Indeed, an ALJ "ha[s] the authority to do all things necessary and

appropriate to discharge his or her duties" in presiding over SEC proceedings. 17 C.F.R. § 201.111; *see also id.* § 201.110; 15 U.S.C. § 78d-1(a). Those powers "include, but are not limited to," "[a]dministering oaths," "[i]ssuing subpoenas," "[r]eceiving relevant evidence and ruling upon the admission of evidence," issuing and enforcing sanctions, "[e]xamin[ing] witnesses," "[r]egulating the course of a proceeding," and "considering and ruling upon all procedural and other motions." 17 C.F.R. §§ 200.14(a), 200.114(b), 201.111, 201.180. In these ways, SEC ALJs "critically shape the administrative record." *Lucia*, 138 S. Ct. at 2053.

They also possess "last-word capacity" for the agency. *Id.* at 2054. At the end of the hearing process, ALJs "issue decisions containing factual findings, legal conclusions, and appropriate remedies." *Id.* (citing 17 C.F.R. § 201.360(b)). And, unless the Commission opts to review that decision "on its own initiative" or an "aggrieved person entitled to review" files a timely petition, the ALJ's "decision becomes [the SEC's] final" action. 17 C.F.R. § 201.360(d)(2); *see* 15 U.S.C. § 78d-1(c).

Such decisions are often highly consequential. They can affect the property, liberty, and reputational interests of those haled before the SEC. *See* Pet.App.1a; Russell G. Ryan, *The Demise of the SEC's Adjudication System*, Federalist Soc'y (June 26, 2023), bit.ly/3LmHbVe. They can communicate the Executive's message to the broader business community. *See* SEC, *ALJ Initial Decisions*, bit.ly/45T5S3U (last visited Oct. 17, 2023) (compiling ALJ decisions). And they can even be used to

"announc[e] and appl[y] a new standard of conduct" with "retroactive effect." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

The prospect of review does little to diminish the ALJ's power. The vast majority of cases settle before they make their way past the ALJ. *See* Priyah Kaul, *Admit or Deny: A Call for Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 U. Mich. J.L. Reform 535, 536 (2015) (noting the SEC's historic 98% settlement rate). And even those that make it through the ALJ ringer rarely make it to the Commission. *See Bandimere v. SEC*, 844 F.3d 1168, 1187 (10th Cir. 2016) (suggesting that about 90% of initial decisions "become final without any review or revision from an SEC Commissioner"). In those that do, the ALJ's influence continues, for the Commission often affords a measure of "deference to its ALJs, even if not by regulation." *Lucia*, 138 S. Ct. at 2054; *see, e.g.*, *In re Nasdaq Stock Market, LLC,* SEC Release No. 57741, 2008 SEC LEXIS 957, at *4 (Apr. 30, 2008) ("Our review of the record cannot replace the law judge's personal experience with the witnesses.").

In short, the SEC's ALJs exercise "significant authority." *Lucia*, 138 S. Ct. at 2052. And no matter how many times the government calls them "adjudicators," Pet.Br.16, 50, 51, 52, 53, 54, 55, 56, it cannot avoid that "under our constitutional structure," the activities of SEC ALJs "'*must be* exercises of . . . the "executive Power,'" for which the President is ultimately responsible," *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (quoting *City of Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013)); *see also Seila Law*, 140 S. Ct. at 2198 n.2; *Freytag*, 501

U.S. at 912 (Scalia, J., concurring in part and concurring in the judgment). That is, SEC ALJs "still exercis[e] executive power and must remain 'dependent upon the President,'" *Arthrex*, 141 S. Ct. at 1982 (2021) (quoting 1 Annals of Cong. 611–12 (1789) (statement of James Madison)). That makes this an easy case.

B. Article II Prohibits Congress From Affording Executive Officers Multiple Layers Of Tenure Protection.

Congress cannot "commit[] substantial executive authority to officers" who are shielded by "two layers of for-cause removal" protection. *Free Enter. Fund*, 561 U.S. at 505. Such double insulation "not only protects [the officer] from removal except for good cause, but withdraws from the President any decision on whether that good cause exists" in the first place. *Id.* at 495. The decision is instead vested in intermediaries not "subject to the President's direct control." *Id.* And thus, "the President is no longer the judge of the [officer's] conduct." *Id.* at 496. The result is that the President "can neither ensure that the laws are faithfully executed, nor be held responsible for [the officer's] breach of faith." *Id.*

Such is the case here. As in *Free Enterprise Fund*, at least two layers of for-cause insulation hamper "the supreme Magistrate in discharging the duties of his trust." *Id.* at 483 (quoting 30 *Writings of George Washington* 334 (J. Fitzpatrick ed., 1939)). First, ALJs may be removed "only for good cause established and determined by the Merit Systems Protection Board [MSPB]." 5 U.S.C. § 7521(a). And second, the members of that Board are themselves removable "by

the President only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202(d). Such "dual for-cause limitations . . . contravene the Constitution's separation of powers." *Free Enter. Fund*, 561 U.S. at 492. And those provisions alone render the statutory scheme unconstitutional. *See id.* at 495–98.

Yet the problems do not stop there, for there is arguably another layer of tenure protection afforded to SEC ALJs. Namely, the government attempts to litigate this case "with th[e] understanding" that the SEC's "Commissioners cannot themselves be removed by the President" absent good cause. Pet.Br.2 (quoting *Free Enter. Fund*, 561 U.S. at 487). And those Commissioners are the ones ultimately responsible for initiating disciplinary actions against the agency's ALJs. *See* 5 U.S.C. § 7521(a).

Add it all up, and SEC ALJs are even less accountable than the Public Company Accounting Oversight Board was before *Free Enterprise Fund*. The ALJs themselves cannot be removed—by anybody—except for cause. Those who decide whether such cause exists (the MSPB) are shielded from the President by their own for-cause protections. And those who decide whether to petition the MSPB for the determination as to whether such cause exists (the SEC Commissioners) are likewise understood to be insulated from presidential supervision.

This sort of "diffusion of accountability" in the Executive Branch is precisely what the Framers sought to prevent. *Free Enter. Fund*, 561 U.S. at 497; *see Seila Law*, 140 S. Ct. at 2203. The public cannot "determine on whom the blame or the punishment . . . ought really to fall" for matters

involving an SEC ALJ. The Federalist No. 70, at 426 (Alexander Hamilton). For "safely encased within a Matryoshka doll of tenure protections," those ALJs stand "immune from Presidential oversight, even as they exercise[] power in the people's name." *Free Enter. Fund*, 561 U.S. at 497. This Court has confirmed that "Congress cannot limit the President's authority in this way." *Id.* at 514.

C. The Government's Counterarguments Are Unavailing.

The SEC's arguments in favor of the statutory scheme lack merit. It begins by noting that this Court has occasionally allowed Congress to "regulate removals *by department heads*." Pet.Br.47 (emphasis added); *see United States v. Perkins*, 116 U.S. 483, 485 (1886). But this Court had made clear that Congress may not strip *the President* of his removal authority. After all, "[i]t is *his* responsibility to take care that the laws be faithfully executed." *Free Enter. Fund*, 561 U.S. at 493. And never has this Court permitted Congress to deprive the President of his ability to determine whether good cause exists for an officer's removal. *See id.* at 494–95.

The government also insists that "*the SEC* has adequate alternative mechanisms for controlling" its ALJs. Pet.Br.56 (emphasis added). But even "[b]road power over [an ALJ's] functions is not equivalent to the power to remove [the officer]." *Free Enter. Fund*, 561 U.S. at 504. And the SEC's argument once again overlooks the key constitutional concern—that "the President can neither oversee the [SEC's ALJs] himself nor 'attribute [their] failings to those whom he can oversee.'" *Arthrex*, 141 S. Ct. at 1979 (emphasis

omitted) (quoting *Free Enter. Fund*, 561 U.S. at 496). Again, the SEC itself maintains "that the Commissioners are removable only for cause." Pet.Br.2. And even the Commissioners lack the authority to remove ALJs at will; review must proceed through the independent and insulated powers that reside in the MSPB.

Finally, the SEC invokes a purportedly "longstanding practice" of affording tenure protections to certain adjudicators in the Executive Branch. Pet.Br.65; *see also* Pet.Br.54–55. But it fails to identify any example of *dual-layer* protection adopted prior to the Administrative Procedure Act. *See* Pet.Br.65. And such a twentieth-century innovation has no bearing on the original understanding of the Constitution. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2137 (2022).

Nor could the APA trump Article II's vesting of the "executive Power" in the President alone, U.S. Const. art. II, § 1, cl. 1, with the Executive's concomitant duty to "take Care that the Laws be faithfully executed," *id.* art. II, § 3. "[M]ultilevel protection[s] from removal" violate those commands. *Free Enter. Fund*, 561 U.S. at 484. If Congress believes that SEC enforcement actions for penalties should be conducted before independent adjudicators, *see* Pet.Br.66 (quoting *Butz v. Economou*, 438 U.S. 478, 513–14 (1978)), the Constitution provides a solution: Entrust the responsibility for such adjudications with the federal judges vested under Article III with the judicial Power of the United States. But Congress may not force regulated parties to have their legal rights adjudicated by inferior officers who wield the

President's executive Power free from his oversight and without the safeguards of a jury.

CONCLUSION

Because the decision below correctly held that the SEC's in-house adjudication of Respondents' case violated the Seventh Amendment and that the statutory removal restrictions on SEC ALJs are unconstitutional, this Court should affirm.

Respectfully submitted,

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