

No. 22-859

IN THE
Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

GEORGE R. JARKESY, JR., ET AL.,

Respondents.

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

**BRIEF OF *AMICUS CURIAE* ANDREW N.
VOLLMER IN SUPPORT OF NEITHER PARTY**

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INTEREST OF *AMICUS CURIAE*

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Mr. Vollmer has studied, taught, wrote, and advised about the operation of the SEC and the federal securities laws for decades. He has an interest in the appropriate construction of those laws and in the restrictions they impose.

SUMMARY OF ARGUMENT

Absent a restriction in a statute, and even over a statutory restriction in certain circumstances, the President has Article II power to remove a principal executive officer at will. Nothing in the federal securities statutes restricts the President's authority to remove an SEC Commissioner. The President therefore may terminate the service of an SEC Commissioner without cause or a reason. The Court should decide the removal question about SEC administrative law judges in this case on that basis

¹ The views in this brief are those of the *amicus curiae* only and not necessarily of any of the institutions mentioned above. No party's counsel wrote this brief in whole or part. No one other than the Mercatus Center and the *amicus curiae* contributed money to fund the preparation or submission of this brief.

and not on any other assumption or understanding of the law.

ARGUMENT

The President Does Not Need Cause or a Reason To Remove a Commissioner of the SEC.

The decision below of a panel of the Fifth Circuit perpetuated a common misconception about Commissioners of the Securities and Exchange Commission. It said “the SEC Commissioners may only be removed by the President for good cause.” *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022); *id.* at 465 (“members of ... the Commission have for-cause protection from removal by the President”).

That is not correct. Nothing in the federal securities statutes restricts the President’s Article II power to remove an SEC Commissioner. Absent a restriction in a statute, and even over a statutory restriction in certain circumstances, the President may remove a principal executive officer without cause or a reason. The Court should not decide the ALJ removal question in this case on an assumption or understanding of removal law that is not correct.

The “President’s removal power is the rule, not the exception.” *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2206 (2020). It derives from Article II of the Constitution, which vests the executive power in the President and obligates the President to take care to execute the laws of the United States faithfully. In *Myers v. United States*, 272 U.S. 52, 122 (1926), the Supreme Court reasoned that the “grant of the executive power” includes the “exclusive power of removal.” In a 2020 decision, the Court recognized “the President’s unrestricted removal power” subject to only two limited exceptions not relevant here.

Congress may create multi-member expert agencies that do not wield substantial executive power and make the group of principal officers removable by the President only for good cause, and Congress may provide tenure protections to certain inferior officers with limited duties and no policymaking or administrative authority. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192, 2199-2200 (2020). Both exceptions require Congress to take action by enacting a statute with a restriction on removal.

“When a statute does not limit the President’s power to remove an agency head, we generally presume that the officer serves at the President’s pleasure.” *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2020); *id.* at 1783 (“we generally presume that the President holds the power to remove at will executive officers and that a statute must contain plain language to take that power away”) (quotation marks, brackets, and citation omitted). Principal officers have no inherent or implied job protections.

The statute creating the SEC and establishing the offices of the Commissioners is silent on removal. The relevant statute is section 4(a) of the Securities Exchange Act (15 U.S.C. § 78d(a)). It creates the SEC “composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate.” Appointment by the President and confirmation by the Senate make SEC Commissioners principal officers. See *Morrison v. Olson*, 487 U.S. 654, 670 (1988).

Section 4(a) sets several qualifications for Commissioners. One is: “Not more than three of such commissioners shall be members of the same political party.” Another is that a Commissioner may not engage in any other business or employment while

serving. The term of office is five years with the possibility of a modest extension. Nothing in the statute or other federal securities statutes addresses removal.

Setting a limited time period for the term of a principal officer does not restrict the President's removal authority. Although a term of a limited period, such as the one for SEC Commissioners in section 4(a) of the Exchange Act, results from congressional action, it is not sufficient to override the President's broad constitutional authority to supervise the executives helping him execute the laws of the United States faithfully. A statute specifying a term of years did not restrict removal power in *Myers*,² *Free Enterprise*,³ or *Seila Law*.⁴ A time period for an office

² In *Myers v. United States*, 272 U.S. 52 (1926), the statute said that the postmaster had a four-year term and that the President may remove a postmaster with the Senate's consent. *Id.* at 107. The removal of Myers was demanded before the end of the four-year term and without the Senate's consent. *Id.* at 106. The Court said the President had the power to remove the postmaster. *Id.* at 176.

³ In *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010), members of the Board had a five-year term. *Id.* at 484. The SEC could remove a Board member for reasons specified in the statute. *Id.* at 486. Those protections combined with the assumed for-cause protections for SEC Commissioners were an unconstitutional limitation on the President's power. *Id.* at 495-96. As a remedy, the majority severed the limitations on the SEC's ability to remove a Board member but did not sever the five-year term. *Id.* at 508-09.

⁴ In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192, 2199-2200 (2020), the Director of the CFPB had a term of five years, and the President could remove the Director only for certain specified reasons. *Id.* at 2193. The insulation from removal by the President was unconstitutional. The majority said explicitly that the President could remove the Director despite the five-year

sets an outer limit of a principal officer's service but does not mean the President may not remove the official earlier.

For-cause protections may not be read into the tenure of SEC Commissioners. That would violate the President's power under the Constitution. The misconception that led the *Jarkesy* panel astray originated with this Court's decision in the *Free Enterprise* case, but *Free Enterprise* did not find that SEC Commissioners had for-cause protection. For purposes of that case, the majority accepted the agreement of the parties that the President needed a reason to fire an SEC Commissioner: "The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office,' and we decide the case with that understanding." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 487 (2010) (citations omitted).

Justice Breyer's dissent challenged the majority's assumption that SEC commissioners had for-cause protection and was critical of the majority for using an assumption to create a constitutional defect in the PCAOB statute. *Id.* at 545-48. He concluded:

The Court then, by assumption, reads *into* the statute books a "for cause removal" phrase that does not appear in the relevant statute and which Congress probably did not intend

term of office. *Id.* at 2204. *See also Collins v. Yellen*, 141 S. Ct. 1761, 1771, 1783-87 (2020) (holding that a statute granting for-cause removal protection to a principal officer violated the separation of powers but not addressing the officer's five-year term).

to write. And it does so in order to strike down, not to uphold, another statute. This is not a statutory construction that seeks to avoid a constitutional question, but its opposite.

Id. at 548 (emphasis in original).

The Court should not decide this case on an assumption or understanding that SEC Commissioners are removable only for cause. *Contra* Petition for a Writ of Certiorari at 20, *SEC v. Jarkesy* (No. 22-859) (filed Mar. 8, 2023). That premise would not be true and would raise concerns about advisory and hypothetical judicial opinions that do not meet the “cases and controversies” requirement of Article III. *See, e.g., Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). The assumption could lead to the invalidation of a congressional enactment, as it did in *Free Enterprise*, but an appropriate assessment of the ability of the President to remove SEC commissioners might preserve a statute.

CONCLUSION

The misimpression about the removal of SEC Commissioners should be corrected. It unnecessarily led to invalidation of a congressional statute in *Free Enterprise* and became part of the *Jarkesy* panel opinion. This Court should resolve this case on the proper ground that SEC Commissioners serve at the President's pleasure and do not have for-cause protection.

Respectfully submitted,

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