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

BRIEF FOR RESPONDENTS

S. MICHAEL MCCOLLOCH
Counsel of Record
6060 N. Central Expy., Suite 500
Dallas, Texas 75206
(214) 643-6055

KAREN L. COOK
6060 N. Central Expy., Suite 500
Dallas, Texas 75206
(214) 643-6054

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether statutory provisions that empower the Securities and Exchange Commission ("SEC") to initiate and adjudicate administrative enforcement proceedings seeking civil penalties for common law claims violate the Seventh Amendment.

2. Whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine.

3. Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 34 F.4th 446 (Pet. App. 1a-62a). The order of the court of appeals denying the rehearing en banc is reported at 51 F.4th 644 (Pet. App. 63a-70a). The opinion of the Securities and Exchange Commission is available at 2020 WL 5291417 (Pet. App. 71a-154a). The initial decision of the administrative law judge is available at 2014 WL 5304908 (Pet. App. 155a-225a).

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2022. A petition for rehearing was denied on October 21, 2022. On January 6, 2023, Justice Alito extended the time for filing a petition for a writ of certiorari to February 17, 2023. On January 30, 2023, Justice Alito granted a second extension of time for filing a writ of certiorari to March 20, 2023. The petition was filed on March 8, 2023, and granted on June 30, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix to this brief. App. 1a, *et seq*.

STATEMENT

A. Legal Background

For most of its history, the SEC could only pursue "regulated entities or their associated persons" administratively, including for fraud claims, but without any authority to obtain monetary penalties. In 1990, Congress dramatically expanded the SEC's administrative power by authorizing administrative *penalty* sanctions against *registered* parties and allowing the agency to litigate administrative actions

against *non-registered* parties ("any person"), but only to impose "cease-and-desist" remedies.[1]

In 2010, § 929P(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") granted the SEC the authority to seek *penalties* administratively against "any person" for violation of the securities laws, including for the traditional fraud claims codified in those statutes, actions that had always been litigated only in Article III courts.[2] This vested the agency's in-house courts and its administrative law judges ("ALJs") with "coextensive," or "dual" jurisdiction in securities fraud actions. The agency took full advantage, diverting numerous enforcement actions to its own Article I courts without juries.

B. Factual Background and Proceedings Below

In 2007, George Jarkesy set up two private investment partnerships, managed by an "adviser" company, Patriot28 LLC, (collectively hereafter, "Jarkesy") for a modest number of accredited investors. The funds were small enough that neither was

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[1] Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990).

[2] Pub. L. No. 111-203, 124 Stat. 1376 (2010). The bill amended each of the three statutes under which Respondents were prosecuted—the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. Each contains standard fraud proscriptions for which the Commission found Respondents liable.

required to register with the SEC.[3] Despite the lack of any investor complaints when the funds' portfolio lost value after the 2008 market collapse, the SEC's New York office launched an investigation in 2011, and in 2013 the agency elected to file a case in its in-house courts primarily charging conventional fraud for, *inter alia* "making an untrue statement of material fact or omitting to state a material fact."[4] The SEC sought the imposition of lifetime securities-industry and officer-and-director bars and over $100 million in punitive civil monetary penalties.[5]

Jarkesy filed suit for pre-hearing injunctive relief in the District of D.C. in January, 2014, to stop the administrative proceeding on constitutional grounds. The district court denied relief for lack of subject matter jurisdiction for failure to exhaust remedies, 48 F.Supp.3d 32 (D. D.C.) (2014), a ruling which was upheld by the D.C. Circuit, 803 F.3d 9 (D.C. Cir. 2015). Neither court reached the merits of Jarkesy's constitutional challenges. These rulings were overruled *sub silentio* by this Court's recent decision in *Axon Enterprise, Inc., v. F.T.C.*, 143 S.Ct. 890 (2023).

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[3] Appendix to Respondents' Opposition to Petition (Opp. App.) 2a.

[4] Section 10(b) and Rule 10b-5 of the Securities Exchange Act, 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b); § 17(a) of the Securities Act, 15 U.S.C. § 77q(a)(2); §§ 206(1), (2) and (4) of the Advisers Act and Rule 206(4)-8, 15 U.S.C. § 80b-6(4), 17 C.F.R. § 275.206(4)-8.

[5] Opp. App. 2a-3a.

Jarkesy was put to "trial" in February, 2014. The evidentiary hearing—in which the ALJ allowed the Division of Enforcement to admit copious hearsay evidence and unauthenticated documents that would be inadmissible in an Article III court[6]—consumed 12 days of testimony over six weeks at the SEC's New York office.[7]

The SEC's home courts bear a superficial resemblance to Article III courts, but the differences are substantial. No procedural constraints limit the time the agency's Division of Enforcement can take to conduct unilateral discovery and prepare its case, but defendants get only a few months, and without the discovery tools available in court. At "trial" the Rules of Evidence do not apply, hearsay and other unreliable evidence is admissible, authenticated evidence is excluded, and defense "subpoenas" are frequently quashed or modified *sua sponte* by the ALJ's. Most significantly, as with all administrative courts, the defendants have no right to a jury to determine the facts.

It is widely recognized that the SEC virtually always wins in its own home courts. At the time of Jarkesy's "trial" in 2014, the agency had, over the last 200 contested cases, compiled an in-house win rate of exactly 100%, contrasted with a 61% success rate over the same time period in Article III courts, where

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[6] Opp. App. 3a.

[7] *Id.*

juries are employed.[8] The agency likewise prevails in nearly 100% of internal appeals to the Commission and, because of the deferential standard imposed on later judicial review, wins virtually 100% of the time on evidentiary sufficiency grounds before the circuit courts.

Among many other challenges, Jarkesy raised and preserved all of the constitutional issues later raised on judicial review. The ALJ took some six months to issue an Initial Decision in the agency's favor, after which the Commission granted the Division of Enforcement's request to *expedite* Jarkesy's internal appeal.[9] The Commission then took *six additional years* to issue its "expedited" Opinion (the "final order") denying all of Jarkesy's points of error and imposing a $300,000 penalty, disgorgement and an industry bar.[10] Having finally

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[8] *See* Nicolas Berg et al., *SEC's Continued Use of Administrative Forum Irks Critics, Raises Sticky Constitutional Questions*, CORP. L. & ACCOUNTABILITY REP., Dec. 19, 2014, at 1722 ("Although the SEC prevailed in 61 percent of its federal cases in the 12 months prior to September 2014, it won every case heard before an ALJ during the same period"); Jenna Greene, *The SEC's on a Long Winning Streak*, NAT'L L.J., Jan. 22, 2015 (SEC won the last 219 decisions before its own ALJs—a "winning streak, which began in October 2013 and continues today"); Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. TIMES, Oct. 5, 2013 (same).

[9] Opp. App. 3a-4a, Opp. App. 10a. The ALJ's Initial Decision was published on the SEC's official website, to be accessed by banks, brokerage houses, the media, and the general public for the six additional years it took to obtain Article III review.

[10] https://www.sec.gov/files/litigation/opinions/2020/33-10834.pdf (last visited October 9, 2023).

run the gauntlet through the administrative process, Jarkesy filed a Petition for Review in the Fifth Circuit under the applicable special review statutes, 15 U.S.C. §§ 78y, 77i and 80b-13. A panel of the Fifth Circuit set aside the final order, holding that Jarkesy was denied his Seventh Amendment right to trial by jury; that the unbridled discretion afforded the Commission by Dodd-Frank § 929Pa to decide whether to pursue common law fraud claims in the securities laws in Article III court or its own in-house courts violated the nondelegation doctrine; and that the multiple layers of for-cause tenure protection enjoyed by the SEC's ALJs violated the Take Care Clause and the separation of powers doctrine. Pet. App. 1a-62a. The Fifth Circuit denied rehearing en banc by a vote of 10-6. Pet. App. 63a-64a.

The SEC's administrative prosecution of this garden-variety securities fraud case has consumed over a decade.

On April 5, 2022, during the pendency of the circuit court review, the SEC disclosed what it labeled an internal "control deficiency"[11] It had conducted an internal investigation, bypassing the Inspector General's Office, and determined that Division of Enforcement personnel accessed Commission adjudication memoranda during the pending internal appeal to the Commission. *Id.* This disclosure especially identified the Jarkesy and *SEC v. Cochran* cases as having been

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[11] https://www.sec.gov/news/statement/commission-statement-relating-certain-administrative-adjudications, last visited October 9, 2023).

improperly accessed. The Commission asserted that these unlawful internal security breaches would not have affected the enforcement cases. *Id*. On June 2, 2023, just before certiorari was granted in this case, the SEC issued unprecedented orders dismissing 42 administrative proceedings and vacating industry bars in 48 cases.[12] With these dismissals, the Jarkesy case is the only one left in the pipeline that has raised the constitutional issues presented in this case.

SUMMARY OF ARGUMENT

1. The Fifth Circuit correctly held that the Seventh Amendment forbids the adjudication of the securities acts' anti-fraud provisions in the SEC's in-house courts.

Section 929Pa of Dodd-Frank vested the SEC with authority to sue "'any person" for violations of the securities acts, including anti-fraud claims, in its own internal administrative tribunals, without any jury trial rights. The Seventh Amendment guarantees the right to trial by jury in "suits at common law," encompassing legal, as opposed to equitable, claims for penalties. This Court has long held that the touchstone for applicability of Seventh Amendment rights is the practice of the courts of England in 1791, when the Seventh Amendment was ratified. That history establishes that eighteenth century English courts afforded jury trial rights—including in civil enforcement actions prosecuted by the Crown—whenever the

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[12] https://www.sec.gov/files/litigation/opinions/2023/33-11198.pdf; https://www.sec.gov/files/litigation/opinions/2023/33-11199.pdf (last visited Oct. 9, 2023).

"core" right of private property was at stake, as in suits for penalties. One of the primary flashpoints of revolutionary fervor in the 1770's was the recent British diversion of such claims for prosecution in jury-less vice-admiralty courts. The draft constitution's omission of a common law jury trial right was the primary objection that nearly scuttled ratification. The Anti-Federalists carried the day in pushing through the Seventh Amendment, in large part to assure that the government could not put citizens to trial for penalties without the intervention of a jury.

Despite this, the SEC insists that juries are not required when government seeks penalties for common law claims for fraud of the sort it pursued against Jarkesy. It bases this position on a flawed interpretation of the "public rights" doctrine, asserting that when government sues on behalf of the "public" to enforce statutory claims, the claim is a "public right" which can be tried outside of Article III courts without juries. But whether a claim is a public or private right depends not on the identity of the plaintiff but on the nature of the underlying claim. Unlike disputes stemming from government benefits and franchises, or where the government is the real party in interest, SEC fraud actions for penalties—seeking to deprive an enforcement target of the "core" right of private property for alleged fraud committed against other private citizens—are private rights requiring fact-finding by a jury.

Moreover, the Court's consistent description of public rights cases as "new" and "novel" claims, "peculiarly suited" to summary agency adjudication, does not remotely fit these securities fraud claims,

which have been tried before real courts and juries for centuries.

2. The Fifth Circuit correctly held that Congress' delegation of unfettered power to assign cases to a jury-less in-house forum violated the separation of powers doctrine.

This Court has long held that the assignment of statutory claims to administrative forums is exclusively within Congress' control, constituting a quintessential legislative power. But § 929P(a) of Dodd-Frank vested that power instead with the SEC, purporting to allow the agency to decide for itself, in a suit against "any person," whether a claim is to be litigated before an Article III judge with a jury or in its own jury-less administrative courts. As the SEC concedes, this authority was transferred without any criteria or "intelligible principle" to constrain the SEC's exercise of that power. This is a textbook violation of the nondelegation doctrine, requiring that § 929P(a) be held unconstitutional and vitiating the proceeding prosecuted against Jarkesy.

3. The Fifth Circuit correctly held that the ALJ who presided over his administrative trial sat in violation of the constitutional separation of powers and the Take Care Clause of U.S. CONST. art. II, § 3.

The SEC agrees that its ALJs are inferior constitutional officers who enjoy multiple layers of for-cause tenure protection from removal by the President. The ALJs are protected from termination by a statutory "good cause" standard and are hired and fired by an

external agency, the Merit Selection Review Board ("MSRB"), which itself is protected from removal except for "inefficiency, neglect of duty, or malfeasance in office." The Take Care Clause, a "structural protection[] against abuse of power" necessary to preserve the separation of powers, forbids the insulation of inferior officers from removal by more than one level of tenure protection. For federal executive agencies, the Court has recognized a singular, narrow exception to the rule of "unrestricted removal power," an exception applicable only to those officers who have "limited duties and no policymaking or administrative authority." Since that does not describe the SEC's ALJs. the SEC effectively urges the Court to create an additional exception for its ALJs, claiming that their adjudicative role is different, but for reasons that contradict the Court's recent precedents and in any event do not withstand scrutiny.

The proper remedy for this violation is the setting aside of the SEC's final order against Jarkesy. The Court cannot fix the violation by severing the offending for-cause protection, because that protection was a material element of Congress' statutory scheme. This is a structural error, and one that defies harm analysis. The remedial jurisdiction invoked in this statutory review is set by 5 U.S.C. § 78y, which directs reviewing courts to either affirm, modify or set aside the Commission's final order, and providing no authority to "remand" to the agency. The reviewing court's decision is the final word.

ARGUMENT

I.

The Seventh Amendment Does Not Allow Government Securities Fraud Claims for Penalties to be Adjudicated Outside of Article III Courts Without Juries.

The Seventh Amendment mandates the right to a jury for suits at "common law," a term which refers to "legal" as opposed to "equitable" claims that are analogous to those that existed at common law in 1791. It is well established that securities fraud claims seeking penalties—at least the sort charged against Jarkesy—are legal claims for which the Seventh Amendment applies. *See Tull v. United States*, 481 U.S. 412, 414-19 (1987). The SEC's position—that its own reading of the modern "public rights" doctrine nevertheless allows the adjudication of government suits for penalties outside of an Article III forum and without a jury—cannot be reconciled with eighteenth century English law, this Court's precedents, or the expressed intent of the founding generation at the time of the Seventh Amendment's ratification.

The history is determinative, and is addressed here in some detail for that reason. For more than two centuries, the "historical test" has been the lodestar of Seventh Amendment analysis.[13] Under this test a

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[13] Justice Story, sitting as a circuit justice, first articulated this standard in *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812), and the test has been consistently applied to this day. *See, e.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, (1996) (discussing "our longstanding adherence to this

jury is required in those civil cases—including those prosecuted by the government—where a jury would have been empanelled in the courts of England in 1791, the year the Amendment was ratified.[14]

A. Preventing the Trial of Government Penalty Claims For Statutory Violations Without Juries was a Core Purpose of the Seventh Amendment.

The Founders would be mystified to discover that something called the "public rights doctrine" could someday be deployed to erase the jury trial guarantee they enshrined in the Seventh Amendment, following a bruising battle for ratification of the Constitution that hinged in no small part on the universal principle that civil juries were necessary for the avoidance of tyranny. And that principle applied with special vigor where the government would pursue a citizen to enforce statutory infractions for penalties.

1. The Right to a Jury in the Defense of Common Law Claims is Firmly Embedded in English and Colonial American History

In English jurisprudence, the trial by jury can be traced back at least to the Frankish Inquest in 829 A.D.[15] and the Norman Conquest after the victory by

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'historical test'"); *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935).

[14] *See Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

[15] 3 Wm. Blackstone, COMMENTARIES ON THE LAW OF ENGLAND, (Clarendon Press - Oxford, 1768) ("Blackstone's COMMENTARIES"), at 258, 334.

William the Conqueror at Hastings in 1066.[16] As a guaranteed and enumerated right it was promulgated by the Magna Carta in 1215, which King John I was forced to sign as a limit on royal power. The Great Charter, at Clause 39, provided that "No free man shall be…stripped of his rights or possessions…except by the lawful judgment of his equals… ." Following the excesses of the Court of Star Chamber and the Glorious Revolution of 1688, Parliament forced William and Mary to sign the British Bill of Rights in 1689, notably including jury trial rights.

Some 20,000 Puritans fled to New England in the 1630's in the "Great Migration" to escape religious persecution chiefly at the hands of the Court of Star Chamber, which adjudicated most cases without a jury to impose liability on these religious dissidents for proselytizing or pamphleteering, then meted out civil fines and gruesome sentences.[17] "From the beginning it defied Magna Carta in denying jury trial," but later on rare occasions the Star Chamber *did* empanel juries in cases filed by the Crown.[18] Upon their arrival in the New World, the Puritans of the Massachusetts Bay Colony included the civil jury trial in their own bill of rights, the 1641 Body of Liberties, the first post-Mayflower legal code in the

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[16] James B. Thayer, A Preliminary Treatise on Evidence at the Common Law 50 (Boston, Little, Brown & Co. 1898);

[17] *See* 2 John Rushworth, Historical Collections of Private Passages of State 463 (London 1721).

[18] *See* Edgar L. Masters, THE NEW STAR CHAMBER 12 (Hammersmark Publishing Co. 1904).

colonies.[19] The civil jury was deemed an essential "libertie" in "all actions at law." Body of Liberties, No. 29. All of the thirteen original colonies eventually followed suit.

In the years preceding ratification, American colonists derived most of their understanding of the practices of British common law from Blackstone, whose commentaries were first published from 1766 to 1769. Book III, entitled "Private Wrongs," repeatedly confirms that actions by the government seeking "goods or chattels" from subjects were "determined by a jury."[20] In Blackstone's words, "it is a part of the liberties of England, and greatly for the fafety of the fubject, that the king may not enter upon or feife any mans' poffeffions upon bare furmifes without the intervention of a jury."[21] A subject's property rights could not be taken away by administrative tribunals (such as the Privy Council) or the jury-less Star Chamber, but only by the "ordinary courts of justice."[22] Blackstone described the civil jury as "the glory of English law."[23]

The colonists' equal attachment to civil jury trial rights was so strong that is was "probably the only one

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[19] *See* Edgar McManus, LAW & LIBERTY IN EARLY NEW ENGLAND 1620-1692, (Amherst, U.Mass. Press 1993).

[20] 3 Blackstone's COMMENTARIES, at 258, 334

[21] *Id*., at 259.

[22] 1 Blackstone's COMMENTARIES, at 129, 142.

[23] 3 Blackstone's COMMENTARIES, at 379.

universally secured by the first American state constitutions" leading up to ratification.[24]

2. The Trial of Colonists by the Crown Seeking Penalties For Statutory Violations In Jury-Less Vice-Admiralty Courts Was a Significant Catalyst of the Revolution

Archives documenting the complaints driving revolutionary fervor in the 1770's and fueling anti-federalist sentiment in the late 1780's are replete with expressions of outrage focused on the British practice of creating statutory penalties in lieu of criminal sanctions to justify trials in vice-admiralty courts and other forums without juries.

Just before the revolution, George Washington expressed fury at the British use of these jury-less tribunals to extract civil penalties against colonists,[25] and other Framers from John Jay to John Adams wrote at length complaining about the need to secure the ancient right of trial by jury to prevent the tyranny of British judges inflicting severe civil

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[24] L. Levy, Freedom of Speech and Press in Early American History—Legacy of Suppression 291 (1963 reprint), quoted in Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1973) ("Wolfram").

[25] *See, e.g.*, Letter from George Washington to Bryan Fairfax (Jul. 4, 1774), in 10 THE PAPERS OF GEORGE WASHINGTON: COLONIAL SERIES 109, 109-110 (W.W. Abbot & Dorothy Twohig eds., 1995).

penalties against colonists in disregard of jury trial rights.[26]

The controversy—one of the primary flashpoints leading to the outbreak of hostilities with the mother country—resulted from legislation in the 1760's which diverted government statutory enforcement claims, both civil and criminal, to jury-less admiralty and vice-admiralty courts, including the Navigation Acts, the Sugar Act, and most notably the Stamp Act.[27] So profound was the acrimony over taxation-without-representation and the parliamentary ruse to circumvent jury trial rights that these issues precipitated street protests, riots, denunciations by colonial legislative bodies, and the first assembly of colonies to devise a coordinated opposition—the Stamp Act

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[26] *See* John Adams, The Bill of Rights; A List of Grievances (Oct. 14, 1774), *in* 2 THE ADAMS PAPERS 159, 159-63 (Robert Taylor ed.,1977); John Adams, Draft of Argument in *Sewall v. Hancock*, *in* 2 LEGAL PAPERS OF JOHN ADAMS 194, 207 (L. Kinvin Wroth & Hiller B. Zobel eds. 1965); John Jay, Address to the People of Great Britain, Philadelphia (Oct. 21, 1774), *in* 1 THE SELECTED PAPERS OF JOHN JAY 1760–1779 100, 100–107 (Elizabeth M. Nuxoll ed. 2010); Letter from George Mason to the Committee of Merchants in London (June 6, 1766), *in* 1 THE PAPERS OF GEORGE MASON 65, 67 (Robert Rutland ed., 1970); *see also* An Old Whig III, PHILA. INDEP. GAZETTEER (Oct. 20, 1787), in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 425, 426-27 (John P. Kaminski et. al eds. 2009).

[27] See HAROLD M. HYMAN & CATHERINE M. TARRANT, ASPECTS OF AMERICAN TRIAL JURY HISTORY IN THE JURY SYSTEM IN AMERICA 29 n.75 (Rita J. Simon ed., 1975); Wolfram, at 654; n.47; Carl Ubbelohde, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 68 (1960). (Chapel Hill, 1960).

Congress of 1765.[28] This precurser to the later continental congresses issued a Declaration of Rights and Grievances proclaiming that "Trial by Jury is the inherent and invaluable Right of every British Subject in these Colonies."[29]

Threats to civil and criminal jury trial rights—especially in these government enforcement actions—would continue to unify the colonies and galvanize opposition to British abuses in the run-up to the Revolution. The First Continental Congress in 1774 reaffirmed "the great and estimable privilege of being tried by a jury of their peers in the vicinage." The Declaration of the Causes and Necessity of Taking Up Arms, issued by the Second Continental Congress in July 1775, specifically challenged British statutes "extending the jurisdiction of courts of admiralty and vice-admiralty beyond their ancient limits [and] ...depriving...[the colonies] of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property."[30] The following year the Declaration of Independence listed the denial of "the benefits of trial by jury" as one of the primary grievances that had compelled secession from Britian and the creation of the new nation.

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[28] AKHIL REED AMAR, THE WORDS THAT MADE US 53-62 (Hachette Book Group, 2021); PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, 43–62 (Edmund S. Morgan, ed. 1959), 43-62.

[29] SOURCES OF OUR LIBERTIES 151 (Richard L. Perry & John C. Cooper eds., 1952), at 288 ("Sources of Our Liberties").

[30] *Id*., at 296.

3. The Ratification Debates Demonstrate that the Seventh Amendment Was Adopted to Prevent Government Enforcement of Statutory Claims for Penalties Without Juries

"[W]ithout the Seventh Amendment, it is unlikely that there would have been any Constitution at all."[31] The draft resulting from the months of heated debate at the Constitutional Convention omitted any express guarantee of a jury trial right for common law claims. The ensuing ratification battle between the Federalists and the Anti-Federalists was fought in large part over this omission. The Anti-Federalists—demanding written constitutional assurance of that very guarantee—won the argument.

Federalist Alexander Hamilton assured his fellow citizens that jury trial rights for common law claims would remain inviolate, writing that "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." THE FEDERALIST 83, at 382 (Masters Smith & Co., 1857) (Hamilton) ("THE FEDERALIST").

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[31] Kenneth Klein, *The Validity of The Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1015 (1994).

This olive branch did not impress the Anti-Federalists, who were so apprehensive of the omission and distrustful of future congresses that they urged rejection of the entire constitution as the only acceptable remedy.[32] Memories of the British legislation that had stripped colonists of jury trial rights by assigning statutory claims to vice-admiralty courts were still fresh, and the Anti-Federalists' objections gained enough traction to threaten to upend the whole constitutional enterprise. *See Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).

Most of those ratifying conventions were contentious, and much of the rancor centered on the many objections to the civil jury omission. Typifying these complaints was a missive by "A Farmer" in 1788, fearing that under the draft constitution, Congress would have:

> the power of instituting courts of justice without trial by jury…under such regulations as Congress may think proper to decide, not only in such cases as arise out of all the foregoing powers, but in the other cases which are enumerated in the system.[33]

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[32] Hamilton himself agreed that "[t]he objection to the plan of the convention which has met with most success in this State, 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 83, at 380.

[33] The Fallacies of the Freeman Detected by a Farmer, PHILA. FREEMAN'S J. (Apr. 16, 1788), *reprinted in* THE COMPLETE ANTI-FEDERALIST 181, 187 (Herbert J. Storing ed. 2015) (hereinafter "STORING").

The "Farmer" was expressly referring to enforcement cases brought by the government for the collection of taxes. Another anonymous author similarly predicted that "a lordly court of justice" sitting without a jury in the federal courts would likely be "ready to protect the officers of government against the weak and helpless citizens... What refuge shall we then have to shelter us from the iron hand of arbitrary power?"[34] An Old Whig likewise wrote that "Judges, unencumbered by juries, have been ever found much better friends to government than to the people."[35] The Anti-Federalists relied on Blackstone's exhortation that any "new tribunal, erected for the decision of facts without the intervention of a jury…is a step toward establishing aristocracy, the most oppressive of absolute governments."[36]

The Anti-Federalists also feared that the government would circumvent jury trial rights—only gurauranteed in the draft constitution for criminal cases—by converting criminal proscriptions into statutory actions for civil penalties:

> Trial by jury in criminal cases may also be excluded by declaring that the libeler, for instance, shall be liable to an action of debt for a specified sum, thus evading the common law prosecution by indict-

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[34] *Id.*, at 154.

[35] An Old Whig VIII (Feb. 6, 1788), PHILA. INDEP. GAZETTEER, *quoted in* THE COMPLETE BILL OF RIGHTS (Neil Cogen ed., 1997)

[36] Blackstone's COMMENTARIES, at 380.

> ment and trial by jury. And the common course of proceeding against a ship for breach of revenue laws by information (which will be classed among civil causes) will at the civil law be within the resort of a court, where no jury intervenes.[37]

Thomas Jefferson shared the concern that the civil jury trial right had been omitted:

> "[T]here are instruments for administering the government, so peculiarly trust-worthy, that we should never leave the legislature at liberty to change them. [T]he new constitution has secured these in the executive & legislative departments; but not in the judiciary. [I]t should have established trials by the people themselves, that is to say by jury …."[38]

In the end, the requisite nine states ratified the new Constitution, but only because most of the states had attached proposed amendments to their respective resolutions—including a civil jury trial right—that the Federalists had committed to take up at the first session of Congress.[39] Those amendments—initally twelve of them—were passed at the first session, and

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[37] The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, *in* 3 Storing, *supra* n.33, at 160.

[38] Letter from Thomas Jefferson to Colonel Humphreys (Mar. 18, 1789) *in* 14 THE PAPERS OF THOMAS JEFFERSON 676, 678 (Julian P. Boyd ed., 1958) ("JEFFERSON PAPERS").

[39] *See* Wolfram, *supra* n.27, at 725.

ten of them were approved by the requisite three-fourths of the new states with the ratification by the Virginia legislature on September 15, 1791.[40]

The Anti-federalists won this debate. As the "generative force" behind the Seventh Amendment, their exhortations about the reach of jury trial rights for common law claims—including statutory enforcement actions by the government—are the best reference.[41] The considerable written record from the ratification era establishes that the Anti-Federalists pushed the Seventh Amendment into the Bill of Rights in material part to prevent Congress from creating forums for civil adjudications by government against citizens on statutory claims without any jury trial rights, allowing judgments against their private property to be meted out by judges alone, whose sympathies they believed would naturally lie with the government.[42] With SEC administrative proceed-ings, Congress has done just that—an unconstitu-tional encroachment rationalized under the "public rights" doctrine.

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[40] *Id*., at 725-26. Madison's first draft of what became the Seventh Amendment restricted the civil jury right to suits at common law "between man and man," 1 ANNALS OF CONG. 435 (1789). But that phrase was quickly deleted by an eleven-man select committee of the House, *id*, at 760, affirming that the newly-installed representatives acknowledged the people's intent that the right extend fully to suits between man and govern-ment. *See* Wolfram, at 728, n.258.

[41] *Id*., at 672-73.

[42] *See generally*, *id*., at 662-730.

B. Properly Construed in its Historical Context, the "Public Rights" Doctrine Cannot Encompass Common Law Claims by the Government for Penalties.

1. The SEC's Version of the Public Rights Doctrine Finds No Support in Eighteenth Century English Law or the Ratification Record.

The SEC's expansive and selective view of the public rights doctrine would permit the evisceration of jury trial rights whenever an agency of the government sues a citizen under a claim contained within a federal statute. The SEC misreads this Court's precedents to conclude that the government's involvement as a plaintiff simply turns the claim into a "public" one, and thus a "public right," allowing the plaintiff to avoid a real court and the inconvenience of a jury.

Nothing in the English historical record supports the version of the public rights doctrine the SEC urges upon the Court today. "Suits at common law" covered all legal claims for damages or penalties—any claim not criminal, equitable or in admiralty. Actions by the Crown to recover penalties against subjects were only adjudicated in the common law courts, where jury rights were fully intact. This included enforce-ment actions by the Crown for securities fraud.[43] The public-private distinction was not a framework for considering whether judicial power was necessary to adjudicate a dispute or whether a party had the right

[43] *See infra*, at 35-36.

to demand a jury trial. The only reference to the phrase "public rights" in connection with eighteenth century English law can be found in a single passing reference by Blackstone in describing "crimes and misdemeanors" as "a breach and violation of the public rights and duties."[44]

The Anti-Federalists were especially distrustful of Congress to protect the jury trial from encroachments, fearing that legislators would be all too tempted to create some "new species of trial" that might be confined to "decision of the magistracy" without juries, cutting out "the great body of the people" from "the administration of public justice."[45]

The intent to embue the Seventh Amendment with the broadest possible scope—and to include suits by the government—is reinforced by the passage of the Judiciary Act of 1789 by the First Congress in defining the jurisdiction of the new Article III courts. Signed into law by President Washington the day before Congress adopted the Bill of Rights for ratification by the states, the Act provided that the newly-established district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be,…of *all suits at common law where the United States sue*…[46]

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[44] 4 Blackstone's COMMENTARIES, at 41.

[45] Essays by The Impartial Examiner No. 1, VA. INDEP. CHRON. (Mar. 5, 1788), *reprinted in* 5 STORING, *supra* n38, at 868–69.

[46] JUDICIARY ACT OF 1789, ch. 20, § 9(b)–(c), 1 Stat.73 (emphasis added) (giving federal circuit courts and district courts concur-

The Court has remained steadfast in holding that the Seventh Amendment's scope is defined by "the right to trial by jury as it existed [in England] in 1791."[47] *Curtis v. Loether*, 415 U.S. 189, 193 (1974). For this reason alone, continued application of this "public rights" construct for Seventh Amendment purposes is unwarranted. The historical record fails to include any equivalent of a "public rights" doctrine or other tenet limiting juries for English common law claims in 1791. It certainly would have been disfavored by most Federalists and met with outright opprobrium by the successful Anti-Federalists who fought for several years to secure a guarantee of "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[48]

Continuing adherence to the historical 1791 guidepost compels a vigorous presumption in favor of jury trial rights and Article III jurisdiction and reexamination of the applicability of the public rights doctrine to the Seventh Amendment. But the Court need not revisit the historical test or abandon the public rights doctrine to resolve this case. The

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rent jurisdiction over suits at common law when the government sues private parties).

[47] The English-law-in-1791 touchstone is the first of two tests for determining whether Seventh Amendment rights apply to a particular claim. The second element requires examination of the nature of the claim—measured by whether the remedy sought is legal or equitable in nature. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

[48] Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* 15 JEFFERSON PAPERS, *supra* n.38, at 267.

decision by the court below is well supported by the Court's modern Seventh Amendment jurisprudence, including the standards laid out in the controversial *Atlas Roofing v. Occupational Safety Comm'n*, 430 U.S. 442 (1977).

2. Whether a Claim is for a Private or Public Right Depends on the Nature of the Underlying Claim, Not the Identity of the Plaintiff.

The public/private rights dichotomy was designed as a test for determining whether a claim must be tried in an Article III court, not whether a ligitant to such claim is entitled to a jury trial. But since this Court, beginning with *Atlas Roofing* decision in 1977, infused the public rights doctrine into Seventh Amendment analysis, the doctrine's outlines have overtaken the historical underpinnings of the Amendment as the primary determinant of its application.

The *Atlas Roofing* blending of Article III and Seventh Amendment analysis, using the elusive boundaries of the public rights doctrine, has created confusion in the face of ever-increasing encroachments on the right to trial by jury, precisely as the Anti-Federalists feared. Mostly for this reason, Seventh Amendment jurisprudence has been criticized perhaps more than any other,[49] the law seeming

[49] Scholars have condemned the case law as "fundamentally incoherent" and "indefensible," constituting "a wholly unprincipled judicial abandonment of a constitutional right, for no other reason than the Court's deference to the conclusion of the majoritarian branches that enforcement of that right would

unfathomable at times even to members of the Court. *See Stern v. Marshall,* 564 U.S. 462, 504 (2011) (White, J., dissenting) (finding the Court's treatment "mystifying," any logic reduced to a mere "tautology"). Justice Scali noted that "something is seriously amiss with our jurisprudence in this area." *Northern Pipeline Constr. Co. Marathon*, 458 U.S. 50, 111 (1982) (Scalia, J. concurring). The Court has more recently acknowledged that the public/private rights dichotomy has still not been "definitively explained" in the Court's decisions. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018).

This case presents the Court with the opportunity to bring much-needed clarity to Seventh Amendment analysis and return the jury trial right to its proper place and its original purpose: to serve as a critical check on government power.[50] Injection of the public rights doctrine into the mix, opening up new exceptions to the Amendment for the benefit of government-enforced claims, has seemingly turned the purpose upside down, scuttling the hard-fought

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be politically or socially difficult or inconvenient" M. Redish and D. LaFave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 411, 429 (1995); *see also*, Kenneth Klein, *The Validity of The Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1045, (1994) ("Klein") (finding the cases "convoluted" and "misguided").

[50] *See* Luther Martin, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 221-22 (Max Farrand ed., 1911).

handiwork and unambiguous intent of the Founders. In the words of one scholar, it is "antithetical to the Seventh Amendment to read into it an exception for government-supervised dispute resolution".[51]

It is also antithetical to the Seventh Amendment and Due Process principles to confer on the Congress the power to strip the Amendment's protections away through Congress' extraneous authority to regulate the jurisdiction of the inferior federal courts. Yet that is precisely the effect of the application of the public rights doctrine to the Seventh Amendment, which in effect subordinates jury right protections to the details of Article III jurisdictional principles. The public rights jurisprudence now vests the legislative branch with power to relegate statutory legal claims for penalties to non-Article III forums where, if they pass the current version of the public rights test, Seventh Amendment rights automatically disappear. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53–54 (1989). In this respect, the Seventh Amend-ment has been reduced to nothing more than another procedural incident of federal court procedure, like the right to discovery and the rules of evidence. But Congress may not exercise its power over the jurisdiction of the courts in order to deprive a party of a right created by the Constitution. *See United States v. Bitty*, 208 U.S. 393, 400 (1908) (Congress' power to regulate jurisdiction of infereior courts under Art III § 2 is subject to "due regard to all the provisions of the Constitution").

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[51] Klein, *supra* n. 56, at 1047.

The principles underlying Article III jurisdiction and Seventh Amendment rights share many general attributes, but they are far from identical. As the Court held in *Tull*, the long-accepted test for the vesting of Seventh Amendment rights looks to (1) the similarity of the claims to eighteenth century actions in the courts of England, and (2) whether the remedy sought classifies the case as either legal or equitable in nature. 481 U.S. at 417-18. But a litigant facing such a claim—and thus placed securely under the Seventh Amendment's umbrella—loses that constitutional protection completely just because Congress elects to switch jurisdiction out of Article III and into an alternative forum, preferring the efficiency of summary adjudications in the administration of a statutory scheme. This confirms the worst nightmares of the Anti-Federalists and is difficult to square with our constitutional structure, not to mention the guarantees of due process and equal protection, all casting grave doubt on the doctrinal underpinnings of *Atlas Roofing*.

But even the public rights doctrine in its modern iteration does not swallow up the jury trial right in the case of statutory securities fraud claims prosecuted by the SEC—at least for the types of claims pursued against Jarkesy. That is because, as the Fifth Circuit held, "fraud claims, including the securities-fraud claims here, are quintessentially about the redress of private harms." Pet. App. 20a. Further recognizing that "these fraud claims and civil penalties are analogous to traditional fraud claims at common law in a way that the 'new' claims and remedies in *Atlas Roofing* were not," the court below

correctly placed these claims squarely within the realm of "private rights." *Id*.

Contrary to the arguments advanced by the SEC, whether a claim involves a "private" or "public" right rests on the underlying nature of the claim itself, not the identity of the government as plaintiff or the claim's incorporation into a statutory scheme.[52] A claim analogous to a common law claim recognized in eighteenth century England which seeks damages or a penalty—thereby implicating a citizen's private property interests—is a legal action attacking a core private right. In its most benign and defensible form, the public rights doctrine allows "a set of [non-Article III] adjudications that are permissible because they are a form of executive power and usually do not involve deprivations of life, liberty, or property."[53] A penalty—just like an award of damages—deprives the defendant of property, which is why "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." Pet. App. 10a, quoting *Tull*, 481 U.S. at 418–19.

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[52] *See, e.g., Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 586 (1985) (rejecting the public rights interpretation "that Article III has no force simply because a dispute is between the Government and an individual" and affirming that the proper inquiry is directed to "the origin of the right at issue or the concerns guiding the selection by Congress of a particular method for resolving disputes"); *Northern Pipeline, supra*, at 69 (government as party to litigation "not sufficient means of distinguishing 'private rights' from 'public rights'").

[53] William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1536 (2020)

Thus public rights are claims to which the government is the real party in interest or otherwise involving public benefits, privileges or franchises granted by the government. Public rights are essentially "the ownership interests of the government."[54] Whatever the government giveth, it may taketh away, however it designs to do so consistent with the rudiments of due process. But a citizen's own private property, the possession of which Blackstone termed an "absolute" right, is a core private right which should be subject to dispossession only upon adjudication by an Article III court and the right to a jury trial.

C. Securities Fraud Claims Prosecuted by the SEC Are Not Public Rights Cases, Even As Defined by *Atlas Roofing*

1. The Public Rights Formulation Adopted by *Atlas Roofing* For "New" and "Unknown" Statutory Claims Does Not Remotely Describe Securities Fraud Claims, Which Have Been Prosecuted Before Juries for Centuries

The SEC's talismanic reliance on *Atlas Roofing* as simply eliminating Jarkesy's Seventh Amendment rights cannot be reconciled with either the multiple elements of *Atlas Roofing's* formulation or the doctrinal constraints imposed by subsequent decisions,

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[54] John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 163–64 (2019).

however "varied" and "not entirely consistent"[55] they may be. Starting with *Atlas Roofing* itself, the Court was careful to limit the analysis to the very circumstances presented there: "whether the Seventh Amendment prevents Congress from assigning to an administrative agency, *under these circumstances* the task of *adjudicating violations of OSHA*." 430 U.S. at 449 (emphasis supplied).

The *Atlas Roofing* Court examined the following criteria to reach the conclusion that the technical OSHA claims—created by statute and prosecuted by the government—should be categorized as public rights:

(1) The claims were "unknown to the common law";

(2) The claims were part of a voluminous "new type of litigation" that "would choke the already crowded federal courts";

(3) The claims provide "new remedies where those available in courts of law were inadequate"; and

(4) The administrative forum would "supply speedy and expert resolutions of the issues involved."

430 U.S. at 455, 460-61. These attributes of "public rights" do not remotely describe the anti-fraud claims pursued by the SEC against Jarkesy. Dodd-Frank created no "new" claims. The statutory claims pursued in this case had been around since the 1930's and

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[55] *Stern v. Marshall*, 564 U.S. 462, 484, 488 (2011).

1940, were prosecuted by the SEC in federal courts for decades, and analogous claims had been litigated—including by the government—for centuries before that. There were no "new" remedies created either—the penalty provisions remained the same, precluding any contention that the old remedies were deemed by Congress to be "inadequate." The Article III courts were not "choking" under the load of securities fraud enforcement actions, and indeed are smoothly adjudicating all of these cases today. Finally, no one could pretend that the SEC's administrative court system is "speedy."

The novelty of the statutory claims was the *sine qua non* of *Atlas Roofing*'s formulation—the factor that can separate the statutory claims from anything echoed in the common law. Indeed, the Court used the word "new" eleven times in characterizing the technical OSHA workplace-safety claims as public rights. This factor alone excludes the statutory anti-fraud claims against Jarkesy from public rights status—claims which serve "the same essential function" of statutory and common law claims in England in 1791.[56]

Fraud cases for damages and penalties were commonplace in the Court of King's Bench and the courts of common pleas going back to the seventeenth century; as Blackstone reported, "Suits alleging falsity or fraud, "which savour of a criminal nature, although the action is brought for a civil remedy," to "make the defendant liable in strictness to pay a fine

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[56] *See* discussion and authorities *infra* at 35-36.

to the king," are prosecuted by common law courts.[57] While securities regulation in general can be found as far back as thirteenth-century England,[58] at least by the eighteenth century, complex fraud suits in connection with secureties transactions were both recognized and widely reported.[59]

The Framers were well acquainted with the series of London financial market scandals that occurred in the decades leading up to ratification, including the South Sea Bubble Scandal of 1720 and the Charitable Corporation Affair in 1731.[60] The Framers were no strangers to market regulation, securities fraud litigation, or to the use of juries to determine liability.

The American securities fraud statutes passed from 1933 to 1940 built upon this history and the

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[57] 3 Blackstone's COMMENTARIES, at 42; *see Gartside v. Isherwood*, 1 Bro. C.C. 558, 564, 28 Eng. Rep. 1297, 1300 (Ch. 1783) (jury required for fraud case in connection with financial transactions); *Barnesly v. Powel*, 1 Ves. Sen. 119, 120, 27 Eng. Rep. 930 (Ch. 1749) (forgery and fraud are jury questions); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 107 (1980).

[58] *See* Louis Loss, FUNDAMENTALS OF SECURITIES REGULATION 1-3 (2d ed. 1988) (tracing origins of securities laws back to English legislation adopted in 1285).

[59] *See, e.g., King v. Cawood*, 5. C. Str. 473, 2 Ld Raym 1361, 92 ER 386 (K.B. 1790), the year before the Seventh Amendment was ratified, in which the defendant was penalized at the Court of King's Bench after he was found liable for violations of the Bubble Act, a financial market statute.

[60] K. Gray, G. Clark and L. Frieder, CORPORATE SCANDALS: THE MANY FACES OF GREED 20 (Paragon House, 2005).

antifraud proscriptions substantially codified the common law fraud jurisprudence that had been used to litigate fraud claims in connection with securities markets, the sale of securities, and the conduct of investment advisors.[61] Courts have consistently noted that the elements of common law fraud, as the "roots" of the securities fraud statutes, either closely resemble or are substantially identical to the antifraud provisions of the securities laws. *See, e.g.*, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 344 (2005) (relying on "the common-law roots of the securities fraud action and the common-law requirement that a plaintiff show actual damages" to interpret causation under Rule 10b-5). These are the claims the SEC

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[61] Echoing traditional common law fraud theories, the securities statutes' antifraud provisions prohibit, *inter alia*, "any device, scheme, or artifice to defraud," or "to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact," or "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. §§ 77a-77aa (2006) (§ 17(a) of Securities Act). See 15 U.S.C. § 78j(b) (§ 10(b) of the Securities Exchange Act); 15 U.S.C. § 80b–6, (§ 206(2) of the Advisers Act).

The courts have long used the tenets of common law fraud, from England and the U.S., to interpret the meaning and application of the securities fraud statutes' antifraud provisions. *See, e.g.*, *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 191 (2015) (using common law Restatement (2d) of Torts to determine whether material omissions actionable under § 11 of Securities Act); *Aaron v. SEC*, 446 U.S. 680, 693 (1980) (looking to common law of fraud to interpret culpable mental state required for liability); *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963) (relying on common law of England and U.S. to "reinforce[] our conclusion that Congress … did not intend to require proof of intent to injure" in Advisers Act cases).

pursued against Jarkesy. Pet. App. 74a-78a.

Contrary to the SEC's contention, Pet. Br. 30-31, the fact that the securities statutes' anti-fraud provisions also contain some "potential for fraud" ingredients, to further define their common law securities fraud analogues, does not vitiate their status as private rights claims. The SEC places heavy reliance on the Securities Act's prohibition of "not just 'the elements of…common-law fraud," but also actions that pose a "potential for abuse," citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 200 (1963). But that decision negates the SEC's point entirely, establishing instead this Court's view that the security acts claims are anything but new:

> That the security acts do not "require proof of intent to injure and actual injury to clients…is not in derogation of the common law of fraud," a conclusion that "finds support in the process by which the courts have adapted the common law of fraud to the commercial transactions of our society." It was thus "logical to conclude that Congress codified the common law 'remedially' as the courts had adapted it to the prevention of fraudulent securities transactions… ."

Id., at 187 (internal citations omitted.) The SEC further asserts that, because of these "potential for abuse" proscriptions, the anti-fraud statutes are "analogous…to the OSHA enforcement mechanisms…in *Atlas Roofing*." Pet. Br. 31. But aside from ordinary negligence claims, the claims for the esoteric

workplace-safety regulations promulgated by OSHA had no specific common law analogues. Unlike Jarkesy, charged with violating basic *statutory* fraud standards, the Atlas Roofing Company was cited—and fined $600—for violating two newly-enacted *regulations*, 29 C.F.R. §§ (b)(1) and (f)(5) (ii) (1976), which "require[d] that roof opening covers be 'so installed as to prevent accidental displacement.'" 430 U.S. at 448. The *Atlas Roofing* Court was correct in finding this claim to be "new." The King's Counsel in 1791 was not prosecuting common law claims against Englishmen for improper placement of roof opening covers, or anything of the sort.

2. Subsequent Cases Have Substantially Overruled *Atlas Roofing*—Cases Which Demonstrate Why The SEC's Claims Cannot Qualify as Public Rights

The SEC complains that the Fifth Circuit erred by relying on this Court's post-*Atlas Roofing* decisions that it deems "inapposite" because they "addressed other aspects of the public rights doctrine," holdings the SEC openly chooses to deprecate or ignore. Pet. Br. 26. But those other "aspects" are critical, and controlling, as they further affirm the anti-fraud claims against Jarkesy to be private, not public, rights. In short, these later cases have so circumscribed *Atlas Roofing's* holding—and backed away from the public/private rights dichotomy—that its earlier formulation can no longer be said to control Article III or Seventh Amendment analysis.

In 1985 the Court in *Thomas v. Union Carbide Agricultural Products Co.* dismissed the *Atlas Roofing*

notion "that Article III has no force simply because a dispute is between the Government and an individual." 473 U.S. 568, 586 (1985). In doing so, the Court eschewed *Atlas Roofing's* "formalistic" analysis of public rights, redirecting the inquiry for assessing the validity of assignments to Article I courts to "the origin of the right at issue or the concerns guiding the selection by Congress of a particular method for resolving disputes," *id.,* all to determine whether the claims are truly new legislative concoctions or instead fall "within the range of matters reserved to Article III courts." 473 U.S. at 587.

In 1986 the Court in *CTFC v. Schor* backed further away from the "public rights/private rights" mode of analysis,[62] arguably rejecting it entirely by embracing a case-by-case approach, and proclaiming that the *Thomas* Court had "rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights." 478 U.S. 833, 853 (1986).

Having seemingly jettisoned the public/private rights model, the Court effectively imposed a new four-part test for assessing the constitutionality of non-Article III assignments,[63] all leading one scholar

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[62] P. Sun, *Congressional Delegation of Adjudicatory Power to Federal Agencies and the Right to Trial By Jury*, 1988 DUKE L.J. 539, 554 (1988).

[63] 478 U.S. at 851. Those factors are: (1) the extent to which the statutory scheme reserves the essential attributes of judicial power for article III courts; (2) the extent to which the non-article III forum exercises the jurisdiction and powers normally vested in article III courts; (3) the concerns that drove Congress to depart from the requirements of article III; and (4) the origins

to conclude that "the public rights/private rights distinction no longer serves as a bright-line test in any context."[64] A split *Schor* Court managed to uphold the Article I proceeding in that case because the defendant broker there had a *choice* whether to submit to the Article I forum, noting that an "absence of consent to an initial adjudication before a non-Article III tribunal [is] a significant factor in determining that Article III forb[ids] such adjudication." *Id*., at 849. *Schor* also described the types of new claims permissible for assignment in Article I agency courts as those "peculiarly suited" for specialized agency adjudication.[65] *Id*. at 856.

These cases focused on Article III jurisdiction, not the separate imperatives underlying the Seventh Amendment. But in 1989, the Court returned to jury trial rights in *Granfinanciera,* detaching the public rights doctrine from Seventh Amendment analysis by holding that, if even a "public rights" claim carried a Seventh Amendment right in an Article III court, the same claim required a jury *even in an Article I forum*. This is so even though the claim was part of a comprehensive statutory scheme. In a case challenging the litigation of a bankruptcy trustee's action to recover fraudulent transfers from a third-party def-

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and importance of the right to be adjudicated in the non-article III forum.

[64] P. Sun, *Congressional Delegation of Adjudicatory Power to Federal Agencies and the Right to Trial By Jury*, 1988 DUKE L.J. 539, 554 (1988).

[65] *Schor*, 478 U.S. at 856, (citing *Crowell v. Benson*, 285 U.S. 22, 46 (1932), and *Thomas,* 473 U.S., at 583–584).

endant in an Article I bankruptcy court without a jury, the *Granfinanciera* Court held that the Seventh Amendment still applied, no matter the forum. 492 U.S. at 36. For the first time, the Court rejected the premise invoked in *Atlas Roofing* that juries are categorically unavailable in Article I forums, and did so by significantly redirecting the analysis for testing limits on Seventh Amendment rights. *Id.*

The *Granfinanciera* Court distanced itself further from *Atlas Roofing*, rejecting the "taxonomic" reclassification of pre-existing common law causes of action into statutory claims to turn them into "public rights." If Congress did not "'creat[e] a new cause of action, and remedies therefor, unknown to the common law,' because traditional rights and remedies were inadequate to cope with a manifest public problem," Seventh Amendment rights cannot be infringed:

> 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.

492 U.S. 60–61.

The *Granfinanciera* Court effectively appended two additional elements to the test for Seventh Amendment compliance. First, that the assignment of a new statutory claim to a jury-less administrative proceeding presumptively violates the Seventh Amendment unless allowing jury consideration would "go far to dismantle the statutory scheme," 492 U.S. at 61, including "imped[ing] swift resolution" of the

claims litigated under the statutory scheme, 492 U.S. at 63. Second, a legislative consignment of claims to an Article I forum is entitled to a degree of deference only if there is evidence that Congress "has given careful consideration to the constitutionality of" the legislative assignment. 492 U.S. at 61.

The *Granfinanciera* Court vindicated the Seventh Amendment right even though the claim arguably involved a "public right" and despite its recognition that juries could inject delays and complications into otherwise streamlined Article I adjudications. *Id*., at 62-64. The Court stressed that there is no "delay and expense" exception to the "clear command of the Seventh Amendment," reiterating the maxim that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[66]

Granfinanciera wiped out the last vestiges of the argument—stemming from *Atlas Roofing*—that Congress may vanquish Seventh Amendment rights simply by assigning common law claims to an Article I forum. But that is the very argument the SEC continues to advance here.[67]

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[66] Citing *Bowsher v. Synar,* 478 U.S. 714, 736 (1986), quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983).

[67] The SEC dismisses *Granfinanciera* as "irrelevant" based on the agency's incorrect assertion that the principles laid out by the *Granfi-nanciera* Court are "inapplicable to cases involving the federal govern-ment," Pet. Br. 27, apparently meaning claims where the government sues as plaintiff. The SEC conflates the Court's specifically addressing a claim "not involving the federal government," 492 U.S. at 54, with the

The Court contined to reinforce Article III jurisdiction in *Stern v. Marshall*, deciding the "narrow" issue that a counterclaim in bankruptcy court could not be tried outside of Article III, even where the claimant consented to the bankruptcy court's jurisdiction. 564 U.S. 462, 484, 488 (2011). In its discussion the Court made only passing reference to *Atlas Roofing* by including it in a string cite that emphasized the limitation of the "public rights" doctrine as encompassing only the types of claims which *historically* were not adjudicated in Article III courts. *Id*. at 489-90.

The Court most recently addressed public rights and the Seventh Amendment in *Oil States Energy Servs., LLC, v. Greene's Energy Grp., LLC*, holding that the *inter partes* review process at the Patent Trial and Review Board does not violate Article III requirements, because patents were never available at common law and could be issued or revoked by Congress directly. 138 S. Ct. 1365, 1375-78 (2018).

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nature of the underlying claim. When the Court there stated that Article III courts must always adjudicate a claim that "neither belongs to nor exists against the Federal Government" *id*. at 54-55, it was referring to the substance of the claim itself, not whether the government happens to be the plaintiff. The SEC likewise points, Pet. Br. 27, to the Court's observation that Congress may strip away Seventh Amendment rights where the "statutory cause of action inheres in…the Federal Government in its sovereign capacity," 492 U.S. at 53, referring again to whether the government itself was victimized or owned the benefits or privileges giving rise to the claim. The SEC erroneously takes this to mean that where "an administrative enforcement proceeding [is] brought by a federal agency," Seventh Amendment rights to not apply, and the *Granfinanciera* analysis is thereby rendered "irrelevant." Pet. Br. 28.

The Court cited *Granfinanciera* and even *Atlas Roofing* for the proposition that the Seventh Amendment does not apply "when Congress *properly* assigns a matter to adjudication in a non-Article III tribunal," *Id.*, at 1379 (emphasis supplied), illustrating that at least the *Oil States* Court viewed Article III and Seventh Amendment rights as coterminous.

Despite this uneven treatment, the Court's decisions establish that the ancient common law anti-fraud claims faced by Jarkesy were private rights which should have been tried in an Article III court with a jury. Niether the original 1930's securities acts nor Dodd-Frank § 929P(a) created "novel" or "new causes of action, and remedies therefor, unknown to the common law," nor were these claims "peculiarly suited" to agency adjudication. And since the elements and penalties were left undisturbed by § 929P(a), it cannot be said that "traditional rights and remedies were inadequate to cope with a manifest public problem." These factors alone place the claims well outside the domain of public rights.

Further, nothing about prosecution of these claims in real courts before juries would "go far to dismantle the statutory scheme" or "impede swift resolution" thereof, as decades of experience demonstrate. It would be ludicrous to assert that juries in Article III courts would "impede swift resolution" of securities fraud enforcement actions, where the SEC's administrative proceedings have frequently proven *more* cumbersome and time-consuming than Article III litigation—including in this case.

Finally, the statutory scheme provides no means of escape for a target trapped in the SEC's administrative court system, a circumstance the *Schor* Court held to be "a significant factor in determining that Article III forb[ids] such adjudication." 478 U.S. at 849.

All of the currently-sanctioned factors for evaluating the validity of congressional assignments of claims to Article I courts, for Seventh Amendment or Article III purposes—including the *Schor* four-part balancing test—demonstrate the constitutional infirmity of the Article I assignment afforded by § 929P(a).

D. The "Coextensive" Jurisdiction Created by Dodd-Frank § 929P Vitiates the Assignment of SEC Anti-Fraud Claims to an Article I Court Without a Jury

The assignment of cases to the SEC's administrative tribunals is *not* exclusive—the agency is afforded "dual" jurisdiction to enforce its anti-fraud claims in either federal court or its own in-house courts. This feature of Dodd-Frank § 929P(a) belies the asserted rationale for Article I adjudications and reveals the claims to be private rights, and cannot be reconciled with the requirement that public rights claims are those which are "uniquely" or "peculiarly suited for agency adjudication." *Granfinanciera*, 492 U.S. 60–61; *Atlas Roofing*, 430 U.S., at 461.

The most consistent dictate running through this Court's public rights/private rights jurisprudence is the insistence that Congress' relegation of new public rights claims to administrative adjudication is to be

"exclusive." When Congress "creates procedures 'designed to permit agency expertise to be brought to bear on particular problems,' those procedures 'are to be exclusive.'" *Free Enterprise Fund v. PCAOB,* 130 S. Ct. 3138, 3150 (2010); *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.,* 85 S. Ct. 551, 557 (1965). This requirement has been recited uniformly and was highlighted even in *Atlas Roofing*, where the Court sanctioned assignments of enforcement cases to Article I courts for adjudication without a jury when "committed exclusively" to those tribunals. *Atlas Roofing*, 430 U.S. at 450.

Indeed, the "dual jurisdiction" feature afforded by § 929P(a) makes a mockery of the Court's arduous journey through the public/private rights forest. A "new" and novel" legal claim is either uniquely and "peculiarly" suited for high-volume administrative adjudication or it is not. The classification of these claims as *both* suited for adjudication in Article III courts *and* in Article I forums at the same time refutes conclusively any bona fide legislative purpose that would justify the Article I assignment under the Court's precedents.

The SEC confronts this problem by misconstruing a quotation in *Oil States*, ignoring the conjunction "or" in the Court's observation that "Congress can 'reserve to itself the power to decide,' 'delegate that power to executive officers,' **or** 'commit it to judicial tribunals," 138 S. Ct. at 1378 (citing *Ex parte Bakelite Corp*., 279 U.S. 438, 451 (1929)) (emphasis added). Pet. Br. 32. Thus *Oil States* does not help the SEC, instead reinforcing the exclusive-assignment condition for

designating claims to Article I tribunals and the inevitable conclusion that the anti-fraud claims in the securities statutes are private rights, as the Fifth Circuit held.

II.

The Unfettered Discretion Conferred By Dodd-Frank to the Commission to Assign Securities Fraud Claims to Article I Courts Was an Unconstitutional Delegation of Legislative Power

Even if the dual jurisdiction scheme crafted by § 929P(a) did not run afoul of Seventh Amendment or Article III constraints, the plenary authority it vests in *the prosecuting agency* to assign cases to its jury-less in-house courts constitutes an unconstitutional delegation of legislative power. The Court has made abundantly clear that only Congress has the power to assign cases for adjudication outside of Article III courts. The Dodd-Frank transfer of that power to the Commission—without *any* criteria or intelligible principle to govern the agency's assumption of that legislative role—crossed the line of permissible delegations of legislative power in contravention of the separation of powers, as the Fifth Circuit correctly decided. Pet. App. 28a.

A. The Nondelegation Doctrine Prohibits the Blanket Transfer of Legislative Authority to Another Branch

The doctrine's roots predate the Founding, grounded in the need to maintain the integrity of the

separation of powers."[68] It is not happenstance that the very first operative sentence of the Constitution, Art. I, § 1, provides that "All legislative Powers herein granted shall be vested in a Congress of the United States." Madison and his fellow Framers were profoundly influenced by the writings of John Locke, who admonished that "The legislative cannot transfer the power of making laws to any other hands. For it being a delegated power from the people, they, who have it, cannot pass it over to others."[69] Chief Justice John Marshall, in the Supreme Court's first serious encounter with the principle against the delegation of legislative authority, confidently declared: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). This strict prohibition generally held up until the courts were forced to confront the contrary demands of the

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[68] Well versed in Montesquieu's admonition that "constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go," 1 Montesquieu, The Spirit of Laws, bk. XI, ch. 4, at 184 (Ewing trans. 1751), Madison signaled the necessity of the doctrine, exhorting in Federalist 48 that "power is of an encroaching nature, and that it ought to be effectively restrained from passing the limits assigned to it." THE FEDERALIST No. 48, at 228 (J. Madison).

[69] John Locke, TWO TREATISES OF GOVERNMENT 408-09 (Laslett ed. 1963). It is generally accepted that the Framers viewed legislative authority as nondelegable. *See, e.g.*, THE FEDERALIST 74, at 342 (Hamilton) (Masters Smith & Co. 1857).

flourishing administrative state in the early 20th century.[70]

The bar against legislative delegation was soon loosened during the New Deal era, the Court sanctioning the transfer of power if accompanied by sufficient congressional guidelines to control and restrict the exercise of that authority, at least theoretically preventing agencies from usurping Congress' constitutional role or misapplying the delegated power. The bar loosened further as the Court came to approve delegations for which some "intelligible principle" was supplied by Congress to guide the exercise of the delegated power. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 372 (1989). No such intelligible principle can be divined to guide the SEC's power to assign cases to its own in-house courts—a point which the SEC does not contest.

B. Assignment of Government Enforcement Claims to Article I Courts Without Juries Is a Core Legislative Power

"In a delegation challenge, the constitutional question is whether the statute has delegated

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[70] The Court remained steadfast in vindicating the non-delegation doctrine through the late 1920's. *See, e.g., J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) ("it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch"); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power...is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

legislative power to the agency." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 437, 472 (2001). The Fifth Circuit held that the authority conferred upon the SEC by § 929P(a) is legislative, "a power that Congress uniquely possesses." Pet. App. 27a. Congress may not confer on the Executive Branch "powers which are strictly and exclusively legislative." *Gundy v. United States,* 139 S. Ct. 2116, 2123 (2019).

But the SEC insists that the power vested by § 929P(a) to assign claims to Article I tribunals without any Seventh Amendment rights is, or becomes, an executive, not legislative, prerogative. Pet. Br. 36-44. The agency's position is directly contradicted by this Court's consistent holdings that this power is quintessentially legislative in nature. The Court held over a century ago in *Oceanic Steam Nav. Co. v. Stranahan* that Congress' assignment of new statutory enforcement actions under agency adjudication is among the "matters exclusively within its control," 214 U.S. 320, 339 (1909), a power "peculiarly within the authority of the legislative department." 214 U.S. 320, 339 (1909).

The Court repeated this axiom in *Crowell v. Benson*, *supra*, stating perhaps even more pointedly that "the mode of determining" the assignment of cases to administrative tribunals "is completely within congressional control." 285 U.S. at 50. The holding has been repeatedly reaffirmed—verbatim—even in *Atlas Roofing*. 430 U.S. at 50. These precedents establish that this authority constitutes core legislative power.

The SEC gives short shrift to these disposive cases, indeed never addressing these passages,

diverting the discussion instead to the concept of prosecutorial discretion in the criminal context. Pet. Br. 38-40. As the Fifth Circuit noted, however, this "reflects a misunderstanding of the nature of the delegated power." Pet. App. 26a. The power to strip away unilaterally an enforcement target's Seventh Amendment and Article III rights bears no relationship to the everyday decisions criminal prosecutors make in deciding whether and how to prosecute—such as which offense best fits the crime—while leaving all components of the Constitution fully intact. By contrast, the anti-fraud penalty claims pursued by the SEC, whether in Article III courts with juries or in-house courts without juries, are the same. The only difference in its exercise of the power afforded by § 929P(a) is whether these fundamental rights will be available to the agency's target.

The SEC also posits that Congress' exclusive prerogative to designate classes of claims for litigation either in federal court or in administrative proceedings does not vitiate the agency's case-by-case decision-making under § 929P(a). Pet. Br. 42-43. But the SEC's argument is purely tautological, based as it is on the incorrect assumption that Congress possesses the power in the first place to authorize the dual jurisdiction conferred by § 929P(a). *Id*. at 43. This circular argument proves nothing.

The Fifth Circuit's analysis was correct, indeed compelled by this Court's clear directives that the delegated power is exclusively legislative. It makes no constitutional difference whether that unauthorized legislative power is exercised by the agency *in toto* or piecemeal. In the face of no intelligible principle to constrain the exercise of that power, the separation of

powers cannot countentance the delegation afforded by § 929P(a).

III.

The ALJ Presided Over Jarkesy's Adjudication in Violation of the Article II Take Care Clause, Requiring That the Final Order be Set Aside

The court below applied the test this Court set out in *Free Enterprise Fund* to hold that the two (or three) layers of for-cause tenure protection enjoyed by the agency's ALJ's unconstitutionally insulated those inferior officers[71] from presidential control, in violation of the Take Care Clause, Art. II, § 3.[72] The SEC does not contest that its ALJs enjoy multiple levels of for-cause protection. Instead it urges the Court to create an new amorphous exception allowing Congress to insulate its ALJs in "the public interest" to the extent it does not "impermissibly burden" presidential control. The SEC's approach has already been rejected by the Court's recent decisions.

A. The SEC Does Not Contest that its ALJs Are Insulated from Presidential Control By Multiple Layers of Tenure Protection

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[71] This Court held in *Lucia v. SEC* that these ALJ's are inferior constitutional officers for Appointments Clause purposes. 138 S.Ct. 2044, 2053 (2018).

[72] Pet. App. at 34a.

The SEC's constitutional view of its own ALJs "has not run altogether straight."[73] The SEC admitted to this Court in 2018 that, without a judicial revision of the statutory scheme, the multiple layers of tenure protection afforded its ALJs violates the Take Care Clause, U.S. CONST. art II § 3. In its merits brief in *Lucia v. SEC*, 138 U.S. 2044 (2018), the SEC candidly described the constitutional problem:

> Here, the statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority: The Commission's ALJs may be removed by the Commission only for good cause established and determined by the Merit Systems Protection Board," 5 U.S.C. 7521(a), and members of that Board in turn "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. 1202(d). And the Commissioners, likewise, may be insulated from removal (as the Court assumed in *Free Enterprise Fund*), although the Securities Exchange Act is silent on the question. 15 U.S.C. 78(d).[74]

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[73] *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2233 (2020) (Kagan, J., dissenting) (referring to the Court's Take Care Clause precedents).

[74] Br. For Resp't Supporting Pet'r, *Lucia v. SEC*, 2018 WL 1251862, at *52-53 (U.S. Feb. 21, 2018). The *Free Enterprise* Court indulged in this assumption by accepting the parties' suggestion of non-removability as to the SEC's Commissioners. But this was just an "understanding" for purposes of resolving the issue in that case, not rooted in statute. In its brief the SEC is silent on this issue. Unlike in *Free Enterprise*, the Respondents here do not ask the Court to assume non-removability;

The SEC told the *Lucia* Court that if the agency's diluted construction of the term "good cause" in § 7521 were not adopted, the scheme is rendered unconstitutional.[75]

The doctrine of judicial estoppel notwithstanding,[76] the SEC has changed its mind, offering the Court an assortment of different rationales it now asserts can save the statutory scheme from constitutional infirmity. But at least the agency has again agreed that its ALJs enjoy multiple levels of for-cause protection.

B. This Court's Recent Precedents Establish that the SEC's ALJs Sit in Violation of the Take Care Clause of Article II, Section 3

"The entire 'executive Power' belongs to the President alone." *Seila Law v. CFPB*, 140 S. Ct. 2183, 2197 (2020). In order to "take care that the Laws be faithfully executed," U.S. CONST. art. II, § 3 (the "Take Care Clause"), the President must be able to direct his subordinates in how the laws will be executed. Because "removal at will" is "the most direct method of presidential control," *Seila Law*, 140 S. Ct. at 2204,

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because there are two additional robust layers of for-cause tenure protection afforded the ALJ's, there is no reason to resort to a tenuous assumption that finds no support in statute. *Collins v. Yellen*, 141 S.Ct. 1761, 1783, n.4 (removal protections cannot be inferred).

[75] *Id.* at *53.

[76] The doctrine applies to prevent an agency from staking out one legal position in litigation "and then relying on a contradictory argument to prevail in another phase," especially in the same case. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

"the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties,'" *id.* at 2191 (quoting *Free Enterprise Fund*, 561 U.S. at 513–14).

Recognized as necessary to preserve the separation of powers, the power to remove those subordinates is a "structural protection[] against abuse of power" that is "critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). "Since 1789, the Constitution has been understood to empower the President to keep...officers accountable—by removing them from office, if necessary." *Free Enterprise Fund*, 561 U.S. at 483; *see also Bowsher*, 478 U.S. at 723–24. Thus the President's "control of those executing the laws" includes the "essential power of removal. *Myers v. United States*, 272 U.S. 117, 163-64 (1926).

The "good cause" standard for removal of ALJs in § 7521(a) "does not mean the same thing as 'at will.'" C*ollins v. Yellen*, 141 S. Ct. 1761, 1787 (2021). *Seila Law* emphasized that the Constitution prohibits even "modest restrictions" on the President's removal power (in that case the head of an agency with a single top officer). 140 S.Ct., at 2205. As the *Collins* Court explained, the President must be able to remove not just for insubordination but also for those he finds "negligent and inefficient," *Myers*, 272 U.S. at 135, or who exercise their discretion in a way that is not "intelligen[t] or wis[e]," *id.*, those who have "different views of policy," *id.*, at 131, those who come "from a competing political party who is dead set against [the President's] agenda," *Seila Law,* 140 S.Ct., at 2204 (emphasis deleted), and those officers in whom he has

simply lost confidence, *Myers*, 272 U.S. at 124, 47 S.Ct. 21. *Collins*, 141 S. Ct. at 1787.

The Court has "recognized only two narrow exceptions to the President's unrestricted removal power" over constitutional officers. *Seila Law*, 140 S.Ct. at 2192. First, the Court has sanctioned the existence of an expert agency led by a group of principal officers removable by the President only for good cause," but only where that agency does not "wield substantial executive power." *Id*. This originated with the New Deal-era case *Humphrey's Executor v. United States*, where the Court upheld the multi-member commission of the FTC, but only upon determining that the agency exercised "quasi judicial" and "quasi legislative" functions, but "no part of the executive power." 295 U.S. 602, 624, 628 (1935).[77] *See also, Wiener v. United States*, 357 U.S.349, 350, 354-56 (1958) (concluding that the War Crimes Commission was an adjudicatory body and, following *Humphrey's Executor*, holding President Eisenhower therefore could not terminate a member without cause).

The second exception to the President's unrestricted removal power stems from two cases where the Court allowed relatively mild tenure protections "to certain *inferior* officers with narrowly defined duties." *Seila Law*, 140 S.Ct. at 2192. In *United States v. Perkins*, the Court upheld a rule preventing the Secretary of the Navy from discharging a low-ranking cadet in the absence of a finding of misconduct or

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[77] *Humphrey's Executor* has been so undermined by subsequent cases that it no longer appears to command support on the Court. *See Seila Law*, 140 S.Ct. at 2217 (Thomas, J., concurring in part and dissenting in part).

convening a court-martial. 116 U.S. 483, 483-85 (1886). And in *Morrison v. Olsen*, the Court upheld the restriction on the Attorney General's ability to terminate without good cause an independent counsel who served under a temporary appointment to discharge the limited function of investigating and prosecuting certain high-ranking officials. 487 U.S. 654, 691-92 (1988).

These exceptions "represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Seila Law*, 140 S.Ct. at 2199–2200. The Court has admonished that these narrow exceptions should not be elevated "into a freestanding invitation for Congress to impose additional restrictions on the President's removal authority." *Id.* at 2206 (cleaned up).

Beyond these "outermost" limits, the Court has invalidated tenure restrictions on the President's ability to remove an inferior officer at will, and has drawn a bright line prohibiting more than one layer of for-cause tenure protection for inferior constitutional officers. In *Free Enterprise Fund*, the Court invalidated a statutory scheme which insulated members of the Public Company Accounting Oversight Board, which reported to the Commission, through two layers of tenure protection. The Court assumed the SEC Commissioners were only removable for cause, and the board members were protected by statute from discharge without good cause. 561 U.S. at 492. The Court held that the independence created by a double layer of tenure protection violated the Take Care Clause and "contravene the Constitution's separation of powers." *Id.* at 392.

The SEC's ALJs are constitutional officers. *See Lucia*, 138 S.Ct. at 2053. As such, they exercise executive power on behalf of the president, by definition. *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (while agencies "make rules...and conduct adjudications…under our constitutional structure they *must be* exercises of—the "executive Power").

Neither of the two narrow exceptions to presidential removal power applies to the SEC's ALJs. As an agency excercising executive power, the SEC does not at all resemble the now-discredited "quasi judicial" and "quasi legislative" characterization of the FTC in *Humphrey's Executor*. And the SEC's ALJs, who serve indefinite terms and perform significant policy-making and administrative functions, occupy qualitatively different positions from the very narrow scope of duties of the low-level cadet in *Perkins* or the temporary and circumscribed appointment of the independent counsel in *Morrison.*[78]

The SEC attempts to escape this constitutional checkmate by recasting the exceptions as the rule and then inviting the Court to venture out beyond its "outermost limits" by creating a brand new special exception for ALJs. The SEC asserts that Congress *can* impose multiple layers of tenure protection for an inferior officer, unless those layers "impermissibly burden[] the President's power to control or supervise" the Executive Branch. Pet. Br. 47, quoting

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[78] The *Morrison* Court stressed that the independent counsel's removal protections did not unduly interfere with the functioning of the Executive Branch because he was "an inferior officer… with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." 487 U.S. at 691.

Morrison, 487 U.S. at 692. In the absence of such burden, the SEC says that those layers are constitutionally permissible if deemed "best for the public interest." Pet. Br. 46, quoting *Perkins*, 116 U.S. at 495. This argument—taking selected quotes from the two outlier "narrow exception" cases as if they defined the general rule—is essentially the position urged in 2021 by the court-appointed *amicus* in *Seila Law*. The Court there rejected that approach: "The President's removal power is the rule, not the exception." *Seila Law,* 140 S.Ct. at 2206. More specifically, the controlling "general rule" staked out by this Court just three years ago is that the President is vested constitutionally with "unrestricted removal power" for inferior officers, except for those officers who have "limited duties and no policymaking or administrative authority." *Id*. at 2198-2200.

This exception does not implicate the SEC's ALJ's, whose duties are not "limited" and involve profound policymaking and administrative authority. The agency concedes that its ALJs can affect policy through their rulings. Pet. Br. 52. ALJs necessarily "fill statutory and regulatory interstices comprehendsively with [their] own policy judgments." *City of Arlington*, 569 U.S. at 304-35. Agency adjudications "now wield[] vast power and touch[] almost every aspect of daily life." *Free Enterprise Fund*, 561 U.S. at 499. The SEC's ALJ rulings create the intra-agency "common law" that serves as precedent for future cases, including in the interpretation of the reach of federal statutes. Their adjudications can "formulate…agency policies" and "promulgate[] new standard[s] that w[ill] govern future conduct." *NLRB v.*

Bell Aerospace Co., 416 U.S. 267, 292-94 (1974). The Court's "general rule" from *Seila Law* precludes the ALJs' tenure protection. 140 S.Ct. at 2200.

Instead, to make room for another exception, the SEC insists that the Court's "general rule" is neither "per se" nor "categorical," Pet. Br. 45, 48, 50, and that the Fifth Circuit's treating it as such defies both "logic" and the constitutional text. *Id.* 50. By envisioning an elasticity in the Court's rule that cannot be found in *Seila Law*, the SEC seeks special constitutional treatment for its ALJs.

But it is the fashioning of a separation of powers and Take Care Clause exception for ALJs that defies logic, and none of the rationales offered by the SEC withstands scrutiny. In attempting to show how its ALJs, as constitutional officers, belong in a class by themselves, the agency first applies its own form-over-substance analysis, in which it emphasizes the ALJs' day-to-day duties in presiding over case-by-case adjudications: the ALJs merely "preside[] over and issue[] rulings in individual enforcement actions." Pet. Br. 52, n.5. This, says the SEC, does not involve "important policy decisions" carrying "significant political, social and economic consequences." *Id.* 51, 52. Therefore, it reasons, little accountability to the president is required for its adjudicators. *Id.* This rationale finds no support in the Court's general rule but fails mostly because it is based on the false premise that the ALJs do not significantly affect policy, as addressed above.

The agency next contends that the nature of the "adjudicative" role makes the ALJs poor candidates for presidential accountability, since the "[p]ressures

and influences" stemming from presidential oversight would create an "unwholesome atmosphere" for fair and unbiased adjudications. *Id.* 53. The SEC compares its ALJs to Article III judges for whom the Constitution grants lifetime tenure to encourage independent judgment, and surmises that Congress may have wanted to excuse the ALJs from separation-of-powers accountability for that reason. *Id.* In support, the SEC cites dicta in *Myers* for the proposition that a president cannot "properly influence or control" a "quasi-judicial" proceeding conducted within an agency. *Id.* 55, citing *Myers*, 272 U.S. at 135. But *Myers* vitiates the SEC's argument: in the very next two sentences—which the SEC leaves out—the *Myers* Court said that a president

> may consider the decision after its rendition as a reason for removing the [hearing] officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise [the President] does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

272 U.S. at 135. Even salutary policy prescriptions must give way if they create structural fault lines running through constitutional imperatives. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983).

The SEC next argues that ALJs are different because, due to the Commission's internal appellate

function and rulemaking authority, ALJs are subject to substantial control by the agency, mitigating the need for presidential removal power. Pet. Br. 56-59. The SEC says that "the salient point [in the removal analysis] is that the Commission remains legally free to review the ALJs' factual findings de novo whenever it deems that course appropriate." *Id*. 58.

Setting aside the fact that such review is discretionary and can creep along for years, during which time the enforcement target is bound by the ALJ's findings, penalties and bars (as it did for Jarkesy), this argument fails for at least three reasons. First, its very premise—that ALJs are really controlled by the Commission—flies in the face of the tenets of administrative adjudication in the Administrative Procedure Act (APA) and the arguments on judicial independence made by the SEC a few pages earlier in its brief. Second, this Court has already rejected the argument, holding that "[b]road powers over [an inferior officer's] functions is not equivalent to the power to remove" such officers. *Free Enterprise Fund*, 561 U.S. at 504. Finally, that the Commission actually controls its ALJs is irrelevant to whether the ALJs enjoy tenure protection on top of the tenure protection afforded the *members of the MSPB*, the agency which hires the SEC's ALJs and can terminate them only for good cause. This argument is wholly without merit.

The SEC next argues that its ALJs should be exempted from presidential control because the general "good cause" standard in § 7521[79] is "less

[79] ALJ's are removable "only for good cause established and determined by the Merit Systems Protection Board on the record

demanding" than that which confronted the Court in *Free Enterprise Fund*. Pet. Br. 59-61. For that reason, the argument goes, the milder good cause standard for removal is the functional constitutional equivalent of no standard at all, thus fixing the tenure protection problem. This argument also fails. The SEC concedes elsewhere that the statutory scheme is stout enough to provide the ALJs with "significant decisional independence." *Id*. 52. The SEC cannot have it both ways; if the ALJs are truly vested with a "significant" degree of "independence" from their principal officer superiors, they are by definition removable by the President only for "significant" good cause. This is corroborated by the SEC's further admission that removal by the MSPB requires "substantially deficient flaws" in job performance or other misconduct that is "significant." *Id*. at 60-61.

This statutory regime places exclusive power with an external agency to determine for itself whether to remove an SEC ALJ, and reveals why the two words "good cause" cannot be dismissed as imposing only a benign and perfunctory standard for removal. Experience proves that the MSPB jealously guards its prerogatives. The MSPB has declined to sustain the removal of ALJs under the statutory "good cause" test even in cases where misconduct has been substantiated by the agency seeking removal.[80] The statute

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after opportunity for hearing before the Board." 5 U.S.C. § 7521(a).

[80] *See, e.g., Social Sec. Admin. v. Goodman,* 19 M.S.P.R. 321, 331 (1984) (ALJ could not be disciplined for productivity far below national averages in absence of specific evidence that the ALJ's docket was comparable to those of peers).

reserves the decision on whether "good cause" exists solely to the MSPB, which reserves to itself the power to determine "the appropriate penalty if it finds good cause," often refusing to terminate ALJ's even in the face of misconduct.[81]

This establishes that the statutory scheme and the "good cause" standard in § 7521(a) are structured to leave any control over ALJs completely out of the President's hands—and even the Commission's hands—imposing a regime that renders it nearly impossible to accomplish a removal, at least without breaking the law and bulldozing the statutory scheme. This frustrates the President's removal authority further than the statutory restrictions in *Free Enterprise Fund*, and indeed sabotages that constitutional authority entirely. The SEC's remaining arguments—that this statutory structure simply presents no constitutional infirmity and has been around for a long time, Pet Br. 61-65—cannot be reconciled with this Court's "general rule" in *Seila Law*.

C. The Remedy for the Take Care Clause Violation is the Setting Aside of the Commission's Final Order

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[81] *See* 5 C.F.R. 1201.140(b) (MSPB "will specify the penalty to be imposed")*; Social Sec. Admin. v. Brennan*, 27 M.S.P.R. 242, 248, 251 (1985, aff'd, 787 F.2d 1559 (Fed. Cir. 1986) (ALJ's pattern of "disruptive conduct," including refusal to follow office procedures, supported only a 60-day suspension rather than removal)); *Social Sec. Admin. v. Glover*, 23 M.S.P.R. 57, 64, 80 (1984) (ALJ's "intemperate" remarks to supervisor supported 120-day suspension without pay but not removal).

Administrative adjudication by a presiding officer sitting in violation of the Constitution's structural commands requires that the resulting judgment be vacated, whether or not the offending sections of the statutory scheme are "severed" in an attempt to mitigate the constitutional violation prospectively, as the SEC suggests. Pet. Br. 66-67.

First of all, an enforcement adjudication that is permitted to occur only by the exploitation of a statutory scheme that violates the separation of powers—whether through a Take Care Clause violation or improperly delegated legislative authority—is a proceeding that should never have been instituted and conducted constitutionally in the first place. It is a structural error, and by its nature defies harmful error analysis.

This Court has already established that prejudicial error principles do not apply to an Article I judge sitting in violation of structural constitutional requirements. In *Lucia*, the Court ruled that the SEC ALJ presided over the administrative proceeding in violation of the Appointments Clause, 138 S.Ct. at 2055, a structural error.[82] 138 S.Ct. at 2055. The remedy imposed by the Court was vacatur.[83] *Id*. The Court did not even entertain a prejudicial error analysis. *Accord, Ryder v. United States*, 515 U.S. 177, 182-83 (1995) (reversing court martial where

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[82] The Appointments Clause "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991).

[83] Actually, the *Lucia* Court reversed the D.C. Circuit's declining to vacate in denying Lucia's petition for review from the Commission final order. 138 S.Ct. at 2056.

military judges sat in violation of Appointments Clause, eschewing harmful error analysis); *Stern v. Marshall*, 564 U.S. at 503 (affirming the vacating of bankruptcy judge actions in violation of Article III). The structural error doctrine, and its rule of harm *per se*, applies especially to *adjudictions*, in contrast to the use of harmful error analysis—and declining to afford retrospective relief—in other contexts. *See, e.g.*, *Collins v Yellen*, 141 S.Ct. 1761. 1787-89 (2021) (finding unconstitutional removal protections in director of agency but declining to hold void his historical actions in implementation of contract).

The *Collins* Court noted that retrospective relief from separation of powers violations is suitable in cases involving "a Government actor's exercise of power that the actor did not lawfully possess." *Id*. at 1788. That is the case where an adjudicator has presided in violation of a constitutional command that is integral to the integrity of the separation of powers, like Appointments Clause and Take Care Clause violations—the ALJ did not lawfully possess the office.

This case is a textbook illustration of the futility of imposing a prejudice standard in resolving a structural error. "[T]he defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017), quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Another feature of structural error cases is the inherent impossibility of proving or disproving the error's effect—"the effects of the error are simply too hard to measure." *Weaver*, 582 U.S. at 295. There is simply no way to compare the outcome of Jarkesy's administrative proceeding

with an alternative outcome in a counterfactual world where the ALJ had no for-cause tenure protection.

And depriving a victimized litigant like Jarkesy of any retrospective relief would obviously disincentivize all future litigants from ever raising and exposing separation of powers violations. This Court stated in *Ryder* that a party "who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments." 515 U.S. at 182-83.

The second, independent reason for retrospective relief is that, without it, the Court will be left only to render an advisory opinion without any remedies. That is because there is no effective path to *prospective* relief, since the offending provisions of the statutory scheme are not susceptible of severance. The central "inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress" if the offending portions alone are invalidated. *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987). Excising the "good cause" protection of § 7521(a) will upset the statutory scheme and thwart the will of Congress.

The SEC concurs that the tenure protection afforded by § 7521 was very deliberately placed there to create a structure for unbiased administrative adjudication. As the SEC argues, the good cause protection "reflects Congress's intent that agency

hearings be conducted by "fair and competent hearing personnel" exercising "independent judgment on the evidence," "free from pressures by the parties or other officials within the agency." Pet. Br. 66. As this Court explained in *Butz v. Economou*, this was one of the components of Congress' attempt to devise an efficacious admistrative court system in the APA. 438 U.S. 478, 513-514 (1978). "[T]he securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication."[84] *Id.*

Thus severing the offending for-cause protection as adjudged by the MSRB would eviscerate Congress' well-documented intent. "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."[85] *Ramspeck v. Fed. Trial Examiners Conf.*, 345 U.S. 128, 132 (1953).

This leaves the Court with no way to rewrite the statutory scheme or surgically delete the offending provisions. The Court "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018); *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362 (1935). The Court in *Free Enterprise Fund* was able to sever the offending for-cause protection from the statutory scheme—Sarbanes-Oxley—because in

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[84] Quoting from Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941).

[85] Congress replaced the Civil Service Commission with the MSRB in 1978. See Civil Service Reform Act of 1978, § 204, 92 Stat. 1134-1138.

that case "nothing in the statute's text or historical context [made] it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will." 561 U.S. at 509. The same cannot be said in this case: the removal protection was a material ingredient in the APA administrative adjudication formula from the beginning. *Ramspeck*, 345 U.S. at 132. It cannot be said that Congress would have preferred unprotected ALJs to no ALJs at all. The "history" and the "statutory text" say otherwise. Just as in *Bowsher*, "striking the removal provisions would lead to a statute that Congress would probably have refused to adopt." 478 U.S. at 735. For this reason the Court must refrain from "the type of creative and imaginative statutory surgery" necessary to revise the statutory scheme," *id.*, at 736, leaving the resolution to Congress, where it belongs.

The third reason Jarkesy must be afforded retrospective relief is that the jurisdictional statutes underpinning the judicial review require it.[86] Jarkesy is not before this Court on a regular "appeal" from a district court under 28 U.S.C. § 2106 or an agency appeal pursuant to the APA, 5 U.S.C. § 706. The Fifth Circuit's jurisdiction was invoked instead under 5 U.S.C. § 78y,[87] which authorizes the special statutory

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[86] This was the sole issue raised in a conditional cross-petition for writ of certiorari filed by Jarkesy after the filing of the SEC's petition. *Jarkesy v. SEC*, 22-991, *cert denied*, June 30, 2023.

[87] App. at 7a.

review of SEC final orders from adjudications in Exchange Act cases.[88]

Section 78y differs from other appellate review-type statutes in several material ways. First, it prescribes a limited array of possible dispositions, and casts those remedies in jurisdictional terms. *Id*. at § 78y(a)(3). Second, it contains a very limited remand authority, only triggered by a party's motion for the purpose of adducing additional testimony. *Id*. at § 78y(a)(5). Subsection (a)(3) provides as follows:

> On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

A "petition for review" proceeding from an SEC final order is fundamentally distinct from a § 2106 appeal, Congress having vested circuit courts with only limited jurisdiction in the review of SEC final orders.[89] It also differs markedly from a circuit court review under the APA, the most common source of authority to review federal agency actions. For example, both § 2106 and APA § 706 allow for remand to courts and agencies respectively, the appeal statute

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[88] Jarkesy also invoked the Fifth Circuit's special review jurisdiction under 15 U.S.C. § 77i (reviews under Exchange Act), App. at 5a-6a, and 15 U.S.C. § 80b-13 (reviews under Advisors Act), App. at 8a-10a, since the Commission's final order found violations—and implicitly imposed penalties—under all three Acts. The language of each section is virtually identical. "Section 78y" is used herein for ease of reference to represent all three.

[89] *See Garland v. Ming Dai*, 141 S. Ct. 1669, 1678 (2021).

by express language and the § 706 by judicial construction.[90] But the special provisions of § 78y are more limiting than those in § 706, precluding an implicit remand power.

A circuit court is vested by Congress with jurisdiction to dispose of a petition for review of an SEC final order from an enforcement adjudication in only one of three ways: (1) to *affirm* the SEC's order; (2) to *modify* and enforce the SEC's order; or (3) to *set aside*[91] the SEC's order.

This short list defines the full extent of the circuit court's remedial jurisdiction to review SEC "final orders" and supersedes the general agency-review authority over agency "action" in § 706 of the APA. A circuit court's authority to directly review a Commission adjudication comes solely from § 78y,[92] leaving the reviewing courts with only the Spartan list of

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[90] The Court has long held that judicial review of agency actions (or inactions) under the APA pursuant to 5 U.S.C. § 706 includes implicit authority to remand. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943) (known as "*Chenery I*").

[91] Courts have historically equated "set aside" with "vacatur," at least in the APA context, and the terms are thus used interchangeably herein.

[92] *See* 5 U.S.C. § 703 (judicial review of agency action "is the special statutory review proceeding relevant to the subject matter in a court specified by statute"; *Steadman v. SEC*, 450 U.S. 91, 105 (1981) ("[T]he general provisions of the APA are applicable only when Congress has not intended that a different standard be used in the administration of a specific statute") (Powell, J., concurring); *Kixmiller v. SEC*, 492 F.2d 641, 645 (D.C. Cir. 1974) (from SEC proceedings, review jurisdiction set by § 78y, not the APA); *Independent Brokers-Dealers Trade Ass'n v. SEC*, 442 F.2d 132, 143 (D.C. Cir. 1971)).

enumerated remedies Congress chose to set out in (a)(3).

These limitations have another ramification. Despite the Court's remedial disposition in *Lucia*,[93] the statute does not provide jurisdiction to "remand" to the agency. This is not only compelled by the unambiguous language of subsection (a)(3) but is supported further by subsection (a)(5), which provides for remand under very narrow circumstances not applicable here.

"Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019). "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act," we generally take the choice to be deliberate. *Collins*, 141 S.Ct. at 1782 (2021) (internal quotation marks omitted); *see Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (it is "presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). Under the long-recognized "surplusage canon," courts must indulge "the presumption that each word Congress uses is there for a reason." *Advoc. Health Care Network v. Stapleton*,

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[93] 138 S. Ct. 2044, 2055 (2018). The *Lucia* Court's detailed prescription for a new hearing before a different ALJ clearly anticipated a court-directed return by the circuit court to the SEC for such further proceedings. That outcome would be unremarkable in an APA review, but falls outside the permissible remedies available under § 78y. The parties in that case mistakenly claimed review jurisdiction under the APA, and asked the Court for the remand, thus receiving what they requested.

581 U.S. 468, 477 (2017). Courts must "give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (cleaned up).

Section 78y commands the remedy here—the vacatur of the Commission's final order. But the Fifth Circuit's remand to the SEC should be reversed.

Conclusion

The Court should affirm the Fifth Circuit's decision, but shoud reverse its order of remand to the Commission.

Respectfully submitted,

S. Michael McColloch
S. MICHAEL MCCOLLOCH PLLC
6060 N. Central Expressway,
Suite 500
Dallas, Texas 75206
Phone: 214.643.6055
smm@mccolloch-law.com

Karen L. Cook
KAREN COOK, PLLC
6060 N. Central Expressway,
Suite 500
Dallas, Texas 75206
214.643.6054
karen@karencooklaw.com

ATTORNEYS FOR
RESPONDENTS

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

APPENDIX

S. MICHAEL MCCOLLOCH
Counsel of Record
6060 N. Central Expy., Suite 500
Dallas, Texas 75206
(214) 643-6055

KAREN L. COOK
6060 N. Central Expy., Suite 500
Dallas, Texas 75206
(214) 643-6054

Attorneys for Respondents

APPENDIX

TABLE OF CONTENTS

1. U.S. Const. Art. I, § 1 provides:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. U.S. Const. Art. II, § 2, Cl. 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein other-wise provided for, and which shall be established by Law: but the Congress may by Law vest the Appoint-ment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. U.S. Const. Art. III, § 1 provides:

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for

their Services a Compensation, which shall not be diminished during their Continuance in Office.

4. U.S. Const. Art. II, § 3 provides:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

5. U.S. Const. Amend. VII provides:

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.

6. 5 U.S.C. § 703 provides:

Actions against administrative law judges

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the

> administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on

the record after opportunity for hearing before the Board.

(b) The actions covered by this section are—
3a
(1) a removal;
(2) a suspension;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less;
but do not include—
(A) a suspension or removal under section 7532 of this title;
(B) a reduction-in-force action under section 3502 of this title; or
(C) any action initiated under section 1215 of this title.

7. 5 U.S.C. § 706 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

8. 5 U.S.C. § 7521(a) provides:

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause establi-shed and determined by the Merit Systems Protec-tion Board on the record after opportunity for hearing before the Board.
(b) The actions covered by this section are-
(1) a removal;
(2) a suspension;

(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less;
but do not include-
(A) a suspension or removal under section 7532 of this title;
(B) a reduction-in-force action under section 3502 of this title; or
(C) any action initiated under section 1215 of this title.

9. 15 U.S.C. § 77i provides:

(a) Any person aggrieved by an order of the Commission may obtain a review of such order in the court of appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such Court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as

to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommen-dation, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

11. 15 U.S.C. § 78y provides:

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as pro- vided in section 2112 of title 28 and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the fil- ing of the record, to affirm or modify and en- force or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a sup- plemental record containing any new evidence, any further or modified findings, and any new order.

12. 15 U.S.C. § 80b-13 provides:

(a) Petition; jurisdiction; findings of Commission; additional evidence; finality

Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal office or place of bus-iness, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order

complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommenddation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(b) Stay of Commission's order

The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.