No. 22-859

IN THE

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

GEORGE R. JARKESY, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF CONSTITUTIONAL ORIGINALISTS EDWIN MEESE III, STEVEN G. CALABRESI, AND GARRY S. LAWSON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Page

Page

Page

Page

Page

INTEREST OF AMICI[1]

The Honorable Edwin Meese III served as the Seventy-Fifth Attorney General of the United States. Previously, Mr. Meese was Counselor to the President. He is now the Ronald Reagan Distinguished Fellow Emeritus at the Heritage Foundation. During his tenure as Attorney General, the Department of Justice defended proper limits on federal power.

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INTRODUCTION & SUMMARY OF THE ARGUMENT

The Constitution creates a federal government of limited and enumerated powers subject to the Bill of Rights and seventeen subsequent constitutional amendments. The Article III federal courts have the limited and enumerated power to hear three categories of cases and controversies: (i) Cases in Law; (ii) Cases in Equity; and (iii) Cases in

1. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

Admiralty.[2] The federal courts also have the limited and enumerated power to hear certain cases or controversies based on the identity of the parties to a lawsuit. Congress has the power to constitute Article I tribunals inferior to the Supreme Court to hear public-rights cases, such as the U.S. Court of Federal Claims or the tribunals of Administrative Law Judges who work for the Social Security Administration. The judges on these tribunals exercise executive power and must therefore be subject to control by the President through direct-decisional, directive, and cancellation powers—that is, the powers of direct control and direction—or through an unlimited removal power, or through all of the above.

The proceeding below was a case in "Law" analogous to the many fraud cases that were prosecuted at common law before the royal courts of justice at Westminster in 1787: (i) the Court of King's Bench; (ii) the Court of Common Pleas; and (iii) the Court of Exchequer. The proceeding below was not a case in "Equity," which would have been heard by the Court of Chancery, the only court at Westminster that did not use jury trial for all facts relevant to liability or guilt. (Even the Chancery Court used juries to resolve factual disputes as to which juries were always supposed to have the last word.) It was established in England and Wales in 1787 that respondents would have been entitled to a civil jury trial, and it was established in the United States from 1789 onward that respondents would have been entitled to a trial before a civil jury.

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2. The Congress alone has jurisdiction to hear Cases of Impeachment. *Nixon v. United States*, 506 U.S. 224 (1993).

The Securities and Exchange Commission relies on the so-called "public rights" doctrine of *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). This Court reasoned in *Atlas Roofing* that OSHA enforcement actions were not "Suits at common law" to which the Seventh Amendment applies. Similarly, the SEC argues that because of their importance, and because the United States is a party to the suit, securities-fraud enforcement actions do not require a jury trial.

The argument that the Seventh Amendment right to a civil jury trial does not attach to civil cases when the government is a party is Orwellian and terrifying. Civil jury trials are important in common-law cases between two private parties, as our ancestors made clear. But civil jury trials are even more essential in securities-fraud cases to which the federal government, with its enormous financial and litigation resources, is a party. Civil and criminal juries are the shield with which the Constitution protects litigants when the all-powerful federal government sues or prosecutes them. The need for the jury-trial guarantee has been recognized in England since Magna Carta, if not before, and in the United States since the adoption of Article III in 1788, the first Judiciary Act in 1789, and the Seventh Amendment in 1791.

If the Court cannot distinguish *Atlas Roofing* on this case's facts, it should overrule *Atlas Roofing* as an obvious misinterpretation of the Seventh Amendment and the most basic rights of American citizens.

We do not disagree with respondents that the statutory authorization to the SEC poses serious sub-

delegation questions, but we would pose the problem of SEC discretion a bit differently. The basic problem is not discretionary choice but that one choice is unlawful. The SEC may constitutionally enforce the laws against securities fraud only by filing a district-court action. The internal resolution of the SEC's prosecution cannot be resolved by the prosecutorial body itself in a manner that deprives the Article III court process of the initial fact-finding function.[3] The SEC could require internal proceedings about whether it wishes to prosecute certain financial activities as securities fraud. But to secure an enforceable judgment, the agency would have to try its case before a civil jury in a district-court action. Only a jury, if a party requests one, may find facts under Article III and the Bill of Rights. Agencies cannot adjudicate their own prosecutions. Doing so is to make the agency the "judge of his own cause" in contradiction to Sir Edward Coke's ruling in *Dr. Bonham's Case*, 8 Co. Rep. 107; 77 Eng. Rep. 638.

Finally, the question whether Congress violated Article II by granting for-cause removal protection to ALJs in agencies whose heads enjoy for-cause removal protection is answered by this Court's prior case law. As it stands, the SEC Commissioners are removable only for cause. To nestle, within the SEC, ALJs who also are removable only for cause is to create an independent entity within an independent entity in violation of *Free*

3. Even if parties elect not to have a jury, they are still entitled to have facts initially found by an Article III judge rather than by an executive official if the government is seeking to deprive them of life, liberty, or property. Claims for benefits are an entirely different story, and nothing we say here applies to agency adjudication of benefits claims.

Enterprise Fund v. Public Company Accounting Board, 561 U.S. 477 (2010) ("*PCAOB*").

As a matter of original meaning, moreover, the Article II Vesting Clause requires that the President control *all* exercises of executive power. At a maximum, that requirement entails the power to exercise such power personally, to cancel any actions of subordinates contrary to presidential directives, and to remove subordinates without limit. If the law does not recognize the President's direct decisional, directive, and cancellation powers—that is, the powers of direct control and direction—it must *at least* recognize the President's power to remove at will, so as to ensure the President's constitutional control of executive power.

At bottom, the power to remove is, in a sense, a power to control. Absent recognition of presidential powers of direct control and direction, in order for Presidents to perform their jobs, they must possess the plenary power to remove subordinates—especially those whose conduct could deprive individuals of life, liberty, or property, and those whose decisions give content to executive policy. That principle applies to the ALJ here. Not only was a deprivation at stake, but the President must have the power to remove such ALJs because the President must have the power to control them and thereby advance particular executive policies and promote a coherent executive vision.

ARGUMENT

I. The Seventh Amendment Right to Jury Trial Attached to This Lawsuit.

A. The Right to Jury Trial Was Fundamental to the Founding Generation.

The right to jury trial is quite simply the most deeply rooted right in American history and tradition. All twelve of the States that wrote constitutions and bills of rights between 1776 and 1791 protected the right to civil jury trial, and 92% of the American population in 1791 lived in States that constitutionally guaranteed the right to civil jury trial. Steven G. Calabresi, Sarah E. Agudo, and Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 So. Cal. L. Rev. 1451, 1511-12 (2012). Two States, Rhode Island and Connecticut, stayed with their colonial charters and thus did not produce a bill of rights, though they honored jury trial rights as a matter of common law. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment,* 57 Minn. L. Rev. 639, 655 (1973). The right to civil and criminal jury trial was guaranteed by 36 out of 37 States in 1868, the year the Fourteenth Amendment was ratified. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 76-77 (2008). Today, the right to civil jury trial is guaranteed in 49 States—every State except Louisiana. Virtually all Americans (98.5%) live in States that guarantee the right to civil jury trial.

Steven G. Calabresi, James Lindgren, Hanna M. Begley, Kathryn L. Dore & Sarah E. Agudo, *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States*, 94 Notre Dame L. Rev. 49, 111-16 (2018).

The civil jury has a long and distinguished history in Anglo-American law. Blackstone claimed that jury trial was used for "time out of mind" in England, *see* 3 William Blackstone, Commentaries *349, and whether or not he was correct as a matter of history, his views were the basis for founding-era attitudes, *see* Wolfram, *supra,* at 653 n.44 ("The framers all seem to have agreed that trial by jury could be traced back in an unbroken line to … Magna Charta"). The Declaration of Independence complained in 1776 of "pretended Legislation … depriving us in many cases of the benefit of Trial by Jury." The Declaration of Independence ¶ 20, 1 Stat. 1, 2. Following independence, "[i]n all of the thirteen original states formed after the outbreak of hostilities with England, the institution of civil jury trial was continued, either by express provision in a state constitution, by statute, or by continuation of the practices that had applied prior to the break with England." Wolfram, *supra*, at 655. Some States even experimented with juries in admiralty cases, though the experiment was brief. *See* Carl Ubbelohde, The Vice-Admiralty Courts and the American Revolution 195-201 (1960). The Continental Congress in the Ordinance for the Northwest Territory ensured that "inhabitants of the said territory shall always be entitled to the benefits of … the trial by jury." An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio art. II (1787). And, importantly, the Judiciary Act of 1789 provided for jury trials in "all suits at common

law in which the United States sue." An Act to Establish the Judicial Courts of the United States § 9, 1 Stat. 73, 77 (1789).

The absence of a civil-jury guarantee in the Constitution was among the Antifederalists' chief objections. Several relevant themes emerge from their remarks from that era. For one, they concurred with Blackstone that the right was a critical check on abuses of power by tribunals of all stripes. The pseudonymous New Hampshire Farmer endorsed Blackstone's observation that "every new tribunal erected for the decision of facts, without the intervention of a jury … is a step towards establishing aristocracy." *See* Letter from a New Hampshire Farmer, No. 3 (June 6, 1788), *in* The Complete Bill of Rights 477 (N. Cogan ed. 1997) (quoting 3 William Blackstone, Commentaries *380). Similarly, another pseudonymous Farmer warned that juries were integral to curbing the power of corrupt judges, "who may easily disguise law, by suppressing and varying fact," and stopping a backslide into "despotism." Essays by A Farmer, Md. Gazette (March 21, 1788), *in* 5 The Complete Anti-Federalist 36, 37-40 (Storing Ed. 1981).

In addition, the Antifederalists understood that the civil-jury guarantee was an especially vital shield of liberty in a particular context: suits between private citizens and the federal government. The pseudonymous Democratic Federalist warned in 1787 of possible abuses by military officers, "excise or revenue officers," or constables:

> [I]n such cases a trial by jury would be our safest resource, heavy damages would at once punish the offender, and deter others from committing the same: but what satisfaction can

> we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen … ? What refuge shall we then have to shelter us from the iron hand of arbitrary power?

See Letter from a Democratic Federalist (Oct. 17, 1787), *in* 5 The Founders' Constitution 354 (P. Kurland & Ralph Lerner eds. 1987). The reference to "excise or revenue officers" makes clear that civil cases between citizens and the federal government were on the author's mind. Likewise, James Monroe at the Virginia ratifying convention worried about the possible loss of jury trial in tax disputes with the federal government. *See* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 218 (Jonathan Elliot ed. 1891).

The Antifederalists also understood that the guarantee was, at its core, a republican ideal. The jury was to the judicial branch what the House of Representatives was to the legislative branch:

> The trial by jury is very important in another point of view. It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department. To hold open to them the offices of senators, judges, and offices to fill which an expensive education is required, cannot answer any valuable purposes for them; they are not in a situation to be brought forward and fill those offices … . The few, the well-born, etc. as Mr. Adams calls them, in judicial decisions as well as in legislation, are generally

> disposed, and very naturally too, to favour those of their own description.
>
> The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community.

Letter from the Federal Farmer, No. 4 (Oct. 12, 1787), *in* 2 The Complete Anti-Federalist 249-50 (Herbert J. Storing ed. 1981).

In the Philadelphia ratifying convention debates, James Wilson fell all over himself reassuring the delegates that the original Constitution's failure to secure the right to civil jury trial did not preclude Congress from affording that right by statute. Wilson also denied that Article III's reference to the courts' jurisdiction over facts signaled that the Framers were seeking to abolish the civil jury trial or shoehorn the hated Roman legal tradition into the American experiment. *See* 2 Debates in the Several State Conventions: On the Adoption of the Federal Constitution 488–89, 515-19 (Jonathan Elliot ed. 1836). James Iredell and Alexander Hamilton agreed that the Constitution's omission was not an exclusion. *See* Marcus, *Answers to Mr. Mason's Objections to the New Constitution*, *in* Pamphlets on the Constitution of the United States 361-62 (P. Ford ed. 1968); The Federalist No. 83 (Alexander Hamilton).

The original Constitution was ratified only because the Federalists promised that the omission of a civil jury-trial guarantee from the text did not support an *expressio unius* inference. And when James Madison set out to secure the right to civil jury trial in the Seventh Amendment, the foregoing substantive notions about the right's nature were woven into the tapestry of the guarantee.

B. The Seventh Amendment Requires a Jury in Civil Fraud Cases.

The opposition to the absence of a civil-jury guarantee, which numerous States voiced in calls for amendments to the new Constitution, resulted in the Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII. Nothing in this amendment excludes common-law suits involving the United States. Indeed, such suits were at the core of the drive to adopt the amendment.

A fraud suit for damages between private parties is obviously a "Suit[] at common law" squarely within the amendment. A fraud suit for damages between a private party and the government is no different. This point is frankly too obvious for argument. There can be cases where it is unclear whether the suit is one at "common law," but a civil fraud action for damages cannot possibly be among them.

The government does and cannot claim otherwise. Its argument rests wholly on the notion that administrative proceedings are not "Suits," so that once Congress supplies an agency adjudicative power, the Seventh Amendment automatically vanishes. That argument, in turn, rests ultimately on *Atlas Roofing*, to which we now turn.

C. There Is No All-Encompassing Seventh Amendment Exception for Government Regulatory Action.

Notwithstanding the Seventh Amendment's language and history, this Court in *Atlas Roofing* carved out an exception to the right to civil jury trial for the first time since 1789—that is, for the first time in 188 years. In *Atlas Roofing*, Justice Byron White posited that the rights for workers that OSHA had created were new public rights rather than old common law rights and that actions concerning such new post-1789 public rights were not "Suits at common law" subject to the requirement of civil jury trial in the Seventh Amendment. This argument is wrong for four reasons.

First, the Framers knew that the common law and statutory law had evolved over centuries and that from time to time new common-law or statutory rights would emerge. It never occurred to the Framers that simply because a right was "new," the right to civil jury trial did not attach to it. That principle certainly applies in this securities-fraud case, which resembles many fraud cases tried at common law. But that principle also applied in *Atlas Roofing*. Just because Congress creates a new cause of action that is a kind of tort does not mean that federal law-enforcement agencies can try those new causes of action themselves—wearing the hat of both prosecutor

and judge, and dispensing with the over-800-year-old right to civil jury trial. Whether an action is a "Suit[] at common law" depends on the action's nature, not on the label that Congress attaches to it.

Second, the tort-like rights that OSHA created, or the SEC's power to prosecute securities fraud, fit quite comfortably within the definition of "Case[s] in Law," which the Article III courts have jurisdiction to hear. Such cases are subject to the Seventh Amendment caveat that persons whom the United States sues retain their Seventh Amendment right to civil jury trial on all questions of fact. That principle applies more obviously to this case than to *Atlas Roofing,* but it should have applied to *Atlas Roofing* as well. New public rights have emerged—like the right to social security benefits, Medicaid and Medicare benefits, veterans' benefits, immigration benefits, and waivers of sovereign immunity by the federal government—and access to those can be adjudicated in Article I tribunals staffed by ALJs with for-cause removal limits, so long as in theory the President can directly control and direct all the decisions of the executive branch personnel who staff those courts. But the tort-like rights that OSHA created, or the SEC's power to prosecute securities fraud, are not examples of the new public rights.

Third, *Atlas Roofing* overlooks the historical fact that the Seventh Amendment is so intolerant of fact-finding outside a jury that it overrules part of Article III on the power of federal judges to find facts. Article III, Section 2, paragraph 2, sentence 2 said: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." The Antifederalists were terrified of this

clause because they thought it took away the fact-finding sovereignty of juries and gave it to Article III judges. In response to that fear, the Seventh Amendment not only preserves the right to civil jury at common law, but it also says: "no fact tried by a jury, shall be otherwise examined in any Court of the United States, than according to the rules of the common law." The Framers did not trust even life-tenured federal judges with the power of finding facts. Only lay people on juries had that power, as at common law. There is no chance that the Framers' Constitution allows for fact-finding that deprives a person of life, liberty, or property as those terms were understood in 1787 if such fact-finding is performed by a politically accountable administrative agency.

Fourth, and finally, it is suggested that in public-rights cases, where the federal government is a party, an individual is less in need of a civil jury than the individual is when involved in litigation with another private party. This argument is ludicrous on its face. The federal government employs hundreds of thousands of lawyers, and it has an annual budget of $1.7 trillion in 2023. *See Discretionary Spending in Fiscal Year 2022*, Congressional Budget Office (Mar. 28, 2023). Surely, the protection of civil jury trial is *more* necessary when the federal government brings a lawsuit than when a private person does so. The founding generation would have laughed at (or perhaps revolted against) this argument.

Atlas Roofing has no defensible constitutional foundation for the tort-like wrongs against which OSHA protects workers. In the end, it is clear that *Atlas Roofing* was driven by policy concerns rather than by constitutional meaning. That is not to deny that there are some new

statutory entitlements, which the federal government can limit in an Article I tribunal staffed by executive ALJs who are not removable, but who are in theory subject to presidential direct control and direction.

II. The SEC Could Not Constitutionally Adjudicate This Lawsuit In-House.

The second question presented is whether the statutory provisions authorizing the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district-court action violate the nondelegation doctrine. We think the question to some extent misses the mark: an SEC law-enforcement action cannot under any circumstances, under any criteria, be tried by the SEC except before a jury and an Article III judge with tenure during good behavior and an irreducible salary. This principle is a bedrock premise of "due process of law." U.S. CONST. amend V.

The SEC cannot "be the judge in its own cause," as Sir Edward Coke held in *Dr. Bonham's Case*. 8 Co. Rep. 107, 77 Eng. Rep. 638 (1610). SEC prosecutors and ALJs, who presumably have lunch together in the cafeteria at the SEC, cannot both prosecute and adjudicate the fact of liability in a case like that of respondents, regardless of the criteria for making that supposed choice. Recent reports of a SEC data breach, which permitted SEC enforcement staff to obtain SEC adjudicatory records, underscore the point. *See* Editorial Board, *What is Gary Gensler Hiding?*, THE WALL STREET JOURNAL (Oct. 13, 2023).

III. The Removal Limits on the ALJ Violated Article II.

The final question presented is whether Congress violated Article II by granting for-cause removal protection to ALJs in agencies whose heads enjoy for-cause removal protection without acknowledging a presidential power to in theory directly control and direct the decision of the Article II Administrative Law Judge here. The answer is yes, as shown by (i) textual arguments; (ii) arguments from original public meaning; (iii) arguments from our actual practice over the last 234 years; and (iv) normative or policy arguments. These arguments support an unlimited presidential removal power over executive officers, or a presidential power of direct control and direction, or all of the above. This analysis is further confirmed by this Court's guiding precedents. Indeed, the removal limits at issue here are contrary to this Court's teachings set out in landmark cases such as *PCAOB*; *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020); and *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

A. Textual Arguments

The Constitution vests three kinds of powers in three kinds of federal institutions: "All legislative Powers herein granted" in Congress, U.S. Const. art. I, § 1; the "executive Power" in the President, *id.* art. II, § 1, cl. 1; and the "judicial Power" in tenured and salary-protected federal courts, *id.* art. III, § 1. Some actors are granted powers that straddle those lines, such as the President's veto power and the Vice President's tie-breaking power in the Senate, but those powers are specifically granted to specific actors. The only general power-grants involve legislative, executive, or judicial power.

The SEC's ALJs did not exercise legislative power over respondents because the SEC did not act via bicameralism and presentment, as the Constitution requires. *See id.* art. I, § 7, cls. 2-3. Action through bicameralism and presentment is the only way in which the legislative power can be deployed. *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

The SEC's ALJs did not exercise judicial power over respondents because they were neither federal judges with tenure during good behavior and an irreducible salary, nor were they state judges hearing federal questions who were independent by virtue of being agents of a different sovereign.

Although the SEC's ALJs could not constitutionally exercise either legislative or judicial power over respondents, the SEC could have prosecuted respondents before a federal civil jury and an Article III federal judge, in which case the SEC would have been exercising executive power. But that "executive Power" is vested by the Constitution in "a President of the United States of America." It is not vested in subordinate executive officials, such as ALJs or other SEC employees. Note that Article II does not mimic Article I by saying "All executive Powers *herein granted* shall be vested in a President of the United States." *Cf.* U.S. Const. art. I, § 1. Nor does Article II mimic Article III by saying "The executive Power of the United States shall be vested in a President *and in such inferior officers as the Congress may from time to time ordain and establish*." *Cf. id.* art. III, § 1. Instead, Article II, Section 1 is a grant of *all* of the executive power *to the President alone*. "The executive power shall be vested in a President of the United States." *Id.* art. II., § 1, cl. 1. This is the irreducible and unavoidable textual source of what is sometimes called the "unitary executive."

The vesting of "executive Power" in the President extends to *all* forms of executive action, including executive adjudication. The Constitution does not distinguish among types of executive power, allocating some to the President and others to subordinates. The Constitution vests *all* of it in the President. The only question is *how* the President can exercise that vested power once Congress has created an apparatus of subordinates.

One possible mechanism is direct decisional control. The President can personally make any and all decisions involving executive power (and indeed had to do so in the first few days in 1789 before executive agencies were created by law). We believe that the President can also issue instructions to subordinates that cancel out, or "veto," any actions by subordinates contrary to those instructions. Otherwise, Congress could "vest" executive power in someone other than the President, in violation of the Article II Vesting Clause. If this Court recognizes the President's direct decisional, directive, and cancellation powers, *perhaps* Congress could create executive subordinates with tenure of office but no power to act in defiance of presidential instructions. We say "perhaps" because direct-control and directive powers would not rule out the "executive Power" including another component: the power to remove officers without legislative limits. Such recognition would simply weaken one argument from the case for such a removal power, based on the constitutional need for some form of presidential control over all exercises of executive power.

The Court's case law has never, to our knowledge, recognized a direct presidential power to exercise or control the exercise of all instances of executive power. No party is asking the Court in this case to recognize

such a power. In the absence of such a power, there must *at least* be a presidential power of removal for the Article II Vesting Clause to mean what it says. Congress can create agents to help the President "carry into Execution," U.S. CONST. art. I, § 8, cl. 18, the "executive Power," but it cannot authorize agents to carry it into execution on their own initiative. The Necessary and Proper Clause refers to "powers vested by this Constitution," but the only person in whom the Constitution vests "executive Power" is the President.

The bottom line is that the President *must,* by constitutional command, have control over *all* exercises of executive power. Had history unfolded differently, debates about control might have involved direct presidential exercises of power that statutes seemingly vested in subordinates or presidential instructions purporting to cancel subordinates' actions. This Court could then recognize a presidential power of control to salvage removal limits on executive branch ALJs. But history has trained its focus on removing subordinates rather than on a theoretical presidential power of direct control and direction. And if the alternative to a presidential power to remove subordinates is subordinates with autonomy to exercise "executive Power" as they, rather than the President, see fit, the constitutional structure demands at least a presidential removal power that Congress cannot obstruct.

The President's power to control all exercises of executive power finds further support in the Take Care and Presidential Oath Clauses. *See Myers v. United States*, 272 U.S. 52, 117 (1926) (referencing the Take Care Clause as a basis for the removal power); Amit R. Vora, *Constitutional Crowding and Article II*, 85 ALB. L. REV.

857, 858 (2022) (observing that the Presidential Oath Clause captures "the spirit of The Federalist No. 70, where Alexander Hamilton demanded executive 'energy'").

B. Arguments from Original Public Meaning of the Text

English precedents are of doubtful value for understanding the American scheme of separated powers. England had a mixed regime, not the distinctive structure of enumerated institutional powers embodied in the U.S. Constitution. In particular, the English Parliament had powers that exceed the limited and enumerated powers of the United States Congress. Because of Parliamentary supremacy, Parliament could pass, and the King could sign, a bill by which the King and the King's heirs gave up all royal rights of removal entirely for all time. Congress, on the other hand, may only pass laws "necessary and proper *for carrying into Execution*" federal powers. That does not include power to undo the Constitution's structure, including its vesting of executive power in the President. One President cannot sign away the constitutional powers of successors.

Moreover, the fact of the matter is that were no independent regulatory commissions in England in 1787 like the Federal Trade Commission, the SEC, the Federal Communications Commission, or the Federal Reserve Board. The idea of an unremovable independent agency commissioner would have been laughed out of court and Parliament in England in 1787. The Bank of England was privately owned by stockholders from its foundation in 1694 until it was nationalized by the Clement Atlee government in 1946. The British East India Company was

held and run by private stockholders, although it had a corporate charter issued by the Monarch.

1. The English Practice

For most of English history, the King of England could remove judges at will. The most famous, indeed the most infamous, exercise of the King's removal power was the firing on November 15, 1616, by King James I, of Sir Edward Coke, the best judge in English legal history, who was then serving as Chief Justice of the Court of King's Bench. Coke was fired solely because he was issuing judicial opinions that curtailed the King's power. No one at the time, including Coke himself, argued that James I's removing Coke from his judgeship was unconstitutional or illegal, though many (including many of the founders a century and a half later) found it grossly unjust.

Before 1701, even the most senior judges in England all held office at the pleasure of the King or Queen. Many judges were removed from office during the seventeenth century for failing to decide cases in accordance with the monarch's wishes. The 1701 Act of Settlement gave English judges tenure during good behavior for the lifetime of the King or Queen who appointed them. When that Monarch died, however, all judicial commissions issued by that Monarch died too. In 1761, an Act of Parliament was adopted which extended the tenure of English judges to serve for life, during good behavior, even after the death of the King or Queen who appointed the judge. Life tenure for judges in England thus dates back only to 1761.

In any event, better evidence of public meaning of the federal constitutional structure comes from the

western side of the Atlantic Ocean and the institutions and practices with which ordinary Americans were familiar.

2. The Colonial Governors-in-Council

The thirteen North American colonies who formed and ratified the U.S. Constitution had also lacked judicial independence until 1776. Thereafter, the colonists raced to give state judges tenure during good behavior, as is thoroughly described in Scott Gerber, A Distinct Judicial Power: The Origins of an Independent Judiciary (2011). It is absurd to think that the governments of the thirteen North American colonies had equivalents to independent modern regulatory commissions *before they had independent state judges*.

Professor Calabresi and Kenton Skarin have studied, in a yet-unpublished book-length manuscript, the executive branches of the thirteen North American colonies from 1607 to 1787 so as to determine what average American colonists, who knew or cared less about England than about their own circumstances, would have thought about who possessed the removal power in their colonies or the power to direct subordinate executive and judicial officers. We surveyed the colonies of Virginia, Massachusetts, New York, Pennsylvania and Delaware, and North Carolina. These six colonies were both the most important and influential of the American colonies, and this list includes northern, southern, and middle colonies.

We found a similar structure in all the colonies we studied. Typically, there was a Governor appointed by the King of England's Privy Council whose salary was paid only at the end of the year by the colonial legislature depending on the Governor's job performance during the previous

year. There was an assembly, which eventually became the State Houses of Representatives, which had the sole power of taxation and appropriation, which was elected by the colonists. And there was a Governor's Council, which comprised elite men in the colony picked by the Governor to serve on the council subject to the approval of the King's Privy Council, which was usually a rubber stamp. The Governor's councils evolved into separately elected state senates after the federal Constitution was ratified. The situation varied in Pennsylvania and Delaware, which were proprietary colonies in which William Penn, the Quaker proprietor, played some of the roles played by the Privy Council and the King in the other colonies.

The general practice we discovered was that *all* colonial officers, including all judges, were either removable by the Governor-in-Council, meaning the Governor and a majority of the hand-picked Council, or subject to the direction and control of the Governor-in-Council. There were no analogues at all to modern day administrative law regulatory commissions whose members could be removed only for cause and who could not be directed or controlled. The historical record includes extensive examples of supervision and control or discipline and removal of inferior executive and judicial officers. In exercising those powers, the Governor-in-Council had full ability to investigate and render judgment. Proceedings could be lengthy, sometimes including hearings over multiple days where witnesses were sworn and examined, but proceedings could also be brief, with officials summarily removed or ordered to do or undo some act if the executive was convinced of the proper resolution.

Not surprisingly, discipline typically was imposed for misconduct. However, there also are important examples

of colonial executives removing officials at will for partisan reasons.

Virginia

The historical record provides examples of discipline and removal of Justices of the Peace, sheriffs, and tobacco inspectors throughout the decades preceding the American Revolution. The most common reason for removing Justices of the Peace was official misconduct, such as levying unauthorized fines,[4] failing to perform their duties,[5] serving as judge in their own cases,[6] or showing partiality in rendering decisions.[7]

Massachusetts

As in Virginia, Justices of the Peace could be removed by the Massachusetts Governor-in-Council. In one instance, at least eleven Justices of the Peace were removed, along with the coroner of Suffolk County.[8] In this instance, all the removals merely resulted from partisan differences, but no one questioned their legality. In November 1768, the Governor was instructed by London to remove "such persons in the commission who

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4. 4 Virginal Council Journals 40 (May 28, 1723).

5. 4 Virginal Council Journals (Sept. 5, 1734).

6. 5 Virginal Council Journals 312 (May1, 1750).

7. 4 Virginal Council Journals 140 (June 14, 1727)

8. Andrew McFarland Davis, *Calendar of the Papers and Records Relating to the Land Bank of 1740, in the Massachusetts Archives and Suffolk Court Files,* at 10 (July 17, 1740), *in* 4 Publications of the Colonial Society of Massachusetts (1910).

are known to be infected with principles of disaffection to the constitutional authority of Parliament."[9]

New York

The New York royal governors repeatedly disciplined lower officials with no dissent. An early dismissal was of a Justice of the Peace named Thomas Stevens, who it was thought had acted corruptly.[10] In 1693, another Justice of the Peace was suspended because of a too friendly relationship with a French privateer.[11] The New York Governor-in-Council removed or otherwise disciplined or directed and supervised lower officials for a broad array of reasons. These reasons ranged from technical deficiencies to official or personal misconduct, to outright illegality. But it is important to note that misconduct was not *required* for removal.

Pennsylvania and Delaware

Turning to Pennsylvania, we see additional now-familiar examples of the executive disciplining lower officials. In 1765, Major General Thomas Gage complained to Lieutenant Governor John Penn about disturbances in Cumberland County.[12] As summarized in the council minutes, Gage stated that "the Inhabitants of Cumberland County … appear daily in Arms, and seem to be in an

9. Letter from Francis Bernard to the Earl of Hillsborough (Nov. 14, 1768), *in* Letters to the Right Honorable the Earl of Hillsborough 22 (1769).

10. N.Y. Calendar 57 (Feb. 2, 1688).

11. N.Y. Calendar 91 (Oct. 10, 1688).

12. IX Penn. Council Minutes 267-72 (June 26, 1765).

actual State of Rebellion. It appears, likewise, that the Rebels are supported by some of the Magistrates, particularly one Smith, a Justice of the Peace, and headed by his Son."[13] There were even allegations that individuals fired on royal troops and took a lieutenant as prisoner.[14] The governor and council commenced an investigation. They directed the Justices of the Peace in Cumberland to provide a full account of any riots and to preserve the peace and prosecute any offenders going forward.[15]

North Carolina

Justices of the Peace were disciplined or supervised and controlled in North Carolina for personal misconduct, others for misconduct in office, and still others for supporting the growing independence movement. In the personal misconduct category, a 1755 incident reflected that "Robert Harris One of the Justices of Granville County had Spoke very Contemptuously of His Excellency [the governor]."[16] Harris was called before the governor and council and "Confessed the Same," and he was summarily "struck out of the Commission of the Peace for the said County."[17] Sheriffs were also removed by

13. IX Penn. Council Minutes 267 (June 26, 1765) (quoting letter from General Gage to Governor, June 16, 1765).

14. *Id.*; *see also* IX Penn. Council Minutes 273-74 (June 28, 1765) (enclosing letter from Governor to Justices of the Peace of Cumberland County, relating allegations).

15. IX Penn. Council Minutes 271 (June 26, 1765)

16. IX Colonial Records of N.C. (2d Series) 12 (Oct. 9, 1755).

17. *Id.*

the North Carolina executive in much the same way as Justices of the Peace. One example of removal states that the "Complaint preferred against Abraham Shippard Sheriff of Dobbs County by Saml. Swann and Thomas McGuire [was] fully proved." It was therefore "Ordered that he be Removed from Executing the said office."[18]

3. Conclusions as to the Original Public Meaning

We think that the colonial evidence, and the seventeenth-century English royal practice of removing high court judges like Chief Justice of the Court of King's Bench, Sir Edward Coke, makes it crystal clear that the original meaning of the Executive Power Vesting Clause (along with the Take Care and Oath Clauses) authorizes the President to remove at will or directly control or direct (or perhaps all three) any principal, inferior, or recess-appointed officer exercising executive power. In other words, the foregoing evidence shows that the Article II Vesting Clause means what it says, and that Congress cannot use the Necessary and Proper Clause to subvert rather than foster the constitutional scheme for controlling and directing executive power. Congress has only the power to pass "necessary and proper laws *for carrying into execution*" the President's "executive Power." It may not pass laws that obstruct the President's use of the "executive Power."

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18. IX Colonial Records of N.C. (2d Series) 97 (Nov. 27, 1762); *see also Minutes of the North Carolina Governor's Council* (Nov. 27, 1762), *in* 6 The Colonial Records of North Carolina 771 (identical entry but with sheriff's name transcribed as "Skippard").

C. Arguments from Practice

If one regards practice as relevant to constitutional meaning, Professor Calabresi has written an entire book in which he shows that the first 43 presidents, from George Washington to George W. Bush, vigorously exercised the removal power and vigorously opposed the constitutionality of for-cause limits on their removal power as to executive branch officers. They also asserted powers of direction and control. *See* Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush (2008). We do not have space in this amicus brief to even briefly summarize this book, but we do not know of anyone who contests that every American President has opposed for-cause limitations on their removal power, as did President Franklin D. Roosevelt in the notorious case of *Humphrey's Executor,* 295 U.S. 602 (1935). Indeed, the paradigm case on presidential removal power, *Myers v. United States*, 272 U.S. 52 (1926), summarizes a consistent pattern of presidents opposing for-cause limits on their removal power from 1789 to 1926.

D. Policy Arguments

While the Constitution means what it means regardless of whether it reflects good policy, several policy considerations militate for an unlimited presidential removal power, or a presidential power direct control and direction, over all federal executive officers who engage in conduct that can deprive individuals of life, liberty, or property. *See* Steven G. Calabresi, *The Fatally Flawed Theory of the Unbundled Executive*, 93 Minn. L. Rev. 1696 (2009). We note at the outset that many subordinate executive officials, including many ALJs, administer benefits instead of depriving individuals of life, liberty,

or property. Prominent examples include the Social Security, Medicare, and Department of Veterans Affairs systems. Because this case involves a clear deprivation of property, there is no occasion here to explore whether different forms of control might be appropriate for benefits decisions.

Presidential power to fire all executive branch officers and employees at will reduces the congressional committee system's influence over the executive branch. As bureaucrats are acutely aware, most Cabinet Secretaries serve on average only a little over two years in office, and Presidents are lame ducks after four years even if they get re-elected. Members of congressional oversight and appropriations committees tend to serve much longer. For example, as of 2023, 24 U.S. Senators have served for 36 years or longer. And the problem is getting worse. All but two of those 26 Senators served in Professors Calabresi's or Lawson's lifetimes, and we were born in 1958. The average length of service for Representatives at the beginning of the 118th Congress was 8.5 years; for Senators, 11.2 years. *See Membership of the 118th Congress: A Profile*, Congressional Research Service (Oct. 4, 2023). A rational bureaucrat, who may want to be confirmed someday by the Senate, will conclude that it is more important for career prospects to please the Senators and Representatives on congressional oversight and appropriations committees than it is to please a Cabinet Secretary who will be gone in two years or the President who will be, at best, a lame duck in four years.

This problem is especially severe because home-state interest groups have captured the congressional committees, while only the President represents a national majority. Members of Congress from farm states

gravitate toward the Agriculture Committees; those from Wall Street gravitate toward the Finance or Ways and Means Committees; those interested in constitutional law gravitate toward the Judiciary Committees; and so forth. For-cause removal protections weaken Cabinet Secretaries' and Presidents' control over the bureaucracy while strengthening the power of special-interest groups who have captured congressional committees.

Removal power, or direct control and directive power, gives the President and the Cabinet Secretaries a fighting chance against the congressional committee system. President Biden has at his disposal only 4,000 political appointees to take on about 30,000 congressional staffers, 2.87 million federal civil employees, and 19.23 million state and local employees. To do their jobs, Presidents must have the power to either remove or directly control and direct all federal executive officers.

That principle extends to the ALJ at issue here. The power to remove is a power to control, and absent direct-decisional, directive, or cancellation powers, the President must have the power to remove ALJs so as to advance particular executive policies and promote a coherent executive vision. *See, e.g.*, *Secretary of Educ. Review of ALJ Decisions*, 15 Op. O.L.C. 8, 15 (1991) ("ALJs determine, on a case-by-case basis, the policy of an executive branch agency.").

The President's lack of power to fire or directly control and direct executive branch officers makes the federal government an unmanageable mess. That is why it is so critical that respondents prevail and that ALJs exercising executive power be made employable at will or subject in theory to presidential direct control and direction.

The only reason to protect ALJs from removal at will is because we enormously value judicial independence. But if that is the case, we ought to require the 35 executive and independent agencies to bring their law-enforcement actions in court and afford a Seventh Amendment jury trial to those who want it. ALJs who are removable only for cause are no substitute for an independent judge and a right to jury trial.

CONCLUSION

Respondents were unconstitutionally deprived of the right to civil jury trial under the Seventh Amendment. The SEC cannot both prosecute and adjudicate the facts in a case, on account of both the Seventh Amendment and the separation of powers. And the ALJ in this case could not constitutionally have been made removable only for cause absent a presidential power of direct control and direction. The decision of the Fifth Circuit should be affirmed on these grounds.

Respectfully submitted,

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