No. 20-61007

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEORGE R. JARKESY, JR. ET AL.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR REVIEW FROM
ORDER OF THE SECURITIES AND EXCHANGE COMMISSION

BRIEF AMICUS CURIAE OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

MARGARET A. LITTLE
RICHARD A. SAMP
SENIOR LITIGATION COUNSEL
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
peggy.little@NCLA.legal
Counsel for Amicus Curiae
NEW CIVIL LIBERITIES ALLIANCE

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for *amicus curiae* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those listed in the Petitioners' Certificate of Interested Persons, have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

***Amicus*:** The New Civil Liberties Alliance is a not-for-profit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c) (3). It does not have a parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

***Counsel for Amicus*:** Margaret A. Little and Richard A. Samp, Senior Litigation Counsel of the New Civil Liberties Alliance.

/s/ Margaret A. Little
Margaret A. Little

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER REFERENCES

INTEREST OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to be tried in front of impartial judges who provide their independent judgments on the meaning of the law. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies like the Securities and Exchange Commission, and even courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

---

[1] All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

NCLA is particularly disturbed at the manner in which Congress has protected SEC Administrative Law Judges (ALJs) from removal, thus depriving Americans of their constitutional freedom to live under a government in which executive power is accountable to them through the President. Americans enjoy a constitutional freedom to elect the person in whom the Constitution vests the executive power, and the Constitution thereby makes the exercise of executive power accountable to the people. That freedom is among those that independent agencies threaten, and NCLA seeks to protect such freedoms by participating in cases such as this one.

In addition, the securities law administrative scheme in question effectively denies individuals the right to be tried by a jury of their peers and equal protection of the laws. By empowering the government—and the government alone—to decide whether to try someone before an ALJ or before a jury, this administrative scheme turns individuals' jury trial *rights* into mere *options*, granted only at the government's sufferance. That asymmetry of power is inconsistent with both the Seventh Amendment's promise of a right to a jury trial and the constitutional guarantee of equal protection of the laws.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

George R. Jarkesy, Jr. was an investment professional and host of a nationally syndicated conservative talk-radio program. He is not, and for decades has not been required to register with the Securities and Exchange Commission. In 2007-10, Mr.

Jarkesy set up two private investment partnerships—managed by an advisor company—for a modest number of accredited investors. Neither the advisor nor these small funds were required to register with SEC. Several of the portfolio companies failed after the 2008 recession.

On its own initiative, not in response to complaints by investors, SEC's New York office launched an investigation in 2011. In 2013, the Commission issued an Order Instituting Proceedings against Mr. Jarkesy and his investment group alleging violations of securities laws to be tried before ALJ Carol Fox Foelak.

Mr. Jarkesy challenged the constitutionality of SEC's administrative proceeding in federal district court, invoking 28 U.S.C. § 1331 jurisdiction over "all civil actions arising under the Constitution." The district court held that 15 U.S.C. § 78y(a)(1)'s provision for circuit court appeal implicitly stripped federal question jurisdiction. *Jarkesy v. SEC*, 48 F. Supp. 3d 32 (D.D.C. 2014). The D.C. Circuit affirmed, holding that Mr. Jarkesy "eventually" could obtain judicial review "when (and if)" SEC ruled against him. *Jarkesy v. SEC*, 803 F. 3d 9, 12, 19 (D.C. Cir. 2015).

After twelve hearing days conducted mostly in New York in February and March of 2014, ALJ Foelak issued her initial decision on October 17, 2014. The Commission granted an "expedited" internal appeal that consumed five years of deliberation before it issued the final order this past September. *In re John Thomas Capital Mgmt. Grp. LLC*, 2020 WL 5291417 (Sep. 4, 2020). In the seven years that

have elapsed since his hearing, Mr. Jarkesy has been unemployable in his chosen profession, and his bank and brokerage accounts have been closed, leaving his credit, reputation, and assets in ruins.

Free Enterprise Fund v. Public Co. Accounting Oversight Board, 561 U.S. 477 (2010) (*FEF*), prohibits officers of the United States from enjoying more than one level of tenure protection—under the same statutory scheme under which Mr. Jarkesy was tried. That decision did not rest on the particular tenure protections of the Public Company Accounting Oversight Board (PCAOB)—it flatly held that Congress could not provide for more than one level of for-cause tenure protection. Even assuming SEC's proposed judicial rewrite of the meaning of the Merit Systems Protection Board (MSPB) § 7521 is permissible, it is unavailing because more than one level of tenure protection remains. Further, SEC's attempt to incorporate by reference a severance solution from briefs in unrelated cases fails for the same reason: even assuming a court could arrogate legislative power to pick and choose among the tenure protections and extinguish one, such constitutionally dubious excision still leaves dual impermissible protections in place. Finally, both the judicial rewrite and severance are after-the-fact "solutions" that cannot cure an unconstitutional proceeding before an SEC ALJ who enjoyed such protections at the time of the hearing and decision.

NCLA fully supports Mr. Jarkesy's assertions that the federal securities laws—by authorizing SEC to impose civil penalties in an administrative proceeding—violated his Seventh Amendment jury-trial rights as well as the equal protection component of the Fifth Amendment's Due Process Clause. NCLA writes separately to focus on the securities laws' unequal allocation of the right to demand a jury in a proceeding seeking imposition of civil penalties. If SEC desires a jury trial, it can obtain one by filing its enforcement action in federal court. Or, it can avoid a jury trial by initiating an administrative proceeding. The targets of those proceedings are afforded no similar option. The Fifth and Seventh Amendments prohibit the federal government from denying citizens the same jury-trial rights it grants to itself.

Moreover, the Seventh Amendment protects a litigant's right to demand a jury trial whenever, as here, the federal government initiates proceedings to impose a civil penalty. *Tull v. United States*, 481 U.S. 412, 423 (1987). SEC argues that the Seventh Amendment is inapplicable to administrative proceedings, citing *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977). SEC Opinion at 44. But *Atlas Roofing* applies only when "'public rights' are being litigated." *Atlas Roofing*, 430 U.S. at 450. Leaving aside that *Atlas Roofing*'s expansive understanding of the "public rights" doctrine has been curtailed by later Court decisions, SEC's civil-penalty proceeding against Mr. Jarkesy does

not constitute assertion of a "public right." To the contrary, SEC seeks a money judgment against Jarkesy for his alleged fraud. Such claims and remedies were not "unknown to the common law"—a prerequisite to any assertion by the federal government that its administrative proceedings are exempt from Seventh Amendment constraints. *Id.* at 461.

ARGUMENT

I. SEC ALJs Enjoy Unconstitutional Multiple Layers of Tenure Protection

A. SEC ALJs Are Inferior Officers of the United States Protected from Removal by Impermissible Multiple Layers

SEC ALJs are "Officers of the United States" within the meaning of the Appointments Clause of the United States Constitution, Art. II, § 2, cl. 2, because they "hold a continuing office established by law" and exercise "'significant discretion' when carrying out … 'important functions'." *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2053 (2018). The Supreme Court reached this conclusion after a thorough analysis of the daunting power vested in SEC ALJs:

> Far from serving temporarily or episodically, SEC ALJs receive a career appointment. … Still more, the Commission's ALJs exercise … significant discretion … [over] important functions [and] have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. … Second, the Commission's ALJs … take testimony … receive evidence and examine witnesses at hearings, and may also take pre-hearing depositions. [SEC ALJs] conduct trials … administer oaths, rule on motions, and generally regulate the course of a hearing, as well as the

> conduct of parties and counsel. . . . Third, the ALJs … rule on the admissibility of evidence. … They thus critically shape the administrative record (as they also do when issuing document subpoenas) . . . . And fourth, the ALJs … have the power to enforce compliance with discovery orders. In particular, they may punish all "[c]ontemptuous conduct," including violations of those orders, by means as severe as excluding the offender from the hearing. …
>
> And at the close of those proceedings, [SEC] ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect. … In a major case like *Freytag*, a regular Tax Court judge must always review an STJ's [Special Trial Judge's] opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. … By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself "becomes final" and is "deemed the action of the Commission." … That last-word capacity makes this an *a fortiori* case.

Lucia, at 2053-54 (cleaned up).

The APA permits removal of these powerful ALJs only "for good cause established and determined by the Merit Systems Protection Board (MSPB)." 5 U.S.C. § 7521(a). Those MSPB members in turn may not be removed except for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). SEC Commissioners, who cannot act without approval from the MSPB, 5 U.S.C. § 7521, are themselves protected by tenure. They may not be removed by the President from their positions except for "inefficiency, neglect of duty, or malfeasance in office." *FEF*, 561 U.S. at 487; *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619-20 (2d Cir. 2004).

Free Enterprise Fund makes clear that these multiple levels of "for-cause limitations … contravene the Constitution's separation of powers." 561 U.S. at 492.

The result is a regime of SEC ALJs whose appointments are defective and who are accountable neither to the President nor to his alter ego, a Head of Department—indeed, they are insulated from control (and thus from accountability to the electorate) by multiple layers of protection from removal. SEC ALJs are protected by multiple layers of tenure protection, which insulate them, like "Matryoshka dolls," from removal by the President in violation of Article II. *FEF*, 561 U.S. at 497. This is a far cry from a President constitutionally charged with "the power of appointing, overseeing, and controlling those who execute the laws." *Id.* at 492 (quoting James Madison, 1 Annals of Cong. 463 (1789)).

Justice Breyer called this the "embedded constitutional question" in the case. *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring). "The same statute, the Administrative Procedure Act, that provides that the 'agency' will appoint its administrative law judges also protects the administrative law judges from removal without cause." *Id*. Thus, the ALJ before whom Mr. Jarkesy was tried enjoys multiple layers of protection from removal without cause—just what *Free Enterprise Fund* interpreted the Constitution to forbid for PCAOB members. *Id.*

B. The Commission Misreads *Free Enterprise Fund*

The Commission Opinion gives scant consideration to Mr. Jarkesy's removal claim. It first argues that *FEF* does not invalidate SEC's ALJ scheme because the PCAOB had "novel" and "unusual" barriers to removal created by its two-tiered

scheme. (SEC Opinion at 42). But the holding of *FEF* is not limited to "novel" or "unusual" tenure protections specific to the PCAOB. *FEF*'s concern was with *layers* of protection: "[w]e deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure … two layers are not the same as one." *FEF* at 501. *FEF* did sever the unusual barriers, but what *FEF* actually *held* was that the President may not be separated from officers by more than a single level of for-cause protection:

> While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.

FEF at 514. Nothing in *FEF* stated that the Court's holding turned on the specific kind of protections from removal at issue or cabined the Court's holding to the specific language in Sarbanes-Oxley, and it is incorrect to suggest otherwise.

The Commission's argument that the holding of *FEF* does not apply to ALJs because footnote 10 of *FEF* "declined to extend its holding to ALJs" (SEC Opinion at 43) is equally flawed. The Court in *FEF* had no occasion to apply its holding to ALJs because ALJs were not at issue. The footnote on which SEC relies simply made that clear and stated that whether ALJs were "officers of the United States" was "disputed." *See* 561 U.S. at 507 n. 10. After *Lucia*, no dispute remains.

Now that *Lucia* has established that SEC ALJs are inferior officers, the conclusion that they violate Article II under *FEF* is unavoidable. SEC desperately

wishes to avoid this conclusion, however, because it has a profound impact on this case. If *Lucia* means anything, it means that Mr. Jarkesy's enforcement proceeding must be vacated.

C. SEC's Proposed Statutory Construction Does Not Save the Day

SEC's contrivance of a "solution" proposing judicial rewriting of the meaning of "good cause" for removal of ALJs under 5 U.S.C. § 7521 requires reinterpretation of the role the Merit Systems Protection Board plays in such determinations—and it simply does not work. SEC's proposal does not involve honest statutory *construction* but freewheeling judicial reformation of all or part of three levels of impermissible tenure protection. It is implausible simply to construe the statute to make all three layers of tenure protection go away, and it requires more than mere "construction" to alter this tenure protection scheme.[2]

[2] Moreover, how does SEC propose to either effectuate or enforce this relaxed and implausible reading of § 7521? Does this court issue a decision that says going forward that is how it is to be read? Even if it were to do so, that does not fix the problem that petitioners' ALJ operated under the stricter reading. Does that relaxed standard bind anyone outside this circuit? Outside of this case? Because the statute says that "good cause" is determined by the MSPB, how can that body be bound by a construction of a statute in a case in which it was not a party? Surely an ALJ dismissed in the future will argue that he or she is not bound by this court's interpretation of language that has long been understood to provide effective tenure. Or is SEC arguing that that is what the statute meant all along? Given that the tenure-protective language at issue is identical to that used widely throughout federal statutes, petitioners may be forgiven for viewing that assertion skeptically.

The government's proposed construction of § 7521 does not cure the remaining levels of constitutional infirmity found in the removal protections afforded the MSPB Members and SEC Commissioners. Thus, even if "good cause" protection for ALJs means "any cause," the President cannot remove the ALJ without going through two layers of decisionmakers who themselves enjoy tenure protection. *See FEF*, 561 U.S. at 487 (Commissioner removal only for "inefficiency, neglect of duty, or malfeasance in office"); *MFS* at 619-20.

Justice Breyer recognized this dilemma in his concurring opinion in *Lucia*. Five U.S.C. § 7521 does not grant the Commission the power to institute removal proceedings at all, because the MSPB has the independent and *exclusive* power to remove ALJs,[3] and the board itself enjoys removal protections. *Lucia*, 138 S. Ct. at 2016. Thus, this court cannot adopt SEC's proposed construction. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

[3] The statute says explicitly that ALJs may be removed only "for good cause *established* and *determined* by the Merit Systems Protection Board (MSPB)." 5 U.S.C. § 7521(a) (emphasis added).

D. SEC's Proposed Severance Solution Has Not Been Properly Preserved and Fails on Its Merits

In dismissing Mr. Jarkesy's constitutional removal claim, SEC attempted to incorporate by reference prior briefing by the Department of Justice in *Lucia* in the Supreme Court and in this and the Ninth Circuit in unrelated cases, *Cochran v. SEC*, No. 19-10396 (5th Cir.) and *Lucia v. SEC*, Case No.: 3:18-cv-02692-DMS-JLB (S.D. Cal.). *See* footnote 181 of the Commission Opinion.[4]

The law in this Circuit holds that parties that engage in such slipshod briefing in court have waived the issues. *See Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 394 n.10 (5th Cir. 2001) (issue waived where brief merely adopts and incorporates by reference arguments presented below).

Even if those arguments could properly be incorporated by reference into an unrelated administrative proceeding, and thereby preserved, the additional argument

[4] It is hard to imagine a more serious indictment of the lack of due process afforded respondents in administrative proceedings than this careless adoption of briefing by a *party* to the dispute as part of the Commission decision—and in unrelated proceedings, no less. The Commission, in its "quasi-judicial" capacity, is supposed to be fairly reviewing Mr. Jarkesy's claims with *de novo* consideration of his legal claims. Indeed, the D.C. Circuit expressly noted that the "Commission reviews ALJ decisions *de novo*" when it mistakenly denied Mr. Jarkesy federal jurisdiction to hear his constitutional challenges before the proceedings took place. *Jarkesy*, 803 F. 3d at 12-13. Yet, seven years into the administrative gantlet, Mr. Jarkesy must research what his opponent—and now adjudicator—argued *as a litigant* in unrelated court proceedings and take that for an opinion, rather than obtain the independently reasoned *de novo* review required from the Commission. This juridical shortcut calls into serious question SEC's contention that its administrative proceedings offer respondents a fair shake—or any shake at all.

advanced by SEC in its briefs in those unrelated cases—that an appeals court could sever § 7521's removal protection—lacks merit. The severance "solution" only works going forward and does nothing to cure Mr. Jarkesy's adjudication by an unconstitutional ALJ who was tenure-protected by the intact statute.

Moreover, even if a court were to sever the "for cause" provisions of § 7521, that still leaves the impermissible double layer of tenure protection of MSPB and the Commission itself in place and thus fails to cure the constitutional defect. Finally, because the Commission has the power to prosecute these cases in district courts or hear the cases itself, as the *Lucia* opinion twice suggested the Commission could do, there is no need for the judicial acrobatics of severance, even assuming Art. III confers such powers on the judiciary. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring). SEC assumes that Article III courts are prepared to wield a scalpel to repair after the fact the constitutional injury caused by the government's choice of tribunal. That approach is the opposite of constitutional avoidance and instead asks courts to invite constitutional moral hazard—and then to clean up the ensuing mess. This court should refuse.

In sum, the multiple layers of tenure protection are undeniable, prohibited by *FEF*, and irremediable for Mr. Jarkesy. Accordingly, the Commission decision should be vacated.

II. FEDERAL SECURITIES LAW VIOLATES PETITIONERS' FIFTH AND SEVENTH AMENDMENT RIGHTS BY DENYING THEM A JURY TRIAL

The Seventh Amendment guarantees the right to trial by jury "[i]n Suits at common law." It applies to actions, *as here*, "brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). Accordingly, SEC violated Mr. Jarkesy's Seventh Amendment rights by denying his request that SEC conduct its enforcement proceedings before a jury. Worse still, federal securities law operates in a blatantly discriminatory manner: it denies enforcement targets the option of choosing a jury trial while granting that very same option to SEC. Both the Fifth and Seventh Amendments prohibit the federal government from dispensing with a valued constitutional right in such an unequal manner.

A. Federal Law Improperly Denies Petitioners Equal Rights to Demand a Jury

Ever since *Crowell v. Benson*, 285 U.S. 22 (1932), the Supreme Court has upheld the federal government's constitutional authority, in at least *some* instances, to adjudicate its enforcement actions before administrative tribunals rather than Article III courts—even though jury trials generally are unavailable in such tribunals. Federal courts have recognized, however, that this "agency-centric process is in some tension with Article III of the Constitution, the Due Process

Clause of the Fifth Amendment, and the Seventh Amendment right to a jury trial in civil cases." *Lorenzo v. SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citing Philip Hamburger, *Is Administrative Law Unlawful?* 227-57 (2014)). But "the premise of *Crowell*" and related decisions is that "putting aside any formal constitutional problems with the notion of administrative adjudication, the administrative adjudication process will at least operate with efficiency and *with fairness to the parties involved*." *Ibid*. (emphasis added).

Federal securities law is inconsistent with that premise: it unfairly deprives enforcement targets of the same right to demand a jury trial that it affords SEC—and yet the Constitution does not guarantee the right to SEC. Given the high importance attached to civil jury-trial rights throughout American history, Congress's decision to deny defendants the same jury-trial rights that it grants SEC can be squared with neither the Seventh Amendment nor the Due Process Clause.[5]

The statutory inequality is self-evident. Federal securities law authorizes SEC to choose either of two civil enforcement paths. It may seek enforcement in federal

[5] Mr. Jarkesy's equal protection claim explicitly focuses on this disparity between his jury-trial rights and those of SEC. *See, e.g.*, Pet. Br. at 46 n.103 ("The Due Process Clause also prohibits the unequal treatment of parties in litigation—especially where one party is denied a fundamental right. That SEC as plaintiff can choose whether to avail itself of a jury determination, while the agency's defendant cannot, creates an extreme asymmetry between the procedural rights of the parties that cannot be reconciled with the equal protection or due process guarantees of the Fifth Amendment.").

district court or in an in-house administrative enforcement proceeding. *See, e.g.*, 15 U.S.C. §§ 78u(d) (authorizing SEC to file federal district court action to enforce Exchange Act) & 78u-3 (authorizing in-house administrative enforcement proceedings for Exchange Act violations). In both types of proceedings, SEC is entitled to seek monetary penalties for securities law violations. 15 U.S.C. §§ 78u(d) & 78u-2(a)(2).[6] SEC possesses unlimited discretion in deciding whether to file in federal court or administratively. *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015) (stating that "[n]othing in [the] Dodd-Frank [Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010)] or the securities laws explicitly constrain SEC's discretion in choosing between a court action and an administrative proceeding when both are available"); *id*. at 17 (stating that "Congress granted the choice of forum to the Commission," not to defendants).

Having its choice of forums grants SEC discretion to decide whether to seek a jury trial on its claims. If it files in federal district court and seeks exaction of monetary penalties, it is entitled to a jury trial. *Tull*, 481 U.S. at 422. If it does not want a jury trial, it can initiate an administrative proceeding, in which juries are

[6] The other two statutes under which Mr. Jarkesy has been charged, the Securities Act and the Investment Advisors Act of 1940, include similar provisions. *See, e.g.*, 15 U.S.C. §§ 77h-1(g)(1) (Securities Act) & 80b-3(i)(1)(B) (Investment Advisors Act).

unavailable. But securities law denies that same choice to the defendant; if SEC opts for an administrative forum, the defendant is deprived of all rights to a jury trial.[7]

Trial by jury is a "fundamental" component of our legal system "and remains one of our most vital barriers to governmental arbitrariness." *Reid v. Covert*, 354 U.S. 1, 9-10 (1957). Because "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence ... any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). So, even assuming that the federal government has the right to abrogate all jury-trial rights in securities enforcement proceedings by mandating that all such proceedings be tried administratively, there can be no justification for abrogating the rights of defendants only.

Moreover, abrogating jury-trial rights on a one-sided basis undercuts the Supreme Court's rationale for *ever* permitting Congress to authorize agencies to

[7] This huge disparity in jury rights is a relatively recent phenomenon. Before 2010, in most instances, SEC was not entitled to seek monetary penalties in administrative proceedings. As a result, SEC filed many of its enforcement actions in federal district court, where the defendant was entitled to demand a jury trial if SEC sought imposition of monetary penalties. But Dodd-Frank, enacted by Congress in 2010, authorized SEC to seek monetary penalties in administrative proceedings filed under any of the three securities statutes at issue in this case. *See* Dodd-Frank § 929P(a). In the ensuing years, SEC has resorted increasingly to administrative proceedings—resulting in a substantial decrease in a defendant's ability to demand a jury trial.

enforce federal law using non-jury administrative proceedings. The Court has explained that such proceedings can sometimes be justified when Congress has determined that they are superior to federal-court actions because an administrative agency has "special competence" to adjudicate issues within its field of expertise. *Atlas Roofing*, 430 U.S. at 455. But if Congress had really believed that SEC enforcement actions could most competently be adjudicated in an administrative tribunal, it would have mandated that *all* actions be adjudicated in that manner—the option chosen by Congress in the statute at issue in *Atlas Roofing*. Congress chose instead to grant SEC absolute discretion in selecting a forum and deciding whether to demand a jury, a congressional choice that can only be explained by a desire to tilt the playing field in SEC's direction.

When a government agency is empowered (as here) to exercise its discretion to choose a forum that deprives a defendant of constitutional protections that the agency itself enjoys, such disparate treatment is constitutionally impermissible. *See Gupta v. SEC*, 796 F. Supp. 2d 503, 513-14 (S.D.N.Y. 2011) (denying SEC's motion to dismiss equal protection challenge to SEC administrative proceeding).

Indeed, the Massachusetts Supreme Judicial Court held that an analogous Massachusetts law (which granted defendants in employment discrimination proceedings fewer jury-trial rights than it granted to plaintiffs) violated defendants' rights to equal protection of the laws guaranteed by the Massachusetts Constitution.

Lavelle v. Massachusetts Comm'n Against Discrimination, 426 Mass. 332 (1997). An employee of a utility company alleged that she was a victim of unlawful sex discrimination by her employer and supervisor. Although she could have filed an employment-discrimination claim in state court (in which either party could have demanded a jury trial), she instead opted to file an administrative claim with the Massachusetts Commission Against Discrimination (where proceedings did not provide for juries). The Court held *unanimously* that because Massachusetts law granted the employee the right to demand a jury trial (by filing suit in state court), the Massachusetts Constitution required that her supervisor also be afforded a jury right. 426 Mass. at 337 (stating that "[i]f one side to a dispute has a constitutional right to a jury trial, generally the other side must have a similar right"). The court explained:

> We are dealing here with a fundamental right (art. 15 [of the Massachusetts Declaration of Rights] says the right is sacred), and differing treatment of complainants and respondents in respect to the availability of that fundamental right ... cannot be justified.

Ibid.

The right to trial by jury in civil proceedings is no less sacred under the U.S. Constitution than it is under the Massachusetts Constitution. If the federal government wishes to preserve for itself the right to jury trials in SEC enforcement proceedings, the Fifth and Seventh Amendments require—at least—that it extend the same right to the targets of those proceedings.

B. *Atlas Roofing* Does Not Permit Congress to Eliminate Jury Rights in Civil Proceedings Alleging Securities Fraud

SEC's abrogation of Mr. Jarkesy's jury-trial rights violates the Seventh Amendment for reasons quite apart from its asymmetrical application. SEC's security-fraud claims against Mr. Jarkesy are analogous to common-law causes of action ordinarily decided in English courts in the late 18th century. As such, the Seventh Amendment protects Mr. Jarkesy's right to demand a jury trial on all legal issues. *Tull*, 481 U.S. at 422.

SEC gave short shrift to Mr. Jarkesy's Seventh Amendment claims. But its decision denying those claims inaccurately quoted relevant Supreme Court case law. The decision stated, "The Supreme Court held in *Atlas Roofing Co. v. OSHA* that the 'Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.'" SEC Opinion at 44 (quoting 430 U.S. at 450). The Supreme Court's actual statement was not nearly so sweeping. The Court expressly limited its statement to "cases in which 'public rights' are being litigated." 430 U.S. at 450. SEC's decision includes no discussion of whether the "public rights" doctrine applies to its claims against Mr. Jarkesy. The decision's quotation from *Tull* ("*Tull* reiterated that 'the Seventh Amendment is not applicable to administrative proceedings,'" SEC Opinion at 44 (quoting 481 U.S. at 418 n.4)) is similarly misleading. *Tull* merely recited the holding in *Atlas Roofing* (that the

Seventh Amendment was inapplicable to the administrative proceedings at issue in that case) and made no categorical statements regarding the scope of Seventh Amendment protections. 481 U.S. at 418 n.4.

The Seventh Amendment provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved … " The Supreme Court has consistently interpreted the phrase "Suits at common law" to refer to "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Parsons v. Bedford*, 28 U.S. 433, 447 (1830). The Seventh Amendment not only preserves the right to jury trial as it existed in 1791 (the year the Seventh Amendment was adopted) but also "applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Granfinanciera*, 492 U.S. at 42.

The Supreme Court held in *Tull* that the Seventh Amendment guarantees a jury trial to determine liability in actions by the federal government seeking civil penalties under federal statutes, reasoning that such actions are analogous to an action in debt and an action to abate a public nuisance, both of which actions fell within the jurisdiction of English courts of law in the 18th century. 481 U.S. at 418-

20. Based on *Tull,* numerous federal appeals courts (including this Court) have held that either party to an SEC enforcement action filed in federal court is entitled to demand a jury. *SEC v. Life Partners Holdings, Inc.*, 853 F.3d 765, 781-82 (5th Cir. 2017).

The Supreme Court has created a Seventh Amendment exception for adjudication of a narrow category of rights that it refers to as "public rights." As understood by 19th-century case law, a "public right" was a right that belonged entirely to the government—in the sense that the Executive could exercise it alone—such as the collection and disbursement of tax revenues. *See Murray's Lessee v. Hoboken Land Co.*, 59 U.S. 284-85 (1856). Because the government has absolute discretion regarding how it will expend government funds, Congress may authorize the Executive Branch to resolve all factual issues arising in connection with those expenditures, without any review by the judiciary. *Ibid*. Similarly, the government's grant of a patent monopoly is subject to the "public rights" doctrine. *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1373 (2018). When the Executive Branch adjudicates these "public rights," the Seventh Amendment is inapplicable. *Crowell*, 28 U.S. at 50-51.

Twentieth-century Supreme Court case law expanded the definition of "public rights," most controversially in *Atlas Roofing*. That decision upheld Congress's choice to assign adjudication of workplace-safety claims arising under the

Occupational Safety and Health Act ("OSH Act") exclusively to an Executive Branch agency, the Occupational Safety and Health Review Commission. 430 U.S. at 450. The Court concluded that because the rights created by the OSH Act were "public rights" and were "unknown to the common law," the Seventh Amendment did not preclude Congress from assigning adjudication of those rights to an administrative tribunal in which jury trials were unavailable. *Id.* at 458, 461.

But both *Atlas Roofing* and subsequent Supreme Court decisions have been careful to impose strict limits on the definition of "public rights." The Court emphasized that a federal statutory right does not automatically become a "public right" merely by virtue of Congress assigning enforcement of the statute to an administrative agency; otherwise "Congress could utterly destroy the right to a jury trial by always providing for administrative rather than judicial resolution of the vast range of cases that now arise in the courts." *Atlas Roofing*, 430 U.S. at 458.

Several features of the OSH Act led the Court to determine that the statute created public rights. In particular, the Court noted the novelty of the statutory provisions, which lacked counterparts in the common law. Adjudication of enforcement actions under the OSH Act required factfinders to undertake detailed assessments of workplace safety conditions and to make unsafe-conditions findings without regard to whether those conditions actually led to employee injuries. The Court held that Congress could reasonably conclude that factfinding would be most

competently performed by an administrative agency "with special competence in the relevant field" and that exclusive reliance on administrative adjudication would lead to "speedy and expert resolutions" of issues arising under these new rights. 430 U.S. at 455, 461.

Later Supreme Court decisions have imposed additional limits on the scope of the "public rights" doctrine. *Granfinanciera*, for example, stated expressly that "Congress' power to block application of the Seventh Amendment to a cause of action has limits," and warned that "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. at 51, 61. And numerous Court decisions have emphasized that the Seventh Amendment applies not only to common-law forms of action "but also to causes of action created by congressional enactment." *Tull*, 481 U.S. at 417; *see Granfinanciera*, 492 U.S. at 41; *Chauffeurs, Teamsters and Helpers v. Terry*, 494 U.S. 558, 564-65 (1990); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998).

Neither this Court nor the Supreme Court has directly addressed whether rights created under federal securities statutes are "public rights" whose adjudication Congress may constitutionally assign to administrative agencies. But the relevant factors all point to the conclusion that the "public rights" doctrine is inapplicable to

SEC enforcement actions. Most importantly, as demonstrated by Mr. Jarkesy at length in his opening brief, the causes of action at issue here were not "unknown to the common law." Common-law courts have been hearing fraud claims, including stock fraud claims, for centuries. By providing for enforcement of the federal securities laws in administrative proceedings, Congress is attempting to do precisely what *Granfinanciera* warned against: eliminate jury-trial rights by "relabeling the cause of action to which it attaches." 492 U.S. at 61.

Atlas Roofing is also distinguishable in that the federal courts lacked familiarity with the complex enforcement standards established by the OSHA Act, the statute at issue in that case. In sharp contrast, when Congress adopted Dodd-Frank in 2010 and thereby shifted the bulk of SEC enforcement actions to administrative proceedings, federal courts were already very familiar with federal securities laws. So, there is no plausible basis for asserting that Congress adopted Dodd-Frank (which, for the first time, permitted SEC to file administrative enforcement claims seeking monetary penalties) to ensure that those claims would come before factfinders with "special competence."[8] *Atlas Roofing* relied heavily on the "special competence" factor in determining that the OSH Act was subject to the "public rights" doctrine.

[8] The publicly available résumés of SEC ALJs evince no previous experience in the securities field. *See* Brief *Amicus Curiae*, New Civil Liberties Alliance, *Lucia v. SEC*, No. 17-130, pp. 20-27 (U.S. Supreme Ct. Feb. 28, 2018).

Nor, based on the evidence of this case (SEC required seven years to adjudicate its enforcement action against Mr. Jarkesy), can application of the public rights doctrine to SEC administrative enforcement actions be justified by the speediness of such actions.

Finally, the statutory grant to SEC of absolute discretion in its choice of forums undercuts any claim that Congress determined that use of administrative proceedings was necessary to ensure adequate enforcement of securities laws. The Supreme Court in *Atlas Roofing* created a "public rights" exception to Seventh Amendment jury trial rights in large measure because Congress had determined that adjudicating OSH Act enforcement actions *exclusively* before a specialized administrative tribunal was necessary to ensure effective enforcement. But when, as with the securities laws, Congress authorizes administrative proceedings as simply one of two options available to the Commission, *Atlas Roofing*'s effective-enforcement rationale for abridging jury-trial rights evaporates.

In sum, because the "public rights" doctrine is inapplicable to the federal securities laws, the Seventh Amendment is fully applicable to SEC's enforcement proceedings against Mr. Jarkesy. Because SEC conducted its administrative proceeding without the jury demanded by Mr. Jarkesy and required by the Seventh Amendment, the Court should set aside the Final Order entered by the Commission on September 4, 2020.

CONCLUSION

For all of the foregoing reasons, SEC's Final Order should be vacated.

Respectfully submitted,

/s/ Margaret A. Little
Margaret A. Little
Richard A. Samp
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Peggy.little@ncla.legal

Counsel for Amicus Curiae

March 17, 2021

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word. See Fed. R. App. P. 29(a)(4), (b)(4), 32(g)(1). This brief complies with the type-volume limitation of Rule 29(a)(5) because it contains 6,477 words, excluding the parts exempted under Rule 32(f).

/s/ Margaret A. Little

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2021, an electronic copy of the foregoing brief *amicus curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/EFC filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ Margaret A. Little