No. 22-859

In the
Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,
v.

GEORGE R. JARKESY, JR. AND PATRIOT28, L.L.C.,
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

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

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

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

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INTEREST OF AMICUS CURIAE[1]

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights group devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—because Congress, administrative agencies, and courts have neglected them for so long.

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

NCLA is especially concerned by the relocation of judicial power from courts—in which Article III solely vests such power—to administrative agencies. Congress lacks judicial power whatsoever, and so

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

cannot delegate that power to any branch of government. It resides in the Courts by the Constitution's very terms.

In addition, the administrative scheme in question effectively denies individuals the right to be tried by a jury of their peers and equal protection of the laws. NCLA is concerned that SEC's claimed exemption from the Seventh Amendment's guarantee of jury-trial rights could, if accepted, eliminate all such rights in suits filed by the federal government.

Finally, Congress's protection of SEC Administrative Law Judges (ALJs) from removal, deprives Americans of their constitutional freedom to live under a government in which executive power is accountable to them through the President and his duty to "take Care" that the laws be faithfully executed. U.S. CONST. art. II, § 3. Americans enjoy a constitutional freedom to elect the person in whom the Constitution vests the executive power, thereby making the exercise of executive power accountable to the people. Independent agencies threaten that freedom, among others, so NCLA seeks to safeguard such freedoms by participating in cases like this one.

SUMMARY OF THE ARGUMENT

Congress cannot delegate judicial power to the Executive Branch, as it does not belong to Congress. The Constitution vests judicial power in Article III courts, and its location there is mandatory. Casting this inquiry in terms of "delegation" doctrine misses the constitutional point altogether. Congress lacks

judicial power, and it may only lawfully locate such power in inferior Article III courts.

By the same token, the Executive Branch is confined to the exercise of executive power. No executive officer can constitutionally exercise the judicial power of the United States. Furthermore, judicial power cannot be subject to political review; yet SEC's adjudicatory regime is premised on such review as an integral part of its in-house adjudication. By shifting enforcement into administrative tribunals, agencies transform Americans' fundamental civil liberties into mere options from which the government can escape by taking the administrative path.

The Constitution guarantees jury rights in both criminal and civil proceedings, other than equity and admiralty. The "public rights" doctrine is alien to American constitutionalism and confuses government "power" with government rights. The public rights doctrine is an atextual recasting of the Seventh Amendment guarantee which should be put out of its misery. The same holds true for this Court's holding in *Atlas Roofing*.

Finally, SEC concedes that its administrative adjudication scheme confers unconstitutional multiple removal protections in violation of the Constitution's imperative that the President "take Care" that the laws be faithfully executed. The only proper remedy for this constitutional infirmity is dismissal of the SEC's proceedings—a remedy SEC saw fit to grant in every other case that could bring the issue before this Court.

ARGUMENT

I. CONGRESS CANNOT RELOCATE JUDICIAL POWER FROM FEDERAL COURTS TO AGENCIES

Relocating judicial power, even with Congress's authorization, runs into five obstacles. Separately, each suffices to hold SEC's administrative exercise of judicial power unconstitutional. Together, the five objections leave no room for doubt.

A. Congress Cannot Delegate a Power It Lacks

Although it is often assumed that Congress delegates power to executive agencies, congressional delegation can neither explain nor justify executive exercise of judicial power, because the Constitution gives Congress only legislative powers. Congress cannot delegate a power it does not have, so it cannot delegate judicial power. Judicial power is exclusively vested in Article III; therefore, the question must be decided in terms of vesting, not "delegation."

This "vesting" language separately appearing at the beginnings of Articles I, II and III properly should be the focus of the Court's decision in this case because it avoids the inaccuracy of describing congressional shifts of power as mere "delegations." A delegated power is one that can be reclaimed by the delegator, such as when an Executive Officer delegates power to a subordinate which she can recall at her own discretion. Similarly, when Congress delegates authority to the Congressional Budget Office, it has full discretion to retrieve any of the delegated authority. But when Congress enacts a law

authorizing the Executive to exercise either legislative or *judicial* power, Congress cannot retrieve that power easily, as it may have to overcome a Presidential veto, something not always or even usually possible. See Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1086 (*forthcoming* 2023) (footnote omitted).[2] ("At stake is not merely another judicial doctrine. The nondelegation doctrine is what justifies the shift of regulatory power from Congress to agencies. It thus is a foundation stone of the administrative state.")

The failure of delegation's analytical framework is especially severe when Congress—endowed with only legislative power—shifts judicial power from the courts to agencies. Not having that power in the first place, Congress cannot lawfully delegate it. This is not merely an initial argument against SEC's exercise of judicial power. The poverty of delegation language is a powerful reminder that the Constitution's language is different. The Constitution speaks in terms of what is *vested*. This Court should put aside the illusory inquiry about delegation of power and ask instead whether Congress has unconstitutionally *divested* the courts of their judicial power.

The decision below and the briefing of the parties have been framed in terms of congressional delegation of legislative power. Once the analysis focuses on the language of the Constitution—as it

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[2]SSRN
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3990247

must—it becomes clear that Congress cannot delegate a power it does not have. One cannot intelligibly decide the constitutionality of the shift of judicial power to SEC in terms of *delegation*, because the Constitution places the judicial power exclusively in Article III. It thus becomes imperative to focus on vesting—and divesting—to decide this case.

B. Article III's Vesting of Judicial Power in the Courts Is Mandatory

Article III of the Constitution provides: "The judicial power of the United States, shall be vested" in the courts. U.S. CONST. art. III, § 1. This phrase is significant.

Had Article III recited that the judicial power "*is hereby vested*" in the courts, it could be argued that that power, like title to land, could be conveyed without any limitation on its subsequent transfer. Courts, leaving aside Congress, could claim a freedom to shift judicial power beyond the courts.

Tellingly, however, Article III avoided this familiar language of conveyancing, instead saying that the judicial power "shall be vested." It thereby made clear that the location of that power was mandatory. The text of the Constitution specifies not merely that powers are "vested" and therefore non-transferable, but where they must be placed. The legislative powers shall be in Congress, the executive power shall be in the President, and the judicial power shall be in the courts.

The principle that the Constitution unambiguously vests judicial power in courts

resounds over centuries of case law, from *Marbury v. Madison*'s recognition of this demarcation—it is "emphatically the province and duty of the judicial department to say what the law is[,]" 5 U.S. (1 Cranch) 137, 177 (1803)—to cases such as *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995), where the Court held that § 27A of the Exchange Act of 1934 violated the separation of powers. ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.").

Nor should this mandatory assignment of powers come as a surprise. The Constitution did not vest its powers in separate branches of government merely as an initial distribution of cards, to be played and transferred as soon as the game began.

C. Article III Authorizes Congress to Locate Judicial Power Only in Inferior Courts, Not Administrative Agencies

Article III begins: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. This judicial vesting clause stands apart from the other vesting clauses. They fully specify the mandatory locations of their powers: the legislative powers in Congress and executive power in the President. In contrast, Article III allows Congress to designate the location of part of the judicial power—but only in "inferior courts," not other bodies. Congress therefore cannot place the judicial power in the SEC or any other administrative agency. See

Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083 (*forthcoming* 2023).[3]

Article I empowers Congress to "constitute Tribunals inferior to the Supreme Court[,]" U.S. CONST. art. I, § 8, and it may be thought that with this power, Congress could place the judicial power in "tribunals," such as the SEC, that are not inferior courts. But this would be to confuse the *courts*, which exercise the judicial power of the United States, with the host of tribunals that do not exercise that judicial power. Article I's Tribunal Clause gives Congress the power to constitute a range of tribunals, including the inferior federal courts exercising the judicial power of the United States, but also lesser tribunals, such as territorial and District of Columbia courts, which exercise the judicial power, respectively, of the territories and that district.

It therefore is telling that, according to Article III, the judicial power of the United States "shall be vested" in the *courts*, not other sorts of tribunals. So, even with the power to constitute tribunals, Congress cannot locate the judicial power of the United States in bodies that are not inferior courts, such as executive agencies.

Whatever the SEC is, it is not an inferior *court*. The Constitution does not say that judicial power "shall be vested" in the Supreme Court and such inferior court *and other tribunals* as Congress may ordain and establish. The judicial vesting clause thus

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[3]SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3990247.

spells out a double limit: the judicial power must be in the courts, and when Congress distributes the judicial power not belonging to the Supreme Court, it cannot place that power in any tribunal other than an inferior court.

The Constitution's restriction of judicial power to the courts is essential. In *Stern v. Marshall*, the Supreme Court stated that "Article III could neither serve its purpose … nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial power' on entities outside Article III." 564 U.S. 462, 484 (2011). Congress simply cannot shift judicial power from one branch to another—especially not to the prosecutor! That danger was expressly articulated at the Founding. "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers." THE FEDERALIST No. 78, at 523 (Alexander Hamilton) (Cooke ed. 1961).

Far from being merely an eighteenth-century concern, this danger has become alive at the SEC, where ALJs must worry that the Commission is looking over their shoulders and that it can alter their decisions, adjust their salaries, and even set into motion their termination. More dramatically, SEC disclosed in a filing[4] in this very case, in the Fifth Circuit, that SEC's enforcement division was routinely spying on the computer files of the

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[4] *See Jarkesy v. SEC*, No. 20-61007, Dkt. 117 (5th Cir.) also available at https://www.sec.gov/news/statement/commission-statement-relating-certain-administrative-adjudications, last visited Oct. 18, 2023).

Commission's ALJs, thus compromising even the weak illusion of separation of functions at the agency.

When it is recognized that the judicial power mandatorily "shall be vested" in the courts, and that Congress may distribute that power only to inferior courts, the constitutional failing of administrative judging comes into sharp focus. The exclusive vesting of powers cannot be undone, even by Congress, because that would allow agencies to function as prosecutors, judges and juries, something the Constitution emphatically prohibited.

D. The Executive Is Vested with Only Executive Power

Article II vests only executive power in the President. So, executive agencies—including those that are quasi-independent, such as SEC—cannot exercise judicial power.

For a branch of government to exercise a power not constitutionally vested in it is to revive the sin long ago repudiated in *Hayburn's Case*, 2 U.S. 409 (1792). That case—actually a series of judicial protests dating from the earliest days of the Republic—centered on the courts' refusal to exercise non-judicial power. For example, the Circuit Court for the District of Pennsylvania said that "the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the circuit court must, consequently, have proceeded without constitutional authority." *Id.* at 410 (1792) (citing C.C.D. Pa.: letter April 18, 1792).

This principle in *Hayburn's Case* did not merely concern the courts but applied equally to all of the branches. No branch could exercise a type of power other than that vested in it by the Constitution. As put by the Circuit Court for the District of North Carolina, "the legislative, executive[,] and judicial departments are each formed in a separate and independent manner," and "the ultimate basis of each is the [C]onstitution only, within the limits of which each department can alone justify any act of authority." *Id.* at 410 (citing C.C.D.N.C.: letter June 8, 1792). Administrative agencies, being lodged in the executive branch, cannot exercise any power that is not executive.

E. Judicial Power Cannot Be Subject to Political Review

Another conclusion of *Hayburn's Case* was that court decisions could not be reviewable by the Executive or Congress. Other cases across the centuries have echoed this essential point—notably *Gordon v. United States*, 69 U.S. 561 (1864) (Supreme Court lacks jurisdiction to hear appeals from the Court of Claims, because a court could not exercise executive power and its judicial power could not be subject to review by the political branches).

Here, of course, judicial power has been displaced from the courts to the Executive. All the same, the case law holds more broadly that judicial power cannot be reviewable by political power. That is exactly what happens at SEC, because the decisions of SEC ALJs are re-examinable by the Commission. If judicial power really can be placed in ALJs, then it cannot be reviewable by non-judicial political commissioners.

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SEC's exercise of judicial power is therefore inconsistent with the text of the Constitution on five separate grounds. Any one of them renders SEC's judicial power unconstitutional; taken together, they doom SEC's administrative adjudications.

II. FEDERAL SECURITIES LAW VIOLATES RESPONDENTS' 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." U.S. CONST. amend. VII. It thereby applies to all civil actions, other than in equity and admiralty, including 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). Moreover, equity involved property and contract claims, not government enforcement, and SEC does not sit in admiralty. Accordingly, SEC violated Jarkesy's Seventh Amendment rights by denying his request that SEC's enforcement proceedings be tried by 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. The Seventh Amendment prohibits the federal government from dispensing a valued constitutional right in such an unequal manner.

More fundamentally, NCLA urges the Court to re-examine its application of the "public rights" doctrine—beginning by abandoning use of that term, which does not accurately describe the federal

government's power in this case or others. The Court also should overrule *Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1977), a decision that cannot be squared with either the Constitution or this Court's other decisions on the judicial power and jury rights.

A. "Public Rights" Mischaracterizes the Issues at Stake and Leads to Anomalous Results

In recent decades, the Court has frequently referred to so-called public rights when considering Seventh Amendment jury-trial claims. *See, e.g., Atlas Roofing*, 430 U.S. at 455 (stating that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment … ."). NCLA urges the Court to give that term a well-deserved retirement. Rather than illuminate the underlying constitutional issues, it tends to mislead judges and lawyers alike.

First, although the term is often used to describe "rights" belonging to the federal government, the federal government is not normally thought of as possessing any rights whatsoever in relation to the people. The government possesses *powers* granted to it in the U.S. Constitution, and the governed possess constitutional *rights* (notably those enumerated in the Bill of Rights), which they may assert as limits on government power. The government often acts in pursuit of what it deems the public interest; but in doing so, it is exercising its own powers, not in any sense the rights of those citizens it hopes will benefit from its actions.

Second, the Court's frequent invocation of the term has done little or nothing to flesh out its meaning. As the Court recently conceded, "This Court has not definitively explained the distinction between public and private rights … and its precedents applying the public-rights doctrine have not been entirely consistent." *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1373 (2018) (citations omitted).

Third, the term "public rights" appears nowhere in the Constitution. It derives from Roman law, not English law, and did not appear in any of this Court's decisions until the mid-19th century. *See Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1855). Moreover, *Murray's Lessee* used the term in a narrow context largely unrelated to its 20th-century usage.

Two provisions of the Constitution address the Executive Branch's authority to use administrative proceedings (in which juries are unavailable) to make determinations affecting individuals and other persons. First, Article III mandates that only the federal courts may exercise the "judicial Power of the United States." U.S. CONST. art. III, § 1. Second, the Fifth Amendment guarantees that no person shall be "deprived of life, liberty, or property, without the due process of law." *Id.* amend. V. Whether a person has a Seventh Amendment right to a jury generally turns on these provisions, not on "public rights." Put another way, the question is whether the Constitution "require[s] judicial determination" of the dispute, *Oil States*, 138 S. Ct. at 1373, thus bringing it within the amendment's "Suits at common law." NCLA urges this Court to abandon its notion of "public rights" and,

instead, speak about matters within the judicial power, or involving life, liberty, or property.

B. Even Accepting *Atlas Roofing* and Its Interpretation of the Public Rights Doctrine, the Absence of a Jury in SEC's Proceedings Violated Jarkesy's Seventh Amendment Rights

Ever since *Crowell v. Benson*, 285 U.S. 22 (1932), the 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 are unavailable in such tribunals. This is striking because *Crowell* was in admiralty. It thus has no precedential value at all for denying jury rights in cases outside of admiralty. In the most extreme application of *Crowell's* public-rights doctrine, *Atlas Roofing*, this Court upheld jury-less administrative hearings within the Occupational Safety and Health Administration (OSHA) imposing civil penalties on employers for maintaining unsafe working conditions. 430 U.S. at 461.

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?* 227–257 (2014)). NCLA agrees with Jarkesy that, even if one accepts *Atlas Roofing*'s broad understanding of agencies' authority to conduct administrative

proceedings, SEC violated Jarkesy's Seventh Amendment rights by denying him a jury trial.

NCLA believes *Atlas Roofing* was wrongly decided and should be overruled now. Nonetheless, the judgment below could also be affirmed without regard to whether *Atlas Roofing* remains in place.

The Seventh Amendment preserves the right to jury trial in all civil cases outside of equity and admiralty. Philip Hamburger, *Is Administrative Law Unlawful?* 247 (2014). Such cases include "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.

This Court has not directly addressed whether federal securities statutes involve "public rights" that Congress may constitutionally assign to administrative agencies. But relevant factors all point to the conclusion that the public rights doctrine is inapplicable to SEC enforcement actions of this sort. SEC's enforcement action accuses Jarkesy of securities fraud. For example, it charged him with falsely telling investors that a prominent accounting firm served as his funds' auditor, Pet. App. 80a, and misrepresenting the funds' investment strategies. *Id.* at 82a–84a. Actions for fraud were regularly decided by law courts in the late 18th century. So, even if this Court fails to recognize the breadth of the Seventh Amendment's protection for juries in all civil actions (outside equity and admiralty), it at least should recognize that SEC's claims are "analogous" to 18th-century suits heard in law courts. *Granfinanciera*,

492 U.S. at 41–42. Jarkesy thus has a right to have those claims tried by a jury.

SEC claims the Seventh Amendment is inapplicable here—notwithstanding the similarities between its enforcement actions and common-law suits alleging fraud. It argues that Congress, in adopting the securities laws, imposed "new" statutory duties and so could assign the adjudication of violations to an administrative agency. SEC Br. 21–25.

But *Granfinanciera* expressly rejected that line of reasoning. It stated 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. 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 v. United States*, 481 U.S. 412, 417 (1987); *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).

Atlas Roofing held that OSHA's administrative claims and proceedings did not implicate Seventh Amendment rights because they were "unknown to the common law," and required factfinding by professionals "with special competence in the relevant field." 430 U.S. at 461, 455. In contrast, SEC's fraud

claims *were* known to the common law. In the absence of any serious effort by SEC to distinguish its fraud-based statutory claim against Jarkesy from common-law fraud claims, he is entitled under the Seventh Amendment to have SEC's claims heard by a jury.

C. *Atlas Roofing* Should Be Overruled Because It Authorizes the Executive to Skirt Judicial and Jury Oversight in Just the Manner the Framers Sought to Avoid

Atlas Roofing broadly endorsed statutes authorizing the Executive Branch to bring enforcement claims in administrative proceedings with no jury rights, as long as the claims can properly be categorized as involving "public rights," an ill-defined term. That standard cannot be reconciled with multiple provisions of the U.S. Constitution, has proven unworkable in practice, and has been undercut by later decisions of this Court. It should be overruled.

To begin with, the public-rights standard on which *Atlas Roofing* relies is atextual. The Constitution contains no suggestion of a public-rights exception to the Seventh Amendment, nor does such an exception have any roots in English common law. On the contrary, a central concern that animated the development of jury rights in England was a desire to *prevent* the Executive from using other mechanisms to seize property. *See, e.g.*, 3 William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND (Clarendon Press–Oxford, 1768) at 259. Similarly, Americans opposed the expansion of admiralty jurisdiction to evade juries in law courts. Philip Hamburger, *Is Administrative Law Unlawful?* 150 (2014).

Opposition to such evasions of jury rights was unqualified by ideas about "public rights."

Although *Atlas Roofing* relied heavily on *Murray's Lessee*, the "public rights" identified in *Murray's Lessee* bear no relationship to the broadly defined "public rights" endorsed by *Atlas Roofing*. *Murray's Lessee* involved an effort by the federal government to collect customs revenues from Swartwout, the former collector of customs for the port of New York. An audit of his books showed that he had collected $1.4 million in customs taxes that were never paid to the federal treasury. An 1820 statute authorized Treasury Department officials to conduct the audit, place a lien on Swartwout's property in the amount of the unremitted taxes, and then issue a "distress warrant" authorizing sale of the property. 59 U.S. at 274–75.

At issue before the Court was whether the actions of Treasury officials constituted "the exercise of the judicial power of the United States." If so, "the proceeding was void," because (as the Court recognized) Article III of the Constitution provides that only the judicial branch of government may exercise that judicial power. *Id.* at 275.

The Court determined that the Treasury officials acted properly because they were not exercising judicial power—but only after undertaking a lengthy analysis of the history of government efforts to collect tax revenue from absconding tax officials. The Court concluded that throughout English and American history, taking steps to collect all tax revenues that a customs official failed to properly forward to the public treasury had been considered an

executive function and never a part of the judicial power. *Id.* at 276–82.

The Court's holding turned on the special status of tax collectors, not a broader right of government officials to act extra-judicially to collect funds, let alone to bring enforcement proceedings. The court's sole reference to "public rights" came at the very end of the opinion, in response to an argument that Congress had converted the "distress warrant" proceeding into an exercise of judicial power when it granted the debtor a private right of action to challenge the proceeding. *Id.* at 282–84. The Court rejected that argument, explaining that the government's right to maintain summary proceedings against its tax collector was a "public right" that was unaffected by Congress's discretionary decision to permit subsequent judicial review. *Id.* at 284.

In sum, *Murray's Lessee*'s single reference to "public rights" provides no support for *Atlas Roofing*'s holding that Congress may authorize administrative proceedings for sanctions against individuals alleged to have violated statutes involving "public rights."

In any government enforcement action, the existence of a Seventh Amendment jury right depends not on whether the action concerns a public right, but whether its resolution requires a judicial determination. *See Oil States*, 138 S. Ct. at 1373 (stating that what it refers to as "the public-rights doctrine" does *not* apply to matters "arising between the government and others, which from their nature … require judicial determination.").

There are, of course, many "constitutional functions" that can be carried out by "the executive or legislative departments" without "judicial determination." *Crowell v. Benson*, 285 U.S. 22, 50–52 (1932). Congress can create benefits that are discretionary, not "vested," and can leave decisions granting or denying the benefits to the Executive Branch. Such determinations clearly are not "judicial determinations," and the decisions denying benefits are not what traditionally was considered a deprivation of life, liberty, or property. So, an affected individual has no suit at common law in which he would be entitled to a jury.

But in binding adjudications governed by binding laws or regulations, the Seventh Amendment guarantees the right to trial by jury, without regard to how strenuously the government asserts that its administrative proceeding involves public rights. Such adjudications entail the exercise of "judicial Power," which Article III entrusts exclusively to the federal courts; and the Seventh Amendment jury right extends to all civil proceedings except those in admiralty or equity.

Atlas Roofing is also ill-considered because it fails to take account of Fifth Amendment due process rights. Since the Middle Ages, the core of due process has been the right to be held accountable only in a court. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679–80 (2012). The 1641 Act of Parliament abolishing the Star Chamber recited the principle, first stated in 1368, that "No Man be put to answer without presentment … by due Process and Writ Original according to the old Law of the Land."

An Act for the Regulating of the Privy Council and for Taking Away the Court Commonly Called the Star Chamber, 16 Car., c. 10 (1641). Due process was the right to be held to account only in the Courts.

Those who ratified the Bill of Rights in 1791 recognized that the "due process of law" guaranteed by the Fifth Amendment included a guarantee that "Due Process of law must then be had before a judicial court, or a judicial magistrate." 2 St. George Tucker, *Law Lectures*, at 4 (1795). *See also* 2 James Kent, *Commentaries on American Law* 13 (New York, W. Kent 1848); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1783 (1833).

The Bill of Rights was added at the end of the Constitution; so rather than merely adjust Article III and limit the courts, the procedural rights limited all three branches of government. Moreover, like the other procedural rights, the Fifth and Seventh Amendments were written in the passive voice. Instead of stating merely that the *courts* should not deny due-process and jury rights, they used the passive voice to limit all parts of government. It thus is apparent that these were rights against the legislative and executive branches as well as the courts. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1721–22 (2012).

If due process and civil juries were merely rights against the courts, they would invite evasion through administrative adjudications. So it is fortunate that they were drafted to limit all parts of government and thereby bar such circumvention.

All this means that administrative agencies cannot deny juries and judicial due process without violating the Bill of Rights. And when this court rejected the Seventh Amendment challenge in *Atlas Roofing*, it denied both the company's due-process right to be heard in court and its right to a jury.

By skirting juries, *Atlas Roofing* also allows agencies to find facts and requires judges to defer to administrative record assembled by the prosecuting party—or at best, by an ALJ employed by that party. This deference to one side's facts (sometimes denoted "*Atlas Roofing* deference") institutionalizes systematic judicial bias in violation of the due process of law.

Despite *Atlas Roofing*'s many deficiencies, including its failure to adhere to Article III and the Fifth and Seventh Amendments, it continues to lead federal courts throughout the country to deny due-process and jury rights. The Court should overrule this grossly mistaken and unjust precedent and should declare that when SEC (as here) seeks civil enforcement for alleged securities law violations, it must file suit in federal court, not proceed administratively.

D. The Securities Laws Improperly Deny Defendants Equal Rights to Demand a Jury

Federal securities law violates the Seventh Amendment for the additional reason that it improperly denies the targets of SEC enforcement actions the same jury rights that it affords to SEC. Federal securities law authorizes SEC to choose

either of two civil enforcement paths. It may seek enforcement in federal 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).[5] 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) (overruled on other grounds, *Axon v. FTC and SEC v. Cochran*, 143 S. Ct. 890 (2023)) 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 constrains the 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).

This choice of fora leaves SEC discretion to decide whether to seek a jury trial on its claims. If it files in federal district court and seeks monetary penalties, it is entitled to a jury trial. *Tull v. United States*, 481 U.S. 412, 422 (1987). If it does not want a jury trial, it can bring an administrative proceeding, in which juries are unavailable. But securities law

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

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.

Indeed, state supreme courts across the country have held that laws granting defendants fewer jury-trial rights than plaintiffs are unfair to defendants and violate their jury rights under the state constitution. In *SCI Management Corp. v. Sims*, 101 Haw. 438 (2003), the Hawaii Supreme Court invalidated a statutory scheme that granted employment discrimination plaintiffs sole discretion to decide whether to have a jury trial (by filing in court) or a non-jury trial (by filing administratively). The court said, "If one side to a dispute has a constitutional right to a jury trial, generally the other side must have a similar right. We are dealing with a fundamental right and differing treatment of complainants and respondents in respect to the availability of that fundamental right cannot be justified." *Id.* at 451 (citation omitted). *See also FUD's, Inc. v. Rhode Island*, 727 A.2d 692, 698 (R.I. 1999) (holding that similar statutory scheme is unconstitutional because it deprives defendants of jury-selection rights granted to plaintiffs); *Lavelle v. Mass. Comm'n Against Discrimination*, 426 Mass. 332 (1997) (same) (overruled on other grounds by *Stonehill College v. Mass. Comm'n Against Discrimination*, 441 Mass. 549 (2004)).

The right to trial by jury in civil proceedings is no less fundamental under the U.S. Constitution than it is under state constitutions. If the federal government wishes to preserve jury trials for itself in SEC enforcement proceedings, the Seventh

Amendment requires that it extend the same right to the targets of those proceedings.

III. SEC ALJS ENJOY UNCONSTITUTIONAL MULTIPLE LAYERS OF TENURE PROTECTION

Among the questions presented in this case, the simplest to resolve in Mr. Jarkesy's favor is the question of whether SEC ALJs are protected by impermissible multiple layers of tenure protection. The Government admits that SEC ALJs have multiple tenure protections, and that this case was litigated on the understanding that the SEC Commissioners enjoy tenure protection. SEC Br. at 16. That these multiple layers of tenure protection violate Article II was also conceded by the Solicitor General in *Lucia*. Brief for Respondent, *Lucia v. SEC*, at 21, 138 S. Ct. 2044 (2018) (No. 17-130) [hereinafter, Gov't Cert. Pet. Br. in *Lucia*]. Relying on this Court's decision in *Free Enterprise Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010), which held that officers of the United States may not be insulated from presidential control by more than one layer of tenure protection, the government recognized that "[h]ere, the statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority." Gov't Cert. Pet. Br. in *Lucia*, at 20. "It is critically important," argued the government, that the Court address the removal issue along with the Appointments Clause issue. *Id*. at 21. "Addressing that issue now will avoid needlessly prolonging the period of uncertainty and turmoil caused by litigation of these issues." *Id*. What was true in 2018 remains true today.

These multiple layers of tenure protection violate Article II of the United States Constitution because this Court has already ruled that any more than one layer of removal protection is constitutionally impermissible. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492 (2010), held that more than one layer of tenure protection violates the Take Care Clause and "contravene[s] the Constitution's separation of powers." The only remaining issue is what remedy is available.

SEC argues that *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021), precludes a remedy here because even "when a federal officer is found to have been unconstitutionally insulated from removal, that defect does not render any of his prior actions "void." From this perspective, the litigant must show some prejudice from those tenure protections, and SEC argues for a remand "to perform the prejudice inquiry." SEC Br. at 67.

Proving such a counterfactual is nigh well impossible, as recognized by this Court in *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017), noting "the effects of the error are simply too hard to measure." Instead, a "structural error [in] the framework within which the trial proceeds" must be distinguished from "simply an error in the trial process itself." *Id.*

A remand in search of an impossible prejudice inquiry is unjust. Addressing these constitutional infirmities before the structural violation takes place is now required by this Court. The federal courts should have been open to Mr. Jarkesy's constitutional claims in 2014, when he first sought to have the constitutionality of these proceedings heard by an

Article III court—not after the constitutional injury has already been inflicted.

That iron logic lies at the heart of this Court's decision last term in *Axon v. FTC and SEC v. Cochran*, 143 S. Ct. 890 (2023). Those cases unanimously overruled the D.C. Circuit's decision in *Jarkesy I* as well as decisions of five other circuits that had denied federal court jurisdiction to hear such constitutional claims before they are irremediable. As Justice Kagan noted:

> The harm Axon and Cochran allege is "being subjected" to "unconstitutional agency authority"—a "proceeding by an unaccountable ALJ." … That harm may sound a bit abstract; but this Court has made clear that it is "a here-and-now injury." … And—here is the rub—it is impossible to remedy once the proceeding is over, which is when appellate review kicks in. Suppose a court of appeals agrees with Axon, on review of an adverse FTC decision, that ALJ-led proceedings violate the separation of powers. The court could of course vacate the FTC's order. But Axon's separation-of-powers claim is not about that order; indeed, Axon would have the same claim had it *won* before the agency. The claim, again, is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker. … And as to that grievance, the court of appeals can do nothing: A proceeding that has already happened cannot be

> undone. Judicial review of Axon's (and Cochran's) structural constitutional claims would come too late to be meaningful.

Axon, 143 S. Ct at 903–04.

The same logic holds true here. Jarkesy has already suffered the constitutional injury of being tried before an unconstitutional adjudicator impermissibly insulated from the President's duty to "take Care." This structural constitutional violation should not impose yet another adjudicative proceeding toward an impossible end upon Mr. Jarkesy as a "remedy" after a decade of proceedings that the Fifth Circuit has already ruled unconstitutional on three separate grounds.

This Court has also said that structural constitutional challenges should be incentivized because they protect and preserve personal liberty and constrain government power. *See, e.g.*, *Ryder v. United States*, 515 U.S. 177, 182–83 (1995) (a timely challenge to the appointment of an officer should have a decision and relief on the merits—any other rule disincentives structural challenges). Mr. Jarkesy has been trapped in the administrative maze for going on a decade—more if the SEC's investigation is included. His occupation, reputation, property, wealth, and well-being have been in the balance throughout these proceedings. His appeal of his adverse ALJ decision alone occupied six long years sitting on the Commission's review docket, only to result in an appellate ruling by an Article III court that the whole proceeding should be set aside. Remand for a prejudice hearing would prove that the process is the

punishment, especially when SEC dismissed every other pending enforcement matter in *Cochran*'s wake.

And how does a "remand" for an impossible-to-prove prejudice inquiry comport with the SEC's disclosure that Mr. Jarkesy's enforcement staff snooped on his ALJ's computer files? Or with its steadfast refusal to comply with its FOIA duty to disclose the details of such spying? As *The Wall Street Journal* recently noted about this very case, "Chairman Gary Gensler is refusing to come clean about the agency's own internal data breach and possible staff misconduct … the SEC's handling of the breach supports Mr. Jarkesy's contention that its internal procedures violate due process."[6] Mr. Jarkesy does not know the half of what happened to him in this unconstitutional adjudication. And the SEC has summarily dismissed all 42 of its other open administrative proceedings, thereby ensuring that no one else can litigate to learn what was happening.[7] As Jarkesy's brief notes, "the *Jarkesy* case is the only one left in the pipeline that has raised the constitutional issues in this case." Resp. Br. at 8. No

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[6] *"What is Gary Gensler Hiding?: The SEC protects a security breach from public view,"* WALL ST. J., Oct. 13, 2023 (editorial).

[7] https://www.sec.gov/files/litigation/opinions/2023/33-11198.pdf (last visited Oct. 18, 2023). The first case dismissed under this order was Michelle Cochran's, for whom NCLA served as counsel. The case was dismissed just weeks after she had won her years-long fight to raise her constitutional claims in federal court. SEC's shocking maneuver to dismiss all open cases not only insulates its adjudication scheme from judicial review, but it also extinguishes court discovery about SEC's troubling breach of ALJ files.

one is left to sue for a ruling on either SEC's ALJ removal protections or the breach of ALJ files by the SEC's enforcement division.

Congress's decision in Dodd-Frank to give SEC the power to try some of its targets before SEC ALJs was a constitutional train wreck with disastrous real-life effects. That unconstitutional scheme lets SEC choose between judicial or administrative adjudication. It thereby transforms Jarkesy's constitutional rights—to a jury, due process, and accountability to an Executive who would "take Care"—"into mere options" chosen by the government at its discretion. Philip Hamburger, *The Administrative Evasion of Procedural Rights*, 11 N.Y.U. J. LAW & LIBERTY 915, 916 (2018).

Alexis de Tocqueville, writing in the 1830s, reflected on the problem of shifting judicial power out of the courts:

> If one now examines what is taking place in the democratic nations of Europe that are called free, as well as in the others, one sees on all sides that alongside these courts, others, more dependent, are being created, the particular object of which is to decide exceptionally the contentious questions that can arise between the public administration and citizens. Independence is left to the former judicial power, but its jurisdiction is narrowed and it tends more and more to be made only an arbiter between particular interests.

> The number of these special courts constantly increases, and their prerogatives grow. The government is therefore escaping more each day from the obligation to have its will and its rights sanctioned by another power. Unable to do without judges, it wishes at least to choose its judges itself and to keep them always in hand; that is to say between it and particular persons it puts the image of justice rather than justice itself.
>
> Thus, it is not enough for the state to attract all business to itself; it also comes more and more to decide everything for itself without control and without recourse.

Alexis de Tocqueville, *Democracy in America*, Part IV 655 (Mansfield ed. 2000).

Tocqueville aptly describes the political cost of devolving judicial power from courts to agencies. As for the personal costs, that is Jarkesy's story.

CONCLUSION

The divesting of judicial power from courts to agencies is unconstitutional and inevitably unjust. It gives judicial power to the very agencies that also prosecute violations and illicitly exercise legislative power. It deprives defendants of their due process right to be held to account in court and their right to a jury. And it leaves courts no choice but to defer to

the administrative record, thus institutionally dragging judges into judicial bias against defendants.

The Constitution's procedural rights are guarantees, not mere options for government, depending on its choice of judicial or administrative process. This Court should restore those rights, preserving them as guarantees. It therefore should vacate the SEC's unconstitutional adjudication of George Jarkesy.

Respectfully submitted,

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