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 OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 17 OTHER STATES IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether statutory provisions that empower the Securities and Exchange Commission 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 violates Article II by granting for-cause removal protection to administrate law judges in agencies whose heads enjoy for-cause removal protection.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

As any good seventh-grade civics student knows, our constitutional structure sets out three branches of government and vests a different form of power in each—legislative, executive, and judicial. See U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1. Article I gives Congress the legislative power. Congress must make "fundamental policy decisions" itself—"the hard choices." *Indus. Union Dept., AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment). Article II then vests "[t]he executive power" in the President and compels him to "take care that the laws be faithfully executed." U.S. CONST. art. II, § 1, cl.1; *id.* art II, § 3, cl.1. Article II makes "emphatically clear" that "the president would be personally responsible for his branch," AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 197 (2005), as the Framers "insist[ed]" on this clear assignment of power to "ensure both vigor and accountability" to the people, *Printz* v. *United States*, 521 U.S. 898, 922 (1997). But both Congress and the executive must also take heed of Article III, which gives the federal courts the judicial power and grants its judges life tenure and pay protection. "Because these protections help to ensure the integrity and independence of the Judiciary, … Congress may not withdraw from the Article III courts any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty." *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U.S. 665, 668 (2015) (cleaned up).

These concepts may seem straightforward, but they're important. The "ultimate purpose" of the Constitution's structural provisions "is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth.* v. *Citizens*

for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991). And "federal action that violates the Constitution's separation of powers may also invade rights which are reserved by the Constitution to the several states." Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001) (cleaned up). So maintaining the separation of powers is essential, and States have a direct interest in seeing that happen.

Unfortunately, despite the Constitution's structural limitations, Congress has seemed more recently inclined to shift power to independent agencies—"a veritable fourth branch of the Government." *FTC* v. *Ruberoid*, 343 U.S. 470, 487 (1952). These agencies wield vast power without presidential oversight or congressional constraints. And as this case shows, these agencies are extending their reach into the judicial role, too. See *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 200 (2023) (Thomas, J., concurring) (discussing the evolution of agency adjudications). But agency autonomy of this sort "pose[s] a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting), *abrogated by Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020).

This threat to constitutional order explains why the *Amici* States have voiced their concerns before (more than a few times) about "the growing power of the administrative state." *City of Arlington* v. *FCC*, 569, U.S. 290, 315 (2013) (Roberts, C.J., dissenting). The *Amici* States write again to reiterate those concerns once more. Like private parties, States feel "the inexorable presence of the administrative state," *Freytag* v. *CIR*, 501 U.S. 868, 885 (1991), and they share the Founders' concerns that these independent federal officers "subvert[] political

accountability and threaten[] individual liberty." *Seila Law*, 140 S. Ct. at 2219 (Thomas, J., concurring in part). The States worry about a system in which unelected decisionmakers wield more and more power over their citizens—and the States themselves.

This case puts these worries front and center. SEC administrative law judges, or ALJs, are not subject to the President's control, either directly or through SEC Commissioners. The SEC may remove an ALJ only for good cause established and determined by the Merit Systems Protection Board, and both SEC Commissioners and the MSPB have for-cause removal protection from the President. 5 U.S.C. § 7521; *id.* § 1202(d). With no practical removal power, ALJs can "ignore the President's supervision and direction without fear, and the President [can] do nothing about it." *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting). Yet "[t]he President cannot 'take Care that the Laws be faithfully executed' [since] he cannot oversee the faithfulness of the officers who execute them." *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010).

It might be one thing if ALJs were deciding issues only involving claims for money *from* the government and adjudicating rights belonging to the public. But ALJs often assess fines, penalties, and forfeitures against private parties *for* the government—all without meaningful supervision. This scheme creates a grave threat to the "Constitution and the individual liberty it protects." *Dep't of Transp.* v. *Ass'n of Am. R.R.s*, 575 U.S. 43, 91 (2015) (Thomas, J., concurring in the judgment).

In many ways, it's easy to solve these issues. Article II requires that the President be able to remove all executive officers. *Seila Law*, 140 S. Ct. at 2191. ALJs are officers of the United States. See *Lucia* v. *SEC*, 138 S. Ct. 2044

(2018). Thus, the President must be able to remove ALJs. The SEC resists that logic. But neither the ALJs' adjudicatory functions nor the alternative methods used to purportedly cabin their powers save their unconstitutional removal protections.

Similarly, Article III prevents administrative agencies from adjudicating private rights. Determining whether securities fraud implicates a private right requires courts to look at the nature of the right and whether it existed under common law. And securities-fraud suits fit squarely in with claims and remedies that historically have been available under the common law. They thus present just the sort of claim that needs to be brought in an Article III court.

In truth, the SEC's ALJ setup hits the trifecta, as it also offends Article I by granting ALJs unfettered discretion to exercise legislative power. See Resp.Br.47-51. But here, the States focus on how the SEC thwarts both Article II and Article III—two elementary but essential parts of our Constitution—by allowing unaccountable officials to decide individuals' private rights. The Fifth Circuit recognized as much and ruled accordingly. The Court should therefore affirm the decision below.

SUMMARY OF ARGUMENT

I. Article II commands the President to take care that the laws be faithfully executed. To help carry out this duty, the Constitution empowers the President to appoint executive officers—and remove them. SEC ALJs' multilevel removal protection frustrates the officers' accountability, which in turn prevents the public from holding the President accountable. Nothing about the

ALJs' duties or structure warrants undermining the President's power to remove.

II. Separation-of-powers concerns animate the Seventh Amendment issue here, too. Article III requires an independent judiciary to hear cases and controversies. Though Congress may assign some adjudications to agency processes involving public rights, agencies cannot adjudicate suits resembling traditional actions at common law. Claims for civil penalties under the securities statutes are like claims traditionally brought at common law, so they need to be brought in Article III courts. The SEC ignores that requirement, instead preferring its own in-house forum that Congress set up in a fit of misguided delegation. But the Commission cannot avoid the Constitution just because Congress passed a statute.

The harms from leaving agency adjudication as-is are far worse than any risk we assume from following the constitutional strictures. This Court should affirm.

ARGUMENT

I. The SEC ALJs' Tenure Protections Violate Article II.

The President must have removal power "to keep [executive] officers accountable," as well as to promote democratic accountability so that the public can "pass judgment on the [President's] efforts." *Free Enter. Fund*, 561 U.S. at 483, 498. Without that power, he could not "take care that the laws be faithfully executed." *Myers* v. *United States*, 272 U.S. 52, 164 (1926). No wonder, then, that it is "at this point settled law" that "the President is presumed to have unfettered discretion to remove an executive officer." *Nat'l Lab. Rels. Bd.* v. *Aakash, Inc.*, 58 F.4th 1099, 1105 (9th Cir. 2023).

The SEC ALJs' removal structure thwarts these ordinary rules. And precedent shows that any exceptions to the removal power are narrow—and inapplicable here. Neither the ALJs' status as adjudicators nor existing oversight mechanisms cures the constitutional issues. And any concerns about ALJ independence cannot outweigh Article II's commands, especially when potential reforms could preserve ALJ independence in a constitutionally permissive way.

A. The President Enjoys Broad Removal Power—And It Applies Here.

The President's removal power derives from the Constitution's text and structure. Article II requires the President to "take Care that the laws be faithfully executed." U.S. CONST. art. II, § 3, cl. 1. This executive power is placed in a single, unitary executive. THE FEDERALIST NO. 70, at 427 (Alexander Hamilton) (Cooke ed. 1961) (noting without a unitary executive, people lose their "two greatest securities" against public malfeasance, the "restraints of public opinion" and the "opportunity of discovering" any abuse of trust). A unitary executive promotes "[d]ecision, activity, secrecy, and d[i]spatch" in ways that a "greater number" cannot. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1414 (1833).

The President mainly ensures that these laws will be executed by appointing lesser executive officers. See *Seila Law*, 140 S. Ct. at 2197; *Myers*, 272 U.S. at 117. Selecting these officers "is a core component of the executive power vested in the President," *Rush* v. *Kijakazi*, 65 F.4th 114, 123 (4th Cir. 2023), and his authority includes "the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter.*

Fund, 561 U.S. at 492 (quoting 1 ANNALS OF CONG. 463 (1789)).

But because the President's officers must remain accountable to him, the power to appoint necessarily includes the converse power to remove. *Free Enter. Fund*, 561 U.S. at 483. The President's removal power "has long been confirmed by history and precedent." *Seila Law*, 140 S. Ct. at 2197; *Free Enter. Fund*, 561 U.S. at 483 ("Since 1789, the Constitution has been understood to empower the President to keep ... officers accountable—by removing them from office, if necessary."); see generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Law*, 104 YALE L.J. 541, 597 (1994) ("[S]tructural reasons and a host of historical and textual arguments persuade us that the President must also have a removal power."); Aditya Bamzai & Saikrishna B. Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023).

The President's removal power is no mere formalism. If the President could not remove his officers, then a "subordinate could ignore the President's supervision and direction without fear, and the President could do nothing about it." *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting). "Once an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey." *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) (cleaned up); see also *Myers*, 272 U.S. at 117 (noting the President has power to "remov[e] those for whom he cannot continue to be responsible"). And without a muscular presidential removal power, the only avenue for removal that the Constitution contemplates is a cumbersome and seldom-used impeachment process. That would hardly keep officers in check. Put simply, "[t]he President cannot 'take

Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enter. Fund*, 561 U.S. at 484.

The removal power, particularly when combined with the Executive Branch's unitary structure, also ensures democratic accountability by making the President "a single object for the jealousy and watchfulness of the people." THE FEDERALIST NO. 70, at 479 (Alexander Hamilton) (Cooke ed. 1961). Come election time, a president should be unable to disclaim responsibility for a rogue agency—so he has every motivation to closely monitor what's happening below him. "Through the President's oversight, the chain of dependence is preserved, so that the lowest officers, the middle grade, and the highest all depend, as they ought, on the President, and the President on the community." *Seila Law*, 140 S. Ct. at 2203 (cleaned up) (quoting 1 ANNALS OF CONG. 518 (1789) (statement of J. Madison)). And presidential influence provides an opportunity for state influence—a virtually non-existent possibility when it comes to agencies like the SEC. See David A. Herrman, *To Delegate or Not to Delegate—That Is the Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power*, 28 PAC. L.J. 1157, 1181-82 (1997).

Finally, the removal power reinforces the President's independence. Working without it "would undermine the separate and coordinate nature of the executive branch." Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1228 (2014). Congress could defeat executive discretion by shunting his power down to functionaries whose interests might not align with the President's. So although the President can and must rely on subordinates, the power to remove those

subordinates is a "structural protection[] against abuse of power" that is "critical to preserving liberty." *Bowsher*, 478 U.S. at 730; cf. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2413 (2019) (explaining agencies "have political accountability[] because they are subject to the supervision of the President).

This Court has recognized these concepts for a long while—and enforced them in the face of congressional intention otherwise. In *Myers* v. *United States*, for instance, the Court struck down a statutory provision that restricted the President's power to remove certain executive officers. 272 U.S. at 176. The President's take-care duty "emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." *Id.* at 122. And since *Myers*, this Court has reiterated more than once that the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. *Free Enter. Fund*, 561 U.S. at 513-14. For example, in *Free Enterprise Fund*, this Court struck down Accounting Board members' dual for-cause removal limitations because those restrictions "subvert[ed] the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Id.* at 498.

From cases like these to the Constitution's text, little doubt remains that ALJs' two for-cause removal restrictions are unconstitutional. Placing removal in the Commission's hands deprives the President of any meaningful power to control enforcement of the SEC's statutes and means that the "the buck [] stop[s] somewhere else." *Seila Law*, 140 S. Ct. at 2191. That's anathema to the President's constitutional responsibility to execute the law.

B. Exceptions To The President's Removal Power Are Narrow—And Don't Apply Here.

1. The States recognize that the President's removal power is not absolute, but text, history, and precedent "all establish that the President's removal power is the rule, not the exception." *Seila Law*, 140 S. Ct. at 2206.

The Court has recognized only two narrow exceptions to the general rule of presidential removal. *First*, the Constitution allows for-cause removal protections for principal officers on balanced multi-member boards or commissions that perform "quasi-judicial" activities. *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 609 (1935). And *second*, for-cause removal protection may apply to the authority of some principal officers to remove inferior officers with more limited mandates performing non-central executive functions. *Morrison* v. *Olson*, 487 U.S. 654 (1988); see also *United States* v. *Perkins*, 116 U.S. 483, 484-85 (1886). But neither kind of exception justifies the SEC ALJs' two-layer, for-cause protections.

Neither case involved—and thus neither exception applies to—two layers of for-cause protection. *Free Enter. Fund*, 561 U.S. at 495 ("*Morrison* did not … address the consequences of more than one level of good-cause tenure."). So the Court could conclude that the ALJs' protections here comply with Article II only by combining a case applying to principal officers unlike the SEC ALJs (*Humphrey's Executor*) and a case applying to inferior officers exercising limited authority broader than the ALJs' (*Morrison*) to create a new exception. But that offends what this Court has since said about *Humphrey's Executor* and *Morrison*: They "represent … the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Seila Law*, 140 S. Ct. at 2200.

And sure enough, extending *Humphrey's Executor* and *Morrison* is dubious given this Court's more recent treatment of the removal power.

First, in *Free Enterprise Fund*, this Court found that two layers of for-cause removal protections violated Article II because the President was "no longer the judge of the Board's conduct" and could not "ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith." *Free Enter. Fund*, 561 U.S. at 496. So *Free Enterprise* embraces the notion so often thought to defeat the SEC setup: the Constitution makes the President accountable to the people for executing the laws, but removal protections—like the ones in *Humphrey's Executor* and *Morrison*—thwart this objective. Yes, *Free Enterprise Fund* noted that ALJs were not affected by the ruling. See *id.* at 507, n.10. But an ALJs' adjudicator status does not exempt them from the Constitution. See *infra*, at 13-16.

Second, *Seila Law* further eroded *Humphrey's Executor*'s removal exception by holding that a limitation providing that the CFPB's single director was removable only for cause again violated Article II and the separation of powers. *Seila Law*, 140 S. Ct. at 2192. There, the Court observed that *Humphrey's Executor* only applies to "multimember expert agencies that do not wield substantial executive power," as the practical constraints of building consensus and staying within the agency's technical boundaries could prevent an agency from going rogue. *Id.* at 2199-2200. Yet the Court also noted that *Humphrey's Executor* did not even satisfy its own exception: "The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time." *Id.* at 2198 n.2. So *Seila Law* "repudiated almost every aspect of *Humphrey's Executor*." *Id.* at 2212

(Thomas, J., concurring in part); see also, *e.g.*, John O. McGinnis & Xiaorui Yang, *The Counter-Reformation of American Administrative Law*, 58 WAKE FOREST L. REV. 387, 407 (2023) ("Although the Court did not formally overrule *Humphrey's Executor*, it significantly limited its applicability.").

Third, *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021), extended *Seila Law*'s reasoning to agencies wielding less expansive powers. *Collins* involved a constitutional challenge to the Federal Housing Finance Agency's structure, which involved a single director removable only for cause. In holding the restriction on the President's power to remove the FHFA Director unconstitutional, the Court reasoned that it did not matter that the FHFA's authority was more limited than CFPB's. "The President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies." *Id.* at 1784. Nor did it matter that the FHFA's for-cause protection was less robust than in prior cases, as the Constitution "prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." *Id.* at 1786-87.

Together, these cases imply that the foundations for both *Humphrey's Executor* and *Morrison* are functionally nonexistent. But again, even if the exceptions remain viable, and even if SEC ALJs fit under the exception for inferior officers in *Morrison* in some respects, that partial congruence still doesn't address ALJs' unique double layer of removal protection. The President would be inappropriately reduced "to a cajoler-in-chief." *Free Enter. Fund*, 561 U.S. at 502.

2. It is no excuse, as the SEC argues, that ALJs are adjudicators. SEC.Br.50. Although *Free Enterprise*

Fund noted that its holding did not address ALJs who often "perform adjudicative rather than enforcement or policymaking functions," 561 U.S. at 507 n.10, it would be a mistake to read too much into the Court's choice to leave that question for another day.

The reservation aside, *Free Enterprise Fund* itself suggests that adjudicatory functions don't immunize officers from the ordinary rule of rule. The Board there performed adjudicative functions, after all. 561 U.S. at 485 (noting that the oversight board "initiate[d] formal investigations and disciplinary proceedings"); see also *id.* at 536 (Breyer, J., dissenting) (noting the "Accounting Board performs adjudicative functions"). So while *Free Enterprise Fund* framed its holding as applying to an "inferior officer [who] determines the policy and enforces the laws of the United States," *id.* at 484, its practical effect went further. And *Free Enterprise Fund* wasn't alone—*Seila Law* invalidated the CFPB Director's removal restrictions even though he had adjudicatory functions, too. *Seila Law*, 140 S. Ct. at 2193 (detailing the CFPB's "extensive adjudicatory authority").

Perhaps the SEC might distinguish between officers performing some adjudicatory functions and officers who are purportedly pure adjudicators—but that would make no constitutional difference, either. "Whatever methods or functions are employed," *all* agency action must be an exercise of the executive power under the separation of powers. *Fleming* v. *U.S. Dep't of Agric.*, 987 F.3d 1093, 1115 (D.C. Cir. 2021) (Rao, J., concurring in part); see also *Freytag*, 501 U.S. at 912 (Scalia, J., concurring in part) ("[T]he Tax Court, like the Internal Revenue Service, the FCC, and the NLRB, exercises executive power.").

And in truth, "pure" adjudicators are policymakers all the same. Even the SEC concedes that "agency

adjudication and policy-making are not hermetically sealed." SEC.Br.52. Adjudication is just another method through which agencies make policy. See *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947); *Lucia*, 138 S. Ct. at 2049 (explaining that ALJ adjudication is "one way" agencies "enforce the nation's ... laws"). One just needs to look to the NLRB, which relies almost exclusively on adjudication to announce policy. See Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411, 414 & nn. 20-22 (2010) (compiling sources). And ALJs have "significant discretion" when exercising their "important functions." *Lucia*, 138 S. Ct. at 2053 (citing *Freytag*, 501 U.S. at 882). So ALJs still "determine, on a case-by-case basis, the policy of an executive branch agency." *Sec'y of Educ. Rev. of ALJ Decisions*, 15 Op. O.L.C. 8, 15 (1991).

Non-final adjudicatory power doesn't distinguish the SEC ALJs from problematic arrangements like the Accounting Board, either. See SEC.Br.58 (noting ALJ's initial decision does not bind agency). The Accounting Board had limited decision-making authority in that the SEC could review some of its calls, but that did not save its structure. *Free Enter. Fund*, 561 U.S. at 486 ("The Act places the Board under the SEC's oversight, particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration)."). And anyway, this argument forgets again *who* is doing the review. SEC Commissioners have themselves been assumed to be removable only for cause, so it remains the case that no one accountable to the electorate holds ultimate responsibility. See *In re Aiken Cnty.*, 645 F.3d 428, 447 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (explaining that it's "customary" to treat SEC Commissioners as removable only for cause even though Congress has not expressly so provided); see also *Free Enter. Fund*, 561

U.S. at 487 (treating SEC Commissioners as removable only for cause).

In short, an adjudicator-based exception conflicts with any reasonable understanding of the President's removal authority.

3. SEC oversight mechanisms don't make up for the separations-of-power violation, either. SEC.Br.59. Even the SEC's choice to make this argument—which rests on the *Commission*'s oversight—signals just how fundamentally the Commission misunderstands the nature of the Take Care Clause. The SEC isn't constitutionally tasked with enforcing the law; it's the President. And this requirement isn't formalism; remember: the SEC's own for-cause removal protection prohibits the President from exerting authority over some executive officers.

SEC's solutions also show a disregard for the President's removal power. First, the SEC notes that the "Commission has no obligation to use ALJs." SEC.Br.57. Second, the SEC has the power to disagree with the ALJ decision are "in no way bound" by them. SEC.Br.59. Neither mechanism gives the President oversight power. Setting that aside, neither mechanism makes up for a constitutional violation.

Though it's true that the SEC doesn't have to use ALJs (a choice that would be the made by the protected Commissioners), the Administrative Procedure Act requires agency heads to either "preside at the taking of evidence" or employ "one or more administrative law judges appointed under section 3105." 5 U.S.C. § 556(b). Seven decades ago, the reality was that "[w]ith the rapid growth of administrative law … the agency heads, the members of boards or commissions, can rarely preside

over hearings in which evidence is required." *Ramspeck* v. *Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 130 (1953). That's even truer now.

And while the SEC may countermand decisions by ALJ officers in a case here or there, it still doesn't "place ALJs within the chain of command to the President." *Fleming*, 987 F.3d at 1122 (Rao, J., concurring in part). Nor does it replace the President's power through the removal power. "Broad power over Board functions is not equivalent to the power to remove Board members." *Free Enter. Fund*, 561 U.S. at 504. Removal power over officers is the constitutional *minimum*, not maximum—any other oversight mechanisms are just extra. The President sets the Executive Branch's policies and "remains accountable to the people for ensuring that his officers follow those policies." *Fleming*, 987 F.3d at 1122 (Rao, J., concurring in part). And while additional controls over officers help ensure the President's duties are carried out, it is "no substitute for at will removal." *Seila Law*, 140 S. Ct. at 2207 (quoting *Free Enter. Fund*, 561 U.S. at 500); cf. *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (explaining why other purported avenues of accountability for administrative patent judges were not enough absent a removal power).

By invoking these in-house mechanisms, the SEC also downplays this Court's holding in *Lucia*, which found that SEC ALJs wield "significant authority" in executing the law even though the Commissioners reviewed their decisions. *Lucia*, 138 S. Ct. at 2052-54. That's because ALJs' decisions are final unless the SEC chooses to review them. *Id.* at 2054. But even if the SEC intervened and reviewed every ALJ decision, ALJs would still be making "discretionary decisions implicating agency policy" while doubly insulated. *Fleming*, 987 F.3d at 1121 (Rao, J.,

concurring in part). Any alternative control mechanism other than presidential removal "transgress[es] the vesting of executive power in the President and the Constitution's careful separation of powers." *Id.* ALJs wield substantial executive power without concomitantly substantial oversight.

C. ALJ Adjudication Could Continue On Without Tenure Protections—In A Better Way.

With this Court's precedents working against it, the SEC argues that removing ALJ protections "would upset longstanding practice" and "subvert Congress's efforts to promote the actual and perceived fairness of agency hearings." SEC.Br.65. At first blush, fears that ALJs will no longer have decisional independence might seem justified. But this supposed problem shouldn't outweigh the President's constitutional duties—especially when the public already questions the legitimacy of the adjudicatory process. Doubly so, considering the SEC has admitted that it can disregard or ignore an ALJ's decision. See SEC.Br.56. In any event, concerns about adjudicatory fairness should not stop this Court from upholding the President's removal power. If agency adjudication is worth saving, both Congress and the President have tools to ensure ALJ independence, while respecting Article II.

1. Although the SEC argues that ALJs need tenure protections to maintain adjudicatory independence, SEC.Br.65, the SEC's oversight mechanisms make all agency adjudications suspect. SEC.Br.56. As the SEC notes, the Commission can choose not to use ALJs at all and can take over the adjudication. SEC.Br.57 (citing 5 U.S.C. 556(a)). And when the SEC uses an ALJ, the SEC says, the "ALJ's decision does not bind it."

SEC.Br.58. All ALJs' findings, rulings, and conclusions are subject to review and modification. ALJs' decisions aren't just reviewable when a party appeals, as the SEC writes, SEC.Br.58, but the SEC can also review the ALJ's decision even when no party requests review, see *Lucia*, 138 S. Ct. at 2049. Only when the Commission opts against review does the ALJ's decision become final and is "deemed the action of the Commission." 15 U.S.C. § 78d-1(c). So the Commissioners oversee all adjudication within the SEC on an ad hoc basis.

These existing ALJ oversight mechanisms fuel public perception that agency adjudication is tainted. No matter how many tiers of protection exist between ALJs and the President, the public will doubt ALJs are independent because they are agency officials adjudicating matters in which the agency is often a party. In other words, the agency's back-door review process "is not a solution. It is the problem … [because] such machinations blur the lines of accountability." *Arthrex*, 141 S. Ct. at 1981-82.

Statistical findings reported in the *New York Times,* the *Wall Street Journal*, and elsewhere undermine the argument that this process promises independence. For example, SEC ALJs find against defendants between eighty and ninety percent of the time, while federal district court judges find against defendants in only sixty-three to sixty-nine percent of SEC enforcement cases. See Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 p.m.), https://tinyurl.com/56jajest; see also Gretchen Morgenson, *At the S.E.C., A Question of Home-Court Edge*, N.Y. TIMES (Oct. 5, 2013), https://tinyurl.com/bddc3j5j; Nate Raymond, *U.S. Judge Criticizes SEC Use of In-House Court for Fraud Cases*, REUTERS (Nov. 5, 2014, 1:47 p.m.), https://tinyurl.com/y7e2bb9z (Judge Rakoff remarking that the SEC had won

100% of its administrative actions in 2014 as compared to 61% in court). The statistics found some anecdotal support when one ALJ—who had purportedly sided with the Commission 100% of the time—"declined to submit an affidavit disavowing that [political] pressures existed" as to his decisions. Kaiya Arroyo, *Preserving the Impartiality and Constitutionality of Sec ALJs: Congressional Reform Over Administrative Remediation*, 1 U. PA. J.L. & PUB. AFF. 91, 104 (2016). This difference in outcome has become so well understood that the SEC is even believed to use it to leverage settlements. See *Cochran* v. *SEC*, 20 F.4th 194, 230 (5th Cir. 2021) (Oldham, J., concurring).

Things don't get better even when one looks beyond the ALJs. Appealing to the Commission will fail, too, as the SEC affirms 95% of the time. Eaglesham, *supra*. And though an Article III court might review the case, that "review is sharply limited," with a highly deferential standard of review. *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 197 (2023) (Thomas, J., concurring).

With the deck stacked this way, it's no surprise that SEC officials are increasingly choosing to file proceedings before SEC ALJs rather than before federal district court judges. In 2014, for example, the SEC initiated eighty percent of its enforcement actions before ALJs rather than federal district court judges. See Eaglesham, *supra*; see also Lucille Gauthier, *Insider Trading: The Problem with the SEC's In-House ALJs*, 67 EMORY L.J. 123, 140 (2017) ("[T]he SEC's patterns in forum selection may indicate a goal of putting more cases before ALJs in the hopes that those ALJs will view the SEC more favorably than would an Article III judge."). Particularly after Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC has been "bringing

actions as administrative proceedings that would not have been brought at all pre-Dodd-Frank." Adam C. Pritchard & Stephen Choi, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. REG. 1, 32 (2017).

Nor is the problem limited to the SEC. For example, FTC's adjudication has been criticized for its unfairness—even by its former commissioners. See Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623, 626 & 627 n.9 (2016) ("FTC serves prosecutorial and adjudicative roles" that resulted in a "liability rate" of "100 percent" over a decade at FTC); Terry Calvani & Angela M. Diveley, *The FTC at 100: A Modest Proposal for Change*, 21 GEO. MASON L. REV. 1169, 1182 (2014) ("Even if one cannot conclusively demonstrate that blending the prosecutorial and adjudicative functions is unfair, it certainly gives rise to the perception of unfairness."). All this is on top of ALJs who "have claimed agency interference in their judicial independence[] in whistleblower appeals filed with the MSPB." Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL'Y REV. 184, 213 (2012).

So the SEC's fears about supposed partiality in agency adjudication may be better taken if the public didn't already view the SEC as biased—but that's just not the case. In the real world, striking down the removal restraints would not affect the agency's perceived fairness because the public's opinion of the process is already low. See Arroyo, *supra*, at 102 (explaining how the SEC's adjudicatory "framework, along with the astronomic success rate for Commission staff, has created an either

real or perceived unfairness in cases that come before SEC administrative law judges").

2. Some might still insist that giving greater control to the President would only worsen public perception that agency adjudication is illegitimate. But even if the concern were real, this worry isn't a problem without a solution. Since *Free Enterprise Fund*, scholars and policy experts have proposed reforms that promote impartiality in agency adjudication while complying with Article II. Congress and the President can still implement those reforms within constitutional boundaries.

For example, nothing stops the President and agencies from issuing impartiality regulations that limit political interference in the hiring, supervising, and firing of agency adjudicators. See Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1700 (2020); Christopher J. Walker et al., *Saving Agency Adjudication* 54 (Working Draft Sept. 6, 2023), available at https://tinyurl.com/4mww2swn. These measures comply with Article II, see Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in* Vermont Yankee's *White Space*, 32 J. LAND USE & ENV'T. L. 523, 523–24 (2017) (explaining that agencies may use procedures above the APA), and they provide ALJs decisional independence. In fact, this Court has already noted how "[t]he President can always choose to restrain himself in his dealings with subordinates." *Free Enter. Fund*, 561 U.S. at 497.

Another proposal would have Congress use its anti-removal power "to make removal so costly that no rational president" would do so. Aaron J. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1, 6 (2023). These tools range from setting a higher cloture voting requirement for confirmation votes, to slowing down Senate confirmation process on

replacement nominees, to requiring the President to report a reason to Congress for the firing. *Id.* at 68. So Congress can check the President's removal power by making it politically costly—all within Article II's bounds.

Other proposals range from creating a centralized administrative judiciary, see Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 44-45 (2020), to expanding Article I courts to include ALJs, see Real Courts, Rule of Law Act of 2022, H.R. 6577, 117th Cong. (introduced Feb. 3, 2022) (proposed legislation to transfer immigration adjudication to a new Article I immigration court system), to allowing all parties to exercise peremptory challenges as to ALJs, Spencer Davenport, *Resolving ALJ Removal Protections Problem Following* Lucia, 53 U. MICH. J.L. REFORM 693, 715-25 (2020), or even moving all agency adjudication to Article III courts, Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 832-35 (2013) (proposing D.C. Circuit appoint and remove ALJs); Memorandum from Steven G. Calabresi & Shams Hirji on Proposed Judgeship Bill to Senate & House of Representatives 1 (Nov. 7, 2017), available at https://tinyurl.com/568h5v5b (advocating to abolish 158 ALJs who impose civil monetary penalties and replace them with Article III judges).

In short, if administrative adjudications are worth saving, a constitutional solution exists.

* * * *

All these considerations make one thing plain: as officers of the United States, SEC ALJs cannot be insulated from removal by the President.

II. The SEC Violates Article III And The Seventh Amendment By Adjudicating Securities-Fraud Claims.

In the same way Article II requires presidential removal so that the President can oversee matters within the Executive Branch, Article III requires an independent judiciary to exercise judicial power. And Article III emphasizes that the courts exercise this judicial power alone. U.S. CONST. art. III, § 1.

Although agencies may adjudicate claims involving public rights, this case involves more. The SEC may not decide cases involving fraud and civil penalties, which history shows arise at common law. The SEC should have brought this case in an Article III court (where, among other things, the States would have more insight into the proceedings and more opportunities for direct involvement). The SEC already does so in some cases, so requiring it to do so in a few others will not hurt. And if it does, the States are here to help.

A. Article III Courts Must Handle "All Cases" Arising Under The Constitution.

1. Article III serves as a check on executive action that interferes with life, liberty, or property. The Founders understood "[a] Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U.S. 200, 217-18 (1980). Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *N. Pipeline* v. *Marathon Pipeline Co.*, 458 U.S. 50, 58 (1982). Thus, the judicial power to interpret the law "can

no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *Stern* v. *Marshall*, 564 U.S. 462, 483 (2011) (cleaned up). Otherwise, "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking." *Id.* at 484.

Not all adjudication is an exercise of Article III power. For example, territorial, state, and tribal courts exercise judicial power under their authority. And as relevant here, the Executive Branch may adjudicate claims depending on the claims' consequences and context. William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1540 (2020). No court is needed, for instance, if the government is deciding a "public right," which generally refers to disputes that "could be conclusively determined by the Executive and Legislative Branches" without judicial intervention. *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (internal quotations omitted).

At the same time, the government must bring a claim in Article III court when it seeks to deprive a person of their "private rights"—encompassing the "core" rights of life, liberty, and property. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 568-69 (2007); see also *Sharif*, 575 U.S. at 711 (Thomas, J., dissenting) ("Disposition of private rights to life, liberty, and property falls within the core of the judicial power."). Thus, "the extent to which the judiciary reviewed actions and legal determinations of the executive depended on private right." John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2516 (1998) (footnote omitted).

Courts must also evaluate whether an agency is deciding a private or public right to discern whether the Seventh Amendment comes into play. If the agency is dealing with public rights, then it is not exercising judicial power. The Seventh Amendment, then, is not triggered. See *Oil States Energy Servs. LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) ("[O]ur rejection of Oil States' Article III challenge also resolves its Seventh Amendment challenge.").

2. Although this Court has "not been entirely consistent" with the precise contours of public and private rights, *Oil States*, 138 S. Ct. at 1373; *Stern*, 565 U.S. at 485-86, recent cases signal that administrative adjudication of public rights is justified because public rights are executive enough in character. "[T]he doctrine covers matters which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Oil States*, 138 S. Ct. at 1373 (cleaned up). Put another way, public rights involve "the ownership interests of the government." John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 163-64, 166-70 (2019). They can implicate entitlements that the government conferred and could freely take away. Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 282-83 (2022). Thus, public rights cases "cannot deprive people of life, liberty, or property." Baude, *supra*, at 1541.

A few examples. The government deprives no one in any relevant way when it denies Social Security benefits; similarly, the "ability of noncitizens to lawfully enter the United States" will not give rise to a deprivation. Baude, *supra*, at 1578. The same holds true for the situation in

Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856), where a public right existed in a dispute between private individuals who purchased land at an auction—there, "no judicial role was required apart from one that Congress specified," and "the relationship between the Treasury and its accountants remained intact." James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493, 551 (2021).

Private rights, by contrast, "encompass the three absolute rights, life, liberty, and property." *Axon*, 598 U.S. at 198 (Thomas, J., concurring) (cleaned up). As originally understood, the judicial power extended to "suit[s] at the common law, or in equity, or admiralty." *Murray's Lessee*, 59 U.S. at 284; see also *Tull* v. *United States*, 481 U.S. 412, 417 (1987). So "when a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789, and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Stern*, 564 U.S. at 484 (cleaned up); see also *Oil States*, 138 S. Ct. at 1381 (Gorsuch, J., dissenting) (noting majority "does not quarrel" with common-law approach to determine private rights).

In sum, agency administration is permissible when it involves a privilege like a public benefit that does not deprive life, liberty, or property. And to determine whether that standard applies, the Court looks to see if a given right is similar to claims that could be litigated only in court; it also looks at the requested remedy. See *Oil States*, 138 S. Ct. at 1376-78 (finding that patent rights are public rights because it is not "a matter that, 'from its nature,' must be decided by a court"); see also *Ortiz* v.

United States, 138 S. Ct. 2165, 2185 (2018) (Thomas, J., concurring) (judicial power involves "the presence (actual or constructive) of adverse parties who" are wrestling over "individual" interests and "had been given some opportunity to be heard before the court rendered a final judgment that bound them").

B. SEC Proceedings Seeking Civil Penalties Implicate Core Private Rights.

1. Fraud prosecutions were regularly brought in English courts at common law. See, *e.g.*, *Pasley* v. *Freeman*, 3 T.R. 51, 65, 100 Eng. Rep. 450, 457 (1789); *Baily* v. *Merrell*, (1615) 81 Eng. Rep. 81 (KB). And "like all suits at law, [fraud suits] were conducted before juries." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 43 (1989); see also, *e.g.*, *Curley* v. *United States*, 130 F. 1, 6 (1st Cir. 1904) (explaining how fraud, "as ordinarily used in the common law, and as used in English statutes and in the statutes of our states, [was] enacted with the object of protecting property and property rights of communities and individuals"); *Browning* v. *Nat'l Cap. Bank of Wash.*, 13 App. D.C. 1, 16 (D.C. Cir. 1898) ("[T]he principle [of fraud] thus stated [by the Supreme Court] appears to be strictly in accordance with the rulings of the English courts upon this subject.").

The question for Article III purposes is thus whether securities fraud is similar enough to common-law fraud to say it implicates private rights. It is.

While common-law fraud has many meanings, see *McAleer* v. *Horlsey*, 35 Md. 439, 452 (1872), the traditional elements include: (1) a material representation; (2) scienter; (3) intention by the declarant to induce action; and (4) damage to the party defrauded. *E.g. Colaizzi* v. *Beck*, 895 A.2d 36, 39 (Pa. Super. Ct. 2006); *Hoseman* v.

Weinschneider, 322 F.3d 468, 476 (7th Cir. 2003); *In re Deepwater Horizon*, 857 F.3d 246, 249 (5th Cir. 2017). Compare this understanding to the statutes under which the SEC brings securities fraud actions, which contain terms like "fraud" and "untrue statement[s] of material fact" to describe prohibited conduct. See 15 U.S.C. §§ 77a – 77aa, 78j(b), 80b-6. Many involve fraud-based scienter requirements as well. When "Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992) (cleaned up).

Securities fraud derives from common-law fraud. See *e.g.*, *Foster* v. *Wilson*, 504 F.3d 1046, 1050 (9th Cir. 2007) (describing "common law fraud" as the "ancestor" of "federal securities fraud"); *Bastian* v. *Petren Res. Corp.*, 892 F.2d 680, 683 (7th Cir. 1990) (explaining how aspects of federal common-law fraud *are* "merely borrowed for use in federal securities fraud cases"); accord Jill E. Fisch, *The Trouble with Basic: Price Distortion After Halliburton*, 90 WASH. U.L. REV. 895, 900 (2013) (explaining how common law fraud was "the initial source of the elements of federal securities fraud"). To be sure, one of securities fraud's purposes "was to rectify perceived deficiencies in the available common law protections." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 389 (1983). Federal securities statutes therefore "establish[] higher standards of conduct in the securities industry." *Id.* But if security-fraud claims are easier to make than common-law fraud, that's more reason why securities claims should be heard by an Article III court, as private rights are likely more often taken away.

This Court has also repeatedly looked to its common-law roots to interpret fraud and misrepresentation in securities statutes. For example, in *Omnicare, Inc.* v. *Laborers District Council Industry Pension Fund*, 575 U.S. 175, 191 (2015), the Court examined the Second Restatement of Torts to determine whether material omissions are actionable under a securities statute. Other cases similarly rely on "the common-law roots of the securities fraud action" to interpret terms. *Dura Pharms., Inc.* v. *Bruodo*, 544 U.S. 336, 343-44 (2005); see also *SEC* v. *Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 195 (1963); accord John C.P. Goldberg & Benjamin C. Zipursky, *The Fraud-on-the-Market Tort*, 66 VAND. L. REV. 1755, 1756 (2013) (noting this Court views securities fraud suits as tracking claims for deceit).

SEC nevertheless argues that securities fraud under section 10(b) is distinct from common-law fraud mainly because section 10(b) is broader. SEC.Br.30. No matter. Comparing securities-fraud claims to common-law fraud claims requires some analogizing between past and present—not a one-for-one identity between old and new claims. To adopt the SEC's rigid approach would be to freeze the law, "which over time would sideline the jury trial right." Sam Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467, 498 (2022). Congress could sidestep Article III anytime it wanted to. So the Court should not accept the SEC's invitation to constrain the right by a cramped use of history. Cf. *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2133 (2022) (explaining that the Second Amendment should be defined by "analogical reasoning" that requires only "a well-established and representative historical *analogue*, not a historical *twin*" (emphasis in original)).

2. Along with the close relationship between the substantive claims and common law, the SEC's sought-after remedy of civil penalties also existed at the common law and implicates the core private right of property. Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1247 (1994) ("[I]mposition of a civil penalty or fine" implicates core Article III power). For example, English courts "held that a civil penalty suit was a particular species of an action in debt that was within the jurisdiction of the courts of law." *Tull*, 481 U.S. at 418 (collecting cases). After the Seventh Amendment's passage, juries continued to hear civil-penalties cases in early America. See *United States* v. *Mundell*, 27 F. Cas. 23 (1795) (finding that bail not required in a civil penalty case tried by a jury because it was an action in debt). Other actions—from those involving civil penalties under a duty tax law, *Jacob* v. *United States*, 13 F. Cas. 267, 268-70 (1821), to operating a still without a license, *United States* v. *Tenbroek*, 28 F. Cas. 33 (Cir. Ct. D. Penn. 1815), *aff'd*, 15 U.S. 248, 258 (1817)—were also heard by a jury.

The SEC mistakenly tries to liken the civil penalty here to the type seen in *Atlas Roofing Co.* v. *Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977). See SEC.Br.22-23. But the SEC's remedy is distinct because the SEC can use it to compensate individuals harmed by defendants' legal violations. See 15 U.S.C. § 77h-1 (2018). An additional remedial order below provided "that the disgorgement, prejudgment interest, and civil money penalty amounts [otherwise ordered] be used to create a Fair Fund for the benefit of investors harmed by Respondents' violations." *In re John Thomas Cap. Mgmt. Grp. LLC*, Securities Act Release No. 5572, 2020 WL 5291417, at *29 (Sept. 4, 2020), *vacated*, Pet.App.1a-54a. Thus, SEC enforcement proceedings

often involve a transfer of property from one private party to another. And redressing private harm is a quintessential private-right claim.

Because both the claim and remedy are found at common law, an Article III court needed to decide this case. Allowing administrative agencies to adjudicate core private rights dispenses with "constitutionally prescribed procedures" that will lead to "the people today and tomorrow [to] enjoy [] fewer rights against governmental intrusion than those who came before." *Oil States*, 138 S. Ct. at 1380, 1386 (Gorsuch, J., dissenting).

C. Shifting SEC Enforcement Actions To Article III Courts Will Not Harm Anyone.

Returning securities-fraud claims back to Article III courts will not dismantle the statutory scheme. For one, the SEC already has the option to bring its enforcement actions in Article III courts—which it often does. See Dodd–Frank Act § 929P(a), 15 U.S.C. § 78u-2(a). The States are also prepared to be more active in securities enforcement—a space it has led for years.

Historically, States have led the way in regulating securities transactions. "[B]y the time the Congress adopted the Securities Act [of 1933], every state except Nevada had a securities law." Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107, 111-12 (2005). When Congress did adopt a securities statute, it recognized the "vital role of state involvement in protecting investors in securities." Manning Gilbert Warren III, *Reflections on Dual Regulation of Securities: A Case Against Preemption*, 25 B.C. L. REV. 495, 515-24 (1984).

Today, States remain central to securities enforcement, despite Congress's efforts to preempt State power. See National Securities Market Improvement Act of 1996, Pub. L. No. 104-290, 11 Stat. 3416. Each year, state securities regulators bring over twice as many enforcement actions as the SEC does. Andrew K. Jennings, *State Securities Enforcement*, 47 B.Y.U. L. REV. 67, 70 (2021) (finding that SEC brought on average 774 administrative and civil actions a year, while state regulators brought on average 1,826 administrative and civil actions annually). And these aren't just small-dollar claims. For example, New York investigated significant analyst conflicts on Wall Street. Jonathan R. Macey, *State-Federal Relations Post-Eliot Spitzer*, 70 BROOK. L. REV. 117, 117 (2004) (arguing state attorneys general "aggressively enter[ed] the regulatory vacuum created by the" SEC). Other States, like Massachusetts, Washington, Connecticut, and Oklahoma have also led high-profile securities investigations. Reza Dibadj, *From Incongruity to Cooperative Federalism*, 40 UNIV. S.F. L. REV. 845, 856 n.67 (2006).

A dual system of securities enforcement between the States and the federal system is thus the norm—and a role that States embrace. It also serves to "protect[] the liberty of the individual" by "denying any one government complete jurisdiction over all the concerns of public life." *Bond* v. *United States*, 564 U.S. 211, 222 (2011). A federalist system better serves the public, see THE FEDERALIST NO. 46, at 292 (James Madison) (Clinton Rossiter ed., 1961) (noting a dual system allows the public to "giv[e] most of their confidence where they may discover it to be most due"), helps maximize government resources, see Elysa M. Dishman, *Enforcement Piggybacking and Multistate Actions*, 2019 BYU L. REV. 421, 450 (2019), and defends against regulatory capture,

see William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture and Corporate Self-Regulation*, 73 N.C. L. REV. 1861, 1885-86 (1995). So if the SEC is somehow unable to handle trying its cases in Article III courts, the States welcome further opportunities to serve as the nation's securities enforcers.

* * * *

In adjudicating core private rights, the SEC offends individual liberty and ignores the separation of powers. The Court shouldn't let that stand.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted.

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