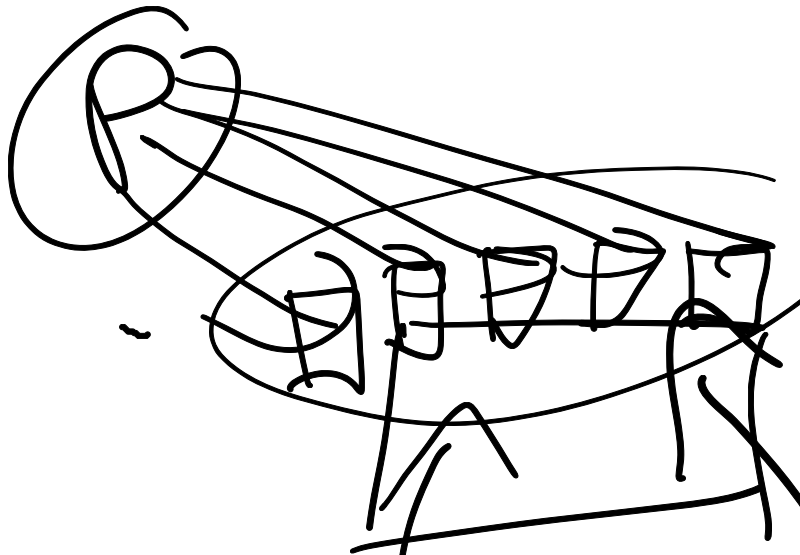


Adlaw in the News

Judges gone wild!

Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022)



Advice & Consent
from Senate

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United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

May 18, 2022

Lyle W. Cayce
Clerk

No. 20-61007

GEORGE R. JARKESY, JR.; PATRIOT28, L.L.C.,

Petitioners,

versus

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for Review of an Order of
the United States Securities and Exchange Commission
No. 3-15255

Before DAVIS, ELROD, and OLDHAM, *Circuit Judges.*

JENNIFER WALKER ELROD, *Circuit Judge:*

Congress has given the Securities and Exchange Commission substantial power to enforce the nation's securities laws. It often acts as both prosecutor and judge, and its decisions have broad consequences for personal liberty and property. But the Constitution constrains the SEC's powers by protecting individual rights and the prerogatives of the other branches of government. This case is about the nature and extent of those constraints in securities fraud cases in which the SEC seeks penalties.

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The SEC brought an enforcement action within the agency against Petitioners for securities fraud. An SEC administrative law judge adjudged Petitioners liable and ordered various remedies, and the SEC affirmed on appeal over several constitutional arguments that Petitioners raised. Petitioners raise those same arguments before this court. We hold that: (1) the SEC’s in-house adjudication of Petitioners’ case violated their Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I’s vesting of “all” legislative power in Congress; and (3) statutory removal restrictions on SEC ALJs violate the Take Care Clause of Article II. Because the agency proceedings below were unconstitutional, we GRANT the petition for review, VACATE the decision of the SEC, and REMAND for further proceedings consistent with this opinion.

I.

Petitioner Jarquesy established two hedge funds and selected Petitioner Patriot28 as the investment adviser. The funds brought in over 100 investors and held about \$24 million in assets. In 2011, the SEC launched an investigation into Petitioners’ investing activities, and a couple of years later the SEC chose to bring an action within the agency, alleging that Petitioners (along with some former co-parties) committed fraud under the Securities Act, the Securities Exchange Act, and the Advisers Act. Specifically, the agency charged that Petitioners: (1) misrepresented who served as the prime broker and as the auditor; (2) misrepresented the funds’ investment parameters and safeguards; and (3) overvalued the funds’ assets to increase the fees that they could charge investors.

Petitioners sued in the U.S. District Court for the District of Columbia to enjoin the agency proceedings, arguing that the proceedings infringed on

Holding

charges

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various constitutional rights. But the district court, and later the U.S. Court of Appeals for the D.C. Circuit, refused to issue an injunction, deciding that the district court had no jurisdiction and that Petitioners had to continue with the agency proceedings and petition the court of appeals to review any adverse final order. *See Jarkey v. SEC*, 48 F. Supp. 3d 32, 40 (D.D.C. 2014), *aff'd*, 803 F.3d 9, 12 (D.C. Cir. 2015).

Petitioners' proceedings moved forward. The ALJ held an evidentiary hearing and concluded that Petitioners committed securities fraud. Petitioners then sought review by the Commission. While their petition for Commission review was pending, the Supreme Court held that SEC ALJs had not been properly appointed under the Constitution. *Lucia v. SEC*, 138 S. Ct. 2044, 2054-55 (2018). In accordance with that decision, the SEC assigned Petitioners' proceeding to an ALJ who was properly appointed. But Petitioners chose to waive their right to a new hearing and continued under their original petition to the Commission.

The Commission affirmed that Petitioners committed various forms of securities fraud. It ordered Petitioners to cease and desist from committing further violations and to pay a civil penalty of \$300,000, and it ordered Patriot28 to disgorge nearly \$685,000 in ill-gotten gains. The Commission also barred Jarkey from various securities industry activities: associating with brokers, dealers, and advisers; offering penny stocks; and serving as an officer or director of an advisory board or as an investment adviser.

Critical to this case, the Commission rejected several constitutional arguments Petitioners raised. It determined that: (1) the ALJ was not biased against Petitioners; (2) the Commission did not inappropriately prejudge the case; (3) the Commission did not use unconstitutionally delegated legislative power—or violate Petitioners' equal protection rights—when it decided to

Lucia

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pursue the case within the agency instead of in an Article III court; (4) the removal restrictions on SEC ALJs did not violate Article II and separation-of-powers principles; and (5) the proceedings did not violate Petitioners' Seventh Amendment right to a jury trial. Petitioners then filed a petition for review in this court.

II.

Petitioners raise several constitutional challenges to the SEC enforcement proceedings.¹ We agree with Petitioners that the proceedings suffered from three independent constitutional defects: (1) Petitioners were deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power; and (3) statutory removal restrictions on SEC ALJs violate Article II.

A.

Petitioners challenge the agency's rejection of their constitutional arguments. We review such issues *de novo*. See *Emp. Sols. Staffing Grp. II, L.L.C. v. Off. of Chief Admin. Hearing Officer*, 833 F.3d 480, 484 (5th Cir. 2016); *Trinity Marine Prods., Inc. v. Chao*, 512 F.3d 198, 201 (5th Cir. 2007).

Standard of review

B.

Petitioners argue that they were deprived of their Seventh Amendment right to a jury trial. The SEC responds that the legal interests at issue in this case vindicate distinctly public rights, and that Congress therefore appropriately allowed such actions to be brought in agency

¹ Multiple *amici* have filed briefs with this court as well: the Cato Institute, Phillip Goldstein, Mark Cuban, Nelson Obus, and the New Civil Liberties Alliance. Each argues that the SEC proceedings exceeded constitutional limitations for reasons that Petitioners raise.

Public v. Private rights

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proceedings without juries. We agree with Petitioners. The Seventh Amendment guarantees Petitioners a jury trial because the SEC's enforcement action is akin to traditional actions at law to which the jury-trial right attaches. And Congress, or an agency acting pursuant to congressional authorization, cannot assign the adjudication of such claims to an agency because such claims do not concern public rights alone.

1.

Thomas Jefferson identified the jury “as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution.” Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* The Papers of Thomas Jefferson 267 (Julian P. Boyd ed., 1958). And John Adams called trial by jury (along with popular elections) “the heart and lungs of liberty.” The Revolutionary Writings of John Adams 55 (C. Bradley Thompson ed., 2000); *see also* Jennifer W. Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 Tex. Tech L. Rev. 303, 303–04 (2012) (explaining that the jury is “as central to the American conception of the consent of the governed as an elected legislature or the independent judiciary”).²

² Veneration of the jury as safeguard of liberty predates the American Founding. Our inherited English common-law tradition has long extolled the jury as an institution. William Blackstone said that trial by jury is “the glory of the English law” and “the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected, either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.” *Mitchell v. Harmony*, 54 U.S. 115, 142–43 (1851) (quoting 4 William Blackstone, *Commentaries on the Laws of England* 227–29 (Oxford, Clarendon Pr. 1992) (1765)); *see also* Jennifer W. Elrod, *W(h)ither The Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 3, 7 (2011). Indeed, King George III's attempts to strip colonists of their right to trial by jury was one of the chief grievances aired against him and was a catalyst for declaring independence. The Declaration of Independence para. 20 (U.S. 1776).

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Civil juries in particular have long served as a critical check on government power. So precious were civil juries at the time of the Founding that the Constitution likely would not have been ratified absent assurance that the institution would be protected expressly by amendment. 2 *The Debate on the Constitution* 549, 551, 555, 560, 567 (Bernard Bailyn ed. 1993) (collecting various state ratification convention documents calling for the adoption of a civil jury trial amendment); *The Federalist* No. 83 (Alexander Hamilton) (“The objection to the plan of the convention, which has met with most success in this State [i.e., New York], and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases.”); Mercy Otis Warren, *Observations on the Constitution* (1788), in 2 *The Debate on the Constitution* 290 (Bernard Bailyn ed. 1993) (worrying that the unamended Constitution would lead to “[t]he abolition of trial by jury in civil causes”); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) (“One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases.”).³

Trial by jury therefore is a “fundamental” component of our legal system “and remains one of our most vital barriers to governmental arbitrariness.” *Reid v. Covert*, 354 U.S. 1, 9–10 (1957). “Indeed, ‘[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions’” *Parklane Hosiery Co., Inc. v. Shore*, 439

³ See also Kenneth Klein, *The Validity of The Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 *Hastings Const. L.Q.* 1013, 1015 (1994) (“At the time the Constitution was proposed, the people of the United States greatly distrusted government, and saw the absence of a guaranteed civil jury right as a reason, standing alone, to reject adoption of the Constitution; only by promising the Seventh Amendment did the Federalists secure adoption of the Constitution in several of the state ratification debates.”).

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U.S. 322, 341 (1979) (Rehnquist, J., dissenting) (quoting Leonard Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 281 (1960)). Because “[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence[,] . . . any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

The Seventh Amendment protects that right. It provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend. VII. The Supreme Court has interpreted “Suits at common law” to include all actions akin to those brought at common law as those actions were understood at the time of the Seventh Amendment’s adoption. *Tull v. United States*, 481 U.S. 412, 417 (1987). The term can include suits brought under a statute as long as the suit seeks common-law-like legal remedies. *Id.* at 418–19. And the Court has specifically held that, under this standard, the Seventh Amendment jury-trial right applies to suits brought under a statute seeking civil penalties. *Id.* at 418–24.

That is not to say, however, that Congress may never assign adjudications to agency processes that exclude a jury. *See Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 455 (1977). “[W]hen Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (internal quotations omitted).

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Public Rights

Whether Congress may properly assign an action to administrative adjudication depends on whether the proceedings center on “public rights.” *Atlas Roofing*, 430 U.S. at 450. “[I]n cases in which ‘public rights’ are being litigated[,] e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact[,] the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.” *Id.* Describing proper assignments, the Supreme Court identified situations “where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, [and] a vast range of other cases as well are not at all implicated.” *Id.* at 458.

The Supreme Court refined the public-right concept as it relates to the Seventh Amendment in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). There, the Court clarified that Congress cannot circumvent the Seventh Amendment jury-trial right simply by passing a statute that assigns “traditional legal claims” to an administrative tribunal. *Id.* at 52. Public rights, the Court explained, arise when Congress passes a statute under its constitutional authority that creates a right so closely integrated with a comprehensive regulatory scheme that the right is appropriate for agency resolution. *Id.* at 54.

The analysis thus moves in two stages. First, a court must determine whether an action’s claims arise “at common law” under the Seventh Amendment. *See Tull*, 481 U.S. at 417. Second, if the action involves common-law claims, a court must determine whether the Supreme Court’s public-rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial. *See Granfinanciera*, 492 U.S. at 54; *Atlas Roofing*, 430 U.S. at 455. Here, the relevant considerations include:

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(1) whether “Congress ‘creat[ed] a new cause of action, and remedies therefor, unknown to the common law,’ because traditional rights and remedies were inadequate to cope with a manifest public problem”; and (2) whether jury trials would “go far to dismantle the statutory scheme” or “impede swift resolution” of the claims created by statute. *Granfinanciera*, 492 U.S. at 60–63 (quoting *Atlas Roofing*, 430 U.S. at 454 n.11, 461 (first and second quotations)).

2.

The rights that the SEC sought to vindicate in its enforcement action here arise “at common law” under the Seventh Amendment. Fraud prosecutions were regularly brought in English courts at common law. See 3 William Blackstone, *Commentaries on the Laws of England* *42 (explaining the common-law courts’ jurisdiction over “actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party”). And even more pointedly, the Supreme Court has held that actions seeking civil penalties are akin to special types of actions in debt from early in our nation’s history which were distinctly legal claims. *Tull*, 481 U.S. at 418–19. Thus, “[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law.” *Id.* at 422.

Applying that principle, the Court in *Tull* held that the right to a jury trial applied to an action brought by an agency seeking civil penalties for violations of the Clean Water Act. *Id.* at 425. Likewise here, the actions the SEC brought seeking civil penalties under securities statutes are akin to those same traditional actions in debt. Under the Seventh Amendment, both as originally understood and as interpreted by the Supreme Court, the jury-trial right applies to the penalties action the SEC brought in this case.

What is this like?

Tull

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More Tull

That conclusion harmonizes with the holdings of other courts applying *Tull*. The Seventh Circuit followed the Supreme Court’s lead in that case and has specifically said that when the SEC brings an enforcement action to obtain civil penalties under a statute, the subject of the action has the right to a jury trial. *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) (“Because the SEC was seeking both legal and equitable relief (the former under the Insider Trading Sanctions Act, 15 U.S.C. § 78u-1, which (in subsection (a)(1)) authorizes the imposition of civil penalties for insider trading at the suit of the SEC[]) . . . [the defendant] was entitled to and received a jury trial.”); *see also id.* (explaining that another circuit was wrong to tacitly assume “that civil penalties in SEC cases are not a form of legal relief”⁴). Some district courts have applied *Tull* similarly. *See, e.g., SEC v. Badian*, 822 F. Supp. 2d 352, 365 (S.D.N.Y. 2011) (explaining that “whether the facts are such that the defendants can be subjected to a civil penalty . . . is a question for the jury, [and] the determination of the severity of the civil penalty to be imposed . . . is a question for the Court, once liability is established”); *SEC v. Solow*, 554 F. Supp. 2d 1356, 1367 (S.D. Fla. 2008) (applying *Tull* for the proposition that civil penalties are “legal, as opposed to equitable, in nature,” and that it therefore “was [the defendant’s] constitutional right to have a jury determine his liability, with [the court] thereafter determining the amount of penalty, if any”).

Other elements of the action brought by the SEC against Petitioners are more equitable in nature, but that fact does not invalidate the jury-trial right that attaches because of the civil penalties sought. The Supreme Court has held that the Seventh Amendment applies to proceedings that involve a mix of legal and equitable claims—the facts relevant to the legal claims

⁴ The Seventh Circuit was referring to the Ninth Circuit’s opinion in *SEC v. Clark*, 915 F.2d 439, 442 (9th Cir. 1990). *Clark* did not address the issue whatsoever.

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should be adjudicated by a jury, even if those facts relate to equitable claims too. *See Ross v. Bernhard*, 396 U.S. 531, 537–38 (1970); *see also Lipson*, 278 F.3d at 662 (noting that the defendant was entitled to a jury trial because the SEC sought legal relief in the form of penalties, even though the SEC also sought equitable relief). Here, the SEC sought to ban Jarkesy from participation in securities industry activities and to require Patriot28 to disgorge ill-gotten gains—both equitable remedies. Even so, the penalty facet of the action suffices for the jury-trial right to apply to an adjudication of the underlying facts supporting fraud liability.

3.

Next, the action the SEC brought against Petitioners is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine. Securities fraud actions are not new actions unknown to the common law. Jury trials in securities fraud suits would not “dismantle the statutory scheme” addressing securities fraud or “impede swift resolution” of the SEC’s fraud prosecutions. And such suits are not uniquely suited for agency adjudication.

Common-law courts have heard fraud actions for centuries, even actions brought by the government for fines. *See Blackstone, supra* at *42; *see also Tull*, 481 U.S. at 422 (“A civil penalty was a type of remedy at common law that could only be enforced in courts of law.”). Naturally, then, the securities statutes at play in this case created causes of action that reflect common-law fraud actions. The traditional elements of common-law fraud are (1) a knowing or reckless material misrepresentation, (2) that the tortfeasor intended to act on, and (3) that harmed the plaintiff. *In re Deepwater Horizon*, 857 F.3d 246, 249 (5th Cir. 2017). The statutes under which the SEC brought securities fraud actions use terms like “fraud” and “untrue statement[s] of material fact” to describe the prohibited conduct.

Fraud
under the
common
law

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See 15 U.S.C. §§ 77a–77aa, 78j(b), 80b-6. 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) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)); see also Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) (explaining that “if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it”).

Accordingly, the Supreme Court has often looked to common-law principles to interpret fraud and misrepresentation under securities statutes. See, e.g., *Omnicare, Inc. v. Laborers Dist. Council Indus. Pension Fund*, 575 U.S. 175, 191 (2015) (considering the Restatement (Second) of Torts to determine whether material omissions are actionable under a securities statute); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343–44 (2005) (relying on “the common-law roots of the securities fraud action” in “common-law deceit and misrepresentation actions” to interpret the statutory securities-fraud action); *SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 192–95 (1963) (considering the principles of common-law fraud to determine the requirements of fraud under the Advisers Act). Thus, fraud actions under the securities statutes echo actions that historically have been available under the common law.

Next, jury trials would not “go far to dismantle the statutory scheme” or “impede swift resolution” of the statutory claims. ~~See *Granfinanciera*, 492 U.S. at 60–63. For one, the statutory scheme itself allows the SEC to bring enforcement actions either in-house or in Article III courts, where the jury-trial right would apply. See Dodd–Frank Act § 929P(a), 15 U.S.C. § 78u-2(a). If Congress has not prevented the SEC from bringing claims in Article III~~

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courts with juries as often as it sees fit to do so, and if the SEC has in fact brought many such actions to jury trial over the years,⁵ then it is difficult to see how jury trials could “dismantle the statutory scheme.” Congress could have purported to assign such proceedings *solely* to administrative tribunals, but it did not. And there also is no evidence that jury trials would impede swift resolution of the claims.⁶ In this case, for example, the SEC took seven years to dispose of Petitioners’ case and makes no argument that proceedings with a jury trial would have been less efficient.

Relatedly, securities-fraud enforcement actions are not the sort that are uniquely suited for agency adjudication. Again, Congress has not limited the SEC’s ability to bring enforcement actions in Article III courts. Consider the statutory scheme in *Atlas Roofing* for contrast. The statutes in that case were new and somewhat unusual. They provided elaborate enforcement mechanisms for the sorts of claims that likely could not have been brought in legal actions before that point. *See Atlas Roofing*, 430 U.S. at 445 (describing how the statutes required factfinders to undertake detailed assessments of workplace safety conditions and to make unsafe-conditions findings even if no injury had occurred). But the federal courts have dealt with actions under

⁵ Indeed, the SEC regularly brings securities-fraud actions in Article III courts and adjudicates them through jury trials. *See, e.g., SEC v. Fowler*, 6 F.4th 255, 258–60 (2d Cir. 2021); *SEC v. Johnston*, 986 F.3d 63, 71 (1st Cir. 2021); *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 772 (5th Cir. 2017); *SEC v. Quan*, 817 F.3d 583, 587 (8th Cir. 2016); *SEC v. Miller*, 808 F.3d 623, 626 (2d Cir. 2015); *SEC v. Jasper*, 678 F.3d 1116, 1119, 1121–22 (9th Cir. 2012); *SEC v. Seghers*, 298 F. App’x 319, 321 (5th Cir. 2008).

⁶ The dissenting opinion contends that these considerations are “not decisive” (that the SEC has for decades sued in Article III courts under securities statutes) or “not determinative” (that those same suits are not unique to agency adjudication). To disregard these facts is to ignore the Supreme Court’s explanation for what public rights are made of. And in any event, though the facts may not in isolation make up a private right, they together establish (along with the other considerations discussed above) that the right being vindicated here is a private right, not a public one.

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the securities statutes for many decades, and there is no reason to believe that such courts are suddenly incapable of continuing that work just because an agency may now share some of the workload. In fact, for the first decades of the SEC's existence, securities-fraud actions against nonregistered parties could be brought *only* in Article III courts. Thomas Glassman, *Ice Skating Uphill: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. Bus. & Sec. L. 47, 50–52 (2015).⁷

The SEC counters that the securities statutes are designed to protect the public at large, and that some circuits have identified SEC enforcement actions as vindicating rights on behalf of the public. Indeed, the SEC says, the statutes allow for enforcement proceedings based on theories broader than actions like fraud that existed at common law.

Those facts do not convert the SEC's action into one focused on public rights. Surely Congress believes that the securities statutes it passes serve the public interest and the U.S. economy overall, not just individual parties. Yet Congress cannot convert any sort of action into a “public right” simply by finding a public purpose for it and codifying it in federal statutory law. *See Granfinanciera*, 492 U.S. at 61 (explaining 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”). Purely private suits for securities fraud likely would have a similar public purpose—they too would serve to discourage and remedy fraudulent

⁷ Moreover, the Supreme Court has noted that agency adjudicators generally do not have special expertise to address structural constitutional claims—precisely the issues central to this case. *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021) (“[T]his Court has often observed that agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise.”).

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behavior in securities markets. That does not mean such suits concern public rights at their core. Granted, some actions provided for by the securities statutes may be new and not rooted in any common-law corollary. The fact remains, though, that the enforcement action seeking penalties in this case was one for securities fraud, which is nothing new and nothing foreign to Article III tribunals and juries.

That being so, Petitioners had the right for a jury to adjudicate the facts underlying any potential fraud liability that justifies penalties. And because those facts would potentially support not only the civil penalties sought by the SEC, but the injunctive remedies as well, Petitioners had a Seventh Amendment right to a jury trial for the liability-determination portion of their case.

4.

The dissenting opinion cannot define a “public right” without using the term itself in the definition. That leads to a good bit of question-begging. It says at times that the “SEC’s enforcement action” is itself “a ‘public right’ because it is a case ‘in which the Government sues in its sovereign capacity to enforce public rights.’” *Post* at 37. So the action is a public right because (1) the SEC is the government, and (2) it is vindicating a public right. And what is that public right being vindicated? The dissenting opinion does not say. In reality, the dissenting opinion’s rule is satisfied by the first step alone: The action is itself a “public right” because the SEC is the government. And the not-so-far-removed consequences that flow from that conclusion: When the federal government sues, no jury is required. This is perhaps a runner-up in the competition for the “Nine Most Terrifying

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Words in the English Language.”⁸ But fear not, the dissenting opinion’s proposal runs headlong into *Granfinanciera*: “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 61. With that limit in place, the dissenting opinion’s bright-line rule burns out. Congress cannot change the nature of a right, thereby circumventing the Seventh Amendment, by simply giving the keys to the SEC to do the vindicating.

In this light, this approach treats the government’s involvement as a sufficient condition for converting “private rights” into public ones. But from 1856 to 1989, the government’s involvement in a suit was only a necessary condition, *not* a sufficient condition, for determining whether a suit vindicated public rights. See *Granfinanciera*, 492 U.S. at 65–66, 68–69 (Scalia, J., concurring in part) (referring to *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 U.S. (How.) 272, 283 (1856), and *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 68–69 (1982) (plurality op.)); cf. *N. Pipeline Constr. Co.*, 458 U.S. at 69 n.23 (“It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing ‘private rights’ from ‘public rights.’”). Then *Granfinanciera* said that a dispute between two private parties could still vindicate “public rights,” such that the government was no longer a *necessary* condition for such suits. See 492 U.S. at 53–55. The dissenting opinion thus says that, after *Granfinanciera*, the government is no longer a necessary condition, but it is now a *sufficient* condition. That is at odds with *Granfinanciera* and does not follow from any of the Court’s previous

⁸ Cf. Ronald Reagan, Presidential News Conference (Aug. 12, 1986), <https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-957>.

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decisions, which stressed that the government’s involvement alone does not convert a suit about private rights into one about public rights.

The question is not just whether the government is a party, but also whether the right being vindicated is public or private, and how it is being vindicated. Tracing the roots of, and justification for, the public-rights doctrine, the Supreme Court has explained “that certain prerogatives were [historically] reserved to the political Branches of Government.” *N. Pipeline Constr. Co.*, 458 U.S. at 67. Specifically, “[t]he public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are ‘inherently . . . judicial.’” *Id.* at 68 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)).

The inquiry is thus inherently historical. The dissenting opinion tries to avoid the history by again emphasizing that *Granfinanciera* dealt with private parties, not the government. But again, if the right being vindicated is a private one, it is not enough that the government is doing the suing. That means we must consider whether the form of the action—whether brought by the government or by a private entity—is historically judicial, or if it reflects the sorts of issues which courts of law did not traditionally decide.

As discussed in Part II.B.2, history demonstrates that fraud claims like these are “traditional legal claims” that arose at common law. Even aside from post-*Atlas Roofing* refinements of the “public rights” doctrine, this fact, among others, distinguishes that case. In *Atlas Roofing*, OSHA empowered the government to pursue civil penalties and abatement orders whether or not any employees were “actually injured or killed as a result of the [unsafe working] condition.” 430 U.S. at 445; *see also id.* at 461 (“[Congress] created a new cause of action, and remedies therefor, unknown to the common law

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...”). The government’s right to relief was exclusively a creature of statute and was therefore distinctly public in nature.

In contrast, fraud claims, including the securities-fraud claims here, are quintessentially about the redress of private harms. Indeed, the government alleges that Petitioners defrauded particular investors. *Cf.* 15 U.S.C. §§ 77q(a), 78j(b), 80b-6. As explained above, these fraud claims and civil penalties are analogous to traditional fraud claims at common law in a way that the “new” claims and remedies in *Atlas Roofing* were not. *See Atlas Roofing*, 430 U.S. at 461.

That being so, *Granfinanciera*’s considerations about whether Congress created a new action unfamiliar to the common law, and whether jury trial rights are incompatible with the statutory scheme, are appropriate for us to address even if the suit involves the federal government. And as discussed above: (1) this type of action was commonplace at common law, (2) jury trial rights are consistent and compatible with the statutory scheme, and (3) such actions are commonly considered by federal courts with or without the federal government’s involvement. Thus, the agency proceedings below violated Petitioners’ Seventh Amendment rights, and the SEC’s decision must be vacated.

C.

Petitioners next argue that Congress unconstitutionally delegated legislative power to the SEC when it gave the SEC the unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency. Because Congress gave the SEC a significant legislative power

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by failing to provide it with an intelligible principle to guide its use of the delegated power, we agree with Petitioners.⁹

“We the People” are the fountainhead of all government power. Through the Constitution, the People delegated some of that power to the federal government so that it would protect rights and promote the common good. *See* The Federalist No. 10 (James Madison) (explaining that one of the defining features of a republic is “the delegation of the government . . . to a small number of citizens elected by the rest”). But, in keeping with the Founding principles that (1) men are not angels, and (2) “[a]mbition must be made to counteract ambition,” *see* The Federalist No. 51 (James Madison), the People did not vest all governmental power in one person or entity. It separated the power among the legislative, executive, and judicial branches. *See* The Federalist No. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”). The legislative power is the greatest of these powers, and, of course, it was given to Congress. U.S. Const. art. I, § 1.

The Constitution, in turn, provides strict rules to ensure that Congress exercises the legislative power in a way that comports with the People’s will. Every member of Congress is accountable to his or her constituents through regular popular elections. U.S. Const. art I, §§ 2, 3; *id.* amend. XVII, cl. 1. And a duly elected Congress may exercise the legislative power only through the assent of two separately constituted chambers

⁹ This is an alternative holding that provides ground for vacating the SEC’s judgment. “This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum.” *Texas v. United States*, 809 F.3d 134, 178 n.158 (5th Cir. 2015) (quoting *United States v. Potts*, 644 F.3d 233, 237 n.3 (5th Cir. 2011)).

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(bicameralism) and the approval of the President (presentment). U.S. Const. art. I, § 7. This process, cumbersome though it may often seem to eager onlookers,¹⁰ ensures that the People can be heard and that their representatives have deliberated before the strong hand of the federal government raises to change the rights and responsibilities attendant to our public life. *Cf.* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989, 1017 (2006). (“[T]he Framers weighed the need for federal government efficiency against the potential for abuse and came out heavily in favor of limiting federal government power over crime.”).

But that accountability evaporates if a person or entity other than Congress exercises legislative power. *See Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (“[B]y directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow.”). Thus, sequestering that power within the halls of Congress was essential to the Framers. As John Locke—

¹⁰ Indeed, President Woodrow Wilson, the original instigator of the agency that became the SEC, believed agencies like that one could solve the “problem” of congressional gridlock and the burden of popular accountability. *See Cochran v. SEC*, 20 F.4th 194, 218 (5th Cir. 2021) (Oldham, J., concurring) (“Wilson’s ‘new constitution’ would ditch the Founders’ tripartite system and their checks and balances for a ‘more efficient separation of politics and administration, which w[ould] enable the bureaucracy to tend to the details of administering progress without being encumbered by the inefficiencies of politics.’” (quoting Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* 227 (2005))), *cert. granted sub nom., SEC v. Cochran*, 21-1239, 2022 WL 1528373 (U.S. May 16, 2022); *see also id.* (“Wilson’s goal was to completely separate ‘the province of constitutional law’ from ‘the province of administrative function.’” (quoting Philip Hamburger, *Is Administrative Law Unlawful?* 464 (2014))).

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a particularly influential thinker at the Founding—explained, not even the legislative branch itself may give the power away:

The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them.

Id. at 2133–34 (quoting John Locke, *The Second Treatise of Civil Government and a Letter Concerning Toleration* § 141, p. 71 (1947)).¹¹

Article I of the Constitution thus provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. Const. art. I, § 1 (emphasis added). In keeping with Founding conceptions of separation of powers,¹² the Supreme Court has made clear that Congress cannot “delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.” *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825); *see also A.L.A. Schechter Poultry Corp. v.*

¹¹ Locke’s perspective on the legislature’s delegation of its power was influential in the United States around the time of the framing of the Constitution. *See* Hamburger, *supra* at 384.

¹² Principles of non-delegation had even taken hold in England before the American Founding. *See* Hamburger, *supra* at 381 (explaining that “even under [King] James I, the judges recognized that the king’s prerogative power came from his subjects—that he was exercising a power delegated by the people” and, as a result, he could not transfer the royal powers to anyone else); *see also id.* (“[P]arliamentary subdelegations were widely understood to be unlawful.”).

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United States, 295 U.S. 495, 529 (1935) (“Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”). According to the Supreme Court’s more recent formulations of that longstanding rule,¹³ Congress may grant regulatory power to another entity only if it provides an “intelligible principle” by which the recipient of the power can exercise it. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The two questions we must address, then, are (1) whether Congress has delegated power to the agency that would be legislative power but-for an intelligible principle to guide its use and, if it has, (2) whether it has provided an intelligible principle such that the agency exercises only executive power.¹⁴

We first conclude that Congress has delegated to the SEC what would be legislative power absent a guiding intelligible principle. Government actions are “legislative” if they have “the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.” *INS v. Chadha*, 462 U.S. 919, 952 (1983). The Supreme Court has noted that the power to assign disputes to agency adjudication is “peculiarly

¹³ Some contemporary academics have argued that the non-delegation doctrine lacks a sound historical basis. See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); but see Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021) (arguing that the doctrine was present at the Founding); Philip Hamburger, *Delegating or Divesting?*, 115 Nw. U. L. Rev. Online 88 (2020) (similar). Of course, our role as an inferior court is to faithfully apply Supreme Court precedent, so we do not reach the proper historical scope of the non-delegation doctrine. See *Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019).

¹⁴ Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547, 1558 (2015) (“[T]here is [no] delegation of legislative power at all so long as the legislature has supplied an ‘intelligible principle’ to guide the exercise of delegated discretion. Where there is such a principle, the delegatee is exercising executive power, not legislative power.” (emphasis and footnote omitted)).

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within the authority of the legislative department” *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 328, 339 (1909).¹⁵ And, as discussed above, in some special circumstances Congress has the power to assign to agency adjudication matters traditionally at home in Article III courts. *Atlas Roofing*, 430 U.S. at 455. Through Dodd–Frank § 929P(a), Congress gave the SEC the power to bring securities fraud actions for monetary penalties within the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so. See 15 U.S.C. § 78u-2(a). Thus, it gave the SEC the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not. That was a delegation of legislative power. As the Court said in *Crowell v. Benson*, “the mode of determining” which cases are assigned to administrative tribunals “is completely within congressional control.” 285 U.S. 22, 50 (1932) (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451).

set the clock back

Legislative function?

The SEC argues that by choosing whether to bring an action in an agency tribunal instead of in an Article III court it merely exercises a form of prosecutorial discretion—an executive, not legislative, power. That position reflects a misunderstanding of the nature of the delegated power. Congress did not, for example, merely give the SEC the power to decide whether to bring enforcement actions in the first place, or to choose where to bring a case among those district courts that might have proper jurisdiction. It instead effectively gave the SEC the power to decide which defendants should

¹⁵ Moreover, at the Virginia Ratifying Convention in 1788, then-delegate John Marshall suggested that it is proper to the legislative power to determine the expedience of assigning particular matters for jury trial. See John Marshall on the Fairness and Jurisdiction of the Federal Courts, in 2 *The Debate on the Constitution* 740 (Bernard Bailyn ed. 1993) (“The Legislature of Virginia does not give a trial by jury where it is not necessary. But gives it wherever it is thought expedient. The Federal Legislature will do so too, as it is formed on the same principles.”).

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receive *certain legal processes* (those accompanying Article III proceedings) and which should not. Such a decision—to assign certain actions to agency adjudication—is a power that Congress uniquely possesses. *See id.*

Next, Congress did not provide the SEC with an intelligible principle by which to exercise that power. We recognize that the Supreme Court has not in the past several decades held that Congress failed to provide a requisite intelligible principle. *Cf. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474–75 (2001) (cataloguing the various congressional directives that the Court has found to be “intelligible principle[s]”). But neither in the last eighty years has the Supreme Court considered the issue when Congress offered *no guidance* whatsoever. The last time it did consider such an open-ended delegation of legislative power, it concluded that Congress had acted unconstitutionally: In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 405–06 (1935), the Court considered a statutory provision granting the President the authority to prohibit the transportation in interstate commerce of petroleum and related products. The Court scoured the statute for directives to guide the President’s use of that authority, but it found none. *Id.* at 414–20. It therefore explained:

[I]n every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that section 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule.

Id. at 430.

Congress’s grant of authority to the SEC here is similarly open-ended. Even the SEC agrees that Congress has given it exclusive authority and absolute discretion to decide whether to bring securities fraud enforcement

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actions within the agency instead of in an Article III court. Congress has said nothing at all indicating how the SEC should make that call in any given case. If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution.¹⁶ See *Gundy*, 139 S. Ct. at 2123 (Kagan, J., plurality op.) (noting that “we *would* face a nondelegation question” if the statutory provision at issue had “grant[ed] the Attorney General plenary power to determine SORNA’s applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time” (emphasis added)). We therefore vacate the SEC’s judgment on this ground as well.

D.

The SEC proceedings below suffered from another constitutional infirmity: ~~the statutory removal restrictions for SEC ALJs are unconstitutional.~~¹⁷ SEC ALJs perform substantial executive functions. The President therefore must have sufficient control over the performance of their functions, and, by implication, he must be able to choose who holds the

¹⁶ As a member of this court aptly noted just last year, the fact that the modern administrative state is real and robust does not mean courts are never called to declare its limits. See *Cochran*, 20 F.4th at 222 (Oldham, J., concurring) (“If administrative agencies ‘are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people,’ the Court warned that ‘we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.’” (quoting *Jones v. SEC*, 298 U.S. 1, 24–25 (1936))).

¹⁷ Because we vacate the SEC’s judgment on various other grounds, we do not decide whether vacating would be the appropriate remedy based on this error alone. See *Collins v. Yellen*, 27 F.4th 1068, 1069 (5th Cir. 2022) (remanding to the district court to determine what remedy, if any, is appropriate in light of the Supreme Court’s holding that removal restrictions applicable to the Director of the Federal Housing Finance Agency were unconstitutional).

we have a role in the ALJ.

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positions. Two layers of for-cause protection impede that control; Supreme Court precedent forbids such impediment.

Article II provides that the President must “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3. The Supreme Court has held that this provision guarantees the President a certain degree of control over executive officers; the President must have adequate power over officers’ appointment and removal.¹⁸ *Myers v. United States*, 272 U.S. 52, 117 (1926). Only then can the People, to whom the President is directly accountable, vicariously exercise authority over high-ranking executive officials. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010). Yet not all removal restrictions are constitutionally problematic. “Inferior officers” may retain some amount of for-cause protection from firing. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 691–92 (1988). Likewise, even principal officers may retain for-cause protection when they act as part of an expert board. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020).

But a problem arises when both of those protections act in concert. In *Free Enterprise Fund*, the Supreme Court considered the constitutionality of two layers of for-cause protection for members of the Public Company Accounting Oversight Board (PCAOB). 561 U.S. at 492. The members of the board answered to the SEC Commissioners. But the SEC could remove them only for “willful violations of the [Sarbanes–Oxley] Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing.” *Id.* at 503.

¹⁸ Of course, the President’s authority over appointments derives from the Appointments Clause as well. *See* U.S. Const. art. II, § 2, cl. 2.

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On top of that, the President could only remove SEC Commissioners for “inefficiency, neglect of duty, or malfeasance in office.” *Id.* at 486–87, 502. The Supreme Court held that this extensive system insulating PCAOB members from removal deprived the President of the ability to adequately oversee the Board’s actions. *Id.* at 492, 496.

•The question here is whether SEC ALJs serve sufficiently important executive functions, and whether the restrictions on their removal are sufficiently onerous, that the President has lost the ability to take care that the laws are faithfully executed. Petitioners’ argument on this point is straightforward: SEC ALJs are inferior officers; they can only be removed by the SEC Commissioners if good cause is found by the Merits Systems Protection Board; SEC Commissioners and MSPB members can only be removed by the President for cause; so, SEC ALJs are insulated from the President by at least two layers of for-cause protection from removal, which is unconstitutional under *Free Enterprise Fund*. The SEC responds that this case is not like *Free Enterprise Fund*. First, it contends that SEC ALJs primarily serve an adjudicatory role. Second, it asserts that the for-cause protections for ALJs are not as stringent as those which applied to PCAOB members at the time of *Free Enterprise Fund*—or, at least, that this court should read the removal protections for ALJs that way to avoid constitutional problems.

Protections

We agree with Petitioners and hold that the removal restrictions are unconstitutional. The Supreme Court decided in *Lucia* that SEC ALJs are “inferior officers” under the Appointments Clause because they have substantial authority within SEC enforcement actions. *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018). And in *Free Enterprise Fund* it explained that the President must have adequate control over officers and how they carry out their functions. 561 U.S. at 492, 496. If principal officers cannot intervene in their inferior officers’ actions except in rare cases, the President lacks the

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control necessary to ensure that the laws are faithfully executed. So, if SEC ALJs are “inferior officers” of an executive agency, as the Supreme Court in *Lucia* indicated was the case at least for the purposes of the Appointments Clause, they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions. Specifically, SEC ALJs exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding. *Lucia*, 138 S. Ct. at 2053–54. But 5 U.S.C. § 7521(a) provides that SEC ALJs may be removed by the Commission “only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before the Board.” (Parenthetical not in original.) And the SEC Commissioners may only be removed by the President for good cause.

Executive Power
or
What
Judges do?

The dissenting opinion’s response is all built on dicta from *Free Enterprise Fund*. There, in noting what issues the Court was leaving open, the Court identified characteristics that were true of ALJs that were not true of PCAOB members: “[U]nlike members of the [PCAOB], many” ALJs “perform adjudicative rather than enforcement or policymaking functions.” *Free Enterprise Fund*, 561 U.S. at 507 n.10. Far from “stat[ing]” that this “may justify multiple layers of removal protection,” *post* at 22, the Court merely identified that its decision does not resolve the issue presented here. In any event, the Court itself said in *Myers* that “quasi[-]judicial” executive officers must nonetheless be removable by the President “on the ground that the discretion regularly entrusted to that officer by statute has not been on



Lucia opens this up by finding ALJs are inferior officers. The USSC can now eliminate their independence if it chooses.

That would limit their independence & raise political influence questions.

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the whole intelligently or wisely exercised.” 272 U.S. at 135.¹⁹ So even if ALJs’ functions are more adjudicative than PCAOB members, the fact remains that two layers of insulation impedes the President’s power to remove ALJs based on their exercise of the discretion granted to them.²⁰

Finally, the SEC urges us to interpret the for-cause protections for ALJs to instead allow removal for essentially any reason. Even if we could do so (and the statutory language likely does not give us that flexibility), that

¹⁹ The dissenting opinion deems this proposition from *Myers* to be *obiter dicta* that the Court subsequently disregarded in *Humphrey’s Executor v. United States*, 295 U.S. 602, 626–28 (1935). *Post* at 54 n.113. But that itself is to disregard the Supreme Court’s more recent guidance, which fortifies the Court’s “landmark decision” in *Myers* and narrowed *Humphrey’s Executor*. See *Seila Law*, 140 S. Ct. at 2191–92, 2197–99 & n.2 (limiting the *Humphrey’s Executor* exception to *Myers* to cases involving “for-cause removal protections [given] to a multimember body of experts, balanced along partisan lines, that perform[] legislative and judicial functions and [are] said not to exercise any executive power,” while casting doubt on the existence of wholly non-executive, quasi-legislative or quasi-judicial agency powers altogether); see also *City of Arlington v. F.C.C.*, 569 U.S. 290, 305 n.4 (2013) (noting that “[agency] activities take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the ‘executive Power’” (citing U.S. Const. art. II, § 1, cl. 1)).

²⁰ In the next breath, the dissenting position draws from a law review article that “[t]he ALJs’ role is similar to that of a federal judge.” *Post* at 52. It then concludes that they must be insulated from removal by the president to maintain their independence. But that analogy runs out under a little scrutiny. The SEC’s ALJs are not mere neutral arbiters of federal securities law; they are integral pieces within the SEC’s powerful enforcement apparatus. The ALJs report to the Commission itself and act under authority delegated by it. SEC Organization Chart (2020), <https://www.sec.gov/about/secorg.pdf>; 15 U.S.C. § 78d-1(a); 17 C.F.R. § 200.30-10. As the amicus brief by the Cato Institute points out, these administrative proceedings differ significantly from cases resolved in federal district courts and reviewed by federal courts of appeals. Cato Amicus Br. at 19–31. First, the Commission has *ex parte* discussions with the prosecutors to determine whether to pursue securities-fraud claims. Then the Commission itself decides what claims should be brought by the prosecutors. Only then do ALJs resolve the claims, which are then again reviewed by the Commission. Suffice it to say, even if ALJs have some of the same “tools of federal trial judges,” *Lucia*, 138 S. Ct. at 2053, they use those tools at the direction of and with the power delegated to them by the Commission.

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would not solve the Article II problem. As noted above, the MSPB is part of the mix as well. Furthermore, MSPB members “may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.” 5 U.S.C. § 1202(d). So, for an SEC ALJ to be removed, the MSPB must find good cause and the Commission must choose to act on that finding. And members of both the MSPB and the Commission have for-cause protection from removal by the President. Simply put, if the President wanted an SEC ALJ to be removed, at least two layers of for-cause protection stand in the President’s way.

Thus, SEC ALJs are sufficiently insulated from removal that the President cannot take care that the laws are faithfully executed. The statutory removal restrictions are unconstitutional.

III.

In sum, we agree with Petitioners that the SEC proceedings below were unconstitutional. The SEC’s judgment should be vacated for at least two reasons: (1) Petitioners were deprived of their Seventh Amendment right to a civil jury; and (2) Congress unconstitutionally delegated legislative power to the SEC by failing to give the SEC an intelligible principle by which to exercise the delegated power. We also hold that the statutory removal restrictions for SEC ALJs are unconstitutional, though we do not address whether vacating would be appropriate based on that defect alone.²¹

We GRANT the petition for review, VACATE the decision of the SEC, and REMAND for further proceedings consistent with this opinion.

²¹ Petitioners also argue that the SEC violated their equal protection rights, and that its decision was infected with bias and violated their due process rights. Because we vacate the SEC’s decision on other grounds, we decline to reach these issues.