

No. 22-859

IN THE
Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

GEORGE R. JARKEYS, JR., ET AL.,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

**BRIEF FOR THE NATIONAL TREASURY
EMPLOYEES UNION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF THE AMICUS¹

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents employees in thirty-five federal agencies and departments nationwide. NTEU has been before this Court often to advocate for federal employee interests, as a party (*see, e.g., United States v. NTEU*, 513 U.S. 454 (1995); *NTEU v. Von Raab*, 489 U.S. 656 (1989)) and as an *amicus* (*see, e.g., Axon Enter., Inc. v. FTC*, 143 S. Ct. 890 (2023); *Babb v. Wilkie*, 140 S. Ct. 1168 (2020)).

NTEU represents bargaining unit employees, including attorneys, economists, and accountants, at the U.S. Securities and Exchange Commission (SEC). These dedicated civil servants fulfill the agency's mission of protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation. The Fifth Circuit's rulings that the SEC's administrative processes violate the Constitution, if allowed to stand, will weaken the SEC's ability to fulfill its mission. NTEU files this brief to urge this Court to reverse them.

SUMMARY OF ARGUMENT

I. Each of the Fifth Circuit's three constitutional rulings against the SEC conflicts with this Court's precedent and must be reversed.

First, the Fifth Circuit's ruling that the SEC's administrative processes violate the Seventh Amendment's right to a jury trial conflicts with *Oil States*

¹ Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

Energy Services, LLC v. Greene's Energy Group, 138 S. Ct. 1365 (2018). *Oil States* reaffirms that the right to a jury trial does not apply when the government sues to enforce public rights created by a properly enacted statute. While the Fifth Circuit held that the public rights doctrine applies only where Congress has designated an administrative forum as the *exclusive* method for dealing with a particular claim, *Oil States* plainly provides that public rights matters may be resolved administratively or judicially.

Second, the Fifth Circuit's ruling that Congress violated the nondelegation doctrine when it authorized the SEC to choose whether to bring securities fraud actions via its administrative processes or federal district court conflicts with *United States v. Batchelder*, 442 U.S. 114 (1979). As *Batchelder* shows, allowing prosecutors to choose which legal processes to pursue (if any) is an executive function to which the nondelegation doctrine does not apply.

Third, the Fifth Circuit's ruling that Congress's tenure protections for SEC administrative law judges (ALJs) violate the President's Article II authority to remove certain officers performing executive duties is irreconcilable with this Court's precedent describing the role of an SEC ALJ as "'comparable to' that of a federal district judge." *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018). Because SEC ALJs do not perform executive functions, the Fifth Circuit's Article II reasoning is inapplicable.

II. If the Fifth Circuit's Seventh Amendment or nondelegation rulings stand, the SEC's ability to fulfill its statutory mission will be diminished. The administrative processes that Congress created through Section 929P of the Dodd-Frank Wall Street Reform and Consumer Protection Act allow for significantly

faster and more cost-effective investigations and prosecutions of federal securities fraud than federal court litigation. In practical terms, affirming either ruling will lead to fewer securities fraud prosecutions.

Further, if the Fifth Circuit’s ruling regarding the tenure protections that Congress granted to SEC ALJs stands, it will shake public confidence in the SEC’s administrative processes. Those tenure protections insulate ALJs from politics and thus ensure their independence.

ARGUMENT

I. The Fifth Circuit’s Decision Must Be Reversed Because Each of Its Rulings Conflicts with This Court’s Precedent.

A. Congress’s Decision To Allow the SEC To Initiate and Adjudicate Administrative Proceedings Seeking Civil Penalties Is Consistent with the Seventh Amendment.

The Fifth Circuit’s ruling that SEC administrative processes that result in civil penalties violate the Seventh Amendment’s right to a jury trial runs counter to over a century of this Court’s precedent on the public rights doctrine. *See* Pet. App. 12a–17a.

“This Court’s precedents establish that, when 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*, 138 S. Ct. at 1379. Put differently, where “the Government sues in its sovereign capacity to enforce public rights created by statutes . . . the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative fo-

rum with which the jury would be incompatible.” *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 450 (1977).²

The Fifth Circuit nevertheless held that “securities-fraud enforcement actions are not the sort that are uniquely suited for agency adjudication.” Pet. App. 15a. Because the SEC may initiate enforcement actions administratively or in federal district court, the Fifth Circuit reasoned, this Court’s public rights precedent does not apply. Pet. App. 15a–16a.

The Fifth Circuit cites no precedent for its proposed “uniquely suited” exception to this Court’s public rights jurisprudence. And the Court explicitly held in *Oil States* that “matters governed by the public-rights doctrine . . . can be resolved in multiple ways: Congress can . . . ‘delegate that power to executive officers’ or ‘commit it to judicial tribunals.’” 138 S. Ct. at 1378 (internal citation omitted) (“That Congress chose the courts in the past does not foreclose its choice of [administrative proceedings] today.”).

Oil States thus shows that the discretion that Congress gave the SEC to proceed judicially or administratively does not render its administrative processes unconstitutional. *See id.* *See also United States v. Badger*, 818 F.3d 563, 566 (10th Cir. 2016) (observing that SEC’s requests for disgorgement as an equitable remedy have been upheld because the agency is furthering the public interest and vindicating public rights). The Fifth Circuit’s contrary ruling must be reversed.

² *Accord* Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 93–94 (2017) (“The Supreme Court has never held that the Seventh Amendment guarantees the right to a jury trial in a proceeding conducted by an administrative tribunal.”).

B. Congress’s Decision To Allow the SEC To Choose Between Initiating Enforcement Proceedings Within the Agency or in Federal District Court Does Not Violate the Nondelegation Doctrine.

The Fifth Circuit’s ruling that Congress violated the nondelegation doctrine when it empowered the SEC to choose whether to pursue securities fraud actions within the agency or in federal district court conflicts with *United States v. Batchelder*, 442 U.S. 114 (1979), and with basic principles of prosecutorial (and thus executive branch) discretion. *See* Pet. App. 21a–28a.

The Fifth Circuit’s ruling is untenable because deciding whether or where to bring enforcement actions is an executive, not legislative, power. The nondelegation doctrine, which is limited to the delegation of legislative powers to an executive agency, is thus inapplicable here. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 420–33 (1935) (holding that Congress may not delegate its legislative powers to an executive agency unless it provides an “intelligible principle” to govern the executive’s actions) (internal citation omitted).

Batchelder—a decision which the Fifth Circuit failed to address altogether—confirms that Congress’s decision to allow the SEC to decide between two different enforcement routes is lawful. *Batchelder* held that Congress did not violate the nondelegation doctrine when it enacted two criminal statutes with “different penalties for essentially the same conduct.” 442 U.S. at 121, 126. While prosecutors had discretion in choosing how to proceed and the resulting universe of penalties, the nondelegation doctrine was not violated: “Having informed the courts, prosecutors, and defendants of the permissible punishment

alternatives available under each [statute], Congress ha[d] fulfilled its duty.” *Id.* at 126. The same is true here.

Consistent with *Batchelder*, prosecutors have wide discretion under federal statutory schemes to pursue (or not pursue) different legal processes against accused parties. *See, e.g., United States v. Labonte*, 520 U.S. 751, 762 (1997) (finding that prosecutorial decisions which result in different penalties for different defendants constitute an appropriate exercise of discretion); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”).

Such prosecutorial choice is a classic executive function and thus does not implicate the nondelegation doctrine. The Fifth Circuit therefore erred when it found that Congress violated the nondelegation doctrine here.

C. Congress’s Grant of Tenure Protections To SEC ALJs Does Not Violate Article II.

The Fifth Circuit’s ruling that Congress’s statutory tenure protections for SEC ALJs unconstitutionally infringe on the President’s Article II authority to fire executive branch officers is incompatible with the role of an SEC ALJ—who, as this Court described in *Lucia v. SEC*, performs no executive function. *Compare* Pet. App. 28a–34a, *with Lucia*, 138 S. Ct. at 2049.

As the Fifth Circuit conceded, constitutional concerns about interference with the President’s “general administrative control of those executing the laws” (*Myers v. United States*, 272 U.S. 52, 164 (1926)) only apply to federal employees performing executive func-

tions. Pet. App. 30a (“The question here is whether SEC ALJs serve sufficiently important executive functions.”).

Lucia confirms, however, that SEC ALJs perform adjudicative—not executive—functions. As this Court has explained, “an SEC ALJ exercises authority ‘comparable to’ that of a federal district judge conducting a bench trial.” *Lucia*, 138 S. Ct. at 2049. And generally, “the role of the modern . . . administrative law judge . . . is ‘functionally comparable’ to that of a judge.” *Butz v. Economou*, 438 U.S. 478, 513 (1978).

In reaching its erroneous conclusion, the Fifth Circuit wrongly equated the work of SEC ALJs to the board members at issue in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). *See* Pet. App. 30a–32a. But those board members perform executive functions, such as promulgating regulations and standards, inspecting accounting firms, and initiating disciplinary proceedings. 561 U.S. at 485. SEC ALJs, by contrast, do not write policy or decide whether to initiate enforcement actions. *See* 17 C.F.R. §§ 201.111, 200.14 (listing ALJ duties). Instead, SEC ALJs hear witnesses, decide motions, and conduct hearings. *Lucia*, 138 S. Ct. at 2049; *see* 17 C.F.R. §§ 201.111, 200.14. Indeed, this Court in *Free Enterprise* specifically noted that unlike the subject board members, SEC ALJs “perform adjudicative rather than enforcement or policymaking functions” and therefore that decision “d[id] not address that subset of independent agency employees who serve as administrative law judges.” 561 U.S. at 507 n.10.

Accordingly, the Fifth Circuit’s ruling that the tenure protections that Congress gave to SEC ALJs are unconstitutional must be reversed.

II. If Affirmed, the Fifth Circuit’s Decision Would Dramatically Reduce the SEC’s Ability To Fulfill Its Statutory Mandate and Would Shake the Public’s Trust in the Independence of SEC ALJs.

A. The Fifth Circuit’s Decision Thwarts Congress’s Intent that the SEC Strengthen Enforcement of Securities Laws After the 2008 Recession.

Should either of the Fifth Circuit’s Seventh Amendment or nondelegation rulings stand, the SEC’s ability to enforce federal securities laws would be drastically curtailed. This result would erode the reforms Congress enacted through the Dodd-Frank Act and flout Congress’s command to “[s]trengthen[] [e]nforcement” of federal securities laws.³

1. In September 2008, the U.S. financial system “came precariously close to failing altogether.”⁴ The Dodd-Frank Act was born out of this turmoil. Its purposes included “promot[ing] the financial stability of the United States by improving accountability and transparency in the financial system, . . . protect[ing] the American taxpayer by ending bailouts, [and] protect[ing] consumers from abusive financial services practices.”⁵

³ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(a), 124 Stat. 1376, 1862–64 (2010) (codified at 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80a-9(d), 80b-3(i)).

⁴ See Baird Webel, Cong. Research Serv., R41350, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Background and Summary* at 3 (2017), <https://sgp.fas.org/crs/misc/R41350.pdf> (quoting then-Secretary of the Treasury Timothy Geithner).

⁵ Dodd-Frank Act, *supra* note 3, at 1376.

Section 929P of the Act, “Strengthening Enforcement by the Commission,” was central to Congress’s reformation of the country’s financial system.⁶ Before Dodd-Frank, the SEC could only pursue civil monetary penalties administratively against registered entities.⁷ Section 929P broadened the scope of this power to include non-registered entities and individuals.⁸ And as the House Report explained, Congress consciously used Section 929P to “streamline[] the SEC’s existing enforcement authorities by permitting the SEC to seek civil money penalties in cease-and-desist proceedings under Federal securities laws.”⁹

In response to Congress’s call to step up its enforcement efforts and aided by its new administrative tools, the SEC’s dedicated workforce has worked tirelessly to fulfill its statutory duty. In the last fiscal year, for example, the SEC recovered \$6.4 billion in penalties and disgorgement on behalf of the investing public.¹⁰ This heightened level of enforcement was facilitated by the additional administrative tools Congress granted to the SEC in Section 929P.

2. The Fifth Circuit’s Seventh Amendment and nondelegation rulings would eliminate the critical tools Congress provided through Section 929P, thus

⁶ *See id.* at 1862.

⁷ *See* Xin Zheng, *A Tale of Two Enforcement Venues: Determinants and Consequences of the SEC’s Choice of Enforcement Venue After the Dodd-Frank Act*, 96 THE ACCOUNTING REV. 451, 455 (Nov. 2021).

⁸ Dodd-Frank Act, *supra* note 3, at 1862–64.

⁹ H.R. REP. NO. 111-687, pt. 1, at 78 (2010).

¹⁰ Press Release, SEC, *SEC Announces Enforcement Results for FY22* (Nov. 15, 2022), <https://www.sec.gov/news/press-release/2022-206>.

impeding the SEC's ability to comply with Congress's mandate.

The SEC's administrative proceedings provide effective, efficient enforcement of securities laws while simultaneously reducing the cost to taxpayers. The SEC's administrative cases are resolved nearly twenty-seven times faster than its district court cases—and at a lower cost.¹¹ Faster proceedings allow for better, fresher testimony and evidence.¹² Speedy resolution of securities fraud allegations also benefits investors: “[F]rom the standpoint of deterrence and investor protection . . . it is better to have rulings earlier rather than later.”¹³ In addition, settlement agreements are often filed in the administrative forum for efficiency reasons; steering the implementation of a settlement agreement towards the administrative process, moreover, prevents any further burdening of “busy district court dockets.”¹⁴

If this Court affirms the Fifth Circuit's Seventh Amendment or nondelegation rulings, it would make it more difficult and more expensive for the SEC's workforce to hold wrongdoers accountable. It would almost certainly lead to fewer prosecutions for federal securities fraud. That result cannot be squared with Congress's intent and the interests of the American public.

¹¹ See Zheng, *supra* note 7, at 453, 456.

¹² See Andrew Ceresney, *Remarks to the American Bar Association's Business Law Section* (Nov. 21, 2014).

¹³ *Id.*

¹⁴ See *id.*

B. The Fifth Circuit’s Decision Imperils Public Confidence in the Impartiality of SEC ALJs.

If the Fifth Circuit’s ruling striking down Congress’s tenure protections for SEC ALJs stands, those ALJs would effectively become political appointees who can be dismissed at will.¹⁵ Concerns over actual and perceived bias would inevitably increase. That would, in turn, undermine public trust in SEC administrative proceedings and their results.

SEC ALJs are unbiased decisionmakers with valuable expertise.¹⁶ Congress created the existing statutory removal safeguards “to protect [ALJs]’ decisional independence.”¹⁷ The Fifth Circuit’s erroneous ruling, if affirmed, would override this congressional intent at the expense of the SEC’s dedicated workforce and, ultimately, the American people.

¹⁵ See Roberta S. Karmel, *Little Power Struggles Everywhere: Attacks on the Administrative State at the Securities and Exchange Commission*, 72 ADMIN. L. REV. 207, 247 (2020) (noting that “[i]f ALJs become political appointees they are likely to have less expertise and less independence than previously”).

¹⁶ See CARL W. HOECKER, REPORT OF INVESTIGATION, CASE # 15-ALJ-0482-I (Office of Inspector General, SEC, 2016) (finding no evidence of bias after investigation).

¹⁷ Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1655 (2016).

CONCLUSION

For the foregoing reasons and for those set forth in the Petitioner's brief, NTEU respectfully requests that this Court reverse the Fifth Circuit's decision below.

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September 5, 2023

