In The

Supreme Court of the United States

No. 2025-2026

Faizmart,

Petitioner,

v.

National Labor Relations Board,

Respondent.

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

Order of the Court

The petition for a writ of certiorari is granted, limited to the following questions:

1. The Seventh Amendment provides that "in Suits at common law… the right of trial by jury shall be preserved." Did the National Labor Relations Board violate that Amendment when it ordered Faizmart to pay an illegally fired employee for all his "foreseeable" expenses resulting from his firing?

2. Article II, Section 1 of the Constitution vests the "executive Power" in "a President of the United States of America." Did Congress violate that constitutional guarantee when it prohibited the President from communicating privately with certain executive officers?

 Revised November 13, 2025

In the United States Court of Appeals
for the Twelfth Circuit

No. 2024-1107

Faizmart, *Appellant*

v.

National Labor Relations Board, *Appellee*

On Petition for Review of an Order of the
National Labor Relations Board

Lewis, J., delivered the opinion of the Court, in which Streit, J., joined. Steeves-Decker, J., filed a dissenting opinion.

Judge Lewis:

You can buy lots of things at Faizmart.[1] Fruits and vegetables, televisions, tires, clothing, window-mounted air-conditioning units: Faizmart sells all of them. And you can find Faizmarts in lots of places. The company operates 3,260 locations in all 51 states.

This case comes from a dispute between Faizmart and some of its employees. Specifically, a group of employees at a Faizmart in Silliman, New Storke decided to form a union, and Faizmart tried to stop them. The Federal Government got involved, and we consider today whether the Federal Government's intervention was allowed under the United States Constitution.

1. Pronounced "Fez" + "mart."

I

A

In January and February 2023, employees at Faizmart's location in Silliman, New Storke considered whether to join the National Union of Retail Workers. Among those employees, two became known for their strong pro-union views: Will Leggat and Jenesis Nwainokpor. Leggat and Nwainokpor hosted pro-union gatherings for their coworkers in their homes. They made social media posts encouraging their coworkers to join the union,[2] wore union pins on their work uniforms, and put union bumper stickers on their cars. And because they did all of these things, Faizmart fired them.

Leggat and Nwainokpor responded by calling the federal agency that polices employers and labor unions, the National Labor Relations Board (NLRB). After investigating the details of what happened, NLRB Regional Director Anna McDougall (who manages the agency in New Storke) called the agency headquarters in Washington. On the other end of the line was NLRB General Counsel Adam Wesley (who serves as the agency's top lawyer). Director McDougall and General Counsel Wesley agreed that Faizmart probably violated the law, so they ordered Faizmart to explain itself in a hearing.

Vikram Ramaswamy testified against Faizmart in that NLRB hearing, and this case comes from what happened next. An employee of the company for thirteen years at the time of the hearing, Ramaswamy worked as a Poultry Specialist Leader in the Silliman location's meat department. After Ramaswamy testified, Faizmart fired him too.

With no job, Ramaswamy stopped receiving paychecks and spent all of his savings. And to make ends meet, he had to find more money. So Ramaswamy took on debt. To cover the rent on his apartment, he took out a high-interest short-term loan. Having lost his employer-provided health insurance, he entered a payment plan with a local hospital to cover the costs of treatment for his patellar tendonitis (a knee issue). And Ramaswamy maxed out the balance on his credit cards to pay for groceries and gasoline.

2. With the slogan "Be smart, unionize Faizmart."

Nine days after Faizmart fired him, Ramaswamy filed his own charges with Director McDougall. He argued that Faizmart illegally retaliated against him for testifying in the hearing about Leggat and Nwainokpor. And after another hearing, NLRB Administrative Law Judge (ALJ) Delaney Moss eventually found that Ramaswamy was right. In her decision, ALJ Moss wrote that Faizmart's decision to fire Ramaswamy violated a federal law called the National Labor Relations Act (NLRA), which makes it illegal to "discharge … an employee because he has … given testimony" to the NLRB. 29 U.S.C. § 158(a)(4).[3] ALJ Moss then ordered Faizmart to give Ramaswamy his job back ("reinstatement") and send over the paychecks he would have earned if Faizmart hadn't fired him ("backpay"). ALJ Moss also ordered Faizmart to "make [Ramaswamy] whole for all direct or foreseeable pecuniary harms" from its unfair labor practices. Those harms included the interest on Ramaswamy's short-term loan and unemployment-related credit card charges, plus fees on his hospital payment plan.

Faizmart appealed ALJ Moss's decision to the Board. But the Board agreed with ALJ Moss, so Faizmart appealed to this Court, where Faizmart argues that the NLRB violated the Constitution in two ways. First, Faizmart argues (under the Seventh Amendment) that its case should have been tried in front of a jury, instead of decided inside the NLRB. And second, Faizmart argues that the NLRB's relationship with the President of the United States violates a constitutional principle called the Separation of Powers.

Before we answer those constitutional questions, we review the history and structure of the NLRB.

B

After decades of labor unrest and out of the depths of the Great Depression, President Franklin Roosevelt signed the National Labor Relations Act, 29 U.S.C. §§ 151-169. The Act created the NLRB, a federal agency, to police conflict between employers, employees, and unions. *Id.* §§ 151, 153. The main goal was to channel disagreements that involve unions into negotiations and bargaining instead of strikes

3. We will refer to this provision as "Section (a)(4)."

and violent confrontations. *Id.* § 151.[4]

Disagreements between unions and employers can be enormously destructive. In the twenty years before the NLRA, thousands of strikes took millions of workers out of their jobs and cost the economy an estimated billion dollars per year.[5] S. Rep. No. 74-573, at 1–2 (1935). And even a single strike could have devastating consequences, like these two examples:

- In 1894, the Pullman Company refused to negotiate when roughly 100,000 Chicago railroad workers refused to handle its cars. United States Strike Commission, *Report on the Chicago Strike of June-July, 1894*, XVIII, XXXIX (1894). Because Chicago was a rail hub, the strike affected traffic in twenty-seven states, and President Cleveland deployed the U.S. military to restore order. Grover Cleveland, *The Government in the Chicago Strike of 1894*, 3, 27-36 (1913).
- During another strike twenty years later, members of the Colorado National Guard killed nineteen people—including striking workers, their spouses, and their children—while burning an encampment set up by striking coal miners. George P. West, United States Commission on Industrial Relations, *Report on the Colorado Strike*, 126–27 (1915). In the next ten days, 31 more people died in skirmishes between union members, mining-company security, and state guardsmen. *Id.* at 135.

Congress designed the NLRB to prevent this kind of destruction. Targeting "the most fertile sources of industrial discontent," S. Rep. No. 74-573, at 2, the NLRA gives the NLRB authority over a list of "unfair labor practices." 29 U.S.C. § 158. Those are practices that tend to obstruct negotiations and lead to the consequences that the NLRA is meant to prevent. To make that a little clearer, here are a few of the practices on the list. Employers, to start with, must allow their employees to join unions, 29 U.S.C. § 158(a), and they have to negotiate with unions in good faith, *Id.* § 158(d). Unions, meanwhile, can't come after employers with pressure tactics that threaten the wider economy, *Id.* § 158(b), and they have to negotiate in

4. While Congress has amended the Act on numerous occasions since its enactment in 1935, *see, e.g.*, Labor-Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947), the act's fundamental principles remain unchanged.

5. This figure, in 1935 dollars, is not adjusted for inflation.

good faith too, *Id.* § 158(d). Lastly, to protect the NLRB's ability to investigate cases and make decisions, the list of unfair labor practices also includes firing employees (like Ramaswamy) who complain or testify to the NLRB. *Id.* § 158(a)(4).

Because unfair labor practices can lead to labor unrest, the NLRA gives the NLRB authority to prevent unfair labor practices, and to redress them when they have already happened. If an employer or union breaks the law by committing an unfair labor practice, then the NLRB can order them to stop and take any "affirmative action" that's necessary to "effectuate" the NLRA's peace-keeping goals. *Id.* § 160(c). The NLRB's power to give orders is broad and open-ended, but the law says that it *at least* includes reinstating fired or laid-off employees (like Ramaswamy) with back pay. *Id.* The goal is to resolve disagreements between employers and employees before they spiral out of control.

C

The NLRB's power to issue orders has a long historical pedigree. In thirteenth-century England, if a person could not seek justice by making a claim in the common-law courts,[6] then they could petition certain officers of the King for relief instead. F. W. Maitland, *Equity: a Course of Lectures* 3 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936). Over the next five hundred years, the King's power to act on these petitions evolved into a body of law called equity—the ability to do justice and grant relief that would be unavailable in traditional common-law courts. *Id.* at 5–11. Equity eventually came to the United States, where the Revolution took it from the King and the Constitution gave most of it to the courts. U.S. Const., art III, § 2, Cl. 1.[7] But even though equity cases moved to the courts, the American executive branch, like the King, kept the broader power to decide issues that the courts do not always recognize. *See SEC v. Jarkesy*, 603 U.S. 109, 130 (2024).

Equity fills in the gaps for common-law courts. What kind of gaps? Ones where the courts would have no choice but to let a person get away with bad things

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6. Common-law courts are the ones with judges and juries.

7. Even after courts took over equity, our terminology still reflects the historical division between equity and common law. We call some remedies and causes of action "legal" or "at law" (meaning "from the old common-law courts"), and we call other remedies and causes of action "equitable" or "in equity" (meaning "from the King's equity court").

on a technicality, or when the remedies that courts can grant wouldn't really make a victim better. Courts offer the same limited menu of options to everyone, and equity recognizes that justice sometimes requires giving people something more tailored.[8]

You can only sue someone in a common-law court if you have something called a cause of action. (Lawsuits are sometimes called "actions.") And courts only recognize a specific list of causes of action.[9] Here are a few examples: If someone lies to you, then you might have a cause of action for *fraud*. If they tell lies about you, then you might have a cause of action for *defamation*. If they won't stop poking you, it could be *battery*. And if they walk onto your land without permission, that's probably *trespass*. Generally, if your problem is not on the list, then courts won't hear your case. Once in a while (rarely), equity fills in where there should be a cause of action but there isn't.

The bigger gap that equity fills is the one sometimes left by common-law courts' remedies. Common-law courts solve almost all problems with money. (The money they award you is called "damages.") If someone steals from you, common-law courts make them pay you money for what they stole. If someone doesn't keep the promises they made in a contract, then common-law courts make them pay you the equivalent, in money, of what they owe you. But the problem with money is that it can't buy everything, and that's where equity comes in. What if someone stole your priceless family heirlooms? Or if they promised to sell you a house with a view like no other view in the world? Then equity awards more than money, it gives orders. Like ordering a thief to give back your grandmother's engagement ring, or ordering a person to hand over the keys to the house you bought. When equity orders a person to do something, that's sometimes called "injunctive relief."

Equity sometimes also orders parties to pay money. This kind of payment is called "restitution." Unlike legal damages, which are designed to make up for

8. As the Greek philosopher Aristotle put it: "This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality." Aristotle, *Nicomachean Ethics* 317 (H. Rackman trans., Harvard U. Press 1926).

9. The list is passed down from many generations of previous courts, and while the list can change over time, judges are very reluctant to add new reasons for people to bring lawsuits. Legislatures, of course, can also create or get rid of causes of action by passing laws.

the harm done to the victim (e.g., paying for hospital bills in a car crash), equitable restitution tries to prevent the unjust enrichment of the guilty party. *See* Dan B. Dobbs, 1 Dobbs Law of Remedies 280 (2d. Ed. 1993). Imagine that you had a factory that made t-shirts. While you were on vacation, someone stole your t-shirt printing machine, worth $1,000, and used it to make and sell $10,000 worth of t-shirts. Legal damages would require the thief to pay you $1,000 for the machine you lost, possibly with a little extra to punish them or compensate you for your emotional distress. But the thief still has the $10,000 they gained from stealing your machine. That's where equitable restitution would come in, ordering the thief to pay back their ill-gotten gains.

D

Like dozens of other federal agencies, the NLRB uses in-house adjudication to determine whether a defendant has violated the law. *See* 29 U.S.C. § 160 (describing NLRB adjudication procedures); *SEC v. Jarkesy*, 603 U.S. 109, 199 (2024) (Sotomayor, J., dissenting) (listing other examples). Put another way, the NLRB collects evidence, hears from both sides, decides what happened, and orders remedies all on its own, without the parties ever going to a courthouse.

1

At the NLRB, in-house adjudication has two main features. First, the NLRB gives different responsibilities to different people within the agency. Agency enforcement staff investigate and prosecute complaints, while adjudication staff hear the enforcement staff's arguments and decide cases. *See* 29 U.S.C. § 153(d) (giving NLRB General Counsel "final authority" over prosecution); *Id.* § 160 (giving NLRB's namesake five-member board final authority to find facts and issue orders). Second, the NLRB's hearings are like trials, with enforcement staff as prosecutors and adjudication staff as judges. In the hearings, the NLRB, union, employees, and employer can all call witnesses, submit briefs, and make oral arguments. 29 C.F.R. § 101.10(a). The federal courts' rules of evidence mostly apply, and lawyers from the NLRB's enforcement staff carry the burden of proof. *Id.* § 101.10. Members of the adjudication staff called administrative law judges (ALJs) preside over the hearings, and parties can appeal to the NLRB itself (that is, the five-member board) if they disagree with an ALJ's ruling. *Id.*

While enforcement and adjudication staff all work in the same agency, Congress has enacted two kinds of rules to keep them independent from each other. The first type of rules maintains a principle called the "separation of functions." Under those rules, ALJs can't be supervised by enforcement staff, and if enforcement staff ever step in to judge cases, then they can't judge cases that resemble the ones they normally argue. 5 U.S.C. § 554(d)(2). Similarly, at the top of the agency, the General Counsel (who leads enforcement) is appointed by the President and confirmed by the Senate; she does not answer to the Board (which leads adjudication). 29 U.S.C. § 153(d).

The second type of rules prohibit *ex parte* contacts.[10] These rules allow ALJs to hear arguments only when both sides have notice and an opportunity to participate. 5 U.S.C. § 554(d)(1). And they prohibit any agency adjudicator from communicating privately about the merits of their cases with people outside the agency who have a stake in the results. *Id.* § 557(d)(1). These provisions are meant to ensure that agency adjudicators make decisions using only the evidence introduced during official hearings, and to guarantee that the parties who participate in hearings have a chance to argue against statements with which they disagree.

2

Congress recently clarified that the existing ban on ex parte communications applies to contacts with the President of the United States. In 2018, President Sydney Chen was elected on a pro-labor platform after receiving endorsements from almost every major union in the country. During the first presidential debate, Chen promised to "tell all those big-business bureaucrats at the NLRB that they have to protect the little guy. I'll call them every day, threaten to fire every one of them, whatever it takes to make sure they are on the side of labor."

When Chen took office in January of 2019, she sought to follow through on those campaign promises. She appointed self-proclaimed "friend of labor" Kevin

10. Communications between an ALJ and only one of the parties to a case, or between an ALJ and people who are not parties to the case, are sometimes called "ex parte contacts." *See* EX PARTE, Black's Law Dictionary (12th ed. 2024) (defining "ex parte" as an adjective meaning "done or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest"). The rule against ex parte contacts has limited exceptions.

Xiao as Secretary of Labor, and routinely contacted adjudicators at more than a dozen agencies from the Securities and Exchange Commission to the Railroad Retirement Board. After a March New Storke Times investigation revealed that President Chen had called ALJ Cameron Coyle at home and told him that "you'll never get a job in this town again if you don't protect these unions," Congress passed the Take Care Act.[11]

Under the Take Care Act, the President cannot "make or knowingly cause to be made … an ex parte communication" to any agency adjudicator that is "relevant to the merits" of that adjudicator's proceedings, 5 U.S.C. § 557(d)(1)(A), and no agency adjudicator can make that kind of ex parte communication to the President, 5 U.S.C. § 557(d)(1)(B). In other words: If an agency like the NLRB is holding a hearing to make a decision, then the President cannot privately contact the agency to influence the outcome. Then-President Chen vetoed the Take Care Act, writing in a social media post on Twitter:

> This corrupt Congress in the pocket of big business wants to shut down the very successful work my administration is doing to fight for the labor rights of the AMERICAN PEOPLE. Now they're trying to stop me from talking to people who work for me. Congress can't stop me from doing the job I was elected to do or from talking to anyone in MY Executive branch. None of the weak @SpeakerStryer's staff want to talk to her, but she doesn't have the Take Care Clause. Sad!

In a public statement, Speaker of the House Rebecca Stryer responded, "We are proud that the Take Care Act codifies the norms of agency independence that successive Presidents have observed since the New Deal. This law will protect independence and due process in our nation's most important labor disputes." Congress passed the Take Care Act over President Chen's veto and the Act took effect immediately, well before the NLRB adjudicated Ramaswamy's complaint.

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11. Specifically, the Act (among other things) amended 5 U.S.C. § 557(d)(1) to include the following language: "As used in this subsection, the term 'interested person' shall include (i) the President, (ii) the Vice President, (iii) any person holding a position under 3 U.S.C. §§ 105-106, and (iv) any other officer or employee of the United States who does not hold a position inside the agency." 5 U.S.C. § 557(d)(1)(F).

Current President Kelly Araujo defeated Chen in her 2022 re-election run. A major part of Araujo's platform was her support for the Take Care Act. In the speech that launched her campaign, Araujo stated,

> The President has a responsibility to ensure that the laws are faithfully executed, not to interfere with the administration of justice to protect her cronies in big labor. As President, I promise to support the Take Care Act and never interfere in any labor disputes. We can't keep letting the unions cheat.

After taking office, President Araujo ordered her Department of Justice to defend the Take Care Act.

E

Today, the NLRB defends its adjudication authority and the Take Care Act against two constitutional challenges from Faizmart. First, Faizmart challenges the constitutionality of the NLRB's adjudication on Seventh Amendment grounds. The Seventh Amendment guarantees a right to a trial by jury in certain cases. U.S. Const. amend. VII. But in this case, Faizmart could not request a jury trial because there are no juries in NLRB adjudications. So if this is one of the cases that falls under the Seventh Amendment, then Faizmart's right was violated, and its case should have been heard by a federal judge instead of an ALJ.

Second, Faizmart challenges the Take Care Act as a violation of the Separation of Powers. The Constitution requires that each of our three branches of government be able to do certain things (and only those things). *See* U.S. Const., arts. I, II, III. In this case, Faizmart argues that its NLRB hearing was one where the President was not allowed to do everything the Constitution requires her to be able to do. If that's true, then the NLRB exercised power in a way that the Constitution doesn't allow, and the NLRB's order regarding Ramaswamy's case is invalid.[12]

For the reasons set out below, we reject both of Faizmart's arguments and affirm the NLRB's order.

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12. This is true regardless of whether the President actually would have made any ex parte contacts. *See Seila Law v. CFPB*, 591 U.S. 197, 211 (2020) (ruling in favor of separation-of-powers challenge without proof that executive officer's decisions would be any different under properly constitutional authority).

II

Faizmart first argues that it is entitled to a jury trial under the Seventh Amendment. But this right is not absolute. The Seventh Amendment "preserve[s]" the jury right only in "suits at common law." U.S. Const. amend. VII. So to invoke the Amendment, Faizmart must prove that the NLRB's claims are "legal in nature" and "analogous to common-law causes of action." *Granfinanciera, S.A v. Nordberg*, 492 U.S. 33, 42, 55 (1989). To that end, Faizmart must demonstrate that this case is analogous to "18th-century actions brought in the [common-law] courts of England." *Id.* at 42 (quoting *Tull v. United States*, 481 U.S. 412, 417–418 (1987)). As we explain below, today's case falls short of an analogue for common law.

A

To assess whether the NLRB's claims were "legal in nature," we first examine whether the agency's remedies would have been awarded in a common-law court. While an order to pay money is a common-law remedy "if it is designed to punish or deter the wrongdoer," monetary remedies are equitable if they are designed "solely to 'restore the status quo.'" *Jarkesy*, 603 U.S. at 123 (quoting *Tull*, 481 U.S. at 422). In this case, we start with the NLRB's first and second remedies: the reinstatement of Ramaswamy's position and the issuance of back pay. These are equitable remedies under Supreme Court precedent. In *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court upheld an NLRB back pay award as a remedy "even though damages might have been recovered in an action at law." 301 U.S. 1, 48 (1937). Forty years later, in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission,* the Court recognized the reinstatement of a dismissed employee as "analogous to … relief historically obtainable only in a court of equity." 430 U.S. 442, 453 n.10 (1977). The Court has been clear: Backpay and reinstatement have no basis in common law. They satisfy the definition of an equitable remedy. *Jones & Laughlin*, 301 U.S. at 48.

Jones & Laughlin's reasoning also applies to the other remedies imposed by the NLRB, the interest on Ramaswamy's loans and fees on his hospital payment plan. Ordering Faizmart to pay for those expenses would be a legal remedy if the order could "be explained as also serving either retributive or deterrent purposes." *Jarkesy*, 603 U.S. at 123. But the NLRB's ruling was designed "solely to serve a *remedial* purpose." *Id.* (emphasis added). It addressed only financial harms that came from Ramaswamy's termination. The remedies returned Ramaswamy to his financial status before Faizmart's unfair labor practice; they "restore[d] the status quo" for the affected party. *Jarkesy*, 603 U.S. at 124 (quoting *Tull*, 481 U.S. at 422).

And unlike the SEC in *Jarkesy*, none of the NLRB's remedies are punishments. If a remedy imposes "monetary penalties to 'punish culpable individuals,'" then it belongs in a court of law. *Id.* at 123 (quoting *Tull*, 481 U.S. at 422). The SEC broke that rule in *Jarkesy* because it ordered $300,000 in civil penalties, *id.* at 119, and civil penalties are by nature designed to "punish the defendant," *id.* at 124. But the NLRB's remedies in this case were different. Instead of punishing Faizmart, the NLRB's remedies align with the long-recognized equitable practice of restoring the status quo. *See id.* at 123–124. Without compensation for interest and fees, Ramaswamy would still be worse off than he was before he was fired. And unlike *Jarkesy*, the monetary remedy in this case is being returned to Ramaswamy, not kept by the government. *See id.* at 125. The NLRB's order was not punitive; it went only as far as necessary to restore Ramaswamy to where he was before Faizmart fired him. It was an equitable remedy that does not implicate the Seventh Amendment.

B

We also find no compelling relationship between the present case and any cause of action available at common law. Section (a)(4) is not, as Faizmart argues, analogous to wrongful termination nor any other common-law cause of action.

First, the unfair labor practice in this case is not analogous to "18th-century actions brought in the [common-law] courts of England." *Id.* at 42 (quoting *Tull v. United States*, 481 U.S. 412, 417–418 (1987)). While it is true, as Faizmart argues, that there was a cause of action for wrongful termination in England, this was only true under limited circumstances. In traditional English common law, employment was for one year unless the parties signed a contract that said otherwise. 1 William Blackstone, *Commentaries on the Laws of England* *413 (1765); *see also Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 280 n.1 (2000). With only two exceptions, if an employer fired an employee (or if the employee quit) before the year was over, then the other party had a cause of action. Blackstone, *supra*, at *413. And the exceptions were narrow. The parties could end the employment before a year if (1) they gave three months' warning, or (2) they explained a "reasonable cause" to a justice of the peace. *Id.*

Section (a)(4) is not analogous to that common-law cause of action for three reasons. First, as long as an eighteenth-century employer acted at the end of the year-long term or gave three months' notice, they could fire their employees for any reason, including union membership (to the extent that union membership even existed in the eighteenth century). *See id.* Under the NLRA, in contrast, it doesn't matter how much notice an employer gives, or whether it's been exactly a year since an employee started. They can *never* fire an employee for testifying to the NLRB. 29 U.S.C. § 158(a)(4). Second, eighteenth-century employers and employees could sign contracts that changed the one-year rule. Blackstone, *supra*, at *413. But no one can sign a contract that allows an employer to violate Section (a)(4). And third, NLRB proceedings reverse the English common law's burden of proof. While the common law treated mid-year termination as unlawful until proven "reasonable," *id.*, the NLRB treats a termination as lawful until the Board's enforcement staff prove otherwise. 29 C.F.R. § 101.10. Because of all these differences, Section (a)(4) does not have a "close relationship" to a common-law cause of action. *Jarkesy*, 603 U.S. at 128.

The dissent erroneously argues that the modern cause of action for wrongful discharge pulls this case under the jurisdiction of the common-law courts. *Fitzgerald*, 613 N.W.2d at 281; *see post*, at 26–27. Specifically, the dissent claims that the protection for employees who testify is a common-law cause of action that mirrors Section (a)(4). But as explained above, we must consider if the case would be heard in an eighteenth-century English common-law court, not a twenty-first century American one. *See Granfinanciera,* 492 U.S. at 42. At the latest, we could consider the common-law causes of action that existed at the time of a statute's enactment. Looking any more recently than that would allow courts to shrink agencies' jurisdiction by expanding the common law over time. And wrongful discharge exemplifies that problem. Sixty years after the NLRA's enactment, courts were only "*beginning* to articulate the elements of … wrongful discharge." *Fitzgerald*, 613 N.W.2d at 282 n.2 (emphasis added). There was no way for Congress to predict that cause of action in 1935.

Taking the common law as late as we could reasonably go, section (a)(4) had no common-law analogue in 1935. Since the late 1800s, American Courts have rejected the English one-year-employment rule. Instead, employment in almost every state has been "inherently indefinite and presumed to be at-will." *Fitzgerald*, 613 N.W.2d at 280. So in 1935, either party could terminate the employment "at any time, for any reason, or no reason at all." *Id.* (quoting *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 202 (Iowa 1997)). And as of 1935, the Supreme Court recognized a *constitutional right* to fire employees because they were union members. *Fitzgerald*, 613 N.W.2d at 280-81 (citing *Adair v. United States*, 208 U.S. 161, 174–75 (1908)). Against that backdrop, Section (a)(4) had no "close relationship" with wrongful termination, or any other common-law cause of action, because wrongful termination did not exist. *Jarkesy*, 603 U.S. at 125. In 1935, the common law was silent, and Section (a)(4) said something new.

Because Section (a)(4) doesn't resemble any common-law cause of action, either in the eighteenth century or in 1935, it falls into a category of statutes that the Supreme Court has long upheld. In *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, for example, the Court upheld federal safety regulations for construction sites. 430 U.S. at 447. An agency had imposed civil penalties on a construction company that, among other violations, dug ditches without properly "shor[ing], … slop[ing], or otherwise support[ing]" the ditch walls. *Id.* (quoting 29 CFR § 1926.652(b)). The Court upheld the agency's civil penalties because none of the ditch-digging rules "traced their ancestry to the common law." *Jarkesy*, 603 U.S. at 137. The agency's rules were "self-consciously novel." *Jarkesy*, 603 U.S. at 137. We uphold Section (a)(4) because, for the reasons we have explained, it was self-consciously novel too.

C

Because the dissent disagrees with us on the remedy and the cause of action, it analyzes this case under the "public rights exception." *Jarkesy*, 603 U.S. at 127; *see post*, at 28. Under that exception, agencies can always decide cases in six categories that have historically belonged to Congress and the President: taxes, customs, immigration, relations with Indian tribes, public lands, and public benefits like pensions and patents. *Jarkesy*, 603 U.S. at 128–130. We need not consider whether Section (a)(4) fits in the categories because Section (a)(4) is not "legal in nature," and that fact resolves this case well before the public rights exception becomes necessary. *Jarkesy*, 603 U.S. at 122.

Jarkesy asks that we show if this case is "made of 'the stuff… of common law.'" *Jarkesy*, 603 U.S. at 128. As we have shown, it is not. The NLRB's remedies are not based on a "perceived need to punish the defendant." *Id.* at 124. Instead, they "restore the victim." *Id.* Restoration makes an equitable remedy, not a legal one. And the NLRB's remedies don't resemble any common-law cause of action from any relevant time. The NLRB's claim was not "legal in nature," *id.* at 122 (quoting *Granfinanciera*, 492 U.S. at 53), and the Seventh Amendment does not apply.

III

Next, Faizmart asks us to hold that the Constitution protects the President's ability to make ex parte contacts with agency adjudicators, and that the Take Care Act violates that constitutional protection. But we can't hold that. First, no precedent requires us to extend the President's power so far. Second, accepting Faizmart's view of presidential authority would deprive in-house defendants of their due process rights. And third, concentrating so much power in the President would cut flatly against the Constitution's history and structure.

We sort cases about presidential power into the three categories from Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-39 (1952). *See, e.g.*, *Trump v. United States*, 603 U.S. 593, 607–10 (2024). The first category contains cases where the President acted to execute laws passed by Congress. *See Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); U.S. Const. art 2, § 3. Because Congress and the President have combined their powers, Category I represents the President's "authority … at its maximum." *Id.* The second category contains cases where Congress has passed no law for the President to enforce. Because Congress has neither permitted nor prohibited the President's action, we ask if the Constitution gave the President power to act alone, or if Congress's silence "enable[d], if not invite[d]" the President to act. *Id.* at 637. The third category contains cases where Congress has attempted to limit the President's action. *Id.* at 637–38. In those cases, we uphold the President's action only if Congress has intruded into the President's constitutionally guaranteed zone of "conclusive and preclusive" authority. *Id.* at 638; *accord Trump*, 603 U.S. at 607.

Because the Take Care Act limits presidential authority, today's case falls in *Youngstown*'s third category. Accordingly, we examine whether control over agency adjudicators "is within [the President's] domain and beyond control by Congress." *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring). We conclude that it is not.

A

Faizmart's view of Presidential power is unprecedented. Admittedly, the President may remove officers who prevent her from "faithfully execut[ing]" the law, U.S. Const. art. II, § 3, and may usually do so on the basis of her judgment alone. *Seila Law v. CFPB*, 591 U.S. 197 (2020). But Faizmart argues one step further. It suggests that the justifications for the President's removal power also justify the (purportedly) lesser power to contact officers and tell them what faithful execution requires. The problem with that argument is that no removal case has ever gone that far.

The Supreme Court's first and broadest recognition of removal power explicitly did not extend to officers in adjudicatory positions. In *Myers v. United States*, the Court affirmed the President's power to remove postmasters without the Senate's consent. 272 U.S. 52 (1926). The President could do so because he has all "the executive power of the government," which includes "general administrative control of those executing the laws." *Id.* at 164. Any officer who executes the laws, including postmasters, exists only because there are too many laws for the President to execute alone, and every officer's power is actually the President's power, which he may sometimes choose to share. *Id.* at 117. But the *Myers* Court recognized that the President's power has limits. Some "executive officers and members of executive tribunals" might have "duties of a quasi judicial character." *Id.* at 135. If those quasi-judicial officers make decisions "after hearing[s]" that "affect interests of individuals," then the President in "particular case[s]" can't "properly influence or control" their judgment. *Id.*

The NLRB is an executive tribunal. *See* 29 U.S.C. § 153. It makes decisions after hearings. *See* 29 U.S.C. § 160. Its decisions affect the interests of individuals like, for example, Faizmart. It satisfies every one of *Myers*'s criteria for independent decisionmaking. On its own terms, *Myers* would not justify invalidating the Take Care Act's guarantee of agency independence.

Seila Law v. Consumer Financial Protection Bureau would not justify that holding either. 591 U.S. 197 (2020). There, the Court held that the President could unilaterally remove the Director of the Consumer Financial Protection Bureau (CFPB). *Id.* at 213. And, as in *Myers*, the Court recognized the President's constitutional monopoly over executive power. *Compare Seila Law*, 591 U.S. at 223–224, *with Myers*, 272 U.S. at 117. But the Court was also clear about what that constitutional monopoly means in practice: a "chain of dependence" subjects every executive officer to removal by the President. 591 U.S. at 224, 225 (quoting 1 Annals of Cong. 499 (J. Madison)). And reflecting the limits of that dependence, *Seila Law*'s remedy stopped at removal; the Court struck down the statute that gave the CFPB director protection and went no further. *Id.* at 238. Nothing in *Seila Law*'s removal holding controls today's dispute about ex parte contacts.

Even if *Seila Law* went beyond removal power (as the dissent suggests it does), it still wouldn't control this case, because the CFPB Director had starkly different responsibilities from the agency adjudicators at issue here. Unlike NLRB Board Members and ALJs, the Director was an enforcement officer who could "seek daunting monetary penalties against private parties on behalf of the United States in federal court." *Seila Law*, 591 U.S. at 220. And that authority was, importantly, "a quintessentially executive power." *Id.* So while *Seila Law* recognized (in dicta) that the President must "supervise" officials who exercise penalty-seeking power, *id.* at 204, 224, 238, that recognition says little about agency adjudicators who decide cases but don't prosecute them. Before we treat adjudication as another "quintessential[] executive power," *id.* at 220, Faizmart must show that we would be right to do so. Faizmart has not made that showing.

To sum up: The power to remove and the power to give orders have always been distinct from one another. *Myers* and *Seila Law* recognized the President's broad and important removal power, but they did not recognize the power that Faizmart suggests today. Instead, *Myers* explicitly stopped short of letting the President "influence or control" decisions in individual adjudications. 272 U.S. at 135. And *Seila Law* did not change that analysis when it struck down removal protections for a "quintessentially executive" enforcement officer. 591 U.S. at 220. While Article II allows the President to "consider [an adjudicator's] decision after its rendition as a reason for [removal]," *Myers*, 272 U.S. at 135, it has never guaranteed the President a right to shape every adjudicatory decision in the first instance.

B

Outside the doctrine of presidential removal power, Faizmart cites the Supreme Court's decision in *Trump v. United States*, 603 U.S. 593 (2024). In *Trump*, the Supreme Court held that communications between the President and the Attorney General are within the President's "conclusive and preclusive authority," and therefore beyond Congress's ability to control. *Id.* at 620. The President must "take care that the laws be faithfully executed," U.S. Const. art. II, § 3, and that obligation means she must also be able to "discuss potential investigations and prosecutions with [the] Attorney General and other Justice Department officials." *Trump*, 603 U.S. at 620. As applied in *Trump*, that constitutional necessity gave the President immunity from criminal prosecution when the allegedly criminal conduct was meeting with Justice Department officials to discuss potential investigations. *Id.* at 619.

Like *Seila Law*, *Trump* relied on the special constitutional status of investigation and prosecution. *Id.* at 620; *Seila Law*, 591 U.S. at 220. Those "quintessentially executive function[s]" fall so deeply within Article II's grant of executive power that the President has "exclusive authority and absolute discretion" over their administration. *Trump*, 603 U.S. at 620 (citations omitted).

For the same reason as *Seila Law*, *Trump* is distinguishable from this case. The quintessentially executive functions at issue in both those cases are not at issue here. The agency adjudicators protected by the Take Care Act don't investigate or prosecute anything; Congress left those duties to the General Counsel and the rest of the enforcement staff. Ignoring that difference, Faizmart asks us to treat communications with NLRB adjudication staff the same way we would treat communications with the Attorney General of the United States. We decline to do so today.

C

With no controlling precedent, we analyze the case under due process and first principles. They strongly counsel against extending the President's authority to include ex parte contacts with agency adjudicators. Recognizing that authority would pose significant fairness concerns in millions of agency adjudications. It would undermine goals that the separation of powers is meant to achieve. And it would be inconsistent with historical theory and practice. Accordingly, we refuse to go where precedent does not take us.

1

Giving the President special access to agency adjudicators would defeat the purpose of having them at all. Assume, for the sake of argument, that Faizmart is right about the scope of executive power. Then the President could call not only on adjudicators, but also on the enforcement staff who appear before them. No principled distinction would prevent that outcome; if "tak[ing] care that the laws be faithfully executed" requires contacts with adjudicators, then it requires contacts with enforcement staff too. U.S. Const., art II, § 3.[13]

Private meetings between administrative judges and prosecutors violate due process. That's the rule of *Morgan v. United States*, which held that when agency enforcement staff make arguments, defendants must have "reasonable opportunity … to know the claims thus presented and to contest them." 304 U.S. 1, 22 (1938). *Morgan* involved an adjudication by the Secretary of Agriculture to cap the rates that stockyards could charge farmers for space to show their animals. *Id.* at 15-16. The Secretary's "quasi-judicial" decision had "all the essential elements of a contested litigation" (i.e., argument from government lawyers and opposition from the stockyards), and it was bound by "the rudimentary requirements of fair play." *Id.* at 14–15, 20. So it was a problem when the Secretary cited hundreds of findings made by agency lawyers without giving the Stockyards an opportunity to see them first. *Id.* at 17–18. "[F]air play" required a "full hearing," *id.* at 15, and a "full hearing"

13. Though we need not definitively resolve the question here, the President's power to oversee enforcement staff would likely be even more expansive. "Investigative and prosecutorial decisionmaking is 'the special province of the Executive Branch,' and the Constitution vests the entirety of the executive power in the President." *Trump*, 603 U.S. at 620 (citations omitted).

was one where defendants knew about all the government's arguments against them, *id.* at 18. "[O]therwise," the Court held, the defendants' "right to submit argument … may be but a barren one." *Id.*

The President is the administrative prosecutor in chief, and private meetings are all the Take Care Act prohibits. *See* 5 U.S.C. § 557; *supra*, at 9 n.11. Under the Act, the President can make whatever claims she likes, as long as she makes them in public. If she orders enforcement staff to relay her views in hearings, then those views would not reach the adjudicator through ex parte contacts. And if she gives a public speech expressing her views on a case, then that speech was not an ex parte contact. But if she calls an adjudicator, and whispers an argument that the defendant never gets to hear, then she would violate due process, and that is not one of her "conclusive and preclusive" powers. *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring); *accord Morgan*, 304 U.S. at 22. "[A] President does not 'stand exempt from the general provisions of the constitution.'" *Trump*, 603 U.S. at 612 (citation omitted).[14]

2

Faizmart's view would also undermine the separation of powers. The Constitution separates the executive from the legislature and the judiciary "to prevent the 'gradual concentration'" of execution, legislation, and judgment "in the same hands." *Seila Law*, 591 U.S. at 223 (quoting *The Federalist No. 51*, at 349 (Madison) (J. Cooke ed. 1961)). The whole point is to "'counteract ambition' at every turn," so that no one branch ever takes on arbitrary power. *Id.*

That principle usually applies between different branches of the government. *See, e.g.*, *Youngstown*, 343 U.S. 579. But the separation of powers has never been as absolute in reality as it is in theory. *See, e.g.*, *SEC v. Jarkesy*, 603 U.S. 109, 128–130 (2024) (listing examples of legislature and executive making judiciary-like

14. JUDGE STEEVES-DECKER suggests that the President's position atop the chain of adjudicators somehow renders ex parte contacts permissible. *See post*, at 33. But that's not how adjudication works; allowing the President to decide cases heard by other officers is just another way to deny defendants "a fair and open hearing." *Morgan*, 304 U.S. at 18. If the parties argued in front of an ALJ and the President made the decision, then the parties argued in front of the wrong audience. If the real judge doesn't even have to be in the courtroom, then the right to a hearing "may be but a barren one." *Id.*

decisions). It has always been true that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). And when practice requires that integration, we can choose to vindicate the purpose of the separation of powers, or to ignore it.

Today, vindicating the separation of powers requires applying its principles inside the executive branch. The NLRB's separation-of-functions rules have done so for nearly eighty years, and we will not in this case interfere with that essential design. *See* 29 U.S.C. § 153. The Board's adjudicators make judge-like decisions in individual cases; their judgment cannot become subject to the executive's unchecked will. Otherwise, power would concentrate in the President's hands, and her ambition would be counteracted by no one.

3

This separation of powers within the executive branch is deeply rooted in our history. Thomas Jefferson wrote, after seven years as President, that the executive branch's Comptroller of the Currency was "the sole & supreme judge in all claims for money against the US." Letter from T. Jefferson to B. Latrobe (June 2, 1808), in *Thomas Jefferson and the National Capital* 429, 431 (S. Padover ed. 1946). He explained that the Comptroller "would no more receive a direction from me as to his rules of evidence than one of the judges of the supreme court." *Id.* He described, in effect, an officer in the executive branch that made decisions independently of the President.

James Madison, in a speech to the First Congress, "question[ed] very much" whether the President "can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States." 1 Annals of Cong. 638 (1789) (Joseph Gales ed., 1834). Because the Comptroller's "principal duty" was to "decid[e] upon the lawfulness and justice of … claims … between the United States and particular citizens," Madison thought that the Comptroller was an executive-branch officer who "part[ook] strongly of the judicial character," which gave "strong reasons why [he] should not hold his office at the pleasure of the executive." *Id.* at 636.

The most extensive early-American analysis of executive officers' independence came from William Wirt, President James Monroe's Attorney General. *See* The President and Acct. Officers, 1 Op. Att'ys Gen. 624 (1823). General Wirt advised the President that "[i]f the laws … require[d] a particular officer by name to perform a duty," then the President could not substitute his judgment for the officer's without failing to "tak[e] care that the laws were faithfully executed." *Id.* at 625. If the President crossed that line, then he would be "violating [the laws] himself." *Id.* Attorney General Wirt was clear: the President must enforce the law, and there's no exception for laws that limit her power to control her subordinates' decisions. *Id.* at 626. If Congress committed certain issues to lower officers' judgment, then the officer's decisions were "final and conclusive," regardless of whether the President agreed. *Id.* at 629.[15]

NLRB adjudicators fit squarely within this historical category. Like the eighteenth-century Comptroller, they "partake strongly of the judicial character," and that's a "strong reason[]" for them to be independent. 1 Annals of Cong. 636 (Madison).

* * *

No precedent recognizes a presidential power to control adjudication. Due process, the Constitution's structure, and our history weigh heavily against changing that situation today; deciding otherwise would unsettle the millions of cases that agencies decide every year. The Take Care Act does not violate the Separation of Powers.

Because Faizmart fails on both of its arguments, the decision of the NLRB is affirmed.

It is so ordered.

15. The dissent brushes off Wirt's opinion as inconsistent with *Myers*, *see post*, at 34–35, but its argument erroneously reads *Myers*'s holding to extend beyond removal (the issue that *Myers* actually decided) and into "general administrative control," 272 U.S. at 164. Removal and order-giving are, as we have shown, not the same thing.

JUDGE STEEVES-DECKER, dissenting:

In this case, the NLRB ordered Faizmart to pay significant penalties in a doubly defective proceeding. That proceeding was unconstitutional at its end, when the NLRB ordered a remedy reserved for real courts. And it was unconstitutional before it began, when Congress cabined off executive officers that are supposed to answer to the President. For these reasons and the others I express below, I respectfully dissent.

I

The Seventh Amendment guarantees a right to jury trial "in suits at common law." U.S. Const. amend. VII. This right "occupies so firm a place in our history and jurisprudence" that any attack on it "has always been and 'should be scrutinized with the utmost care.'" *SEC v. Jarkesy*, 603 U.S. 109, 121 (2024) (citation omitted). The jury trial is fundamental to our system of ordered liberty, and citizens should not be deprived of it lightly.

The Supreme Court has long held that the Seventh Amendment applies to any claim that is "legal in nature." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989). Quite simply, a legal case belongs in a court of law, an Article III court that provides protections including trial by jury and higher standards of evidence. To determine whether a suit is legal in nature, and invokes Seventh Amendment protection, courts consider both the remedy and cause of action, although the remedy is more important. *See Jarkesy*, 603 U.S. at 123. When the NLRB imposed a broad legal remedy on Faizmart without a jury trial, it violated the Seventh Amendment.

A

Here, as in *Jarkesy*, the remedy is "all but dispositive." *Id.* The Board required Faizmart to compensate Ramaswamy for all "foreseeable" monetary harms, including interest on credit card debt. This remedy is far closer to legal damages, which require an Article III court, than the equitable restitution that the NLRB could provide without implicating the Seventh Amendment. Legal damages begin "with the aim of compensation for the plaintiff" whereas equitable restitution has the goal of "preventing unjust enrichment of the defendant." *Int'l Union of Operating Engineers v. NLRB*, 127 F.4th 58, 96 (9th Cir. 2025) (Bumatay, J., dissenting) (quoting Dan B. Dobbs, 1 *Dobbs Law of Remedies* 280 (2d ed. 1993)). "In other words," monetary damages in law consider "what has the owner lost?" while equitable restitution is limited to returning what "the taker," in this case Faizmart, has gained. *Id.* (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999)).

The Board compensated Ramaswamy for all his losses, including those that go beyond the scope of what Faizmart gained, straying into the realm of legal damages that are the purview of Article III courts and constitutionally mandated juries. While Faizmart saved money by withholding Ramaswamy's wages, his hospital fees and credit card interest did nothing to enrich the company. Under a scheme of equitable restitution, the NLRB would be limited to disgorging Faizmart's gain. Instead, the Board's focus on indirect harm forced it into the realm of monetary damages, "the prototypical common law remedy." *Jarkesy*, 603 U.S. at 123.

The majority points to *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), to argue that this monetary remedy is merely an attempt to "restore the status quo." *Jarkesy*, 603 U.S. at 123 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)); *See ante*, at 11–12. In *Jones & Laughlin*, the Court held that the Seventh Amendment was not implicated when the NLRB ordered an employer to pay backpay, "wages for the time lost by the discharge." 301 U.S. at 48. Yet *Jones & Laughlin* considered only backpay and reinstatement, *id.*, and the NLRB today goes far beyond the scope of that ruling. Admittedly, reinstating Ramaswamy and issuing backpay were equitable remedies; they "restore[d] the status quo" by requiring Faizmart to return the money it saved by firing Ramaswamy. *Jarkesy*, 603 U.S. at 123 (quoting *Tull*, 481 U.S. at 422). But the additional relief went beyond the equitable restitution allowed in *Jones & Laughlin* because it aimed to compensate Ramaswamy for his losses. Given that these remedies are "all but dispositive," *Jarkesy*, 603 U.S. at 123, imposing them violated the Seventh Amendment.

B

Even without the NLRB's legal remedies, the "close relationship" between Section (a)(4) and a common-law cause of action would alone trigger the Seventh Amendment. *Jarkesy,* 603 U.S. at 125. Section (a)(4) mirrors the common-law cause of action for wrongful termination,[16] which can trace its history back to "18th-century actions brought in the courts of England." *Granfinanciera*, 492 U.S. at 42 (quoting *Tull*, 481 U.S. at 417–418); 1 William Blackstone, *Commentaries on the Laws of England* *413 (1765). Thus Section (a)(4), like the claims in *Granfinanciera* and *Jarkesy*, "borrows its cause of action from the common law" and must be adjudicated in Article III courts. *Jarkesy*, 603 U.S. at 136.

Wrongful discharge has a long history that can be traced back to English common law. English Courts assumed a one-year term of employment and held employers liable for terminations during that term if they lacked "reasonable cause." Blackstone, *supra*, at *413. The majority argues that the English rule is not analogous to modern wrongful termination because "any reason" for termination was permissible at certain times. *Ante*, at 13. But outside those times, English common law still provided a cause of action for an unjustified dismissal, and that cause of action is analogous to Section (a)(4). An employer's reason for firing an employee mattered, just like it matters under Section (a)(4). The scope of acceptable reasons to terminate employment may have been different 250 years ago, but common-law courts and the NLRB both evaluate an employer's rationale nonetheless. At bottom, the NLRB's claim is that Faizmart terminated Ramaswamy without the modern-day equivalent of "reasonable cause." Blackstone, *supra*, at *413. Because that claim would be a valid cause of action in English common-law courts, it follows that Faizmart has a right to a jury trial.

The rise of impersonal at-will employment in the United States during the industrial revolution did, as the majority notes, lead to a departure from the British standard. But the majority is incorrect to assume that the lack of a cause of action for wrongful termination in 1935 strips Faizmart of its Seventh Amendment protections. While it is true that Ramaswamy would not have been able to bring his claim in a common-law court in 1935, that does not change the fact that wrongful discharge is a "traditional legal claim[]." *Granfinanciera*, 492 U.S. at 52.

1935 is the wrong year to look for an analogue. The Seventh Amendment was ratified in 1791, which is why we look at "18th-century actions brought in the [common-law] courts of England," *Id.* at 42 (quoting *Tull*, 481 U.S. at 417–418). If

16. That exception exists in more than forty states, including New Storke.

the Seventh Amendment protected a person's right to a jury trial at that time, then it still protects that right now. And as I explain below, there is an unbroken line of continuity from the eighteenth-century common law to the modern cause of action for wrongful termination. When the Seventh Amendment was ratified, there was an individual private right to sue for the legal ancestor of wrongful termination. That right did not disappear just because it briefly went unused.

Granfinanciera affirms this conclusion. There, the Court made clear that Congress cannot "eviscerate the Seventh Amendment's guarantee" by using a "newly fashioned regulatory scheme" to "strip parties ... of their constitutional right to a trial by jury." *Id.* at 51–52. The NLRA may have been dressed up as a hot new regulatory scheme, but the claims it created "traced their ancestry to the common law." *Jarkesy*, 603 U.S. at 137. Unlike the OSH Act in *Atlas Roofing v. Occupational Safety and Health Review Commission*, Section (a)(4) was not an "innovative method[]" of dealing with modern problems. *Id.*; 430 U.S. 442, 444–445 (1977). It addressed conflicts between employers and employees, tensions visible in every peasant uprising since the dawn of civilization, and tensions demonstrably addressed in the common law. *See* Blackstone, *supra*, at *413. The NLRA may have been enacted in 1935, but it was not "self-consciously novel" even then. *Jarkesy*, 603 U.S. at 137.

Instead of looking for an analogous cause of action in 1935, we should focus on the modern public policy exception, which reflects continuity with the pre-industrial tradition and would allow Ramaswamy to bring his case before a jury in a common-law court today. As Courts abandoned the strong pro-business attitude that many of them embraced from Reconstruction until the New Deal, the "citadel" of at-will employment gave way to "piecemeal attacks" from new causes of action. *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 281 (2000) (*citing Scott v. Extracorporeal Inc.*, 545 A.2d 334, 336 (Pa. Super. Ct. 1988)). Courts across the country began to recognize a "public policy against firing an employee for giving testimony in court proceedings." *Id.* at 285. An employer does not have a right to fire an employee for refusing to perjure himself. If the employer, as Faizmart did, illegally fires an employee for testifying as whistleblower in the public interest, as Ramaswamy did, the employee can sue under the public policy exception to at-will employment. *See* *id.* at 286 (citing cases from across the country that recognize "actions for employees who were discharged … for testifying truthfully against their employers").

Broadly, courts recognize four elements of a wrongful discharge cause of action: (1) "the existence of a clear public policy," (2) a dismissal that "would jeopardize public policy," (3) the public policy conduct "was the reason for dismissal" and (4) the "employer lacked an overriding business justification for the dismissal." *Fitzgerald*, 613 N.W.2d at 281 n.2. In this case, the NLRB has determined that Faizmart "discharged" Ramaswamy "because he … [gave] information or testimony under" the NLRA. 29 U.S.C. § 158(a)(4). In other words: The NLRB proved that Ramaswamy's "giving testimony" on behalf of other employees seeking to join a union, was the "reason for [his] dismissal," *Fitzgerald*, 613 N.W.2d at 285, 286 (quoting *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959)), and that's exactly what Ramaswamy would argue to prove wrongful termination in a common-law court. *See id.* The NLRB's claim need not be "identical" to wrongful discharge under *Jarkesy*. *Jarkesy*, 603 U.S. at 126. It just has to be "close[ly] relat[ed]," and it is. *Id.*

The majority argues that we cannot use a twenty-first century common-law analogue to invoke the Seventh Amendment. *Ante*, at 13–14. But *Jarkesy* did just that, citing fraud cases from the 2020s to connect the SEC's action with common-law fraud. *See* 603 U.S. at 125 (citing, among other cases, *Pauwels v. Deloitte LLP*, 83 F.4th 171 (2d Cir. 2023)). I do the same by pointing to a modern common-law cause of action as an alternative to agency adjudication. There is a place for this action in a common-law court.

Thus, both Section (a)(4) and wrongful termination "target the same basic conduct," discharge in violation of public policy, and "operate pursuant to similar legal principles." *Id.* at 134. When the NLRB acts to regulate the behaviors of businesses in the private market, it creates claims that resemble common-law wrongful termination and have remedies that are only available in courts of law. This case is "a common law suit in all but name" that "must be adjudicated in Article III courts." *Id.* at 136.

C

Finally, the NLRB cannot invoke the public rights exception to evade jury trial. The exception is narrow, disfavored, and limited to historically executive matters. *See Jarkesy*, 603 U.S. at 128. It "has no textual basis in the Constitution" and "the presumption is in favor of Article III courts." *Id.* at 131, 132 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982) (plurality opinion)). The Court has outlined six categories that fall within the exception, all of which evidently do not apply here: the collection of revenue, customs and tariff law, immigration law, relations with Indian tribes, administration of public lands, and the granting of specific public benefits like pensions and patents. *Id.* at 129–130. These powers have fallen under the purview of the executive branch since the founding. *Jarkesy* refused to expand that list to include conduct resembling "common law fraud," *id.* at 126, and this Court should not go where *Jarkesy* would not, even if *Jarkesy*'s six categories are not exhaustive.

As Justice Gorsuch emphasized in his *Jarkesy* concurrence, "traditionally recognized public rights" require "a serious and unbroken pedigree." *Jarkesy*, 603 U.S. at 153 (Gorsuch, J., concurring). This case closely resembles wrongful termination and lacks a history of adjudication outside common-law courts; that falls well short of what it takes. To protect due process and the jury trial, there is a strong "presumption ... in favor of Article III courts" overcome only by a "'deeply rooted' tradition of nonjudicial adjudication." *Id.* at 154–155 (alteration in original) (citation omitted). The majority does not provide convincing evidence of such a tradition.

II

The majority also skips over the threat that the Take Care Act poses to the President's ability to carry out her Article II constitutional duties. As a basic matter, the Framers established that "[*t*]*he* executive power" lies with "*a* President." U.S. Const. art II, § 1 (emphasis added). In the next sentence, they referred to the President with the singular pronoun "[h]e." *Id.* The Constitution's repeated use of singular articles, nouns, and pronouns establishes that the "entire 'executive power' belongs to the President alone." *Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020) (quoting U.S. Const., art II, § 1, cl. 1). She is the person that is elected by the American people, and she is the one who should face their praise or blame.

The Framers' writings support this reading of the Constitution. *See, e.g.*, *The Federalist No. 70* (Alexander Hamilton) (Clinton Rossiter ed., 1961). And the Supreme Court has repeatedly endorsed reading the Constitution in this way. In 2020: "[L]esser officers must remain accountable to the President, whose authority they wield." *Seila Law*, 591 U.S. at 213. Nearly a century earlier: The President "may properly supervise and guide" executive officers because Article II "evidently contemplated" a "*unitary* and uniform execution of the laws." *Myers v. United States*, 272 U.S. 52, 117 (1926) (emphasis added).

In 1791, the Constitution mandated a unitary executive, and nothing in the intervening 234 years has altered this reality. I proceed to analyze the legal questions of this case against this background. And I conclude that the Take Care Act is unconstitutional.

A

The Take Care Act forbids the President from "mak[ing] or knowingly caus[ing] to be made … an ex parte communication" to an agency adjudicator that is "relevant to the merits" of their proceedings, 5 U.S.C. § 557(d)(1)(A), and vice versa, from agency adjudicator to President. *Id.* § 557(d)(1)(B). These agency adjudicators are members of the executive branch serving under and at the pleasure of the President. So in effect, the Take Care Act forbids communication between the executive's head and its hands. In so doing, the Act unconstitutionally meddles with the President's executive power and violates Article II of the United States Constitution.

This conclusion follows from the binding precedent. Almost 100 years ago, the *Myers* Court established that the President is *the* decision-maker for the activities of the executive branch. *See Myers*, 272 U.S. at 131.[17] *Myers* teaches that the Constitution forbids the legislature from placing upon the President's neck the heavy weight of subordinates who frustrate her ability to faithfully execute laws. *Id.* Such

17. The majority makes much of the one sentence in *Myers* that cuts the other way. *See ante*, at 16–17 (quoting *Myers*, 272 U.S. at 135). That sentence says that there "*may be*" duties that the President cannot supervise. 272 U.S. at 135. But as the rest of this opinion demonstrates, *Myers* was right to be tentative, because such duties are not consistent with the text, history, or structure of the Constitution.

frustration can come from open and rank opposition, or disloyalty. *Id.* But it can also arise from sheer incompetence, such as poor technical skill or poor understanding of the President's actual policy and objectives. This Act does nothing to alleviate the former and actively forbids the President from rectifying the latter.

In the Executive branch, "the discretion to be exercised is that of the President in determining the national public interest and … the action to be taken by his … subordinates to protect it. In this field his cabinet officers must do his will." *Id.* at 134. How are the President's subordinates supposed to execute her will if they do not know or understand it? How can they know or understand it if the President cannot communicate with them about it? They cannot. The Take Care Act prevents the President from doing what the Court has explained she must be able to do.

The Court reaffirmed *Myers*'s commitment to presidential power in *Seila Law*. That case updated removal power jurisprudence for today's government, but kept the core reality that the President's power "generally includes the ability to remove executive officials." *Seila Law*, 591 U.S. at 213–14.[18] It reaffirmed that the President's power to remove subordinate officials stems from the maintenance of his policy objectives. If the President, in furtherance of these aims, has the power to completely remove subordinate officials, agency adjudicators included therein, then the President has the lesser power to communicate with them during the course of their work.[19] *Seila Law* again established the President's authority to direct the executive branch, a power which Congress has, through the Take Care Act, limited.

Seila Law also explained that the President's control over the executive is not just an abstract conclusion but an integral part of our government's separation

18. The Court noted the continuity of this decision with the Framers' thoughts by quoting James Madison: "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Seila Law*, 591 U.S. at 213–14 (quoting 1 Annals of Cong. 463 (1789)).

19. The majority stresses that "[t]he power to remove and the power to give orders [are] distinct from one another." *Ante*, at 17–18. But that's not what the Constitution requires. The President can remove executive officers precisely because the threat of removal ensures their fidelity. And the alternative makes no sense. Forcing the President to settle for decisions she disagrees with (or else fire the decisionmakers entirely) would do more harm than good. Power to remove officers is worth very little if the President could not attempt to correct their errors first.

of powers. Congress's checks over the President's power are several: it decides the "salary, duties, and even existence of executive offices." *Seila Law*, 591 U.S. at 231 (citing *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010)). Giving orders and backing them up with removal is the President's "*only* tool to counter Congress's influence." *Id.* (emphasis added). And the President's "accountab[ility] ... to elections" is the strongest tie between executive officers and the will of the people. *Id.* at 224. With the power to communicate included in the power to remove and essential to democratic control, *Seila Law* established that the President's ability to do what the Take Care Act prohibits is a fundamental part of maintaining our government's structure.

And *Trump v. United States* says the same thing. 603 U.S. 593 (2024). Contacting enforcement and adjudicatory officials within the executive branch falls within the President's "conclusive and preclusive" authority, and thus outside Congress's admittedly long reach. *Id.* at 620. When the President uses powers derived from the Constitution, "his discretion in exercising such authority cannot be subject to further judicial examination." *Id.* at 608. The same is true for Congress, which "cannot act on" subjects within the "conclusive and preclusive" power of the president. *Id.* at 609.

Contacting and supervising subordinates falls within those "conclusive and preclusive powers." *Id.* *Trump* held that communications between then-President Trump and his Acting Attorney General were official acts because of "the President's official relationship to the office held by that individual." *Id.* at 617. By the same principle, the President can supervise NLRB adjudicators, who like the Attorney General, assist her in her duty to "take Care that the Laws be faithfully executed." *Trump*, 603 U.S. at 620 (quoting U.S. Const., art. II, § 3). By prohibiting communication, the Take Care Act interferes with the President's supervision of executive officers. This is something Congress cannot do.

B

As the Court explained in *Seila Law*, leaving intact the President's authority to communicate with his subordinates about their work is not only an abstracted application of constitutional principles. It is also a concrete practice of good government. First and foremost, it allows for the vigorous application of law. From the very start, Alexander Hamilton recognized that "[a] feeble executive implies a feeble execution of the government," and "a government ill executed, whatever it may be in theory, must be, in practice, a bad government." *The Federalist No. 70*, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

As true as this sentiment was in 1788, it has only become more accurate today. As the objects of government grow ever more complex, so must the execution of the laws. To preserve an energetic executive, the Framers "chose not to bog the executive down with the 'habitual feebleness and dilatoriness' that comes with 'a diversity of views and opinions.'" *Seila Law*, 591 U.S. at 223 (citing *The Federalist No. 70*). The Framers designed an executive branch with one president, not a council of men with independent minds who can deliberate, debate, and disagree. "[D]ecision, activity, secrecy, and dispatch" all require the timely and specific intervention of the President in her subordinate's decisions. *The Federalist No. 70* at 424 (Hamilton) (Clinton Rossiter ed., 1961). Accordingly, this country will be worse off for that intervention's prohibition.

Impeding the President's ability to communicate with her subordinates hinders the public's ability to hold the executive accountable for its action (and inaction). The Supreme Court has appealed to such concerns over accountability in directing lower courts to respect the President's control over the executive. In *Myers*, they explained that the President is the most direct representative of the people because she is "elected by all" of them and carries their mandate "to exercise [her] executive power under the Constitution." *Myers*, 272 U.S. at 123. The President is the one with the mandate, not her subordinates. There is no reason to construe the Constitution as limiting the president's power beyond the express limitations it lays out. *See Myers*, 272 U.S. at 123–24.

The presidency's historical and structural importance require as much. If the American people have an issue with a U.S. Attorney's decision to press charges, or the National Park Service's decision to close a trailhead, they know that, while the President herself may not be involved in every decision, all executive officials ultimately answer to her. She takes ultimate responsibility for all those officials' actions at the ballot box, and the system only works if she maintains supervisory authority. The Take Care Act muddies these lines of accountability, reducing the people's power to identify mistakes and correct them with their votes.

C

The majority, in defending the Take Care Act, claims that allowing the President to have ex parte contacts with agency adjudicators would violate the due process rights of agency defendants. On the majority's view, unless this Court upholds the Act, the President will be able to make secret arguments to agency adjudicators, which deprives defendants of their right to respond. *See Morgan v. United States*, 304 U.S. 1 (1938); *ante*, at 19–20. But that claim misunderstands the President's role. She is not just another enforcement officer. She is also the executive branch's highest adjudicator, for the reasons explained above. So when she contacts an ALJ or an NLRB member, she's exercising both powers, a judge as much as a prosecutor.

That is, of course, a lot of power for one person. But it is still our constitutional design. We "divide power everywhere *except* for the Presidency," and constrain the President's undivided power by "render[ing] the President directly accountable to the people through regular elections." *Seila Law*, 591 U.S. at 224. The majority's view of due process ignores the process we follow every four years, when millions of Americans vote to choose the head of the Executive Branch.

And to the extent there's a due process problem, it is of the majority's own creation. As I explained above, this case should never have been adjudicated in the Executive Branch in the first place. And Congress's constitutionally flawed decision to put cases like this one under the President is not a reason to artificially limit the President's power. Instead, the President's power over adjudicators is yet another reason (if the majority is right about due process) that this case belongs in the judiciary.[20] Simply put, if due process is a problem, then cutting away at the President's proper control of her officers is the wrong solution.

D

Lastly, a word about history. The majority cites James Madison, Thomas Jefferson, and Attorney General William Wirt to defend its freshly-minted "separa-

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20. Incidentally, sending the case to an Article III Court would "vindicate the purpose of the separation of powers" far better than the majority's intrusive limits on presidential authority. *Ante*, at 20–21. It would, as the name of the principle suggests, *separate* the powers instead of jumbling them together in the same branch.

tion of powers within the executive." *Ante*, at 21–22. But not one of those sources reveals much about the meaning of the Constitution, and they represent a view of our history that the Supreme Court has affirmatively rejected.

The majority omits important context from the speech it cites by James Madison. While it's true that Madison thought the Comptroller of the Currency "part[ook] of judicial qualities," his proposal was to make that officer more "dependent" on the political branches, not less. 1 Annals of Cong. 636 (1789); *see Seila Law*, 591 U.S. at 227 n.10 (citing *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 499, 500 n. 6 (2010)) (reaching the same conclusion about the same speech). And Madison withdrew his proposal the next day. 1 Annals of Cong. 639 (1789). Madison's view lasted one day and cuts against the majority's conclusion.

Thomas Jefferson's letter exhibits exactly the behavior that the Constitution designed the Presidency to prevent. Addressed to the Architect of the Capitol, Jefferson's letter explained and apologized for a deficit in the construction budget. Letter from T. Jefferson to B. Latrobe (June 2, 1808), in *Thomas Jefferson and the National Capital* 429, 431 (S. Padover ed. 1946). He blamed Congress for not appropriating enough money. *Id.* at 431. And when he discussed the Comptroller's independence, it was only to explain that he could not be accountable for the Comptroller's decisions. *Id.* That deflection of accountability is, as I have discussed, exactly what is not supposed to happen. *See The Federalist No. 70*, at 428 (Hamilton) (C. Rossiter ed., 1961) (arguing that between independent officers and the President, blame can be "shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author").

And Attorney General Wirt's opinion runs head on into contradictory Supreme Court precedent. General Wirt understood the President's power narrowly. On his view, she may ensure only that an executive officer "performs his duty faithfully—that is, honestly: not with perfect correctness of judgment, but honestly." The President and Accounting Officers, 1 Op. Att'ys Gen. 624, 626 (1823). *Myers*, on the other hand, held that the President can remove officers because they hold "different views of policy," no matter how honestly those views are held. 272 U.S. at 131. That, again, is because only the President's views were chosen by the people, and in case of disagreement, the people win.

All of this is affirmed by binding Supreme Court precedent. *Myers* spent dozens of pages exhaustively reviewing the history of Presidential authority from 1789 to the twentieth century. *See* 272 U.S. at 109–173. It concluded that she has "the general administrative control of those executing the laws." *Id.* at 164. *Seila Law* considered some of the majority's precise historical arguments and rejected them. 591 U.S. at 227 n.10. The Act is unconstitutional, and nothing counsels turning the cheek to its unconstitutionality.

* * *

Today, the majority ignores two glaring constitutional errors and leaves Faizmart with the bill. To make the executive branch fit an adjudicatory role that it was never supposed to have, they contort the President's power into a shape it was never supposed to take. I cannot join in that decision.

For the foregoing reasons, I respectfully dissent.

Appendix A

5 U.S.C. § 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

…

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

…

(F) As used in this subsection, the term 'interested person' shall include

(i) the President,

(ii) the Vice President,

(iii) any person holding a position under 3 U.S.C. §§ 105–106, and

(iv) any other officer or employee of the United States who does not hold a position inside the agency.

Appendix B

29 U.S.C. § 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer–

…

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

…

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