No. _____

IN THE

# Supreme Court of the United States

**GEORGE R. JARKESY, JR., and PATRIOT28 LLC**
***Cross Petitioners,***

**v.**

**SECURITIES AND EXCHANGE COMMISSION**
***Respondent.***

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

## CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, under special review statute 15 U.S.C. § 78y, circuit courts on a petition for review of a Securities and Exchange Commission final order resolving an enforcement adjudication may "remand" back to the agency after overturning the final order because the proceedings were conducted in violation of law or the Constitution, where § 78y expressly vests only the jurisdiction to "affirm," "modify" or "set aside" the order and does not confer jurisdiction to remand.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Cross-Petitioner Patriot28 LLC, a Delaware limited liability company, discloses that there is no parent or publicly held company owning 10% or more of its membership units.

## RELATED PROCEEDINGS

United States District Court (D.D.C.)

*Jarkesy v. United States SEC*, No. 140cv-114 (June 10, 2014)

United States Court of Appeals (D.C. Cir.):

*Jarkesy v. SEC*, No. 14-5196 (Sept. 29, 2015)

United States Court of Appeals (5th Cir.):

*Jarkesy v. SEC*, No. 20-61007 (May 18, 2022)

United States District Court (S.D.- Tex.)

*Jarkesy v. SEC*, No. 3:22-cv-00405 (pending)

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MISCELLANEOUS

MISCELLANEOUS—CONTINUED

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## CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI

George R. Jarkesy, Jr., and Patriot28 LLC respectfully cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, conditioned upon the granting of a writ of certiorari sought by the Securities and Exchange Commission in No. 22-859.

## OPINIONS BELOW

The denial of rehearing by the en banc court of appeals by a 10-6 vote (App. 1a-2a), is reported at 51 F.4th 644. The opinion of the court of appeals panel (App. 3a-58a) is reported at 34 F.4th 446. The final order of the Securities and Exchange Commission (App. 59a-107a) is available at 2020 WL 5291417.

## JURISDICTION

The judgment of the en banc court of appeals was entered on October 21, 2022. The Petitioner filed its Petition for a Writ of Certiorari on March 8, 2023, in No. 22-859. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Respondents' Conditional Cross-Petition is filed pursuant to Supreme Court Rule 12.5.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the appendix to the Petition, supplemented by the attached Cross-Petition appendix ("Cr.-Pet. App."). App. 226a-227a; Cr.-Pet. App. A1 -A12.

## STATEMENT OF THE CASE

### 1. Statutory Background

Congress passed the Securities Exchange Act in 1934 ("Exchange Act"),[1] establishing the Securities and Exchange Commission ("SEC") and providing for, *inter alia*, the regulation of the secondary trading of securities through the exchanges, regulation of broker-dealers, and incorporation of claims for fraud to invigorate the new agency's enforcement arsenal.[2] The Exchange Act vested the Commission with the authority to conduct investigations and file lawsuits or conduct administrative proceedings against registered entities or individuals to enforce those antifraud provisions.[3]

The SEC's administrative enforcement process eventually came to be dominated by administrative law judges ("ALJ's") as adjudicators over "evidentiary hearings," the administrative version of a trial. The Exchange Act provides for internal "appeals" from the "initial decisions" of those ALJ's to the five-member Commission, culminating in a Commission "final order" that conclusively affirms, modifies or vacates

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[1] Pub. L. No. 73-291, 48 Stat. 881, ch. 404, codified at 15 U.S.C. § 78a *et seq*.

[2] Previously, securities fraud was litigated in state and federal courts by private parties, using common law causes of action that were largely incorporated into § 10b-5 of the Exchange Act. App. 13a-14a.

[3] See 15 U.S.C. §§ 78u – 78u-3.

the ALJ's initial decision.[4] Superseding the Administrative Procedure Act ("APA"), the Exchange Act then provides that the non-prevailing party may seek judicial review of the Commission's final order in a circuit court of appeals through an exclusive special review proceeding pursuant to § 25 of the Act, codified at 15 U.S.C. § 78y.[5] The APA does not apply to circuit court reviews of Commission final orders.

The scope of a circuit court's remedial power under § 78y is the focus of this cross-petition. Congress chose to expressly cast the available remedies in subsection (a)(3) as a matter of the courts' jurisdiction, not as a mere procedural rule. Those remedies are limited to (1) affirmance, (2) modification or (3) vacatur of the Commission's final order. The statute provides for one narrow circumstance under which the special reviewing court may "remand" the matter to the agency, and only where one of the parties has moved for remand to adduce additional facts material to the issues under review by the court. That unique circumstance did not arise in this case.

**2. Factual and Procedural Background**

Cross-petitioners Jarkesy and Patriot28 LLC (collectively hereafter, "Jarkesy") found themselves in the SEC's crosshairs in 2011. George Jarkesy was a businessman and investor who had set up two private investment partnerships starting in 2007, managed by an "adviser" company (Patriot28), for a modest

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[4] 5 U.S.C. § 704; 17 C.F.R. § 201.410.

[5] App. 2a, and discussion *supra* at 13, n.28.

number of accredited investors.[6] The funds were small enough that neither was required to register with the SEC.[7] Despite the lack of any investor complaints when the funds' portfolio lost value after the 2008 market collapse, the SEC's New York office launched an investigation in 2011, and in 2013 the agency elected to file a case in its in-house courts[8] primarily charging conventional fraud under the Securities Act, Securities Exchange Act and Advisers Act for "making an untrue statement of material fact or omitting to state a material fact."[9]

The SEC sought the imposition of lifetime securities-industry and officer-and-director bars and over $100 million in punitive civil monetary penalties. Jarkesy was put to "trial" before one of the agency's ALJ's starting in February of 2014,[10] a forum where

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[6] App. 2a, 72a.

[7] App. 72a.

[8] The charging instrument in an SEC administrative proceeding is called an "Order Instituting Administrative Proceedings," or "OIP." The OIP against Jarkesy was filed March 22, 2013.

[9] Section 10(b) and Rule 10b-5 of the Securities Exchange Act, 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b); § 17(a) of the Securities Act, 15 U.S.C. § 77q(a)(2); §§ 206(1), (2) and (4) of the Advisers Act and Rule 206(4)-8, 15 U.S.C. § 80b-6(4), 17 C.F.R. § 275.206(4)-8. *See* App. 2a-3a.

[10] Jarkesy filed suit for injunctive relief pre-hearing in the District of D.C. in January, 2014, to stop the administrative proceeding on most of the grounds raised in his later Petition for Review in the Fifth Circuit. The district court denied relief for lack of subject matter jurisdiction due to lack of exhaustion of remedies, *Jarkesy v. SEC*, 48 F.Supp.3d 32 (D.D.C.) (2014), a ruling which was upheld on appeal to the D.C. Circuit, 803 F.3d

the SEC virtually always wins.[11] Jarkesy's evidentiary hearing consumed 12 full days of testimony over six weeks.[12] The agency's ALJ then took some six months to issue an Initial Decision in the agency's favor, after which the full Commission granted the Division of Enforcement's request to expedite Jarkesy's internal appeal to the Commission.[13] The Commission then took nearly six years to issue its "expedited" Final Order,[14] from which Jarkesy filed his Petition for Review in the Fifth Circuit. In all, the agency's administrative prosecution of this garden-variety securities fraud case has consumed over a decade.

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9 (D.C. Cir. 2015), without ever reaching the merits of Jarkesy's constitutional challenges.

[11] At the time of Jarkesy's administrative "trial" in early 2014, the agency's in-house win rate was 100%, against a less pristine 61% success rate in federal court, where juries are employed. *See* Nicolas Berg et al., *SEC's Continued Use of Administrative Forum Irks Critics, Raises Sticky Constitutional Questions*, CORP. L. & ACCOUNTABILITY REP., Dec. 19, 2014, at 1722 ("Although the SEC prevailed in 61 percent of its federal cases in the 12 months prior to September 2014, it won every case heard before an ALJ during the same period"); Jenna Greene, *The SEC's on a Long Winning Streak*, NAT'L L.J., Jan. 22, 2015.

[12] App. 156a.

[13] App. 155a, Cr.-Pet. App. A12. The ALJ's Initial Decision was published on the SEC's official website, to be accessed by banks, brokerage houses, the media, and the general public for the six years it took to obtain this Article III review.

[14] The Commission rejected all of the constitutional claims and ordered Mr. Jarkesy to pay a civil penalty of $300,000, ordered Patriot28 to disgorge nearly $685,000, and barred Jarkesy from associating with brokers, dealers, and advisers, from offering penny stocks, and from ever serving as an officer or director of an advisory board or as an investment adviser. App. 3a-4a.

In his Petition for Review in the Fifth Circuit, Jarkesy raised five constitutional claims, and the Fifth Circuit ruled on three of them. The court held that (a) by trying private parties and seeking penalties through its own "in-house" courts for securities fraud, the SEC was depriving parties like Jarkesy of their Seventh Amendment right to a jury trial;[15] (b) by delegating unfettered legislative power to the SEC to choose for itself whether to cast a target into an in-house adjudication and thereby strip the target of the right to trial by jury, the Dodd-Frank Wall Street Reform and Consumer Act of 2010 ran afoul of the non-delegation doctrine, in violation of the Constitution's separation of powers and the Legislative Vesting Clause;[16] and (c) the agency's Administrative Law Judges (ALJ's), including the one who presided over Jarkesy's case, were inferior officers sitting unconstitutionally because they are separated from presidential control by at least two levels of for-cause tenure protection, in violation of the Take Care Clause of Article II.[17]

The Fifth Circuit vacated the Commission's Final Order on the Seventh Amendment and non-delegation violations,[18] the remedy dictated by the jurisdictional commands of § 78y. But the court then departed from the express terms of the statute in two ways: (1) it declined to apply any one of the three

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[15] App. 17a, 20a.

[16] *Id*. at 28a.

[17] *Id*. at 31a, 34a. The SEC's Petition challenges each of these.

[18] *Id*. at 20a, 28a.

statutorily-prescribed remedies for the Take Care Clause violation,[19] and (2) it "remanded" the Final Order to the SEC "for further proceedings consistent with [its] opinion."[20] The court did not specify what "further proceedings" the agency might want to entertain, or explain whether any such proceedings against Jarkesy would be statutorily or constitutionally permissible.

## REASONS FOR GRANTING THE PETITION

### CIRCUIT COURTS HAVE NO GENERAL JURISDICTION TO "REMAND" TO THE SEC UPON STATUTORY REVIEW OF A COMMISSION ADJUDICATION UNDER 15 U.S.C. § 78y

It has long been recognized that the jurisdiction Congress confers on the federal courts may not "be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1994); *Sheldon v. Sill*, 49 U.S. 441, 449 (1850). But that is exactly what the circuit court did in the proceedings below. This cross-petition contests the Fifth Circuit's choice of remedies after disposing of a petition for review of a final order of the Securities and Exchange Commission under special review statute 15 U.S.C. § 78y—imposing a remedy that statute did not include. In § 78y, Congress provided circuit courts with

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[19] *Id*. at 29a, n.17.

[20] *Id*. at 35a.

narrow *jurisdiction* to impose only three remedies: affirmance, modification or vacatur.

The Fifth Circuit vacated the SEC's final order on two constitutional grounds and declined to impose one of the three available remedies on a third ground—and then "remanded" the final order, apparently on all three grounds, to the Commission for some unspecified "further proceedings." App. 29a. But on its face, § 78y prohibits circuit courts from remanding to the agency after invalidating a final order. Because other circuit courts have also followed this unauthorized procedure[21]—outside of the jurisdiction conferred by Congress—this Court should grant this cross-petition to vindicate the integrity of Congress' constitutional power to dictate the limits of the inferior courts' jurisdiction and the well-settled principles of statutory construction.

The scope of remedial authority granted to the circuit courts on review of SEC adjudication final orders is jurisdictional. With one narrow exception not applicable here, that authority does not include the power to "remand" to the agency for further proceedings once the court has disposed of the petition for review or, for that matter, to issue advisory opinions with no remedy attached.[22] The 15 U.S.C. §

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[21] *See* case examples *infra* at 14, n.30, n.31.

[22] By deciding that the ALJ who adjudicated Jarkesy's case was an inferior constitutional officer presiding in violation of the Take Care Clause in Art. II, § 3, but providing no statutory remedy for that violation, the Fifth Circuit effectively rendered no more than an advisory opinion or, arguably, a declaratory judgment. A circuit court reviewing an SEC final order under §

78y special statutory review proceeding is qualitatively different from an ordinary "appeal" from a lower court and from a review proceeding under the APA or other special statutory reviews of actions of other agencies.

The court below was without any remedial jurisdiction to order further proceedings to take place in the agency. Congress did not see fit to expressly provide that authority in § 78y(a)(3), and it cannot be judicially divined from the statute as a form of inherent power ancillary to the reviewing court's statutory jurisdiction.

### A. Section 78y Contrasts Starkly with Other Circuit Court Review Statutes

To contextualize the reach of remedial power available to the circuit courts, it is helpful to contrast the statutory grants of authority conferred for review of other proceedings. The federal courts' jurisdictional authority flows from the enabling language of the Exceptions and Regulations Clause, Congress' power to create the lower federal courts, and Congress' power to do everything necessary and proper to carry the courts' powers into effect.[23] Congress is vested with the sole power to create and circumscribe federal courts' jurisdiction. Congress has chosen to define the

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78y has no jurisdiction to issue advisory opinions or declaratory judgments—it must enter one of the three dispositions commanded by the statute.

[23] U.S. CONST. art. I, § 8, cls. 9, 18; art. III, § 1, cl. 1; art. III, § 2, cl. 2.

federal courts' "appellate" remedial power broadly in 28 U.S.C. § 2106, which provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order *of a court* lawfully brought before it for review, *and may remand the cause* and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(Emphasis supplied.) Section 2106 is clear in expressing the authority of courts hearing cases under its purview to "remand" as they deem necessary. But by its own terms § 2106 applies only to higher courts sitting as appellate tribunals from orders or judgments *of lower courts*. The power to enter an order of remand to "require such further proceedings to be had as may be just under the circumstances" applies to review of judicial—not agency—action.[24]

A "petition for review" proceeding from an SEC final order is fundamentally distinct from a § 2106 appeal, the Congress having vested circuit courts with only limited jurisdiction in the review of SEC final orders.[25] It also differs markedly from a circuit court

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[24] This Court has long recognized that its general remand authority flows from the express grant of that power in § 2106. *See Wood v. Georgia*, 450 U.S. 261, 266 n.5 (1981) (citing § 2106 in ordering remand).

[25] Recognizing the confusion, the Court has recently noted that there are crucial differences between a special collateral review

review under the APA, the most common source of authority to review federal agency actions. The Court has long held that judicial review of agency actions (or inactions) under the APA pursuant to 5 U.S.C. § 706 includes implicit authority to remand. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943) (known as "*Chenery I*"). But the special provisions of § 78y are more limiting than those in § 706, precluding an implicit remand power. *See infra* at 22-26.

15 U.S.C. § 78y is indeed very different, subsection (a)(3) of which omits any blanket grant of remand authority:

> On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

15 U.S.C. § 78y(a)(3).[26] Thus a circuit court is vested by Congress with jurisdiction to dispose of a petition for review of an SEC final order from an enforcement adjudication in only one of three ways: (1) to *affirm*

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of an agency action and an ordinary § 2106 appeal. *See Garland v. Ming Dai*, 141 S. Ct. 1669, 1678 (2021).

[26] Congress appended the qualifier "final" to § 78y in 1975, further narrowing the class of proceedings eligible for such special circuit court review to "final orders." *See* Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 20, 89 Stat. 97, 158. The quoted language comprising subsection (a)(3) has been otherwise left undisturbed since the statute was passed in 1934, more than a decade before the APA was enacted.

the SEC's order; (2) to *modify* and enforce the SEC's order; or (3) to *set aside*[27] the SEC's order.

This short list defines the full extent of the circuit court's remedial jurisdiction to review SEC "final orders" and supersedes the general agency-review authority over agency "action" in § 706 of the APA. A circuit court's authority to directly review a Commission adjudication comes solely from § 78y,[28] leaving the circuit court with only the enumerated remedies Congress chose to set out in (a)(3).

Although the courts, including this Court, have sometimes overlooked these jurisdictional limita-

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[27] Courts have historically equated "set aside" with "vacatur," at least in the APA context, and the terms are thus used interchangeably herein. *See, e.g., American Petroleum Inst. v. EPA*, 906 F.2d 729, 742 (D.C.Cir.1990) ("vacating" rulemaking pursuant to APA statutory authority to "set aside" agency action).

[28] *See* 5 U.S.C. § 703 (judicial review of agency action "is the special statutory review proceeding relevant to the subject matter in a court specified by statute"; *Steadman v. SEC*, 450 U.S. 91, 105 (1981) ("[T]he general provisions of the APA are applicable only when Congress has not intended that a different standard be used in the administration of a specific statute") (Powell, J., concurring); *Kixmiller v. SEC*, 492 F.2d 641, 645 (D.C. Cir. 1974) ("'Agency action,' as defined in the Administrative Procedure Act, 'includes . . . failure to act,' 5 U.S.C. § 551(13), and the Act commands the reviewing court to 'compel agency action unlawfully withheld or unreasonably delayed.' *Id.* § 706(1). But [§ 78y], which sets our jurisdiction, 'applies in terms only to 'orders,' a narrower concept than that of 'agency action' reviewable in district courts," quoting *Independent Brokers-Dealers Trade Ass'n v. SEC*, 442 F.2d 132, 143 (D.C. Cir. 1971)).

tions,[29] they have done so with only passing mention of § 78y (a)(3), never focusing on or even reciting the statutory language.[30] Mostly the courts have cited no authority at all or have mistakenly relied on the APA's remand power, likely as a matter of habit, disregarding that their review jurisdiction was invoked exclusively under § 78y and not the APA.[31] It does not appear that the issue raised in this Cross-Petition has been specifically pressed before.

### B. Statutory Construction Rules Demonstrate the Lack of General Remand Jurisdiction

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[29] *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); *Checkosky v. SEC,* 23 F.3d 452, 462 (D.C. Cir. 1994), *superseded by regulation on other grounds*, 17 C.F.R. § 201.102(e). This Court's remand in *Lucia* was technically a remand to the circuit court, not the agency, so the remedy was authorized by 28 U.S.C. § 2106, but the Court's detailed prescription for a new hearing before a different ALJ clearly anticipated a court-directed return by the circuit court to the SEC for such further proceedings. That outcome would be unremarkable in an APA review, but falls outside the permissible remedies available under § 78y.

[30] *See, e.g., SEC v. Seghers*, 298 F. App'x 319, 337 (5th Cir. 2008) (remanding Commission enforcement final order after affirming in part and vacating in part, but never referencing § 78y); *Beck v. SEC*, 413 F.2d 832, 834 (6th Cir. 1969) (inserting only a passing citation to § 78y and proceeding to find insufficient support in record for securities industry bar, then remanding without vacating Commission order).

[31] In *Checkosky, supra* n.29, the D.C. Circuit referred to § 78y but then cited the inapplicable § 706 of the APA as supporting remand in that case. 23 F.3d at 462. *See also, Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 183 (2d Cir. 1976) (in § 78y review, imposing remedy of modification of Commission sanctions order, but doing so under authority of APA instead of § 78y).

### 1. The Statutory Language is Unambiguous

Confusion between the APA and § 78y notwithstanding, the (a)(3) language is clear and concise, and therefore dispositive. The starting point for statutory analysis is the text itself. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006); *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 98 (2003). When examining the law's language, the Court "must presume that Congress 'says in a statute what it means and means in a statute what it says there.'" *Rotkiske v. Klemm*, — U.S. —, 140 S. Ct. 355, 360 (2019) (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). And in most situations, "judicial inquiry is complete" when the "terms of a statute [are] unambiguous." *Rubin v. United States*, 449 U.S. 424, 430 (1981); s*ee Tex. Educ. Agency v. United States Dep't of Educ.*, 908 F.3d 127, 132 (5th Cir. 2018) ("The judicial inquiry thus 'begins with the statutory text, and ends there as well if the text is unambiguous.'" (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)).

These tenets of statutory construction are especially critical respecting the statutory definition of federal court jurisdiction. That is because the jurisdiction Congress confers may not "be expanded by judicial decree." *Kokkonen, supra,* 511 U.S. at 377; *Sheldon v. Sill*, 49 U.S. 441, 449 (1850) (courts "have no jurisdiction but such as the statute confers."). More generally it is likewise well settled that "absent [statutory] provision[s] cannot be supplied by the courts." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 94 (2012)). *See also,*

*Vaden v. Discover Bank*, 556 U.S. 49, 59 n.9 (2009) ("when Congress wants to expand [federal court] jurisdiction, it knows how to do so clearly and unequivocally") (cleaned up). For the circuit courts to exceed the jurisdictional boundaries set by Congress "is, by very definition, for a court to act ultra vires." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

Congress well knew how to "clearly and unequivocally" include general remand power in its § 78y jurisdictional grant—as it did for "regular" appeals in § 2106—but elected not to do so. The statute is clear that "the court has jurisdiction . . . to affirm or modify and enforce or to set aside" the Commission's final order—no more, no less. The missing jurisdictional remedy "cannot be supplied by the courts," however compelling the courts' frustration with the statute's Spartan list of remedies. As the Court explained in *Tennessee Valley Authority v. Hill*, "[o]ur individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." 437 U.S. 153, 194 (1978).

To be sure, courts have been known to stray from the literal statutory text in agency reviews under the APA, disposing of reviews by forsaking the "set aside" remedy in § 706 (2) and instead remanding to give the agency an opportunity to correct its errors. Mostly in the context of agency rulemaking and immigration

appeals,[32] the formerly rare remand-without-vacatur disposition has recently come to be accepted as a mainstay of administrative law, gaining its foothold first in the D.C. Circuit in the 1990's.[33] Much ink has been spilled in the courts and the academy debating the legality and wisdom of this movement, with proponents of the activist view of expansive remedial discretion gaining ground over what they dismissively label the "literalists."[34]

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[32] Judicial review of removal determinations by the Board of Immigration Appeals were governed by the APA until 1961, then by 8 U.S.C. § 1105a (Judicial Review of Orders of Deportation and Exclusion) until 1996 and, since then, by 8 U.S.C. 1252(a), part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (incorporating Hobbs Administrative Orders Review Act, 28 U.S.C. § 2341 *et seq*.). This complex statutory review scheme contrasts notably from § 78y, and expressly excludes carved-out authority to remand for taking of additional testimony, *see* 8 U.S.C. § 1252 (a)(1), the signature component of § 78y that precludes any implicit remand authority in reviews of Commission enforcement actions. *See infra* at 22-26.

[33] *See* Brian S. Prestes, Remanding Without Vacating Agency Action, 32 SETON HALL L. REV. 108, 151 (2001) ("Prestes").

[34] Myriad rationales have been cited to excuse this diversion from the statutory text, motivated initially by the circuit courts' repeated attempts to confront records of agency actions that manifested inadequately reasoned decisions or deviations from the APA's notice-and-comment requirements. In the courts' view, these deficient agency decisions did not fall neatly within the "arbitrary or capricious" or "unsupported by substantial evidence" tests in 5 U.S.C. § 706, leaving these courts to conclude effectively that the APA's express remedial structure was itself inadequate. *See, e.g., Transcanada Pipeline Ltd. v. FERC*, 24 F.3d 305, 310 (D.C. Cir. 1994) (remanding without vacating a FERC order after concluding that "[t]oo much is lacking that a reasoned explanation would have supplied") (citations omitted);

This debate was most prominently displayed in *Checkosky v. SEC*, where the D.C. Circuit, per Judge Silverman, relied on *Chenery I* to hold that courts should not have to decide whether an agency's action is "unlawful or lawful on . . . first pass, even when the judges are unsure as to the answer because they are not confident that they have discerned the agency's full rationale." 23 F.3d 452, 462 (D.C. Cir. 1994). This deviation from the APA's text was met with a spirited dissent from Judge Randolph, who insisted that ignoring the remedies dictated by the statute was "in stubborn violation of the law," *id.*, at 493, since the clear language of § 706 (2)(a) of the APA "flatly prohibits" resolving an agency review with remand-without-vacatur, *id.*, at 490.

The *Checkosky* Court and others have analogized agency reviews to ordinary appeals,[35] another rationale said to support unconstrained discretion in

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*see also Allied-Signal v. NRC,* 988 F.2d 146, 150 (D.C. Cir. 1993) (holding that "the Commission's denial of relief...cannot be viewed as reasonable decision-making," but stating that "[a]n inadequately supported rule [ ] need not necessarily be vacated").

[35] 23 F.3d at 462 n.11, comparing the APA review to the regular § 2106 appeal in *United States v. Williams*, 951 F.2d 1287, 1290 (D.C.Cir.1991) ("The purpose of an appeal is to review the judgment of the district court, a function we cannot properly perform if we are left to guess at what it is we are reviewing"). *But see Ming Dai, supra,* n.25, 141 S. Ct. at 1678 (where the Court in 2021 explained that a statutory collateral review of an executive agency decision is not "an 'appeal' akin to that taken from the district court to the court of appeals" under § 2106).

disposing of agency reviews.[36] Still others have claimed that the "broad equitable discretion" afforded federal courts generally should apply with equal force in APA agency reviews.[37]

Circumscribed reviews under the APA and other agency-specific review schemes are not like regular appeals, however, and Congress has full authority to cabin the courts' remedial authority, likewise thwarting the use of equitable discretion to construct remedial powers at odds with the enabling statute.[38] One scholar has called the whole remand-without-vacatur phenomenon "unlawful," concluding that "the text of the APA, along with the legislative history, statutory purpose, canons of construction, and judicial precedent demonstrate the illegality of remanding without vacating."[39] And this practice is

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[36] The unlikely notion that statutory agency review proceedings under the APA should be treated as § 2106 appeals was endorsed in Report to the House of Delegates, American Bar Association Section of Administrative Law and Regulatory Practice and Business Law, at 4 (1997). The report stated flatly that "[t]he literal interpretation of the 'shall . . . set aside' language of § 706 should be rejected."

[37] *See* Ronald Levin, "Vacation at Sea: Judicial Remands and the APA," 21 ADMIN. & REG. L. NEWS 4, 5 (Spring 1996).

[38] *See Liu v. SEC*, 140 S. Ct. 1936, 1947 (2020) (equitable power to exercise jurisdiction available "[u]nless otherwise provided by statute"; the contours of a court's remedial power are set by statute).

[39] Prestes, *supra* n.33, at 109 (examining extensively the "shaky legal pedigree" of the practice); *see also*, Frank H. Wu & Denisha S. Williams, Remand Without Reversal: An Unfortunate Habit, 30 ENVTL. L. REP. 10193 (March 2000) (outlining how the

very difficult to reconcile with this Court's admonition in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, that courts applying procedures not found in the APA or any other statute "totally disrupt the statutory scheme, through which Congress enacted 'a formula upon which opposing social and political forces have come to rest." 435 U.S. 519, 524 (1978).

Even under the longstanding *Chenery I* "remand rule"—allowing disposition of APA reviews by vacating *and* remanding—courts have frequently refused to remand when an agency decision has been reversed exclusively on a question of law or where remand would be otherwise "futile."[40] One scholarly study indicated that some 20% of agency reviews are resolved on these grounds, the courts avoiding

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avoidance of the statutory remedy of vacatur started out as a rare anomaly but eventually transformed into a standard practice).

[40] *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (no remand to Art. I bankruptcy court after deciding the broad grant of jurisdiction to the court was unconstitutional); *City of Yonkers v. United States*, 320 U.S. 685, 692 (1944) (no remand because Court concluded that the agency had no jurisdiction to take any action); *Kyong Ho Shin v. Holder*, 607 F.3d 1213, 1221 (9th Cir. 2010) (reversing but not remanding inadmissibility decision of Board of Immigration Appeals as based on incorrect application of statute); *Karimijanaki v. Holder*, 579 F.3d 710, 721 (6th Cir. 2009) ("remand is not required where such a gesture would be futile"); *Watson v. Geren*, 569 F.3d 115, 130 (2d Cir. 2009) (applying the futility exception); *Calle v. U.S. Atty. Gen.*, 504 F.3d 1324, 1330 (11th Cir. 2007) (no remand where issue is a legal one).

remand altogether.[41] While this Court has carved out a circumstance where courts may remand for questions of law, the remand rule only applies to such cases in which the agency is deemed equipped to exercise executive branch policy discretion as it does, for example, with statutory interpretation pursuant to the *Chevron* doctrine.[42]

Justice Kennedy once explained that the APA "remand rule exists, in part, because 'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.'"[43] This is a far cry from matters decided on constitutional grounds, as in the instant case, since these constitutional issues are not the sorts of issues where the agency could "bring its expertise to bear...evaluate the evidence]...make an initial determination [and thereby] help a court later determine whether its decision exceeds the leeway that the law provides." *Gonzales v. Thomas*, 547 U.S. 183, 186–87 (2006) (quoting *INS v. Ventura*, 537 U.S. 12, 17 (2002)). To the contrary, as this Court stated in *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, purely "constitutional claims are outside" an administrative

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[41] *See* Christopher J. Walker, The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue, 82 GEO. WASH. L. REV. 1553, 1584 (2014) (analyzing the relevant universe of 342 published immigration review decisions from 2002 to 2012).

[42] *See, e.g., Negusie v. Holder*, 555 U.S. 511, 523 (2009).

[43] *Id.*, at 523 (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

agency's "competence and expertise." 561 U.S. 477, 491 (2010).

Aside from the extensive differences between the two statutory review schemes, the practical and policy concerns animating the regular remand rule, or the discovery of inherent authority to remand without vacating in APA reviews and other agencies' special review proceedings, do not at all apply to review of SEC final orders determining liability in SEC adjudications. This is especially so where the circuit court has no trouble discerning the reasoning of the agency in determining liability but has invalidated the proceedings *in toto* as running afoul of multiple constitutional imperatives. At that point, what exactly is there to remand, and for what purpose?

Even if the Jarkesy Final Order was reviewed under § 706 of the APA instead of § 78y, remand would be—or should be—"futile."

**2. The Surplusage Canon Precludes General Remand Authority under Subsection (a)(3)**

The Fifth Circuit's determination to remand the Final Order, and to remand without vacating on the Take Care Clause violation, was unlawful for another, independently dispositive reason: even if the bare grant of affirm-or-vacate jurisdiction in subsection (a)(3) were somehow ambiguous and thus arguably vulnerable to "equitable" judicial expansion, application of other binding principles of statutory construction—most notably the "surplusage canon"—would dictate otherwise. That is because a nearby

subsection, § 78y (a)(5), provides for a limited-purpose remand to the SEC from a circuit court solely *for the purpose of adducing additional evidence* material to the circuit court's review, and *only upon motion* of one of the parties. Neither of these elements is present here.

Subsection (a)(5) provides that:

> If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

This narrow jurisdictional license for remand in (a)(5) would be meaningless if Congress intended for circuit courts under (a)(3) to remand to the SEC whenever and however they wished. Simple application of the ancient maxim that *expressio unius est exclusio alterius* would compel the conclusion that subsection (a)(3) does not include blanket jurisdiction to remand. *See Tennessee Valley Authority, supra at* 188 (employing this Latin maxim to hold that statutory exceptions to otherwise mandatory text demon-

strate the nonexistence of other, arguably implicit exceptions). The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others. *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001); *Karahalios v. Federal Employees*, 489 U.S. 527, 533 (1989); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 93–94 (1981).

"Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019) (quoting *Dep't of Homeland Security v. MacLean*, 574 U.S. 383, 391 (2015)). "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act," we generally take the choice to be deliberate. *Collins v. Yellen*, 594 U. S. —,141 S.Ct. 1761, 1782 (2021) (internal quotation marks omitted); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (it is "presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

The Court must look to the whole of § 78y in discerning the meaning of (a)(3). "When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (in construing a statute, "the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole"). If

Congress intended by implication to extend plenary remand jurisdiction to circuit courts in (a)(3), the special-purpose remand authority in (a)(5) would have been wholly unnecessary. Under the long-recognized "surplusage canon," courts must indulge "the presumption that each word Congress uses is there for a reason." *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017). Courts must "give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (cleaned up).

Judicially inserting "remand" into subsection (a)(3) would render the subsection (a)(5) provisions wholly superfluous, and courts "generally presum[e] that statutes do not contain surplusage." *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019) (where it applies, the surplusage canon creates "insurmountable obstacle" to a contrary interpretation); *Williams, supra* at 404 (describing the surplusage canon as a "cardinal principle of statutory construction").[44]

Subsection (a)(5) is indeed rendered utterly meaningless if general remand jurisdiction could be said to flow from (a)(3). The narrow exception in (a) (5) is dispositive for purposes of defining the reach of auth-

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[44] The canon well predates the Founding, having been fully established in the English common law. *See Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'").

ority in (a)(3), both for this reason and because it finds no equivalent in the APA.

### C. Subsection (a)(3) Cannot be Read to Include Jurisdiction to Remand a Final Order From an SEC Adjudication

Neither the recent remand-without-vacatur remedy nor the traditional *Chenery I* remand-*with*-vacatur remedy can be "imported" from the APA into § 78y review of SEC adjudications, for several reasons.

First, in § 78y(a)(3) Congress has chosen to define the permissible remedies as a matter of *jurisdiction*, not as a mere procedural rule. Judicial expansion of those remedies is especially prohibited as an encroachment on Congress' exclusive constitutional prerogative to define the jurisdiction of the inferior federal courts under Art. 1, § 8.[45]

Second, unlike the APA, § 78y(a)(5) contains an express grant of remand jurisdiction, but *only* in the narrow circumstance where additional *evidence* must be adduced and only where one of the parties moves for such remand, while the circuit court maintains review jurisdiction. Under the surplusage canon, this, by itself, conclusively precludes any "implicit" jurisdiction to remand generally or some "inherent" authority to fashion judicially a remand remedy under (a)(3) that Congress did not see fit to include.

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[45] *See supra*, at 15-16.

Third, whatever the merits of remand-without-vacatur authority for *rulemaking reviews under the APA*, the remand of an SEC enforcement *adjudication* which has been held unlawful under § 78y simply makes no sense. Once the SEC's prosecutors have tried and failed to secure a valid order of liability and penalties, the whole proceeding is over. This is especially so where the circuit court has declared the proceeding constitutionally defective *ab initio*, as the Fifth Circuit did here. Like all statutes, § 78y must not be read to produce absurd results. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

This is not a serial-remand rule-making exercise or an ongoing asylum claim. In the context of an overturned SEC enforcement action, there is no "case" left to be remanded, and no "further proceedings" to be conducted. And adjudicating agencies do not issue appellate court-style mandates against themselves.

The remedial limitations imposed by Congress in § 78y have real world consequences. By restricting its application to reviews of Commission "final orders," Congress assured that petitions for review would dispose of the underlying adjudications as a whole, precluding piecemeal, interlocutory interventions by the circuit courts.[46] In this one respect, the process closely adheres to the traditional definition of finality for purposes of appellate review of trial court judg-

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[46] This is underscored by the Court's endorsement of pre-"final order" judicial intervention only when it is determined that § 78y does not apply in the first place. *See Free Enterprise, supra*, at 491.

ments under 28 U.S.C. § 2106.[47] *See Catlin v. United States*, 324 U.S. 229, 233 (1945) (a judgment is final where it "ends the litigation … and leaves nothing for the court to do but execute the judgment"). But § 78y then departs sharply from the § 2106 appellate model, where reviewing courts are supplied with a robust, unlimited panoply of remedial options—expressly including remand. By excluding remand from the circuit courts' remedial arsenal in § 78y, Congress meant to give the courts the final word—once the circuit court has ruled, its "judgment is conclusive between the parties,"[48] and the enforcement adjudication is, at long last, at an end. "A losing litigant deserves no rematch after a defeat fairly suffered." *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 107 (1991).

But here the losing litigant may very well conclude—because of the "remand" for "further proceedings"—that it *does* get a rematch, launching a new civil prosecution of Jarkesy all over again, this time straining to somehow avoid the fatal structural constitutional violations that nullified the case on its decade-long "first pass." The SEC does not get a "second pass," however, and it should not be directed by the circuit court to conduct some unidentified "further proceedings."

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[47] The "final order" prerequisite for a § 78y review also contrasts with the open-ended triggers for court review of agency actions under the APA.

[48] Restatement of Judgments (Second) § 27(o). This Court uses the Restatement as authoritative even in the context of administrative proceedings. See *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015).

### D. The Contours of Circuit Courts' Jurisdiction under § 78y is a Recurring and Important Issue that Merits this Court's Review

Whether circuit courts exercising jurisdiction exclusively under § 78y can order such further proceedings in the SEC, after invalidating a Commission final order, is a significant and recurring jurisdictional issue that requires this Court's clarification. The ubiquity of agency reviews pursuant to the Administrative Procedure Act—where remands are long established—has created confusion in the courts as they mistakenly apply the broad and expanding array of APA remedies to § 78y reviews, missing the limitations of that special review statute.[49]

This case also presents a major question of statutory construction—including the continuing force of the surplusage canon—the resolution of which will vindicate the essential principles of statutory interpretation and return the courts to the jurisdictional constraints dictated by Congress.

As Jarkesy has framed these questions above, this Cross-Petition raises a consequential jurisdictional issue of first impression. Should the Court grant the SEC's Petition for a Writ of Certiorari, Jarkesy's

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[49] The rare court recognizing the inapplicability of the APA and properly recognizing the limitations of § 78y remains within its jurisdictional boundaries and refrains from remanding. *See Sacks v. SEC*, 648 F.3d 945, 952 (9th Cir. 2011) (ruling that SEC regulation was improperly applied retroactively but, relying solely on the terms of § 78y, did not remand to the agency for any further proceedings).

Cross Petition should be granted as well and, upon review, the "remand" by the court below should be reversed.

## CONCLUSION

For these reasons, this Cross Petition for a Writ of Certiorari should be granted, if this Court grants the SEC's Petition for a Writ of Certiorari in No. 22-859.

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