

IN THE SUPREME COURT OF THE UNITED STATES

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No. 22A-\_\_\_\_

SECURITIES AND EXCHANGE COMMISSION, APPLICANT

v.

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

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APPLICATION FOR AN EXTENSION OF TIME  
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Solicitor General -- on behalf of the Securities and Exchange Commission -- respectfully requests a 29-day extension of time, to and including February 17, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The opinion of the court of appeals (App., infra, 1a-54a) is reported at 34 F.4th 446. The order of the court of appeals denying rehearing en banc (App., infra, 55a-61a) is reported at 51 F.4th 644. The opinion and order of the Securities and Exchange Commission (App., infra, 62a-109a) is available at 2020 WL 5291417. The initial decision of the administrative law judge (App., infra, 110a-145a) is available at 2014 WL 5304908.

The court of appeals entered its judgment on May 18, 2022. A petition for rehearing was denied on October 21, 2022. Unless extended, the time within which to file a petition for a writ of certiorari will expire on January 19, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. In 2013, the Securities and Exchange Commission (SEC or Commission) brought an administrative proceeding against respondents George Jarquesy and Patriot28, L.L.C., alleging various violations of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77a et seq.; the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a et seq.; and the Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. 80b-1 et seq. App., infra, 64a. The Commission assigned the initial stages of the proceeding to an administrative law judge (ALJ), who held an evidentiary hearing and issued a decision finding that respondents had violated the securities laws. Id. at 110a-145a. Reviewing the ALJ's initial decision, the Commission likewise determined that respondents had violated the securities laws. Id. at 62a-109a. The Commission ordered respondents to pay a civil penalty of \$300,000 and to cease and desist from their violations of the securities laws. Id. at 64a. It also barred Jarquesy from various activities in the securities industry and directed Patriot28 to disgorge nearly \$685,000 in illicit gains. Ibid.

2. A divided panel of the Fifth Circuit granted respondents' petition for review, vacated the SEC's decision, and

remanded the matter to the Commission for further proceedings. App., infra, 1a-54a.

The court of appeals issued three alternative holdings. First, the court held that Congress had violated the Seventh Amendment by empowering the Commission to bring certain administrative proceedings seeking civil penalties. App., infra, 4a-18a. The court acknowledged that the Seventh Amendment poses no bar to an administrative agency's adjudication of cases involving public rights, but concluded that securities-fraud actions do not involve public rights. Id. at 11a-18a.

The court of appeals then held that Congress had improperly delegated legislative power to the SEC by giving the agency unconstrained authority to choose in particular cases to seek civil remedies by instituting administrative proceedings rather than filing suit in district court. App., infra, 18a-25a. The court concluded that the statutory scheme was infirm because Congress had not provided an "intelligible principle" to guide the Commission's choice to institute administrative proceedings rather than to file a civil action in district court. Id. at 25a.

Finally, the court of appeals held that statutory restrictions on the removal of the Commission's ALJ violated Article II. App., infra, 25a-30aa. The court read this Court's decision in Free Enterprise Fund v. PCAOB, 561 U.S. 477 (2010), to mean that Congress may not grant executive officers "two layers of for-cause protection" from removal. App., infra, 26a. It

concluded that Congress had violated that principle here because ALJs may be removed by the SEC only for good cause found by the Merit Systems Protection Board (MSPB), App., infra, 28a (citing 5 U.S.C. 7521(a)); "the SEC Commissioners may only be removed by the President for good cause," ibid.; and MSPB members "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office," id. at 30a (quoting 5 U.S.C. 1202(d)).

Judge Davis dissented. App., infra, 31a-54a. He first concluded that the SEC adjudication complied with the Seventh Amendment, reasoning that an SEC enforcement proceeding involves public rights because it is brought by the government in its sovereign capacity to vindicate public interests. Id. at 31a-44a. He also determined that the SEC's ability to choose between judicial and administrative enforcement in particular cases does not violate the nondelegation doctrine, explaining that Congress had "fulfilled its legislative duty" by expressly authorizing the Commission to pursue enforcement actions in Article III courts or in administrative proceedings. Id. at 44a. Finally, he concluded that Congress could properly grant ALJs two layers of removal protections because they perform purely adjudicative functions. Id. at 47a-54a.

3. The court of appeals denied the SEC's petition for rehearing en banc by a vote of 10-6. App., infra, 55a-61a.

Judge Haynes, joined by four other judges, dissented from the denial of rehearing en banc. App., infra, 57a-61a. She stated

that the panel's decision conflicted with this Court's precedent, that it would have "massive impacts on the directly involved statutes," and that its "potential application to agency adjudications more broadly raises questions of exceptional importance." Id. at 61a.

4. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The additional time sought in this application is needed to continue consultation within the government and to assess the legal and practical impact of the court of appeals' ruling. Additional time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Solicitor General

JANUARY 2023