No. 22-859

IN THE

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION
Petitioner,

v.

GEORGE R. JARKESY, JR., and PATRIOT28 LLC
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether statutory provisions that empower the Securities and Exchange Commission ("SEC") to initiate and adjudicate administrative enforcement proceedings seeking civil penalties for common law claims violate the Seventh Amendment.

2. Whether statutory provisions that vest the SEC with unfettered discretion to choose to enforce common law fraud claims in the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine.

3. Whether Congress violated Article II by affording at least two levels of for-cause removal protection to the SEC's administrative law judges.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent 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.

RULE 15(2) STATEMENT OF RELATED PROCEEDINGS NOT IDENTIFIED IN THE PETITION

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

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

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INTRODUCTION

The Securities and Exchange Commission ("SEC") has long litigated common law fraud claims for penalties under the securities laws in federal district courts. But the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 vested the agency with authority to adjudicate such claims against ordinary citizens in its own in-house "courts," stripping those citizens of their rights to a jury, to a real, Article III judge, and to the procedural and due process protections guaranteed in federal courts.

At the same time, Congress vested the SEC with the unconstrained and unreviewable power to pick and choose unilaterally whether to force its targets into an Article I administrative court or to prosecute its claims in an Article III court. And an enforcement target relegated to the administrative forum would be subjected to protracted proceedings over many years presided over by an inferior constitutional officer called an administrative law judge ("ALJ") who enjoyed multiple layers of for-cause tenure protection, as the Commisssion itself conceded in 2018.

This is the fate which befell the Respondents, charged with traditional fraud and put to trial before a captive agency judge sitting unconstitutionally, with no right to a jury, and no way to escape to court.

The Fifth Circuit applied well-settled doctrines of constitutional law—and controlling precedents from this Court—to hold that (1) the assignment of common law claims for penalties for adjudication in a

jury-less Article I court violated the Seventh Amendment, (2) the wholesale delegation of legislative power to make that assignment—without any intelligible principle—violated the nondelegation doctrine, and (3) the multiple layers of tenure protection afforded the agency's ALJ's violated the Take Care Clause of Article II.

Following the trend experienced across the administrative state, the SEC's enforcement power has expanded exponentially since its creation in 1934, each new financial crisis propelling the accumulation of more and more executive, legislative and judicial authority for this "independent" agency. At some point the never-ending power creep was bound to crash headlong into the tripartite constitutional structure, and it did so here. The Fifth Circuit's holdings below merely affirmed our constitution's intrinsic limits on unconstrained executive power.

The Respondents disagree with the SEC's characterizations of the Fifth Circuit's holdings and thus its articulation of the questions presented. Those critical differences will be explained below.

Cast correctly, the decisions rendered by the court below are unremarkable, compelled by controlling precedents and faithful to constitutional principles.

STATEMENT OF THE CASE

Prior to 1990, the SEC functioned as a financial market regulator and could only pursue "regulated

entities or their associated persons"[1] administratively, including for fraud claims. That year Congress dramatically expanded the SEC's administrative power by authorizing administrative *penalty* sanctions against *registered* parties and allowing the agency to litigate administrative actions against *non-registered* parties ("any person"), but only to impose "cease-and-desist" remedies.[2] In 2010, § 929P(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") granted the SEC the authority to seek *penalties* administratively against "any person" for violation of the securities laws, including for traditional fraud claims, actions that had always been litigated only in Article III courts.[3]

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[1] *See* S. REP. NO. 101-337, at 1 (1990) (Senate Report on "The Securities Law Enforcement Remedies Act of 1990," Senate Bill 647).

[2] Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990) (the "1990 Act").

[3] Pub. L. No. 111-203, 124 Stat. 1376 (2010). The bill amended each of the three statutes under which Jarkesy was prosecuted—the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. Each contains standard fraud proscriptions. *See* § 929P(a)(1) (allowing the SEC to pursue civil monetary penalties in any cease-and-desist proceeding initiated under the Securities Act where it could not prior to Dodd-Frank); § 929P(a)(2)(E) (allowing the SEC to pursue civil monetary penalties in any cease-and-desist proceeding initiated under the Exchange Act where the SEC was limited to seeking monetary penalties in limited circumstances—not relevant here—prior to Dodd-Frank); and § 929P(a)(4)(E) (allowing the SEC to seek civil monetary penalties in proceedings initiated under subsection "k" of Section 203 of the Adviser Act—subsection "k" of Section 203 of the Adviser Act allows the SEC to initiate a cease-and-desist proceeding against

This vested the agency's in-house courts with "coextensive" jurisdiction in securities fraud actions, and the SEC soon began diverting enforcement actions to its own Article I courts, without juries, for reasons that quickly became clear.[4] The Commission's newfound authority to pick and choose the forum—and the constitutional rights afforded to its targets—came without any strings attached: Congress provided no intelligible principle to guide the decision and no process by which a target could contest it. The SEC's choice is unilateral.

The SEC's home courts bear a superficial resemblance to Article III courts, but the differences are substantial. No procedural constraints limit the time the agency's Division of Enforcement can take to conduct unilateral discovery and prepare its case, but defendants (called "respondents") get only a few months, and without the discovery tools available in court. At "trial" the Rules of Evidence do not apply,

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"any person" for a violation of the Adviser Act). "Cease-and desist proceeding" is a statutory term for "administrative proceeding."

[4] *See infra*, n.5. Although the number of cases diverted to the SEC's home courts skyrocketed once it obtained administrative penalty authority against "any person," the number of contested fraud cases like Jarkesy's "tried" before an ALJ—the types traditionally tried in Article III courts—is modest, as most cases are resolved by settlement or default. Analysis of the SEC's own published database reflects that, from 2017 to 2020, the home courts hosted a combined average of only 2.5 "trials" of securities fraud cases per year. *See* https://www.sec.gov/alj/alj dec. htm, last visited May 20, 2023. More recently, the cases it has diverted to its in-house courts has plummeted, as the constitutional challenges have continued to mount.

hearsay is admissible, and defense "subpoenas" are frequently quashed *sua sponte* by the ALJ's, who rarely rule against the agency. Most significantly, as with all administrative courts, the defendants have no right to a jury to determine the facts.

It is widely recognized that the SEC virtually always wins in its own home courts. At the time of Jarkesy's "trial" in 2014, the agency had, over the last 200 contested cases, compiled an in-house win rate of exactly 100%, contrasted with a less pristine 61% success rate over the same time period in Article III courts, where juries are employed.[5]

In 2007, George Jarkesy set up two private investment partnerships, managed by an "adviser" company, Patriot28 LLC, (collectively, "Jarkesy") for a modest number of accredited investors. The funds were small enough that neither was required to register with the SEC.[6] 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

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[5] *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 (SEC won the last 219 decisions before its own ALJs—a "winning streak, which began in October 2013 and continues today"); Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. TIMES, Oct. 5, 2013 (same).

[6] App. 72a.

courts[7] 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."[8] The SEC sought the imposition of lifetime securities-industry and officer-and-director bars and over $100 million in punitive civil monetary penalties.[9]

Throughout the proceedings Jarkesy sought the dismissal of the administrative proceeding on several constitutional grounds, including the denial of his right to a jury trial under the Seventh Amendment, violation of the nondelegation doctrine over the unreviewable Commission decision to assign the claims against him to its in-house courts, and violations of equal protection and due process. The ALJ dismissed all of his motions, including these constitutional complaints.[10]

Jarkesy was put to "trial" in February of 2014.[11] The evidentiary hearing—in which the ALJ allowed

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

[8] 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.

[9] Opp. App. 2a-3a.

[10] App. 158a-167a.

[11] 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 briefed herein. The district

the SEC to admit copious hearsay evidence that would be inadmissible in an Article III court[12]—consumed 12 full days of testimony over six weeks at the SEC's New York City office. 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.[13] The Commission then took six additional years to issue its "expedited" Final Order, in which it affirmed the AJL's denial of Jarkesy's constitutional challenges.[14] Having finally run the gauntlet through the administrative process, Jarkesy filed a Petition for Review in the Fifth Circuit pursuant to the applicable special review statute, 15 U.S.C. § 78y.

The SEC's administrative prosecution of this garden-variety securities fraud case has consumed over a decade.

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court denied relief for lack of subject matter jurisdiction due to lack of exhaustion of remedies, 48 F.Supp.3d 32 (D. D.C.) (2014), a ruling which was upheld on appeal to the D.C. Circuit, 803 F.3d 9 (D.C. Cir. 2015). Neither court reached the merits of Jarkesy's constitutional challenges. These rulings were overruled *sub silentio* by this Court's recent decision in *Axon Enterprise, Inc., v. F.T.C.*, 143 S.Ct. 890 (2023).

[12] Opp. App. 3a.

[13] Opp. App. 3a-4a, Opp. App. 10a. 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 additional years it took to obtain Article III review.

[14] App. 125a-151a.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit Followed Controlling Precedent in Holding that the Seventh Amendment Does Not Allow Securities Fraud Claims to be Adjudicated in Article I Courts Without Juries

In its Petition the SEC misconstrues the basis of the Fifth Circuit's holding that securities fraud claims are "private rights" and that a government enforcement action seeking civil penalties for those claims requires fact-finding by an Article III court with the Seventh Amendment fully intact. The SEC likewise misstates the underlying precedent upon which the Fifth Circuit relied.

The Seventh Amendment mandates the right to a jury for suits at "common law," a term which refers to "legal" as opposed to "equitable" claims. It is well established that securities fraud claims—at least the sort charged against Jarkesy—are legal claims for which the Seventh Amendment applies. *See Tull v. United States*, 481 U.S. 412, 414-19 (1987).[15]

[15] "Actions by the Government to recover civil penalties under statutory provisions … historically have been viewed as one type of action in debt requiring trial by jury," holding that a defendant in a Clean Water Act case involving penalties and equitable remedies is entitled to a jury under the Seventh Amendment, at least on the issues relevant to liability for the penalties. This has been applied repeatedly to SEC fraud claims. *See, e.g., SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) (defendant entitled to a jury trial when the SEC sought a civil money penalty).

The SEC concedes as much but quickly averts to its own version of the "public rights" doctrine that does not comport with this Court's jurisprudence. By leaving out a word or two in quoting historical precedents, the SEC urges upon the Court a formulation of "public rights" which would eviscerate the application of the Seventh Amendment and the demands of Article III. To be sure, the precise contours of the ever-evolving public rights doctrine have proven elusive for a century or more, but its essential elements are well enough defined to show that the Fifth Circuit's conclusion was correct and inevitable.

It is primarily the SEC's talismanic reliance on the frequently-misconstrued *Atlas Roofing v. Occupational Safety & Health Review Comm'n* that leads to confusion. 430 U.S. 442 (1977). Although *Atlas Roofing* has been largely overtaken[16] and arguably overruled[17] by a substantial body of subsequent decisions, even back in 1977 it did not stand for the proposition effectively asserted by the SEC—that Congress can casually dispense with the Seventh Amendment by incorporating virtually any common law claim into a statute and diverting the government prosecution of the claim to an Article I court. Such a

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[16] *See, e.g., Stern v. Marshall*, 564 U.S. 462 (2011); *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989); *CFTC v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); and *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

[17] *Atlas Roofing*'s author, Justice Byron White, lamented over a decade later that by then the Court had "overrul[ed] or severely limit[ed] the relevant portions" of the decision. *Granfinanciera, supra*, 492 U.S. at 71 (White, J., dissenting).

formulation would enable government lawsuits for penalties or damages against any citizen without a jury while completely circumventing Article III. But this is the very theme embraced by the SEC and the two dissenting opinions in the court below.

The doctrine does not mean that any statutory claim enforced on behalf of the "public" through a government agency is thereby converted into a "public right" such that Article III and the Seventh Amendment magically disappear. The SEC strains to reach this absurd interpretation by quoting selectively, first from *Atlas Roofing*, and then by ignoring the considerable body of subsequent case law defining the circumscribed types of claims that truly qualify as "public rights." For example, the SEC offers the conclusion that under the *Atlas Roofing* "framework," "SEC administrative adjudications seeking civil penalties qualify as matters involving public rights," Pet. at 10, which both mischaracterizes the Fifth Circuit's holding[18] and fails to address the components of "public rights" explained in *Atlas Roofing* that compel the opposite conclusion.[19]

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[18] The court below did not hold that all of the agency's "administrative adjudications seeking civil penalties" were for private rights claims. It held instead that the statutory anti-fraud claims against Jarkesy were common law fraud claims that clearly qualified as private, not public, rights. App. 20a.

[19] The *Atlas Roofing* construct for public rights included additional elements not analyzed or mentioned in the Petition, including that the claims must be "new" or "novel" statutory obligations, that the high volume of the claims created by the new statutory scheme would "choke" the federal judiciary, and that those claims are "committed exclusively" by Congress to the agency tribunal. App. 9a-15a. The claims against Jarkesy fail

The SEC also asserts that it makes no difference whether these statutory anti-fraud claims are closely akin to traditional common law claims. Pet. at 11-12. This section of the Petition is equally wide of the mark.

This Court has long held that the Seventh Amendment "applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Curtis v. Loether*, 415 U.S. 189, 193 (1974). As the Fifth Circuit noted, public rights claims are, by contrast, "new" actions "unknown to the common law," App. 9-10a, the first factor in the definition of public rights. But the substantive elements of the anti-fraud provisions of the securities laws are anything but "new," and indeed closely adhere to traditional elements of common law fraud, especially as those claims were long pursued before the SEC was born. App. 10a. This alone renders it difficult to label these claims as public rights. As this Court explained in *Stern v. Marshall*, "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article

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all of these threshold tests for proper assignment to an Article I forum, and the "public rights" doctrine is thereby rendered irrelevant to the analysis. The SEC fails to address any of these issues.

III judges in Article III courts." 564 U.S. 462, 484 (2011) (internal citation omitted).

The Petition rejects this settled paradigm, flatly stating that "Congress's power to assign an enforcement proceeding to a non-Article III tribunal does not depend on the extent to which that proceeding resembles common law actions." Pet. at 12. To underscore its position, the SEC asserts that the Court's analogous-claim litmus test is "beside the point" in the public rights/private rights analysis. *Id*. This contrarian view is supported only by a misquote from *dicta* in *Granfinanciera*: "Congress may fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable." *Id*., citing 492 U.S. at 52.

What the SEC left out of that quote was the first part of the sentence—"In certain situations, of course,"—which demonstrated that the Court was only explaining the *exception* to the general rule, those cases clearly involving public rights, where the analogy factor is overcome by all the other components of the analysis.[20]

[20] The *Granfinanciera* Court cited examples of claims that passed the *other* elements of the public rights test. Those include, *inter alia*, newly fashioned statutory claims to replace common law claims that were "inadequate" to cope with a manifest public problem, *Atlas Roofing*, 430 U.S. at 460, were committed by Congress "exclusively" to an Article I court, *id*. at 450, and where Article III jurisdiction would "impede swift resolution" of the newly-fashioned claims, *Granfinanciera,* 492 U.S. at 60-61.

What the *Granfinanciera* Court *did* hold was that Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be … taken to an administrative tribunal," 492 U.S. at 52, further explaining that:

> Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

Id. at 61. As the Fifth Circuit wrote, "Congress cannot convert any sort of action into a 'public right' simply by finding a public purpose for it and codifying it in federal statutory law." App. 16a.

The SEC completes its arguments by misconstruing *Oil States Energy Servs., LLC, v. Greene's Energy Grp., LLC*, which held that the inter partes review process at the Patent Trial and Review Board involves public rights and thus can be adjudicated outside of Article III, because patents were never available at common law and could be issued or revoked by Congress directly. 138 S. Ct. 1365, 1375-78 (2018). The Petition cites this case in an attempt to rebut the Fifth Circuit's application of the "exclusivity" requirement for Article I assignments. The most consistent dictate running through this Court's public rights/private rights jurisprudence is the insistence that Congress's relegation of new public rights claims to administrative adjudication is to be "exclusive." When Congress "creates procedures 'designed to per-

mit agency expertise to be brought to bear on particular problems,' those procedures 'are to be exclusive.'" *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 489-90 (2010); *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.,* 379 U.S. 411, 419-20 (1965). This requirement is recited uniformly and was highlighted even in *Atlas Roofing*, where the Court sanctioned assignments of enforcement cases to Article I courts for adjudication without a jury when "committed exclusively" to those tribunals. *Atlas Roofing*, 430 U.S. at 450.

That the assignment of cases to the SEC's administrative tribunals is *not* exclusive—the agency is afforded "dual" jurisdiction to enforce its claims in either federal court or its own in-house courts—is another feature of Dodd-Frank § 929P(a) that belies the asserted rationale for Article I adjudications and reveals the claims to be private rights. The SEC can bring the very same fraud claims in federal court—as it does most of the time—which cannot be reconciled with the requirement that public rights claims are those which are "uniquely" or "peculiarly suited for agency adjudication." App. 15a. *Granfinanciera*, 492 U.S. 60–61; *Atlas Roofing*, 430 U.S., at 461.

The Petition confronts this problem, once again with a partial quote, by referring to the observation in *Oil States* that "matters governed by the public-rights doctrine * * * can be resolved in multiple ways"; Congress can " 'delegate [them] to executive officers,'" but it can also " 'commit [them] to judicial tribunals.'

Oil States, 138 S. Ct. at 1378 (citation omitted)." Pet. 13. What the SEC leaves out of this compilation is the word "or." The full quote from *Oil States reads*: "Congress can 'reserve to itself the power to decide,' 'delegate that power to executive officers,' or 'commit it to judicial tribunals,'" *id*. at 1378 (citing *Ex parte Bakelite Corp*., 279 U.S. 438, 451 (1929) (emphasis added).

Thus *Oil States* does not help the SEC, instead reinforcing the exclusive-assignment condition for designating claims to Article I tribunals and the inevitable conclusion that the anti-fraud claims in the securities statutes are private rights, as the Fifth Circuit held.[21] These claims are codifications of traditional fraud claims at common law, equally enforceable by private parties and by the government. And even when the government stands in as the plaintiff, as it did here, the claims are "quintessentially about the redress of private harms." Pet. App. at 20a.

The SEC is unable to properly cite a single precedent or policy rationale to undermine the Fifth Circuit's decision that the statutory anti-fraud claims pursued against Jarkesy are private rights that must be tried in an Article III court with the right to trial by jury. The Petition should be denied.

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[21] The *Oil States* Court cited *Granfinanciera* and even *Atlas Roofing* for the longstanding rule that the Seventh Amendment does not apply "when Congress *properly* assigns a matter to adjudication in a non-Article III tribunal." *Id*., at 1379 (emphasis added). As the long line of cases consistently demonstrates, a non-exclusive assignment to a forum outside of Article III is not a "proper" one.

II. The Fifth Circuit Correctly Held That the Unfettered Discretion Conferred by Dodd-Frank to Assign Claims to Article I Courts Was an Unconstitutional Delegation of Legislative Power

The Fifth Circuit was presented with the first case in almost ninety years where Congress had delegated core legislative power to an executive agency without providing any guidelines or intelligible principle to govern the agency's exercise of that power. Dodd-Frank § 929P(a) delegated to the Commission the authority to decide for itself—for any reason or no reason at all—whether claims against its enforcement targets should be assigned to its in-house courts or to an Article III court. This vested the Commissioners[22] with the unilateral and unreviewable power to strip citizens of their Seventh Amendment rights, of all the procedural, evidentiary and due process protections afforded in the federal courts, and of the right to an independent, life-tenured presiding judicial officer. And at least at the time of Jarkesy's administrative trial, it also guaranteed the SEC a win.[23]

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[22] SEC representations in Jarkesy's pre-hearing injunction action in the D.C. District revealed that this legislative power is not actually exercised by the Commissioners—it is wielded mostly by the SEC's Division of Enforcement, the very prosecutors charged with bringing the case and presenting it to the ALJ. Opp. App. 5a-7a.

[23] *See* discussion *supra* at 5 n.5.

Throughout the administrative proceedings, the appeal before the Commission, and later in the Fifth Circuit, the SEC has found itself unable to conjure up any kind of intelligible principle from the statute, the larger statutory scheme, or the legislative history, leaving it only with the untenable argument that the authority delegated by § 929P(a) instead constitutes executive, not legislative, power, rendering an intelligible principle unnecessary. The SEC continues that line of argument in its Petition. Pet. at 14-16.

The Fifth Circuit's holding that the prerogative to assign claims adjudication either to an administrative tribunal or to Article III courts constitutes legislative power was based directly on this Court's precedents holding exactly that. The Court's pronouncements on this subject could not be clearer. The Court in *INS v. Chadha* held generally that government actions are "legislative" if they have "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." 462 U.S. 919, 952 (1983).

Specifically, the Court held over a century ago that the power to assign disputes to agency adjudication is among the "matters exclusively within [Congress's] control" and "peculiarly within the authority of the legislative department." *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). In *Crowell v. Benson* the Court reiterated that "the mode of determining" which cases are assigned to administrative tribunals "is completely within congressional control." 285 U.S. 22, 50 (1932).

This language was quoted verbatim with approval even in *Atlas Roofing*, 430 U.S. at 452.

These cases were cited by the Fifth Circuit as the controlling precedent that permitted no other conclusion, the centerpiece of the nondelegation analysis. Pet. App. 25a-26-a. Tellingly, the SEC continues to argue the opposite without so much as a mention of these cases.

The Petition instead insists on equating the SEC's Article I assignments to the discretion exercised by prosecutors in criminal cases, and relies on criminal procedure precedents to make its case. Pet. at 15-16. The SEC highlights *United States v. Batchelder*, where the Court rejected a nondelegation challenge over a prosecutor's ability to choose between two different criminal statutes with different penalty ranges. Pet. at 16-17; 442 U.S. 114 (1979). But as the Fifth Circuit explained, this sojourn into criminal law "reflects a misunderstanding of the nature of the delegated power" from § 929P(a), and in any event cannot be reconciled with *Oceanic Steam*, *Crowell, Atlas Roofing* and other decisions by this Court which have consistently held that the power to assign claims for adjudication to Article I forums without juries is quintessentially legislative. App. 25a-27a.

There is a reason why the Petition ignores the relevant cases that resolve the threshold issue. The delegated power is legislative, and the SEC cannot divine an intelligible principle from the statute. Thus § 929P(a) assigned the agency an unreviewable plenary power which is supposed to be "completely

within congressional control," a textbook violation of the nondelegation doctrine. The Petition provides no rationale for disputing the Fifth Circuit's conclusion, and for this reason the Petition should be denied.

III. The Petition Fails to Contest the Fifth Circuit's Conclusion that the Multiple Layers of Tenure Protection Afforded the SEC's ALJs Violate the Take Care Clause of Article II

The court below applied the test this Court set out in *Free Enterprise, supra* at 14, 561 U.S. at 484, 498, to hold that the two (or three) layers of for-cause tenure protection enjoyed by the agency's ALJ's unconstitutionally insulated those inferior officers[24] from presidential control, in violation of the Take Care Clause, Art. II, § 3.[25] Perhaps because it has already essentially confessed error on this issue before the Court,[26] the SEC does not effectively controvert that holding, choosing instead to focus on the legality of a *single* layer of tenure protection for "quasi-judicial" officers who perform "adjudicative" functions. Pet. at 17-19.

The SEC's contention that a single layer of removal restrictions is permissible misses the whole point of the *Free Enterprise* rule and the Fifth Circuit's decision. What the Fifth Circuit held was that,

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[24] App. 30a-34a. This Court held in *Lucia v. SEC* that these ALJ's are inferior constitutional officers for Appointments Clause purposes. 138 S.Ct. 2044, 2053 (2018).

[25] App. 2a.

[26] *See* discussion *infra* at 23.

even though a single layer of for-cause protection is constitutionally permissible,[27] *more than one layer* of protection precludes the degree of accountability to the president necessary for the chief executive to take care that the laws be faithfully executed. App. at 31a-32a.

In the case of ALJ's reporting to the Commission, a complex statutory and regulatory scheme shields them through two, and arguably three, layers of protection. A president wanting to fire an ALJ at the SEC would encounter several obstacles:

(1) The Commission itself has been assumed by this Court to be immune from presidential removal except in cases of "inefficiency, neglect of duty, or malfeasance in office," *Free Enterprise*, 561 U.S. at 487, although no statute so provides.[28]

(2) The Merit Systems Protection Board ("MSPB"), which hires and fires ALJ's for a number of agencies,

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[27] *See, e.g., Morrison v. Olsen*, 487 U.S. 654, 691-92 (1988).

[28] The *Free Enterprise* Court indulged in this assumption by accepting the parties' suggestion of non-removability as to the Commissioners, adopting the standard for removal drawn from the Federal Trade Commission Act in *Humphrey's Executor v. United States*, 295 U.S. 602, 620 (1935). 561 U.S. at 487. But this was just an "understanding" for purposes of resolving the Take Care Clause issue in that case, not rooted in statute. In its Petition the SEC asks the Court to again adopt this understanding. Pet. at 20. But unlike in *Free Enterprise*, the Respondents here do not join in the request. Because there are two additional robust layers of for-cause tenure protection afforded the ALJ's, there is no reason to resort to a tenuous assumption that is not well grounded in any applicable statute.

has the sole statutory authority to fire the SEC's ALJ's, but the MSPB members themselves are vested with for-cause tenure protection, removable by the president "only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. 1202(d).

(3) The ALJ's are removable "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board"," 5 U.S.C. § 7521(a). The MSPB has declined to sustain the removal of ALJs even in cases where misconduct has been substantiated by the agency seeking removal.[29] The statute reserves the decision on whether "good cause" exists solely to the MSPB, which reserves to itself the power to determine "the appropriate penalty if it finds good cause," refusing to terminate ALJ's even in the face of misconduct.[30]

Pity the president who resolves to fire an ALJ and quickly encounters these multiple barriers that make it all but impossible to command his own subor-

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[29] *See, e.g., Social Sec. Admin. v. Goodman,* 19 M.S.P.R. 321, 331 (1984) (ALJ could not be disciplined for productivity far below national averages in absence of specific evidence that the ALJ's docket was comparable to those of peers).

[30] *See* 5 C.F.R. 1201.140(b) (MSPB "will specify the penalty to be imposed")*; Social Sec. Admin. v. Glover*, 23 M.S.P.R. 57, 64, 80 (1984) (ALJ's "intemperate" remarks to supervisor supported 120-day suspension without pay but not removal); *see also, e.g., Social Sec. Admin. v. Brennan*, 27 M.S.P.R. 242, 248, 251 (1985), *aff'd* 787 F.2d 1559 (Fed. Cir.), *cert. denied*, 479 U.S. 985 (1986) (ALJ's pattern of "disruptive conduct," including refusal to follow office procedures, supported only a 60-day suspension rather than removal).

dinates, hamstrung by these roadblocks that vitiate the principle of accountability written by the Framers into Article II to prevent an officer or department of the Executive Branch from "slip[ping] from the Executive's control." 561 U.S. at 499.

The Petition's rejoinder is unavailing. The SEC insists that the § 7521 "good cause" standard for ALJ removal is so flexible that it creates no real barrier at all. According to the Petition, the statute should be "properly read" to encompass "a broad range of reasons" for removal, in contrast to the more "stringent" specific grounds for terminating members of the Public Company Accounting Oversight Board in *Free Enterprise*. Pet. at 18-19. Maybe it should, but the president's Article II authority cannot be hobbled by "good cause" criteria. And the fact remains that the statutory scheme vests all of the removal discretion in the MSPB, which as noted above has proven loathe to remove ALJ's even for obvious misconduct. The SEC offers no answer for any of this.

The tenure protection enjoyed separately by the members of the MSBP is dismissed by the SEC as not even "contribut[ing]" to the Take Care violation. Pet. at 19. The Petition suggests that because *Morrison v. Olsen* rejected the Take Care challenge to a statute which subjected the removal of an independent counsel to judicial review—a case involving a *single* layer of statutory for-cause tenure protection—the MSBP's own tenure protection does not count in the Take Care analysis. Pet. at 19-20. *Morrison* is not relevant here, and the Petition's rationale makes little sense.

Finally, the Petition's arguments are most noteworthy for what they leave out. The SEC neglects to disclose that in 2018 it *admitted to this Court* that "the statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority."[31] In its merits brief in *Lucia v. SEC*, *supra* at 19, n.24, the SEC also candidly concluded that if its own elastic, unconstrained interpretation of § 7521 "cannot be reconciled with the statute, then the limitations on removal of the Commission's ALJs would be unconstitutional."[32] This position it staked out in 2018 simply cannot be reconciled with the thrust of the arguments advanced in the Petition, arguments that this Court should reject at the outset under the settled doctrine of judicial estoppel.[33]

IV. If The Court Grants Certiorari, It Should Grant on All Questions Presented, Including That Presented in the Cross-Petition (No. 22-991)

The SEC's attacks on the Fifth Circuit decision all miss the mark, as the ruling on all three issues is

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[31] Br. For Resp't Supporting Pet'r, *Lucia v. SEC*, 2018 WL 1251862, at *52-53 (U.S. Feb. 21, 2018).

[32] *Id*. at *53.

[33] *See, e.g., Allen v. C & H Distribs., L.L.C.*, 813 F.3d 566, 572 (5th Cir. 2015) (judicial estoppel is a common law doctrine that prevents a party from "assuming a legal position that is inconsistent with a prior position"; its purpose is "to protect the integrity of the judicial process by prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self-interest.")

sound and indeed compelled by binding precedent. But the Respondents cannot credibly dispute that the impact of the decision goes beyond the parties to the case and the jurisdictional confines of the Fifth Circuit, potentially affecting the operations of multiple agencies across the ever-expanding administrative state, including the constitutional upending of several acts of Congress. Jarkesy acknowledges that such factors often lead the Court to grant certiorari, whether or not a circuit split exists or the issues have thoroughly percolated through the lower courts.

Should the Court grant the Petition on any of the issues presented in this case, Jarkesy respectfully suggests that certiorari ought to be granted on all three questions addressed herein and as they are articulated on the opening page of this Opposition brief. The first two issues—applicability of the Seventh Amendment to administrative enforcement proceedings, and the applicability of the nondelegation doctrine to the dual jurisdiction options afforded by Dodd-Frank—are inextricably intertwined. And it is difficult to assert that the constitutionality of the agency's ALJ's—who are insulated from removal just like the ALJ's in most other agencies, all hired and fired by the MSPB—should not be definitively resolved until some other case is presented, as the Petition suggests, with a Commission which is statutorily protected from removal. In this case, the insulation or removability of the SEC's Commissioners is unnecessary to resolve the question.

In any event, Jarkesy further urges the Court to grant review at the same time on his Cross-Petition,

No. 22-191, because the issues presented there—the scope of remedies available to the circuit courts on review of SEC enforcement proceedings under 15 U.S.C. § 78y—directly affects the course of any further proceedings once the Court has disposed of the other questions. Since, as the Cross-Petition argues, the Fifth Circuit ordered a remedy beyond its jurisdiction, the resolution of that issue now—a straightforward exercise of statutory construction—will reorient the court below and the other circuit courts to their proper jurisdictional boundaries and, in this case, avoid further proceedings in this Court.[34]

The number of constitutional questions notwithstanding, the interests of judicial economy are best respected by the resolution of all of the ripe issues presented in both petitions instead of deferring these pivotal questions to another day.

For his part, Jarkesy has suffered through over ten life-altering years in the crucible of the SEC's Byzantine administrative apparatus, finally receiving the "meaningful review" from the judicial branch required by the rudiments of due process. If the Court grants certiorari, all of these issues should be resolved now.

[34] Jarkesy raised two additional constitutional issues in the court below—based on equal protection and due process—which were left unresolved in light of the rulings discussed herein. App. at 34a. Should this Court overturn all of the Fifth Circuit's rulings, that court will have to undertake to decide those issues as well. Either way, the permissible dispositions of all of these challenges in the Fifth Circuit will be dictated by this Court's guidance on the scope of remedial jurisdiction under § 78y.

Conclusion

The Court should deny the Petition for Certiorari.

Respectfully submitted,

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RESPONDENTS

No. 22-859

IN THE

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION

Petitioner,

v.

GEORGE R. JARKESY, JR., and PATRIOT28 LLC

Respondents.

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

APPENDIX

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FILED: March 10, 2021

No. 20-61007

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE R. JARKESY, JR. AND
PATRIOT28, L.L.C.,
Petitioners,
V.
SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Review of an Order of the
Securities and Exchange Commission

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Excerpt from Brief

Brief Page 21

George Jarkesy set up two private investment partnerships, managed by an "adviser" company (Patriot28), for a modest number of accredited investors. The funds were small enough that neither was required to register with the SEC.[6] Despite

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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 court[7] primarily charging conventional fraud under the Securities Act, Securities Exchange Act and Advisers Act by "making an untrue statement of material fact or omitting to state a material fact."[8] The SEC sought the imposition of lifetime securities-industry and officer-and-director bars and over $100

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[6] Record On Appeal (Record) 3.

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

[8] 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-g(4), 17 C.F.R. § 275.206(4)-8.

million in punitive civil monetary penalties. Two months before the scheduled "trial" before an ALJ, the Commission—which sits as the neutral "appellate court" on review of the ALJ's "Initial Decision," settled with Jarkesy's co-respondent and entered a published order containing 34 paragraphs of findings of fact and conclusions of law *against Jarkesy*, finding him liable for many of the allegations yet to be tried.[9] Given only four months to prepare a defense by review of a 700 GB "document dump" (the equivalent of 475 million pages of text files), Jarkesy was put to "trial" in February of 2014.[10] The evidentiary hearing—in

Brief Page 23

which the ALJ allowed copious hearsay evidence that would be inadmissible in a real court—consumed 12 full days of testimony over six weeks at the SEC's New York City office. 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 appeal.[11] The Commission then

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[9] App. 18-29; *see* discussion *infra* at 47-54.

[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 briefed herein. The district court denied relief for lack of subject matter jurisdiction due to lack of exhaustion of remedies, 48 F.Supp.3d 32 (D.D.C.) (2014), a ruling which was upheld on appeal to the D.C. Circuit, 803 F.3d 9 (D.C. Cir. 2015). Neither court reached the merits of Jarkesy's constitutional challenges.

took six years to issue its "expedited" Final Order from which Jarkesy has filed this Petition for Review.

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11 App. 30-65; App. 66-68. 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 has taken to obtain this Article III review.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No.: CA 14-114
Washington, DC
1:59 p.m., Friday
January 31, 2014

GEORGE R. JARKESY, et al.,
Plaintiffs,
vs.

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,
Defendant.

Excerpt from Transcript

Transcript page 66:

1 they can direct that that be done. All of those
2 things can take place.
3 THE COURT: All right. Let me just ask you
4 a couple of other questions, as the hour is growing
5 later.
6 The plaintiffs -- as I mentioned before, the
7 plaintiffs claim that the SEC used animus in deciding
8 to bring this -- bring charges against them in an
9 administrative proceeding as opposed to referring them

10 for criminal prosecution or, finally, a civil suit
11 where they would get a right to a jury trial.
12 So I don't want to go into the whole animus
13 thing, actually, but could you just explain, what are
14 the criteria that the SEC uses to determine whether a
15 matter is referred to court, criminally or civilly,
16 versus referred for administrative proceeding.
17 MR. FORSTEIN: To start with, Congress gave
18 the SEC two distinct paths that it can follow in
19 pursuing a civil action: You can go into Federal
20 District Court; you can bring it in an administrative
21 proceeding. It did not provide any criteria as to
22 when the Commission would or should do one versus the
23 other. It's entirely left to the Commission's
24 discretion.
25 The Commission decides -- does not have

<u>Transcript page 66</u>:

1 formal criteria. The Commission decides on a
2 case-by-case basis, based on everything before it,
3 which route it might want to follow.
4 An example where it would automatically go
5 into federal court -- if there's information, for
6 example, that a potential defendant is actively
7 stealing funds and sending them out of the country, so
8 that it may be necessary for the Commission to go into

9 court immediately to get a TRO or injunction, that’s a
10 case that, obviously, would be filed in federal court.
11 But most cases are not that obvious. Most
12 cases Enforcement sits down, they look at a lot of
13 considerations, and they decide whether to do one or
14 the other.
15 THE COURT: I did notice in the list of nine
16 comparator case that the plaintiffs put forward, some
17 did involve direct misappropriation of funds from
18 client accounts, for example, and that’s not involved
19 in this case against -- the SEC's case against these
20 plaintiffs; is that correct?
21 MR. FORSTEIN: Not to my knowledge. I am
22 not intimately aware of the facts of the underlying
23 case.
24 And even in those cases where people are
25 absconding with their clients' funds, the question is :

* * *

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9688 / December 11, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 73819 / December 11, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3978 / December 11, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31370 / December 11, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15255

In the Matter of
JOHN THOMAS CAPITAL
MANAGEMENT GROUP LLC d/b/a
PATRIOT28 LLC and GEORGE R.
JARKESY, JR.

ORDER GRANTING REVIEW AND SCHEDULING BRIEFS

Pursuant to Commission Rule of Practice 411,[1] the petition of respondents John Thomas Capital Management Group LLC d/b/a Patriot28 LLC ("JTCM") and George R. Jarkesy, Jr. and the cross-petition of the Division of Enforcement for review of

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[1] 17 C.F.R. § 201.411.

an administrative law judge's initial decision are GRANTED.[2] Pursuant to Rule of Practice 411(d), the Commission will determine what sanctions, if any, are appropriate in this matter.[3]

Accordingly, IT IS ORDERED, pursuant to Rule of Practice 450(a),[4] that briefs be filed as follows:

> Respondents' opening brief: Respondents shall file a single consolidated brief, not to exceed 16,000 words, by January 13, 2015.
>
> Division's principal and response brief: The Division shall file a brief, not to exceed 16,000 words, by February 13, 2015. This brief must address the issues presented by the Division's crosspetition for review and respond to respondents' opening brief.
>
> Respondents' response and reply brief: Respondents shall file a single consolidated brief, not to exceed 10,000 words, by March 9, 2015.
>
> Division's reply brief: The Division may file a reply brief, not to exceed 2,000 words, by March 23, 2015. This brief must be limited to the issues presented by the Division's cross-petition for review.

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[2] *John Thomas Capital Mgmt. Group LLC*, Initial Decision Release No. 693, 2014 WL 5304908 (Oct. 17, 2014).

[3] 17 C.F.R. § 201.411(d).

[4] 17 C.F.R. § 201.450(a).

As provided by Rule of Practice 450(a), no briefs in addition to those specified in this schedule may be filed without leave of the Commission.[5] Pursuant to Rule of Practice 180(c), failure to file a brief in support of the petition or cross-petition may result in dismissal of this review proceeding as to that party.[6]

The Division requests expedited treatment of this review proceeding "to protect any remaining assets in the funds." Consistent with the Commission's other responsibilities, this request will be granted; no motions for extensions of time to file briefs will be entertained. The Commission's ongoing consideration of this matter is without prejudice to any other remedies or relief that the Division might pursue.

We remind the parties that Rule 452 provides that motions for leave to adduce additional evidence must show with particularity that the evidence is material and there were reasonable grounds for failure to adduce such evidence previously.[7] Thus, to the extent that any party contends that the record compiled before the law judge is incomplete or inadequate, we direct that relief under Rule 452 be sought promptly, and in no event later than the date on which respondents' opening brief is due. Such motion shall demonstrate that the evidence could not have been developed and introduced below; if the law

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[5] Attention is called to Rules of Practice 150-153, 17 C.F.R. §§ 201.150-153, with respect to form and service, and Rules of Practice 450(b) and (c), 17 C.F.R. § 201.450(b), 201.450(c), with respect to content and length limitations (except as modified in this order). The number of words includes any pleadings that are incorporated by reference.

[6] 17 C.F.R. § 201.180(c).

[7] 17 C.F.R. § 201.452.

judge refused relief, the motion shall specify the manner in which relief was sought, the proffer made to the law judge, and the law judge's ruling.

For the Commission, by the Office of General Counsel, pursuant to delegated authority.

Brent J. Fields
Secretary