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Jarkesy v. SEC: Are Federal Courts Pushing the U.S. Toward the Next Financial Crisis?

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ABSTRACT

In the wake of both the Great Depression and the Financial Crisis of 2008, Congress established and expanded the powers of the Securities and Exchange Commission (SEC). As part of this expansion, the SEC in-house administrative proceedings, designed to adjudicate SEC violations before the SEC's administrative law judges (ALJs), were born. These in-house proceedings have faced multiple constitutional attacks in the past decade. In the most recent iteration of such challenges, Jarkesy v. SEC*, the Fifth Circuit held that the SEC's in-house proceedings were unconstitutional on three grounds: (1) the in-house proceedings deprived petitioners of their constitutional right to jury trial, (2) Congress unconstitutionally delegated its legislative power to the SEC, and (3) the statutory removal restrictions of the SEC's ALJs violated Article II of the Constitution.*

This Note rejects the Fifth Circuit's majority opinion, argues that future courts should be wary in following the Jarkesy *holding, and provides a synopsis of the multifaceted impacts the* Jarkesy *decision would have on administrative agencies if affirmed by the United States Supreme Court. This Note also encourages the SEC to implement policies to combat the* Jarkesy *decision, and suggests that Congress implement legislative changes to the underlying statutes that govern the SEC.*

The SEC plays a major role in protecting investors and ensuring orderly and efficient financial markets. A look back at the events that led to the rise of the SEC and its administrative powers shows the risks that come with hindering the SEC's ability to adjudicate securities violations—namely, widespread market crashes, recessions, and an overall lack of confidence in the U.S. markets.

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I. INTRODUCTION

On October 29, 1929, also known as Black Tuesday, investors traded over sixteen million shares on the New York Stock Exchange in a single day and the market crashed, marking the beginning of the Great Depression.[1] By the early 1930s "thousands of banks . . . collaps[ed], the unemployment rate soared to almost twenty-five per cent, and soup kitchens and shantytowns sprang up across the country."[2] After his father died in his 40s, Dusko Condic from Chicago, Illinois, recounts being evicted from his home:

> Unfortunately, we lost the house. I can remember to this day—and I become emotional when I think of it—literally being placed on the sidewalk [with] every last possession that my poor mother had because she wasn't able to supposedly pay the mortgage. And an incredible number of people came to my mothers' aid, literally wheeling wheelbarrows of coal to help warm the house.[3]

Fast forward to 2008, the fall of the investment bank Lehman Brothers began the biggest financial crisis since the Great Depression.[4] In the wake of the financial hardship, millions of Americans lost their homes due to mortgage foreclosures, and by 2010, the unemployment rate rose to ten percent.[5] People like Jennifer Butz, thirty-five, from Atlanta, lost their jobs, foreclosed on their homes, and faced thousands of dollars in debt.[6] Theodora Stephen, a single

1. *See Stock Market Crash of 1929*, HISTORY (Aug. 12, 2022), https://www.history.com/topics/great-depression/1929-stock-market-crash (describing the onset of the Great Depression and harsh economic conditions).

2. John Cassidy, *The Real Cost of the 2008 Financial Crisis*, THE NEW YORKER (Sept. 10, 2018), https://www.newyorker.com/magazine/2018/09/17/the-real-cost-of-the-2008-financial-crisis. A "shantytown" is "a collection of rough huts which poor people live in, usually in or near a large city." *Shantytown*, COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/shantytown (last visited Jan. 29, 2023).

3. Neenah Ellis, *Survivors of the Great Depression Tell Their Stories*, NPR (Nov. 27, 2008, 1:31PM), https://www.npr.org/templates/story/story.php?storyId=97468008 (recounting stories from three survivors of the Great Depression).

4. *See* Cassidy, *supra* note 2.

5. *See id.*

6. Janna Herron, *4 Personal Stories of the Great Recession*, BANKRATE (Sept. 27, 2013), https://www.bankrate.com/personal-finance/smart-money/4-personal-stories-of-the-great-recession/ (describing the experiences of four individuals during the recession) ("Butz was hospitalized . . . for 38 days in 2008. By the time she got out, she had no job. Her house was going into foreclosure and her car had been repossessed. Her credit cards had gone to collections and she faced thousands of dollars in medical bills. She finally filed for bankruptcy in September 2009.").

mother from Southern California, struggled to get her two daughters through school while paying off her mortgage.[7] Her property was "worth less than the balance of the loan."[8] Still, almost ten years later families are living paycheck to paycheck.[9] The stories of people like Dusko Condic, Jennifer Butz, and Theodora Stephen exemplify the widespread loss that led to the creation of the Securities and Exchange Commission (SEC) and later expansion of broad powers to police securities violations.[10]

The SEC was created to protect and inform investors as well as promote fairness in the securities market.[11] Modernly, the SEC prosecutes securities violations in rapidly developing fields ranging from crypto, to cybersecurity, and environmental, social, and corporate governance (ESG).[12] In 2022, the SEC filed 760 total enforcement actions against individuals and corporations that committed securities violations.[13] The SEC's prosecutorial claims are largely conducted through the SEC's in-house, administrative proceedings.[14]

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7. *See* Colleen Shalby, *The Financial Crisis Hit 10 Years Ago. For Some, It Feels Like Yesterday*, L.A. TIMES (Sept. 15, 2018), https://www.latimes.com/business/la-fi-financial-crisis-experiences-20180915-htmlstory.html.

8. *See id.*

9. *See id.* ("Mechele H. says her family is still living paycheck to paycheck. She and her husband owned a home in Huntington Beach for 10 years. When the financial crisis hit in 2008, her husband—who had suffered a heart attack the year before—saw his hours and pay cut.").

10. *See infra* notes 29–47 and accompanying text (describing the rise of the SEC in response to the 1929 financial crisis which resulted from widespread stock misinformation, and the implementation of the Dodd-Frank Act following the 2008 financial downturn).

11. *See The Role of the SEC*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/role-sec#:~:text=The%20U.%20S.%20Securities%20and%20Exchange,Facilitate%20capital%20formation (last visited Oct. 11, 2023) (describing how the SEC's three-part mission is to protect investors, maintain fair markets, and facilitate capital formation).

12. *See* Press Release, SEC, SEC Announces Enforcement Results for FY 2021 (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238#:~:text=The%20Securities%20and%20Exchange%20Commission%20today%20announced%20that,involved%20at%20least%20one%20individual%20defendant%20or%20respondent.

13. *See* Keri E. Riemer et al., *United States: A Record Year: SEC FY 2022 Enforcement Actions Bring Big Penalties*, K&L GATES GLOBAL INV. L. WATCH (Nov. 16, 2022), https://www.investmentlawwatch.com/2022/11/16/united-states-a-record-year-sec-fy-2022-enforcement-actions-bring-big-penalties/#page=1.

14. *See* Susan E. Hurd, *Securities Litigation Advisory: SEC's In-House Court System in Jeopardy After Two Major Developments*, ALSTON & BIRD (May 31, 2022), https://www.alston.com/en/insights/publications/2022/05/securities-litigation-advisory-secs-in-house-court ("When the SEC brings a contested enforcement action, it can choose to file in federal court, where defendants receive protections such as the right to a trial by a jury of one's peers. Or it can choose to file that same action in an administrative proceeding before one of the in-house administrative law judges (ALJs) appointed by the Commission . . . .").

At the heart of these proceedings are the SEC's administrative law judges (ALJs), who render initial decisions on the claims brought.[15] However, this system is under attack by respondents raising constitutional challenges.[16] There is much at stake in suits challenging the SEC.[17] These challenges not only threaten the viability of the SEC's policing powers but also the power of the over thirty other administrative federal agencies.[18] The widespread support of these challenges by courts and commentators "reflects a significant blow to the legitimacy of the agency's enforcement program."[19]

This Note examines the most recent constitutional attack on the SEC's in-house proceedings—*Jarkesy v. SEC*.[20] In line with the *Jarkesy* dissent, this Note criticizes the majority's foundations for all three holdings in the opinion relating to the respondent's right to a jury trial, the nondelegation doctrine, and the statutory removal holding.[21] Finally, because the holding questions not only the continuing viability of the SEC's administrative proceedings, but also those of other federal agencies, this Note encourages the SEC and Congress to address the issues raised in the *Jarkesy* decision by amending SEC in-house proceedings as well as existing statutes governing the SEC's procedures.[22]

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15. *See* Susan E. Hurd & Matthew E. Newman, *Is the SEC's In-House Court System in Jeopardy?*, BLOOMBERG L. (July 29, 2022, 1:00AM), https://news.bloomberglaw.com/securities-law/is-the-secs-in-house-court-system-in-jeopardy ("In an administrative proceeding, the SEC is not just the prosecutor, but it also serves as judge and jury. These in-house proceedings are before administrative law judges (ALJs), who are appointed by the SEC.").

16. *See* Hurd, *supra* note 14 ("Defendants frequently object that this system is unfair at best and unconstitutional at worst. Their objections are finally getting traction in the courts, including in two recent decisions that represent some of the biggest developments in this area for several years. First, on May 18, 2022, the U.S. Court of Appeals for the Fifth Circuit issued a landmark decision in *Jarkesy v. SEC*, holding that the SEC's in-house court system is unconstitutional in its current form for a number of independent reasons. Second, on May 16, the U.S. Supreme Court agreed to hear *SEC v. Cochran*, a procedural case that may allow defendants to go directly to federal court to challenge the constitutionality of the SEC's in-house court system rather than enduring a full administrative proceeding and an appeal to the Commission before doing so.").

17. *See* Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. LAW. 1, 1 (2015) (arguing that the SEC should "reestablish the equilibrium between penalties and procedures by revising its rules of practice that govern" admistrative proceedings to avoid constitutional challenges).

18. *See id.* at 2 ("The challenges invite courts to strike down features of administrative adjudication utilized (in variation) by regulatory agencies across the executive branch.").

19. *See id.*

20. *See infra* Part IV.

21. *See infra* Part V.

22. *See infra* Part VI.

Part II of this Note provides background on the SEC, its in-house proceedings, and the administrative law judges at the heart of its administrative proceedings.[23] Part III examines the backlash the SEC has faced in recent years regarding its administrative proceedings, including Appointments Clause and jurisdictional challenges.[24] Part IV provides an overview of the *Jarkesy* decision and its three-part holding relating to right to jury trial, nondelegation, and statutory removal procedures.[25] Part V presents the legal reasons for why future federal courts should be wary in following the *Jarkesy* holding and its foundational reasoning.[26] Part VI outlines the impact the *Jarkesy* decision has on the SEC and its wider implications for other federal agencies, argues that the SEC should implement policies (such as waiver of right to jury trial clauses in its settlement agreements and authorization of interlocutory judicial review to increase the legitimacy of SEC administrative proceedings), and suggests that Congress implement legislative changes to underlying statutes that govern the SEC.[27] Part VII briefly concludes.[28]

II. THE RISE OF THE SEC AND ITS IN-HOUSE PROCEEDINGS

A. Establishment of the SEC in the Wake of the Great Depression

The Securities Exchange Act of 1934 (Exchange Act) created the Securities & Exchange Commission.[29] The SEC is an independent agency tasked

23. *See infra* Part II.
24. *See infra* Part III.
25. *See infra* Part IV.
26. *See infra* Part V.
27. *See infra* Part VI.
28. *See infra* Part VII.
29. The Securities Exchange Act, 15 U.S.C. § 78b (1934) ("[T]ransactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, to remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions."); *see also* Ellen Terrell, *Signing of the Securities Exchange Act of 1934*, LIBR. CONGRESS (July 2021), https://guides.loc.gov/this-month-in-business-history/june/signing-securities-exchange-act-1934.

with investigating potential violations of federal securities laws.[30] The purpose of the SEC is to protect investors, promote fairness in the securities markets, and share information about companies and investment professionals to help investors make informed decisions and invest with confidence.[31] Examples of such violations include manipulation of investment prices, making false or misleading statements about a company, and offering fraudulent securities.[32]

Prior to the passing of the Exchange Act, there was little oversight of the United States securities market.[33] The development of federal securities law was sparked by widespread misinformation by companies regarding the value of their stock.[34] First, Congress enacted the Securities Act of 1933 and the Exchange Act in response to the stock market crash of 1929, which spurred the Great Depression.[35] Prior to the crash, "companies issued stock and

30. *Securities and Exchange Commission (SEC)*, CORNELL L. SCH. LEGAL INFO. INST., https://www.investor.gov/introduction-investing/investing-basics/role-sec#:~:text=The%20U.%20S.%20Securities%20and%20Exchange,Facilitate%20capital%20formation (last updated Apr. 2021) ("The Securities and Exchange Commission (SEC) is a federal administrative agency tasked with monitoring markets, enforcing securities laws, and developing new regulations. . . . It is a body of five commissioners, appointed by the President by and with the consent of the Senate. That is, the SEC is an independent agency with five department heads.").

31. *See About the SEC*, SEC, https://www.sec.gov/about (last visited Oct. 10, 2023) ("The SEC's mission is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.").

32. SAYLOR ACADEMY, FOUNDATIONS OF BUSINESS LAW AND THE LEGAL ENVIRONMENT ch. 24 (2012) (ebook), https://saylordotorg.github.io/text_foundations-of-business-law-and-the-legal-environment/s27-securities-regulation.html ("Among the violations the commission searches out are these: (1) unregistered sale of securities subject to the registration requirement of the Securities Act of 1933, (2) fraudulent acts and practices, (3) manipulation of market prices, (4) carrying out of a securities business while insolvent, (5) misappropriation of customers' funds by brokers and dealers, and [(6)] other unfair dealings by brokers and dealers.").

33. *See* Terrell, *supra* note 29 ("Prior to the signing of the Securities Exchange Act by President Roosevelt on June 6, 1934, there was not much oversight of the United States securities market.").

34. *See* John H. Matheson, *Securities and Exchange Commission*, FREE SPEECH CTR., https://firstamendment.mtsu.edu/article/securities-and-exchange-commission/ (last upated Sept. 19, 2023) ("To restore the country's faith in the economy, Congress passed two significant reforms: the Securities Act of 1933 and the Securities Exchange Act of 1934. At their core, these acts provide increased structure and improved oversight to the securities market.").

35. *Securities Law History*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/securities_law_history (last updated Oct. 2023) ("In response to this calamity and at President Franklin Roosevelt's instigation, Congress enacted laws to prevent speculative frenzies like those in the 1920s. After a series of hearings that brought to light the severity of the abuses leading to the crash of 1929, Congress enacted the Securities Act of 1933 (the 'Securities Act'), and the Securities Exchange Act of 1934 (the 'Exchange Act').").

enthusiastically promoted the value of their company to induce investors to purchase those securities.[36] Brokers in turn sold this stock to investors based on promises of large profits but with little disclosure of relevant information about the company."[37] Many of these promises made by companies and brokers either had no substantive basis or were fraudulent.[38] Because of this, the market became extremely unstable and the market crashed in 1929, "as panicky investors sold off their investments en masse."[39]

B. Dodd-Frank and the 2008 Financial Crisis

In 2008, deregulation in the financial industry allowed banks to invest consumer money in derivatives.[40] Because of this, "unscrupulous investment banking and insurance practices" passed financial risks to investors, and ultimately led to the 2008 financial crisis.[41] Following critiques that the SEC failed to prevent the financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).[42] Prior

36. *Id.*

37. *Id.*

38. *Id.* ("In many cases, the promises made by companies and brokers had little or no substantive basis, or were wholly fraudulent.").

39. *Id.* Because of the false promises provided by brokers, the stock values were in great excess of their real value. *Stock Market Crash of 1929*, *supra* note 1. As stock prices began to drop, panic set in, and on Black Thursday, "a record 12,894,650 shares were traded." *Id.*

40. *See* Kimberly Amadeo, *Causes of the 2008 Financial Crisis*, THE BALANCE, https://www.thebalancemoney.com/what-caused-2008-global-financial-crisis-3306176 (last updated Dec. 13, 2022) [hereinafter Amadeo, *2008 Financial Crisis*]. A derivative is "a financial contract that derives its value from an underlying asset. The buyer agrees to purchase the asset on a specific date at a specific price. Derivatives are often used for commodities, such as oil, gasoline, or gold." Kimberly Amadeo, *Financial Derivatives: Definition*, *Types, Risks*, THE BALANCE, https://www.thebalancemoney.com/what-are-derivatives-3305833 (last updated Jan. 24, 2022).

41. Amadeo, *2008 Financial Crisis*, *supra* note 40 (describing the causes of the 2008 Financial Crisis) ("The investors took all the risk of default, but they didn't worry about the risk because they had insurance, called credit default swaps. These were sold by solid insurance companies like the American International Group. Thanks to this insurance, investors snapped up the derivatives. In time, everyone owned them, including pension funds, large banks, hedge funds, and even individual investors. Some of the biggest owners were Bear Stearns, Citibank, and Lehman Brothers. A derivative backed by the combination of both real estate and insurance was very profitable. As the demand for these derivatives grew, so did the banks' demand for more and more mortgages to back the securities. To meet this demand, banks and mortgage brokers offered home loans to just about anyone.").

42. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. §§ 5301–5641; *see also* Gregory A. Markel et al., *SEC's In-House Adjudication Deemed Unconstitutional by Fifth Circuit,* SEYFARTH (May 26, 2022), https://www.seyfarth.com/news-insights/secs-in-house-adjudication-deemed-unconstitutional-by-fifth-circuit.html.

to Dodd-Frank, "there were seven different regulators with authority over the consumer financial services marketplace" which made accountability impossible due to the diffused and fragmented nature of the system.[43] Congress attempted to centralize the monitoring of financial services.[44] Because of this, under Dodd-Frank, the SEC became authorized to impose civil penalties[45] against any person who violates any federal securities laws in proceedings before an ALJ.[46] Dodd-Frank gives the SEC sole discretion to decide whether to bring an action in federal court or through an in-house administrative proceeding.[47]

C. SEC's In-House Administrative Proceedings

The process by which the SEC brings civil penalties is often referred to as the SEC's "in-house" administrative proceedings.[48] During the SEC's in-house proceedings, the ALJ acts as judge and jury.[49] Throughout the action, the ALJ presides over the case like a federal court judge would (for instance, deciding motions, resolving discovery, evidentiary, and other disputes

43. *Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE PRESIDENT: BARACK OBAMA, https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform (last visited Nov. 7, 2023).

44. *Id.* One way the Dodd-Frank Act attempted to do this was by setting clear and consistent rules through the Consumer Financial Protection Bureau (CFPB). *Id.* The CFPB sets "clear rules of the road and . . . ensure[s] that financial firms are held to high standards," while the SEC was tasked with enforcing these rules. *Id.*

45. 15 U.S.C. § 77h-1; *see* Platt, *supra* note 17 ("Dodd-Frank enhanced the agency's penalty authority . . . the Commission has taken advantage of its new penalty authority . . . ."). Civil monetary penalties are defined "as any penalty, fine, or other sanction that: (1) is for a specific amount, or has a maximum amount, as provided by federal law; and (2) is assessed or enforced by an agency in an administrative proceeding or by a federal court pursuant to federal law." Adjustments to Civil Monetary Penalty Amounts, Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 Release Nos. 33-111143, 88 Fed. Reg. 1614, 1614–15 (Jan. 6, 2023). Per the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the SEC must adjust these penalties yearly to account for inflation. *Id.* The SEC issued the most recent 2023 penalty values on January 6, 2023. *Id.* (chart containing the current penalty values for 2023).

46. 15 U.S.C. §77h-1; *see also* Platt, *supra* note 17, at 4.

47. *See* Platt, *supra* note 17, at 3 ("[T]he SEC can . . . file a civil lawsuit in federal district court, or commence an [administrative proceeding].").

48. *See, e.g.*, Perrie Weiner et al., *Will the SEC Lose Its Home Court Advantage?*, 21 WESTLAW J. SEC. LITIG. & REG. 1, 1 (2015).

49. John J. Carney et al., *Navigating a Litigated SEC Administrative Proceeding*, BLOOMBERG L. (Jan. 2021), https://www.bloomberglaw.com/external/document/XB356GR4000000/litigation-professional-perspective-navigating-a-litigated-sec-a.

between the parties).[50] The ALJ "considers the evidence presented by the Division as well as any evidence put forth by the respondent, makes credibility determinations, and then issues an initial decision with findings of fact and conclusions of law."[51] Because of this, the SEC in-house proceedings lack fact-finding juries and involve limited depositions.[52] Once the ALJ issues a decision, both the SEC and the respondents may appeal the decision in whole or part.[53] On appeal, the ALJ's post-hearing decision "is subject to de novo review by the Commission, which may affirm, reverse, modify, set aside, or remand for further proceedings."[54] Therefore, "[i]f a party does not petition for review, and the Commission does not order review on its own initiative, the SEC's Rules of Practice provide that the Commission will issue an order stating that the initial decision has become final."[55] The Commission may also choose, on its own initiative, to review an ALJ's initial decision.[56] Thus, the five SEC commissioners make the final decision on findings of fact and sanctions.[57] The respondents of SEC proceedings may appeal the SEC administrative decision to federal court only after the case has been decided by the ALJ and appealed to the SEC Commission.[58]

Post Dodd-Frank, the frequency of administrative proceedings increased significantly.[59] Prior to Dodd-Frank, 60% of SEC claims were brought as

50. *Id.* ("The SEC can seek virtually the same sanctions through the administrative proceeding process as it can seek in federal court.").

51. *Id.* (describing that the SEC ALJ "issues an initial decision with findings of fact and conclusions of law" following an administrative proceeding).

52. Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 72 (2016) ("The AP is conducted before an ALJ, with staff members (usually from the CFTC Division) acting as prosecutors. There is no jury."); *see also* Carney et al., *supra* note 49 ("Unlike document discovery, the number of depositions is strictly limited in SEC administrative proceedings.").

53. *See* Carney et al., *supra* note 49.

54. *See Office of Administrative Law Judges*, SEC, https://www.sec.gov/page/aljsectionlanding (last visited Oct. 16, 2023).

55. *Id.*

56. *See* Carney et al., *supra* note 49.

57. *Id.* ("The target of an SEC administrative proceeding reaches federal court only after the case has been decided by the ALJ and appealed to the Commission.").

58. *Id.*; *see also Navigating SEC Administrative Proceedings Flowchart*, WESTLAW PRAC. L. LITIG., https://1.next.westlaw.com/Link/Document/Blob/I26212754116311e698dc8b09b4f043e0.pdf (last visited Nov. 10, 2023) (flow chart outlining "[t]he respondent appeals to the US Court of Appeals" as the final step in the chart).

59. Stephen J. Choi & Adam C. Prichard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1, 26 fig. 6 (2017).

administrative proceedings.[60] After Dodd-Frank's enactment in 2010, between 2010 and 2015, 78% of cases involving non-financial public companies were brought as administrative proceedings.[61] One feature of administrative proceedings that led to this shift is the expedited nature of in-house proceedings as compared to non-in-house proceedings.[62] Limited motion practice, discovery, and prehearing preparation contributes to the expedited nature of the proceedings.[63] The most extended timeline requires the SEC ALJ to issue a decision three hundred days from the Order Instituting Proceedings.[64] The SEC administrative rules suggest strict adherence to this timeline.[65] Additionally, the SEC now has a lower burden of proof.[66] During an administrative proceeding, the SEC simply must establish the evidence by a preponderance of the evidence, meaning the SEC must prove the respondent is more likely guilty than not, rather than the typical beyond a reasonable doubt standard of federal criminal cases.[67]

III. CONSTITUTIONAL DANGER ZONE: CHALLENGES TO SEC ADMINISTRATIVE PROCEEDINGS

The SEC's in-house proceedings have faced multiple constitutional challenges threatening the viability of the SEC's administrative investigations in recent years.[68] Two of the most impactful decisions resulting from these

60. *Id.* at 1 (contributing the findings to the fact that "administrative proceedings following Dodd-Frank tended to be weaker (i.e., less likely to prevail) and less salient (i.e., less likely to garner media attention). These findings are consistent with the SEC attempting to maximize the monetary penalties it imposes as well as positive media attention from its enforcement actions, while allocating its limited resources between administrative proceedings and civil court actions in a cost-effective way.").

61. *Id.* at 19.

62. *See* Carney et al., *supra* note 49.

63. *Id.* ("The scheduling order includes dates for motion practice, fact discovery, expert discovery, and hearing preparation. The turnaround time on motion practice is also quick, with just three days between opposition and reply briefs.").

64. *See* Platt, *supra* note 17, at 4 (citing 17 C.F.R. § 201.360(a) (2018)). Non-in-house proceedings typically take up to a year to litigate, with appeals tacking on another 1–2 years. *See* Eugene Lee, *How Much Time Do Lawsuits Take?*, CAL. LAB. & EMP. L., https://www.calaborlaw.com/how-much-time-do-lawsuits-take (last visited Oct. 16, 2023).

65. *See* Platt, *supra* note 17, at 4–5.

66. *Id.* at 6.

67. *Id.* ("At trial, the Enforcement Division must prove its case only by a preponderance of the evidence, far lower than the beyond a reasonable doubt standard required in criminal prosecutions (but the same as required in district court civil proceedings).").

68. *See* Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018); Cochran v. SEC, 20 F.4th 197, 197–98 (5th

constitutional challenges are *Lucia v. SEC* and *Cochran v. SEC*.[69] First, in *Lucia v. SEC*, the Supreme Court established that SEC ALJs are "Officers" per the Appointments Clause who must be properly appointed by the President, subject to the advice and consent of the Senate.[70] The *Lucia* decision quickly became a basis of constitutional and legal challenges against ALJs and administrative judges throughout the federal government.[71] Second, in *Cochran v. SEC*, the Fifth Circuit, en banc, determined that federal district courts have subject matter jurisdiction to hear collateral lawsuits with SEC administrative proceedings.[72] This case, if affirmed by the Supreme Court, could significantly hinder the SEC's efforts to regulate violations of securities laws administratively.[73]

A. The First Domino to Fall: Lucia v. SEC

In *Lucia*, the SEC charged Raymond Lucia with violating securities laws.[74] Judge Elliot, the ALJ assigned to the case, issued a decision concluding that Lucia violated the law and imposed sanctions.[75] On appeal, Lucia argued that Judge Elliott had not been constitutionally appointed, and therefore was deciding cases without constitutional authority.[76]

Cir. 2021) (en banc).

69. *See Lucia*, 138 S. Ct. at 2049 (holding SEC ALJs are "Officers of the United States" who must be appointed under the Appointments Clause); *see also Cochran*, 20 F.4th at 197–98 (holding that federal district courts have subject mater jurisdiction to hear collateral lawsuits with SEC administrative proceedings).

70. *See infra* notes 74–92.

71. Danette L. Mincey, *The Far-Reaching Tentacles of* Lucia v. SEC (Apr. 21, 2022), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/april-2022/farreaching-tentacles-lucia-v-sec/ ("In the three years since the Court decided *Lucia*, appointments of ALJs have been challenged in numerous other federal agencies.").

72. *See infra* notes 93–115.

73. *See* Cochran v. SEC: *Fifth Circuit Creates Circuit Split by Allowing Prefinal Judicial Review of SEC Enforcement Proceeding*, 135 HARV. L. REV. 1963, 1970 (2022) ("Depending on how the Supreme Court rules, *Cochran* has the potential to crystallize a growing tension in the way courts understand prefinal review.").

74. *See Lucia*, 138 S. Ct. at 2049 ("Lucia marketed a retirement savings strategy called 'Buckets of Money.' In the SEC's view, Lucia used misleading slideshow presentations to deceive prospective clients. The SEC charged Lucia under the Investment Advisers Act.").

75. *See id.* at 2050.

76. *See id.* ("According to Lucia, the Commission's ALJs are 'Officers of the United States' and thus subject to the Appointments Clause. Under that Clause, Lucia noted, only the President, 'Courts of Law,' or 'Heads of Departments' can appoint 'Officers.' And none of those actors had made Judge Elliot an ALJ.") (citation omitted).

Previously, the SEC's ALJs were hired by the Commission's Office of Human Resources with input from the chief ALJ and U.S. Office of Personal Management.[77] "The SEC has historically taken the view that its ALJs are employees (rather than Officers)" of the United States.[78] Officers of the United States are "a class of government officials distinct from mere employees."[79] Under the Appointments Clause of the United States Constitution "the President alone, in the Courts of Law, or in the Heads of Departments" may appoint officers of the United States.[80] Therefore, officers of the United States must be appointed by the President, subject to the advice and consent of the Senate.[81]

The Commission held that the ALJs are not "Officers of the United States" and are instead "mere employees."[82] A panel of the Court of Appeals for the D.C. Circuit and Court of Appeals affirmed the Commission's ruling.[83] The Supreme Court granted certiorari to determine whether SEC ALJs are "Officers of the United States" per the Appointments Clause.[84]

The Supreme Court reversed the holding of the Court of Appeals and held

77. Daniel Walfish, *The Post*-Lucia *Executive Order on ALJs*, PROGRAM ON CORP. COMPLIANCE & ENFORCEMENT N.Y.U. (July 18, 2018), https://wp.nyu.edu/compliance_enforcement/2018/07/18/the-post-lucia-executive-order-on-aljs/.

78. *See* Veronica E. Callahan et al., *Supreme Court to Decide Whether the SEC's Administrative Law Judges Are Officers of the United States Under the Appointments Clause of the Constitution*, ARNOLD & PORTER (Apr. 26, 2018), https://www.arnoldporter.com/en/perspectives/advisories/2018/04/supreme-court-to-decide-whether-the-sec-aljs?utm_source=mondaq&utm_medium=syndication&utm_term=CorporateCommercial-Law&utm_content=articleoriginal&utm_campaign=article. *But see Lucia*, 138 S. Ct. at 2055 ("For all the reasons we have given . . . the Commission's ALJs are 'Officers of the United States,' subject to the Appointments Clause.").

79. *See Lucia*, 138 S. Ct. at 2049.

80. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

81. *Overview of Appointments Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C2-3-1/ALDE_00013092/ (last visited Feb. 3, 2023).

82. *See Lucia*, 138 S. Ct. at 2050 (explaining that the SEC declined to hold that the SEC's ALJs are officers of the United States and rather held that the ALJs are "'mere employees'—officials with lesser responsibilities who fall outside the Appointments Clause's ambit").

83. *See id.* ("Lucia's claim fared no better in the Court of Appeals for the D. C. Circuit. A panel of that court seconded the Commission's view that SEC ALJs are employees rather than officers, and so are not subject to the Appointments Clause.").

84. *See id.* at 2051.

that the ALJs of the SEC were "Officers" within the meaning of the Appointments Clause.[85] Following precedent in *Germaine*, the Court noted that employees' "duties [are] 'occasional or temporary' rather than 'continuing and permanent.'"[86] Additionally, following the holding in *Buckley v. Valeo*, the Court outlined that officers of the United States "'exercis[e] significant authority pursuant to the laws of the United States.'"[87] The Court held that ALJs hold a continuing office established by law, and exercise significant discretion when carrying out important functions including: (1) taking testimony, (2) receiving evidence, (3) examining witnesses, (4) conducting trials, and (5) issuing decisions.[88]

Following the *Lucia* decision, the SEC retroactively appointed the five SEC ALJs that were appointed at the time of *Lucia*.[89] The Commission issued an order to ratify the constitutional appointment of its ALJs on November 30, 2017, and later issued an order lifting the stay on pending administrative proceedings on August 22, 2018.[90] Through its ratification order, the SEC

85. *See id.* at 2055–56.

86. *See id.* at 2051; *see also* United States v. Germaine, 99 U.S. 508, 511–12 (1878) ("If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case the court said, the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent.").

87. *See Lucia*, 138 S. Ct. at 2051; *see also* Buckley v. Valeo, 424 U.S. 1, 126 (1976) ("We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II].").

88. *See Lucia*, 138 S. Ct. at 2053.

89. *See* Press Release, SEC, SEC Ratifies Appointment of Administrative Law Judges (Nov. 30, 2017), https://www.sec.gov/news/press-release/2017-215 ("The Securities and Exchange Commission today announced that it has ratified its prior appointment of Chief Administrative Law Judge Brenda Murray and Administrative Law Judges Carol Fox Foelak, Cameron Elliot, James E. Grimes, and Jason S. Patil. . . . By ratifying the appointment of its ALJs, the Commission has resolved any concerns that administrative proceedings presided over by its ALJs violate the Appointments Clause. The Commission Order also directs the ALJs to review their actions in all open administrative proceedings to determine whether to ratify those actions."); *see also Article II—Appointments Clause—Officers of the United States*—Lucia v. SEC, 132 HARV. L. REV. 287, 291 (2018) ("The SEC employs only five ALJs, which the 'head of department' had already 'retroactively' appointed by the time the litigation reached the Supreme Court.").

90. *SEC Ratifies Appointment of ALJs and Lifts Stay on Pending Administrative Proceedings*, ROPES & GRAY (Aug. 23, 2018), https://www.ropesgray.com/en/newsroom/alerts/2018/08/sec-ratifies-appointment-of-aljs-and-lifts-stay-on-pending-administrative-proceedings ("Through the ratification order, the Commission has also attempted to comply with the Appointments Clause of the Constitution. Whether this *post hac* [sic] ratification passes constitutional muster, however, remains to be tested in the courts.").

attempted to confirm that it had appointed the ALJs as per the Appointments Clause.[91] Although the *Lucia* decision ultimately did not have a direct impact on the SEC, it began a chain of court decisions challenging the appointment of ALJs on various constitutional bases.[92]

B. Chain Reaction: Cochran v. SEC

In April 2016, the SEC brought an enforcement action against Michelle Cochran, a certified public accountant.[93] The SEC alleged that Cochran violated the Exchange Act by failing to comply with auditing standards issued by the Public Company Accounting Oversight Board (PCAOB).[94] An SEC administrative law judge ruled against Cochran and imposed "a $22,500 penalty and a five-year ban on practicing before the SEC."[95] Cochran objected to this holding.[96]

Before the SEC ruled on the objection, and in response to *Lucia*, the SEC remanded all pending administrative cases for new proceedings before constitutionally appointed ALJs.[97] Following this, "Cochran filed suit in federal district court to enjoin the SEC's administrative enforcement proceedings against her."[98] Cochran argued "because SEC ALJs enjoy multiple layers of 'for-cause' removal protection, they are unconstitutionally insulated from the President's Article II removal power."[99] Therefore, according to Cochran, the SEC's ALJ removal procedures are unconstitutional.[100]

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91. *Id.* ("The August 22, 2018 Order 'reiterates' the Commission's 'approval of [the ALJs'] appointments as [its] own under the Constitution.'").

92. *See* Michael A. Sabino, *"Liberty Requires Accountability": The Appointments Clause,* Lucia v. SEC*, and the Next Constitutional Controversy*, 11 WM. & MARY BUS. L. REV. 173, 249 (2019) ("*Lucia* is invigorated from the Supreme Court's prior declarations that we cannot permit the contemporary Administrative State to 'slip from the Executive's control, and thus from that of the people.'") (citing Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010)).

93. Cochran v. SEC, 20 F.4th 194, 198 (5th Cir. 2021) (en banc) ("In April 2016, the Securities and Exchange Commission ('SEC') brought an enforcement action against Michelle Cochran, a certified public accountant.").

94. *Id.* ("The SEC alleged that Cochran violated the Exchange Act by, *inter alia*, failing to comply with auditing standards issued by the Public Company Accounting Oversight Board ('PCAOB') when performing quarterly reviews and annual audits between 2010 and 2013.").

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* This argument is echoed in *Jarkesy v. SEC*, discussed later in this Note. *See infra* notes

The district court rejected Cochran's argument and dismissed the case for lack of subject-matter jurisdiction.[101] The district court held that because section 78y of the Securities Exchange Act of 1934 "permits judicial review of final SEC orders in the courts of appeals, the Exchange Act implicitly strips district courts of jurisdiction to hear challenges to ongoing SEC enforcement proceedings."[102] Cochran appealed this decision, and the Court of Appeals for the Fifth Circuit enjoined the SEC administrative proceeding pending appeal.[103] Following a 2–1 decision affirming the removal power claim, the Fifth Circuit granted a rehearing en banc.[104]

The Fifth Circuit held that the Securities Exchange Act "did not explicitly or implicitly strip the district court of jurisdiction over Cochran's claim."[105] The court noted that the statutory text provides that "*only* 'person[s] aggrieved by a final order of the Commission' may petition in the relevant court of appeals to review that final order.[106] The statute says nothing about people, like Cochran, who have not yet received a final order of the Commission."[107] Additionally, the court held that it was bound by *Free Enterprise*,[108] in which the Supreme Court held that the Securities Exchange Act divested district courts of jurisdiction over removal power challenges to SEC proceedings.[109] The court outlined that "[j]ust like *Free Enterprise Fund*, this case concerns the question of whether the Exchange Act divests district courts of jurisdiction to consider removal power challenges; every material aspect of the Supreme Court's reasoning in *Free Enterprise Fund* would seem to apply with equal

160–171.

101. *Cochran*, 20 F.4th at 198.

102. *Id.*; *see also* Securities Exchange Act of 1934, 15 U.S.C. § 78y(a)(1) ("A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.").

103. *Cochran*, 20 F.4th at 198.

104. *Id.* at 199.

105. *Id.*

106. *Id.* at 200.

107. *Id.*

108. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 514 (2010) (Breyer, J., dissenting) ("While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.").

109. *Cochran*, 20 F.4th at 201–02.

force here."[110] Therefore, Cochran's claim was within the district court's jurisdiction to review.[111]

On May 16, 2022, the Supreme Court granted certiorari to answer the question of "[w]hether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing [SEC] administrative proceeding seeks to enjoin that proceeding."[112] On November 7, 2022, the Supreme Court heard oral arguments in both *Cochran* and *Axon Enterprise, Inc. v. FTC*.[113] On April 14, 2023, the Supreme Court held that "the review scheme[] set out in the Exchange Act . . . do[es] not displace district court jurisdiction over . . . Cochran's far-reaching constitutional claims," thereby hindering the SEC's efforts in regulating violations of securities laws via its administrative proceedings.[114]

Cochran is the penultimate constitutional challenge to the SEC's in-house administrative proceedings followed by *Jarkesy v. SEC*, filed on May 18, 2022.[115]

IV. THE *JARKESY* DECISION

Jarkesy follows *Lucia* and *Cochran* as the most recent and impactful constitutional challenge to the SEC's administrative proceedings.[116] The *Jarkesy* decision addresses a variety of issues including right to jury trial,

110. *Id.* at 203.

111. *See id.* at 213 ("Accordingly, we . . . REVERSE the dismissal of her removal power claim, and REMAND for further proceedings consistent with this opinion.").

112. SEC v. Cochran, 142 S. Ct. 2707 (2022) (mem.), https://www.supremecourt.gov/docket/docketfiles/html/qp/21-01239qp.pdf.

113. *See* H. Gregory Baker & Ari K. Bental, *Supreme Court Hears Oral Arguments in* SEC v. Cochran, *a Case Concerning Challenges to Federal Administrative Proceedings*, PATTERSON BELKNAP (Dec. 14, 2022), https://www.pbwt.com/securities-litigation-insider/supreme-court-hears-oral-arguments-in-sec-v-cochran-a-case-concerning-challenges-to-federal-administrative-proceedings ("[Both cases] address whether respondents in federal administrative proceedings have the ability to pose constitutional challenges to those proceedings in federal court prior to exhausting the administrative process.").

114. *See* Axon Enter., Inc. v. FTC, 598 U.S. 175, 185 (2023).

115. *SEC Faces New Challenges to Constitutionality of its In-House Proceedings*, EVERSHEDS SUTHERLAND (May 24, 2022), https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/251233/SEC-faces-new-challenges-to-constitutionality-of-its-in-house-proceedings; *see also* Jarkesy v. SEC, 34 F.4th 446, 450 (5th Cir. 2022) ("Petitioners sued in the U.S. District Court for the District of Columbia to enjoin the agency proceedings, arguing that the proceedings infringed on various constitutional rights.").

116. *See supra* notes 74–115.

nondelegation doctrine, and statutory removal proceedings, and greatly threatens the ability of the SEC to litigate violations through its in-house proceedings.[117]

The respondent, Jarkesy, established two hedge funds and selected Patriot28 as the investment adviser.[118] The SEC brought a claim against Jarkesy and Patriot28 (petitioners) for securities fraud seeking both monetary and equitable relief.[119] The SEC ALJ found the petitioners liable and ordered "various remedies."[120] The Commission affirmed this ruling despite several constitutional arguments that the petitioners raised.[121] The Commission determined:

> (1) [T]he ALJ was not biased against Petitioners; (2) the Commission did not inappropriately prejudge the case; (3) the Commission did not use unconstitutionally delegated legislative power—or violate Petitioners' equal protection rights—when it decided to pursue the case within the agency instead of in an Article III court; (4) the removal restrictions on SEC ALJs did not violate Article II and separation-of-powers principles; and (5) the proceedings did not violate Petitioners' Seventh Amendment right to a jury trial.[122]

Jarkesy filed a petition for review in the Fifth Circuit.[123] The Fifth Circuit addressed three arguments raised by the petitioners: (1) whether the "[p]etitioners were deprived of their constitutional right to a jury trial;" (2) whether "Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power;" and (3) whether "statutory removal restrictions on SEC ALJs

117. *See Jarkesy*, 34 F.4th at 451, 459–60.

118. *Id.* at 450 ("The funds brought in over 100 investors and held about $24 million in assets.").

119. *Id.* (alleging that Jarkesy "(1) misrepresented who served as the prime broker and as the auditor; (2) misrepresented the funds' investment parameters and safeguards; and (3) overvalued the funds' assets to increase the fees that they could charge investors.").

120. *Id.* at 449; *see also* Scott Mascianica et al., *SEC in Constitutional Danger Zone Following Several Recent Decisions*, HOLLAND & KNIGHT (June 3, 2022), https://www.hklaw.com/en/insights/publications/2022/06/sec-in-constitutional-danger-zone-following-several-recent-decisions ("The SEC's Administrative Law Judge (ALJ) ultimately imposed fines and banned Cochran from practicing before the SEC for five years.").

121. *Jarkesy*, 34 F.4th at 449.

122. *Id*. at 450.

123. *Id.*

violate Article II" of the Constitution.[124]

A. Right to Jury Trial

First, the petitioners argued that the SEC's in-house proceedings deprived the petitioners of their Seventh Amendment right to jury trial.[125] The Seventh Amendment preserves the right to a jury trial in common law proceedings where the value in controversy exceeds twenty dollars.[126] "The Supreme Court has interpreted 'Suits at common law' to include all actions akin to those brought at common law as those actions were understood at the time of the Seventh Amendment's adoption."[127]

Congress may assign an action to administrative adjudication depending on whether the proceeding centers on a "public right[]."[128] Historically, public rights were those "'rights belonging to the people at large,' as distinguished from 'the *private* unalienable rights of each individual.'"[129] The Fifth Circuit used a two-prong test to determine whether the public right requirement was met.[130] First, the court asked whether the claims arose "at common law" under the Seventh Amendment.[131] Suits that arise at common law that exceed twenty dollars give rise to the right to a jury trial.[132] Second, the court asked whether the case is adjudicating a public right.[133] If the case is adjudicating a

124. *Id.* at 451.

125. *Id.*

126. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

127. *Jarkesy*, 34 F.4th at 452 ("The term can include suits brought under a statute as long as the suit seeks common-law-like legal remedies."); *see also* Tull v. United States, 481 U.S. 412, 417 (1987).

128. *Jarkesy*, 34 F.4th at 453; *see also* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450 (1977) ("At least in cases in which 'public rights' are being litigated e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.").

129. Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 713 (2015) (Thomas, J., dissenting).

130. *Jarkesy*, 34 F.4th at 457 ("So the action is a public right because (1) the SEC is the government, and (2) it is vindicating a public right.").

131. *Id.* at 453.

132. *Id.* at 452.

133. *Id.* at 453 ("[In *Granfinanciera*], the Court clarified that Congress cannot circumvent the Seventh Amendment jury-trial right simply by passing a statute that assigns 'traditional legal claims' to

public right, "the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum."[134] Therefore, even if a claim arises at common law, if the right being adjudicated is a public right, a person's Seventh Amendment right to jury trial is not implicated.[135]

The court held that the rights the SEC sought to "vindicate" in its administrative proceedings arise "at common law" under the Seventh Amendment because fraud claims were often brought in English courts at common law.[136] The court also noted that in *Tull v. United States*, the Supreme Court held that the right to jury trial applied to actions brought by agencies seeking civil penalties, like the SEC in the current case.[137] The fact that equitable relief was sought in addition to legal claims did not change this result.[138]

The court also held that the action brought by the SEC is not a public right that may be assigned to agency adjudication.[139] In reaching this holding, the court noted that common-law courts have heard fraud actions for centuries brought by the government.[140] The court also relied heavily on *Granfinanciera, S.A. v. Nordberg*.[141] In *Granfinanciera*, a bankruptcy trustee sued a corporation in bankruptcy court.[142] The *Grafinanciera* court held that the dispute centered around public rights, despite the case being between two private

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an administrative tribunal. Public rights, the Court explained, arise when Congress passes a statute under its constitutional authority that creates a right so closely integrated with a comprehensive regulatory scheme that the right is appropriate for agency resolution.") (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 52, 54 (1989)).

134. *Id.* (describing public rights as those "'where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, [and] a vast range of other cases as well are not at all implicated.'") (citing Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 458 (1977)).

135. *Id.*

136. *Id.* at 453.

137. *Id.* at 454 (referencing Tull v. United States, 481 U.S. 412, 425 (1987)). At issue in *Tull* was the Clean Water Act. 481 U.S. at 414. The Government brought charges against the petitioner (a real estate developer) for "dumping fill on wetlands on the island of Chincoteague, Virginia." *Id.*

138. *Jarkesy*, 34 F.4th at 454 ("The Supreme Court has held that the Seventh Amendment applies to proceedings that involve a mix of legal and equitable claims—the facts relevant to the legal claims should be adjudicated by a jury, even if those facts relate to equitable claims too.") (referencing Ross v. Bernhard, 396 U.S. 531, 537–38 (1970)).

139. *Id.* at 455 ("Securities fraud actions are not new actions unknown to the common law.").

140. *Id.*

141. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53–55 (1989).

142. *See id.* at 36.

parties.[143] Relying on this, the *Jarkesy* court determined that questions of whether public rights are being vindicated do not depend on whether the government is a party to the proceeding.[144] Moreover, relying on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the court noted that the public rights doctrine is grounded in a historical distinction between executive and legislative matters and matters that are inherently judicial.[145]

Concluding that the SEC's administrative proceedings at bar fell outside the public rights doctrine, the court noted that:

> If Congress has not prevented the SEC from bringing claims in Article III courts with juries as often as it sees fit to do so, and if the SEC has in fact brought many such actions to jury trial over the years, then it is difficult to see how jury trials could "dismantle the statutory scheme."[146]

Therefore, the public right requirement was not met, and the court held that the Jarkesy's right to jury trial was violated.[147]

B. Nondelegation Doctrine

The petitioners in *Jarkesy* also argued that Congress unconstitutionally delegated legislative power to the SEC by giving the SEC authority to choose whether to bring actions in federal court or its in-house proceedings.[148] Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[149] However, the Supreme Court has instructed that, "Congress cannot 'delegate to the Courts, or to any other

143. *Id.* at 53–55; *see also Jarkesy*, 34 F.4th at 458–59.

144. *See Jarkesy*, 34 F.4th at 458–59.

145. *See id.* at 428; *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (holding that Congress unconstitutionally vested judicial power in United States Bankruptcy Courts).

146. *See Jarkesy*, 34 F.4th at 455–56.

147. *Id.* at 457 ("That being so, Petitioners had the right for a jury to adjudicate the facts underlying any potential fraud liability that justifies penalties. And because those facts would potentially support not only the civil penalties sought by the SEC, but the injunctive remedies as well, Petitioners had a Seventh Amendment right to a jury trial for the liability-determination portion of their case.").

148. *Id.* at 459.

149. U.S. CONST. art. I, § 1.

tribunals, powers which are strictly and exclusively legislative.'"[150] Actions are legislative if they have "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch."[151] Congress can "grant regulatory power to another entity only if it provides an 'intelligible principle' by which the recipient of the power can exercise it."[152] Therefore, to avoid violations of Article I when delegating legislative powers, Congress must provide an agency guidance for the use of the delegated power.[153]

The *Jarkesy* court concluded that Congress delegated legislative power to the SEC through the Dodd-Frank Act without also providing a guiding intelligible principle.[154] By providing the SEC with the sole discretion to bring securities fraud actions in federal court or in-house administrative proceedings, Congress gave the SEC power to determine which of its enforcement targets are entitled to court proceedings with a jury trial (and which are not).[155] This is a power that Congress solely possesses.[156] Congress did not provide the SEC with an intelligible principle by which to exercise its power.[157] Congress gave the SEC absolute discretion to decide whether to bring securities fraud enforcement actions through in-house proceedings.[158] Therefore, the Court held that Congress improperly delegated its legislative powers to the

150. *Jarkesy*, 34 F.4th at 460 (quoting Wayman v. Southard, 23 U.S. 1, 42 (1825)).

151. *Id.* at 461 (quoting Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983)).

152. *Id.* (citing Mistretta v. United States, 488 U.S. 361, 372 (1989)); *see also* Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1558 (2015) (reviewing PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)) ("Where there is [an intelligible] principle, the delegatee is exercising executive power, not legislative power.").

153. See Vermeule*, supra* note 152, at 13–14.

154. *Jarkesy*, 34 F.4th at 461.

155. *Id.*

156. *Id.* ("Through Dodd-Frank § 929P(a), Congress gave *the SEC* the power to bring securities fraud actions for monetary penalties within the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so. Thus, it gave the SEC the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not. That was a delegation of legislative power.") (citation omitted).

157. *Id*. at 449 ("Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I's vesting of 'all' legislative power in Congress.").

158. *Id.* at 462 ("Congress did not, for example, merely give the SEC the power to decide whether to bring enforcement actions in the first place, or to choose where to bring a case among those district courts that might have proper jurisdiction. It instead effectively gave the SEC the power to decide which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not. Such a decision—to assign certain actions to agency adjudication—is a power that Congress uniquely possesses.").

SEC through the Dodd-Frank Act § 929P(a).[159]

C. Statutory Removal Procedures

The *Jarkesy* petitioners also claimed that the statutory removal restrictions for SEC proceedings are unconstitutional.[160] Article II of the Constitution states that the President must "take Care that the Laws be faithfully executed."[161] The court noted that "[t]he Supreme Court has held that this provision guarantees the President a certain degree of control over executive officers."[162] Therefore, the President must have a certain degree of control over executive officers' appointment and removal.[163]

The *Jarkesy* court agreed that the SEC removal restrictions are unconstitutional.[164] The Court relied on *Free Enterprise Fund v. Public Co. Accounting Oversight Board* in reaching this holding.[165] In *Free Enterprise*, the Supreme Court held that the Public Company Accounting Oversight Board (PCAOB), which utilized for-cause limitations on the removal of PCAOB members, violated Article II.[166] The PCAOB's functions include:

> adopt[ing] rules and standards "relating to the preparation of audit reports"; [] adjudicat[ing] disciplinary proceedings involving accounting firms that fail to follow these rules; [] impos[ing] sanctions; and [] engag[ing] in other related activities, such as conducting inspections of accounting firms registered as the law requires and investigations to monitor compliance with the rules and related legal

159. *Id*. at 461 ("Through Dodd-Frank § 929P(a), Congress gave *the SEC* the power to bring securities fraud actions for monetary penalties within the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so.").

160. *Id.* at 451.

161. U.S. CONST. art. II, § 3.

162. *Jarkesy*, 34 F.4th at 463.

163. *Id.*

164. *Id.* at 464.

165. *See id.* at 463; *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010).

166. *Free Enter. Fund*, 561 U.S. at 513–14 ("While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.").

obligations.[167]

Following *Lucia*, and the Supreme Court's decision that SEC ALJs are officers under the Appointments Clause, the *Jarkesy* court held that SEC ALJs "are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions."[168] However, SEC's ALJs can only be removed by the Commission for good cause, and in turn the "Commissioners may only be removed by the President for good cause."[169] The court explained that "SEC ALJs are sufficiently insulated from removal that the President cannot take care that the laws are faithfully executed."[170] Therefore, the court held that the statutory removal restrictions are unconstitutional.[171]

D. Judge Davis's Dissent

Judge W. Eugene Davis dissented.[172] Judge Davis's dissent provided a three-fold argument against the entire majority holding.[173] First, he argued that the SEC's in-house administrative proceedings fall squarely within the public rights doctrine and thus do not violate the petitioner's Seventh Amendment right to a jury trial.[174] Second, he argued Congress provided sufficient direction to satisfy the intelligible principal standard.[175] Finally, the dissent argued that the SEC's ALJs provide adjudicative rather than executive functions and thus fall outside the bounds of *Free Enterprise*.[176]

167. *Id.* at 528 (Breyer, J., dissenting).
168. *Jarkesy*, 34 F.4th at 464.
169. *Id.*
170. *Id.* at 465.
171. *Id.*
172. *Id.* at 466 (Davis, J., dissenting) ("The majority holds that (1) administrative adjudication of the SEC's enforcement action violated Petitioners' Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated an Article I legislative power to the executive branch when it gave the SEC the discretion to choose between bringing its enforcement action in an Article III court or before the agency without providing an intelligible principle to guide the SEC's decision; and (3) the removal protections on SEC administrative law judges violate Article II's requirement that the President 'take Care that the Laws be faithfully executed.' I respectfully disagree with each of these conclusions.").
173. *Id.* (Davis, J., dissenting).
174. *Id.* at 467–73 (Davis, J., dissenting).
175. *Id.* at 473–75 (Davis, J., dissenting).
176. *Id.* at 475–79 (Davis, J., dissenting).

E. Subsequent History

Following the *Jarkesy* decision, the SEC filed a petition for rehearing en banc with the Fifth Circuit.[177] However, on October 21, 2022, the Fifth Circuit denied the petition.[178] Ten judges voted against rehearing while six voted in favor of rehearing.[179] Five of the six judges who favored rehearing issued a dissent critiquing the *Jarkesy* holding as well as the decision to deny rehearing.[180] The denial of the rehearing leaves a decision by the Supreme Court as the SEC's only next step.[181] On March 8, 2023, the SEC filed a writ of certiorari asking the Supreme Court to address all three issues raised in the Fifth

177. *See* Jarkesy v. SEC, 51 F.4th 644, 644 (2022) (en banc) (mem.).

178. *Id.* ("Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. 35 I.O.P.), the petition for panel rehearing is DENIED . . . .").

179. *Id.*

180. *Id.* at 645 ("In the en banc poll, six judges voted in favor of rehearing (Richman, Stewart, Dennis, Haynes, Graves, and Higginson), and ten judges voted against rehearing (Jones, Smith, Elrod, Southwick, Willett, Ho, Duncan, Engelhardt, Oldham, and Wilson)."). The dissent mirrored the dissent by Judge W. Eugene Davis. *Id.* ("I respectfully dissent from the denial of the petition for rehearing en banc and would grant it. The excellent dissenting opinion explains the problems with the panel majority opinion's holdings, so, rather than repeat that, I will only summarize here."). First, the dissent argues that the majority opinion ignores important Supreme Court and Fifth Circuit precedent in holding that violations of securities laws are not public rights. *Id.* ("Under *Atlas Roofing* and a fair reading of *Granfinanciera*, there is no question that the SEC's enforcement action against Petitioners in this matter for violations of the securities laws involves 'public rights.'"). Next, the dissenting Justices argued that the power delegated by Congress to the SEC was not a "legislative" power. *Id.* at 646. ("There are ample real-world examples of executive action that 'alter[s] the legal rights, duties and relations of persons . . . outside the legislative branch' that are not considered exercises of legislative power.") (citing Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983)). Finally, the dissenters argued that SEC ALJ's duties are distinctly adjudicatory rather than executive:

> These duties include, *inter alia*: (1) fixing the time and place of hearings, (2) postponing or adjourning hearings, (3) granting extensions to file papers, (4) permitting filings of briefs, (5) issuing subpoenas, (6) granting motions to discontinue administrative proceedings, (7) ruling on the admissibility of evidence, and (8) hearing and examining witnesses. SEC ALJs do not decide to bring enforcement actions, they merely preside over administrative hearings as neutral arbitrators. The majority opinion's conclusion to the contrary lacks any authority.

Id. at 646–47 (citations omitted).

181. *Introduction to the Federal Court System*, OFF. U.S. ATT'YS, https://www.justice.gov/usao/justice-101/federal-courts (last visited Dec. 23, 2022) ("After the circuit court or state supreme court has ruled on a case, either party may choose to appeal to the Supreme Court.").

Circuit.[182] On June 20, 2023, the Supreme Court granted certiorari.[183] The case is scheduled on the October Term 2023 calendar.[184]

V. CRITIQUE OF THE *JARKESY* DECISION

The *Jarkesy* court cherry picks precedent and legal principles in reaching all three of the decision's holdings, while ignoring major discrepancies in their reasoning.[185]

A. The Fifth Circuit Erred in Holding that the SEC's Enforcement Action Adjudicated Private Rights

First, the *Jarkesy* majority correctly held that a case involving public rights may be adjudicated by an agency administrative proceeding without implicating a respondent's right to a jury trial.[186] However, the *Jarkesy* majority also mislabeled the SEC's enforcement action as a private rather than public right.[187] The court reasoned that securities fraud actions were not

182. Jessica Corso, *SEC Asks Justices to Hear New Challenge to In-House Courts*, LAW 360 PULSE (Mar. 09, 2023), https://plus.lexis.com/api/permalink/0a1dbb32-4b5b-4d12-9183-0312b6d95094/?context=1530671 (detailing the SEC's Petition for Certiorari) ("The SEC petitioned the high court to hear a case, known as SEC v. Jarkesy, that the agency said could determine the future of not only its own administrative law court but also all other administrative law courts.").

183. SEC v. Jarkesy, 143 S. Ct. 2688 (2023) (cert. granted). The Supreme Court will

> review three questions about the Securities and Exchange Commission's (SEC's) administrative courts: 1. Do they violate the 7th Amendment's right to jury trial of actions then known at common-law, rather than "public rights"? 2. Do they violate the non-delegation doctrine by enabling statutes giving the SEC discretion to choose to bring enforcement actions in its administrative courts or Article III courts? 3. Do the two levels of '"or cause" removal protection for SEC ALJs violate Article II by protecting them from Presidential removal?

Thomas K. Potter III, Jarkesy *Gets His Day: SCOTUS to Review SEC ALJs*, BURR & FORMAN LLP (July 5, 2023), https://www.burr.com/securities-litigation/jarkesy-gets-his-day-scotus-to-review-sec-aljs.

184. Leonard Gordon & Michael Munoz, *Supreme Court Case Watch:* Securities and Exchange Commission v. Jarkesy *and Its Impact on Independent Agencies*, JDSUPRA (July 10, 2023), https://www.jdsupra.com/legalnews/supreme-court-case-watch-securities-and-2694113/.

185. Jarkesy v. SEC, 51 F.4th 644, 645–47 (2022) (en banc) (mem.) (Haynes, J., dissenting) (summarizing various inaccuracies in the Fifth Circuit's right to jury trial, nondelegation, and removal procedure holdings).

186. *See* Jarkesy v. SEC, 34 F.4th 446, 450–60 (5th Cir. 2022).

187. *See id.* at 453 ("Whether Congress may properly assign an action to administrative adjudication depends on whether the proceedings center on 'public rights.' . . . '[I]n cases in which "public rights" are being litigated . . . the Seventh Amendment does not prohibit Congress from assigning the

unknown to the common law and would not "'dismantle the statutory scheme'" or "'impede swift resolution'" of SEC fraud prosecutions, and such suits are not suited solely for administrative proceedings.[188] In doing so, the Fifth Circuit misinterprets and overlooks Supreme Court and federal precedent outlining the bounds of public rights.[189]

Most significantly, the majority opinion rests on the mistaken premise that the Supreme Court's decision in *Granfinanciera* limited the scope of its prior holding in *Atlas Roofing*.[190] As outlined in the *Jarkesy* dissent, "*Granfinanciera* did not involve a suit by or against the Federal Government."[191] "This distinction is important."[192] In *Granfinanciera*, the Court held that Congress may replace a common-law cause of action requiring a jury with a statutory cause of action if the action "inheres in, or lies against, the Federal Government in its sovereign capacity."[193] Therefore, the Court in *Granfinanciera* was only concerned about whether the rights adjudicated between two private parties were nevertheless "private rights" that would be applicable under the public rights doctrine.[194]

In fact, scholars have noted that *Granfinanciera* re-established *Crowell* as the controlling standard with respect to the application of the public rights.[195] *Crowell v. Benson* established a broad view of the public rights doctrine, defining public rights as "those which arise between the government and persons subject to its authority in connection with the performance of the

factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.'") (citing Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450 (1977)).

188. *Id.* at 453–56 ("[T]he action the SEC brought against Petitioners is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine. Securities fraud actions are not new actions unknown to the common law. Jury trials in securities fraud suits would not 'dismantle the statutory scheme' addressing securities fraud or 'impede swift resolution' of the SEC's fraud prosecutions. And such suits are not uniquely suited for agency adjudication.").

189. *Id.* at 452–60; *see also infra* notes 190–223 and accompanying text (outlining Supreme Court and federal circuit cases discussing what is and what is not adjudication of a public right).

190. *See Jarkesy*, 34 F.4th at 452–53.

191. *Id.* at 470–71 (Davis, J., dissenting) ("Because the bankruptcy trustee's suit involved only private parties and not the Government, *Granfinanciera*'s analysis is solely concerned with whether the action was one of the 'seemingly "private" right[s]' that are within the reach of the public-rights doctrine.").

192. *Id.* at 470 (Davis, J., dissenting).

193. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989).

194. *Id.*

195. Michael Rothwell, *Patents and Public Rights*: *The Questionable Constitutionality of Patents Before Article I Tribunals After* Stern v. Marshall, 13 N.C. J. L. & TECH., 287, 341 (2012).

constitutional functions of the executive or legislative departments."[196] Therefore, in contrast to the *Jarkesy* court's narrow reading of the case, in which the majority concludes that the government as a party is not dispositive of a public right, *Granfinanciera* recognizes the more expansive definition of public rights established by courts in which public rights doctrine can extend to cases where the Government is not a party.[197]

While this distinction is important, even in the context of suits between two private parties, the Supreme Court has upheld Congress's use of non-Article III adjudication.[198] For instance, in *Thomas v. Union Carbide Agricultural Products Co.*, the Supreme Court considered the viability of mandatory arbitration provisions in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).[199] The Court justified its decision in part through an expanded definition of "public rights."[200] The *Thomas* Court outlined that the characteristics of a public right are "(1) [the right is] created by Congress, and (2) [is] invested with a public rather than private purpose."[201] The Court went on to note that the public policy that led to the mandatory arbitration provisions of FIFRA (the danger to public health posed by pesticides), justified the use of an alternate method of dispute resolution.[202] Thus, under *Thomas*, a right

196. See Crowell v. Benson, 285 U.S. 22, 50 (1932).

197. *See Jarkesy*, 34 F.4th at 453. *But see Granfinanciera*, 492 U.S. at 54.

198. *See* Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1066 (1999) ("Both *Crowell* and *Northern Pipeline* contained the germs of this new method of justifying administrative agency adjudication. In *Crowell*, the Court approved of agency adjudication of federal workers' compensation claims under the Longshoremen's and Harbor Workers' Compensation Act. Claims brought under the Act were claims by workers against their employers—two private parties.").

199. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 571 (1985).

200. *Id.* at 589; *see also* Sward, *supra* note 198, at 1069 ("The *Thomas* Court approved of this mandatory arbitration, relying on two distinct grounds. First, the Court devised an expanded definition of 'public rights.' Although the claim was one between private parties and so appeared to concern only private rights as defined in *Crowell* and the *Northern Pipeline* plurality, the Court determined that the claim had the characteristics of a public right because (1) it was created by Congress, and (2) it was invested with a public rather than private purpose in that the ability of 'follow-on registrants' of the pesticide to make use of data submitted by earlier registrants 'serves a public purpose as an integral part of a program safeguarding the public health.'").

201. *See* Sward, *supra* note 198, at 1069.

202. *Thomas*, 473 U.S. at 590 ("Given the nature of the right at issue and the concerns motivating the Legislature, we do not think this system threatens the independent role of the Judiciary in our constitutional scheme."); *see also* Sward, *supra* note 198, at 1069 ("In *Thomas*, the Court found it significant that Congress had created the rights being adjudicated, so that those rights did not fall 'within the range of matters reserved to Article III courts.' In addition, Congress was searching for a 'pragmatic solution to the difficult problem of spreading the costs of generating adequate information

could be public even if it involves claims between two private parties.[203] The Court noted that they considered the Article III requirement "in light of 'the origin of the right at issue [and] the concerns guiding the selection by Congress of a particular method for resolving disputes.'"[204] Therefore, beyond *Granfinanciera*, Supreme Court precedent has expanded the public rights doctrine in the context of adjudication between two private parties.[205]

Additionally, Supreme Court precedent uses a far more expansive definition of public rights in the case of public rights asserted by the government as compared to the *Jarkesy* court.[206] For instance, the Supreme Court in *Crowell* distinguished between cases dealing with private rights and "those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[207] Several Supreme Court cases following *Crowell* utilize this broad definition of public rights when adjudicating Seventh Amendment issues.[208] One of the most recent iterations of the Supreme Court's interpretation of the public rights doctrine was *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, decided in 2018.[209] The *Oil States* Court found that administrative processes to reconsider previously issued patents did not violate the Seventh Amendment.[210] In sum, the *Jarkesy* court

regarding the safety, health, and environmental impact of a potentially dangerous product.' These factors outweighed any need to preserve what had to be a minimal Article III interest: because the rights at issue could have been determined by Congress or the executive, there was little encroachment on the Article III judiciary.").

203. *See Thomas*, 473 U.S. at 593–94 ("Congress . . . may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.").

204. *See* Sward, *supra* note 198, at 1069–70 (quoting *Thomas*, 473 U.S. at 587).

205. *See id.* at 1069.

206. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 50 (1932).

207. *Id.*; *see also* Sward, *supra* note 198, at 1066.

208. *See, e.g.*, Austin v. Shalala, 994 F.2d 1170, 1177–78 (5th Cir. 1993) (holding that administrative proceedings before the Social Security Administration to recover overpayment of social security benefits did not violate the Seventh Amendment based off Crowell's public rights definition).

209. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1370–72 (2018); *see also* John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 147–48 (2019) ("In *Oil States Energy Services, L.L.C. v. Greene's Energy Group, L.L.C.*, the Court upheld a form of executive adjudication on the ground that the interests involved were public and not private rights. The Court spoke through Justice Thomas, who has expressed serious skepticism about executive performance of adjudicatory functions and has discussed the public rights rationale in earlier opinions in which he did not speak for a majority.").

210. *See Oil States Energy Servs., LLC*, 138 S. Ct. at 1373 (quoting *Crowell*, 285 U.S. at 50) ("Our precedents have recognized that the doctrine covers matters 'which arise between the Government and

ignored a long line of Supreme Court precedent recognizing congressional latitude to establish administrative proceedings enforced by the government.[211]

The right to jury trial implications of administrative agency proceedings have been further addressed by other federal courts of appeals.[212] For instance, in *Myron v. Hauser*, the Eighth Circuit addressed right to jury trial issues in the context of Commodity Futures Trading Commission (CFTC) proceedings.[213] The petitioners sought judicial review of an order from the CFTC.[214] Following an administrative proceeding by an ALJ, the CFTC found that the petitioners committed fraud in connection with the sale of commodity options.[215] The petitioners argued that the reparations procedure established by the Commodity Futures Trading Commission Act of 1974 (Act of 1974) violated their right to jury trial.[216] The Eighth Circuit concluded that "Atlas Roofing refutes [petitioner's] [S]eventh [A]mendment challenge."[217] The court noted that even if reparations claims could historically be characterized as a legal issue, Congress created a "comprehensive statutory scheme

persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'").

211. *See* Jarkesy v. SEC, 34 F.4th 446, 455 (5th Cir. 2022) ("[T]he action the SEC brought against Petitioners is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine."); *see also* Harrison, *supra* note 209, at 148 ("The principle that executive adjudication is permissible with respect to public rights is not a new one.").

212. *See, e.g.*, Myron v. Hauser, 673 F.2d 994, 1001–05 (8th Cir. 1982); *see also* Joy Techs., Inc. v. Manbeck, 959 F.2d 226, 229 (Fed. Cir. 1992) (holding that proceedings related to validity of patents involve public rights); Simpson v. Off. of Thrift Supervision, 29 F.3d 1418, 1423 (9th Cir. 1994) (holding that proceeding in front of an ALJ regarding banking violations involved public rights).

213. *Myron*, 673 F.2d at 1008.

214. *Id.* at 1002–03. The CFTC has authority under § 14(g) of the Commodity Futures Trading Commission Act of 1974 to conduct administrative hearings held before an ALJ. *Id.* at 1008.

215. *Id.* at 997; *see also Commodity Options*, ANGELONE, https://www.angelone.in/knowledge-center/futures-and-options/commodity-trading-option (last visited Oct. 16, 2023) ("Commodity trade options contracts are rights to buy (call option) or sell (put option) underlying commodity futures at predetermined prices on the date of contract expiry."). At issue in *Myron* was London sugar options. *Myron*, 673 F.2d at 996 ("Nutter told Hauser that Rosenthal analysts predicted a sharp rise in sugar prices in the immediate future, that sugar prices had risen sharply in 1974, and that London options were a good way to invest in sugar.").

216. *See Myron*, 673 F.2d at 1002 ("[The petitioner argued that,] in the absence of a de novo hearing before a jury in federal district court prior to enforcement, deprives Rosenthal of the right to jury trial. Rosenthal also argues that administrative adjudication violates its right under Article III of the Constitution to have reparations claims heard and determined in a judicial forum.").

217. *Id.* at 1003.

to address widespread fraud in the commodity options industry."[218] Because of this, by entrusting the enforcement of this statutory scheme in an administrative agency, the Act of 1974 did not violate the petitioner's rights under the Seventh Amendment.[219] Like the Act of 1974 in *Myron*, Congress sought to create a comprehensive statutory scheme that addresses widespread fraud in the U.S. stock markets, and entrusted the SEC's administrative procedures to carry out this scheme.[220] Therefore, under the reasoning in *Myron*, the SEC's administrative procedures do not subvert the rights conferred by the Seventh Amendment, contrary to the holding in *Jarkesy*.[221] Although Eighth Circuit precedent is not binding on the Fifth Circuit, looking to sister circuit decisions provides insight into how other courts are handling the complex issue of private and public rights under the Seventh Amendment.[222]

Under a fair reading of the Supreme Court and federal court precedent outlined, the *Jarkesy* court should have found that the SEC's administrative proceedings met the public rights doctrine, and thus do not subvert the rights afforded by the Seventh Amendment.[223]

B. Congress Did Not Violate the Nondelegation Doctrine in Delegating Its Power to the SEC via Dodd-Frank

Next, the *Jarkesy* court also mistakenly determined that Congress improperly delegated its power to the SEC via the Dodd-Frank Act.[224] In making this determination, the *Jarkesy* court relied on the idea that the SEC's powers are legislative powers.[225] To support this, the court looked at *Immigration & Naturalization Service v. Chadha*.[226] Quoting *Chadha*, the court noted that

218. *Id.* at 1004 ("Congress in the 1974 Act created new statutory rights and remedies and entrusted their enforcement, at least with respect to reparations, to an administrative agency.").

219. *Id.* ("We hold that the reparations procedure does not violate the [S]eventh [A]mendment.").

220. *See The Role of the SEC*, *supra* note 11.

221. *See Myron*, 673 F.2d at 1004; *see also* Jarkesy v. SEC, 34 F.4th 446, 465 (5th Cir. 2022).

222. *See Legal Research: An Overview: Mandatory v. Persuasive Authority*, UCLA HUGH & HAZEL DARLING L. LIBR., https://libguides.law.ucla.edu/c.php?g=686105&p=5160745 (last visited Oct. 16, 2023) ("[I]t can be useful to [look] to non-binding cases as relevant persuasive authority.").

223. *See* Jarkesy v. SEC, 51 F.4th 644, 645 (2022) (en banc) (mem.) (Haynes, J. dissenting) ("[T]here is no question that the SEC's enforcement action against Petitioners in this matter for violations of the securities laws involves 'public rights.'").

224. *Jarkesy*, 34 F.4th at 461–65.

225. *Jarkesy*, 51 F.4th at 646 (Haynes, J., dissenting) ("The majority opinion's holding rests on an incorrect conclusion that this was a delegation of legislative power.").

226. *Jarkesy*, 34 F.4th at 461–62. *But see id.* at 474–76 (Davis, J., dissenting).

"[g]overnment actions are 'legislative' if they have 'the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.'"[227] However, in *Chadha* the nondelegation doctrine was not at issue.[228]

Additionally, the holding that Congress improperly delegated its legislative power because "the SEC [has] the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not"[229] is directly at odds with Supreme Court precedent addressing expansive statutory delegation, for instance, *Gundy v. United States*.[230] At issue in *Gundy* was the Sex Offender Registration and Notification Act (SORNA), which provided in relevant part that the "Attorney General shall have the authority to specify the applicability of [SORNA's registration] requirements . . . and to prescribe rules for the registration."[231] The petitioner argued that the Act unconstitutionally delegated power to the Attorney General to "'specify the applicability' of SORNA's registration requirements to pre-Act offenders."[232] However, after interpreting the statute to require the Attorney General to "apply SORNA to all pre-Act offenders as soon as feasible," the Court determined the Act contained an intelligible principle.[233] Therefore, the Court determined congressional delegation under SORNA to the Attorney General fell well within constitutional bounds.[234]

Comparing the powers delegated to the Attorney General in *Gundy*, if vague delegation of power to the Attorney General to "apply SORNA to all pre-Act offenders as soon as feasible"[235] does not violate the nondelegation doctrine, then it should follow that the SEC's authority to issue civil penalties, with clear guidelines of how much and when to provide such penalties is

227. *Id.* at 461 (quoting Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983)). *But see id.* at 474–76 (Davis, J., dissenting).

228. *Chadha*, 462 U.S. at 919.

229. *Jarkesy*, 34 F.4th at 461.

230. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

231. *Id.* at 2122 (quoting The Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. § 20913(d) (2006)).

232. *Id.* at 2122 (analyzing the language in SORNA using statutory interpretation).

233. *Id.* at 2121 ("Under § 20913(d), the Attorney General must apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment. That delegation easily passes constitutional muster.").

234. *Id.* at 2123.

235. *See id.*

proper.[236]

Moreover, Supreme Court precedent shows that the Court is reluctant to find a statute that does not contain an intelligible principle.[237] As of January 2020, the Supreme Court has not invalidated a statute on nondelegation grounds since 1935, despite multiple cases before them raising such challenges.[238] Therefore, lower federal courts, including the Fifth Circuit, should proceed with caution when determining whether a statute should be invalidated under the nondelegation doctrine.[239]

C. The SEC's ALJs Perform Purely Adjudicative and Recommendary Functions

Finally, the *Jarkesy* court incorrectly held that the removal restrictions on SEC ALJs leads to insulation from presidential control and are unconstitutional in violation of Article II.[240] In fact, the *Jarkesy* court relied on a faulty reading of *Lucia* and *Free Enterprise* to come to this finding.[241]

In *Jarkesy*, the Fifth Circuit noted that, following *Lucia*, because the SEC's ALJs are "officers" per the Appointments Clause, they in turn serve an executive function per Article II.[242] Therefore, under the *Jarkesy* court's

236. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 929P(a), 15 U.S.C. §77h-1(a). The Dodd-Frank Act provides the "[g]rounds" and "[m]aximum [a]mount of [p]enalty" which the Commission must follow in its imposing of civil penalties. *Id.*

237. *See Nondelegation Doctrine: A Timeline*, BALLOTPEDIA, https://ballotpedia.org/Nondelegation_doctrine:_a_timeline (last visited Nov. 15, 2023) (providing a timeline of the development of the nondelegation doctrine).

238. *See id.* ("The court has not invalidated a statute on nondelegation grounds since 1935 as of January 2020."); *see also* Nat'l Broad. Co. v. United States, 319 U.S. 190, 225 (1943) (rejecting a nondelegation challenge brought against the Federal Communications Commission (FCC)); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 56 (2015) (rejecting nondelegation challenge against the Department of Transportation).

239. *See supra* notes 237–238 and accompanying text (illustrating tha the Supreme Court is reluctant to invalidate agency rulings based on the nondelegation doctrine).

240. *See supra* notes 160–171 and accompanying text.

241. *See* Jarkesy v. SEC, 51 F.4th 644, 646 (5th Cir. 2022) (en banc) (mem.) (Haynes, J. dissenting) ("The majority opinion erroneously concludes that the removal restrictions on SEC ALJs are unconstitutional, citing that 'SEC ALJs perform substantial executive functions.' . . . In summary, the majority opinion reaches this conclusion by incorrectly reading *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and *Free Enterprise Fund v. Public Co. Accounting Oversight Board,* 561 U.S. 477 (2010).") (citations omitted).

242. *See supra* notes 168–171 and accompanying text; *see also* Jarkesy v. SEC, 34 F.4th 446, 464–65 (5th Cir. 2022) ("We agree with Petitioners and hold that the removal restrictions are unconstitutional. The Supreme Court decided in *Lucia* that SEC ALJs are 'inferior officers' under the

reasoning, the President must be able to exercise control over these functions.[243] However, the Fifth Circuit erred in equating officer status with performing executive functions.[244] Neither the Appointments Clause nor *Lucia* require that officers of the United States hold executive functions per Article II.[245]

In fact, *Free Enterprise*, which the *Jarkesy* court relied on to hold that the SEC's removal procedures violate Article II, outlined circumstances in which officers of the United States are not considered to hold executive functions, but rather adjudicative functions.[246] The *Free Enterprise* Court held that the PCAOB's activities were "executive activities typically carried out by officials within the Executive Branch."[247] However, the Supreme Court expressly declined to hold that this finding extended to agency employees who serve as ALJs, namely because the law was unclear whether ALJs are officers of the United States and whether ALJs perform adjudicative, policymaking, or purely recommendatory functions (rather than executive functions).[248] While the Supreme Court in *Lucia* later held that ALJs are officers of the United States, the question of whether they serve adjudicative functions remains unclear.[249] Therefore, as the *Free Enterprise* decision rested on not only whether the agency employees were officers of the United States but also whether they served executive functions, it was improper for the *Jarkesy* court to hold that

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Appointments Clause because they have substantial authority within SEC enforcement actions. And in *Free Enterprise Fund* it explained that the President must have adequate control over officers and how they carry out their functions.").

243. *See Jarkesy*, 34 F.4th at 464–65.

244. *Id.* at 475 (Davis, J., dissenting); *see also Jarkesy*, 51 F.4th at 646 (Haynes, J., dissenting) ("The majority opinion erroneously concludes that the removal restrictions on SEC ALJs are unconstitutional, citing that 'SEC ALJs perform substantial executive functions.'").

245. See Lucia v. SEC, 138 S. Ct. 2044, 2050–51 (2018) (holding that SEC ALJs qualified as officers under the Appointments Clause where, similar to United States Tax Court special trial judges, they received career appointments, created by statute, and they exercised significant discretion over adversarial hearings, issued decisions containing factual findings, legal conclusions, and appropriate remedies).

246. Free Enter. Fund v. Pub. Co. Acccounting Oversight Bd., 561 U.S. 477, 507 n.10 (2010) ("[O]ur holding also does not address that subset of independent agency employees who serve as administrative law judges.").

247. *Id.* at 504.

248. *Id*. at 507 n.10 ("Whether administrative law judges are necessarily 'Officers of the United States' is disputed. And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers.") (citations omitted).

249. *See supra* notes 74–92 and accompanying text (summarizing the holding of *Lucia*).

they were bound by *Free Enterprise* to hold the SEC's removal procedures unconstitutional.[250]

Moreover, the SEC's ALJs serve adjudicative rather than executive functions.[251] The Fourth Circuit's holding in *Bennett v. United States* provides insight into one federal court's finding that the SEC's ALJs perform adjudicative rather than executive functions.[252] In *Bennett*, the appellant filed an action in federal court seeking to enjoin an SEC administrative proceeding against him, arguing that the proceedings violate Article II of the Constitution.[253] In its decision, the court notes that Congress "authorized the SEC to delegate its adjudicative functions to an administrative law judge ('ALJ'), while 'retain[ing] a discretionary right to review the action of any such' ALJ on 'its own initiative' or at a party's request."[254] The court contrasted the SEC's administrative proceedings from those in *Free Enterprise*.[255] In *Free Enterprise*, the statute at issue "provide[d] only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule."[256] However, under the SEC administrative proceedings, even if the party does not request an appeal of the decision, the holding is considered "a final Commission order."[257] Therefore, this decision would be

250. *See supra* notes 164–167 and accompanying text (holding that the Dodd-Frank Act violated Article II). *But see* Jarkesy v. SEC, 34 F.4th 446, 475 (5th Cir. 2022) (Davis, J., dissenting); Jarkesy v. SEC, 51 F.4th 644, 646–47 (2022) (en banc) (mem.) (Haynes, J., dissenting).

251. *See Jarkesy*, 51 F.4th at 647 ("The discussion of *Free Enterprise* is . . . worrisome as it addresses inherently executive functions but, by contrast, an SEC ALJ's duties are distinctly adjudicatory."). Unlike the PCAOB, the SEC's ALJ's functions include "supervising discovery, issuing subpoenas, deciding motions, ruling on the admissibility of evidence, hearing and examining witnesses, generally regulating the course of the proceeding, and imposing sanctions for contemptuous conduct or procedural violations." *Jarkesy*, 34 F.4th at 477 (Davis, J., dissenting). These responsibilities are arguably adjudicatory rather than executive powers (which are central to the functioning of the executive branch). *Free Enter. Fund*, 561 U.S. at 507 n.10 (2010).

252. *See* Bennett v. SEC, 844 F.3d 174, 174 (4th Cir. 2016).

253. *See id.* at 177 ("On September 9, 2015, the Commission instituted an administrative proceeding against Bennett to determine whether, as the SEC's Division of Enforcement alleged, Bennett had violated the antifraud provisions of the federal securities laws by materially misstating the amount of assets managed for investors, materially misstating investor performance, and failing to adopt and implement adequate written policies for calculating and advertising assets managed and investment returns. . . . On October 30, 2015, Bennett filed this action in federal district court, seeking to enjoin the administrative proceeding and a declaration that it is unconstitutional.").

254. *See id.*

255. *See id*. at 182 ("Bennett reads too much into the *Free Enterprise* Court's conclusion, which is distinguishable on the facts.").

256. *Id.* (citing *Free Enter. Fund*, 561 U.S. at 490).

257. *Id.*

reviewable by federal courts.[258] Although the *Bennett* case is only persuasive authority, it not only shows that the SEC's ALJs functions are more adjudicative than the executive functions outlined in *Free Enterprise* but also the SEC's administrative procedures differ meaningfully from those at issue in *Free Enterprise*.[259]

Furthermore, the SEC's ALJs also perform recommendatory functions, as outlined in *Free Enterprise*.[260] First, any decisions rendered by the SEC's ALJs must be reviewed and affirmed by the Commission.[261] Therefore, the decisions made by the SEC's ALJs are purely recommendatory holdings to the Commission rather than binding precedent.[262] Additionally, decisions rendered by the SEC's ALJs, when affirmed by the Commission, are considered actions of the Commission itself as outlined in the *Lucia* dissent.[263] Even if a court held that the SEC's ALJ's powers were not purely adjudicative, they are recommendatory.[264] Therefore, following a careful reading of *Free Enterprise*, the SEC's removal procedures do not violate Article II.[265]

As several scholars have outlined, "[T]here is no doubt that finding a *Free*

258. *Id.* ("[T]he proceedings will result in a *reviewable* Commission order.") (emphasis added).

259. *See id.* at 176–84 (affirming district court dismissal of case challenging constitutionality of SEC administrative enforcement proceedings).

260. *See Free Enter. Fund*, 561 U.S. at 507 n.10 (outlining that those employees who "possess purely recommendatory powers" may not be subject to Article II scrutiny).

261. 17 C.F.R. § 201.360(d)(2) (2018) ("If a party or aggrieved person entitled to review fails to file timely a petition for review or a motion to correct a manifest error of fact in the initial decision, and if the Commission does not order review of a decision on its own initiative, the Commission will issue an order that the decision has become final as to that party. The decision becomes final upon issuance of the order."); *see also* John J. Carney et al., *supra* note 49 ("On appeal, the Commission may make any findings or conclusions that in its judgment are proper and on the basis of the record. Indeed, '[o]nce the Commission grant[s] the parties' petitions for review, the initial decision cease[s] to have any force or effect.'") (citing the Exchange Act, 5 U.S.C. § 557(b) (1934)).

262. *See Commission Statement Relating to Certain Administrative Adjudications*, SEC (April 5, 2022), https://www.sec.gov/news/statement/commission-statement-relating-certain-administrative-adjudications ("The Commission may itself preside over such a proceeding and issue a decision."); *see also* The Securities and Exchange Act of 1934, 15 U.S.C. § 78u(a)(1) (1934) ("The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter.").

263. 5 U.S.C. § 557(b) ("When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule."); *see also* Lucia v. SEC, 138 S. Ct. 2044, 2066 (2018) (Sotomayor, J., dissenting) ("[E]very action taken by an ALJ 'shall, for all purposes, . . . be deemed the action of the *Commission*.'").

264. *See supra* notes 240–245 and accompanying text.

265. *See supra* notes 240–245 and accompanying text.

Enterprise exception for ALJs is both doctrinally likely and sound policy."[266] The United States adjudicatory system rests on the principles that adjudicators will be impartial, and not affected by outside influence.[267] Applying *Free Enterprise* to ALJs would compromise the independence and impartiality of those ALJs.[268] Therefore, the autonomy of administrative ALJs "would be compromised if those judges were . . . subject to the influence of the President."[269]

Thus, both the SEC's policies, as well as larger public policy concerns, support the finding that the SEC's ALJs should not fall within the bounds of *Free Enterprise*.[270]

In sum, the *Jarkesy* court erroneously held that the SEC was enforcing a private right, and in doing so ignored expansive definitions of public rights in Supreme Court and other federal precedent.[271] Further, the *Jarkesy* court improperly relied on cases where nondelegation was not at issue and overlooked the Supreme Court's reluctance to establish that congressional statutes do not contain intelligible principles.[272] Finally, looking to *Free Enterprise* and sister circuit precedent, the Fifth Circuit should have held that the SEC's ALJs perform adjudicative and purely recommendatory functions rather than executive functions.[273]

VI. FAR-REACHING TENTACLES: IMPACTS OF *JARKESY*

A. Jarkesy*'s Chilling Effect on SEC Proceedings*

The *Jarkesy* decision impacts the constitutional viability of both past civil enforcement actions conducted in the SEC's in-house system and future SEC administrative proceedings, in turn affecting the SEC's ability to prosecute security violations.[274] Therefore, the impacts of the *Jarkesy* decision will

266. *See* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1195 (2016).
267. *See id.* ("Claiming the importance of affecting the course of adjudications for enacting the policies of the President is a strange line to draw; we usually hope that our adjudicators will not be susceptible to the influence of parties outside of their tribunals.").
268. *Id.* ("ALJs, it is supposed, were created to deliver judicially comparable, trial-type justice.").
269. *Id.*
270. *See supra* notes 240–269 and accompanying text.
271. *See supra* notes 186–223 and accompanying text.
272. *See supra* notes 224–239 and accompanying text.
273. *See supra* notes 240–269 and accompanying text.
274. *See* Jeffrey J. Ansley & Samuel M. Deau, *Fifth Circuit Holds that SEC Administrative*

affect the SEC for the foreseeable future unless the Commission itself alters its procedures or the Supreme Court rules on an appropriate remedy.[275]

On July 1, 2022, the SEC filed a petition for rehearing with the Fifth Circuit.[276] However, this petition was denied on October 21, 2022.[277] Until a decision is rendered on the *Jarkesy* case by the Supreme Court, it is likely that the SEC will proceed by filing most of its enforcement actions in federal district court.[278] If the SEC were to bring fraud charges in its in-house proceedings, any defendant can now raise Seventh Amendment defenses.[279]

These interim changes to the SEC's civil actions will have a chilling effect on the SEC's ability to adjudicate security law violations.[280] First, the administrative proceedings assist the SEC in adjudicating securities violations efficiently.[281] Data shows that the SEC enjoys a significant "home court advantage," and finds more success in administrative proceedings than it does in federal court.[282] The SEC would need to limit the cases they initiate to

Proceedings are Unconstitutional, VEDDERPRICE (May 27, 2022), https://www.vedderprice.com/-/media/files/vedder-thinking/publications/2022/5/fifth-circuit-holds-that-sec-administrative-proceedings-are-unconstitutional.pdf?rev=4a6f4f191ce540f684dd98f3e6cae98f ("Overall, the Fifth Circuit opinion presents a novel interpretation of Supreme Court precedent that seemingly was previously well-settled. The case is significant as it breaks new ground.").

275. *See* Robert Stebbins, et al., *The* Jarkesy *Decision and Ramifications for Administrative Proceedings*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 29, 2022), https://corpgov.law.harvard.edu/2022/06/29/the-jarkesy-decision-and-ramifications-for-administrative-proceedings/ ("While the SEC could pursue a legislative fix to this issue, such a fix seems unlikely in the current legislative environment.").

276. *See* Petition of the Securities and Exchange Commission for Rehearing En Banc, Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) (No. 20-61007).

277. Jarkesy v. SEC, 51 F.4th 644, 644–45 (5th Cir. 2022) (en banc) (mem.) ("In the en banc poll, six judges voted in favor of rehearing (Richman, Stewart, Dennis, Haynes, Graves, and Higginson), and ten judges voted against rehearing (Jones, Smith, Elrod, Southwick, Willett, Ho, Duncan, Engelhardt, Oldham, and Wilson).").

278. *See* Ansley & Deau, *supra* note 274.

279. *See* Mascianica et al., *supra* note 120 ("The Seventh Amendment holding from *Jarkesy* hinged on matters where the SEC is seeking a civil penalty in fraud actions. In other words, for matters where the SEC isn't alleging fraud or seeking a penalty, that aspect of the ruling likely won't have much . . . impact.").

280. *See* Margaret D. Farrell & Kaitlin M. Humble, *Fifth Circuit's* Jarkesy v. SEC *Decision Calls into Question SEC's Adjudication Powers*, HINCKLEY ALLEN (June 10, 2022), https://www.hinckleyallen.com/publications/fifth-circuts-jarskey-v-sec-decision-calls-into-question-secs-adjudication-powers/.

281. *See* Jean Eagleshan, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015, 10:30PM), https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803.

282. *See* Ryan Jones, Comment, *The Fight over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. REV. 507, 510, 519 (2015) ("In fiscal year 2014, during

egregious violations of securities law.[283] Additionally, the influx of SEC civil enforcement proceedings will add to the already crowded schedules of Article III federal courts.[284] In light of these procedural challenges, the SEC may need to be more selective in deciding which cases to pursue.[285]

These setbacks in adjudicatory efficiency hamper the SEC's ability to adapt to the ever-changing corporate market.[286] For instance, the SEC has filed an increasing number of suits related to emerging fields, including cryptocurrency.[287] Additionally, with the increasing reliance current investors place on environmental, social, and corporate governance (ESG) policies and disclosure, the SEC created the Climate and ESG Task Force in the Division of Enforcement.[288] The ESG Task Force's duties include developing

which the SEC began its yearlong 100% administrative proceeding win streak, the Commission won only 61% of the cases that it brought in federal court. That same year, the SEC won all six administrative hearings that came to verdict. By contrast, the Commission won only 11 out of 18 cases in district court. Finally, a recent Wall Street Journal study found that from October 2010 to March 2015, the SEC won 90 percent of contested cases that progressed before an administrative law judge compared to a 69 percent success rate in federal court over the same timeframe. Respondents' appeals to SEC administrative decisions fared worse: '[t]he [SEC] commissioners decided in their own agency's favor concerning 53 out of 56 defendants in appeals—or 95%—from January 2010 through [March 2015].'") (footnotes omitted).

283. *See, e.g.*, *id.* at 509 (noting that with the addition of insider trading cases to the docket as of 2014, "administrative proceedings [] make up more than 80% [] of the SEC's total caseload.").

284. *See* Farrell, *supra* note 280 ("*Jarkesy* calls into question the SEC's ability to adjudicate actions under its current enforcement regime. In the absence of the ALJ-based system, such actions would instead proceed in federal court and additional federal judges would be needed to address the influx of new cases. This could chill SEC enforcement actions and result in longer case timelines from initiation to resolution.").

285. *See id.*

286. Markel et al., *supra* note 42 ("[A]t present the SEC has demonstrated a strong preference for bringing enforcement actions in-house, which critics contend provides it with a distinct advantage it would not otherwise have in federal court. If the SEC is unable to secure this advantage, and instead forced to bring actions in federal civil court only, it may be hampered in its enforcement priorities.").

287. Press Release *supra* note 12 (listing first of the kind actions filed by the Commission in 2021, including: securities using decentralized finance, securities law violations on the dark web, regulation crowdfunding, and charging an alternative data provider with securities fraud.); *id.* ("[N]ew actions spanned the entire securities waterfront, including against emerging threats in the crypto and SPAC spaces.").

288. Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42 ("'Climate risks and sustainability are critical issues for the investing public and our capital markets,' said Acting Chair Allison Herren Lee. 'The task force announced today will play an important role in enhancing and coordinating the efforts of the Division of Enforcement, the Office of the Whistleblower, and other parts of the agency to bolster the efforts of the Commission as a whole on these vital matters.'").

initiatives to identify ESG-related misreporting and related misconduct.[289] Therefore, the *Jarkesy* decision will hinder the SEC's ability to investigate violations of securities laws in emerging fields.[290]

In addition to the *Jarkesy* decision's impact on future proceedings, the *Jarkesy* decision will also impact the finality of past SEC settlements.[291] Like most civil litigation, a majority of SEC administrative proceedings are resolved via settlement.[292] Because of *Jarkesy*, federal courts (especially in the Fifth Circuit) will likely face arguments that prior SEC settlements are void because they were entered into during an unconstitutional proceeding.[293] Therefore, following *Jarkesy*, millions of dollars in settlement following SEC in-house proceedings could face revocation.[294]

Considering the events that led to the enactment of the Securities Act of 1933 and the Dodd-Frank Act of 2010, including the market crash of 1929

289. *Id.* (describing the ESG Task Force's duties, including "evaluat[ing] and pursu[ing] tips, referrals, and whistleblower complaints on ESG-related issues."). The Commission has the authority to take such actions via its power under "the Securities Act and Exchange Act to implement disclosure rules that are 'necessary or appropriate in the public interest or for the protection of investors.'" *See* Stebbins et al., *supra* note 275 (citing the Securities Act, 15 U.S.C. § 77g(a)(1)). These efforts have gained backlash from commentators, and it is likely that court challenges to the ESG Task Force will include nondelegation claims. *See* Commissioner Hester M. Pierce, *We are Not the Securities and Environment Commission—At Least Not Yet*, SEC (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 ("Contrary to the hopes of the eager anticipators, the proposal will not bring consistency, comparability, and reliability to company climate disclosures. The proposal, however, will undermine the existing regulatory framework that for many decades has undergirded consistent, comparable, and reliable company disclosures. We cannot make such fundamental changes to our disclosure regime without harming investors, the economy, and this agency.").

290. *See supra* notes 286–289 and accompanying text.

291. *See* Mascianica et al., *supra* note 120.

292. *See* Chairman Jay Clayton, *Statement Regarding Offers of Settlement*, SEC (July 3, 2019), https://www.sec.gov/news/public-statement/clayton-statement-regarding-offers-settlement ("The Commission has long recognized that an appropriately-crafted settlement can be preferable to pursuing a litigated resolution, particularly when the settlement is agreed early in the process and the Commission obtains relief that is commensurate with what it would reasonably expect to achieve in litigation.").

293. *See* Mascianica et al., *supra* note 120.

294. *See, e.g.*, Press Release, SEC, SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations (May 23, 2022), https://www.sec.gov/news/press-release/2022-86#:~:text=The%20SEC%27s%20order%20finds%20that,was%20not%20always%20the%20case; Press Release, SEC, UBS to Pay $25 Million to Settle SEC Fraud Charges Involving Complex Options Trading Strategy (June 29, 2022), https://www.sec.gov/news/press-release/2022-117; Press Release, SEC, Equitable Financial to Pay $50 Million Penalty to Settle SEC Charges That It Provided Misleading Account Statements to Investors (July 18, 2022), https://www.sec.gov/news/press-release/2022-124.

and the 2008 financial crisis, the chilling of securities regulations would have devastating effects on the securities market.[295] With decreased viability of securities violation enforcement by the SEC, perpetrators in U.S. stock markets will have increasing opportunities to manipulate investment prices and offer fraudulent securities.[296] In turn, the risk of another devastating economic crises would increase dramatically.[297] Stories of widespread loss, like those of Dusko Condic, Jennifer Butz, and Theodora Stephen, would re-emerge across the nation.[298]

B. Beyond Jarkesy*: Larger Societal Impacts*

The *Jarkesy* decision has wide impacts beyond securities law.[299] The holding came as a shock to many and sparked commentary in mainstream media.[300] As Circuit Judges Haynes, Stewart, Dennis, Graves, and Higginson stated in the Fifth Circuit en banc hearing denial dissent, "Beyond its massive impacts on the directly involved statutes, the opinion's potential application to agency adjudication more broadly raises questions of exceptional importance."[301] Many practitioners, authors, and public figures have commented on the widespread impacts of the *Jarkesy* opinion, making statements such as: "The holding of *Jarkesy* is broad. It could destroy the federal government's power to enforce key laws preventing companies from deceiving investors, and it likely goes much farther than that";[302] and "[T]he decision would significantly decrease Congress' authority to regulate the economy and combat

295. *See supra* notes 29–47 and accompanying text (detailing the SEC's rise and expansion following the market crashes of 1929 and 2008); *see also infra* notes 299–304 and accompanying text (discussing the impacts of *Jarkesy*'s holding in mainstream media).

296. *See* SAYLOR ACADEMY, *supra* note 32 (outlining that securities violations include manipulation of investment prices, making false or misleading statements about a company, and offering fraudulent securities).

297. *See supra* notes 30–43 and accompanying text (highlighting the correlation between devastating market downturns and increasing reliance on SEC enforcement).

298. *See supra* notes 3–9 and accompanying text.

299. *See infra* notes 302–323 and accompanying text.

300. *See, e.g.*, Blake Emerson, *The 5th Circuit's Ambush Against the SEC is Unprecedented and Shocking*, SLATE (May 20, 2022, 11:13AM), https://slate.com/news-and-politics/2022/05/5th-circuit-sec-securities-fraud-civil-service.html.

301. Jarkesy v. SEC, 51 F.4th 644, 647 (5th Cir. 2022) (en banc) (mem.) (Haynes, J. dissenting).

302. Ian Millhiser, *A Wild New Court Decision Would Blow Up Much of the Government's Ability to Operate*, VOX (May 19, 2022, 4:10PM), https://www.vox.com/2022/5/19/23130569/jarkesy-fifth-circuit-sec.

private corruption, magnify the powers of the courts to thwart administrative agencies, and potentially increase political control over agency adjudicators and the civil service."[303] Discussion of the *Jarkesy* decision has even expanded into popular culture; for instance, Jon Stewart (a comedian and political commentator) stated, "[The ruling] strike[s] at the heart of the government's ability to regulate anything. Clean air, clean water, food. Anything . . . ."[304]

Courts employ the nondelegation doctrine for the purpose of "ensur[ing] that the rules an agency issues further an existing, congressionally enacted statutory scheme, rather than to create entirely new laws."[305] Various commentators speculate that the nondelegation holding in *Jarkesy* may foreshadow "greater judicial scrutiny of the scope of administrative rulemaking."[306] In the past, the Supreme Court has been hesitant to reject congressionally enacted statutes such as § 109(b)(1) of the Clean Air Act.[307] However, if the Supreme Court decides to follow suit with the Fifth Circuit and question the viability of Congress' delegation of power to administrative agencies, administrative agencies' discretion to pursue policy priorities would be severely limited.[308]

Since the *Jarkesy* holding in May 2018, courts have been facing nondelegation challenges against governmental agencies.[309] On August 24, 2022, the U.S. District Court for the Eastern District of Louisiana rendered a decision in *United States v. Empire Bulkers Limited*, addressing nondelegation challenges against the U.S. Coast Guard (Coast Guard).[310] The Coast Guard inspected the MV JOANNA, a "23,494 gross-ton bulk cargo carrier registered

303. *See* Emerson, *supra* note 300.

304. *The Problem with Jon Stewart: The SEC Was in Trouble. Now They're Screwed*, APPLE PODCASTS (June 7, 2022) (Audio at 14:18).

305. *See* Stebbins et al., *supra* note 275.

306. *Id.*; *see also* Matt Levine, *Is the SEC Unconstitutional?*, BLOOMBERG (May 19, 2022, 10:29AM), https://www.bloomberg.com/opinion/articles/2022-05-19/is-the-sec-unconstitutional.

307. *See* Stebbins et al., *supra* note 275 ("[T]he Supreme Court has routinely upheld vague intelligible principles, such as Section 109(b)(1) of the Clean Air Act, which allows the Environmental Protection Agency to set ambient air standards at a level 'requisite to protect the public health.'") (citing Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 465 (2001)).

308. *Id.*

309. *See* United States v. Empire Bulkers Ltd., No. 21-126, 2022 U.S. Dist. LEXIS 151817, at *6 (E.D. La. Aug. 24, 2022), *aff'g* 583 F. Supp. 3d 746 (E.D. La. 2022).

310. *Id.* at *7 ("Tan contends that as enforced, the APPS regulations . . . run afoul of the holding in *Jarkesy*.").

in the Marshall Islands" as it arrived at the Port of New Orleans, Louisiana.[311] During the inspection, the Coast Guard found a modified oil content meter.[312] This meter prevented the pollution equipment from detecting the oil content of waste being discharged into the Mississippi River.[313] The U.S. government brought charges against Warlito Tan, the chief engineer, and (vicariously) Joanna Maritime and Empire Bulkers Ltd., two Greek companies.[314] The first count charged the defendants with violating the Act to Prevent Pollution from Ships (APPS).[315] Tan argued that following the *Jarkesy* nondelegation holding, the APPS does not contain a guiding principle because the Act simply permits worldwide U.S. enforcement of the International Convention for the Prevention of Pollution from Ships.[316] The court distinguished the idea of an Act's "open-ended" language versus the Act providing no guidance.[317] The Court found that the APPS in fact does contain guiding principles because it provides "guidance on the duties of the Secretary of the department in which the Coast Guard is operating."[318] Despite the *Empire Bulker* court's dismissal of the nondelegation challenges brought by the defendants, the case illustrates the arguments that will frequently arise in challenges to governmental charges.[319] Claims like those in *Empire Bulker Ltd.* risk crowding courts with constitutional challenges that will reduce judicial efficiency and obstruct efforts by governmental agencies to perform essential functions, such as protecting our waterways.[320]

311. *Empire Bulkers Ltd.*, 583 F. Supp. 3d at 750, *aff'd* 2022 U.S. Dist. LEXIS 151817, at *13.

312. *Id.* ("During the inspection, the Coast Guard discovered a concealed modification to a valve handle for the Oil Content Meter . . . which had been made prior to the vessel's arrival in New Orleans.").

313. *See* Press Release, U.S. Department of Justice, Ship Owner and Operator Sentenced for Environmental Crimes (Jan. 19, 2023), https://www.justice.gov/opa/pr/ship-owner-and-operator-sentenced-environmental-crimes.

314. *See Empire Bulkers Ltd.*, 583 F. Supp. 3d at 751.

315. *Chief Engineer of Bulk Carrier "MV Joanna" Found Not Guilty of Oil Pollution Charges*, MANIFOLD TIMES (Nov. 21, 2022), https://www.manifoldtimes.com/news/chief-engineer-of-bulk-carrier-mv-joanna-found-not-guilty-of-oil-pollution-charges.

316. *Empire Bulkers Ltd.*, 2022 U.S. Dist. LEXIS 151817, at *7.

317. *Id.* ("Tan does not address the fact that in *Jarkesy*, the problem identified was not just the open-endedness of the provision, but the lack of guidance as to how it should be applied.").

318. *Id.* (citing Act to Prevent Pollution from Ships of 1983, 33 U.S.C. § 1903); *see also Empire Bulkers Ltd.*, 583 F. Supp. 3d at 758.

319. *See Empire Bulkers Ltd.*, 583 F. Supp. 3d at 763.

320. *See Empire Bulkers Ltd.*, 2022 U.S. Dist. LEXIS 151817, at *11.

As for the statutory removal holding in *Jarkesy*, while the SEC only has a few ALJs and can bring civil actions in federal court, other federal agencies would have significant difficulty adjudicating cases without a workable remedy provided by either Congress or the Supreme Court.[321] For instance,

> [T]he Social Security Administration employs about 1,400 ALJs that hold hearings on benefits disputes, the Department of Health and Human Resources has approximately 60 ALJs to conduct hearings on coverage and claim issues, and the Federal Energy Regulatory Commission employs 12 ALJs that oversee gas and electric market manipulation cases.[322]

Therefore, if the Supreme Court were to find that the "multiple layers of for cause removal" structure of the SEC violates Article II, many administrative agencies would have to alter their removal procedures for the in-house ALJs.[323]

VII. LOOKING FORWARD: RESOLVING THE *JARKESY* IMPACTS

A. Reforming SEC Procedural Rules and Practices

Although the SEC could have implemented administrative reforms after the introduction of the Dodd-Frank Act to help avoid backlash, the Commission should mitigate the harm that the recent constitutional challenges have on the SEC's in-house proceedings.[324]

First, the SEC should take steps to ensure that the Commission's in-house

321. *See, e.g.*, *Program Provisions and SSA Administrative Data*, SOC. SEC. ADMIN. (2020), https://www.ssa.gov/policy/docs/statcomps/supplement/2020/2f8-2f11.html (listing the large amount of ALJs that the Social Security Administration relies upon); *see also, e.g.*, *OALJ Org Chart*, FED. ENERGY REG. COMMISSION, https://www.ferc.gov/office-administrative-law-judges-oalj (last visited Oct. 28, 2022).

322. *See* Stebbins et al., *supra* note 275; *see also Program Provisions and SSA Administrative Data*, *supra* note 321; *OALJ Org Chart*, *supra* note 321.

323. *See* Stebbins et al., *supra* note 275. For instance, administrative agencies could remedy this outcome by making "ALJs removable by the Commission without cause; with this change, the [] administrative tribunals would no longer suffer from any Constitutional defect under the Take Care Clause." *Id.*

324. *See* Platt, *supra* note 17, at 48 ("The wave of backlash facing the SEC poses risks potentially reaching well beyond the agency. The agency might have been able to preempt this backlash by promptly recalibrating the procedural protections available in [administrative proceedings] . . . but it may not be too late for the agency to mitigate the harm that follows.").

administrative proceedings do not violate the constitutional concerns outlined in *Jarkesy* and other preceding cases.[325] The SEC should limit the impact of *Jarkesy's* right to jury trial holding by implementing waiver of right to jury trial clauses in its settlement agreements.[326] Considering most SEC cases settle, these administrative changes to SEC proceedings would curtail the likelihood of later constitutional challenges and ensure that respondents are aware of their rights.[327]

Additionally, looking back at *Thomas*, where the Supreme Court upheld a statute that provided for mandatory arbitration provision, it is clear that governmental agencies may implement procedural "compromises" that put checks and balances on the rights of respondents to challenge claims brought by the government.[328] The statute at issue in *Thomas* limited judicial review of the arbitration to claims of "fraud, misrepresentation, or other misconduct."[329] The Court noted that this system arose as a "compromise" to the policy issues that the statute addressed.[330] Like the statute at issue in *Thomas*, the SEC should alter its existing framework to provide a similar "compromise" and allow limited judicial review over certain subject matter.[331] This would greatly limit the amount of right to jury trial challenges brought against SEC in-house proceedings.[332]

As for the Article II holding, the SEC should authorize interlocutory judicial review to the Commission, as opposed to its current policies in which

325. *Id.* at 44 ("It is true that by failing to promptly engage in procedural reform following Dodd-Frank, the SEC may have lost its best opportunity to avoid backlash. Now that the litany of constitutional defects with APs have been aired, and the legitimacy of the agency's expanded use of APs called into doubt, it will take a very significant effort to change the momentum.").

326. *See* Mascianica et al., *supra* note 120.

327. *See* Clayton, *supra* note 292 ("The Commission has long recognized that an appropriately-crafted settlement can be preferable to pursuing a litigated resolution, particularly when the settlement is agreed early in the process and the Commission obtains relief that is commensurate with what it would reasonably expect to achieve in litigation.").

328. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 573–74 (1985). Like in *Jarkesy*, at issue in *Thomas* was the Article III and public rights doctrine. *Id.* at 576 ("[Appellees] allege that the statutory mechanism of binding arbitration for determining the amount of compensation due them violates Article III of the Constitution.").

329. *Id.* at 573–74.

330. *Id.* at 575.

331. *Id.*

332. *See* Sward, *supra* note 198, at 1069 ("In contrast to the relatively searching review of the matters at issue in *Crowell*, judicial review of the arbitrators' award was limited to claims of 'fraud, misrepresentation, or other misconduct.' The *Thomas* Court approved of this mandatory arbitration . . . .").

such review is "disfavored" and granted in only "extraordinary circumstances."[333] This reform would reduce the likelihood of Article II challenges by altering the ALJs powers towards "recommendatory agents, rather than policy-making 'officers.'"[334] Therefore, it would make it harder for respondents bringing challenges based on Article II to establish that the SEC's ALJs are officers of the United States performing executive functions.[335] By making the in-house proceedings increasingly reviewable by the Commission throughout the proceedings, the SEC would weaken the likelihood of success in nondelegation constitutional challenges by respondents.[336]

By reforming its procedural rules and practices, the SEC can ensure that respondents have a proper opportunity to pursue their legal theories as they would in federal court, and help the in-house proceedings gain legitimacy.[337]

B. Congressional Action in Response to Jarkesy

Additionally, Congress may take steps to amend the existing statutes to comply with the concerns in constitutional challenges to the SEC administrative proceedings.[338] Commentators have noted that as to the nondelegation holding, Congress should act to provide the SEC an "intelligible principle" at issue in *Jarkesy*.[339] Such a result would need not only focus on the SEC, but

333. 17 C.F.R. § 201.400(a) (2015); *see also* Platt, *supra* note 17, at 6, 42 ("The rule governing interlocutory appeals should be amended to allow for immediate appeals of denials of motions for summary disposition contesting the government's underlying legal theory.").

334. *See also* Platt, *supra* note 17, at 43.

335. *See supra* notes 240–273 and accompanying text (outlining the distinction between ALJs performing executive functions and those performing adjudicative or purely recommendatory functions).

336. *See* Platt, *supra* note 17, at 43 ("By relying on APs to develop novel theories of the law, the agency makes ALJs into quasi-rulemaking entities. Allowing for expedited appellate review of legal issues would weaken plaintiffs' claims that ALJs effectively wield final rulemaking authority, and thus demonstrate that . . . ALJs do not constitute 'officers' of the United States.").

337. *Id.* at 48. Some may argue that these changes do not go far enough to resolve the constitutional challenges about the SEC's policing of securities laws. *See id.* at 44–45. Others argue that these efforts will diminish the primary advantages of the SEC's in-house proceedings—its efficiency and finality. *See id.* at 45 ("Some might also object that this proposal goes too far—that respondents will overuse this right to seek appeal as a delaying tactic.").

338. *See* Bill Flook, *Beyond* Jarkesy*, SEC Administrative Proceedings Face Attacks on Multiple Fronts*, THOMSON REUTERS: TAX & ACCT. (June 17, 2022), https://tax.thomsonreuters.com/news/beyond-jarkesy-sec-administrative-proceedings-face-attacks-on-multiple-fronts/.

339. *Id.* ("For *Jarkesy,* [DLA Piper Partner Deborah Meshulam] sees a possibility for Congress to act to address the 'intelligible principle' issue in the second holding. Not so for the other two holdings, however. 'I don't think it can necessarily resolve the issue about deprivation of rights to a jury trial so long as the authority for the SEC to collect civil penalties administratively remains,' she said. Nor

rather be implemented more generally, given the impact the *Jarkesy* result has on all federal administrative agencies.[340] Given the recent Republican gain of control of the House of Representatives,[341] which has shown its more hostile nature towards the SEC in-house administrative proceedings,[342] Congress may have trouble agreeing to any *Jarkesy* fix.[343] Between long-overdue reform needed by the SEC and possible legislative action targeting the nondelegation doctrine, the wide ranging effects of the *Jarkesy* decision can be mitigated.[344]

In sum, the *Jarkesy* decision leaves the SEC and other federal agencies with serious questions about the continued viability of their in-house proceedings.[345] Until these issues are resolved by the Supreme Court, Congress, or the agency itself, litigants will continue to challenge the ability of the SEC and other government agencies to bring cases before these administrative courts.[346]

VIII. CONCLUSION: PROTECTING U.S. MARKETS FROM FINANCIAL DISASTER

The SEC plays a major role in protecting investors and ensuring orderly

does she believe lawmakers can easily solve the ALJ removal protection issue.").

340. *Id.* ("'It can't be just SEC focused,' [DLA Piper Partner Deborah Meshulam] said. 'That issue has potential impact across a wide array of administrative agencies. So I think there could be some but not complete legislative fixes on these issues.'").

341. *See* Deirdre Walsh, *Republicans Narrowly Retake Control of the House, Setting Up Divided Government*, NPR (Nov. 16, 2022, 6:35 PM), https://www.npr.org/2022/11/16/1133125177/republicans-control-house-of-representatives ("A Republican House will likely clash on most issues with a Democratic Senate in 2023, with bitter fights over basic functions like funding the government threatening to paralyze Washington.").

342. *See* Flook, *supra* note 338 ("To underscore the GOP's hostility towards the SEC's use of ALJs, in April, the Senate Banking Committee released its JOBS Act 4.0 package containing the Administrative Enforcement Fairness Act, sponsored by Sen. Cynthia Lummis, a Wyoming Republican. The measure would stipulate that: 'any administrative proceeding brought by the Commission under this Act may be removed by the eligible respondent to the district court of the United States.'"). Despite hostility by Republicans in Congress to SEC in-house proceedings, because the delegation holding in *Jarkesy* has ramifications beyond SEC proceedings, congressional response to this prong of the decision is more likely compared to the rest of the holding. *Id.*

343. *Id.* ("[Republicans] would be less likely to agree to any *Jarkesy* fix should they regain one or both chambers of Congress following the midterm elections.").

344. *See supra* notes 324–342.

345. *See* Michael D. Birnbaum et al., Jarkesy*,* Cochran*, and the Attack on ALJs*, MORRISON FOERSTER (May 24, 2022), https://www.mofo.com/resources/insights/220524-jarkesy-cochran-attack-on-aljs.

346. *Id.*

and efficient markets.[347] A look back at the events that led to the rise of the SEC and its administrative powers shows the risks that come with hindering the SEC's ability to adjudicate securities violations—namely, widespread market crashes, the Great Depression, and an overall lack of confidence in the U.S. markets.[348] The SEC was an integral agency during high-profile investigations such as the Enron scandal, the Bernie Madoff pyramid scheme, and securities violations during the 2008 financial crisis.[349] At odds with the policy supporting the broad powers of the SEC, is the constitutional right to a fair trial and concerns related to the separation of powers.[350] These competing policies have led to an increasing amount of federal court cases challenging the constitutionality of SEC in-house administrative proceedings.[351]

The *Jarkesy* decision follows a growing list of challenges the SEC faces from Appointments Clause issues to subject matter jurisdiction questions.[352] The *Jarkesy* court vacated an SEC administrative proceeding and outlined a three-fold attack on the constitutionality of the SEC in-house proceedings.[353] Namely, the Fifth Circuit found that: (1) the SEC in-house proceedings deprived the petitioner of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power; and

347. *See The Role of the SEC*, *supra* note 11.

348. *Id.* ("When the stock market crashed in October 1929, so did public confidence in the U.S. markets. Congress held hearings to identify the problems and search for solutions. Based on its findings, Congress—in the peak year of the Depression—passed the Securities Act of 1933. The following year, it passed the Securities Exchange Act of 1934, which created the SEC.").

349. Eric Rosenberg, *What is the Securities and Exchange Commission?*, CREDIT KARMA (Nov. 11, 2020), https://www.creditkarma.com/advice/i/what-is-the-sec ("The SEC frequently gets big news coverage during major instances of investor fraud. For example, the Securities and Exchange Commission investigated the Enron scandal, the Bernie Madoff pyramid scheme, and trading improprieties during the 2008 Financial Crisis.").

350. *See* Mascianica et al., *supra* note 120 ("The Fifth Circuit held the SEC's action against the Petitioners suffered from three independent constitutional infirmities: 1) the proceedings violated Petitioners' Seventh Amendment right to a jury trial; 2) Congress had unconstitutionally delegated legislative power to the SEC by granting it full discretion to choose the forum for enforcement actions without appropriate guidance; and 3) the statutory removal restrictions on SEC ALJs violated the President's removal power.").

351. *See* Lucia v. SEC, 138 S. Ct. 2044, 2047 (2018) (holding SEC ALJs are "Officers of the United States" who must be appointed under the Appointments Clause); *see also* Cochran v. SEC, 20 F.4th 197, 197–98 (5th Cir. 2021) (holding that federal district courts have subject matter jurisdiction to hear collateral lawsuits with SEC administrative proceedings).

352. *See Lucia*, 138 S. Ct. at 2047; *see also Cochran*, 20 F.4th at 197–98.

353. *See* Jarkesy v. SEC, 34 F.4th 446, 449–50 (5th Cir. 2022).

(3) the statutory removal restrictions on SEC ALJs violate Article II of the Constitution.[354]

In *Jarkesy*, the Fifth Circuit based its holding that the SEC's administrative proceedings are unconstitutional on various inaccuracies and misstatements.[355] First, in holding that the SEC's administrative proceedings violate a respondent's right to jury trial, the *Jarkesy* court incorrectly relied on a faulty reading of *Granfinanciera*, and ignored Supreme Court precedent outlining circumstances in which adjudication authority may be delegated to an agency without violating the Seventh Amendment.[356] Additionally, in holding that the Dodd-Frank Act violated the nondelegation holding, the *Jarkesy* court incorrectly relied on *Chadha*, where nondelegation was not at issue, and ignored a long line of Supreme Court precedent reluctant to find that statutes violate the nondelegation doctrine.[357] Finally, the *Jarkesy* court improperly ignored explicit language in *Free Enterprise* suggesting that employees (such as ALJs) that perform adjudicative or recommendatory functions may not be subject to Article II restrictions on removal proceedings.[358]

The Fifth Circuit's holding in *Jarkesy* has the potential to upheave both past and future civil administrative proceedings brought by the SEC.[359] Any administrative proceedings brought in front of the SEC post-*Jarkesy* could now be met with Seventh Amendment and other constitutional challenges.[360] Such challenges will lead to chilling effects on the SEC's ability to adjudicate violations of securities laws.[361] Additionally, the influx of SEC adjudication in federal courts will create greater burdens on already over-crowded U.S.

354. *See id.* at 449–50 ("Because the agency proceedings below were unconstitutional, we GRANT the petition for review, VACATE the decision of the SEC . . . .").

355. *See supra* note 185 and accompanying text.

356. *See supra* notes 186–273 and accompanying text.

357. *See supra* notes 224–239 and accompanying text.

358. *See supra* notes 240–270 and accompanying text.

359. *See* Potter, *supra* note 183 ("The [*Jarkesy*] case may settle challenges to the SEC's administrative citadel that have been percolating for decades, and has ramifications for administrative review regimes across many federal agencies.").

360. *See* Stebbins et al., *supra* note 275 ("[A]ny contested administrative proceedings, any such defendant can now be expected to raise Seventh Amendment defenses until the Fifth Circuit (sitting *en banc*) or the Supreme Court overrules the Seventh Amendment holding in *Jarkesy*.").

361. *Id.* ("Given the *Jarkesy* decision and the grants of *certiorari* by the Supreme Court on the removal question, until further appellate guidance on the topics raised in these cases, it is likely that the SEC will refrain from bringing in its administrative courts any contested enforcement cases in which there is an available concurrent federal court forum for the respective claims.").

court dockets.[362] Considering that the SEC and its in-house proceedings were created to protect investors from devastating market crashes, the reduced ability of the SEC to adjudicate violations of securities laws in well-established and emerging fields creates the risk of another financial crisis grows exponentially.[363]

The *Jarkesy* holding has wide-ranging effects beyond the SEC and signals a greater skepticism of administrative agencies by federal courts.[364] Most concerning is the effect the statutory removal holding of *Jarkesy* will have on administrative agencies that utilize ALJs.[365] Since administrative agencies perform vital roles in modern American society, including interpreting laws, enacting and enforcing rules, and adjudicating matters relating to all aspects of daily life,[366] increasing challenges to such agencies have unimaginable effects.[367]

362. *See* Farrell & Humble, *supra* note 280 (outlining the fact that additional judges would be needed to address the influx of SEC securities violation cases).

363. *See* Commissioner Luis A. Aguilar, *Addressing Market Instability Through Informed and Smart Regulation*, SEC (Feb. 22, 2013), https://www.sec.gov/news/speech/2013-spch022213laahtm ("The rise in the number of trading venue—on exchanges and off-exchanges—and the fragmentation of trading volume, and the reliance on automated systems have increased the potential for system failures to spread quickly and affect the entire market. . . . Addressing the weakness and instability in the market structure must be a top Commission priority. To that end, the Commission must proactively develop an oversight and regulatory structure that is aligned with the purpose of serving the needs of investors.").

364. *See* Levine, *supra* note 306 (describing the rise of administrative agencies and the growing skepticism towards such agencies).

365. *See supra* notes 321–323 and accompanying text.

366. *See* Levine, *supra* note 306 ("Some federal law is made by Congress, but quite a lot of federal law is made by government departments and administrative agencies. In many cases, Congress passes fairly general laws, and those laws instruct the relevant agency to write rules implementing the laws, and then the agencies write more specific rules. Sometimes these rules just fill in details in a comprehensive statutory scheme. Other times the agencies have pretty broad mandates to write rules that are in the public interest, and they get to set their own agendas and decide what that means. . . . There are obviously good reasons to do things this way. Congress does not have time to write all the rules, so delegating rulemaking to agencies is efficient. Congress also has limited subject-matter expertise: The SEC knows more about securities law and financial markets than the average congressperson, so it makes sense for the SEC to write most of the securities rules."); *see also Administrative Law Center*, JUSTIA, https://www.justia.com/administrative-law/ (last reviewed May 2022) ("Administrative agencies have executive, quasi-legislative, and quasi-judicial functions. They can enforce laws and regulations, create new regulations through the rulemaking process, and conduct adjudicatory proceedings involving violations of laws or regulations.").

367. *See* Cary Coglianese, Administrative Law: The U.S. and Beyond 2 (July 3, 2016) (unpublished manuscript) (on file with the *University of Pennsylvania Law Review*) ("Administrative law refers to the body of rules and procedures affecting government agencies as they implement legislation and administer public programs. Yet it is also much more than just rules and procedures. Administrative

In light of *Jarkesy*'s constitutional holdings, the SEC and Congress should consider steps to limit the impact of *Jarkesy*.[368] First, the Commission should mitigate the harm that the recent constitutional challenges have on the SEC's administrative proceedings.[369] For instance, the SEC should take steps to ensure that the Commission's in-house administrative proceedings do not violate the constitutional concerns outlined in *Jarkesy* and other preceding cases.[370] Additionally, the SEC should implement waiver of right to jury trial clauses in its settlement agreements and authorize interlocutory judicial review to the Commission.[371] These changes would make it harder for respondents to bring challenges based on *Jarkesy*.[372] By reforming its procedural rules and practices, the SEC can ensure that respondents have a proper opportunity to pursue claims as they would in federal court and help the in-house proceedings gain legitimacy.[373] Moreover, Congress may take steps to amend the existing statutes to comply with the concerns in constitutional challenges to the SEC administrative proceedings.[374] Between the suggested reform by the SEC and possible legislative action, the wide-ranging effects of the *Jarkesy* decision can be mitigated, and the SEC can maintain its latitude to protect investors from widespread loss.[375]

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law applies to the ongoing operation of government bodies and seeks to shape official decisions that impact businesses and citizens throughout society. These decisions include granting licenses, dispensing government benefits, conducting inspections and investigations, imposing sanctions, issuing orders, awarding contracts, collecting information, hiring employees, and even making still further rules and regulations that apply to both governmental and private actors. Administrative law affects all of these varied decisions and addresses fundamental questions about how government authority can and ought to be exercised. It implicates society's most deepseated political and moral values: democracy, equity, efficiency, privacy, transparency, and justice.").

368. *See supra* notes 324–337 and accompanying text.

369. *See* Platt, *supra* note 17, at 48 ("The wave of backlash facing the SEC poses risks potentially reaching well beyond the agency. The agency might have been able to preempt this backlash by promptly recalibrating the procedural protections available in [administrative proceedings] . . . but it may not be too late for the agency to mitigate the harm that follows.").

370. *See supra* notes 325 and accompanying text.

371. *See supra* notes 326–332 and accompanying text (suggesting the SEC implement waivers of right to jury trial in its settlement agreements); *see also supra* notes 333–336 and accompanying text (suggesting the SEC alter its interlocutory appeal procedures).

372. *See supra* notes 324–337 and accompanying text.

373. *See* Platt, *supra* note 17, at 43.

374. See *supra* notes 338–344 and accompanying text.

375. *See supra* notes 345–346 and accompanying text.

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