No. 22-859

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

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

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the Constitution and its principles, which are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs.

This case interests Cato because it involves the right to a civil jury trial in conflicts between individuals and administrative agencies, a core separation of powers protection.

[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

"I consider [trial by jury] as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution."
Thomas Jefferson to Thomas Paine, July 11, 1789.

At one time, the right to a jury trial was considered indispensable to liberty. But with the rise of the administrative state, that right has been eviscerated. An alphabet soup of agencies now interpret the contours of their own authority, promulgate regulations governing aspects of our everyday lives, and prosecute alleged violators in-house, with limited Article III review. In short, agencies now play judge, jury, and executioner. Without the need to prove their case to a jury, these agencies have cast off Jefferson's anchor and sailed far from constitutional limits. The result has been almost certain victory for the agencies before their own administrative law judges ("ALJs").

The government touts in-house proceedings as supposedly more efficient than old-fashioned Article III jury trials. But that assertion is belied by this very case, which began 12 years ago and has still not been resolved.

In early 2007, George Jarkesy founded John Thomas Capital Management Group, LLC. Jarkesy intended to manage several "hedge" investment funds. When the investment funds suffered losses, the SEC began investigating Jarkesy for violations of the Dodd-Frank Wall Street Reform Act of 2010. Following its usual course, the SEC's enforcement staff conducted a nonpublic investigation into Jarkesy and his businesses for several years. It then gave a privileged, *ex*

parte presentation to the SEC Commissioners describing the nature of Jarkesy's alleged misconduct.

Following this investigation and presentation, the Commissioners initiated a public administrative enforcement action in March 2013. On the same day, the Commission issued an official press release touting the merits of the agency's case. Jarkesy was then subject to prehearing procedures that had been promulgated by the SEC and that hampered development of a robust defense. Jarkesy was subsequently tried before an ALJ, who had been appointed by and reported to the agency. The ALJ made credibility determinations and factual findings in the SEC's favor. The Commissioners then affirmed those findings on intra-agency appeal while modestly reducing the financial sanctions.

Conspicuously absent from this lengthy saga is any determination by a jury of Jarkesy's peers that he had broken the law. The Constitution guarantees fair and impartial adjudication procedures to prevent arbitrary deprivations of life, liberty, and property. In cases like Jarkesy's, that includes a civil jury trial. The SEC believes that stripping a citizen of liberty and property through supposedly expedient executive-branch adjudication is an acceptable substitute for a jury trial. It is not—instead it simply puts the thumb on the scale in favor of the agency.

Because this action concerns the private rights of life, liberty, and property, and because the remedies were recognized at common law, Jarkesy was entitled to a jury trial.

ARGUMENT

I. THE RIGHT TO A CIVIL JURY TRIAL WAS PRECIOUS TO THE FOUNDERS.

Veneration for the right to a jury did not begin with the enactment of the Seventh Amendment in 1791; it can be traced back centuries further. "[T]he colonists were firmly of the opinion that trial by jury in civil cases was an important right of freemen." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 654 (1973). The Framers understood that the right to a civil jury trial was rooted in the Magna Carta and was a vital check on state power. *Id.* at 653 n.44; *see also* Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1017 (1994).

The colonists and their leadership never veered from their esteem—and demand—for the trial by jury. "Trial by jury" was declared "the inherent and invaluable right of every British subject in these colonies."[2] The First Continental Congress demanded the "great and estimable privilege of being tried by their peers in the vicinage."[3] The "accustomed and inestimable privilege of trial by jury, in cases of both life and property" was listed as among those rights denied by the Crown.[4] And the Declaration of Independence charged the King

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[2] Declaration of Rights of the Stamp Act Congress of 1765, available at https://tinyurl.com/4swbm77z.

[3] Declaration and Resolves of 1774, available at https://tinyurl.com/23jun5c4.

[4] Declaration of Causes and Necessity of Taking Up Arms of 1775, available at https://tinyurl.com/4fra6k9w.

with "[d]epriving us in many cases, of the benefits of trial by jury."[5]

Americans were well aware of the tactics that government officials might use to avoid facing juries. In the years leading up to the Revolution, English colonial administrators attempted to subvert the right to a civil jury trial by trying cases in specialized courts called "vice-admiralty" courts. Colonial authorities would seize American ships under the pretext that they had violated customs and revenue measures and then try their cases in the vice-admiralty courts, without the benefit of a jury. *See* Wolfram, *supra*, at 654 n.47. The notorious Stamp Act was also originally enforced via prosecution in the vice-admiralty courts. *See* Stamp Act of March 22, 1765, at LVII–LVIII.[6] These courts not only sat without juries, but also applied a presumption in favor of the government.

The vice-admiralty courts posed such a threat to the right of trial by jury that they were specifically identified by George Mason as a significant complaint against British rule. In a letter to the Committee of Merchants in London, Mason wrote that the British had "depriv[ed] us of the ancient Tryal, by a Jury of our Equals." Letter from George Mason to the Committee of Merchants in London (June 6, 1766).[7] Mason wrote that vice-admiralty courts forced the colonists to "defend [their] property before a Judge . . . a Creature of the Ministry." *Id.* If the same cases were prosecuted in England against Englishmen, many would have been tried in front of a jury. Erwin C. Surrency, *Courts*

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[5] Available at https://tinyurl.com/mtnby6wk.

[6] Available at https://tinyurl.com/bdess58a.

[7] Available at https://tinyurl.com/3sp54p9r.

in the American Colonies, 11 AM. J. LEGAL HIST. 347, 357 (1967).

Foreshadowing the SEC's power to choose either district court litigation or agency adjudication, British authorities could bring customs cases in either common law courts or the vice-admiralty courts. But bringing cases outside of common law courts came with certain benefits for the government. *See* Vice Admiralty Court Act of July 6, 1768;[8] *see* also Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part I)*, 26 J. OF MARITIME L. & COMM. 581, 583 (1995). One example is that defendants in vice-admiralty courts did not have the same rights to a convenient venue as they had in the common law courts. The vice-admiralty court in Halifax, Nova Scotia exercised jurisdiction across the length of the colonies, from the Floridas to Newfoundland. Arthur J. Stone, *The Admiralty Court in Colonial Nova Scotia*, 17 DALHOUSIE L.J. 363, 381 (1994). Thus, if customs officials were uncertain of success, they could bring a case in Halifax rather than in a more convenient location, requiring the defendant to either travel long-distance or suffer a default judgment. Those who could not afford the trip to Halifax lost their case and their property.

And again like the SEC's agency adjudications, the vice-admiralty courts did not give defendants sufficient procedural protections. Once a vice-admiralty court found probable cause, American ship owners were precluded from bringing a separate common law action against the officials who had seized their ships for conversion, or to recover costs. Such actions were precluded even if their vessels were eventually held to

[8] Available at https://tinyurl.com/yc4kvrcz.

have been wrongly condemned. *See* Wolfram, *supra*, at 654 n.47. Vice-admiralty courts further imposed an "extraordinarily difficult burden of proof on the claimant seeking the return of confiscated property." Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35, 79 (2005).

The protections afforded by juries were not just theoretical to America's Founders. The pre-Revolutionary era featured several famous examples of juries protecting individual liberty from government oppression. Decades before America's independence, a jury had saved Pennsylvania founder William Penn, who had been arrested for preaching in defiance of the Church of England. Andrew R. Murphy, *The Emergence of William Penn*, 1668–1671, 57 J. CHURCH & ST. 333, 337 (2015). The jury refused to convict Penn even after threats from the bench. *Id.* at 339.

Juries in the colonial era defended not just the right to freedom of religion but also the right to freedom of speech. One of the most stirring pre-Revolutionary episodes was the jury acquittal of John Peter Zenger in 1735. *See* Wolfram, *supra*, at 654–55.

Zenger was a printer in New York who was arrested and charged with seditious libel for his criticisms of the Royal Governor of New York, William Cosby. *Id.* On his arrival in New York, Cosby had sought half the pay of the Acting Governor, who had served for a year before Cosby's arrival. *See* Walker Lewis, *The Right to Complaint: The Trial of John Peter Zenger*, 46 A.B.A. J. 27, 27 (1960). When the Acting Governor refused to pay, Cosby sued. The case ordinarily would have required a jury, but Cosby arranged

for the New York Supreme Court to sit in equity to hear the case. *Id.* at 28.

Cosby's ploy prompted an outraged Chief Justice Lewis Morris to dissent. Morris authored an opinion describing the dangers that arise when officials evade legal processes, an opinion which Zenger then publicized. *See* Doug Linder, *The Trial of John Peter Zenger: An Account* (2001).[9] Governor Cosby then removed the Chief Justice, leading Zenger to publish yet another article criticizing the Governor. *See* Lewis, *supra*, at 30. Zenger was then charged with seditious libel. *Id.*

The right to a jury trial loomed large throughout the case, both because Cosby had attacked it and because it was ultimately the jury that protected Zenger's rights. A grand jury refused to indict Zenger, but Cosby pressed on in his prosecution and pursued a course of action that did not require a grand jury's indictment. *Id.* at 29. Cosby had Zenger's attorneys disbarred, but this unexpectedly benefited Zenger, because his new attorneys made the novel argument that truth should be a defense to libel. Even though such a legal defense did not then exist, the jury saw the fairness in this argument and refused to convict. *Id.* at 111. The trial thus reinforced the notion of juries as checks on executive power. Gouverneur Morris later called Zenger's case "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America." *See* Linder, *supra*, at 8.

The Zenger trial is often considered one of the inspirations for the First Amendment. *See, e.g.*, Edward Bloustein, *The First Amendment Bad Tendency of Speech Doctrine*, 43 RUTGERS L. REV. 507, 509 (1991)

[9] Available on SSRN at https//tinyurl.com/45hcpu5y.

(discussing the case as a "watershed in the evolution of freedom of the press") (quoting LEONARD LEVY, EMERGENCE OF A FREE PRESS 16 (1985)). But the case was also an impetus for the Seventh Amendment right to trial by jury, a right that the Framers knew would be an additional safeguard for other rights like the freedom of speech. *See* Steven Alan Childress, *The First Amendment*, 17 TEX. TECH. L. REV. 615, 626 n.66 (1986).

Precisely because juries were so effective at curbing excessive or arbitrary exercises of power, the British frequently tried to evade them. In the Administration of Justice Act of 1774, which is considered one of the "Intolerable Acts" and thus a contributing factor to the American Revolution, the British provided for the transfer of trials between colonies or to England.[10] This assault on the institution of the jury allowed for a different jury in a different land and deprived accused colonists of a jury of their peers. It also effectively immunized British officials for crimes against colonists since their trials could be transferred to friendly British fora. Similarly, the Quebec Act, sometimes included as an Intolerable Act, extended the borders of Quebec and permitted French civil law to remain in place, under which there was no jury trial right.[11]

In response, the founding generation demanded a civil jury trial guarantee. The lack of such a right in the original Constitution was nearly fatal to its ratification. *See* Klein, *supra*, at 1017–20. Antifederalists

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[10] Available at https://tinyurl.com/vrmz8adw.

[11] *See* The Quebec Act: October 7, 1774, at XI, available at https://tinyurl.com/ypb3ddvu.

galvanized opposition to the Constitution due to its lack of a Bill of Rights and its lack of a right to a civil jury trial in particular. *See* Wolfram, *supra*, at 667; *see also Parsons v. Bedford*, 26 U.S. (1 Pet.) 433, 446 (1830) ("One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases."). Both future Vice President Elbridge Gerry and Founding Father George Mason identified the absence of a provision guaranteeing civil jury trials as a major reason why neither signed the Constitution. Wolfram, *supra*, at 660 n.59, 667. The Antifederalists' concern over civil juries became so intense that Alexander Hamilton dedicated all of Federalist No. 83 to assuaging their fears, telling readers that "[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury." The Antifederalists' demand ultimately was met, of course, in the form of the Seventh Amendment.

According to the Antifederalists, the guarantee of a civil jury trial meant "the protection of debtor defendants; the frustration of unwise legislation; the overturning of the practices of courts of vice-admiralty; the vindication of the interests of private citizens in litigation with the government; and the protection of litigants against overbearing and oppressive judges." Wolfram, *supra*, at 670. "Another important function of the civil jury, was to provide the common citizen with a sympathetic forum in suits against the government." *Id.* at 708. One pseudonymous writer suggested in the pages of the *Pennsylvania Packet* that "it was quite predictable that a 'lordly court of justice' sitting without a jury in the federal courts would likely be

'ready to protect the officers of government against the weak and helpless citizens. . . .'" *Id.*

Of course, it was understood that the civil jury right would protect litigants in disputes between private citizens. But the core of the demand for the right focused on suits brought by the *government* against citizens. The Seventh Amendment ensures that when the government threatens the private rights of citizens—their lives, liberty, or property—it is accountable to a jury whenever an Englishman would have had one under British common law.

II. THE SEC'S PROCEDURES ARE NO SUBSTITUTE FOR JURY TRIALS.

The growth of the SEC's adjudicatory powers has come at the expense of the right to a jury protected by the Seventh Amendment. The SEC's current scheme is incompatible with that guarantee.

Over the decades-long growth of the administrative state, matters that should properly be decided by juries have come to be instead adjudicated within agencies. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 69 (1989) (Scalia, J., concurring) (protesting the expansion of the "public rights" doctrine, which has permitted jury-free adjudication). But those agency procedures are no substitute for a jury trial.

A. SEC Enforcement Staff Are Impermissibly Enmeshed with the Adjudicative Staff.

In-house adjudications not only create the appearance of institutional bias, they also yield unfair results. *See Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek

to transgress the separation of powers."). Chief among the liberties secured by the Constitution is the right to "[a] fair trial in a fair tribunal," *In re Murchison*, 349 U.S. 133, 136 (1955), which is "one of the rudiments of fair play assured to every litigant" and an "inexorable safeguard" of individual liberty. *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 304–05 (1937) (internal quotation marks and citation omitted).

Flouting these norms, the SEC relies on an administrative process that is infected with structural bias, and it routinely imposes civil penalties on private citizens like Jarkesy with only a shadow of due process. A fair trial requires an adjudicator who lacks "a direct, personal, substantial, pecuniary interest" in a case. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)); *see also* THE FEDERALIST NO. 10 (James Madison) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."). This means there can be no "objective risk of actual bias," regardless of "whether or not actual bias exists or can be proved." *Caperton*, 556 U.S. at 886 (2009); *accord Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (courts "apply an objective standard" that asks not whether the adjudicator harbors actual, subjective bias, but instead whether, as an objective matter, "there is an unconstitutional 'potential for bias'") (quoting *Caperton*, 556 U.S. at 881). Due process is violated where perceived bias, "under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear[,] and true.'" *Caperton*, 556 U.S. at 885 (quoting *Tumey*, 273

U.S. at 532).The SEC's procedures fall far short of this standard.

In the case of the SEC, the supposedly "neutral" adjudicators can never appear unbiased because their institutional role is so closely entwined with the agency prosecutors. The Commissioners are the ultimate adjudicators of SEC enforcement actions, but they also have a close working relationship with the prosecutors of those actions. The Commission's Division of Enforcement is primarily composed of attorneys who advise the Commissioners as trusted fiduciary counsel, represent the Commission as litigation counsel in other cases in federal court, and act as the prosecutors in administrative actions. In other words, the prosecutors act as counsel to the very people who will be adjudicating their case. It's akin to a federal judge deciding cases in which the prosecuting attorney happens to be employed as not only the judge's personal attorney, but also the judge's law clerk.

This creates a conflict of interest from the start. At the outset, the Commissioners must decide whether to institute an enforcement action for which they will be the ultimate adjudicators. *See* 17 C.F.R. §§ 201.101(a), (4), (7) and 201.200. They typically make this determination after the agency's Enforcement Division prosecutors have presented their case in written and oral *ex parte* communications cloaked in attorney-client privilege. *See* SEC Enforcement Manual § 2.5 (last updated Nov. 28, 2017). This not only allows the Commissioners to pre-judge the evidence, but also violates "basic notions of due process," which require the "insulation of the decision maker from ex parte contacts" with any of the parties. *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981), *as amended* (June 1, 1981).

The close relationship between SEC enforcement staff and the in-house adjudicators has led to breaches of confidential information. A "control deficiency" resulted in enforcement staff accessing adjudication memoranda in dozens of cases, including Jarkesy's. *See* SEC, Second Commission Statement Related to Certain Administrative Adjudications (June 2, 2023)[12] ("[C]ertain Adjudication memoranda were accessible to all Enforcement staff, including attorneys investigating and prosecuting . . . *Jarkesy*."). All other implicated cases that were pending at the time the breach was discovered were dismissed. Pete Schroeder, *U.S. SEC to Dismiss 42 Enforcement Cases After Internal Data Mishap*, REUTERS (June 2, 2023).[13] But Jarkesy's was already pending in this Court. This breach would have been avoided had the judicial and executive functions been independent of each other, as our Constitution requires.

The SEC's combination of adjudicative and prosecutorial functions leads to further unfairness. Although the accused is typically allowed to submit a written position statement (commonly referred to as a "Wells submission") before the SEC decides whether to file charges, *see* 17 C.F.R. § 202.5(c), the prosecution team can challenge that statement in its *ex parte* communications with the Commissioners. The accused, by contrast, neither sees the prosecutors' written presentation nor hears the contents of their privileged discussions with the Commissioners.

In some cases, including Jarkesy's, the SEC will then issue an official press release that reads as if the

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[12] Available at https://tinyurl.com/3crf2h34.

[13] Available at https://tinyurl.com/55djh9tw.

case has already been proved, the facts have already been found, and the respondent has already been deemed guilty. *See* SEC, Press Release No. 2013-46, SEC Charges Hedge Fund Manager and Brokerage CEO With Fraud (Mar. 22, 2013).[14] These press releases blur the line between the Enforcement Division's allegations and the agency's purported neutrality as the ultimate adjudicator.

Reviewing these accusatory press releases, "a disinterested reader . . . could hardly fail to conclude" that the Commission has "in some measure decided in advance" that the accused has violated the law. *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated on unrelated grounds*, 381 U.S. 739 (1965) (per curiam). But such prejudgment violates due process. *See Antoniu v. SEC*, 877 F.2d 721, 725 (8th Cir. 1989) (SEC Commissioner's speech about pending case created impermissible bias); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966) (disqualifying Commissioner who had, in a former role, investigated many of the same facts at issue).

The specter of prejudgment is exacerbated in cases where, as here, some co-respondents choose to settle rather than try their luck in a stacked proceeding. In these cases, the SEC typically issues a public settlement order with detailed "findings" of misconduct, even if the parties settled without admitting or denying relevant facts. Here, that order incriminated not just the settling respondents but also Jarkesy and his company, who were superficially anonymized as "the Manager" and "the Adviser," but whose identities were obvious. *See* John Thomas Capital Mgmt. Grp., LLC,

[14] Available at https://tinyurl.com/3m6ue8rx.

Exchange Act Release No. 34-70989, at 2 (Dec. 5, 2013).[15]

In this public settlement order, the SEC noted in a boilerplate footnote that the findings were not "binding" on any other person. *Id.* at 2 n.1. But Jarkesy could be forgiven for believing that the ALJs or Commissioners might be reluctant to contradict the agency's "non-binding" findings later, when they would adjudicate essentially the same facts all over again.

Once a defendant reaches the adjudicative stage, SEC administrative proceedings deny defendants a trial before a petit jury—the constitutional requirement for adjudicating private rights. *See Granfinanciera*, 492 U.S. at 42. In its place, the SEC offers defendants an initial hearing before an ALJ who, like the prosecutors, reports to the Commissioners. *See* SEC Organization Chart (2020).[16] For several reasons, that is not a fair trade.

A hearing before an ALJ provides little comfort for the accused because ALJs act according to authority delegated by the Commission and their positions are created, maintained, and funded by the Commission. 15 U.S.C. § 78d-1(a); 17 C.F.R. § 200.30-10. Evidence suggests that the Commission's ALJs feel pressure to rule in favor of the agency they work for. *See* Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 6, 2015),[17] (quoting a former ALJ as stating that she "came under fire . . . for finding too often in

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[15] Available at https://tinyurl.com/bdzmk386.

[16] Available at https://tinyurl.com/25bcz4kd.

[17] Available at https://tinyurl.com/m6b7dtje.

favor of defendants"); Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 278–79 (1994) (finding that 34% of non-Social Security ALJs were "asked to do things that are against their better judgment," 15% believe "threats to independence were a problem," and 9% were "pressure[d] to make different decisions").

These problems are compounded because the Commissioners themselves hear appeals from ALJ decisions. Thus, by the time a case comes back around to the Commissioners on appeal, they have already seen and weighed a preview of the evidence and made a threshold determination that the case had enough merit to justify public charges and a public hearing. *Amos Treat & Co. v. SEC*, 306 F.2d 260, 266–67 (D.C. Cir. 1962) ("We are unable to accept the view that a member of an investigative or prosecuting staff may . . . recommend the filing of charges, and thereafter . . . participate in adjudicatory proceedings"); *accord Williams*, 136 S. Ct. at 1907–08 (due process violated in civil postconviction case where state supreme court justice, as a former district attorney, had approved subordinate prosecutor's request to seek death penalty in underlying criminal case 25 years earlier). A former prosecutor appointed to the federal bench would necessarily recuse from deciding any cases that she herself had prosecuted, but SEC Commissioners are, by design, called upon to play both roles in the same case at different stages.

B. SEC Procedural Rules Favor the Government.

The deck is further stacked against the accused by lopsided procedural rules that have been promulgated by the Commission itself. Parties must prepare their

defenses within strict timelines—a maximum of 10 months in the most complex of cases. *See* 17 C.F.R. § 201.360(a)(2)(C)(ii). And parties have few discovery tools at their disposal; only in the most complex SEC administrative cases are they allowed depositions at all, and even these are subject to strict limits. *Compare* 17 C.F.R. § 201.233(a)(1) (maximum of three depositions per side in single respondent cases and five per side in multi-respondent cases), *with* Fed. R. Civ. P. 30 (permitting 10 depositions, or more with leave of the court).

In contrast, by the time an action has been brought, the Commission's prosecution team has typically already taken plenty of time to investigate and prepare its case. The average SEC investigation takes more than two years, and many take five years or more. *See* SEC, Division of Enforcement 2020 Annual Report, at 6 (2020). Prosecutors typically enjoy subpoena power throughout their investigation, allowing them to amass substantial evidence through document productions and sworn nonpublic testimony. *See, e.g.*, 15 U.S.C. §§ 78u(b), 80b-9(b); 6 Thomas Lee Hazen, Law Sec. Reg. § 16:101 (2020).

The SEC's procedures, and agency adjudication itself, are purported to enhance efficiency. Yet they often drag on for excessive periods of time, as evidenced by this case. Even though the SEC established nonbinding deadlines for proceedings in 1995, *see* 60 Fed. Reg. 32, 738 (June 23, 1995), "the Commission and its [ALJs] have generally failed to meet these goals." 68 Fed. Reg. 35, 787 (June 17, 2003). A 2015 study found that just two of the 15 surveyed opinions were issued within the time set by the guidelines. *See* U.S. Chamber of Commerce Center for Capital Markets

Competitiveness, Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Process and Practices 16 (2015).[18] The SEC's data show that it has not published a timely opinion on an enforcement action since at least September 30, 2017.[19] This prolonged Sword of Damocles puts pressure on defendants to settle and undermines any argument that agency adjudication promotes efficiency.

C. Intra-Agency Appeals Are No Substitute for Article III Courts.

An ALJ's initial decision can be appealed to the Commissioners, but they rarely rule against the prosecutions that they authorized. From 2010 to 2015, the Commissioners decided 95% of appeals in the agency's favor, sometimes overruling ALJ decisions that were more favorable to the respondent only to impose harsher sanctions. Eaglesham, *supra*.

This is predictable; after all, former Commissioners have described the agency as "first and foremost a law enforcement agency," and they have pledged to be "bold and unrelenting" in pursuit of securities violators. *See* Christopher Cox, Chair, SEC, Address at the

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[18] Available at https://tinyurl.com/mr4c8tzm.

[19] *See* Report on Administrative Proceedings for the Period October 1, 2022 through March 31, 2023, Exchange Act Release No. 97400 (Apr. 28, 2023); Report on Administrative Proceedings for the Period October 1, 2021 through March 31, 2022, Exchange Act Release No. 94820 (Apr. 29, 2022); Report on Administrative Proceedings for the Period April 1, 2020 through September 30, 2020, Exchange Act Release No. 90289 (Oct. 20, 2020); Report on Administrative Proceedings for the Period October 1, 2018 through March 31, 2019, Exchange Act Release No. 85750 (Apr. 30, 2019).

PLI 40th Annual Securities Regulation Institute: Building on Strengths in Designing the New Regulatory Structure (Nov. 12, 2008);[20] Nominations Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 113th Cong. 10 (2013) (statement of Chair Mary Jo White).

The SEC also has strong jurisprudential motivations to rule in favor of its Enforcement Division prosecutors whenever possible. By doing so, the Commission can often steer the development of securities law in its favor, establishing a body of self-serving precedent that it can then use to its advantage when litigating subsequent cases in federal courts or when extracting settlements. *See* Jed S. Rakoff, U.S. Dist. Judge, S.D.N.Y., Keynote Address at the PLI Sec. Reg. Int.: *Is the S.E.C. Becoming a Law Unto Itself?* (Nov. 5, 2014), at 1 (expressing concern about the SEC using administrative adjudication to undermine the impartial development of securities law);[21] Joseph A. Grundfest, *Fair or Foul? SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143, 1148 (2016) (arguing that by litigating administratively, the SEC seeks to control the interpretation of federal securities laws); *cf. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824–25 (1986).

D. Unrestrained Growth of the SEC's Adjudicatory Powers Threatens Liberty.

Historically, the SEC managed to function by litigating in Article III courts. The original Securities Exchange Act of 1934 empowered the Commission to

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[20] Available at https://tinyurl.com/5be7mfxs.

[21] Available at https://tinyurl.com/tmc4627k.

enforce violations of the new securities laws primarily by "seeking injunctions in federal district court." Thomas Glassman, *Ice Skating Up Hill: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. BUS. & SEC. L. 47, 50 (2015). Administrative proceedings, by contrast, could be used only to "expel members or officers of [the] national securities exchanges" that the Act directly regulated. *Id.*

Even as the SEC's powers and duties expanded over the next several decades, a defendant's right to the procedures guaranteed by the Seventh Amendment was largely preserved. Each time the Commission "obtained or asserted additional administrative powers . . . the expansion was tied to the agency's oversight of regulated entities or those representing those entities before the Commission, and even then was largely ancillary to the broader remedies and sanctions [the Commission] could obtain" in court. *Id.* (internal quotations omitted). Indeed, the Commission's adjudicative purview largely remained limited to cases involving the registration and deregistration of securities, *see* 15 U.S.C. §§ 77h(d), 78l(j), and the barring or suspension of SEC-licensed securities firms and their associated persons, *see id.* §§ 78o(b)(4), 80a-8(e), 80a-9(b), 80b-3(c)(2)(b), 80b-3(e), 80b-3(f).

Given these limited administrative powers and the fact that SEC-regulated respondents had arguably "consented" to such procedures, Stephen J. Choi & A. C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1, 6 (2017), the system remained largely consistent with the traditional boundaries of agency adjudication. *See generally* William Baude, *Adjudication*

Outside Article III, 133 HARV. L. REV. 1511, 1554–57 (2020).

Over the past four decades, however, Congress and the SEC have pushed the constitutional boundaries. In the 1980s, concerns over insider trading led to an expansion of the remedies that the Commission could exact via the courts as punishment for violating the law. *See* Glassman, *supra*, at 51; *see also* Ryan Jones, *The Fight Over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. REV. 507, 511 (2015). With the enactment of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (the "Remedies Act"), the Commission's administrative adjudications could, for the first time, result in money penalties against SEC-regulated parties and permanent cease-and-desist orders against even non-regulated parties. Pub. L. No. 101-429, §§ 202(a), 301, 401, 104 Stat. 931, 937, 941–45, 946–49 (1990) (codified respectively at 15 U.S.C §§ 78u-2, 80a-9(d), and 80b-3(i)); *see also* Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 367, 392–93 (2008); Jones, *supra*, at 511–12; Choi, *supra*, at 7.

In this same timeframe, the Commission set out to increase "efficiency" by truncating and streamlining the discovery and trial phases in its adjudicative procedures. *See* Jones, *supra*, at 513. Still, throughout the 1990s and early 2000s, if the Commission wished to impose penalties on unregistered private citizens, it had to prove its case in an Article III court, subject to the Seventh Amendment. *See* Remedies Act §§ 101, 201, 302, 402 (codified at 15 U.S.C. §§ 77t(d), 78u(d)(3); 80a-41(e), and 80b-9(e)).

In the wake of the 2008 financial crisis, however, Congress took an unprecedented leap. In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress purported to empower the SEC to impose harsh quasi-criminal sanctions against any private citizen through its own administrative adjudications with only limited, after-the-fact review by a federal court of appeals. *See* Pub. Law No. 111-203, § 929P, 124 Stat. 1376, 1862–64 (2010) (codified at 15 U.S.C. §§ 77h-1(g), 78u-2(a)(2), 80a-9(d), and 80b-3(i)); *see also* Choi, *supra*, at 9. The fear that such a scheme might come to pass is exactly the fear that motivated the Seventh Amendment. The Commission had sought this extraordinary power decades earlier, but Congress had declined to grant it "specifically because the [Commission] might be perceived to have an incentive to conduct more enforcement actions through its own administrative proceedings." Jones, *supra*, at 516 (internal quotations omitted).

The results were predictable. In the aftermath of Dodd-Frank, the SEC ramped up the number of cases it brought in its own in-house forums and amassed an impressive win rate before its own ALJs. *See, e.g.*, Glassman, *supra*, at 56–57. This case demonstrates the danger: The Commission seeks to deprive Jarkesy of personal property and the freedom to participate in the securities industry or to serve as an officer or director of a publicly listed company. To accomplish this result, the SEC chose to investigate, charge, adjudicate, and punish Jarkesy all in-house.

In SEC administrative adjudications, the deck is stacked heavily against the respondent from start to finish, with the burden of proof, as in the vice-admiralty courts of yore, effectively on the respondent

rather than the government. That inverts where the burden rightly belongs in this kind of quasi-criminal prosecution. *Cf. Patterson v. New York*, 432 U.S. 197, 211 (1977) ("[T]he universal rule in this country [is] that the prosecution must prove guilt beyond a reasonable doubt."). As one former ALJ put it, "the burden was on the people who were accused to show that they didn't do what the agency said they did." Eaglesham, *supra*. The cumulative effect is predictable: Most respondents, with the looming threat of a process skewed against them, understandably cry uncle and settle rather than rolling the dice with costly hearings and years of uphill appeals. *See* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH L. REV. 315, 340, 346–47 (2017).

The SEC's new authority to impose harsh punitive sanctions against private, non-registered parties in these inherently biased administrative proceedings has only increased the agency's leverage in settlement negotiations. *See* Choi, *supra*, at 16 (confirming empirically the hypothesis "that the SEC would use its additional enforcement powers under the Dodd-Frank Act as leverage to obtain greater monetary penalties in administrative proceedings"); Velikonja, *supra*, at 365 ("[W]illingness to settle may be affected by [defendants'] perception that ALJs are less fair."). For its part, the Commission is at least honest about what it's up to: an Enforcement Division head admitted that "there have been a number of cases in recent months where we have threatened administrative proceedings . . . and they settled." Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, LAW360 (June 11, 2014). It's not hard to see why.

This entire institutional arrangement embodies many of the worst-case-scenario arguments that the Antifederalists made for the indispensability of civil juries. The SEC features inherently partial adjudicators, reflexive deference to the government, and unilateral encroachment upon life, liberty, and property. At a time when our legal system is "filled with more civil laws bearing more extravagant punishments" and when "[t]oday's 'civil' penalties include confiscatory rather than compensatory fines," many of which "are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies," *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and in the judgment), the Seventh Amendment should reprise its role as "an important right of freemen." Wolfram, *supra*, at 654. The SEC's system of in-house adjudication is incompatible with the Seventh Amendment.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Fifth Circuit.

Respectfully submitted,

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