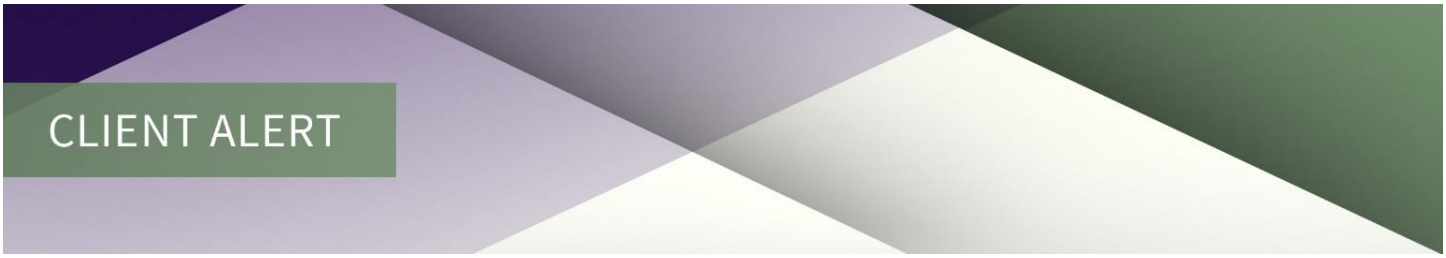

The *Jarkesy* Decision and Ramifications for Administrative Proceedings

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On May 18, 2022, in *Jarkesy v. S.E.C.*, a divided Fifth Circuit panel vacated the Securities and Exchange Commission's (the "Commission" or the "SEC") affirmation of an SEC administrative law judge's ("ALJ") determination that Jarkesy and Patriot28, LLC committed securities fraud.[1] The panel found that (1) the in-house adjudication of the case violated Petitioners' Seventh Amendment right to a jury trial, (2) Congress unconstitutionally delegated legislative power to the SEC by authorizing it to determine whether to bring these types of cases in an Article III court[2] or before an ALJ, and (3) the ALJ removal protections violate Article II, Section III (the "Take Care Clause") of the U.S. Constitution.

Background

The SEC pursued this action through its administrative adjudication process.[3] Initial decisions in administrative proceedings can be appealed to the Commission and Commission decisions can be appealed to the federal court of appeals. That appellate review, however, is limited as findings of fact can only be overturned if they are supported by

1 *Jarkesy v. SEC*, No. 20-61007, slip. op. (5th Cir., May 18, 2022) (hereinafter "*Jarkesy*").

2 An Article III court is one established pursuant to Article III of the U.S. Constitution, which establishes that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time, ordain and establish," and those courts' "judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made" as well as under several other circumstances. U.S. Const., Art. III §§1, 2. A presidentially appointed judge presides over these courts.

3 *John Thomas Cap. Mgmt. Grp. LLC*, Securities Act of 1933 (the "Securities Act") Release No. 9396 (Mar. 22, 2013).

"substantial evidence"[4] and the Commission's interpretation of the securities laws may also be entitled to *Chevron* deference.[5]

Historically, the remedies the SEC could seek against respondents in administrative proceedings were limited and until 1990 the Commission could generally only bring securities fraud actions and seek civil penalties in Article III courts.[6] The SEC was first authorized to impose money penalties in administrative proceedings with the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 but only with respect to entities that were required to register with the SEC, such as broker-dealers.[7]

However, in 2010 the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") expanded the SEC's authority to bring securities fraud actions and pursue civil penalties against non-regulated entities and individuals in administrative proceedings, instead of Article III courts, whenever the Commission, in its discretion, decided.[8] Following enactment of the Dodd-Frank Act, the SEC did not immediately shift its enforcement efforts to administrative proceedings; however, in 2014, there was a sharp increase in such proceedings and an increase in the complexity of the cases brought in such proceedings.[9] This shift was met with criticism and with constitutional challenges.[10] Commencing in 2018, the Commission's enforcement division drastically cut back on use of the administrative courts, especially as to litigated enforcement cases in which there was an available concurrent federal court forum for the respective claims.[11]

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4 Administrative Procedure Act, 5 U.S.C. § 706(2)(E) ; Stephen J. Choi and Adam C. Prichard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1,7 (2017).

5 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

6 Choi and Prichard, *supra* note 4, at 6.

7 *Id*. at 7.

8 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Sec. 929P, 124 Stat. 1376, 1862–64 (2010) (codified at 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80a-9(d), 80b-3(i)) (the "Dodd-Frank Act").

9 Choi and Prichard, *supra* note 4, at 36–37 (concluding that the SEC's ability to extract settlements increased with the flexibility to choose its forum provided by the Dodd-Frank Act); "SEC Announces Arrival of New Administrative Law Judge," Press Release, SEC (Sept. 22, 2014) (noting that arrival of two ALJs and their law clerks nearly doubles the staff of the Office of Administrative Law Judges).

10 Choi and Prichard, *supra* note 4, at 36; Remarks to the American Bar Association's Business Law Section Fall Meeting, Director, SEC Division of Enforcement (Nov. 21, 2014) (addressing criticisms of the SEC's use of the administrative forum); The Honorable Jed S. Rakoff, Judge, Southern District of New York, PLI Securities Regulation Institute Keynote Address: Is the S.E.C. Becoming a Law unto Itself? (Nov. 5, 2014); *Gupta v. SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011).

11 Securities Exchange Act of 1934 (the "Exchange Act") Release No. 85750 (Apr. 30, 2019). Certain types of proceedings (including 12(j) proceedings to revoke an issuer's Exchange Act registration) may only be brought by the Commission in the administrative courts.

In response to being sued in the administrative forum, Petitioners brought an action in federal district court, and upon appeal, to the D.C. Circuit, alleging that the proceedings violated their constitutional rights.[12] The D.C. Circuit affirmed the district court's finding that it lacked subject-matter jurisdiction because Petitioners had failed to exhaust their administrative remedies.[13] Meanwhile, the presiding ALJ had held an evidentiary hearing and concluded that Petitioners had committed securities fraud,[14] and Petitioners sought Commission review of that decision.

While the Commission's review of the ALJ's determination that Petitioners had committed securities fraud was pending, the Supreme Court held that SEC ALJs had not been properly appointed under the Constitution.[15] In *Lucia*, the Court held that SEC ALJs are "inferior officers" under the Appointments Clause of Article II of the U.S. Constitution[16] due to the substantial authority they possess in connection with SEC enforcement actions.[17] As inferior officers, in order to comply with the Appointments Clause the SEC ALJs could only be appointed by "the President, Courts of Law or Heads of Departments," and, in practice, the SEC ALJs had not been so appointed.[18] The SEC had requested, in its *Lucia* brief, that the Supreme Court provide guidance regarding potential implications of a finding that ALJs are "Officers of the United States" with respect to *both* appointment and removal.[19] The Supreme Court did not, however, and only addressed the appointment question.

Following *Lucia*, the SEC assigned Petitioners' proceeding to a different ALJ who was properly appointed. Petitioners, however, waived their right to a new hearing and continued under their original petition to the Commission. The Commission subsequently affirmed the ALJ's decision,[20] and having exhausted administrative remedies, Petitioners then filed for review in the Fifth Circuit.

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12 *See Jarkesy v. SEC*, 48 F. Supp. 3d 32, 40 (D.D.C. 2014), ***aff'd***, 803 F.3d 9, 12 (D.C. Cir. 2015). The Securities Act provides that federal appellate courts, and not federal district courts, have jurisdiction to hear challenges to SEC adjudications. *Jarkes*y, 48 F. Supp. at 40.

13 *Jarkesy* , 803 F.3d at 30 (holding that "the securities laws provide an exclusive avenue for judicial review that Jarkesy may not bypass by filing suit in district court").

14 *See John Thomas Capital Mgmt. Grp.*, Initial Decision Release No. 693, 2014 WL 5304908, at *1–6 (ALJ Oct. 17, 2014).

15 *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

16 Article II provides that the President shall nominate, and by and with consent of the Senate shall approve, all "other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . . ."

17 *Lucia,* 138 S. Ct. at 2053.

18 *Id.* at 2051; *see also* U.S. Const. Art. II §2, Cl. 2.

19 Brief for Respondent at 25, *Lucia v. SEC*, 138 S. Ct. 2044 (2018). The SEC had already changed its process of hiring ALJs prior to the *Lucia* decision by requiring appointments of all current and future ALJs to be approved by a vote of the Commission.

20 The Commission affirmed the ALJ's decision that Petitioners had committed securities fraud and ordered Petitioners to cease and desist from committing further violations, pay a civil penalty of $300,000, and for Patriot28 to disgorge nearly $685,000 in ill-gotten gains. *John Thomas Cap. Mgmt. Grp. LLC*, Securities Act Release No. 10834 (Sept. 4, 2020).

In the Fifth Circuit, a divided panel found for the Petitioners on three separate grounds, which are discussed below. Two days before the Fifth Circuit issued its opinion, the Supreme Court agreed to hear a different case, *Cochran v. SEC*, that presents the question of whether SEC ALJs are unconstitutionally protected from removal.[21] The Supreme Court also recently granted *certiorari* in *Axon Enterprise, Inc. v. Federal Trade Commission*, in which petitioner challenges the constitutionality of the FTC's structure and asserts that the district court should have jurisdiction to hear its challenge prior to the final agency determination.[22] On May 19, 2022, the Office of the Solicitor General requested that the briefing schedules for *Cochran* and *Axon* be aligned but the cases argued separately.[23]

Right to a Jury Trial

The Fifth Circuit panel concluded that the Commission's decision to bring the case in front of an ALJ, rather than an Article III court, deprived Petitioners of their "fundamental" right to a jury trial under the Seventh Amendment. That right attaches to "[s]uits at common law," which include "all actions akin to those brought at common law as those actions were understood at the time of the Seventh Amendment's adoption."[24] Congress is only authorized to assign adjudication of such a matter to a non-Article III tribunal (here, an administrative proceeding before an SEC ALJ) if the proceeding centers on a "public right."[25]

According to the majority, to determine if an action "center[ed] on" a "public right," a court must first determine whether the underlying claim arises "at common law." Then, if so, a court must evaluate whether the Supreme Court's jurisprudence nonetheless permits Congress to assign it to agency adjudication without a jury trial. If the underlying claim arose at common law and Supreme Court precedent does not allow agency adjudication, then the proceeding centers on a public right and cannot be assigned to a non-Article III tribunal. The Fifth Circuit panel, in applying this test, found that the rights that the SEC sought to vindicate arose at common law and that no exception applied that would otherwise allow Congress to assign the case to agency adjudication.

21 Petition for Writ of Certiorari at 2, *Securities Exchange Commission v. Cochran*, 21-1239 (U.S. Mar. 11, 2022).

22 Petition for Writ of Certiorari, *Axon Enterprise, Inc. v. Federal Trade Commission*, 21-86 (U.S. Jul 20, 2021).

23 Letter of Elizabeth B. Prelogar, Solicitor General, *Securities Exchange Commission v. Cochran*, 21-1239 (May 19, 2022).

24 *Jarkesy* at 7 (citing *Tull v. United States*, 481 U.S. 412, 417 (1987)).

25 *Jarkesy* at 8 (citing *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 450 (1977)).

Non-Delegation Doctrine

The Fifth Circuit panel also held that the Dodd-Frank Act unconstitutionally delegated legislative power to the SEC by granting the SEC unfettered discretion in determining whether to bring securities fraud actions for monetary penalties in Article III courts or in the SEC's administrative courts.[26]

Article I, Section I of the Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States. . . ."[27] Under Supreme Court precedent, Congress may only grant an agency regulatory power if it provides an "intelligible principle," or a guiding condition that an agency must follow when promulgating rules or otherwise exercising quasi-legislative power.[28] This requirement that Congress moderate grants of delegated legislative authority is often referred to as the non-delegation doctrine.

The SEC, in litigating this case, did not dispute that it possesses absolute discretion to determine whether to bring a securities fraud action in its own administrative courts or in federal court. Instead, the SEC characterized its decisions regarding forum selection as a form of prosecutorial discretion, claiming that the exercise of this discretion constituted an exercise of executive, not legislative, power. The Court disagreed. First, in distinguishing legislative actions from executive ones, the Court, citing *INS v. Chadha*, defined the former as having "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch."[29] According to the Fifth Circuit, the administrative forum versus Article III court determination is an inherently legislative decision regarding which legal processes a defendant should receive, rather than a traditional exercise of prosecutorial discretion.[30]

Some commenters have speculated that the Fifth Circuit's non-delegation holding may foreshadow greater judicial scrutiny of the scope of administrative rulemaking.[31] In theory, the purpose of the non-delegation doctrine is to ensure that the rules an agency issues further an existing, congressionally enacted statutory scheme, rather than to create entirely new laws. In the past, the 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

[26] *Jarkesy* at 25.

[27] U.S. Const. Art. 1 §1.

[28] *See J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

[29] *Jarkesy* at 22 (citing *INS v. Chadha*, 462 U.S. 919, 952 (1983)).

[30] *Jarkesy* at 24.

[31] *See, e.g.*, Matt Levine, *Is the SEC Unconstitutional?*, BLOOMBERG NEWS (May 19, 2019), here.

"requisite to protect the public health."[32] A reinvigorated non-delegation doctrine might limit administrative agencies' discretion to pursue policy priorities that are not squarely within the ambit of their jurisdiction through rulemaking.[33]

Multilevel Removal Protection

The Fifth Circuit panel held that SEC ALJs are unduly protected from Presidential oversight by multiple layers of "for cause" removal protection, in violation of the Take Care Clause of the U.S. Constitution, as interpreted by the Supreme Court in *Free Enterprise Fund v. PCAOB*.[34]

For-cause removal protections for "officers of the United States" subject to the Appointments Clause of Article II of the U.S. Constitution present constitutional issues due to the inherent conflict between Congress's Article I legislative power to create and define the jurisdiction of regulatory agencies and the President's Take Care Clause executive power to supervise the executive branch. Two Supreme Court cases, *Myers v. United States*,[35] and *Humphrey's Executor v. United States*,[36] established a rule to balance congressional and executive power.[37] Congress cannot restrict the President's power to remove the principal officers of purely executive agencies, like the Department of State or the Department of Defense.[38] In contrast, for-cause removal protections for the principal officers of quasi-legislative, quasi-judicial agencies Congress created, including the FTC, SEC, and CFTC, are constitutionally permissible.[39]

In *Free Enterprise Fund*, the Supreme Court considered how the *Myers* and *Humphrey's Executor* cases applied to inferior officers insulated by two layers of for-cause removal protection. Specifically, the SEC Commissioners could only

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[32] *See Whitman v. American Trucking Association*, 531 U.S. 457, 465 (2001). The Supreme Court has not invalidated a statute on non-delegation grounds since 1935, a fact which led law professor Cass Sunstein to remark famously that the non-delegation doctrine "has had one good year." The current Supreme Court may be more amenable to non-delegation challenges. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), both Justice Gorsuch's dissent (joined by Justice Roberts and Justice Thomas) and Justice Alito's concurrence expressed an interest in revisiting non-delegation precedent.

[33] Court challenges to the SEC's recent proposed climate disclosure rule, 87 FR 21335 (April 11, 2022), will likely include non-delegation claims. *See* Matt Levine, *Is the SEC Unconstitutional*?, BLOOMBERG NEWS (May 19, 2019), here; Hester Peirce, SEC Commissioner , We are Not the Securities and Environment Commission – At Least Not Yet (Mar. 21, 2022), here. The Commission promulgated the climate disclosure rule pursuant to its authority under the Securities Act and the Exchange Act to implement disclosure rules that are "necessary or appropriate in the public interest or for the protection of investors." *See, e.g.*, Section 7 of the Securities Act, 15 U.S.C. § 77g.

[34] 561 U.S. 477 (2010).

[35] 272 U.S. 52 (1926).

[36] 295 U.S. 602 (1935).

[37] *Free Enterprise Fund*, 561 U.S. at 493 (discussing the *Myers* and *Humphrey's Executor* holdings).

[38] *Myers*, 272 U.S. at 164.

[39] *Humphrey's Executor v. United States*, 295 U.S. at 627–29.

remove members of the Board of the Public Company Accounting Oversight Board (the "PCAOB")[40] for cause, and the President could only remove the SEC Commissioners themselves for cause. The Supreme Court first decided that both the SEC Commissioners and the PCAOB Board Members were inferior officers under the Appointments Clause, and then held that multiple layers of for-cause removal violated the Take Care Clause's vesting of executive power in the President.[41] The multilevel scheme, as opposed to the single level of protection at issue in *Humphrey's Executor*, was unconstitutional because "the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly."[42]

The Fifth Circuit panel in *Jarkesy* employed similar logic as the Supreme Court in *Free Enterprise Fund* in establishing that the removal restrictions for SEC ALJs violated the Take Care Clause of the U.S. Constitution. First, the Court noted that, per *Lucia*, SEC ALJs are inferior officers under the Appointments Clause.[43] The Court then emphasized that SEC ALJs can be removed by the Commission "only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before the Board," and the SEC Commissioners can only be removed for cause.[44] As in *Free Enterprise Fund*, the Court in *Jarkesy* concluded that these multiple layers of removal protection for inferior officers under the Appointments Clause are unconstitutional.[45]

The Dissenting Opinion

Judge W. Eugene Davis filed a dissenting opinion, disagreeing with the majority's (i) Seventh Amendment, (ii) non-delegation, and (iii) removal holdings.[46]

On the Seventh Amendment holding, the dissent concluded that this case involves a "public right," because it was a case "in which the Government sue[d] in its sovereign capacity to enforce public rights created by statutes within the power of

[40] The Sarbanes-Oxley Act of 2002 created the PCAOB to oversee the audits of public companies.

[41] *Free Enterprise Fund*, 561 U.S. at 486–87.

[42] *Free Enterprise Fund*, 561 U.S. at 481 (concluding that the President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them).

[43] *Jarkesy* at 27.

[44] *Jarkesy* at 27. The Court further noted that MSBP members themselves can only be removed by the President for cause, meaning that the SEC ALJs may be insulated from removal by three layers of for-cause protection.

[45] *Jarkesy* at 28.

[46] *Jarkesy* dissent at 31.

Congress to enact."[47] The majority critiqued the dissent's position as relying solely on the SEC's status as a government entity, without conducting the "inherently historical" inquiry regarding whether the right arose under common law.[48]

As to the non-delegation issue, the dissent agreed with the SEC that its choice of an administrative forum versus an Article III court constituted an exercise of executive power. Citing two Supreme Court administrative law cases, *Heckler v. Chaney*[49] and *SEC v. Chenery Corp*.,[50] the dissent noted that administrative agencies possess substantial discretion with respect to enforcement and rulemaking proceedings. The dissent characterized the majority's distinction between traditional forms of prosecutorial discretion and the SEC's choice between an administrative forum and an Article III court as lacking precedent.[51]

Finally, regarding the removal issue, the dissent argued that the *Free Enterprise Fund* holding invalidating multiple layers of removal protection does not apply to inferior officers solely exercising adjudicative functions. The dissent noted that the Supreme Court in *Free Enterprise Fund* expressly declined to extend its holding to federal ALJs.[52] The dissent further argued that the Take Care Clause analysis must consider the practical extent of the limitation on the President's executive authority. As SEC ALJs exercise authority that is more akin to an Article III judge than a policymaking official, the dissent contended that the extra layer of removal protection has a negligible impact on the President's authority.[53]

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47 *Id*. at 37 (citing *Atlas Roofing*, 430 U.S. at 450).

48 *Jarkesy* at 17. The disagreement between the majority and the dissent as to the correct method of determining public rights hinged on different readings of *Granfinanciera, S.A. v. Nordberg*, 492 U.S 33 (1999). According to the majority, *Granfinanciera* established that Congress could not eliminate the Seventh Amendment jury trial right "simply by passing a statute that assigns traditional legal claims to an administrative tribunal." Rather, only rights that are "so closely integrated with a comprehensive regulatory scheme" (as distinct from claims arising at common law) are fit for administrative adjudication. *Jarkesy* at 8. The dissent, by contrast, emphasized that *Granfinanciera* involved a bankruptcy suit with only private parties. According to the dissent, the notion that a case may only center on public rights when the claim at issue is "closely integrated with a comprehensive regulatory scheme" is only relevant when the government is not a party. If a cause of action "inheres in . . . the Federal Government in its sovereign capacity," then "Congress may effectively supplant a common law cause of action." *Jarkesy* dissent at 38–39.

49 470 U.S. 821 (1985).

50 332 U.S. 194 (1947).

51 *Jarkesy* dissent at 46.

52 *Jarkesy* dissent at 48–49 (citing *Free Enterprise Fund*, 138 S. Ct. at 514).

53 *Jarkesy* dissent at 50–51. In responding to the dissent, the *Jarkesy* majority asserted that *Free Enterprise Fund* did not hold that ALJs were exempt from the general rule prohibiting multiple layers of removal protection, it merely left that question open. Moreover, the majority emphasized that cases brought before ALJs are subject to the review of the Commission itself, stating that "SEC[] ALJs are not mere neutral arbiters of federal securities law; they are integral pieces within the SEC's powerful enforcement apparatus." *Jarkesy* at 29, n.20.

Takeaways

While the SEC has not yet issued a statement on this decision, given the Seventh Amendment and non-delegation holdings and the possible ramifications for its enforcement program, the SEC will likely appeal the *Jarkesy* decision and may first seek a review of this decision, *en banc*, *i.e.*, before the entire Fifth Circuit. If the Fifth Circuit affirms the panel decision, the SEC will likely petition the Supreme Court for *certiorari*.

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.

The removal question is a difficult issue for the federal courts and for the federal government as a whole. As noted above, the Supreme Court recently granted *certiorari* on the removal question for SEC ALJs.[54] While the SEC has only a handful of ALJs and could instead file its cases in federal courts instead of administrative tribunals,[55] other federal agencies would have much more difficulty if the Supreme Court is not able to fashion a workable remedy that allows federal administrative tribunals to continue to function. For example, the 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.[56] If the Supreme Court finds that the multiple "for cause" removal protection of SEC ALJs violates the Take Care Clause of the U.S. Constitution, a likely remedy would be to make these ALJs removable by the Commission without cause; with this change, the SEC administrative tribunals would no longer suffer from any constitutional defect under the Take Care Clause.

Even if the Supreme Court rules in favor of the SEC in the *Cochran* case or rules against the SEC but fashions a remedy that allows the SEC to continue to use its administrative courts, if the SEC were to subsequently bring fraud charges in any 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*. Thus, even after a successful resolution of the removal question, the SEC may continue to avoid bringing contested fraud cases in its administrative courts until any such appellate action occurs, and if the Seventh Amendment

54 *Securities Exchange Commission v. Cochran*, 21-1239 (U.S. Mar. 11, 2022).

55 However, as noted above certain types of proceedings are currently required to be brought by the SEC before an ALJ. *See* note 11 above. In addition, the SEC brings many settled enforcement proceedings before its ALJs; this allows the parties the convenience of avoiding having to file such matters in federal court.

56 Social Security Administration, Program Provisions and SSA Administrative Data (Annual Statistical Supplement, 2020) here (last visited May 29, 2022); Department of Health and Human Services, here (last visited May 29, 2022); FERC Office of Administrative Law Judges Org. Chart, here (last visited May 27, 2022).

holding in *Jaresky* is upheld by the Supreme Court, the administrative courts will no longer be an acceptable forum to try such fraud cases as well as any other cases not involving a "public" right.

In addition, so long as *Jarkesy's* non-delegation holding is "good law," the SEC would no longer be able to bring contested fraud proceedings in its administrative courts, regardless of any changes to the Seventh Amendment and removal holdings. While the SEC could pursue a legislative fix to this issue, such a fix seems unlikely in the current legislative environment. As noted above, commentators have highlighted the potential ramifications of the *Jarkesy* non-delegation holding on administrative agencies, including on the SEC's recently proposed environmental rules, and the current Supreme Court may be amenable to non-delegation challenges.[57] However, final resolution of the legality of these environmental rules will likely be determined by the courts some years in the future.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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[57] *See supra* note 33.