GATHERING STORM: *SEC V. JARKESY* AND IMPLICATIONS FOR ENVIRONMENTAL ENFORCEMENT

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SUMMARY

The U.S. Environmental Protection Agency's (EPA's) enforcement program has long been the backbone of environmental enforcement in the United States. That program may now be bound for dramatic change. This Article analyzes the threats posed to the Agency's program by the U.S. Supreme Court's forthcoming decision in *Securities and Exchange Commission v. Jarkesy*, in which three constitutional questions presented cut to the core of administrative enforcement. The Court's decision there will foreshadow the outcome of similar challenges currently facing EPA, and the Agency's historically robust enforcement apparatus may depend on its ability to distinguish its administrative enforcement from the SEC's. *Jarkesy* and similar challenges to the foundations of administrative law signal that a reimagining of environmental enforcement in the United States may soon be necessary.

This term, through careful curation of its docket, the U.S. Supreme Court has brought before itself a robust set of challenges against the administrative state and government regulatory power. The Court's case selection reflects a zealous pursuit of opportunities to reinterpret doctrines and precedents that form the core of environmental and other regulation in the United States. One such case is *Securities & Exchange Commission v. Jarkesy*,[1] which has ensnared the U.S. Securities and Exchange Commission (SEC) in a web of three separate constitutional claims.

All three *Jarkesy* theories are uniquely complex and merit articles of their own. Yet, when the Court heard oral arguments for the case last November, the justices showed an almost singular focus on the Seventh Amendment right to a jury trial.[2] At the risk of oversimplification, this Article seeks to analyze equally each of the *Jarkesy* issues and the threats that they could pose to enforcement at the U.S. Environmental Protection Agency (EPA). In short, the justices' opinion(s) will assess (1) whether SEC administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment right to a jury trial; (2) whether the statutory provisions authorizing SEC discretion to enforce securities laws administratively instead of judicially violate the nondelegation doctrine; and (3) whether Congress violated Article II of the Constitution by granting for-cause removal protection to administrative law judges (ALJs) in agencies whose heads enjoy for-cause removal protection.[3] Should the justices find a constitutional deficiency through the first question presented, they may forgo addressing in-depth the other two questions.

Given EPA's reliance on administrative enforcement under the major environmental statutes, SEC's fate in *Jarkesy* may force a re-envisioning of the Agency's approach to enforcement. While SEC has litigated constitutional challenges before the Court as recently as 2018,[4] the multifaceted threats it now faces are unprecedented in scope.

Author's Note: The author would like to thank Professor Lisa Heinzerling for her guidance in researching these issues and for encouraging her students to embrace creativity within their advocacy. He would also like to thank Gary Jonesi at the Environmental Protection Agency's Office of Enforcement and Compliance Assurance for providing the inspiration behind this Article and for his steadfast mentorship. The opinions here are those of the author only and not of the institutions that he has been or is currently affiliated with.

1. 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 600 U.S. ___ (June 30, 2023).
2. Transcript of Oral Argument, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023) (focusing heavily on the Seventh Amendment question raised in the first question presented and seeming very skeptical of SEC's position).
3. Brief for the Petitioner at 2, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Aug. 28, 2023).
4. *See* Lucia v. Securities & Exch. Comm'n, 585 U.S. 237 (2018).

Created in 1934 as a key feature of the New Deal, SEC has endured as a cornerstone of the modern administrative state.[5] Throughout SEC's history, administrative enforcement has provided a streamlined alternative to judicial adjudication in federal courts.[6]

SEC's use of its administrative enforcement mechanism has, in no small part, helped bring relative stability to the securities world. Since its establishment nearly four decades after SEC, EPA has to an even greater extent come to heavily rely on administrative adjudication as its preferred means of enforcement.[7] Thus, a decision by the Court to rule against SEC on any of the three issues has the potential to shake EPA to its core. Regardless of whether that occurs, or the Court leaves SEC unscathed, the tremors that will follow *Jarkesy* may leave EPA on unstable ground.

I. Background

A. Facts and Procedural History

The facts and procedural history of *Jarkesy* are as follows. Mr. Jarkesy established two hedge funds that had more than 100 investors and approximately $24 million in assets.[8] In 2011, Jarkesy was the subject of an SEC investigation inquiring into the overestimation of assets and allegedly false claims made about the hedge funds that he managed.[9]

Following its investigation, SEC brought an administrative action against Jarkesy, alleging fraud under the Securities Act, the Securities and Exchange Act, and the Advisers Act.[10] Though Jarkesy challenged the constitutionality of the ongoing agency proceedings, the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit refused to issue an injunction, holding that Jarkesy could petition a federal court of appeals for review only after an adverse final order was issued by SEC.[11]

Following those refusals, Jarkesy was found liable for securities fraud before an SEC ALJ.[12] The Commission, serving as the SEC's appellate body, then affirmed the ALJ's ruling, barring Jarkesy from a number of securities industry activities, issuing a $300,000 civil penalty, and requiring the disgorgement of close to $685,000.[13] After the Commission rejected several of Jarkesy's constitutional arguments, Jarkesy petitioned for review in the U.S. Court of Appeals for the Fifth Circuit, raising three constitutional challenges that target administrative enforcement at SEC.[14]

The Supreme Court's review of *Jarkesy* comes after the Fifth Circuit held that Jarkesy was deprived of his Seventh Amendment right to a jury trial; that SEC's ability to choose whether to bring enforcement judicially or administratively was a violation of the nondelegation doctrine; and that the statutory removal restrictions in place for SEC ALJs violate Article II's "take care clause."[15]

B. Jarkesy *Will Forecast the Future of Administrative Enforcement at EPA*

In many ways, administrative enforcement at EPA mirrors that at SEC.[16] As such, *Jarkesy* presents a potentially existential threat to EPA's administrative enforcement program. Although it is unlikely that the Court will speak directly to EPA's administrative enforcement authority in *Jarkesy*, the modern Court has shown a willingness to stretch its logic beyond the facts at hand.[17] And whether the Court directly addresses EPA in *Jarkesy* may ultimately make little difference, for similar challenges have already been brought against EPA's administrative enforcement program.

As the world watched *Jarkesy* play out before the Court, the Pacific Legal Foundation mounted a similarly framed Seventh Amendment challenge against EPA administrative enforcement. *Ro Cher Enterprises, Inc. v. Environmental Protection Agency*, filed in November 2023, challenges an administrative enforcement action brought by EPA under

5. Securities Exchange Act of 1934, Pub. L. No. 73-290, §4, 48 Stat. 881, 885 (1934) (establishing SEC).
6. *See* Andrew Ceresney, Director, SEC Division of Enforcement, Remarks to the American Bar Association Business Law Section Fall Meeting (Nov. 21, 2014):
   > [W]e have been using administrative proceedings throughout the 42-year history of the Division of Enforcement, and the Commission used them even before its enforcement activities were consolidated in one division. . . . [ALJs] develop expert knowledge of the securities laws, and the types of entities, instruments, and practices that frequently appear in our cases.
7. U.S. EPA, *Enforcement and Compliance Annual Results for FY 2023: Data and Trends*, https://www.epa.gov/enforcement/enforcement-and-compliance-annual-results-fy-2023-data-and-trends (last updated Dec. 18, 2023) (noting that in fiscal year 2023, EPA initiated 1,751 civil judicial and administrative cases, which include 912 administrative penalty order complaints, 758 administrative compliance orders, and 81 civil judicial conclusions); *compare with* SEC, Addendum to Division of Enforcement Press Release Fiscal Year 2023, https://www.sec.gov/files/fy23-enforcement-statistics.pdf (noting that in fiscal year 2023, SEC initiated 663 total enforcement actions (not including delinquent filings), 432 of which were brought administratively and 231 judicially).
8. Jarkesy v. Securities & Exch. Comm'n, 34 F.4th 446, 450 (5th Cir. 2022).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 466-67.
16. For example, both administrative enforcement programs use ALJs, governed under the Administrative Procedure Act (APA). *See* 5 U.S.C. §3105; 17 C.F.R. §201.110 (1982) (empowering ALJs as presiding officers for SEC administrative adjudications); 40 C.F.R. §22.21 (1999) (empowering ALJs as presiding officers for EPA administrative adjudications). Further, administrative adjudications under both programs are governed by rules of practice that differ dramatically from the rules that govern adjudications in federal judicial forums. The rules of practice that govern each program notably lack prohibitions on hearsay evidence. 17 C.F.R. §201.320 (2016) (governing administrative adjudications at SEC); 40 C.F.R. §22.22 (1999) (governing administrative adjudications at EPA); U.S. EPA, Practice Handbook Administrative Enforcement at EPA 18 (2000) (recognizing that "the rule against hearsay does not apply in Part 22 proceedings"); Fed. R. Evid. 802.
17. *See generally* Collins v. Yellen, 141 S. Ct. 1761 (2021) (the Court, led by Justice Samuel Alito, struck down the structure of the Federal Housing Finance Agency, and in doing so went beyond the facts of earlier cases).

the Toxic Substances Control Act (TSCA).[18] Regardless of whether the U.S. District Court for the Northern District of Illinois decides to wait for the justices' decision in *Jarkesy* before fully addressing the merits of *Ro Cher Enterprises*, any appeal of its decision will be subject to the Court's rationale in *Jarkesy*. In this way, the outcome of *Jarkesy* may have an almost immediate impact on administrative enforcement at EPA and foreshadow an approaching onslaught of similar constitutional challenges.

Based on EPA's recent string of defeats before the Court, the prospect of returning to defend the nucleus of its administrative enforcement authority would understandably provoke anxiety for the Agency and its allies. In each of its past two terms, the Court has shown its willingness to challenge the basic legal underpinnings of environmental regulation, in *West Virginia v. Environmental Protection Agency* and *Sackett v. Environmental Protection Agency*, the lasting implications of which are difficult to exaggerate and will continue to unfold in coming years.[19] With the ink on those decisions still drying, the Court has pushed forward with more cases that threaten the role of government oversight in the United States. Unlike *West Virginia* and *Sackett*, *Jarkesy*'s hydra-headed constitutional assault does not directly consider environmental regulation. Yet, its outcome is set to alter the bedrock principles on which enforcement at EPA relies.

To best prepare for current and impending constitutional challenges post-*Jarkesy*, EPA must consider ways to distinguish its administrative enforcement from the SEC's. Now more than ever, creative enforcement strategies are required from EPA and its allies to respond to the immediate threat of such challenges. Without those strategies, the major environmental statutes may soon be without their once-sharp teeth.

II. The *Jarkesy* Issues

A. *Issue One: "Whether Statutory Provisions That Empower the Securities and Exchange Commission to Initiate and Adjudicate Administrative Enforcement Proceedings Seeking Civil Penalties Violate the Seventh Amendment."*[20]

At the Supreme Court, the first *Jarkesy* issue consumed virtually all of what was an unusually long oral argument.[21] That issue zeroes in on one of the most cherished (and argued-over) aspects of the American legal system: the constitutional right to a jury trial in federal civil cases. Motivated by a suspicion of the "well born" judiciary, the right to civil jury trials was enshrined in the Constitution's Seventh Amendment.[22] That right is now "seen by many judges as well as plaintiff and defense attorneys as providing a fairer way to resolve lawsuits than bench trials or arbitration."[23]

The Court has acknowledged on several occasions that the Seventh Amendment is not applied to administrative proceedings, implying a Seventh Amendment right that is forum-dependent.[24] This is outwardly promising for SEC, EPA, and all agencies that rely on administrative enforcement. However, during oral argument in *Jarkesy*, several justices overtly ridiculed the notion that the Seventh Amendment civil jury trial right could be forum-dependent.[25]

18. Verified Complaint for Injunctive and Declaratory Relief at 1, Ro Cher Enters., Inc. v. Environmental Prot. Agency, No. 1:2023cv16056 (N.D. Ill. Nov. 16, 2023); 15 U.S.C. §§2601-2692, ELR Stat. TSCA §§2-412.

19. In *West Virginia*, the Court reached out to invalidate EPA's Clean Power Plan, which had been repealed and replaced by the Affordable Clean Energy Rule in 2019. West Virginia v. Environmental Prot. Agency, 142 S. Ct. 2587, 2628, 52 ELR 20077 (2022) (Kagan, J., dissenting). While odd enough for the Court to reach back in time and evaluate a dead rule (*id.* at 2593-94), it pushed even further, establishing a new clear statement rule within its "major questions doctrine." *Id.* at 2628. In a strong dissent, Justice Elena Kagan recognized that

> the Court's docket is discretionary, and because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide this case. The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering. That new rule will be subject anyway to immediate, pre-enforcement judicial review. But this Court could not wait—even to see what the new rule says—to constrain EPA's efforts to address climate change.

In its next term, the Court dealt another unprecedented blow to federal environmental regulation in *Sackett v. Environmental Protection Agency*, this time targeting the Clean Water Act (CWA). Although the Court did not quite reach out to evaluate a dead rule as in *West Virginia*, the *Sackett* majority essentially revisited and resurrected Justice Antonin Scalia's plurality approach in *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006), originally rejected by five justices. Sackett v. Environmental Prot. Agency, 598 U.S. 651, 671, 53 ELR 20083 (2023) (concluding that "the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water'").

20. Petition for Writ of Certiorari at I, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Mar. 8, 2023).

21. *See generally* Transcript of Oral Argument, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023) (Court's oral argument in *Jarkesy* went on for more than two hours).

22. U.S. Const. amend. VII.

23. Wen W. Shen, Congressional Research Service, LSB10883, The Right to a Jury Trial in Civil Cases Part 1: Introduction and Historical Background 1 (2022).

24. Tull v. United States, 481 U.S. 412, 428 n.4, 17 ELR 20667 (1987) ("The Court has also considered the practical limitations of a jury trial and its functional capability with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings."); Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 454 (1977); Pernell v. Southall Realty, 416 U.S. 363, 383 (1974).

25. Transcript of Oral Argument, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023). Justice Neil Gorsuch's criticism of a forum-dependent Seventh Amendment right bordered on hostility during oral argument, where he asked SEC, "What if the government tomorrow decided, well, we don't like those jury trial[s] that come with that . . . we're going to effectively overrule *Tull* by moving those to administrative proceedings? Then the Seventh Amendment would disappear on your account, wouldn't it?" *Id.* at 18. Criticizing SEC's assertion that the distinction between public and private plaintiffs justifies a forum-dependent Seventh Amendment right, Justice Brett Kavanaugh rhetorically asked "what sense does it make to say the full constitutional protections apply when a private party is suing you, but we're going to discard those core constitutional historic protections when the government comes at you for the same money?" *Id.* at 28. Justice Alito reiterated Justice Kavanaugh's skepticism, asking:

> what sense does it make to say you have this protection when you're being sued by a private party, whose resources are certainly going to be more limited than the resources of the federal government, but when the same thing happens to you and the party that's against you is the federal government, well, this right to a jury trial simply goes out the window[?] Does that make sense?

On this first issue, the justices appeared deeply divided. Justice Elena Kagan positioned herself on one side of the spectrum, exuding confidence that the Court's unanimous decision in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission* resolved this matter nearly five decades ago.[26] Justices Ketanji Brown Jackson and Sonia Sotomayor both seemed inclined to agree.[27] Opposite them was Justice Neil Gorsuch who, in a heated exchange, opined that if SEC got its way "the Seventh Amendment would . . . dissipate, disappear, whatever verb you want to use."[28] Although brief in their comments, Justices Samuel Alito and Clarence Thomas both seemed aligned with Justice Gorsuch in his suspicion of SEC's argument.[29]

Justices Amy Coney Barrett, Brett Kavanaugh, and Chief Justice John Roberts all expressed reservations about SEC's arguments. However, their positions through oral argument were less clear than the other six justices. For example, Justices Coney Barrett and Kavanaugh each, at various points, appeared open to maintaining SEC's status quo.[30]

The justices' seesawing during oral argument exemplifies the sharp division that has grown over which cases are entitled to the civil jury trial right. At the heart of this disagreement sits a distinction struck long ago in the Court's most exalted judicial model: 18th-century English courts. In their lordly wisdom, 18th-century English jurists illuminated a distinction between cases brought in law and those brought in equity. The modern Court has extended the right to a civil jury trial only to cases falling into the former category,[31] while also exempting those cases dealing with statutory "public rights," created by Congress.[32] Although the reach of the public rights doctrine and the distinction between 18th-century suits of law and equity are heavily contested, both concepts may help defend EPA's enforcement program against Seventh Amendment challenges to come.

1. EPA's Administrative Enforcement Program May Be Differentiated From SEC's by the Public Rights Doctrine

While SEC argued that securities fraud, as involved in *Jarkesy*, falls under the public rights doctrine, that argument was sharply rejected by the Fifth Circuit.[33] Should the Court rule against SEC on this point, EPA's administrative enforcement of the major environmental statutes may still be defended under the public rights doctrine.

The public rights doctrine allows the government to exempt certain civil disputes from the Seventh Amendment right to a jury trial.[34] Drawing from the Court's

Id. at 50-51. Adding to the Court's collective skepticism of SEC's forum-dependent Seventh Amendment argument, Justice Amy Coney Barrett probed for a limiting principle, inquiring "what is the limit on Congress's ability to shift these kind[s] of adjudications for civil penalties to administrative agencies. . . . [W]e are talking here about securities law, but Congress can enact such a scheme and has enacted such schemes in many, many, many different areas." *Id.* at 83-84.

26. Specifically, Justice Kagan believed that the distinction between private and public rights in *Atlas Roofing* settles this issue in favor of SEC. Transcript of Oral Argument at 55, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023) ("I think one of the oddities of this case is, if you look at the question presented and then you read *Atlas Roofing*, you wonder why this case is here, in other words, that *Atlas Roofing* simply resolves the issue."); *id.* at 111 ("Nobody has had the, you know, chutzpah . . . to bring [this issue] up since *Atlas Roofing*."). *See also Atlas Roofing*, 430 U.S. at 450:
> [I]n 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 fiction and initial adjudication to an administrative forum with which the jury would be incompatible.

27. Justice Jackson indicated that the claim in *Jarkesy* is
> not even purporting to be common law fraud. I mean, I understood that the Seventh Amendment protects private rights of action that the common law has created and is given to private parties to enforce . . . But, when Congress has created a new right, a new duty, you know, the duty that exists under the Securities and Exchange Act, that is created by law, I thought *Atlas Roofing* was saying you're not worried about stealing a common law claim and putting it into a non-Article III tribunal.

Transcript of Oral Argument at 12-13, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023). Justice Sotomayor, speaking to SEC, noted that
> I understood a public right to be a right possessed by the sovereign . . . that would include actions that have nothing to do with fraud, like a failure to disclose, registration requirements, et cetera, et cetera . . . and you're absolutely right . . . we've permitted the public interest to be protected in an administrative proceeding.

id. at 52-53.

28. *Id.* at 21.

29. *Id.* at 46-47. Justice Alito, in reference to SEC's argument, noted:
> doesn't [it] seem like a pretty patent evasion of the Seventh Amendment to say this protection which was regarded at the time of the adoption of the Bill of Rights as sufficiently important to merit inclusion in the Constitution can be nullified simply by changing the label that is attached to a tribunal?

id. at 46-47. *See also* Axon Enter., Inc. v. Federal Trade Comm'n, 598 U.S. 175, 203-04 (2023), where, beyond his probing at oral argument, Justice Thomas' concurrence in *Axon* makes clear that he too will be wholly unsympathetic to SEC; in that case, he wrote separately from the majority to note that
> [t]he rights at issue in these cases appear to be core private rights that must be adjudicated by Article III courts . . . Axon and Cochran face the threat of significant monetary fines . . . these types of penalties and orders implicate the core private right to property . . . [b]y permitting administrative agencies to adjudicate what may be core private rights, the administrative review schemes here raise serious constitutional issues.

30. Transcript of Oral Argument, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023). Justice Coney Barrett, speaking to Jarkesy's counsel, noted that
> I think part of what your colloquy with Justice Jackson is showing is that this isn't exactly fraud . . . how close is this to the common law tort of fraud? So what kind of a test would you propose for deciding whether something represented that common law right? I mean [SEC]'s test has the virtue—it's very broad, but it has the virtue of being a pretty bright line.

Id. at 105. Justice Kavanaugh signaled agreement with SEC's point that many agencies would need new statutes in order to bring certain claims in federal courts, and that ruling against SEC on this point could have sweeping repercussions for other administrative agencies and the federal courts themselves. *Id.* at 77-78.

31. Tull v. United States, 481 U.S. 412, 417, 17 ELR 20667 (1987).

32. Granfinanciera v. Nordberg, 492 U.S. 33, 51 (1989); *see* Curtis v. Loether, 415 U.S. 189, 193 (1974).

33. Jarkesy v. Securities & Exch. Comm'n, 34 F.4th 446, 451 (5th Cir. 2022) ("Congress, or an agency acting pursuant to congressional authorization, cannot assign the adjudication of [securities fraud] claims to an agency because such claims do not concern public rights alone.").

34. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1369 (2018) ("[M]atters governed by the public-rights doctrine may be assigned to the Legislature, the Executive, or the Judiciary. . . . When Congress properly assigns a matter to adjudication in a non-article III tribu-

analysis in cases like *Granfinanciera v. Nordberg* and *Oil States Energy Services v. Greene's Energy Group*, this subsection shows how EPA's administrative enforcement program may fashion a shield of the public rights doctrine to defend against impending Seventh Amendment challenges.

Most agree that public rights are, at their core, matters "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional function of the executive or legislative departments."[35] That notion has since been expanded by the Court in cases like *Granfinanciera*, in which the Court recognized that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'"[36] As the Court made clear here and has since verified, a civil jury trial may be dispensed with when public rights are involved.[37]

The Court has recently revisited this issue and fortified its public rights doctrine by acknowledging that "[under its] precedents, Congress has significant latitude to assign adjudication of public rights to entities other than Article III courts."[38] Those same precedents dictate that public rights arise when Congress, under its constitutional authority, creates a statutory right that is so intertwined with a comprehensive regulatory system that agency resolution of the right is appropriate.[39]

This directly implicates the major environmental statutes. For example, the statutory rights to clean air and water created under the Clean Air Act (CAA) and Clean Water Act (CWA), respectively, are comprehensively regulated under those statutes.[40] Both rights are deeply intertwined with EPA's regulatory system and are in fact so comprehensively regulated under the statutes that the CAA and the CWA have become favorite targets of business-friendly administrations seeking to reduce regulatory burdens on industry.[41]

The Court has not expressly determined whether adjudication under the major environmental statutes entails public rights. However, such adjudication aligns with the Court's recent application of the public rights doctrine in *Oil States Energy Services*.[42] There, the Court acknowledged that "the public-rights doctrine applies to matters '"arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it."'"[43]

The Court went on to hold that patents, which give a *private* benefit to the patent owner by allowing them the right to exclude others, are nevertheless *public* rights.[44] In its 7-2 decision, the Court found that patents therefore fall squarely within the public rights doctrine, and do not require a jury trial for their litigation.[45] Cementing the view of patents as vessels for the transfer of immense public value, Justice Thomas added for the majority that they confer "the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States."[46]

In regulating pernicious outputs like hazardous waste and emissions into air and water, the major environmental statutes too seek to protect rights of immense value—namely human health and environmental resources.[47] Similar to patents, as described by Justice Thomas, these statutes provide the statutory right for state and federal

nal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'" (quoting *Granfinanciera*, 492 U.S. at 52-53)); 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, 1014 (1994).

35. Crowell v. Benson, 258 U.S. 22, 50 (1932).
36. *Granfinanciera*, 492 U.S. at 51 (quoting Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 (1977)).
37. *See id*. at 51-55 ("[T]he question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal."); *see also Oil States Energy Servs.*, 138 S. Ct. at 1379 ("This Court's precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'" (quoting *Granfinanciera*, 492 U.S. at 53-54)).
38. *Oil States Energy Servs.*, 138 S. Ct. at 1368.
39. *See Granfinanciera*, 492 U.S. at 54-55:

> If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court. If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial.

40. Regarding the CWA (33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607), see S.D. Warren Co. v. Maine Bd. of Env't Prot., 547 U.S. 370, 385, 36 ELR 20089 (2006):

> Congress passed the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's Waters," 33 U.S.C. §1251(a) . . . the "national goal" being to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water," 33 U.S.C. §1251(a)(2). To do this, the Act does not stop at controlling the "addition of pollutants," but deals with "pollution" generally, see §1251(b), which Congress defined to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." §1362(19).

> The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250, 22252 (Apr. 21, 2020) ("[The 1972 restructuring of the CWA] resulted in the enactment of a comprehensive scheme (including voluntary as well as regulatory programs) designed to prevent, reduce, and eliminate pollution in the nation's waters generally[.]"). Regarding the CAA (42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618), see *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587, 2629, 52 ELR 20077 (2022) (Kagan, J., dissenting) (discussing how "Section 111(d) operates to ensure that the [Clean Air] Act achieves comprehensive pollution control"); S. Rep. No. 91-1196, at 20 (1970) ("[T]here should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.").

41. *See, e.g.*, Revised Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Jan. 18, 2023) (eliminating requirements for landowners to gain EPA approval for certain land modifications and rolling back protections for certain wetlands); Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 84130 (Dec. 23, 2020) (imposing restrictions that limit EPA's ability to use best available science and consider co-benefits in regulating under the CAA).
42. *See Oil States Energy Servs.*, 138 S. Ct. at 1373.
43. *Id*. (quoting Ex Parte Bakelite Corp., 279 U.S. 438, 451 (1929)).
44. *Id*. ("By 'issuing patents,' the [U.S. Patent and Trademark Office] 'take[s] from the public rights of immense value, and bestow[s] them upon the patentee.'").
45. *See id*. at 1373-74, 1379.
46. *Id*. at 1374.
47. *See, e.g.*, 42 U.S.C. §9602; *id*. §7401; 33 U.S.C. §125.

governments to "exclude" or prohibit certain types of pollution and the improper use of resources that are otherwise "public rights of immense value."[48] If patents may be equated by the Court to vessels containing public, transferrable value, why can't discrete units of clean air and water, or the pollutants that threaten to corrupt them? Is this not the underlying principle upon which federal emissions control systems like the U.S. Acid Rain Program[49] and technology-based requirements for hazardous air pollutants under §112 of the CAA stand?[50]

The major environmental statutes need not be put under a microscope to appreciate the immeasurable value of public resources regulated under them, both to the public and to private industry. By allowing private industry to pollute up to a certain threshold, *public rights* to such necessities as clean air and water are *partially* privatized for profit through the major environmental statutes, just as patents are through patent regulations.[51] However, the very existence of pollution thresholds in those statutes might as well be a flashing sign that reads "EXTREMELY VALUABLE PUBLIC RESOURCES, NO POLLUTION BEYOND THIS POINT."[52]

It would be difficult for Congress to state the value of these public resources more conspicuously than they have through the major environmental statutes.[53] By analogizing to patents and narrowing in on the comprehensive regulatory system intertwined with statutory rights created under the major environmental statutes, EPA may distinguish its administrative enforcement program based on the public rights doctrine. This is perhaps EPA's best chance at withstanding Seventh Amendment challenges against its administrative enforcement program following *Jarkesy*.

48. *See Oil States Energy Servs.*, 138 S. Ct. at 1374.
49. Richard K. Lattanzio, Congressional Research, Service, RL30853, Clean Air Act: A Summary of the Act and Its Major Requirements 2 (2022) (The 1990 Amendments to the CAA establish "an acid rain control program, with a marketable allowance scheme to provide flexibility in implementation.").
50. *Id.* at 11. Note that Justice Kavanaugh, for one, may be suspicious of such a comparison, suggesting at oral argument that benefits programs may be distinguished from regulatory programs. Transcript of Oral Argument at 69-80, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023).
51. This is not meant as an admission that the statutory rights here are private. Rather, this is to say that those *public* rights are partially privatized as a part of the federal government's regulatory regime.
52. *See, e.g.*, 42 U.S.C. §7401(b)(1) ("The purpose[ ] of this subchapter [is] to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population[.]"); 33 U.S.C. §1251(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."); 42 U.S.C. §6901(a)(4) ("objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by . . . assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment").
53. *See* 42 U.S.C. §7401(b)(1); 33 U.S.C. §1251(a); 42 U.S.C §6901(a)(4).

2. EPA's Administrative Enforcement Actions May Be Distinguished Due to Similarities With Suits Traditionally Tried in Equity

Beyond the public rights doctrine, the Court has construed the language of the Seventh Amendment to require a jury trial for actions analogous to "suits at common law."[54] Here lies another possible strategy for EPA to distinguish its administrative enforcement actions from those at SEC: analogize its actions to those traditionally seen in courts of equity. Admittedly, challenging precedent stands in the way of this strategy's success. Nevertheless, it is worth mentioning as a means by which EPA may be able to distinguish its program should the Court rule against SEC on the first *Jarkesy* issue.

As noted above, cases customarily brought in English *law* courts have been distinguished from those that are analogous to 18th-century cases in courts of *equity*.[55] The Court has determined that cases falling into the latter category do not require a jury trial.[56] For the purposes of the Seventh Amendment, this analysis applies both to common-law actions as well as those created through Congress.[57]

In *Jarkesy*, the Fifth Circuit found that the SEC enforcement action in question was analogous to fraud, traditionally brought at common law in English courts.[58] In arriving at this conclusion, the Fifth Circuit adopted the Supreme Court's two-stage analysis to determine whether an action is more similar to suits traditionally tried in courts of law, or in courts of equity.[59] Under this framework, courts emulate the venerated English courts of old, first "compar[ing] the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity."[60] Then, the remedy sought is evaluated to determine whether it is more legal or equitable in nature.[61]

The Court's analysis in *Tull v. United States* presents an application of this framework to an action under the CWA. There, the Court found that an action for civil penalties under §1319(d) of the CWA was analogous to an action in debt at common law.[62] Since such an action at common law could only be enforced in a court of law, the Court found that a jury trial was necessary.[63]

This seems a bleak precedent for EPA if it hopes to characterize its administrative enforcement as equitable under

54. Tull v. United States, 481 U.S. 412, 417, 17 ELR 20667 (1987).
55. *Id.*
56. *Id.*
57. *See* Curtis v. Loether, 415 U.S. 189, 193 (1974).
58. Jarkesy v. Securities & Exch. Comm'n, 34 F.4th 446, 453 (5th Cir. 2022).
59. *Id.*; *Tull*, 481 U.S. at 417; Granfinanciera v. Nordberg, 492 U.S. 33, 54 (1989); Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 (1977).
60. *Tull*, 481 U.S. at 417.
61. *Id.*
62. *Id.* at 412 ("A Government suit [for civil penalties] under [CWA] §1319(d) is analogous to an action in debt within the jurisdiction of English courts of law prior to the Seventh Amendment's enactment, and therefore should be tried by a jury.").
63. *See id.*

the framework's first step. However, under the CWA, *civil penalties* detailed in §1319(d) are separate and distinct from *administrative penalties*, found in §1319(g).[64] Each of these sections details maximum penalties, factors to be considered in penalty assessment, and other relevant information specific to civil and administrative penalties, respectively. By leaning on these distinct provisions, EPA could potentially distinguish its administrative actions brought under §1319(g) from actions in debt at common law.

The second stage of analysis will likely prove more trying for EPA. Under that prong, the Court has characterized only a narrow subset of monetary awards as equitable relief, therefore not subject to a jury trial right.[65] Two prominent categories of monetary awards exist within that subset: restitutionary awards, primarily found in disgorgement of improper profits,[66] and awards incidental to or intertwined with injunctive relief.[67] In *Tull*, the Court excluded civil penalties under §1319(d) of the CWA from both of these categories; they were not seen as restitutionary, nor properly intertwined with a claim for injunctive relief under §1319(b).[68]

The Court cited three fatal flaws in support of its latter finding.[69] Of particular concern was the fact that each form of relief under the CWA was respectively authorized by distinct statutory provisions.[70] For the Court, this seems to prove that §1319(d) and the CWA's other distinct provisions cannot be properly intertwined with injunctive relief under §1319(b).

Fortunately for EPA, similar challenges to enforcement have yet to materialize under the CAA and Resource Conservation and Recovery Act (RCRA).[71] Nevertheless, these statutes contain similarly distinct statutory provisions detailing unique forms of relief.[72] Based on *Tull*, if such challenges were to arise, they may be limited to enforcement actions in Article III courts that seek monetary awards. EPA may benefit from doing all they can to evade this negative precedent from *Tull* when enforcing under the CAA and RCRA going forward.

When possible, it will be in EPA's best interest to avoid drawing challenges against its enforcement actions and meandering toward a future without administrative enforcement. Halting enforcement provides no solution, but understanding Seventh Amendment vulnerabilities for EPA in judicial forums may help the Agency avoid drawing some such challenges.[73] *Tull* provides that the Seventh Amendment does not apply to administrative proceedings,[74] meaning that EPA, pending the Court's outcome in *Jarkesy*, may have a strong defense against Seventh Amendment challenges when seeking monetary awards through administrative penalties. However, even implicit disagreement with this premise in *Jarkesy* will send EPA back to the drawing board and leave the Agency scrambling to interpret any updated guidance from the Court.

With a Court that has reveled in upending long-standing precedent, it is difficult to tell what will remain intact post-*Jarkesy*. The Court does not seem eager to pull its punches in rolling back agency power to seek monetary awards administratively, without a Seventh Amendment jury. Although the first issue in *Jarkesy* is narrowly directed toward administrative enforcement at SEC, the Court's chosen outcome will foreshadow battles looming not only at EPA, but across the administrative state. EPA and other agencies that rely on administrative penalties to enforce their statutes will be closely watching and preparing for potential adjustments to their own enforcement programs.

64. *Compare* 33 U.S.C. §1319(d) (Enforcement; Civil penalties) (where Congress has provided a maximum penalty of $25,000 per day for each violation and sets basic guidance for how to determine a penalty amount), *with id*. §1319(g) (Administrative penalties) (This provides in-depth instruction on how to proceed with administrative penalties. This includes an explanation of what provisions trigger those penalties, and two separate classes of penalties, each with ceilings of $10,000 per day for each violation and maximum accumulations of $25,000 and $125,000, respectively. The section also provides some separate factors to be considered in determining penalty amounts and the rights of interested persons.).
65. Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry, 494 U.S. 558, 558 (1990); *but cf.* Shen, *supra* note 23, at 2 (highlighting that when an agency chooses to enforce civil penalties in Article III courts, a jury trial may be required to assess liability for the penalty, but not the penalty amount itself).
66. *Terry*, 494 U.S. at 570 (citing *Tull*, 481 U.S. at 570). *See, e.g.*, Chesapeake Bay Found. v. Gwaltney of Smithfield, 611 F. Supp. 1542, 1558, 15 ELR 20663 (E.D. Va. 1985), *aff'd*, 791 F.2d 304, 16 ELR 20636 (4th Cir. 1986), *rev'd on other grounds*, 484 U.S. 49, 18 ELR 20142 (1987) (noting that the purpose behind including an economic benefit component in a CWA penalty assessment is "to ensure that the violator disgorges at least its economic benefit"); *but see Tull*, 481 U.S. at 423-24 (recognizing that civil penalties under the CWA are analogous to actions for disgorgement of improper profits; disgorging improper profits is a remedy for restitution, which is "a more limited form of penalty than a civil fine").
67. *Terry*, 494 U.S. at 559.
68. *Tull*, 481 U.S. at 424-25.
69. *Id*.:
> First, while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties. *See Porter v. Warner Holding Co.*, *supra*, at 328 U.S. 399. Second, the Government was aware when it filed suit that relief would be limited primarily to civil penalties, since petitioner had already sold most of the properties at issue. App. 110, 119. A potential penalty of $22 million hardly can be considered incidental to the modest equitable relief sought in this case. Finally, the Government was free to seek an equitable remedy in addition to, or independent of, legal relief. Section 1319 does not intertwine equitable relief with the imposition of civil penalties. Instead, each kind of relief is separably authorized in a separate and distinct statutory provision.

70. *See id*.; 33 U.S.C. §1319.
71. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.
72. *See* 42 U.S.C. §6928; *id*. §7413.
73. *But see* Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185-86, 30 ELR 20246 (2000) (Civil penalties can offer a similar remedy to injunctive relief, as
> Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations. . . . It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description.

74. *Tull*, 481 U.S. at 428 n.4:
> The Court has also considered the practical limitations of a jury trial and its functional capability with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings. *See, e.g.*, *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 430 U.S. 454 (1977); *Pernell v. Southall Realty*, *supra*, at 416 U.S. 383.

B. *Issue Two: "Whether Statutory Provisions That Authorize the SEC to Choose to Enforce the Securities Laws Through an Agency Adjudication Instead of Filing a District Court Action Violate the Nondelegation Doctrine."*[75]

In the Fifth Circuit's *Jarkesy* decision, the court held that "Congress unconstitutionally delegated legislative power to the SEC by failing to give the SEC an intelligible principle by which to exercise the delegated power."[76] As a result, and seemingly with the intent of speaking to the nondelegation doctrine, the Court accepted the second question presented in *Jarkesy*.[77] As developed below, this second issue in *Jarkesy* is far more threatening to environmental enforcement and the administrative state than either of the other two issues considered. Given the expansive ramifications of the nondelegation doctrine, one would expect a commensurately fierce battle over the second *Jarkesy* issue.

It is then puzzling why this issue was allotted only five pages (of 73) in the brief for respondents,[78] and three pages (of 32) in the reply brief for the petitioner.[79] The justices seemed even less focused on the nondelegation doctrine during oral argument, where the doctrine was not mentioned by name.[80] Perhaps, with the Court's apparent disinterest in bolstering the nondelegation doctrine through *Jarkesy*, administrative agencies may collectively breathe a sigh of partial relief. While certification of the nondelegation issue in *Jarkesy* was no accident, the petition may have been accepted merely to reach the first and third issues. Regardless, with nondelegation before them, the justices have the trigger to a constitutional supernova. For now, it seems like they will save that spectacle for another case.

Contextual clues warn that the Court's articulation of the major questions doctrine in *West Virginia* may soon be but a prologue to a more robust interpretation of the nondelegation doctrine. In opinions from as early as 2001, Justice Thomas has urged the Court to revisit the nondelegation doctrine.[81] Justice Gorsuch prominently expressed the same sentiment more recently in his dissent in *Gundy v. United States*.[82] The majority in that case, led by Justice Kagan, found no unconstitutional delegation of power by Congress.[83]

However, in coming to the opposite conclusion, Justice Gorsuch spoke of the forthcoming major questions doctrine, noting that "it is nominally a canon of statutory construction . . . [applied] in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[84] These words appear to paint the major questions doctrine as merely subservient to the long-dormant, now eagerly awaited nondelegation doctrine. Those who were disheartened by the major questions doctrine may yet find even darker days ahead.

Contrary to what a savvy originalist would hope, the principle of nondelegation finds no basis in the constitutional text or debates surrounding its ratification.[85] Despite this reality, a six-justice conservative majority on the Court, all self-described originalists, have signaled their desire to fashion new claws for enforcement of nondelegation. Justice Gorsuch's dissent in *Gundy* provides a foundation on which the Court may choose to build a robust approach for enforcement of the nondelegation doctrine.

The *Gundy* dissent, joined by Chief Justice Roberts and Justice Thomas, expressed a strong desire not only to reexamine the nondelegation doctrine, but to scratch a more visceral itch: stripping power from administrative agencies.[86] In that 5-3 case, Justice Alito's absence from Justice Gorsuch's dissent is tempered by his separate assertion that "[i]f a majority of th[e] Court were willing to reconsider the approach we have taken [to nondelegation] for the past 84 years, I would support that effort."[87] With the subsequent additions of Justices Kavanaugh[88] and Coney Barrett,[89] a potential six-justice majority has materialized,

75. Petition for Writ of Certiorari at I, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Mar. 8, 2023).
76. Jarkesy v. Securities & Exch. Comm'n, 34 F.4th 446, 465 (5th Cir. 2022).
77. Brief for the Petitioner at 2, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Aug. 28, 2023).
78. Brief for Respondents at 47-53, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Oct. 11, 2023).
79. Reply Brief of Petitioner at 14-17, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 13, 2023).
80. Transcript of Oral Argument, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023) (the only mention of the nondelegation doctrine came from SEC in their opening statement).
81. *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring):

> [T]he Constitution does not speak of "intelligible principles." Rather, it speaks in much simpler terms: "*All* legislative Powers herein granted shall be vested in a Congress." U.S. Const., Art. 1, §1 (emphasis added). I am not convinced that the intelligible principle doctrine serves to prevent all cessions to legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative." . . . I would be willing to address the question of whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.

82. 139 S. Ct. 2116 (2019).
83. *Id.* at 2121.
84. *Id.* at 2141 (Gorsuch, J., dissenting).
85. *See, e.g.*, West Virginia v. Environmental Prot. Agency, 142 S. Ct. 2587, 2642, 52 ELR 20077 (2022) (Kagan, J., dissenting) ("The records of the Constitutional Convention, the ratification debates, the Federalist—none of them suggests any significant limit on Congress's capacity to delegate policymaking authority to the Executive Branch. And neither does any early practice."); Julian D. Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Mich. L. Rev. 277, 280-82 (2021).
86. *See Gundy*, 139 S. Ct. at 2139-40 (Gorsuch, J., dissenting).
87. *Id.* at 2131 (Alito, J., concurring).
88. See *Paul v. United States*, 140 S. Ct. 342, 342 (2019), where Justice Kavanaugh expressed a desire to reconsider the nondelegation doctrine (Kavanaugh, J., concurring) (expressing support for Justice Gorsuch's dissent in *Gundy* and suggesting that concerns around the scope of the nondelegation doctrine "may warrant further consideration in future cases").
89. Although Justice Coney Barrett did not directly assess the nondelegation doctrine while she was on the Seventh Circuit, she has previously critiqued the intelligible principle test, calling it "notoriously lax." Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2381 (2023) (Coney Barrett, J., concurring) (arguing that "in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details'").

expressly interested in strict enforcement of the nondelegation doctrine.

Under the modern nondelegation doctrine, the "intelligible principle" standard has been used by the Supreme Court for nearly a century to evaluate whether legislative power has been improperly delegated by Congress to the other branches of government. One of the Court's earliest and most clear explanations of the nondelegation doctrine comes from Chief Justice William Howard Taft in *J.W. Hampton, Jr. & Co v. United States*.[90] Blessing Congress' delegation of authority to set duties to a tariff commission, the Court asserted that there is no "forbidden delegation of legislative power" where "Congress [lays] down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform."[91]

Outside of Taft's articulation of the intelligible principle standard, there has been little clarity provided about what constitutes an intelligible principle. This has left the law without a workable test, resulting in leniency awarded to agencies through the intelligible principle standard.[92] Under this deferential standard, there have only ever been two successful nondelegation doctrine challenges, both in 1935.[93] Although the Court has since been served an abundance of opportunities to rearm the main corpus of the nondelegation doctrine, they have repeatedly declined to do so. Now, with an appetite to dismantle the administrative state and the requisite votes to strictly enforce the nondelegation doctrine, the justices may be poised, if not in *Jarkesy*, to soon break long-standing precedent and reinterpret for themselves the equivalent of a constitutional bulldozer.

The crux of the nondelegation problem at SEC, according to Jarkesy, is that the Commission has been delegated the authority "to decide for itself—for any reason or no reason at all—whether claims against its enforcement targets should be assigned to its inhouse courts or to an Article III court."[94] But is this power of choice not at the very heart of executive enforcement authority? Dodging the meat of the question, the Fifth Circuit's characterization of this choice as purely legislative in nature casts aside reverence long paid to the executive power of prosecutorial discretion.[95]

At a surface level, the enforcement guidance provided by EPA closely tracks that provided by SEC. In a fanciful world where the Court respects its long-standing precedent and deference given to agencies under the nondelegation doctrine, EPA has several enforcement response policies and guidance documents that may help it meet the intelligible principle standard.[96] This guidance largely comprises policies for various rules and standards, issued through memorandums, to guide EPA enforcement of the major environmental statutes.[97] Even if the status quo is preserved, such guidance from EPA on decisions to bring enforcement actions administratively or judicially would not withstand the intelligible principle standard.[98]

Further, EPA will have a difficult time arguing that an intelligible principle exists within many of the major environmental statutes. Take the CAA and the CWA for example. Each statute provides maximums for administrative penalties, amounts exceeding which must be exacted judicially.[99] What leaves these statutes vulnerable to nondelegation challenges is that neither *requires* EPA to seek penalties administratively when *below* the maximums. While it makes little sense for them to do so, EPA has the apparent discretion to bring such penalties judicially.

As cautioned by Professor Heinzerling, "*American Trucking* teaches that an agency cannot fix a nondelegation prob-

90. 276 U.S. 394, 400, 404-05 (1928).
91. *Id.* at 409.
92. David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1229-37 (1985):
> The Court's stated delegation doctrine thus allows the delegation of some quantity of power without providing any yardstick with which to measure that limit. The test of whether a statute is overly ambiguous is, thus, without substance and so no test at all of whether Congress has met its obligation.

John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 241-42 (2000) ("[E]nforcement of the nondelegation doctrine necessarily reduces to the question whether a statute confers too much discretion. Without a reliable metric (other than an I-know-it-when-I-see-it-test), the Court has long doubted its capacity to make principled judgments about such questions of degree."); *see* Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (posing the question of "[w]hat legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny[?]").
93. *See* Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935) (holding that Congress failed to provide an intelligible principle in §9(c) of Title 1 of the National Industrial Recovery Act); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding that §3 of the National Industrial Recovery Act of 1933 is an unconstitutional delegation of power); Madison Fitzgerald, *A Blast From the Past: Revival of the Nondelegation Doctrine in* Jarkesy v. SEC, 68 Vill. L. Rev. Tolle Lege 1, 3 (2023).
94. Brief in Opposition to Petition for Writ of Certiorari at 16, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. May 23, 2023). *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §929P(a), 124 Stat. 1376, 1863-64 (2010). The Act amended the Commission's authority to impose civil penalties in cease-and-desist proceedings under the Securities Act of 1933, the Securities and Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. Under each of the Acts, the amendment allows
> the Commission [to] impose a civil penalty if the Commission finds, on the record, after notice and opportunity for hearing, that—(A) such person—(i) is violating or has violated any provision of this title, or any rule or regulation issued under this title; or (ii) is or was a cause of the violation of any provision of this title, or any rule or regulation issued under this title.

(internal quotations omitted).
95. Jarkesy v. Securities & Exch. Comm'n, 34 F.4th 446 (5th Cir. 2022) (Davis, J., dissenting).
96. U.S. EPA, *Enforcement Response Policies and Guidance*, https://www.epa.gov/enforcement/enforcement-response-policies-and-guidance (last updated Apr. 27, 2023); *see also*, *e.g.*, Memorandum from Rosmarie A. Kelley, Director of the Waste and Chemical Enforcement Division, U.S. EPA, to the Office of Enforcement and Compliance Assurance, U.S. EPA (Mar. 9, 2012) (on file with EPA) (providing "the final revised Enforcement Response Policy (ERP) for actions taken pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) pesticide container/containment regulations").
97. *See, e.g.*, U.S. EPA, *supra* note 96; Memorandum from Rosmarie A. Kelley, *supra* note 96.
98. *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472-73 (2001):
> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. . . . We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. . . . The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise . . . would *itself* be an exercise of the forbidden legislative authority.

99. 42 U.S.C. §7413(d)(1)(C); 33 U.S.C. §1319(d).

lem by restricting its own power."[100] Rather, any potential constitutional infirmity resides within the statute itself.[101] It flows from this analysis that a strict reading of the nondelegation doctrine, as requested by Jarkesy,[102] could quickly engulf much of EPA's enforcement autonomy under the major environmental statutes.

There is no overstating the difficulty, if not impossibility, of EPA avoiding the sweeping ramifications of a more robust nondelegation doctrine applied to its enforcement program. Should EPA seek to stave off the inevitable, at least for a time, it may avoid triggering some direct challenges by channeling more cases through the judicial forum. As discussed in the Seventh Amendment analysis, and notwithstanding administrative penalty maximums, EPA has the discretion to pursue some monetary awards administratively *or* judicially under the CAA, the CWA, and RCRA.[103]

With this in mind, regardless of the Court's decision in *Jarkesy*, monetary awards brought administratively under the CAA, the CWA, and RCRA face a more acute threat from nondelegation challenges than the other major environmental statutes.[104] While EPA could reduce the nondelegation threat by proceeding with such monetary awards judicially, the slower, more resource-intensive nature of the judicial forum presents problems of its own.

These choices will matter little if the Court soon finds EPA's delegated authority to choose between enforcement in administrative or judicial forums constitutionally impermissible. When that day comes, enforcement at EPA and across the administrative state is due for a hard reset. To cure such constitutional infirmities would require, at the very least, sweeping amendments to the major environmental statutes.[105]

Since the Court's brief flirtations with nondelegation in 1935, Congress has, by practical necessity, continued to delegate broad powers to administrative agencies. We have these delegations to thank for such diffuse benefits as Social Security, fair housing, and clean air. Despite their resentment of the administrative state, the Court's conservative justices have long struggled to coalesce around a unified standard to constrain these delegations by Congress.[106]

That period of dysfunction may be nearing its end.[107] Now, a majority of the Court has approached a new standard for determining the improper delegation of legislative authority[108]: when the executive branch is delegated power by Congress regarding important policy issues, it may not use that power to control private conduct.[109] This would deeply upset EPA's enforcement power and require a complete overhaul of EPA's enforcement program.[110] Without further guidance from the Court, it is difficult to tell exactly how EPA's choice of whether to enforce through the Agency or the courts would be affected. What seems sure is that in such a world, both forums would fester with constitutional challenges.

The landscape of administrative authority is set to fissure once again. Whether EPA could maintain its administrative enforcement program amid such dramatic change is unclear. It appears certain, however, that a strictly enforced nondelegation doctrine could be wielded to force a fundamental reorganization of the modern administrative state. This would pervade every aspect of environmental enforcement at EPA.

C. *Issue Three: "Whether Congress Violated Article II by Granting For-Cause Removal Protection to Administrative Law Judges in Agencies Whose Heads Enjoy For-Cause Removal Protection."*[111]

The third issue presented in *Jarkesy* focuses the Court on Article II of the Constitution, where, in relevant part, the president is required to "take care that the laws be faithfully executed."[112] Previously, the Court has recognized that the successful completion of such an arduous task requires that the president be allowed to "remove" certain classes of executive officers without cause.[113] But exactly how far does this power reach?

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100. Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. Env't L. Rev. 379, 398 (2021).
101. *Whitman*, 531 U.S. at 472 ("The [lower] court hence found that the EPA's interpretation (but not the statute itself) violated the nondelegation doctrine. . . . We disagree. In a delegation challenge, the constitutional question is whether the *statute* has delegated legislative power to the agency." (emphasis added)).
102. Brief for Respondents at 48-49, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Oct. 11, 2023).
103. *See* 42 U.S.C. §6928; *id.* §7413.
104. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) gives EPA similar enforcement choices. In that context, EPA can choose to issue an administrative order under §106 to potentially responsible parties, ordering them to clean a contaminated site. EPA may also choose to clean the site itself under §104 and seek reimbursement in court under §107. Although the enforcement discretion given to EPA under CERCLA is also susceptible to challenges going forward, the threat to the CAA, the CWA, and RCRA is more acute given that they explicitly allow civil penalties to be sought in both forums. The discretion given to EPA in CERCLA effectively achieves the same means as that given in the other three Acts (extracting money from respondents to serve the statute's objectives), but it does not do so as directly.
105. *See Whitman*, 531 U.S. at 472-73.
106. Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).
107. Heinzerling, *supra* note 100, at 382.
108. *Id.* at 382 n.10.
109. *Id.* at 381 ("These justices appear to be converging on at least one test for identifying an improper delegation of legislative authority: a delegation is improper when Congress hands off an important policy issue to the executive branch for decision, and the executive uses that delegated power to control private conduct."). *See* Gundy v. United States, 139 S. Ct. 2116, 2130-31 (2019) (Alito, J., concurring); *id.* at 2136 (Gorsuch, J., dissenting); Paul v. United States, 140 S. Ct. 342, 342 (2019).
110. This is especially true for provisions like §404 of the CWA and §9 of the Endangered Species Act, which have long been targeted with challenges by property rights advocates. *See generally* Daren Bakst & Tony Francois, Heritage Foundation, Congress Must Protect Innocent Property Owners From Section 404 Civil and Criminal Penalties (2022); Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 Env't L. 369 (1994).
111. Petition for Writ of Certiorari at I, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Mar. 8, 2023).
112. U.S. Const. art. II, §3.
113. Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) (citing generally Myers v. United States, 272 U.S. 52 (1926)).

In exploring that question further, *Jarkesy* considers for-cause removal protections granted to ALJs in agencies whose heads also enjoy for-cause removal protection.[114] These for-cause removal protections for ALJs were born of the Administrative Procedure Act (APA) to address due process concerns and bolster faith in administrative adjudications by limiting bias.[115] Importantly, they provide that ALJs are only removable for good cause, as determined by the U.S. Merit Systems Protection Board (MSPB), an independent agency of its own.[116]

As with nondelegation, the Court paid little direct attention to the Article II challenge during oral argument.[117] The question is then, once again, why did it certify and require briefing on this third issue? Perhaps, as some have suggested, the justices have made up their minds and feel that they have little to learn from discussing further an issue that has been addressed at length in recent cases.[118] To the extent that the justices meaningfully interact with the third issue in *Jarkesy*, their guidance may help clarify the status of ALJs and other administrative adjudicators at EPA.

Without ALJs, the modern administrative apparatus could not exist in its current form. This is exactly why the federal government employs approximately 2,000 of them.[119] Although the Court has seemingly limited its inquiry to agencies whose heads enjoy for-cause removal protection, like SEC, its chosen remedy will have ramifications for ALJs at agencies whose heads do not enjoy for-cause removal protection, like EPA and many others.

1. The Constitutionality of Removal Protections Is Determined by Status as an Inferior or Principal Officer

To determine whether for-cause removal protections are appropriate, a preliminary inquiry must be made into whether an individual is an executive officer, or merely an employee.[120] In 2010, the Court explicitly deferred the question of whether ALJs are "necessarily 'Officers of the United States.'"[121] Further, the Court as yet has avoided passing down clear guidance on distinguishing between employees and officers, advising only that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States.'"[122]

Without further clarification on what "significant authority" entails, one must look to the Court's previous decisions to see where significant authority has been identified. For example, in *Freytag v. Commissioner of Internal Revenue*, the Court determined that special trial judges of the Internal Revenue Service wielded significant authority such that they were officers, despite being unable to enter a final decision.[123] There, the Court heavily weighed that special trial judges could "take testimony, conduct trials, rule on the admissibility of evidence, and . . . enforce compliance with discovery orders."[124] Since ALJs at both SEC and EPA hold many of those same powers, the Court could perhaps identify them as officers under the *Freytag* criteria.[125]

If an individual serves as an executive officer, it must then be determined whether they are a principal or inferior officer.[126] Generally, neither may be insulated from presidential removal by multiple layers of for-cause protection—though, prior to *Jarkesy*, that question was not answered with respect to ALJs.[127] The Court has conceded that "[c]ertain *inferior* officers" with "narrowly defined"

114. Brief for the Petitioner at 2, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Aug. 28, 2023).
115. Benjamin M. Barczewski, Congressional Research Service, LSB10823, Removal Protections for Administrative Adjudicators: Constitutional Security and Considerations for Congress 2 (2022).
116. *Id.* (This provides protection to ALJs from being fired merely for a policy or partisan disagreement with the sitting administration.).
117. Transcript of Oral Argument at 79, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023) (the only question directed toward the Article II issue was asked by Justice Kavanaugh, remarking simply that "this seems problematic under *Free Enterprise Fund*").
118. Ronald Mann, *Justices Divided Over SEC's Ability to Impose Fines in Administrative Proceedings*, SCOTUSblog (Nov. 30, 2023, 7:28 AM), https://www.scotusblog.com/2023/11/justices-divided-over-secs-ability-to-impose-fines-in-administrative-proceedings/. *See, e.g.*, Lucia v. Securities & Exch. Comm'n, 138 S. Ct. 2044, 2049 (2018); *Free Enter. Fund*, 561 U.S. at 588 n.10.
119. While it is difficult to understate the value of ALJs to EPA, SEC, and the other 25 agencies that employ them, it is worth noting that across all administrative agencies there are approximately 10,000 non-ALJ adjudicators. *See* Kent Barnett et al., Administrative Conference of the United States, Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 3 (2018).
120. *See Lucia*, 138 S. Ct. at 2049.
121. *Free Enter. Fund*, 561 U.S. at 588 n.10.
122. *Lucia*, 138 S. Ct. at 2047; Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) (quoting U.S. Const. art. II, §2, cl. 2). *But see Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring) (with Gorsuch, J., joining) (The justices criticized the majority's test and noted that "[t]he Founders likely understood the term 'Officers of the United States' to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty." With Justices Coney Barrett and Kavanaugh since joining the Court, Justices Thomas and Gorsuch may have growing support for a more expansive definition of "Officers of the United States," as posited here.).
123. 501 U.S. 868, 881 (1991).
124. *Id.* at 881-82.
125. *See* 17 C.F.R. §201.111 (2005) (recognizing that the
> powers of [SEC ALJs when designated as] the hearing officer include, but are not limited to . . . [i]ssuing subpoenas authorized by law . . . [r]eceiving relevant evidence and ruling upon the admission of evidence and offers of proof . . . [r]egulating the course of a proceeding and the conduct of the parties and their counsel . . . [s]ubject to any limitations set forth elsewhere in these Rules of Practice, considering and ruling upon all procedural and other motions.

see also 40 C.F.R. §22.4(c) (2017) (granting ALJs and other presiding officers at EPA the authority to, among other things,
> [r]ule upon motions, requests, and offers of proof, and issue all necessary orders . . . [a]dminister oaths and affirmations and take affidavits . . . [o]rder a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party; [and] . . . [a]dmit or exclude evidence.

126. Morrison v. Olson, 487 U.S. 654, 670-71 (1988).
127. Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 514 (2010) ("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.").

duties may enjoy a single layer of such protection.[128] But first, how does one determine whether they are a principal or inferior officer?

The Constitution distinguishes between principal officers, appointed by the president with advice and consent from the U.S. Senate, and inferior officers, who may be appointed by the president, a court, or agency head, without such confirmation.[129] The Court previously acknowledged in *Edmond v. United States* that there exists no "exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause Purposes."[130] However, in that same case, the Court provided that "[g]enerally speaking, 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the Senate's advice and consent."[131] Such opaque guidance leaves the determination of whether one is an officer and, if so, whether they are an inferior officer, subject to heavy debate and to be assessed on a case-by-case basis.[132]

2. The Court May Alter the Removal Protections Currently Granted to SEC ALJs

Looking to the case of SEC ALJs, the Court's decisions regarding the president's removal power in *Selia Law v. Consumer Financial Protection Bureau*[133] and *Collins v. Yellen*[134] seem to spell trouble. In those cases, the Court found that the for-cause removal protections granted to the directors of the Consumer Financial Protection Bureau and the Federal Housing Finance Agency, respectively, violated the separation of powers.[135] Quoting directly from Chief Justice Roberts' majority opinion in *Selia Law*, Justice Alito's opinion embodied the Court's recent unwillingness to "revisit [its] prior decisions allowing certain limitations on the President's removal power."[136] Having only recognized two exceptions to the president's unrestricted removal power, displayed in *Humphrey's Executor v. United States*[137] and *Morrison v. Olson*,[138] the Court is not keen on extending those exceptions any further.[139]

Against this backdrop, the Court will analyze the for-cause removal protections afforded to SEC ALJs and determine whether they are in violation of Article II. The APA provides ALJs a first layer of for-cause removal protection, stating that ALJs may be removed only for good cause "established and determined by the Merit Systems Protection Board."[140] Although Jarkesy argues that Article II precludes even a single layer of for-cause protection for ALJs,[141] the real battle will likely play out over the second layer of protection.

MSPB members enjoy for-cause removal protection, removable by the president "only for inefficiency, neglect of duty, or malfeasance in office."[142] This, according to Jarkesy, is an unconstitutional second layer of for-cause removal protection provided to SEC ALJs.[143] SEC downplays this assertion by looking directly to the text of the APA, where the "agency" is empowered to appoint ALJs,[144] and to remove them for good cause.[145] According to SEC, this merely inserts the MSPB as an enforcer of agency removal decisions made pursuant to the first layer of protection, such that there exists only one layer.[146]

If the Court continues to push forward in the spirit of *Selia Law* and *Collins*, it could ultimately identify an Article II violation in *Jarkesy*. With those decisions holding five current justices in common, the addition of Justice Coney Barrett strengthens the possibility that traces of their rationale could be stretched to SEC ALJs. Although, it should be noted, that

128. Barczewski, *supra* note 115, at 3 (emphasis added); Selia L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct 2183, 2191-92 (2020); *Morrison*, 487 U.S. at 724 n.4.
129. U.S. Const. art. II, §2, cl. 2; Lucia v. Securities & Exch. Comm'n, 138 S. Ct. 2044, 2051 n.3 (2018).
130. 520 U.S. 651, 663 (1997).
131. *Id.* at 652.
132. *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring):
> I agree with the Court that this case is indistinguishable from [*Freytag*]. If the special trial judges in *Freytag* were "Officers of the United States," then so are the administrative law judges of the [SEC]. Moving forward, however, this Court will not be able to decide every Appointments Clause case by comparing it to *Freytag*. And, as the Court acknowledges, our precedents in this area do not provide much guidance. While precedents like *Freytag* discuss what is *sufficient* to make someone an officer of the United States, our precedents have never clearly defined what is *necessary*.

(internal citations omitted)).
133. *Selia L.*, 140 S. Ct. 2183.
134. 141 S. Ct. 1761 (2021).
135. *Selia L.*, 140 S. Ct. at 2197; *Collins*, 141 S. Ct. at 1783-84.
136. *Collins*, 141 S. Ct. at 1783 (adding that the Court found "'compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director'" (quoting *Selia L.*, 140 S. Ct. at 2192)).
137. 295 U.S. 602 (1935).
138. 487 U.S. 654 (1988).
139. *Selia L.*, 140 S. Ct. at 2198-200:
> *Free Enterprise Fund* left in place two exceptions to the President's unrestricted removal power. First, in *Humphrey's Executor*, decided less than a decade after *Myers*, the Court upheld a statute that protected the Commissioners of the [Federal Trade Commission] from removal except for "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 620, 55 S. Ct. 869 (quoting 15 U.S.C. §41). . . . We have recognized a second exception for *inferior* officers in two cases, *United States v. Perkins* and *Morrison v. Olson*. In *Perkins*, we upheld tenure protections for a naval cadet-engineer. 116 U.S. at 485, 6 S. Ct. 449. And, in *Morrison*, we upheld a provision granting good-cause tenure protection to an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials. . . . These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—"represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power."
140. Barczewski, *supra* note 115, at 2; 5 U.S.C. §7521(a).
141. Brief for Respondents at 54-60, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Oct. 11, 2023). Some amici to the case, even if only implicitly, have asked the Court to overrule *Humphrey's Executor*. *See, e.g.*, Brief of Constitutional Originalists Edwin Meese III, Steven G. Calabresi, and Garry S. Lawson as Amici Curiae in Support of Respondents at 28, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. 2023).
142. 5 U.S.C. §1202(d).
143. Brief for Respondents at 63-64, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Oct. 11, 2023).
144. *See* 5 U.S.C. §3105.
145. *Id.* §7521(a).
146. Brief for the Petitioner at 21, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Aug. 28, 2023) ("[T]he MSPB simply reviews the agency's removal decision to verify that good cause supports it. The MSPB's role thus does not give ALJs a second layer of protection from removal; the MSPB simply enforces the first layer.").

applying such logic to an ALJ instead of an administrative agency's director would require breaking new ground.[147]

What remains even less clear, and will ultimately determine the ramifications of this case, is how the Court would remedy such an Article II violation if found. The nuclear option, as argued for by Jarkesy, is preventing the Commission from using ALJs as adjudicators.[148] This, of course, would be catastrophic for enforcement at SEC, and would lead to almost immediate challenges of a similar magnitude against EPA administrative enforcement. Alternatively, as favored by SEC, the Court could hold that "agencies still need 'good cause' to remove their ALJs, but that good cause need not be 'established and determined by the Merit Systems Protection Board.'"[149]

Stripping ALJs of for-cause removal protection or preventing SEC from using them as adjudicators would likely bring upon the judiciary a deluge of cases. As appealing as the administrative state's demise is to the Court, the justices may wish to avoid the practical consequences of this option, lest they unleash the dreaded floodgates of litigation.[150] Further, such action by the Court would obliterate any confidence in the adjudicatory impartiality of administrative enforcement (if such enforcement still exists).

As cautioned by the Court in *Humphrey's Executor*, "it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."[151] While *Humphrey's Executor* seems to be living on borrowed time,[152] the Court has not signaled its intent to strike it down in *Jarkesy*. Even if the Court exercises some modicum of restraint and avoids its nuclear option, the justices are ready to bolster the president's removal power. With this, the most powerful individual in all American government would brandish even greater autonomy.

3. The Court's Chosen Outcome Will Preview Challenges to Come Against EPA Adjudicators, Like Members of the Environmental Appeals Board

Regardless of the Court's chosen direction, the fate of SEC ALJs in *Jarkesy* will forecast that of ALJs at EPA and elsewhere across the administrative state. The Court's reasoning will ultimately show whether there remain any viable strategies for EPA to distinguish its administrative adjudicators. The outcome in *Jarkesy* will also provide a barometer for measuring the health of administrative enforcement generally. This will inevitably shed light on the vulnerabilities of other key players in EPA's administrative enforcement apparatus, most notably members of the Environmental Appeals Board (EAB).

Members of the EAB are likely inferior officers, based on the guidance presented in *Edmond*.[153] This probability flows from the "significant power"[154] exercised by the EAB and the direct supervision that it receives from the EPA Administrator,[155] who is appointed by the president with Senate advice and consent. As members of the Senior Executive Service (SES), EAB members enjoy for-cause removal protection.[156] Like ALJs, a final determination of whether cause exists for removal is made by the MSPB.[157] Based on these similarities, the Court's rationale in *Jarkesy* may determine future challenges against the EAB.

However, in preparing for such challenges, it should be acknowledged that as members of the SES, and unlike ALJs, members of the EAB can be reassigned within the SES.[158] A 2021 rule furthers this distinction, recognizing that the EAB remains accountable to the Administrator.[159]

147. *See* Selia L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020); Collins v. Yellen, 141 S. Ct. 1761, 1783-84 (2021).

148. Brief for Respondents at 67-69, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Oct. 11, 2023). *But see* Transcript of Oral Argument at 74, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023) (Justice Kavanaugh acknowledging the concern that the removal remedy supported by Jarkesy would exacerbate the problem at hand, including for EPA).

149. Brief for the Petitioner at 29, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Aug. 28, 2023).

150. At oral argument, Justice Kagan questioned Jarkesy about this fear, albeit while addressing the Seventh Amendment issue, by reading directly from *Atlas Roofing*. *See* Transcript of Oral Argument at 97-98, Securities & Exch. Comm'n v. Jarkesy, No. 22-859 (U.S. Nov. 29, 2023):

> *Atlas Roofing* says numerous times, it could not have been clearer, the Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law. . . . Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevent it from committing some new types of litigation to administrative agencies with special confidence.

151. *E.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

152. Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 Vand. L. Rev. 1, 4 (2023):

> Justice Samuel Alito authored the Court's opinion in *Collins v. Yellen*, which held that *any* restriction on presidential removal is unconstitutional for a single-headed agency. All the while, Chief Justice John Roberts has repeatedly refused to extend *Humphrey's Executor*, including most recently in *Selia Law v. CFPB* and *United States v. Arthrex*. And for her part, Justice Amy Coney Barrett openly espouses the methodology of her late former boss, Justice Antonin Scalia. Scalia, of course, attacked *Humphrey's Executor* in his . . . dissent[ing opinion in *Morrison v. Olson*].

Selia L., 140 S. Ct. at 2219 (Thomas, J., concurring in part; joined by Gorsuch, J.) (identifying *Humphrey's Executor* as a "serious, ongoing threat" that "subverts political accountability and threatens individual liberty"); In re Aiken Cnty., 645 F.3d 428, 441-42 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (noting that *Humphrey's Executor* may perhaps be "disregarded as [a] relic[ ] of an overly activist anti-New Deal Supreme Court," and is unsupported by "the text of Article II").

153. Edmond v. United States, 520 U.S. 651, 652 (1997) ("Generally speaking, 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the Senate's advice and consent.").

154. *See* William Funk, *Is the Environmental Appeals Board Unconstitutional or Unlawful?*, 49 Env't L. 737, 738 (2019) (recognizing that the EAB was created "to have final decisional authority for the agency in all cases").

155. Revisions to the Permit Appeals Process to Restore the Organization and Function of the Environmental Appeals Board, 86 Fed. Reg. 31172, 31174-75 (June 11, 2021) ("[T]he Administrator assigns and appoints career appointees to serve as EAB judges, and each judge acts on the express delegated authority of the Administrator and remains accountable to the Administrator.").

156. 5 C.F.R. §§359.501-503; 5 U.S.C. §3592.

157. *Id.*

158. 5 C.F.R. §317.901; 5 U.S.C. §3395.

159. Revisions to the Permit Appeals Process to Restore the Organization and Function of the Environmental Appeals Board, 86 Fed. Reg. at 31174 ("The EAB's independence from the various component offices *outside the immediate Office of the Administrator* is a critical element of inspiring confidence in the fairness and transparency of the Agency's appellate adjudication process." (emphasis added)).

Similar support is also found through case law, such as in *Avenal Power Center v. Environmental Protection Agency*, which noted that the EAB was created through the Administrator's power to delegate his or her authority as a means of implementing statutory objectives.[160]

The question seems not to be *whether* EPA will soon face challenges against its ALJs and EAB, but *when* those challenges will come. As noted above, there is hope for EPA to distinguish the EAB and successfully defend it against impending Article II challenges. This hope is fully contingent upon the extent of the Court's rationale on the third *Jarkesy* issue. For the time being, the future roles of ALJs and EAB members at EPA hang in the balance.

III. Conclusion

The threats currently facing EPA's enforcement program and the administrative state are unprecedented. By the scope of the constitutional challenges in *Jarkesy*, not to mention those of other cases like *Loper Bright Enterprises v. Raimondo*,[161] this term's effect on administrative law could eclipse any term of recent memory. Less comforting for administrative agencies may be the realization that these challenges are perhaps only the beginning of a full-frontal assault on the administrative state. Will *Jarkesy* be remembered as but a stop along the Court's march to overturning *Humphrey's Executor*?

These possibilities will come as somber thoughts for environmentalists and proponents of the administrative state alike. Earth needs robust environmental regulation and enforcement now more than ever. Yet unconvinced, the Court appears willing to twist its knife with apathy. Despite this bleak reality, hope remains for environmental regulation and enforcement.

Although the Court will continue to exert immense influence over the state of environmental enforcement, there remains momentum on the side of individual states and citizen enforcers. With the frontline of environmental enforcement shifting away from federal administrative forums, a more consequential battle has been primed. This change will thrust an even more important role upon individual states, for whom the major environmental statutes set only a floor.[162]

Should they choose, individual states are generally of the capacity to enforce more rigorous environmental standards than are set at the federal level.[163] This enables states to go further than the federal government in their efforts to regulate the environment, as California has often done.[164] By embracing this role, states can help supplement a weakened federal administrative enforcement program.

Some states have shown their willingness to go even further by declaring constitutional rights to a healthful environment.[165] While only three states have formally

160. 787 F. Supp. 2d 1, 3 (D.D.C. 2011).

161. 45 F.4th 359 (D.C. Cir. 2022), *cert. granted* 598 U.S. ___ (May 1, 2023). *Loper* allows the Court to consider whether to formally overturn its landmark decision in *Chevron v. Natural Resources Defense Council*, which created a strong presumption of deference for agency action. *See* Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66, 14 ELR 20507 (1984). In environmental law, *Chevron* deference has been the catalyst for more progressive policy action from EPA. E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law*, 16 Vill. Env't L.J. 1, 3-4 (2005):

> *Chevron* moved the debate from a sterile, backward-looking conversation about Congress' nebulous and fictive intent to a forward-looking, instrumental dialogue about what future effects the proposed policy is likely to have. Shifting the focus to questions like which policy choice is actually likely to do a better job of clearing up the air is a progressive change.

While some district and circuit courts have continued to cite *Chevron*, its once mighty deference has not been granted by the Court since 2016. Benjamin M. Barczewski, Congressional Research Service, LSB10976, Chevron Deference in the Courts of Appeals 2 (2023); *see* Cuozzo Speed Techs. v. Lee, 579 U.S. 261, 266-67 (2016) (granting deference to the Patent Office's regulation requiring the agency to construe a patent claim by its broadest reasonable construction). In this way, the Court may be gearing up to provide what feels like an overdue funeral for *Chevron* and its long-respected doctrine of deference. *See* Nathan Richardson, *Deference Is Dead, Long Live* Chevron, 73 Rutgers L. Rev. 441, 486 (2021) ("[There] has been a total collapse of [*Chevron*] deference to agency statutory interpretations at the Supreme Court level."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (asserting the concentration of federal power allowed by *Chevron* deference is "more than a little difficult to square with the Constitution," and that "[m]aybe the time has come to face the behemoth"); Michigan v. Environmental Prot. Agency, 576 U.S. 743, 761, 45 ELR 20124 (2015) (Thomas, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions . . . [and] precludes judges from exercising [independent judgment]."); Utility Air Regul. Grp. v. Environmental Prot. Agency, 134 S. Ct. 2437, 2444, 44 ELR 20132 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'").

162. *Constitutional Considerations: State Versus Federal Environmental Policy Implementation: Hearing Before the Subcomm. on Env't and the Economy of the Comm. on Energy and Commerce*, 113th Cong. 159 (2014) (Rep. Henry Waxman (D-Cal.) recognizing that

> [o]ver the years, Congress and States have developed and refined a proven model of cooperative federalism which has successfully reduced air and water pollution and ensured the public's access to safe drinking water. Under this model, Congress sets minimum national standards of environmental protection. States may take responsibility for implementing and enforcing these standards if their requirements are at least as protective as the Federal floor. EPA retains backstop enforcement authority, ensuring that every citizen in the United States receives a minimum level of protections from environmental risks. And States retain the authority to establish more protective standards and programs to meet their own individual circumstances.

See also Richard Frank, *A(nother) California "Regulatory Takings" Case Heads to the Supreme Court*, Legal Planet (Oct. 10, 2023), https://legal-planet.org/2023/10/10/another-california-regulatory-takings-case-heads-to-the-supreme-court/; Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, Atlantic (Mar. 29, 2017), https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/.

163. William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 Geo. Wash. L. Rev. 1521, 1545 (2009); *see* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1157-59 (2007).

164. California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 Fed. Reg. 14332 (Mar. 14, 2022) ("Since the CAA was enacted, EPA has granted California dozens of waivers of preemption, permitting California to enforce its own [more stringent] motor vehicle emission standards."); *but see* Petition for Review, Ohio v. Environmental Prot. Agency, No. 22-1081 (D.C. Cir. May 22, 2022) (This case, which has since been granted and argued, challenges the EPA reinstatement of California's waiver for motor vehicle greenhouse gas emissions regulation.).

165. Martha F. Davis, *The Greening of State Constitutions*, State Ct. Rep. (Aug. 14, 2023), https://statecourtreport.org/our-work/analysis-opinion/greening-state-constitutions.

adopted these "green amendments," at least nine additional states considered ratification in 2023.[166] With this push, individual states have an opportunity to encourage robust environmental enforcement within their borders. Such leadership from the states will be of paramount importance in a world with significantly less (or no) administrative environmental enforcement from the federal government.

Similarly, citizens have an increasingly prominent role to play as enforcers, empowered by citizen suit provisions included in most of the major environmental statutes.[167] As cases continue to shift from administrative to judicial forums, cases that would have been easily resolved administratively will demand more resources from EPA. Even in its current state of growth, EPA lacks the resources to pursue in the judicial forum every case brought to its attention.

If at some point in the future the Agency were starved of resources and prohibited from administrative enforcement, EPA would have a reduced means to take on an increasing work load. Traditionally, the role of citizen enforcers has been to catch the judicial cases that slip through the cracks at EPA.[168] With space growing between the floorboards, there will be an increasing need for nonprofits and citizen groups to help pick up the cases left unenforced.

The enforcement role that states and citizens will assume in coming years will in large part be determined by the outcome of *Jarkesy* and its progeny. With *Jarkesy*, the Court holds the fate of the administrative state in its hands. Each of the three issues poses elaborate, largely inescapable threats to administrative enforcement at SEC, EPA, and other administrative agencies. As the world waits for the Court to speak, one thing seems clear: the status quo will not remain for long.

166. Kate Burgess, *Green Amendments in 2023: States Continue Efforts to Make a Healthy Environment a Legal Right*, Nat'l Caucus Env't Legislators (Mar. 27, 2023), https://www.ncelenviro.org/articles/green-amendments-in-2023-states-continue-efforts-to-make-a-healthy-environment-a-legal-right/.

167. Margaret Bowman et al., Environmental Law Institute, The Role of the Citizen in Environmental Enforcement §2.3.2.1 (1992), https://www.eli.org/sites/default/files/eli-pubs/57aa3700d853b-themetheroleofcitizensinenvironmental-full.pdf ("In the United States, most environmental statutes contain 'citizen suit' provisions enabling citizens to prosecute violators of the statutory regime.").

168. Scott Strand, *At Risk: Citizen Suits and the Doctrine of Standing*, Env't L. & Pol'y Ctr. (June 21, 2023), https://elpc.org/blog/citizen-suits-and-the-doctrine-of-standing/ ("[For environmental groups,] environmental citizen suits have been a critical tool to make enforcement of our environmental laws a reality and to hold the agencies accountable. Too often, the agencies don't have the resources, or, frankly, much interest in taking effective enforcement actions.").