

# The Right To Remove in Agency Adjudication

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*In SEC v. Jarkesy, the Supreme Court will decide the constitutional future of agency adjudication, especially in the context of agency enforcement actions and the imposition of civil penalties. If the Court agrees with the Fifth Circuit on any of its three independent reasons for unconstitutionality, agency enforcement and adjudication schemes across the federal regulatory state will be severely disrupted, in ways that are detrimental to both the regulator and the regulated. In this Essay, we propose a path forward: In certain circumstances, the regulated party should have a right to remove an enforcement action from an in-house agency adjudication to an Article III federal court. This right to remove would avoid the constitutional issues Jarkesy presents while also advancing the goals of agency enforcement and adjudication better than the alternative of only bringing enforcement actions in federal court. Moreover, the SEC could adopt this right to remove now, before the Court decides Jarkesy, through internal administrative law. Congress, of course, could also enact it through ordinary legislation. It is also possible that the Court itself could adopt this remedy in Jarkesy, based on its recent decisions in United States v. Arthrex, Inc. and Axon Enterprise v. FTC.*

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## I. INTRODUCTION

This Term, in *SEC v. Jarkesy*, the Supreme Court will consider the constitutional future of agency adjudication at the Securities and Exchange Commission (“SEC”).<sup>1</sup> In the decision under review, a divided Fifth Circuit panel held that certain aspects of agency adjudication at the SEC violate the Constitution in three independent ways. First, in-house SEC adjudication that imposes a civil penalty for fraud liability offends the Seventh Amendment right to a jury trial and should instead be brought in federal court.<sup>2</sup> Second, Congress violated the nondelegation doctrine by providing the SEC with no “intelligible principle” for deciding whether to pursue a civil-penalty action before an administrative law judge (ALJ) or in an Article III federal court.<sup>3</sup> Third, how the SEC is structured violates the constitutional rule from *Free Enterprise Fund v. PCAOB* that Congress cannot impose two levels of removal protection between ALJs and the President.<sup>4</sup>

*Jarkesy* may well be the most important agency adjudication case to reach the Supreme Court in decades. In dissenting from the denial of rehearing en banc, for instance, Judge Catharina Haynes exclaimed that the panel decision “deviated from over eighty years of settled precedent.”<sup>5</sup> Indeed, commentators openly fear that “[u]nless overturned, the [Fifth Circuit’s] decision will be a sea change in both the regulation of the financial industry and administrative law.”<sup>6</sup> Expect much commentary and scholarship to come that explores the

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<sup>1</sup> See generally *U.S. Sec. & Exch. Comm’n v. Jarkesy*, 34 F.4th 446 (5th Cir. 2022), cert. granted, 143 S. Ct. 2688 (2023).

<sup>2</sup> *U.S. Sec. & Exch. Comm’n v. Jarkesy*, 34 F.4th 446, 457 (5th Cir. 2022).

<sup>3</sup> *Id.* at 462–63.

<sup>4</sup> *Id.* at 463 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010)). After all, the Fifth Circuit reasoned, the President cannot remove SEC Commissioners at will, and those Commissioners in turn cannot remove the SEC’s ALJs at will, thereby—in the Fifth Circuit’s view—preventing the President from “tak[ing] care that the laws are faithfully executed.” *Id.* at 465.

<sup>5</sup> *Jarkesy v. U.S. Sec. & Exch. Comm’n*, 51 F.4th 644, 647 (5th Cir. 2022) (Haynes, J., dissenting from denial of rehearing en banc).

<sup>6</sup> Benjamin M. Daniels & Trevor L. Bradley, *Fifth Circuit Decision Threatens to Upend SEC’s Use of Administrative Proceedings*, NAT’L L. REV. (June 7, 2022), <https://www.natlawreview.com/article/fifth-circuit-decision-threatens-to-upend-sec-s-use-administrative-proceedings> [<https://perma.cc/6U4D-JMAJ>].

ramifications of the Supreme Court’s ultimate decision in terms of administrative law, separation of powers, and agency adjudication and enforcement activities.

In this Essay, we do not opine on the constitutional merits in *Jarkesy*. Instead, we assume the Court will strike down SEC adjudication on at least one constitutional ground and explore a potential path forward. We argue that, in certain circumstances, the regulated party should have a right to remove an enforcement action from an in-house agency adjudication to an Article III federal court. This right to remove would avoid the constitutional issues presented in *Jarkesy*. It would also, in our view, result in better administrative policy, at least when it comes to the agency adjudications that implicate civil penalties or otherwise get close to the private-rights line. In so doing, the right to remove retains a well-established, effective alternative to federal court litigation—formal adjudication under the Administrative Procedure Act (APA)—if both the government and the regulated entity find that alternative to be preferable, without unilaterally expanding the regulatory authority of the SEC or the jurisdiction or workload of the federal courts.

We are not the first to recommend that regulated parties have a right to remove in SEC adjudication proceedings—although our proposal expands on the prior work and identifies an opportunity to put it into practice, while at the same time using removal to solve constitutional problems. Three decades ago a task force of the American Bar Association Section of Business Law recommended that Congress authorize “each respondent in an SEC administrative proceeding the right to remove the issue of violation of law to the U.S. District Court.”<sup>7</sup> Nearly a decade ago, the U.S. Chamber of Commerce recommended a similar right-to-remove legislative proposal.<sup>8</sup> In 2022, moreover, Senate Republicans introduced a version of this removal proposal in the Administrative Enforcement Fairness Act, which was ultimately to be included in the larger JOBS Act 4.0.<sup>9</sup> Indeed, we are aware of at least three

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<sup>7</sup> *Report of the Task Force on the SEC Administrative Law Judge Process*, 47 BUS. LAW. 1731, 1736 (1991) [hereinafter ABA REPORT].

<sup>8</sup> U.S. CHAMBER OF COMMERCE, EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT 20 (July 2015) [hereinafter CHAMBER REPORT] [https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882\\_SEC\\_Reform\\_FIN1.pdf](https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf) (on file with the *Ohio State Law Journal*) (“The Commission should adopt a policy that any party named in an administrative proceeding that desires a jury trial may file a notice to remove the proceeding to federal district court.”).

<sup>9</sup> Administrative Enforcement Fairness Act, S. 3930, 117th Cong. (2022); Jumpstart Our Business Startups Act, S. 3930, 117th Cong. § 405 (2022), [https://www.banking.senate.gov/imo/media/doc/the\\_jobs\\_act\\_4.0discussiondraft.pdf](https://www.banking.senate.gov/imo/media/doc/the_jobs_act_4.0discussiondraft.pdf) [<https://perma.cc/85L2-W3U3>]. As further discussed in Part III.C.2 *infra*, the removal mechanism in this legislation differs in important respects from our proposal.

instances where Congress has recognized a right to remove regarding the prospect of civil penalties in agency adjudication.<sup>10</sup>

The ABA and U.S. Chamber grounded their recommendations in fairness and due process for the regulated party that seem to be reflected in the Seventh Amendment's civil jury trial right.<sup>11</sup> Our recommendation, by contrast, focuses on how a right to remove solves the constitutional problems presented by *Jarkesy*. When a regulated party decides not to exercise its right to remove, it consents to an ALJ proceeding and ultimately an agency final decision on the merits. In so doing, it waives its potential constitutional challenges to such in-house agency adjudication. Similarly, this proposal gives the regulated entity the right to choose between judicial and administrative proceedings, curing any problem from a lack of congressional direction about which sort of adjudication the SEC should pick. Finally, the proposal turns ALJs, regardless of the manner of their appointment, into something like private-sector arbitrators, making the manner of their appointment potentially irrelevant to their decision.<sup>12</sup> As a constitutional matter, this recommendation is similar to Federal Rule of Civil Procedure 73, which allows a magistrate judge to "conduct a civil action or proceeding, including a jury or nonjury trial," so long as "all parties consent."<sup>13</sup> It is also similar to parties' agreement to have disputes settled through arbitration.

As a policy matter, a right to remove is far more efficient and effective than a rule that civil penalties and other SEC enforcement actions can *only* be brought in federal court. After all, prior to *Jarkesy*, SEC ALJs adjudicated hundreds of matters each year.<sup>14</sup> Many of those individuals and entities may well prefer to have their matters adjudicated in house at the SEC, as it can be faster and more efficient and can leverage the ALJ expertise in the matter. Sometimes, fast proceedings make sense for matters where liability is not in dispute. In technical

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<sup>10</sup> See Federal Power Act, 16 U.S.C. § 823b(b); Fair Housing Act, 42 U.S.C. § 3612(a); Energy Policy and Conservation Act, 42 U.S.C. § 6303(d). These statutory provisions are explored in Part III.C.2 *infra*. The authors thank Will Yeatman for bringing these statutory provisions to our attention.

<sup>11</sup> See ABA REPORT, *supra* note 7, at 1733; CHAMBER REPORT, *supra* note 8, at 20.

<sup>12</sup> Although our recommendation here may also avoid that constitutional issue, we do not explore it in depth, as the dual-layer removal issue implicates many more federal adjudication issues where we doubt the right to remove presents a one-size-fits-all remedy. Elsewhere one of us explores a different path forward to address the dual-layer removal protection of ALJs. See generally Aaron Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, 103 TEX. L. REV. (forthcoming 2025), <https://ssrn.com/abstract=4563879> [<https://perma.cc/E3RG-RSGP>].

<sup>13</sup> FED. R. CIV. P. 73(a).

<sup>14</sup> See, e.g., David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1176 (2016) ("Between the passage of Dodd-Frank on July 22, 2010, and March 27, 2015, SEC ALJs issued 359 initial judgments."). Today, the SEC has filed far fewer cases with ALJs, who now issue a handful of initial decisions per year. See *ALJ Initial Decisions: Administrative Law Judges*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/alj/aljdec> [<https://perma.cc/573J-J6VD>].

cases, expert agency adjudicators will offer an attractive alternative to generalist judges. By allowing but not requiring regulated entities to remove adjudication matters to federal court, our recommendation preserves the comparative advantages of in-house adjudication while creating a safety valve for regulated entities that prefer a jury and/or a federal judge in the first instance. Indeed, administrative proceedings subject to the threat of removal are likely to encourage the adjudicators who preside over those proceedings to improve their expertise and efficiency to compete with federal courts. In that sense, our proposal, along with the older recommendations by the Administrative Conference of the United States,<sup>15</sup> business advocates, and others, should reduce congestion on judicial dockets by limiting the number of cases filed or removed to those courts.

We encourage the SEC to implement this right to remove now through internal administrative law. It could promulgate a procedural rule before the Supreme Court issues its decision in *Jarkesy* that details when and how regulated parties can request the SEC to remove an agency adjudication proceeding to federal court. Similarly, we urge Congress to consider amending the SEC's governing statute to codify a right to remove. In Part II.C, we also suggest how the Court in *Jarkesy* may be able to recognize a right to remove as a matter of constitutional avoidance or severability, similar to how it refashioned the Patent Act in *United States v. Arthrex, Inc.* to allow for agency-head review of patent adjudication decisions.<sup>16</sup>

After Part II provides a primer on agency adjudication at the SEC, Part III sketches out the right to remove in agency adjudication—how it avoids the constitutional concerns presented in *Jarkesy* and how the SEC, Congress, and perhaps even the Supreme Court could create such a right to remove. Part IV then presents the policy case for the right to remove. We conclude by zooming out beyond the SEC, as the right to remove could have similar application in other agency adjudication systems throughout the federal regulatory state—

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<sup>15</sup> In 1972, the Administrative Conference enthused that “it is desirable to commit the imposition of civil monetary penalties to agencies themselves, without subjecting agency determinations to *de novo* judicial review.” Admin. Conf. U.S., Recommendation 72–6, at 3 (Dec. 14, 1972), <https://www.acus.gov/recommendation/civil-money-penalties-sanction> [<https://perma.cc/Y8BD-FLYW>]. Harvey Goldschmid, in the report underlying the recommendation, argued that the “increased use of civil money penalties constitutes an important and salutary trend.” HARVEY J. GOLDSCHMID, REPORT IN SUPPORT OF RECOMMENDATION 72–6: AN EVALUATION OF THE PRESENT AND POTENTIAL USE OF CIVIL MONETARY PENALTIES AS A SANCTION BY FEDERAL ADMINISTRATIVE AGENCIES 898 (Admin. Conf. U.S. ed., 1972), <https://www.acus.gov/sites/default/files/documents/1972-06%20Civil%20Money%20Penalties%20as%20a%20Sanction.pdf> [<https://perma.cc/9MFJ-X9K8>]. His report supported the use of administrative proceedings. *See id.* at 901. Indeed, Goldschmid argued that cases “which are simply inappropriate” for federal courts “would be removed from federal district courts” and left to administrative agencies. *Id.* at 929.

<sup>16</sup> *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986 (2021) (holding that “the structure of the PTO and the governing constitutional principles chart a clear course: Decisions by APJs must be subject to review by the Director”).

especially in the enforcement context where civil penalties and similar remedies can be imposed.

## II. *JARKESY* AND AGENCY ADJUDICATION AT THE SEC

In this Part, we provide a primer on how agency adjudication at the SEC works. At the outset, it is worth emphasizing that agency adjudication at the SEC has been available for decades, that it involves adjudicators experienced with those cases, and that it has often been compared to judicial processes in district courts.<sup>17</sup> To be sure, SEC ALJs do not offer a jury trial or a senate-confirmed adjudicator, or—at least for now—an adjudicator removable for any reason by the president.<sup>18</sup> In our view, however, the agency adjudication process might offer regulated entities an attractive alternative to district court proceedings.

The SEC first received the power to direct cases to administrative proceedings in the Securities Enforcement Remedies and Penny Stock Reform Act of 1990,<sup>19</sup> which gave ALJs the power to issue cease-and-desist orders and to revoke respondents' license to participate in the securities industry.<sup>20</sup> However, federal courts had exclusive jurisdiction over respondents not licensed to practice before the SEC.<sup>21</sup> Until the Dodd–Frank Wall Street Reform Act (“Dodd–Frank”),<sup>22</sup> the SEC could impose civil monetary penalties in an administrative proceeding only against a violator that was a person registered under the Exchange Act, and only a federal court could assess penalties against defendants who were not registered persons.<sup>23</sup> Dodd–Frank gave ALJs the

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<sup>17</sup> Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. LAW. 1, 6 (2015).

<sup>18</sup> BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., LSB10823, REMOVAL PROTECTIONS FOR ADMINISTRATIVE ADJUDICATORS: CONSTITUTIONAL SCRUTINY AND CONSIDERATIONS FOR CONGRESS 1 (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10823> (on file with the *Ohio State Law Journal*).

<sup>19</sup> Securities Enforcement Remedies and Penny Stock Reform Act of 1990, 15 U.S.C. § 77h-1 (2012) [hereinafter 1990 Remedies Act].

<sup>20</sup> *Id.* § 203, 104 Stat. at 939. The FTC and then the SEC had power to commence types of administrative proceedings under the original Securities Act of 1933 (see original section 8(b), (d)) and Securities Exchange Act of 1934 (see original section 19(a)). Congress added a major new area for administrative proceedings in 1936. It amended section 15 of the Exchange Act to require broker-dealers to register and gave the SEC power to revoke or suspend broker-dealer registration in an AP. Pub. L. No. 621, 49 Stat. 1375, 1377–78 (1936).

<sup>21</sup> See 1990 Remedies Act, *supra* note 19, § 203(c)(2); see also Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 317 (2017).

<sup>22</sup> See generally Dodd–Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. 77h-1 [hereinafter Dodd–Frank Act].

<sup>23</sup> The 1990 Remedies Act gave the SEC the power to commence an administrative proceeding to obtain a cease-and-desist order against *any person* who violated the federal

power to both award monetary penalties and take jurisdiction over respondents not registered with the agency who broke the securities laws.<sup>24</sup> That left only a few differences between the remedies available to the agency in formal administrative proceedings and those in federal court: only a federal judge can issue injunctive relief (a rare remedy in securities litigation), issue an order prohibiting a person from serving as an officer or director of a public company,<sup>25</sup> or require the forfeiture of incentive-based compensation following a restatement of a public company's required reports.<sup>26</sup>

In formal adjudications at the SEC, the commissioners authorize enforcement proceedings, the agency's enforcement division brings the case against the regulated entity, the SEC-employed ALJ adjudicates, and appeals from administrative proceedings go to the commissioners.<sup>27</sup> Moreover, adjudication proceedings before an ALJ have frequently been analogized to court proceedings, including by the Supreme Court itself.<sup>28</sup> ALJs do not wear robes, but they oversee the proceedings, review evidentiary questions, regulate the hearing process, make initial decisions,<sup>29</sup> administer oaths, and subpoena

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securities laws or any person who caused such a violation. Pub. L. No. 101-429, § 203, 104 Stat. 939 (October 15, 1990) (section 21C(a) of the Exchange Act, 15 U.S.C. § 78u-3(a)).

<sup>24</sup> Dodd-Frank Act, *supra* note 22, § 929P. The statute broadened the SEC's authority to impose industry-wide suspensions, which prohibit securities professionals who are found to have violated any aspect of securities laws from joining any regulated entity. *See id.* As Andrew Ceresney, former director of the SEC Enforcement Division explained, "Congress provided us authority to obtain penalties in administrative proceedings against unregistered parties comparable to those we already could obtain from registered persons." Andrew Ceresney, Dir., U.S. Sec. & Exch. Comm'n Div. of Enf't, Remarks to ABA Business Law Section Fall Meeting (Nov. 21, 2014).

<sup>25</sup> An injunction from a federal court in a private securities case is atypical (though not unprecedented), but an injunction from a federal court in an SEC enforcement case is standard. For decades, the sole statutory remedy available to the SEC in federal court was an injunction (The Securities Act of 1933, 15 U.S.C. §§ 77a-77aa, § 20(b); The Securities Exchange Act of 1934, Ch. 404, tit. 1, § 21(d)(1), 48 Stat. 881). The SEC may enter a cease-and-desist order in an administrative proceeding, and a cease-and-desist order is similar in many ways to a court's injunction. Securities Exchange Act of 1934, 15 U.S.C. § 78u(d)(2) (2012).

<sup>26</sup> Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7243(a) (2012) [hereinafter Sarbanes-Oxley Act]. Under Section 954 of Dodd-Frank, however, all listed companies are required to adopt clawback policies, and because those policies are adopted by individual companies to comply with exchange listing standards, the SEC does not have much more to do to implement Sarbanes Oxley. 17 C.F.R. § 240.10D-1 (2015).

<sup>27</sup> SEC Rules of Practice, 17 C.F.R. § 201 (2023).

<sup>28</sup> *See, e.g.,* Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743, 758 (2002) ("[T]he role of the ALJ . . . is similar to that of an Article III judge."); *Butz v. Economou*, 438 U.S. 478, 513 (1978) ("[T]he role of the modern . . . administrative law judge . . . is 'functionally comparable' to that of a judge."); *see also* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 798 (2013) ("Federal administrative law judges . . . are the demigods of federal adjudication.").

<sup>29</sup> The scope of SEC ALJs' authority is equal to that of all other ALJs under the APA. *See* 17 C.F.R. § 201.111 ("No provision of these Rules of Practice shall be construed to limit

witnesses.<sup>30</sup> They cannot hear counterclaims against the agency, but can consider constitutional and common-law issues and defenses.<sup>31</sup> There is no jury, and the SEC's Rules of Procedure supplant the Federal Rules of Civil Procedure and Evidence.<sup>32</sup> These rules differ in some ways from the rules the courts apply—taking a relaxed view towards admissible evidence, including hearsay, for example<sup>33</sup>—and some motions, including motions to dismiss, may not be brought.<sup>34</sup>

If after that process the respondent remains aggrieved, she may appeal the decision to the Commission itself, with further appeal to the relevant federal courts of appeals under the standard principles of APA review.<sup>35</sup> There, the agency's factual findings are reviewed for “substantial evidence.”<sup>36</sup> Its legal determinations are entitled to deference, if a reasonable construction of an ambiguous statutory provision,<sup>37</sup> although the Supreme Court recently stopped citing the famous *Chevron v. NRDC* case that set forth that standard of review.<sup>38</sup>

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the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557.”)

<sup>30</sup> 17 C.F.R. § 201.111(a)–(c).

<sup>31</sup> See *McKart v. United States*, 395 U.S. 185, 195 (1969) (“[N]otions of administrative autonomy require that the agency be given a chance to discover and correct its own errors.”); *Chau v. U.S. Sec. & Exch. Comm’n*, 72 F. Supp. 3d 417, 435 (S.D.N.Y. 2014), *aff’d*, 665 F. App’x 67 (2d Cir. 2016) (noting that SEC ALJs have authority to consider constitutional challenges to the fairness of the administrative hearing itself, “at least in the first instance”). SEC ALJs have issued initial decisions addressing a wide range of constitutional issues and common-law defenses raised by respondents. See, e.g., *Harding Advisory LLC*, Initial Decision Release No. 734, 2015 WL 137642, at \*86 (ALJ Jan. 12, 2015) (considering equal protection and due process); *Michael A. Horowitz*, Initial Decision Release No. 733, 2015 WL 77529, at \*26 (ALJ Jan. 7, 2015) (considering laches and equitable estoppel); *John Thomas Capital Mgmt. Grp. LLC*, Initial Decision Release No. 693, 2014 WL 5304908, at \*2 (ALJ Oct. 17, 2014) (considering the impartiality of an SEC tribunal and ex parte communication between prosecutor and ALJ), *vacated* 2020 WL 5291417 (Sept. 2, 2020), *cert granted* 34 F.4th 446 (5th Cir. 2022).

<sup>32</sup> See 17 C.F.R. § 201.31.

<sup>33</sup> Jay Alan Ochanpaugh, Opinion of the Commission, Exchange Act Release No. 54363, 88 SEC Docket 2510, 2515 n.29 (Aug. 25, 2006) (quoting Jesse Rosenblum, Investment Advisers Act Release No. 913, 30 SEC Docket 692, 696 (May 17, 1984)).

<sup>34</sup> See Jeffrey L. Feldman, Admin. Proc. File No. 3-8063, SEC Release No. 403, 55 SEC Docket 2477, 2478 (ALJ Jan. 14, 1994) (“[U]nder Rule 11 of the Commission’s Rules of Practice the first opportunity I have to rule on a motion which would dispose of a proceeding is at the conclusion of the Division’s direct case . . . . I have no authority to rule on the motions at this stage of the proceeding.”).

<sup>35</sup> 5 U.S.C. § 702.

<sup>36</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–79 (1951).

<sup>37</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

<sup>38</sup> See, e.g., Richard J. Pierce, Jr., *Is Chevron Deference Still Alive?*, REGUL. REV. (July 14, 2022), <https://www.theregreview.org/2022/07/14/pierce-chevron-deference/> [https://perma.cc/5L3B-DDRE].



ALJs receive career appointments,<sup>39</sup> and may only be removed from their position for good cause, as “established and determined” by the Merit Systems Protection Board (“MSPB”).<sup>40</sup> ALJs can be removed by SEC commissioners, who themselves can only be removed from office for “inefficiency, neglect of duty or malfeasance in office.”<sup>41</sup> And more, members of the MSPB are also only removable for the same reasons.<sup>42</sup> According to the Fifth Circuit in *Jarkesy*, these multiple layers of removal protection violate separation of powers.<sup>43</sup> ALJs, moreover, are exempt from performance reviews, cannot be supervised by investigators or prosecutors, enjoy a variety of work assignment protections, and receive salaries that are not set by statute (and not by the agency for which they work).<sup>44</sup>

However, respondents before ALJs are conferred one benefit that is not afforded in district courts: The SEC Rules of Practice impose a *Brady* obligation on the agency, meaning that the SEC must turn over all exculpatory information to the respondent before any hearing.<sup>45</sup> Generally, this rule applies only to criminal defendants in federal courts and not to civil defendants in other contexts.<sup>46</sup> Yet the imposition of the *Brady* rule has not necessarily eased hesitancy over administrative proceedings. William McLucas, who previously served as the SEC enforcement head and now leads the defense bar, nicely captures this concern:

With limited ability to obtain documents needed for a defense, with no opportunity to depose witnesses like the SEC did during the often multiyear investigation leading to the charges, and with insufficient time to locate defense

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<sup>39</sup> 5 C.F.R. § 930.204(a) (2016).

<sup>40</sup> See 5 U.S.C. § 7521(a) (providing ALJs with for cause removal protection); Memorandum from the Solicitor General, U.S. Dep’t of Just., to Agency Gen. Counsels, Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) (July 2018) (arguing that this protection remains intact after *Lucia*).

<sup>41</sup> *MFS Sec. Corp. v. U.S. Sec. & Exch. Comm’n*, 380 F.3d 611, 619 (2d Cir. 2004) (internal quotations omitted) (quoting *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988)). The Supreme Court seemed to endorse the existence of “for cause” protections for SEC commissioners in *Free Enterprise*, but it is worth noting that the statute says nothing about it. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 546 (2010) (“It is certainly not obvious that the SEC Commissioners enjoy ‘for cause’ protection. Unlike [other statutes], the statute that established the Commission says nothing about removal.”).

<sup>42</sup> 5 U.S.C. § 1202(d).

<sup>43</sup> *Jarkesy v. U.S. Sec. & Exch. Comm’n*, 34 F.4th 446, 465 (5th Cir. 2022), *cert granted*, 143 S. Ct. 2688 (2023).

<sup>44</sup> Jeffrey Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 111, 119, 128 (1981).

<sup>45</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>46</sup> See 17 C.F.R. § 201.230(a)(1) (2023) (“[T]he Division of Enforcement shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division’s recommendation to institute proceedings.”).

expert witnesses to respond to the SEC's experts, these proceedings can be stacked in favor of the SEC.<sup>47</sup>

Monetary penalties can range from relatively small to quite large in aggregate: for each violation, individuals face up to \$160,000 and corporations face up to \$775,000 (the maximum number is adjusted for inflation).<sup>48</sup> The SEC has defined violations broadly. For example a material misstatement made to a number of different investors could create the basis for a series of monetary penalties.<sup>49</sup> In FY 2022, the agency, via an administrative proceeding, imposed a civil monetary penalty of \$125,000 for a Philadelphia lawyer who facilitated the sale of illegally unregistered securities—a modest fine, although certainly uncomfortable for most individuals to have to pay.<sup>50</sup> That year, again through an administrative proceeding, it also imposed a \$100 million penalty on Ernst and Young for permitting its employees to cheat on the exams required to obtain CPA licenses—many employees cheated on the ethics components of the exam, making for many different penalties, which were then wrapped up in a round number settlement.<sup>51</sup> It sanctioned JP Morgan in the amount of \$125 million for using unauthorized communications media—texts and WhatsApp, most notably—to communicate with one another and with other financial professionals.<sup>52</sup>

Additionally, the statute provides that the SEC can “enter an order requiring accounting and disgorgement” in any proceeding wherein the SEC can impose a penalty.<sup>53</sup> Disgorgement serves as a critical deterrent to violation of securities

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<sup>47</sup> William McLucas & Matthew Martens, *How to Rein in the SEC*, WALL ST. J. (June 2, 2015), <https://www.wsj.com/articles/how-to-rein-in-the-sec-1433285747> (on file with the *Ohio State Law Journal*).

<sup>48</sup> 17 C.F.R. § 201.1001 tbl.I.

<sup>49</sup> *See id.*

<sup>50</sup> *SEC Charges Philadelphia Lawyer with Fraud*, U.S. SEC. & EXCH. COMM'N (July 7, 2022), <https://www.sec.gov/enforce/33-11080-s> [<https://perma.cc/D9A4-MLTX>].

<sup>51</sup> Press Release, U.S. Sec. & Exch. Comm'n, Ernst & Young to Pay \$100 Million Penalty for Employees Cheating on CPA Ethics Exams and Misleading Investigation (June 28, 2022), <https://www.sec.gov/news/press-release/2022-114> [<https://perma.cc/5GP6-CAFT>].

<sup>52</sup> Press Release, U.S. Sec. & Exch. Comm'n, JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay \$125 Million Penalty to Resolve SEC Charges (Dec. 17, 2021), <https://www.sec.gov/news/press-release/2021-262> [<https://perma.cc/WXT6-Y5YF>]. Nor was this the largest civil monetary penalty the agency imposed in the fiscal year. *See* Press Release, U.S. Sec. & Exch. Comm'n, Barclays Agrees to a \$361 Million Settlement to Resolve SEC Charges Relating to Over-Issuances of Securities (Sept. 29, 2022), <https://www.sec.gov/news/press-release/2022-179> [<https://perma.cc/FRA6-J8YJ>] (“The firms agreed to pay a \$200 million civil penalty and the SEC additionally ordered BBPLC to pay disgorgement and prejudgment interest of more than \$161 million.”).

<sup>53</sup> 15 U.S.C. § 78u-2(e).

laws, in addition to a way to compensate victims.<sup>54</sup> Consequently, disgorgement, which can be punishingly large, provides a way for the agency to establish a large monetary award, while also avoiding the almost philosophical difficulties brought about by questions of investor harms assuming diversified holdings and efficient markets.<sup>55</sup> The SEC often collects more in disgorgement than it does in civil penalties.<sup>56</sup> In FY 2022, however, the penalties collected by the agency were far higher, with the SEC sending \$4.194 billion in penalties to the Treasury Department's general fund, compared to the \$2.245 billion it collected through disgorgement of illegal profits.<sup>57</sup> The FY 2022 collections were the highest ever recorded by the agency, and the highest amount of civil monetary penalties collected by the agency.<sup>58</sup>

To be sure, the agency adjudication enforcement channel at the SEC has not always been a particularly venerable one. It has been marked with a steady expansion of the jurisdiction and powers of SEC administrative adjudicators, culminating with Dodd–Frank ushering in an era where they wield power approximately equal to Article III courts.<sup>59</sup> In response to Congress's grant of authority in that statute, the SEC brought more cases in administrative proceedings.<sup>60</sup> Drawing protests from the securities defense bar and

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<sup>54</sup> U.S. Sec. & Exch. Comm'n v. Cavanagh, 445 F.3d 105, 117 (2d Cir. 2006) (“In a securities enforcement action, as in other contexts, ‘disgorgement’ is not available primarily to compensate victims. Instead, disgorgement has been used by the SEC and courts to prevent wrongdoers from unjustly enriching themselves through violations, which has the effect of deterring subsequent fraud.” (footnote omitted)).

<sup>55</sup> While the 1990 statute explicitly gave the SEC the power to seek disgorgement in the federal forum, the SEC has long sought disgorgement as an equitable remedy in enforcement actions in federal court. *See, e.g.*, Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1, 2–3, 2 n.12 (2013) (“In practice . . . the SEC rarely uses administrative proceedings to pursue contested disgorgement claims, preferring instead to file and litigate such claims in federal court.”).

<sup>56</sup> *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Results for FY21 (2021) (on file with author).

<sup>57</sup> Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), <https://www.sec.gov/news/press-release/2022-206> [<https://perma.cc/U5E5-HBRK>].

<sup>58</sup> *Id.*

<sup>59</sup> Some forms of relief are available only in administrative proceedings, such as stop orders (*e.g.*, SA §§ 8(b), (d)) and limitations on or discipline of regulated persons (*e.g.*, EA sections 15(b), 19(h)). *See* Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORD. L. REV. 1143, 1145 nn.2, 4 (2016).

<sup>60</sup> *See* Jean Eaglesham, *SEC Wins with In-House Judges; Agency Prevails Against Around 90% of Defendants When It Sends Cases to Its Administrative Law Judges*, WALL ST. J., (May 6, 2015), <https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803> (on file with the *Ohio State Law Journal*) (“The SEC brought more than four out of five of its enforcement actions as administrative proceedings, rather than federal-court cases, in the fiscal year ended Sept. 30.”).

constitutional litigation against SEC proceedings<sup>61</sup> (which eventually spread to other agencies' administrative proceedings)<sup>62</sup>, the SEC ultimately redirected its most contentious cases away from administrative proceedings.<sup>63</sup> Judicial and executive developments in the wake of the passage of Dodd–Frank have made it somewhat less likely that ALJs would be as politically independent as federal judges.<sup>64</sup> And *Jarkesy* has thrown the entire enterprise of agency adjudication into question.<sup>65</sup>

### III. A PATH FORWARD: THE RIGHT TO REMOVE

As detailed in the Introduction, the constitutional questions presented in *Jarkesy* have the potential to cause tremendous disruption at the SEC and in the federal administrative judiciary more generally. Indeed, as noted in Part II, the SEC has already substantially shifted enforcement activities outside of its in-house adjudication system and into federal courts. In this Essay, we do not weigh in on the merits of the constitutional claims, but instead focus on one path forward that the SEC or Congress could implement now, or that perhaps the Court could embrace in *Jarkesy*: a right to remove to federal court.

In this Part, we flesh out this right-to-remove proposal. Part III.A sketches out the details of the process. Part III.B explains how the right to remove avoids the constitutional issues raised by *Jarkesy*. Part III.C explores how the SEC, Congress, and perhaps even the Supreme Court could implement this reform.

#### A. *Mechanics of Right to Remove*

The mechanics of the right to remove at the SEC (or other agencies) will differ somewhat depending on the breadth of the removal right and the structure

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<sup>61</sup> See Platt, *supra* note 17, at 14–21 (discussing constitutional arguments advanced by respondents in SEC enforcement actions).

<sup>62</sup> See, e.g., *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986 (2021) (holding that patent adjudication at the U.S. Patent and Trademark Office was too insulated from presidential control to be consistent with separation of powers).

<sup>63</sup> Adrian Brune, *Removing Barriers to Removal*, FORDHAM L. NEWS (Jan. 15, 2015), <https://news.law.fordham.edu/blog/2015/11/30/removing-barriers-to-removal/> [<https://perma.cc/38FC-9E6P>] (“Of 160 cases affecting more than 500 defendants in the past two quarters, the SEC sent just 11 percent of its contested cases to its administrative law judges, down from 40 percent in 2014.”).

<sup>64</sup> After the Supreme Court held that ALJs are obligated, as a matter of constitutional law, to be appointed by the SEC commissioners, see *Lucia v. SEC*, 138 S. Ct. 2044, 2054 (2018), President Trump issued an executive order that provided that ALJs could be appointed without the civil service protections afforded other government employees. Exempting Administrative Law Judges from the Competitive Service, Exec. Order No. 13843, 83 Fed. Reg. 32,755 (July 10, 2018).

<sup>65</sup> See generally *U.S. Sec. & Exch. Comm’n v. Jarkesy*, 34 F.4th 446 (5th Cir. 2022), *cert granted*, 143 S. Ct. 2688 (2023); Nielson, Walker & Wasserman, *supra* note 12, manuscript at 19–33.

of the agency's statutory and regulatory scheme. For ease of illustration, we focus on the civil penalty provision at issue in *Jarkesy*.<sup>66</sup>

In that statute, Congress gives the SEC “or the appropriate regulatory agency” the authority to impose a civil penalty in certain administrative proceedings if the agency “finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person” has willfully violated certain statutes or regulations, aided or abetted in such violation, “failed to reasonable supervise” to prevent such violation, or willfully made a material misrepresentation to the agency or in public filings.<sup>67</sup> The statute instructs how the agency should determine “public interest” for civil penalty purposes.<sup>68</sup> It also establishes three tiers for the maximum amount of penalty per violation—ranging from \$5,000 per natural person or \$50,000 for any other person to \$100,000 and \$500,000 at the high end if the violation involved fraud or deceit and resulted in substantial losses to others or substantial gain to the violator.<sup>69</sup> Finally, the statute allows the agency to consider the violator's ability to pay the civil penalty and authorizes the agency to require accounting or disgorgement.<sup>70</sup>

A right to remove could fit comfortably within this statutory scheme. Once the SEC has issued its statutorily required notice of the potential of imposing civil penalties under the statute, the respondent could be allowed to file with the SEC a notice to remove the proceeding to federal district court. In response, the SEC would then stay or dismiss the administrative proceedings and file its complaint seeking civil penalties in the appropriate federal district court. For reasons explained in Part III.B, it would be important for the SEC to include in its notice of potential civil penalties that the respondent has a right to remove the matter to federal court and that its failure to request removal indicates the respondent consents to proceed with an in-house agency adjudication.

Conversely, it is important that the ability to exercise this right to removal be time limited. As the U.S. Chamber recommends, the notice of removal to federal court “should be filed after a respondent has been informed that the Commission has authorized an administrative proceeding and prior to the Commission issuing an order instituting proceedings.”<sup>71</sup> Here, that time limit may be set as between when the SEC issues notice of the potential civil penalties and the date of the hearing on those penalties. But we leave those details to the SEC or Congress to sort out by regulation or statute, respectively.

This sort of regulatory mechanism is not completely unprecedented at the SEC. In 2012, Egan-Jones Ratings Co. and Sean Egan filed a notice with the SEC Enforcement Division, prior to formal agency action, of their request for

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<sup>66</sup> See 15 U.S.C. § 78u-2.

<sup>67</sup> *Id.* § 78u-2(a)(1).

<sup>68</sup> *Id.* § 78u-2(c).

<sup>69</sup> *Id.* § 78u-2(b).

<sup>70</sup> *Id.* § 78u-2(d), (e).

<sup>71</sup> CHAMBER REPORT, *supra* note 8, at 20.

the matters to be litigated in federal court, and then filed a lawsuit in federal court against the SEC.<sup>72</sup> They ultimately dismissed that lawsuit as part of a settlement that also settled the agency enforcement action.<sup>73</sup> Although the SEC did not grant the request to remove in that case,<sup>74</sup> it nicely illustrates how the removal mechanism could work.

Similarly, this sort of consent-based adjudication outside of Article III courts is not at all unusual. Congress has implemented it in a number of contexts, perhaps most notably with respect to trials before federal magistrate judges, who are not presidentially appointed, Senate-confirmed Article III judges.<sup>75</sup> By statute, Congress authorizes federal magistrate judges, “[u]pon the consent of the parties,” to “conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.”<sup>76</sup> Such consent, the statute provides, “allows a magistrate judge . . . to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure.”<sup>77</sup> After a magistrate enters judgment, “an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court.”<sup>78</sup> Federal Rule of Civil Procedure 73 further details this process, including the method by which the parties consent.<sup>79</sup>

In sum, a right to remove would impose in SEC adjudication of civil penalties a principle of consent to in-house agency adjudication. The SEC would provide notice of the potential for civil penalties issued through its in-house adjudication proceedings and allow the respondent to file a notice of removal to federal court within a specific time. If the respondent requests removal, the SEC would then file a complaint in federal district court seeking such civil penalties.

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<sup>72</sup> See *id.* at 59 n.72; see also Jeannette Neumann, *Egan-Jones Petitions to Move SEC Case to Federal Court*, WALL ST. J. (June 6, 2012), <https://www.wsj.com/articles/SB10001424052702303665904577450923469493822> (on file with the *Ohio State Law Journal*).

<sup>73</sup> See CHAMBER REPORT, *supra* note 8, at 59 n.72 (discussing *In the Matter of Egan-Jones Ratings Co. and Sean Egan*, Rel. 34-66854, File No. 3-14856, April 24, 2012, <http://www.sec.gov/litigation/admin/2012/34-66854.pdf>).

<sup>74</sup> *Id.*

<sup>75</sup> See *About Federal Judges*, U.S. COURTS, (Jan. 6, 2023), <https://www.uscourts.gov/judges-judgeships/about-federal-judges> [<https://perma.cc/Z2YN-BXRC>].

<sup>76</sup> 28 U.S.C. § 636(c)(1).

<sup>77</sup> 28 U.S.C. § 636(c)(3).

<sup>78</sup> *Id.*

<sup>79</sup> FED. R. CIV. P. 73(b).

### B. *Constitutionality of the Right to Remove*

Perhaps the more pressing question than whether such a right to removal could be implemented is whether it would avoid the constitutional questions raised in *Jarkesy* or perhaps even introduce other constitutional complications. Can Congress or an agency eliminate a nondelegation separation of powers violation by delegating power to private parties to consent away the violation? Can Congress or an agency get around the Seventh Amendment jury right by having the parties to the litigation consent? Or put differently, perhaps, can consent confer “judicial power” under Article III on an ALJ and the agency more generally?

Here, we do not endeavor to answer these questions as a matter of original understanding of the Constitution, but instead we base our analysis on the Supreme Court’s existing precedent. And under that precedent, the answer is yes. Let’s return to the federal magistrate judge context. As noted in Part III.A, Congress allows magistrate judges to adjudicate jury and nonjury civil matters whenever the parties consent.<sup>80</sup> By statute, Congress also allows magistrate judges to adjudicate criminal misdemeanors so long as the parties consent to the adjudication.<sup>81</sup> Indeed, in *Peretz v. United States*, the Court held that magistrate judges, when delegated authority from a district court judge, may conduct jury selection in a felony trial so long as the defendant consents.<sup>82</sup> In so doing, the Court held that “a defendant has no constitutional right to have an Article III judge preside at jury selection if the defendant has raised no objection to the judge’s absence.”<sup>83</sup>

In reaching this conclusion, the Court recited the numerous precedents that hold that “[t]he most basic rights of criminal defendants are similarly subject to waiver.”<sup>84</sup> And it relied on *CFTC v. Schor* for the precedent “that litigants may waive their personal right to have an Article III judge preside over a civil trial.”<sup>85</sup> We agree with Will Baude that *Peretz* arguably overreads *Schor*, in that in *Schor*, consent “was deemed to be ‘relevan[t]’ but not always ‘dispositive.’”<sup>86</sup> But, as Baude points out, the Court subsequently upheld bankruptcy adjudication based on consent in *Wellness International Network, Ltd. v. Sharif*,

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<sup>80</sup> 28 U.S.C. § 636(c)(1).

<sup>81</sup> 18 U.S.C. § 3401(b).

<sup>82</sup> *Peretz v. United States*, 501 U.S. 923, 936 (1991); *cf. Gomez v. United States*, 490 U.S. 858, 860, 870–72 (1989) (holding that a magistrate judge cannot preside over jury selection in a felony trial without the defendant’s consent).

<sup>83</sup> *Peretz*, 501 U.S. at 936.

<sup>84</sup> *Id.* at 936–37 (citing precedents).

<sup>85</sup> *Id.* at 936 (citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986)).

<sup>86</sup> William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1556 (2020) (alterations in original) (quoting *Schor*, 478 U.S. at 849, 851).

holding that “Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.”<sup>87</sup>

To be sure, over the decades, not all Justices have agreed that parties can consent to certain adjudications outside of Article III. Dissenting in *Schor*, for instance, Justice Brennan, joined by Justice Marshall, expressed disbelief “that a litigant may ever waive his right to an Article III tribunal where one is constitutionally required. In other words, consent is irrelevant to Article III analysis.”<sup>88</sup> And in his dissent in *Wellness International Network*, Chief Justice Roberts, joined by Justice Scalia, argued that consent is not sufficient to constitutionalize the bankruptcy adjudication of state-law claims at issue because the parties have “no authority to compromise the structural separation of powers or agree to an exercise of judicial power outside Article III.”<sup>89</sup> Andy Hessick has developed this argument in greater detail, concluding that “permitting Article I tribunals to adjudicate based on the parties’ consent is inconsistent with the text of the Constitution and historical practice, and it undermines both the separation of powers and federalism.”<sup>90</sup> But those are minority positions that do not garner a current Supreme Court majority and would require a substantial reworking of current doctrine and precedent.

As a matter of precedent and practice, moreover, the logic of this no-consent argument would extend to parties’ agreements to private adjudication, including of disputes under federal law, under the Federal Arbitration Act and similar statutes.<sup>91</sup> Although some scholars have questioned the consent justification for the constitutionality of arbitration,<sup>92</sup> it is unlikely the Court would reverse course anytime soon and declare that arbitration too is unconstitutional because parties cannot consent to non-Article III adjudication. Indeed, Justice Alito’s concurrence in *Wellness International Network* is instructive:

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<sup>87</sup> *Id.*; *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 669 (2015). There is, of course, a case to be made against settlement, *cf.* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984), but it is not a very realistic one. It is hard to argue that litigants who no longer wish to litigate are nonetheless forced to do so.

<sup>88</sup> *Schor*, 478 U.S. at 867 (Brennan & Marshall, JJ., dissenting).

<sup>89</sup> *Wellness Int’l Network*, 575 U.S. at 695 (Roberts, C.J., dissenting); *see also id.* at 706–721 (Thomas, J., dissenting) (exploring the interaction between consent and judicial power in greater detail). Although outside the scope of this Essay, it is quite possible that the consent issues in bankruptcy are more complicated and problematic—i.e., where absent third parties are affected greatly by decisions made by bankruptcy judges and where bankruptcy judges adjudicate state-law claims, as opposed to claims under federal law.

<sup>90</sup> F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 715 (2018).

<sup>91</sup> *See* 9 U.S.C. § 2; *see also, e.g.*, *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion . . .”).

<sup>92</sup> *See, e.g.*, Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1193 (2008) (arguing “that arbitration implicates serious structural values underpinning Article III—values that the traditional account is unable to accommodate”).



No one believes that an arbitrator exercises “[t]he judicial Power of the United States,” Art. III, § 1, in an ordinary, run-of-the mill arbitration. And whatever differences there may be between an arbitrator’s “decision” and a bankruptcy court’s “judgment,” those differences would seem to fall within the Court’s previous rejection of “formalistic and unbending rules.”<sup>93</sup>

Professor Baude provides perhaps the most compelling argument why such consent to non-Article III adjudication does not constitute the exercise of judicial power and thus is constitutional:

Locating non-Article III adjudication within the Constitution helps us see the power reflected by consent. Arbitrators and magistrates do not exercise judicial power, whether of the United States or any other government. But their adjudication of federal claims is nonetheless permissible.

It is true, as the skeptics argue, that consent cannot confer judicial power. But it can make judicial power unnecessary. Judicial power is necessary because the Due Process Clause gives one a right to it. But if one waives that right, then judicial power is no longer necessary. Indeed, no power is necessary, other than the ordinary powers of contract that can be bestowed upon anybody.<sup>94</sup>

In sum, under existing precedent and a proper understanding of judicial power, a right to remove—and thus transform agency adjudication to impose civil penalties into a consent-based adjudication—would avoid the constitutional questions raised in *Jarkesy* without introducing other constitutional concerns. As further detailed in Part IV, this proposal would also be superior as a policy matter compared to a rule that civil penalties may only be sought in federal courts.

### C. Potential Reformers: SEC, Congress, or the Court?

Another benefit of this proposal is that it could be adopted by the SEC or Congress, or perhaps even by the Supreme Court in *Jarkesy*. We address each in turn.

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<sup>93</sup> *Wellness Int’l Network*, 575 U.S. at 686 (Alito, J., concurring in part and concurring in the judgment) (quoting U.S. CONST. art. III, § 1, and *Schor*, 478 U.S. at 851).

<sup>94</sup> Baude, *supra* note 86, at 1557. To be sure, consent must be, well, consensual. For instance, one could imagine a regulatory scheme raising questions of unconstitutional conditions if the regulated entity had to consent or waive an Article III adjudication at the outset in order to receive a permit, obtain a government benefit, or otherwise gain access to a regulated market. *See generally* Randy J. Kozel, *Leverage*, 62 B.C. L. REV. 109 (2021); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

### 1. *The Regulatory Approach*

The SEC through internal administrative law could adopt the right to remove now, before the Court even decides *Jarkesy*. To do so, it could promulgate a procedural rule that creates the right-to-remove mechanism sketched out in Part III.A. Because this is a procedural rule, it would not have to go through notice-and-comment rulemaking<sup>95</sup>—though it would be prudent to seek post-promulgation comments to receive input from the regulated and the public more generally on how to best design this right to remove. By creating this procedural rule now, that may well bring the issue before the Court in *Jarkesy* itself.

It is worth noting that the ABA Section of Business Law seemed to operate under the assumption that legislation would be required to implement a right to remove.<sup>96</sup> That is because it envisioned the right to remove to be an extension of a respondent’s statutory right to remove an action brought in state court that could have been brought in federal court.<sup>97</sup> Although we agree that such an approach would require legislative action, we do not weigh in here on whether that sort of statutory removal process would work. Our proposal is more advantageous, as it is one the agency could promulgate through internal administrative law now without the need for congressional action.

### 2. *The Legislative Approach*

Congress could amend the SEC’s governing statute to create a right to remove when the SEC seeks civil penalties in an in-house adjudication. As noted in the Introduction, Republicans introduced a version of this removal proposal in the Administrative Enforcement Fairness Act of 2022, which was ultimately to be included in the larger JOBS Act 4.0.<sup>98</sup> That removal mechanism provides that “[a]ny administrative proceeding brought by the Commission . . . may be

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<sup>95</sup> 5 U.S.C. § 553(b)(A); *see also, e.g.*, OFF. FED. REG., A GUIDE TO THE RULEMAKING PROCESS 8 (2011), [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) [<https://perma.cc/HQ79-74QJ>].

<sup>96</sup> *See* ABA REPORT, *supra* note 7, at 1733 (“The desired reform could be achieved by giving a defendant in an SEC administrative proceeding the right to insist that his trial be before a U.S. district court. Another way to implement our recommendation would be to vest the SEC’s authority to initiate an ALJ proceeding in an independent General Counsel’s office, as is the existing practice in the NLRB. We recognize that either recommendation would require legislative action which we urge Congress and the Commission to consider.”); *cf.* CHAMBER REPORT, *supra* note 8, at 20 (similarly recommending a right to remove but not necessarily suggesting that legislation would be required).

<sup>97</sup> 28 U.S.C. § 1446(a) (“A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal . . .”).

<sup>98</sup> Administrative Enforcement Fairness Act, *supra* note 9, § 2; Jumpstart Our Business Startups Act, *supra* note 9, § 405. As further discussed in Part IV.B *infra*, the removal mechanism in this legislation differs in important respects from our proposal.

removed by the eligible respondent to the district court of the United States in accordance with” the existing statutory procedure for removing civil actions from state court to federal court.<sup>99</sup> The proposal excludes any respondent whose securities are registered with the SEC, which includes issuers, broker-dealers, investment advisers, and others, and in that way differs from our proposal, which would extend the right to remove to any respondent.<sup>100</sup> It also permits respondents to remove administrative proceedings up to one year after the proceedings are filed.<sup>101</sup> We think—especially given that administrative proceedings are supposed to be concluded in less than one year—that a long deadline could be disruptive; better to have respondents seek to remove shortly after the SEC provides notice about the potential for civil penalties.

Unlike the JOBS Act 4.0 approach to removal—modeled after the federal statute allowing for removal to federal court of actions pending in state court—Congress has codified a right to remove more similar to our proposal in at least three other statutory contexts. Under the Fair Housing Act, “a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed” has 20 days after receiving service of the charge to “elect to have the claims” adjudicated in federal court; otherwise, the case will remain in agency adjudication.<sup>102</sup> When such election is made, “the Secretary shall authorize, and not later than 30 days after the election is made the Attorney General shall commence and maintain, a civil action” in federal district court.<sup>103</sup> This is the model we recommend that Congress (or the SEC) adopt here.

Somewhat similarly, under the Federal Power Act and Energy Policy and Conservation Act, the agency must provide notice of the proposed penalty in advance; “[s]uch notice shall inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice” that the respondent may receive *de novo* review in a federal court.<sup>104</sup> Whether the election is made, the Federal Energy Regulatory Commission (FERC) assesses the penalty.<sup>105</sup> Without the election, that penalty is not assessed until after an

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<sup>99</sup> Administrative Enforcement Fairness Act, *supra* note 9, § 2; see Jumpstart Our Business Startups Act, *supra* note 9, § 405 (“In this section, the term ‘eligible respondent’ means any respondent that does not act, or, at the time of the alleged misconduct, did not act, as a registered broker or dealer, registered investment adviser, registered investment company, registered municipal securities dealer, registered nationally recognized statistical rating organization, registered government securities broker, registered government securities dealer, registered public accounting firm, or registered transfer agent.”).

<sup>100</sup> Administrative Enforcement Fairness Act, *supra* note 9, § 2.

<sup>101</sup> *Id.*

<sup>102</sup> 42 U.S.C. § 3612(a).

<sup>103</sup> 42 U.S.C. § 3612(o).

<sup>104</sup> Energy Policy and Conservation Act, *supra* note 10, § 6303(d)(1); accord Federal Power Act, *supra* note 10, § 823b(d)(1).

<sup>105</sup> Energy Policy and Conservation Act, *supra* note 10, § 6303(d)(2)(A) (“Unless an election is made within 30 calendar days after receipt of notice under paragraph (1) to have paragraph (3) apply with respect to such penalty, the Secretary shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for

ALJ hearing and decision, and the respondent has 60 days after the final decision to seek review in a federal court of appeals, subject to the APA's deferential review for agency actions.<sup>106</sup> With the election, FERC assesses the penalty without an ALJ adjudication, and if the respondent does not pay within 60 days, FERC must institute a civil action in federal district court, where "[t]he court shall have authority to review de novo the law and facts involved."<sup>107</sup> This approach seems more time- and resource-intensive than our preferred approach, but it too could work and has a historical pedigree.

These caveats aside, however, our legislative fix is similar to what the ABA and U.S. Chamber have recommended and what Congress has considered and enacted in other contexts. We would encourage Congress to enact such a right to remove, which Congress could do in a simple and straightforward way as it has already done under the Fair Housing Act, leaving the implementation details for the SEC to flesh out through procedural rules. Among other things, one could imagine that the parties would agree that the bulk of the SEC adjudication remain in agency adjudication, while only the civil penalty issue be removed to federal court. Or, conversely, the SEC, on receiving a respondent's notice to remove, may well decide not to proceed with the civil penalty proceeding at all, avoiding the need for the SEC (or respondent) to file an action in federal court.

### 3. *The Judicial Approach*

Perhaps even the Supreme Court could embrace this right to remove in *Jarkesy* itself. At the outset, we confess this would be a creative statutory interpretation, as the statute itself gives the SEC the authority to seek civil penalties in agency adjudication and says nothing about a right to remove.<sup>108</sup> But creative statutory interpretation to avoid or even resolve constitutional issues is a hallmark of the Roberts Court—and also, in our view, might appeal to those Justices interested in improving due process in administrative enforcement without entirely upsetting the applecart of the thousands of cases that are resolved by administrative adjudicators, of various stripes, every year. The Court has often used tailored remedies to limit the consequences of recognizing separation-of-powers rights that would replicate the unpredictable effects of such a remedy.<sup>109</sup>

We see two potential routes.

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an agency hearing pursuant to section 554 of title 5 before an administrative law judge appointed under section 3105 of such title 5.”)

<sup>106</sup> 42 U.S.C. § 6303(d)(2)(B); *accord* 16 U.S.C. § 823b(d)(2); *see also* 5 U.S.C. § 706 (setting forth deferential scope of review under the APA).

<sup>107</sup> 42 U.S.C. § 6303(d)(3)(B); *accord* 16 U.S.C. § 823b(d)(3)(B).

<sup>108</sup> 15 U.S.C. § 78u-2; *see also supra* Part III.A (detailing statutory scheme).

<sup>109</sup> *See* David Zaring, *Toward Separation of Powers Realism*, 37 *YALE J. ON REGUL.* 708, 743 (2020).

First, the Court could do something like what it did in *United States v. Arthrex*.<sup>110</sup> *Arthrex* involved another constitutional challenge to agency adjudication, this one focused on the fact that administrative patent judges exercise final decision-making authority, enjoy tenure protections, yet are not Senate-confirmed principal officers under the Constitution.<sup>111</sup> The constitutional wrinkle is that, in the America Invents Act, Congress empowered these administrative patent judges to resolve certain patent questions without plenary review by a principal officer.<sup>112</sup> The Federal Circuit reasoned that this was unconstitutional, and that the proper remedy was to sever these adjudicators from their tenure protection such that the agency head could remove administrative patent judges at will.<sup>113</sup>

The Supreme Court agreed with the Federal Circuit that the structure of these PTO adjudications violates the separation of powers, holding that “[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us.”<sup>114</sup> But the Court opted for a different remedy. Instead of making administrative patent judges removable at will by the agency head, the Court struck down the Patent Act’s prohibition on agency-head review of administrative patent judges’ decisions.<sup>115</sup> This is a complete rewriting of the statute—a proposal which at least one of us thought would have required Congress to enact.<sup>116</sup> But the Court grounded this invalidation of the statutory bar on agency-head review on the fact that “the structure of the [U.S. Patent and Trademark Office] and the governing constitutional principles chart a clear course: Decisions by APJs must be subject to review by the Director.”<sup>117</sup> As the Court further observed, this “tailored approach . . . does not result in an incomplete or unworkable statutory scheme” and “would follow the almost-universal model of adjudication in the Executive Branch.”<sup>118</sup>

It is not difficult to see how the Court could craft a similar constitutional remedy in *Jarkesy*. After all, the structure of the agency adjudication system and the governing constitutional principles would support the remedy, as opposed to eliminating agency adjudication entirely for civil penalties. (Unlike in *Arthrex*, administrative proceedings are already reviewable by the SEC

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<sup>110</sup> *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

<sup>111</sup> *Id.* at 1976–78.

<sup>112</sup> *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1329 (Fed. Cir. 2019), *vacated and remanded sub nom. United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

<sup>113</sup> *Id.* at 1338 (labeling this the “narrowest remedy”).

<sup>114</sup> *Arthrex*, 141 S. Ct. at 1985.

<sup>115</sup> *Id.* at 1986–87.

<sup>116</sup> See Christopher J. Walker, *Congress Can and Should Fix the Constitutional Status of Administrative Patent Judges*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 18, 2019), <https://www.yalejreg.com/nc/congress-can-and-should-fix-the-constitutional-status-of-administrative-patent-judges/> [<https://perma.cc/EU9T-62ZE>].

<sup>117</sup> *Arthrex*, 141 S. Ct. at 1986.

<sup>118</sup> *Id.* at 1987.

commissioners.)<sup>119</sup> It would be a much more tailored and less disruptive remedy than eliminating agency adjudication for civil penalties—something Congress expressly authorized in Dodd–Frank. And it would be a complete and workable statutory scheme, as detailed in Part II.A, that would preserve Congress’s decision to allow for agency adjudication in the first instance. Here, the Court could invoke the disruption posed by the elimination of administrative proceedings—contrary to congressional wishes—paired with the settled expectations of regulated entities that administrative proceedings would be an option, as a basis to conclude that opt-out administrative proceedings nicely balance due process with presidential control.

Second, and more creatively, the Court could rely on its decision last term in *Axon Enterprise v. FTC*.<sup>120</sup> There, the Court held that when regulated entities and individuals want to challenge the constitutionality of in-house agency adjudications at the FTC and SEC, they need not wait until the agency adjudications conclude in a final agency action and then seek review in a federal court of appeals, which is the “well-trod path” for judicial review of agency adjudication decisions.<sup>121</sup> Instead, the Court held, regulated parties may “sidestep[] that review scheme” and raise the structural constitutional challenges in federal district court before the agency adjudication has concluded; “[t]he ordinary statutory review scheme does not preclude a district court from entertaining these extraordinary claims.”<sup>122</sup>

Leveraging *Axon* to recognize a constitutional remedy in *Jarkesy* would be a novel path forward. But perhaps the Court could declare prospectively that regulated parties in civil penalty cases can go to district court to enjoin the SEC in-house adjudication—essentially removing the adjudication to federal court by forcing the agency to bring the action there. And the Court could declare in *Jarkesy* that a regulated party’s failure to file an *Axon* challenge in federal court results in constructive consent to the agency adjudication proceeding as a constitutional matter.

If the Court were inclined to craft a right-to-remove remedy in *Jarkesy*, *Arthrex* strikes us as a more compelling (though still creative) path than *Axon*. Indeed, perhaps *Axon*’s recognition of interlocutory judicial review of structural constitutional challenges to agency adjudication makes an *Arthrex* remedy even more appropriate, as it better reconciles the statutory scheme with the underlying structural constitutional concerns. One sees hints of this judicial remedy in some of the briefing in *Jarkesy*. For instance, in its *amicus curiae*

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<sup>119</sup> 5 U.S.C. § 557(b); see also *Office of Administrative Law Judges*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/page/aljsectionlanding> [<https://perma.cc/RTV6-FSHS>] (Nov. 19, 2020) (“An administrative law judge’s initial decision is subject to de novo review by the Commission, which may affirm, reverse, modify, set aside, or remand for further proceedings. A party may petition the Commission for review, or the Commission may choose to review an initial decision on its own initiative.”).

<sup>120</sup> *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023).

<sup>121</sup> *Id.* at 180.

<sup>122</sup> *Id.*

brief, the U.S. Chamber underscores that it is not the case that “administrative agencies may never adjudicate claims implicating private rights.”<sup>123</sup> That is because “the target of an administrative proceeding has the right to demand a trial by jury in an Article III court or to waive that right (knowingly and voluntarily) and have the matter heard before an ALJ in an agency tribunal.”<sup>124</sup>

We leave the potential judicial solution here to the Court and the litigants to explore further. But the SEC (and Congress) need not, and should not, wait for *Jarkesy* to implement a right to removal.

#### IV. THE POLICY CASE FOR THE RIGHT TO REMOVE

In our view, it is worth remembering that agency adjudication has important advantages over alternatives, including litigation in federal court. The ALJs at the SEC are securities law experts, unlike generalist federal judges who rarely see securities litigation. The SEC ALJ process is designed to be concluded within eight months, making it quicker and more efficient.<sup>125</sup> Contesting administrative proceedings is less expensive than federal litigation.<sup>126</sup> And, like Article III federal courts, ALJs have comparable reputation for impartiality and procedural fairness. The courts have compared the agency adjudication process to judicial proceedings relatively favorably,<sup>127</sup> and one of us has conducted a study noting that ALJs render federal court-type decisions in memoranda that look like federal court opinions and that use the same kind of language.<sup>128</sup>

To be sure, there is some tension between the idea that administrative proceedings are fast, cheap, and efficient, and the idea that they are about the same thing as Article III judicial proceedings.<sup>129</sup> Many doubt whether administrative proceedings are quite as fair to defendants as federal court adjudications. Many of the rules of evidence do not apply, most notably the rules

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<sup>123</sup> Brief of The Chamber of Commerce of the U.S., the National Federation of Independent Small Business Legal Center, Inc., and Business Roundtable as Amici Curiae in Support of Respondents at 21, *U.S. Sec. & Exch. Comm’n v. Jarkesy*, 143 S. Ct. 2688 (2023) (No. 22-859).

<sup>124</sup> *Id.*

<sup>125</sup> SEC Rules of Practice, 17 C.F.R. § 201.900(a)(iii) (2023); *cf.* Kaela Dahan, *The Constitutionality of SEC Administrative Proceedings: The SEC Should Cure Its ALJ Appointment Scheme*, 38 CARDOZO L. REV. 1211, 1226 (2017) (critiquing what was at the time the “expedited nature of the SEC’s administrative proceedings—the ‘rocket docket’”).

<sup>126</sup> *See, e.g.*, Platt, *supra* note 17, at 7.

<sup>127</sup> The Supreme Court, for example, has said that the role of ALJs when presiding over hearings is “functionally comparable” to that of an Article III judge. *Butz v. Economou*, 438 U.S. 478, 513 (1978).

<sup>128</sup> Zaring, *supra* note 14, at 1188.

<sup>129</sup> *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 759 (2002) (finding that the similarities between adjudication before ALJs and before federal district court judges are “overwhelming”).

against hearsay evidence,<sup>130</sup> and in general, formal adjudications are not quite as formal as federal courts. There is, of course, no jury trial in agency adjudication. In the case of SEC ALJs, there have been complaints that “[t]he judges’ mind-set reflects the agenda of the agency, which in this arena is enforcement,”<sup>131</sup> that the work product of the adjudicators “ooze[s] parochialism and tunnel vision, again showing the administrative forum is no place for enforcement actions of . . . magnitude,”<sup>132</sup> and that there is a “record of utter deference to the agency.”<sup>133</sup> If anything, the idea is that ALJs will not police the agency for broad overreach, as federal judges sometimes do, but instead focus more on whether the agency has met its legal requirements.<sup>134</sup>

But in what follows, we explore the reasons why even regulated entities might opt for administrative proceedings when given a choice between agency adjudication and federal district court. Administrative proceedings offer advantages to the judicial process itself, in terms of adjudicator expertise, adjudicative speed, and litigation expenses. An alternative rule that requires all these matters to be brought in federal courts would impose substantial costs on the judicial system. And perhaps most importantly, as we conclude in this Part, the right to remove would create a market for law, encouraging the SEC to make its in-house adjudication system even more expert-driven, expedient, efficient, fair, and otherwise attractive for regulated entities in order to compete with the Article III judicial alternative.

### A. Adjudicator Expertise

The handful of ALJs at the SEC have deep expertise in both securities law and regulation and adjudicating administrative disputes. Former SEC enforcement division chief Andrew Ceresney has observed:

The ALJs are focused on hearing and deciding securities cases, year after year. They develop expert knowledge of the securities laws, and the types of entities, instruments, and practices that frequently appear in our cases. Many of our

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<sup>130</sup> See Eugene J. Jeka, *Administrative Law—Hearsay Evidence Held Admissible but Insubstantial in a Social Security Hearing*, 1 LOY. U. CHI. L.J. 155, 156 (1970) (“Hearsay evidence . . . is admissible in an administrative hearing.”).

<sup>131</sup> Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. TIMES (Oct. 5, 2013), <http://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html> [<https://perma.cc/VC83-NMKE>] (quoting securities law practitioner Lewis D. Lowenfels).

<sup>132</sup> *SEC ALJ in Bebo Case Refuses to Consider Constitutional Challenge and Denies More Time to Prepare Defense*, SEC. DIARY (Apr. 8, 2015), <http://securitiesdiary.com/2015/04/08/sec-alj-in-bebo-case-refuses-to-consider-constitutional-challenge-and-denies-more-time-to-prepare-defense/> [<https://perma.cc/K7NS-EDZK>].

<sup>133</sup> Eaglesham, *supra* note 27 (internal quotation marks omitted).

<sup>134</sup> Zaring, *supra* note 14, at 1216.



cases involve somewhat technical provisions of the securities laws, and ALJs become knowledgeable about these provisions.<sup>135</sup>

In the past, ALJs often started at the Social Security Administration, the agency that handles the vast majority of ALJ decision-making.<sup>136</sup> Once judges have amassed a record before that agency, many apply to go work somewhere else.<sup>137</sup> Once at the SEC, ALJs quickly become well versed in the minutiae of the complicated securities laws. Because every case heard is a securities law case and with a high volume of adjudication, the case for expertise is straightforward enough. As such, we will not spend more space here making that case.

### B. Adjudication Speed

In addition, ALJ proceedings are fast. The SEC has in the past been proud of the “rocket docket” overseen by agency adjudicators.<sup>138</sup> ALJs have eight months between complaint and initial decision, meaning that discovery is brief, trial time is generally limited, and the time between the filing of a complaint and a decision is quick.<sup>139</sup> As a result, regulated entities are not left in the purgatory of uncertainty about their legal status for long. As Ceresney has observed, ALJs often can resolve a case while in cases filed in district court, the agency might “still be just at the motion to dismiss stage or part of the way through discovery, with any trial still far down the road.”<sup>140</sup> Administrative proceedings move significantly faster than proceedings in district courts, which is advantageous for several reasons.

First, fast proceedings offer regulated entities resolution and legal certainty. As Ceresney has argued, “It is better to have rulings earlier rather than later. Doing so allows us to have timely public findings of fact and law, and where we are successful, to obtain remedies like industry bars more promptly.”<sup>141</sup> Perhaps most obviously, speedy proceedings mean that those who have violated SEC rules are more quickly removed from positions in which they can continue their

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<sup>135</sup> Ceresney, *supra* note 24.

<sup>136</sup> See Doug Walker, *Answer the Call to Public Service, Become an Administrative Law Judge*, SOC. SEC. MATTERS, <https://blog.ssa.gov/answer-the-call-to-public-service-become-an-administrative-law-judge/> [<https://perma.cc/G87E-KNXE>] (Aug. 19, 2021) (“There are approximately 1700 federal ALJs nationwide, and the Social Security Administration (SSA) employs about 1500 of them.”).

<sup>137</sup> See *Administrative Law Judge Demographics and Statistics In the US*, ZIPPIA, <https://www.zippia.com/administrative-law-judge-jobs/demographics/> [<https://perma.cc/4PYR-P3WE>] (Sept. 9, 2022) (showing that 44% of ALJs stayed in the job for less than 2 years).

<sup>138</sup> See Dahan, *supra* note 125, at 1226; 15 U.S.C. § 78y(b)(4) (2012).

<sup>139</sup> SEC Rules of Practice, 17 C.F.R. § 201.900(a)(iii) (2023).

<sup>140</sup> Ceresney, *supra* note 24.

<sup>141</sup> *Id.*

violations.<sup>142</sup> On the flip side, a shorter timeline in court shortens the period when a respondent might not be permitted to work in the securities industry as a result of the pending proceedings.<sup>143</sup> Moreover, with fewer resources dedicated to proceedings, the SEC has an increased capacity to use its resources in other contexts.

The timeframe for administrative proceedings is fast enough for regulated entities and the agency alike to reap these benefits, while avoiding the problem of being so fast as to disadvantage respondents. Such was not the case prior to 2016. Before then, the SEC required ALJs to render decisions within 300 days of the “date of service of the Order Instituting Proceedings.”<sup>144</sup> And from that point, a hearing had to be held within four months.<sup>145</sup> This could prove burdensome for respondents, who had only those four months to “answer the OIP, review the Commission’s often-voluminous investigative file, prepare for the hearing, and attend the hearing”—a degree of speed that earned protests from the securities defense bar and, eventually, a reformulation of the process by the SEC.<sup>146</sup> In July 2016, the agency amended its Rules of Practice to increase the four-month prehearing period to up to ten months,<sup>147</sup> thereby providing respondents with sufficient time to prepare a defense, while still offering a faster process to respondents than the process they would enjoy in federal court.

The median timeframe for an SEC ALJ decision being handed down is 632 days after filing, whereas the median timeframe for court decisions is 767 days—a five-month difference.<sup>148</sup> A variety of factors contribute to the longer timeframe of district court proceedings. For one, discovery adds length to the judicial process compared to the condensed discovery in administrative proceedings. Indeed, for single-respondent administrative proceedings, each side is permitted up to three depositions; for administrative proceedings involving multiple parties, up to five depositions are allowed for each side.<sup>149</sup>

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<sup>142</sup> See *id.*; see also Velikonja, *supra* note 21, at 326 (“Most significantly, the process before ALJs is much quicker than in court. Mandatory timelines imposed by the SEC’s Rules of Practice require that in many cases, the entire administrative proceeding be completed in less than one year.”); Philip J. Griffin, *Developments in SEC Administrative Proceedings: An Evaluation of Recent Appointment Clause Challenges, the Rapidly Evolving Judicial Landscape, and the SEC’s Response to Critics*, 19 U. PA. J. BUS. L. 209, 214 (2016) (“[A]dministrative proceedings move at a much faster pace than cases brought in federal district court.”).

<sup>143</sup> Cf. *In re* Judy K. Wolf, Initial Decision Release No. 851, 2015 WL 4639230, \*10 (ALJ Aug. 5, 2015) (noting that once Wells Fargo became aware of the SEC investigation, the respondent was placed on administrative leave, and Wells Fargo subsequently terminated her).

<sup>144</sup> Griffin, *supra* note 142, at 214.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 214, 236.

<sup>147</sup> Amendments to the Commission’s Rules of Practice, 17 C.F.R. § 201.

<sup>148</sup> Velikonja, *supra* note 21, at 326 n.75.

<sup>149</sup> 17 C.F.R. § 201.233(a)(1)–(2) (2023).

Instead of a lengthy discovery process, the SEC's Enforcement Division has a *Brady*<sup>150</sup> obligation, meaning it must turn over all relevant evidence, including exculpatory evidence, to the respondent.<sup>151</sup> And, of course, ALJs do not have to select, empanel, and instruct a jury.

### C. *Litigation Expense*

A final broad class of advantages enjoyed by agency adjudication when compared to federal court is that the administrative proceedings are much less expensive. Alexander Platt has observed that litigation costs at the administrative proceeding level are lower than those that might be incurred in the federal court action.<sup>152</sup>

These cost savings can matter for regulated entities. They also have budgetary implications for the SEC itself. If some class of enforcement actions can be disposed of inexpensively, it frees up resources to be deployed for more complicated cases. And, of course, the same rule applies for respondents trying to decide whether to spend company or personal dollars on litigation defense, or on other matters. A related benefit for regulated entities is that there is some possibility that the short nature of the administrative proceedings affords less flexibility to the agency when it comes to the complexity of the prosecution.<sup>153</sup>

### D. *Institutional Efficiency*

Administrative adjudicators perform tasks that would otherwise occupy—perhaps “clog” is a term that could also be used—the dockets of federal district courts. Congress and the courts have both created a number of trial-type adjuncts that perform functions comparable to those performed by the SEC ALJs, and these trial alternatives have long been accepted as useful, and in some cases, vital cogs in the process of administering case-by-case dispute resolution.<sup>154</sup>

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<sup>150</sup> See generally *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>151</sup> See 17 C.F.R. § 201.230(a) (“[T]he Division of Enforcement shall make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division’s recommendation to institute proceedings.”).

<sup>152</sup> Platt, *supra* note 17, at 7 (“[Administrative Proceedings] offer such respondents an opportunity to quickly settle or litigate the case and move on without undergoing the same litigation costs that might be incurred in a federal court action.”).

<sup>153</sup> WM. SHAW MCDERMOTT & JASON S. PINNEY, AM. L. INST. & AM. BAR ASS’N, ADMINISTRATIVE PROCEEDINGS AND THE NEW RULES OF PRACTICE 98 (May 2004) (“Where the administrative deadlines force the SEC to show its hand after only a few months, the federal forum, outside a rocket docket, provides more cover for adjusting a trial plan.”).

<sup>154</sup> For a survey of these many variants of agency adjudication, see KENT BARNETT, LOGAN CORNETT, MALIA REDDICK & RUSSELL WHEELER, ADMIN. CONF. OF THE U.S., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL 2 (2018), <https://www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal> [<https://perma.cc/T8WM-7WVR>].

The availability of administrative proceedings alleviates the overloaded dockets of federal district judges, who are unlikely to want to take on additional proceedings like pro forma delistings of companies that no longer file their required reports with the SEC, often because the companies no longer exist.

Federal district courts are busy, and getting busier, with their already extant dockets. In 2015, 374,822 cases were filed in district courts across the nation; that number spiked to 562,342 in 2020.<sup>155</sup> Yet, the number of judgeships, 677, has remained unchanged.<sup>156</sup> District judges in 2020 needed to deal with 831 cases on average, a 50% increase from 2015.<sup>157</sup> Even though the number of cases filed in 2021 experienced a relatively sharp drop compared to that in 2020 (perhaps due to the COVID-19 pandemic), because the filings of cases exceeded terminations of cases, the total for pending cases still grew by 12.8%.<sup>158</sup> Not surprisingly, some judges have publicly expressed their frustration over overloaded dockets.<sup>159</sup> For instance, judges of the district court in Arizona stated that they have “been struggling to keep pace with a staggering civil and criminal caseload.”<sup>160</sup>

Of course, the busy district courts may not be appealing for regulated entities desirous of getting a speedy yet careful resolution of the claims against them. And the SEC in some cases may wish to move quickly against a respondent unlikely to contest charges for rule of law and efficiency reasons. It is easy to imagine that federal judges might share the interest in the availability of administrative proceedings that the agency and some regulated entities certainly would take.

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<sup>155</sup> U.S. CTS., UNITED STATES DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE 1 (2020), [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distprofile0930.2020.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2020.pdf) [https://perma.cc/XPB6-VTTV].

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> U.S. CTS., UNITED STATES DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE 1 (2021), [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distprofile0930.2021.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2021.pdf) [https://perma.cc/JNL9-7SCZ].

<sup>159</sup> See, e.g., Cara Bayles, *Crisis to Catastrophe: As Judicial Ranks Stagnate, ‘Desperation’ Hits the Bench*, LAW360 (Mar. 19, 2019), <https://www.law360.com/articles/1140100/as-judicial-ranks-stagnate-desperation-hits-the-bench> [https://perma.cc/7P9P-APW4] (“Judges in the Eastern District of California carry the heaviest caseloads in the nation,” [Chief Judge Lawrence O’Neill’s] rulings say. “The parties and counsel are encouraged to contact the offices of U.S. Senators [Dianne] Feinstein and [Kamala] Harris to address this court’s inability to accommodate the parties and this action.”); *Some Federal Judges Handle Inordinate Caseloads*, TRAC (Mar. 14, 2018), <https://trac.syr.edu/tracreports/judge/501/> [https://perma.cc/6AEU-ZDTY] (describing how some judges were forced to handle inordinate caseloads).

<sup>160</sup> Ryan Knappenberger, *Judge Tells Lawmakers Arizona Federal Courts Are Overloaded, Overworked*, CRONKITE NEWS (Feb. 24, 2021), <https://cronkitenews.azpbs.org/2021/02/24/judge-tells-lawmakers-arizona-federal-courts-are-overloaded-overworked/> [https://perma.cc/ZB5Z-WDCY].

Moreover, Congress, in addition to creating the ALJ role in the APA, has repeatedly endorsed other sorts of agency adjudications, suggesting that the broad delegations of judicial authority to administrative judges are encouraged in other areas.<sup>161</sup> For instance, acknowledging the executive branch's expertise in handling specific matters related to immigration, Congress created the position of immigration judges in 1952.<sup>162</sup> By directing most immigration-related adjudications to administrative immigration courts, Congress effectively prevented federal district courts from being swallowed by those cases. It is almost impossible to imagine a world where district judges hear the cases immigration judges hear. In 2021, the pending cases in the U.S. Immigration Court system reached 1,596,193.<sup>163</sup> That amounts to almost 2,358 additional cases per district court judge—and immigration cases, of course, are unevenly distributed across judicial districts.<sup>164</sup> Accordingly, although there are calls to improve immigration adjudication, few if any argue that all immigration cases should be heard in federal courts in the first instance.<sup>165</sup> The federal courts do not seem to be uncomfortable with this arrangement either.<sup>166</sup>

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<sup>161</sup> See Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J. L. & PUB. POL'Y 73, 73 (2010) (“The Supreme Court has often upheld broad delegations to administrative actors and in so doing has pointed out that judicial review is available to safeguard citizens from the abuse of unconstrained government power.”); see also, e.g., Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 157–61 (2019) (detailing Congress's decision to expand patent adjudication at the U.S. Patent and Appeals Board to, inter alia, alleviate docket pressures in the federal district courts).

<sup>162</sup> Jayanth K. Krishnan, *Overstepping: U.S. Immigration Judges and the Power to Develop the Record*, 2022 WIS. L. REV. 57, 57 (2022).

<sup>163</sup> *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, TRAC (Jan. 18, 2022), <https://trac.syr.edu/immigration/reports/675/> [<https://perma.cc/78HP-VEL4>].

<sup>164</sup> See UNITED STATES DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE, *supra* note 158.

<sup>165</sup> See Press Release, Rep. Zoe Lofgren, Lofgren Introduces Landmark Legislation to Reform the U.S. Immigration Court System (Feb. 3, 2022) <https://lofgren.house.gov/media/press-releases/lofgren-introduces-landmark-legislation-reform-us-immigration-court-system> [<https://perma.cc/XE8E-4R28>] (suggesting to reform the immigration court system to have immigration judges handle immigration cases more efficiently); Rebecca Baibak, *Creating an Article I Immigration Court*, 86 U. CIN. L. REV. 997, 997 (2018) (suggesting to create an Article I immigration court to enable immigration judges to better handle all immigration cases).

<sup>166</sup> See Krishnan, *supra* note 162, at 57 (“In 1952, Congress established a new federal position to be filled by ‘special inquiry officers’ charged with overseeing deportation cases. These *immigration judges*—as they eventually came to be called—were assigned to work within the executive branch . . .”).

### E. *A Market for Law*

Perhaps the most compelling policy argument for the right to remove—as opposed to all SEC enforcement actions being tried in Article III courts in the first instance—is that the regulated entity’s choice between agency and Article III adjudication will improve the quality of SEC adjudication.

The SEC was headed by William Cary from 1961 to 1964.<sup>167</sup> He was so impressed by the capabilities of the agency that he recommended that corporate charters be federalized, and taken away from the 50 states who, in his view, stripped shareholder protections from their corporate governance regimes in an effort to attract corporate registrations.<sup>168</sup> Our view is different. We think, as did Cary’s debate partner Ralph Winter, that a competitive market for legal regimes can incentivize the managers of those regimes to improve the quality and attractiveness of their product.<sup>169</sup>

Administrative proceedings at the SEC, under an opt-out regime, could incentivize both administrative law judges and enforcement attorneys to develop an expert and efficient alternative to adjudication in federal district court. We assume that the calling card would be a combination of efficiency and expertise when it comes to securities regulation that federal courts would find difficult to match. The optionality of administrative proceedings, in other words, could incentivize their improvement and provide competition to the district courts. And there is every reason to think that this sort of competition could flourish.

## V. CONCLUSION

In the last decade and a half, the SEC has been subject to a panoply of separation-of-powers challenges, particularly with regard to the way it conducts administrative proceedings. Our proposal would balance the interests of regulated entities in SEC enforcement proceedings to avail themselves of an Article III federal court (and jury) with the availability of the long-established formal agency adjudication for those who would prefer them. Our proposal solves the tension between an Article III “gold standard” sort of adjudication and the reasonable desire, in many cases, to resolve agency enforcement matters cheaply, quickly, and efficiently. Moreover, our fix could be adopted by the agency itself, required by Congress, or even adopted as a constitutional fix by the Supreme Court this Term in *SEC v. Jarkesy*.

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<sup>167</sup>For information on the tenure of SEC chairs, see *SEC Historical Summary of Chairmen and Commissioners*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/about/sechistoricalsummary> [<https://perma.cc/SD4P-RE9E>].

<sup>168</sup>William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 665–66 (1974) (decrying the race to the bottom, which encourages states to emulate Delaware law so companies “remain at home”).

<sup>169</sup>Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 256–58 (1977) (claiming corporations are incentivized to incorporate in Delaware because it offers the legal rules investors find most attractive).

With these sorts of benefits, the question might arise as to whether optional removal should be applied to every agency adjudication regime in the modern administrative state. We are not prepared to make that recommendation now. For instance, it seems imprudent to adopt a right to remove in high-volume adjudication systems involving quintessential public rights—like veterans and social security benefits, Medicare reimbursement claims, and immigration. But in our view, this right to remove may have similar purchase in agency enforcement contexts to avoid the constitutional issues presented and to encourage more efficient and effective resolution of disputes. But we leave the nuances of the where and the when in those cases to future research. For present purposes, the focus is on SEC civil penalty proceedings. In this context, the right to remove resolves the constitutional issues raised in *Jarkesy* and provides a far better alternative than shifting all SEC enforcement actions out of in-house agency adjudication and into the federal district courts.

