No. 23- _____

In the United States Court of Appeals for the Fifth Circuit

IN RE MARIAN P. YOUNG AND SAVING2RETIRE, LLC,
***Petitioners*.**

PETITION FOR A WRIT OF MANDAMUS TO THE U.S. SECURITIES AND EXCHANGE COMMISSION

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CERTIFICATE OF INTERESTED PERSONS

The following persons and entities as described in Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case.

1. Marian P. Young, *Petitioner*
2. Saving2Retire, LLC, *Petitioner*
3. Russell G. Ryan, *Counsel for Petitioners*
4. Margaret A. Little, *Counsel for Petitioners*
5. Kara M. Rollins, *Counsel for Petitioners*
6. New Civil Liberties Alliance, *Law Firm for the Petitioners*
7. U.S. Securities and Exchange Commission
8. Gary Gensler, *SEC Chair*
9. Hester M. Pierce, *SEC Commissioner*
10. Caroline A. Crenshaw, *SEC Commissioner*
11. Mark T. Uyeda, *SEC Commissioner*
12. Jaime Lizárraga, *SEC Commissioner*
13. Jennifer D. Reece (née Brandt), *Counsel for SEC Division of Enforcement*
14. Vanessa A. Countryman, *SEC Secretary*
15. Megan Barbero, *SEC General Counsel*

/s/ Russell G. Ryan
Attorney of record for Petitioners

STATEMENT REGARDING ORAL ARGUMENT

Petitioners respectfully request oral argument. This case involves important questions under the Due Process clause of the Constitution as well as the Administrative Procedure Act—to wit, can a federal agency indefinitely evade federal court review of an in-house administrative adjudication by simply refusing to adjudicate the case with a final order? Oral argument will aid the Court in understanding the inner workings of the adjudication machinery at the Securities and Exchange Commission and the lengths to which the agency has gone in flouting its own rules and evading its constitutional and statutory duty to adjudicate cases within a reasonable period.

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INTRODUCTION

"Relax," said the night man,
"We are programmed to receive.
You can check out any time you like,
But you can never leave."[1]

These haunting final lyrics to the Eagles' iconic 1976 song ring all too familiar to Petitioners Marian P. Young and Saving2Retire, LLC. The Securities and Exchange Commission ("SEC" or "Commission") has been inspecting them, investigating them, and prosecuting them for more than eight years based on events dating back to 2011, with no end in sight. For nearly seven years they have been trapped inside the Commission's Hotel California adjudication system with all exits blocked. At least a dozen other enforcement targets are likewise stuck in the agency's interminable version of administrative purgatory.

Flouting basic notions of due process of law, the Administrative Procedure Act, and the agency's own internal rules, SEC has effectively stopped adjudicating pending appeals from decisions issued by the agency's administrative law judges ("ALJs"), one of the most important responsibilities Congress has assigned to SEC. This unofficial work stoppage has left Petitioners and similarly situated SEC targets twisting in regulatory limbo as they await an elusive final agency order from which they might finally seek relief in a real Article III court. Like Kafka's "man from the

[1] EAGLES, "HOTEL CALIFORNIA" (Asylum Records 1976).

country" endlessly awaiting admittance to the Law, Petitioners endlessly wait for their day in court. FRANZ KAFKA, THE TRIAL 213 (W. Muir & E. Muir trans. 1937) (1925). ("[T]he doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. 'It is possible,' answers the doorkeeper, 'but not at this moment.' … The doorkeeper gives him a stool and lets him sit down at the side of the door. There he sits waiting for days and years.").

For decades, SEC and other agencies have assured courts and litigants that the notoriously paltry process they provide in their captive, home-court administrative prosecutions is nothing to worry about. True, they concede, the accused is deprived of a jury trial and other due process protections taken for granted in real court proceedings. But the deprivations are worth it, they insist, because in-house administrative adjudication is so much more streamlined and efficient, thereby producing "prompt decisions." *See, e.g.*, Andrew Ceresney, Dir., SEC Div. of Enf't, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014), www.sec.gov/news/speech/2014-spch112114ac ("administrative actions produce prompt decisions" and "timely public findings of fact and law," and "we can all agree that it is better to have rulings earlier rather than later").

Petitioners' endless run through SEC's gauntlet illustrates how laughably vacuous these agency assurances are. For nearly seven years, SEC has strategically

denied Petitioners their rights to a jury trial, due process of law, and a timely adjudication of the Commission's defamatory public allegations against them. As explained below, the Court should declare SEC's adjudicative malfeasance unconstitutional and otherwise unlawful, and it should issue a writ of mandamus that compels SEC to dismiss its tainted proceeding against Petitioners with prejudice or, in the alternative, that compels SEC to issue a final order within a fixed period of no more than 30 days.

RELIEF REQUESTED

Petitioners seek a writ of mandamus that compels SEC to dismiss with prejudice a pending administrative adjudication proceeding the Commission commenced against Petitioners in July 2016, which remains undecided to this day. In the alternative, the writ should at a minimum direct SEC to issue a final order in its administrative proceeding within a fixed period of not more than 30 days from the date of this Court's issuance of the writ.

JURISDICTION AND VENUE

SEC predicated jurisdiction over its administrative proceeding against Petitioners on Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. § 80b-3(e), (f), (k). This Court has jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651, the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a), and the Administrative Procedure Act ("APA"), 5 U.S.C.

§§ 702, 706. *See In re La. Pub. Serv. Comm'n*, 58 F.4th 191, 192–93 (5th Cir. 2023) (non-dispositive published opinion) ("We interpret the All Writs Act and the APA to provide separate, but closely intertwined, grounds for mandamus relief.");[2] *see also Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 74–79 (D.C. Cir. 1984) (court of appeals has exclusive jurisdiction over mandamus petition to compel agency action unreasonably delayed).

Venue is proper in this Circuit because Petitioners are citizens of Texas and thus, if SEC ever issues a final order against them, venue for a petition to review that order would be proper in this Circuit pursuant to section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a).

ISSUES PRESENTED

1. Is SEC denying Petitioners' rights to due process of law under the Fifth Amendment, to a jury trial under the Seventh Amendment, and to a fair and prompt decision under the APA, by willfully refusing for more than three years to issue a final adjudicative order in its nearly seven-year-old administrative enforcement proceeding against Petitioners, thereby unlawfully preventing Peitioners from seeking judicial review in this Court?

[2] In that case, after the Federal Energy Regulatory Commission ("FERC") filed a letter pursuant to this Court's Order, the petition for mandamus was summarily denied. *See* Order, *In re La. Pub. Serv. Comm'n*, No. 22-60458 (5th Cir. Feb. 13, 2023) (unpublished).

2. If so, should the Court issue a writ of mandamus that compels SEC to dismiss its administrative proceeding or, in the alternative, to issue a final order within a specified period not to exceed 30 days?

RELEVANT FACTS

I. RELEVANT PARTIES

Petitioner Young is a citizen of Texas and the sole owner of Petitioner Saving2Retire, which is also located in Texas. *See* App.5; App.72. Petitioner Young has been a professional in the securities industry since the mid-1980s and formed Petitioner Saving2Retire, a small investment adviser, in 2011. App.72.

SEC is an agency of the United States government headquartered in Washington, D.C. with a regional office in Fort Worth, Texas.

II. PETITIONERS' INTERMINABLE ORDEAL INSIDE SEC'S ADMINISTRATIVE PROCESS

Petitioners' never-ending administrative ordeal with SEC is now in its ninth year (and counting). It started back in November 2014, during the Obama Administration, when SEC staff launched an inspection of Petitioners' business activities focused on events dating back to 2011. *See* App.5. That inspection led to an enforcement investigation in or about the Spring of 2015, App.79, and that investigation then led to the initiation of a public SEC administrative enforcement proceeding against Petitioners in July 2016, *see* App.4. That administrative enforcement proceeding remains pending to this day, still unresolved. *See* App.112.

In the administrative enforcement proceeding, SEC charged Petitioners with relatively minor violations of certain registration and bookkeeping requirements under the Investment Advisers Act of 1940, and with not fully cooperating with SEC's inspection and investigation. *See* App.6. SEC did not allege any fraud, investor harm, or unjust enrichment, but the reputational harm inflicted by the Commission's public filing of charges effectively ended Petitioners' ability to operate in the securities industry or other sectors of the financial services industry, and they have effectively been out of that business ever since. *See* App.74 (finding that Petitioners "never advised a single internet client," took their website down in August 2015, and withdrew their SEC registration in November 2017).

SEC could have filed its charges against Petitioners in federal court, thereby enabling Petitioners to contest them before a jury overseen by an independent, Article III judge. *See* 15 U.S.C. § 80b(d), (e), (f). At the time, however, SEC had recently made a deliberate and unprecedented policy decision to avoid jury trials and judicial scrutiny of its enforcement cases by diverting as many of those cases as possible into its more Commission-friendly, in-house administrative adjudication system, where cases could be initially decided by SEC employees (the ALJs) with appeals then decided by the Commission itself and where, unsurprisingly and as a result, the SEC is far more likely to prevail. *See, e.g.*, Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, Wall St. J. (Oct. 21, 2014); Gretchen

Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. Times (Oct. 5, 2013).

In January 2017, the SEC ALJ assigned to Petitioners' case granted partial summary disposition against Petitioners on certain aspects of SEC's books-and-records claims, and in May 2017 the remainder of the case proceeded to an administrative hearing superintended by the ALJ. *See* App.9–15; *see also* App.16.

In October 2017, the ALJ issued a public decision in which he ruled against Petitioners in virtually all respects and, as punishment, revoked Petitioner Saving2Retire's investment adviser registration; barred Petitioner Young from the securities industry for a minimum of five years; issued a cease-and-desist order against both Petitioner Young and Petitioner Saving2Retire; ordered Petitioner Saving2Retire to pay a $76,000 penalty; and ordered Petitioner Young to pay a $26,000 penalty. *See* App.17–53. The ALJ also summarily rejected, without any analysis, Petitioners' arguments that the ALJ had not been constitutionally appointed under the Appointments Clause of Article II, that the ALJ was unconstitutionally protected from presidential removal in violation of Article II, and that the administrative proceeding deprived Petitioners of their right to a jury trial in violation of the Seventh Amendment. App.51. Several months later, in an unrelated SEC case, the Supreme Court vindicated Petitioners' Appointments Clause argument. *See Lucia v. SEC*, 138 S. Ct. 2044 (2018). More recently, this Court

vindicated their removal-protection and jury-trial arguments. *See Jarkesy v. SEC*, 34 F. 4th 446 (5th Cir. 2022).

Petitioners appealed the ALJ's decision to SEC's commissioners in November 2017. *See* App.2. But later that month the U.S. Solicitor General effectively conceded during Supreme Court briefing of the unrelated *Lucia* case that SEC ALJs were unconstitutionally appointed, after which SEC purported to "ratify" the ALJs' appointments and remanded all pending appeals back to the ALJs who had initially decided them for reconsideration or ratification in light of any new evidence the parties might adduce. *See* App.54–59. On remand of Petitioners' case, the ALJ issued a perfunctory order in which, unsurprisingly, he ratified all of his prior decisions in the case. *See* App.60–61.

SEC's commissioners thereafter agreed to hear Petitioners' appeal from the ALJ's now-ratified decision, and the parties filed their appellate briefs in May and June 2018. *See* App.2. But SEC never decided that appeal, because the Supreme Court issued its opinion in *Lucia* on June 21, 2018, and later that day SEC ordered a stay of all pending cases on its administrative docket. *See* App.62.

At that point, as Justice Gorsuch recently noted, SEC could have applied some discretion and ended Petitioners' ordeal, but SEC "chose instead to take a mulligan." *Axon Enterprise, Inc. v. FTC*, Nos. 21-86, 21-1239, ___ S. Ct. ___ (Apr. 14, 2023) (slip op. at 11) (Gorsuch, J., concurring in the judgment). In August 2018, SEC

lifted its docket-wide stay and advised the respondents in all pending proceedings that, in light of *Lucia*, they were entitled to a new hearing before an ALJ other than the one who had previously decided their case. *See* App.63–68. Petitioners' case was then remanded and reassigned to a new ALJ. *See* App.69. The parties stipulated that the new ALJ could decide the case based on the administrative record previously compiled (including the May 2017 hearing transcript), supplemented by additional briefs from the parties, the last of which was filed in May 2019. *See* App.71. Ms. Young represented herself and her company *pro se* during the remanded proceedings. *See* App.70.

The newly assigned ALJ issued her decision on August 26, 2019. *See* App.70. In it, she ruled against Petitioners in all material respects but expressly acknowledged the absence of any fraud, client harm, unjust enrichment, or other misconduct, and therefore imposed materially less severe sanctions than those previously ordered by the original ALJ. App.93–94. Specifically, she imposed a cease-and-desist order against both Petitioners; barred only Petitioner Young from the securities industry and only for a minimum of two years (instead of the original five); imposed a $13,000 penalty against Petitioner Young (instead of the original

$26,000); and imposed no penalty against Petitioner Saving2Retire (instead of the original $76,000). *Compare* App.93–95, *with* App.51–52.[3]

Petitioners then appealed to SEC's commissioners again, and the parties completed their briefing in mid-December 2019—*i.e.*, more than three years ago. *See* App.2. Only one of the five SEC commissioners then serving remains with the agency today; the four others have been replaced in the interim and their successors presumably began their SEC tenures having no familiarity with Petitioners' case (a state of affairs that may persist to this day). *See Current SEC Commissioners*, SEC, https://www.sec.gov/about/commissioners (last visited Apr. 17, 2023) (all commissioners except for Commissioner Pierce were appointed in 2020 or later).

Under SEC's own rules, the commissioners should have decided Petitioners' appeal no later than October 2020, but as of the filing of this petition, the case remains undecided. Those rules say that appeals "ordinarily" should be decided within no more than ten months after completion of briefing, even in the most complex cases (which Petitioners' case assuredly is not).

Specifically, Rule 900 of SEC's Rules of Practice provides:

> Timely resolution of adjudicatory proceedings is one factor in assessing the effectiveness of the adjudicatory program in protecting investors,

[3] Tragically, given the practical effect of the ALJ's imposition of the bar, should SEC eventually affirm Petitioner Young's two-year bar now (after more than three years of appellate delay), that two-year bar would only begin to run if and when SEC issues a final order, effectively converting the original two-year bar into a five-plus-year bar.

> promoting public confidence in the securities markets *and assuring respondents a fair hearing*. Establishment of guidelines for the timely completion of key phases of contested administrative proceedings provides a standard for both the Commission and the public to gauge the Commission's adjudicatory program on this criterion. The Commission has directed that:
>
> ….
>
> (iii) Ordinarily, a decision by the Commission with respect to an appeal from the initial decision of a hearing officer ... *will be issued within eight months from the completion of briefing* on the petition for review … . If the Commission determines that the complexity of the issues presented in a petition for review … warrants additional time, the decision of the Commission in that matter *may be issued within ten months of the completion of briefing*.

17 C.F.R. § 201.900(a)(1) (emphasis added).

Instead of deciding Petitioners' appeal with a final order they could appeal to this Court, SEC has summarily granted itself eleven successive ninety-day extensions of its time to decide the case—collectively delaying SEC's self-imposed decision deadline by 990 days thus far (and counting). Each of the substantially identical extension orders has perfunctorily recited that, in its "discretion" and without any explanation, SEC found it "appropriate" to postpone its decision again (and again and again). These now-farcical extension orders are summarized in the following table:[4]

[4] Information in the table is drawn from App.98; App.99; App.100; App.101; App.102; App.103; App.104; App.105; App.106; App.111; App.112.

Date of Order	New Deadline
10/16/2020	01/14/2021
01/14/2021	04/14/2021
04/14/2021	07/13/2021
07/09/2021	10/12/2021
10/12/2021	01/10/2022
01/10/2022	04/11/2022
04/11/2022	07/11/2022
07/11/2022	10/11/2022
10/11/2022	01/09/2023
01/09/2023	04/10/2023
04/10/2023	07/10/2023

All told, more than three years have elapsed since the close of briefing on Petitioners' appeal—nearly *four times* what SEC's own rules say should "ordinarily" suffice for deciding even complex cases, much less simple ones like Petitioners'. And that's counting only the months since completion of briefing at this final stage of an overall regulatory ordeal that began *more than eight years ago* (*i.e.*, 101 months ago).[5] *And there is still no end in sight*. As one Fifth Circuit judge recently quipped about another litigant's similar eight-year administrative ordeal with SEC, "[s]o much for efficiency." *Cochran v. SEC*, 20 F.4th 194, 235 (5th Cir. 2021) (en banc) (Oldham, J., concurring).

[5] Although Covid-19 may have marginally contributed to SEC's delay, most of the extension orders occurred after the widespread availability of vaccines, and in any event nothing about reviewing a confined administrative record or writing a decision (as opposed to, say, interrogating live witnesses or conducting on-site examinations) is materially inhibited by working in a remote environment. Federal appellate courts, for example, do not appear to have similarly fallen years behind schedule in disposing of appeals.

Adding insult to injury, SEC's enforcement staff filed a motion late last year seeking a formal stay of Petitioners' administrative proceeding for an open-ended time period contingent entirely on whether SEC sought a writ of certiorari from the Supreme Court in *Jarkesy* and, if so, when and how the Court ultimately decides that case. *See* App.107–109. For obvious reasons—including that SEC sought and was granted two extensions of its time to seek certiorari, thus virtually ensuring that even if it granted certiorari in *Jarkesy*, the Court would not decide that case before this time *next year*—Petitioners opposed the stay motion. *See* App.2 (response in opposition filed on Dec. 21, 2022).[6] True to form, SEC still has not decided the stay motion.

SEC's shocking dereliction of its adjudicative responsibility contrasts sharply with the relative alacrity of federal court litigation. According to recent statistics, the average time between the filing of a complaint and judgment after a jury trial in federal court is 771 days, and most federal circuit courts—including this one—routinely decide appeals within a year of *docketing* and within a matter of months after the close of briefing and any oral argument. *See* Taylor Dalton, *The Trajectory of Civil Cases in Federal Court*, Above the Law (May 28, 2021), https://tinyurl.com/ycyctbmp; *see also* U.S. Courts of Appeals Federal Court

[6] SEC filed a petition for a writ of certiorari on March 8, 2023. *See* Petition for Writ of Certiorari, *SEC v. Jarkesy*, No. 22-859 (Mar. 8, 2023).

Management Statistics (June 30, 2022)[7] (median time from filing an appeal to its disposition in this Court is 9.4 months). Thus, litigants in federal court on average can anticipate approximately 1,100 days (or about three years) from the filing of a complaint through both a jury trial *and* a decision on appeal. By contrast, Petitioners have already been in SEC's adjudication system for more than 2,400 days (six and a half years and counting) with no final decision expected anytime soon, if ever. And even if SEC eventually issues a final decision against them, that will only start the clock for a months-long appeal to this Court.

III. THE BROADER CONTEXT

Perhaps most shocking is that Petitioners' case is not an anomaly; Petitioners are far from alone in their interminable state of SEC purgatory. After the Supreme Court decided *Lucia* in 2018, SEC effectively stopped assigning new enforcement cases to its ALJs. *See generally* Russ Ryan, *The SEC's Incredible Shrinking Adjudications Docket*, LinkedIn (June 1, 2021), *available at* https://www.linkedin.com/pulse/secs-incredible-shrinking-adjudication-docket-russ-ryan/ (citing SEC semi-annual reports demonstrating dwindling workload of SEC ALJs after *Lucia*). At the time, however, more than 100 administrative cases remained pending at some stage of adjudication and had to be reassigned for new hearings before different, properly appointed ALJs. *See* App.66–68. SEC

[7] www.uscourts.gov/sites/default/files/fcms_na_appsumary0630.2022_0.pdf.

eventually settled or dismissed most of these post-*Lucia* proceedings, and others resulted in defaults, but many went forward again on remand and at least twelve remain pending on SEC's appellate docket in a state of suspended animation.

Merits briefing in all these pending appeals was completed at least a year ago, and in some cases (including Petitioners') more than two or three years ago. But over the past two years SEC has stubbornly refused to decide *any* of these cases, leaving the respondents in perpetual legal limbo and effectively unemployable in their chosen line of work. Indeed, SEC has decided only two appeals from initial decisions issued by its ALJs since the Supreme Court decided *Lucia*, the last of which it decided in November 2020. *See, e.g., Alexandre S. Clug*, Securities Act Release No. 10886, 2020 WL 6585907 (Nov. 9, 2020). With SEC, the process has literally become the (inescapable) punishment.

In all these remaining appeals, as in Petitioners' case, SEC has issued a succession of perfunctory orders repeatedly extending its time to issue a decision. In addition to the eleven extension orders issued in Petitioners' case, SEC has over the past several years issued well over 100 similar orders in these other languishing appeals. *See, e.g.*, SEC Admin. Proc. File No. 3-16047, https://www.sec.gov/litigation/apdocuments/ap-3-16047.xml (23 extension orders dating back to June 2020); SEC Admin. Proc. File No. 3-17253,

https://www.sec.gov/litigation/apdocuments/ap-3-17253.xml (16 extension orders dating back to August 2020).[8]

SEC has obvious, self-serving tactical reasons for indefinitely pocket-vetoing these appeals by simply refusing to decide them. For one, issuing final orders would allow the respondents to finally challenge SEC—and its unconstitutional adjudicative process—in neutral Article III courts. That's the last thing SEC wants right now, especially given its dismal recent track record in the courts.

SEC has lost five of its last six cases in the Supreme Court, mostly without a single justice siding with the agency's position. *See Gabelli v. SEC*, 568 U.S. 442 (2013) (unanimous); *Kokesh v. SEC*, 581 U.S. 455 (2017) (unanimous); *Lucia*, 138 S. Ct. 2044; *Liu v. SEC*, 140 S. Ct. 1936 (2020) (eight-justice majority vacated judgment for SEC; dissenting justice would have reversed without remand); *Axon Enterprise, Inc.*, Nos. 21-86, 21-1239, ___ S. Ct. ___ (unanimous) (affirming and remanding *Cochran*, 20 F.4th 194 (en banc)). Among the non-unanimous losses was *Lucia*, which held that SEC ALJs were unconstitutionally appointed and effectively required the agency to relitigate or settle more than 100 then-pending administrative enforcement cases. *See generally* 138 S. Ct. 2044. Two years later

[8] This total does not include hundreds of similar extension orders SEC has issued in its dozens of pending appeals from disciplinary orders issued by self-regulatory organizations, such as the Financial Industry Regulatory Authority ("FINRA"). Although that portion of SEC's adjudicative docket typically moves at a snail's pace too, at least SEC still occasionally decides one of those appeals, even if belatedly.

in *Liu,* all nine justices agreed that SEC for decades had been unlawfully confiscating funds from its enforcement targets under the guise of "equitable disgorgement." *See generally* 140 S. Ct. 1936.

SEC has especially good reason to dread judicial scrutiny in Petitioners' case. Because Petitioners are residents of Texas, they could promptly appeal any final SEC decision to this Court, where SEC would need to contend with last year's *Jarkesy* precedent. *Cf.* App.107–109 (SEC Division of Enforcement's motion to stay the administrative proceeding grounded on the fact that Petitioners reside in Texas and would have the benefit of this Court's *Jarkesy* decision). As previously noted, *Jarkesy* held that SEC administrative enforcement proceedings deprive respondents of their Seventh Amendment jury trial rights, 34 F.4th at 451–57, and that SEC ALJs enjoy an unconstitutional degree of multi-layered protection from presidential removal, *id*. at 463–65. *Jarkesy* also held that Congress violated the constitutional non-delegation doctrine by giving SEC unfettered discretion to choose whether to prosecute alleged wrongdoers administratively or in federal courts. *Id*. at 459–63. With *Jarkesy* as controlling precedent in this Circuit, SEC's only lawful option, if it were to decide Petitioners' appeal, is vacatur of the ALJ decision and dismissal of the proceeding. SEC may not like that inevitable outcome, but that's obviously not a legitimate excuse for simply refusing to decide the case and leaving Petitioners to twist indefinitely in the regulatory wind.

Also overhanging SEC's administrative case against Petitioners is *United States v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985), in which this Circuit held that actions to enforce administrative penalties must be commenced within five years after the conduct on which the penalty was based—*i.e.*, not just within five years after the penalty was imposed. Because approximately 10 years have already elapsed since the events relevant to this case, even if SEC were to order an administrative penalty at this late date against Petitioners, any attempt to collect that penalty would be time-barred under *Core Laboratories*.

Other tactical concerns could also be paralyzing SEC. For example, in April 2022 the Commission publicly admitted that it had identified "a control deficiency related to the separation of its enforcement and adjudicatory functions within its system for administrative adjudications." *See* Statement, SEC, Commission Statement Relating to Certain Administrative Adjudications (Apr. 5, 2022).[9] More specifically, SEC admitted that contrary to its own rules and the APA:

> [C]ertain databases maintained by the Commission's Office of the Secretary were not configured to restrict access by Enforcement personnel to memoranda drafted by Adjudication staff. As a result, in [an unspecified] number of adjudicatory matters, administrative support personnel from Enforcement, who were responsible for maintaining Enforcement's case files, accessed Adjudication memoranda via the Office of the Secretary's databases. Those individuals then emailed Adjudication memoranda to other

[9] www.sec.gov/news/statement/commission-statement-relating-certain-administrative-adjudications.

> administrative staff who in many cases uploaded the files into Enforcement databases.

Id. It is no stretch to suspect that this "control deficiency" tainted SEC's administrative adjudication against Petitioners as well as some or all of the other dozen similarly frozen administrative appeals referenced above. As SEC admitted, its enforcement administrative staff could have accessed adjudication files during a period when Petitioners' case was already pending. *Id.* SEC still has not disclosed whether enforcement prosecutors accessed the adjudicators' files in Petitioners' case. Regardless of whether they did or did not, is it not difficult to imagine that SEC has strong institutional incentive to shield this embarrassing control deficiency from judicial (and further public) scrutiny. Indeed, despite assurances that it would release its findings, the Commission has not yet done so. *Id.* Nor has SEC formally notified Petitioners that the breach occurred at all.

Some combination of these reasons likely explains SEC's current foot-dragging, but in truth adjudicatory backlogs have been a recurring SEC problem over at least the past twenty years. A 2003 memorandum from the agency's commissioners to its general counsel, for example, acknowledged the importance of timely decision-making but laid bare the ugly reality:

> The Commission must lead by example and this means seriously tightening up the time frame from the date an appeal is taken from an ALJ or SRO decision to the time the Commission issues its Opinion. The major issue that must be addressed by the Office of the General Counsel (OGC) is the time it takes for OGC to do

> the necessary review of the record and briefs and submit a draft opinion to the Commission. …
>
> …
>
> While these matters take time, statistics show an inordinate amount of delay in the Commission's issuance of appellate decisions. At the time we concluded our initial examination, well over a third of all the cases on appeal to the Commission had been waiting for decision for over two years, and 20% of cases on appeal had been awaiting decision for over 900 days. With respect to some cases decided by the Commission this year, more than 3½ years passed between the time of the initial decision and the time of the Commission's decision. Each opinion typically goes through three layers of review, by the Assistant General Counsel, Associate General Counsel, and the General Counsel, each layer of review taking between five and twelve months. Finally, when the opinion gets to the Commission, sometimes no action is taken for many months.

Joint Appendix at A180–181, *Flynn v. SEC*, 877 F.3d 200 (4th Cir. 2017) (No. 16-2122), ECF No. 27.

The SEC commissioners' blunt assessment elsewhere in the same 2003 memorandum—"*There is no justifiable explanation for such delays*," *id*. at A181 (emphasis added)—applies with even greater force today. SEC adjudicative celerity has not improved since the 2003 memorandum, but rather has deteriorated further. According to public reports on SEC's website, from its 2005 fiscal year through its 2017 fiscal year, the agency decided an average of nearly 11 ALJ appeals per year, with only 40% decided within the time limits directed by its rules. *See e.g.*, SEC, Report on Administrative Proceedings for the Period October 1, 2016 through March

31, 2017 at 3, Securities Exchange Release No. 80556 (Apr. 28, 2017), https://www.sec.gov/files/34-80556.pdf (3 of 7 dispositions decided within guidelines time limit (Oct. 2015–Mar. 2016); 5 of 14 dispositions decided within guidelines time limit (Apr. 2016–Sept. 2016); 6 of 10 dispositions decided within guidelines time limit (Oct. 2016–Mar. 2017)). Since 2017, as previously noted, SEC has decided only two ALJ appeals—the last one in late 2020—neither of which was timely under the rules. *See e.g.*, SEC, Report on Administrative Proceedings for the Period October 1, 2020 through March 31, 2021 at 4, Securities Exchange Release No. 91734 (Apr. 30, 2021), https://www.sec.gov/files/34-91734.pdf (0 dispositions decided (Oct. 2019–Mar. 2020); 0 of 1 dispositions decided within guidelines time limit (Apr. 2020–Sept. 2020); 0 of 2 dispositions decided within guidelines time limit (Oct. 2020–Mar. 2021) (with one opinion and one settlement)); *see also* SEC, Report on Administrative Proceedings for the Period April 1, 2022 through September 30, 2022 at 4, Securities Exchange Release No. 96185 (Oct. 31, 2022), https://www.sec.gov/files/34-96185.pdf (0 dispositions decided (Apr. 2021–Sept. 2022)). Over the past 20 years, it seems, the problem has gradually morphed from issuing habitually delinquent appellate decisions to intentionally issuing none at all.

REASONS WHY THE WRIT SHOULD ISSUE

This Court has ample power to compel administrative agencies like SEC to perform in a timely manner the duties assigned to them by Congress. First, the All

Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The APA further directs that a reviewing court "*shall* … compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (emphasis added). Courts routinely invoke these statutory powers to compel agencies to act. *See, e.g., In re La. Pub. Serv. Comm'n*, 58 F.4th at 192–93, 195 (invoking statutes and ordering the FERC to "provide [the] court … with a meaningful explanation for the length of time the Commission takes for final action" and retaining jurisdiction); *Telecomms. Rsch. & Action Ctr.*, 750 F.2d at 79 ("Claims of unreasonable agency delay clearly fall into that narrow class of interlocutory appeals from agency action over which we appropriately should exercise our jurisdiction.").

When an allegation of unreasonable delay is made, courts must "consider whether the agency's delay is so egregious as to warrant mandamus." *Telecomms. Research & Action Ctr.*, 750 F.2d at 79. While there is no "single test" for when a writ should issue in unreasonable delay cases, *see id.* 79–80, this Court considers several factors in making that determination:

> (1) the length of time that has elapsed since the agency came under a duty to act, and any prospect of early completion; (2) the presence of any legislative mandate, and the degree of discretion given the agency by Congress with respect to timing; (3) whether injury will likely result from avoidable delay; (4) the presence or absence of bad faith on the

> agency's part; and (5) administrative necessity, the need to establish priorities given limited resources, and complexity of the task.

Nat'l Grain & Feed Ass'n, Inc. v. OSHA, 903 F.2d 308, 310 (5th Cir. 1990) (citing *Cutler v. Hayes*, 818 F.2d 879, 897-98 (D.C. Cir. 1987)). At least three of these factors weigh heavily in favor of granting Petitioners' requested relief—the length of time elapsed (39 months and counting), likelihood of injury (ongoing deprivation of constitutional rights and financial and reputational harms), and the presence of bad faith on the Commission's part (repeated, systematic refusal to decide any pending appeals and recent motion for an indefinite stay of Petitioners' appeal based on the speculative timing and outcome of an unrelated case). And although there is no "legislative mandate" with respect to timing, SEC has already egregiously exceeded the time limits set by its own rules, as previously described.

SEC's willful failure to perform the adjudicative duties assigned to it by Congress is unacceptable and has inflicted prolonged financial and reputational harm against Petitioners and others similarly situated. SEC has placed Petitioners and other litigants in a perpetual state of anxiety and limbo—unable as a practical matter to work in the securities industry, unable to achieve finality and repose with respect to SEC's accusations, and unable to seek judicial review or vindication because SEC willfully refuses to issue any appealable final order.

Federal courts are the only meaningful check on SEC's combined exercise of vast legislative power (through rulemaking), executive power (through

enforcement), and pseudo-judicial power (through adjudication and punishment), yet the Commission has effectively barricaded the courthouse doors. After first making the deliberate tactical choice to deprive Petitioners of their Seventh Amendment right to a jury trial in a federal district court, SEC is now indefinitely blocking their access to judicial review in a federal appeals court by cynically refusing to issue a final order. And it bears emphasizing that Petitioners are among the very small percentage of SEC targets who ever get anywhere near this final stage of the agency's interminable administrative labyrinth, because the vast majority of SEC targets either settle or default early in the process, unwilling to devote the time and resources required to defend themselves in a home-court venue where it is widely understood that the agency will rarely rule against itself. Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J. (May 6, 2015), https://on.wsj.com/3L4cPUN.

SEC's adjudicatory dithering has also deprived Petitioners of their constitutional and statutory right to a fair and timely adjudication. "A fair trial in a fair tribunal is the basic requirement of due process," *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)), as well as an "inexorable safeguard" of individual liberty, *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 304 (1937) (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936)). As SEC itself has acknowledged when

rebuking the securities industry self-regulatory adjudicators it oversees, unreasonably delayed regulatory enforcement proceedings deprive the accused of a fundamentally fair process. *See Jeffrey Ainley Hayden*, Securities Exchange Act Release No. 42772, 2000 WL 649146, at *2 (May 11, 2000) (dismissing New York Stock Exchange disciplinary sanctions, imposed after five years of combined investigation and adjudication based on aged conduct, because "[w]e believe that the delay in the underlying proceedings was inherently unfair"); *accord Dep't of Enf't v. Morgan Stanley DW Inc.*, No. CAF000045, 2002 NASD Discip. LEXIS 11, at *39 (NASD Nat'l Adjudicatory Council July 29, 2002) ("Based on the totality of circumstances, including the length of delay [more than five years of combined investigation and adjudication based on aged conduct] and harm to the respondents, we dismiss this action as being inherently unfair.").

SEC's egregious dereliction of duty also violates the command of the APA that an agency "shall proceed to conclude a matter presented to it" within a "reasonable time" and without undue delay. 5 U.S.C. §§ 555(b),706(1). It likewise contravenes Rule 900(a)(1) of the agency's own Rules of Practice which, as previously noted, codifies an expectation that appeals from ALJ initial decisions will "ordinarily" be decided no later than ten months after completion of briefing, even in the most complex cases. 17 C.F.R. § 201.900(a)(1)(iii).

Here, as noted above, SEC's defiance of its own rule is not measured in mere days or even weeks. More than *39 months* have already passed since completion of briefing in Petitioners' case, and that's not even counting the more than 60 months of SEC inspection, investigation, and administrative litigation that preceded the close of briefing on appeal. Enabled by eleven successive perfunctory orders extending its time to decide the case, SEC has already taken nearly *quadruple* the post-briefing decision time set forth in its own rule, *with no end in sight*.

Finally, SEC's delaying tactics expose the lack of seriousness the agency attaches to its prosecution of Petitioners for their relatively minor and unintentional alleged transgressions dating back more than a decade. SEC enforcement staff's recent motion seeking an indefinite further stay of the administrative proceeding against Petitioners, *see* App.107–109, adds an exclamation point to this lack of seriousness. SEC cannot plausibly find, after all these years of delay and indifference, that punishing Petitioners at this point would serve the "public interest," a predicate finding required by the relevant statute to impose such punishment. 15 U.S.C. § 80b-3(f), (i).

Given the implausibility of any public-interest finding at this point, SEC's deliberate tactical denial of Petitioners' jury trial rights, this Court's binding *Jarkesy* and *Core Laboratories* precedents, and the broader context of SEC's apparently calculated refusal to decide *any* of the ALJ appeals still pending on its docket, the

most appropriate and effective remedy for SEC's refusal to act is a writ of mandamus compelling SEC to dismiss its administrative enforcement proceeding against Petitioners, with prejudice. In the alternative, at minimum the writ should compel SEC to issue a final order in Petitioners' proceeding within a fixed period of no more than 30 days so that, if they are aggrieved by that order, they can finally get their day in a real court after all these years stuck in SEC's Hotel California.

CONCLUSION

Petitioners respectfully request the Court to declare SEC's pending adjudicative proceeding against them unconstitutional and unlawful, and to issue a writ of mandamus that compels SEC to dismiss the proceeding with prejudice. In the alternative, at minimum the writ should compel SEC to issue a final order in the proceeding within a fixed period of no more than 30 days after issuance of the writ.

April 24, 2023

Respectfully submitted,

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This petition has been served on the following respondents pursuant to Fed. R. App. P. 21(c) via first-class mail, return receipt requested:

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CERTIFICATE OF COMPLIANCE

This petition complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 21(d) because it contains 6,299 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used to calculate the word count).

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