No. 23-20179

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

On Petition for a Writ of Mandamus
to the Securities and Exchange Commission

SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO THE PETITION FOR A WRIT OF MANDAMUS

MEGAN BARBERO
General Counsel

MICHAEL A. CONLEY
Solicitor

DOMINICK V. FREDA
Assistant General Counsel

DANIEL E. MATRO
Senior Appellate Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) 551-8248 (Matro)

CERTIFICATE OF INTERESTED PERSONS

In re Marian P. Young and Saving2Retire, LLC, No. 23-20179

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. *Petitioners*: Marian P. Young and Saving2Retire, LLC.

2. *Counsel for Petitioners*: Russell G. Ryan, Margaret A. Little, Kara M. Rollins of New Civil Liberties Alliance.

3. *Respondent*: The United States Securities and Exchange Commission.

4. *Counsel for Respondent*: Megan Barbero, Michael A. Conley, Dominick V. Freda, and Daniel E. Matro.

5. *Counsel for SEC Division of Enforcement*: Jennifer D. Reece.

/s/ Daniel E. Matro
Attorney of Record for Respondent

STATEMENT REGARDING ORAL ARGUMENT

The Commission is prepared to participate in oral argument if the Court determines that oral argument would assist in its consideration of the petition. However, the Commission believes that the issues may be resolved on the basis of the parties' written submissions.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

STATEMENT REGARDING ORAL ARGUMENT ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

BACKGROUND 3

A. Statutory and Regulatory Overview 3

B. Petitioners' Enforcement Proceeding 6

C. The *Jarkesy* Decision 8

ARGUMENT 9

I. The Court lacks jurisdiction to issue a writ of mandamus compelling the Commission to dismiss petitioners' administrative proceeding 11

II. Petitioners' alternative request for a writ of mandamus compelling the Commission to issue a final order in their administrative proceeding within 30 days is unwarranted 12

A. Petitioners have not shown that the Commission has a clear duty to issue an immediate final order in their proceeding 13

B. The circumstances do not justify the extraordinary relief sought by petitioners 14

CONCLUSION 19

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases **Page(s)**

Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n,
430 U.S. 442 (1977) 18

Axon Enter., Inc. v. FTC, 143 S. Ct. 890 (2023) 3

Califano v. Sanders, 430 U.S. 99 (1977) 12

Flynn v. SEC, 877 F.3d 200 (4th Cir. 2017) 13

Hancock v. Urban Outfitters, Inc., 830 F.3d 511 (D.C. Cir. 2016) 16

Henderson v. Thaler, 626 F.3d 773 (5th Cir. 2010) 16

In re Core Commc'ns, Inc., 531 F.3d 849 (D.C. Cir. 2008) 13, 14, 15

In re. La. Pub. Serv. Comm'n, 58 F.4th 191 (5th Cir. 2023) 10, 11

In re Monroe Commc'ns Corp., 840 F.2d 942 (D.C. Cir. 1988) 15

In re Nat'l Nurses United, 47 F.4th 746 (D.C. Cir. 2022) 1, 2, 10, 11, 12

In re Pub. Employees for Envtl. Responsibility, 957 F.3d 267 (D.C. Cir. 2020) 15

In re Sims, 994 F.2d 210 (5th Cir. 1993) 11-12

Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) .... *passim*

Jarkesy v. SEC, 51 F.4th 644 (5th Cir. 2022) 9

Leonard v. Martin, 38 F.4th 481 (5th Cir. 2022) 2, 9

Lucia v. SEC, 138 S. Ct. 2044 (2018) 6-7

In re Mashpee Wampanoag Tribal Council, Inc. v. Norton,
336 F.3d 1094 (D.C. Cir. 2003) 14

Nat'l Grain & Feed Ass'n v. OSHA, 903 F.2d 308 (5th Cir. 1990) 14-15

NLRB v. Sw. Reg'l Council of Carpenters, 826 F.3d 460 (D.C. Cir. 2016) 16

SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) 3, 4, 14

Stockman v. FEC, 138 F.3d 144 (5th Cir. 1998) 12

Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984) 12

United States v. Core Labs., Inc., 759 F.2d 480 (5th Cir. 1985) 19

United States v. Reynoso, 38 F.4th 1083 (D.C. Cir. 2022) 16

Wolcott v. Sebelius, 635 F.3d 757 (5th Cir. 2011) 9-10, 12

Statutes and Rules

5 U.S.C. 555(b) 14

5 U.S.C. 706(1) 10, 12, 14

28 U.S.C. 1651 10

28 U.S.C. 2462 19

Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.*

Section 4A(a), 15 U.S.C. 78d-1(a) 3

Investment Advisers Act of 1940, 15 U.S.C. 80b-1, *et seq.*

Section 201, 15 U.S.C. 80b-1 3

Section 203, 15 U.S.C. 80b-3 .... 3, 18

Section 203, 15 U.S.C. 80b-3(e)-(f), (i)-(k) 13

Section 203A, 15 U.S.C. 80b-3a 4, 6, 7, 8

Section 204(a), 15 U.S.C. 80b-4 .... 5, 7, 8

Section 209, 15 U.S.C. 80b-9 .... 3, 18

Section 213, 15 U.S.C. 80b-13(a) 4, 11

Rules Under the Investment Advisers Act of 1940, 17 C.F.R. 275.0-2, *et seq.*

Rule 203A-2(e), 17 C.F.R. 275.203A-2(e) 5

Rule 204-2(a), 17 C.F.R. 275.204-2(a) 5, 6, 7, 8

Commission Rules of Practice, 17 C.F.R. 201.100, *et seq.*

Rules 221-360, 17 C.F.R. 201.221-201.360 3-4

Rule 410(a), 17 C.F.R. 201.410(a) 4

Rule 411(a), 17 C.F.R. 201.411(a) 4

Rule 411(c), 17 C.F.R. 201.411(c) 4

Rule 900(a), 17 C.F.R. 201.900(a) 13

17 C.F.R. 200.30-9 3

Legislative Materials

S. Rep. No. 104-293 (1996) 4-5

Commission Releases

Hammon Capital Mgmt. Corp., Advisers Act Release No. 744,
1981 WL 36244 (Jan. 8, 1981) 5

Amendments to Form ADV,
75 Fed. Reg. 49,234 (Aug. 12, 2010) 17

No. 23-20179

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

On Petition for a Writ of Mandamus
to the Securities and Exchange Commission

SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO THE PETITION FOR A WRIT OF MANDAMUS

INTRODUCTION

Invoking this Court's May 2022 decision in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), which held that several federal statutory provisions governing the Securities and Exchange Commission's administrative enforcement proceedings are unconstitutional, petitioners Marian P. Young and her investment advisory firm Saving2Retire, LLC seek a writ of mandamus compelling the Commission to dismiss a pending administrative enforcement proceeding against them. But this Court lacks jurisdiction to grant that extraordinary relief. The All Writs Act authorizes "the issuance of a writ of mandamus in aid of jurisdiction [a] court already has or will have as a result of issuing the writ." *In re Nat'l Nurses United*, 47 F.4th 746, 752 (D.C. Cir. 2022). Because this Court "does not and would not have jurisdiction to review" the dismissal of petitioners' proceeding, it cannot compel that action. *Id.* at 752, 755-56.

Petitioners' alternative request for a writ compelling the Commission to issue a final order in their proceeding within 30 days is likewise without merit. The Commission is seeking Supreme Court review of *Jarkesy*, and petitioners fail to demonstrate that they have a "clear and indisputable right" to an immediate final order. *Leonard v. Martin*, 38 F.4th 481, 489 (5th Cir. 2022) (quotation omitted). There is no statutory deadline by which the Commission must issue a final order in petitioners' proceeding, much less a requirement that the Commission do so even if it is challenging a potentially dispositive intervening decision that it believes is contrary to Supreme Court precedent.

Nor are there "extraordinary circumstances" warranting the drastic remedy of mandamus. *In re Nat'l Nurses United*, 47 F.4th at 752-53. An administrative law judge ("ALJ") found that petitioners—fiduciaries who managed approximately $4 to $4.5 million in client assets—committed multiple securities law violations, including by failing to cooperate with a Commission examination, and imposed a cease-and-desist order, a bar from the securities industry with a right to reapply after two years, and a $13,000 civil penalty. Petitioners do not seriously contest the ALJ's liability findings. And while they suggest that the ALJ's proposed sanctions were unjustified, those sanctions have not taken effect because the Commission agreed to review them.

Ultimately, petitioners' interest in a final determination by the Commission must be balanced against the Commission's statutory responsibility to protect

investors by ensuring that "the highest ethical standards prevail" in the securities markets. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-87 (1963) (quotation omitted). Compelling the Commission to dismiss enforcement actions subject to *Jarkesy* before it exhausts all avenues of review would be inconsistent with that mandate. And it is unlikely that petitioners would achieve "finality and repose" from the "appealable final order" they alternatively purport to seek (Pet. 23) given the potential for Supreme Court review of their constitutional arguments in *Jarkesy*.

Because petitioners have not demonstrated a clear and indisputable right to a writ of mandamus, the petition should be denied.

BACKGROUND

A. Statutory and Regulatory Overview

1. Congress established the Securities and Exchange Commission "to protect investors in securities markets." *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 897 (2023). The Commission enforces a variety of federal statutes, including the Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. 80b-1 *et seq*. These statutes authorize the Commission to address statutory violations by bringing civil actions in federal district court or by instituting administrative enforcement proceedings. *See, e.g.*, *id.* 80b-3, 80b-9.

If the Commission institutes an administrative proceeding, it may assign the initial stages of the proceeding to an ALJ. *Id.* 78d-1(a); 17 C.F.R. 200.30-9. The ALJ

receives evidence, holds a hearing, hears argument, and issues an initial decision on liability and any potential sanctions. 17 C.F.R. 201.221-201.360. The respondent or the Commission's Division of Enforcement may appeal the ALJ's decision to the Commission, or the Commission may review the decision on its own. *Id.* 201.410(a), 201.411(c). The Commission engages in de novo review of the ALJ's decision, and issues an order affirming, reversing, modifying, or setting aside the decision, or remanding for further proceedings. *Id.* 201.411(a). If the Commission's final order is adverse to the respondent, that party may obtain judicial review by filing a petition in a court of appeals. 15 U.S.C. 80b-13(a).

2. The Advisers Act "was the last in a series of Acts designed to eliminate certain abuses in the securities industry" that had "contributed to the stock market crash of 1929 and the depression of the 1930's." *Capital Gains*, 375 U.S. at 186. In enacting these laws, Congress intended "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." *Id.* Investment advisers, who give trusted advice to clients about how to invest their money, are held to the highest such standard: they are fiduciaries. *Id.* at 194.

Section 203A of the Advisers Act generally prohibits an investment adviser from registering with the Commission if it has less than $100 million of assets under management. 15 U.S.C. 80b-3a(a). Congress enacted this prohibition in 1996 to

eliminate overlapping responsibilities of the Commission and state securities authorities in regulating investment advisers. S. Rep. No. 104-293, at 3-4 (1996). Congress was particularly concerned about investment advisers holding themselves out to the public as "registered with the SEC," which "may give investors a false sense of confidence." *Id.* at 3. However, Rule 203A-2(e) exempts from this prohibition certain investment advisers that provide advisory services through the internet. 17 C.F.R. 275.203A-2(e).

Advisers Act Rule 204-2(a) requires that registered investment advisers "make and keep true, accurate and current" certain "books and records," including "[a]ll check books, bank statements, cancelled checks and cash reconciliations of the investment adviser." *Id.* 275.204-2(a). And Section 204(a) of the Advisers Act provides that such records "are subject at any time . . . to such reasonable . . . examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 80b-4(a). The Commission has explained that the books and records requirements are "a keystone of the investment adviser surveillance with which we are charged in order to protect the investing public." *Hammon Capital Mgmt. Corp.*, Advisers Act Release No. 744, 1981 WL 36244, at *2 (Jan. 8, 1981).

B. Petitioners' Enforcement Proceeding

Petitioner Marian P. Young was the sole owner and managing member of co-petitioner Saving2Retire, an investment advisory firm located in Texas. Pet. App. 72. From 2011 to 2015, Saving2Retire had approximately $4 to $4.5 million in assets under management. Pet. App. 72. In 2011, Saving2Retire registered with the Commission as an investment adviser under the internet investment adviser exemption. Pet. App. 73. It withdrew its registration in November 2017. Pet. App. 74.

The Commission commenced an examination of Saving2Retire in November 2014. Pet. App. 76. In July 2016, the Commission brought an administrative enforcement proceeding against petitioners based on allegations by the Division of Enforcement that petitioners had violated Advisers Act Sections 203A and 204 and Rule 204-2. Pet. App. 71. The Commission assigned the initial stages of the proceeding to an ALJ, who held an evidentiary hearing and, in October 2017, issued an initial decision finding petitioners liable for violations of these provisions and ordering sanctions. Pet. App. 17-53. Petitioners then sought Commission review. Pet. App. 2. In June 2018, while their petition for review was pending, the Supreme Court held in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), that the Commission's ALJs had not been appointed in accordance with the Appointments Clause and that litigants

whose cases had been heard by improperly appointed ALJs were entitled to new hearings. *Id.* at 2054-55.

In light of that holding, in August 2018, the Commission remanded petitioners' proceeding for a new hearing before a different, properly appointed ALJ. *See* Pet. App. 63-68, 69. On remand, the parties agreed that the new ALJ would decide the case based upon the prior administrative record as well as additional briefs. Pet. App. 71. The additional briefing was completed in May 2019, and the ALJ issued an initial decision in August 2019, reaching the following conclusions:

- Saving2Retire violated Section 203A of the Advisers Act by registering with the Commission in reliance on the internet adviser exemption, even though it did not have an interactive website for two years after registration and never had a single internet client. Pet. App. 83-84.

- Saving2Retire violated Rule 204-2(a) by failing to maintain a range of required books and records, including canceled checks, cash reconciliations, current bank statements, a current cash receipts or disbursements journal, general ledger, or trial balances. Pet. App. 86-87.

- Saving2Retire violated Section 204(a) by failing to make its records available for examination and instead "stonewall[ing] and obstruct[ing] the examination." Pet. App. 85, 94.

- Young aided, abetted, and caused the first two of these violations, and caused the third. Pet. App. 88-89.

Although the ALJ found no investor harm or fraud, she concluded that petitioners' violations were "serious" and that, as a fiduciary, Young's failure to keep required books and records or to comply with the Commission's examination was "highly unreasonable" and "reckless." Pet. App. 70, 88. The ALJ ordered petitioners

to cease and desist from future violations of Sections 203A and 204(a) and Rule 204-2(a), barred Young from the securities industry with a right to reapply after two years, and imposed a $13,000 civil penalty on Young. Pet. App. 90-95.

Petitioners again sought Commission review, which the Commission granted. Pet. App. 2. The parties completed briefing before the Commission in December 2019. Pet. App. 2.

C. The *Jarkesy* Decision

On May 18, 2022, this Court issued a decision in *Jarkesy v. SEC*, 34 F.4th 446. The Commission had found that the respondents in *Jarkesy* committed securities fraud and ordered them to cease and desist from further violations and to pay disgorgement and a civil penalty. *Id.* at 450. A divided panel of this Court granted the respondents' petition for review on three constitutional grounds.

The Court first held that the adjudication of certain enforcement actions seeking civil penalties in an administrative proceeding violates a respondent's Seventh Amendment right to a jury trial. *Id.* at 451-59. The Court next held that Congress had violated the nondelegation doctrine by giving the Commission unconstrained authority to choose in particular cases whether to bring an enforcement action in an administrative proceeding or in an Article III court. *Id.* at 459-63. And finally, the Court held that the statutory restrictions on the removal of the Commission's ALJs violated Article II. *Id.* at 463-65. The Court concluded that its Seventh Amendment

and nondelegation holdings each justified vacatur of the Commission's order. *Id.* at 459 & n.9. The Court found it unnecessary to decide whether "vacating would be the appropriate remedy based on [the removal issue] alone." *Id.* at 463 n.17.

On October 21, 2022, the Court denied the Commission's petition for rehearing en banc by a vote of 10-6. *Jarkesy v. SEC*, 51 F.4th 644 (5th Cir. 2022). Judge Haynes, joined by four other judges, dissented from the denial. *Id.* at 645. She argued that the panel's Seventh Amendment holding was "in conflict with Supreme Court and this court's precedent"; that its nondelegation holding had wrongly treated an agency's exercise of enforcement discretion "as an exercise of legislative power"; and that its Article II holding would improperly "threaten the independence" of ALJs. *Id.* at 645-47 (quotation and alteration omitted).

The Commission filed a petition for a writ of certiorari in *Jarkesy* on March 8, 2023. The response to the petition is currently due on May 23, 2023.

ARGUMENT

Mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Leonard*, 38 F.4th at 488-89 (quotation omitted). It "may only issue when (1) the plaintiff has a clear right to relief, (2) the defendant a clear duty to act, and (3) no other adequate remedy exists." *Wolcott v. Sebelius*, 635 F.3d 757, 768

(5th Cir. 2011). Even then, "the decision to grant or deny the writ remains within the court's discretion because of the extraordinary nature of the remedy." *Id.*

Petitioners seek a writ of mandamus under the All Writs Act, 28 U.S.C. 1651, to compel the Commission to issue a final order they claim it has "unlawfully withheld or unreasonably delayed" in violation of the Administrative Procedure Act (APA), 5 U.S.C. 706(1). *See* Pet. 3-4, 21-22. The All Writs Act authorizes the Court to "issue all writs necessary or appropriate in aid of [its] . . . jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). This Court has recognized that "[w]hen federal appellate courts have jurisdiction to review agency action, 'the All Writs Act empowers those courts to issue a writ of mandamus compelling the agency to complete the action.'" *In re. La. Pub. Serv. Comm'n*, 58 F.4th 191, 192 (5th Cir. 2023) (quoting *In re Nat'l Nurses United*, 47 F.4th at 753).

To obtain such extraordinary relief, however, petitioners must establish (1) that the Court has jurisdiction under the All Writs Act—*i.e.*, that "issuing the writ would protect [the Court's] current or prospective jurisdiction," (2) that the agency has "a crystal-clear legal duty to act," and (3) even if such a clear duty exists, that the agency's delay is "so egregious" under the circumstances that the "drastic remedy" of mandamus is warranted. *In re Nat'l Nurses United*, 47 F.4th at 752-53 (quotation omitted). Petitioners' request for a writ of mandamus compelling the Commission to dismiss their administrative proceeding fails the threshold jurisdictional requirement.

And their alternative request for a writ compelling the Commission to issue a final order within 30 days fails both the second and third requirements.

I. The Court lacks jurisdiction to issue a writ of mandamus compelling the Commission to dismiss petitioners' administrative proceeding.

The All Writs Act is not itself a grant of jurisdiction to issue a writ of mandamus. *In re Nat'l Nurses United*, 47 F.4th at 752. Rather, the Act authorizes a court to issue a writ of mandamus "to protect jurisdiction it already has or will have once an appeal has been perfected." *Id.* at 755 (quotation omitted). It follows that a court "only ha[s] jurisdiction to compel an agency to take an action [the court] would ultimately have jurisdiction to review." *Id.*; *see also In re. La. Pub. Serv. Comm'n*, 58 F.4th at 192 (the Act empowers courts to compel agencies to "complete [an] action" that the court "ha[s] jurisdiction to review"). If a court "does not and would not have jurisdiction to review the agency action sought by petitioners, it cannot bootstrap jurisdiction via the All Writs Act." *In re Nat'l Nurses United*, 47 F.4th at 752.

These principles foreclose petitioners' request for a writ compelling the Commission to dismiss their administrative proceeding. The Advisers Act provides that a person "aggrieved" by a Commission order "may obtain a review of such order" by filing a petition in a court of appeals. 15 U.S.C. 80b-13(a). The filing of such a petition gives the appellate court "jurisdiction . . . to affirm, modify, or set aside [the] order, in whole or in part." *Id.* Petitioners could not fairly be said to be "aggrieved" by a Commission order dismissing their proceeding. *Cf. In re Sims*, 994

F.2d 210, 214 (5th Cir. 1993) ("[A] party who has obtained a judgment in his favor, granting the relief sought, is not aggrieved by it."). There would thus be no party who conceivably could seek this Court's review. Because an order compelling such a dismissal would not "protect [this Court's] current or prospective jurisdiction," the Court "cannot grant th[at] relief" under the All Writs Act. *In re Nat'l Nurses United*, 47 F.4th at 755.

Section 706(1) of the APA, 5 U.S.C. 706(1), cited at Pet. 3-4, 22, does not fill the jurisdictional gap. That provision "does not confer an independent grant of jurisdiction" to issue mandamus relief unavailable under the All Writs Act. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 76-77 (D.C. Cir. 1984) (citing *Califano v. Sanders*, 430 U.S. 99, 107 (1977)); *see also Stockman v. FEC*, 138 F.3d 144, 151 n.13 (5th Cir. 1998) ("[T]he APA does not create an independent grant of jurisdiction to bring suit.").

II. Petitioners' alternative request for a writ of mandamus compelling the Commission to issue a final order in their administrative proceeding within 30 days is unwarranted.

Petitioners have not established that the Commission has an "incontrovertible" duty to issue an immediate final order in their proceeding. *In re Nat'l Nurses United*, 47 F.4th at 752; *see also Wolcott*, 635 F.3d at 768 (duty must be "so plainly prescribed as to be free from doubt"). Nor is the delay, in these circumstances, "so egregious as to warrant mandamus." *In re Nat'l Nurses United*, 47 F.4th at 753 (quotation omitted).

A. Petitioners have not shown that the Commission has a clear duty to issue an immediate final order in their proceeding.

The "extraordinary remedy" of mandamus is "reserved only for the most transparent violations of a clear duty to act." *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quotation omitted). But here, as petitioners acknowledge (Pet. 23), the federal securities statutes do not specify any time period within which the Commission must issue a final order in an administrative enforcement proceeding. *See, e.g.*, 15 U.S.C. 80b-3(e)-(f), (i)-(k).

Nor does the Commission have a duty to act within the timeframes specified in Rule 900(a) of its Rules of Practice, as petitioners incorrectly assert. Rule 900(a) states that, "[o]rdinarily," the Commission's decision in the appeal of an ALJ decision "will be issued within eight months from the completion of briefing on the petition for review," or "within ten months" if the "complexity of the issues" warrants. 17 C.F.R. 201.900(a)(1)(iii). But this is merely an "aspirational and discretionary" guideline, *Flynn v. SEC*, 877 F.3d 200, 206 (4th Cir. 2017), which "confer[s] no rights or entitlements on parties," 17 C.F.R. 201.900(a)(1)(iv). The Commission "may extend the period . . . by orders as it deems appropriate in its discretion," as it has done in this proceeding. *Id.*; *see* Pet. App. 98-112.

Petitioners identify no other provision of law imposing a mandatory timeframe that would apply here—much less a duty to issue a final order while the Commission is appealing a potentially dispositive judicial ruling that it believes is wrong. Indeed,

particularly if that ruling might require dismissal of the proceeding, any such duty would potentially conflict with the Commission's statutory charge to protect investors and maintain "the highest ethical standards" in the securities industry. *See Capital Gains*, 375 U.S. at 186-87.[1]

B. The circumstances do not justify the extraordinary relief sought by petitioners.

Although the APA obligates the Commission to "conclude a matter" presented to it "within a reasonable time," 5 U.S.C. 555(b), the final order petitioners seek is not being "unlawfully withheld or unreasonably delayed," *id.* 706(1), and in any event, the circumstances do not warrant a writ of mandamus compelling its issuance.

The reasonableness of an agency delay "cannot be decided in the abstract, by reference to some number of months or years beyond which agency action is presumed to be unlawful." *In re Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003); *see also In re Core Commc'ns, Inc.*, 531 F.3d at 855 (there is "no per se rule as to how long is too long to wait for agency action" (quotation omitted)). And the analysis must "begin with the recognition that an administrative agency is entitled to considerable deference in establishing a timetable

[1] Petitioners briefly suggest that they have a constitutional right to an immediate decision, but they do not develop the argument and none of the authorities they cite supports it. *See* Pet. 24-25 (citing general due process principles and unrelated administrative decisions dismissing disciplinary actions on statutory grounds due to unfair delays in the filing of charges).

for completing its proceedings." *Nat'l Grain & Feed Ass'n v. OSHA*, 903 F.2d 308, 310 (5th Cir. 1990) (quotation omitted); *see also In re Monroe Commc'ns Corp.*, 840 F.2d 942, 946 (D.C. Cir. 1988) (three-year delay following ALJ's initial decision not "unreasonable on its face").

The Court considers a number of factors in evaluating an agency's lack of action, including:

> (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, 903 F.2d at 310. "No one factor is determinative, and each case must be analyzed according to its own unique circumstances." *In re Pub. Employees for Envtl. Responsibility*, 957 F.3d 267, 273 (D.C. Cir. 2020) (quotation omitted).

These factors counsel against the drastic remedy of mandamus. Petitioners focus on the time that has passed since the completion of briefing, but there is a rational, good-faith explanation why the Commission has not yet issued a final order. *See In re Core Commc'ns, Inc.*, 531 F.3d at 855 (whether timing of agency decision is "governed by a rule of reason" is the "most important factor" in assessing reasonableness of a delay (quotation omitted)). In May 2022, this Court issued its

decision in *Jarkesy*, which, petitioners argue, would require that their proceeding be dismissed.[2] The Commission believes *Jarkesy* is contrary to Supreme Court precedent and has exercised its right to seek en banc and now Supreme Court review.

Waiting for resolution of *Jarkesy* would not contravene any "legislative mandate" or binding rules governing the timing of Commission decisions and is consistent with the Commission's statutory responsibility to protect investors. It is also consistent with the common judicial practice of placing cases in abeyance, even after oral argument has been held, pending the Supreme Court's review of a case involving a potentially dispositive issue. *See, e.g.*, *United States v. Reynoso*, 38 F.4th 1083, 1087 (D.C. Cir. 2022); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 513 (D.C. Cir. 2016); *NLRB v. Sw. Reg'l Council of Carpenters*, 826 F.3d 460, 461 (D.C. Cir. 2016); *Henderson v. Thaler*, 626 F.3d 773, 777 (5th Cir. 2010).

Nor do the injuries that petitioners claim to suffer as a result of the lack of a final order justify the extraordinary relief they seek. Pet. 23. The Commission recognizes that petitioners have an interest in an end to their proceeding. But petitioners offer no evidence that the "financial and reputational harm[s]" they assert stem from the lack of a final order rather than their own misconduct. Indeed, the

[2] Petitioners' assertion that *Jarkesy* is an "unrelated case" (Pet. 23) contradicts their references to it as "binding" precedent with which the Commission "would need to contend" in deciding their case. Pet. 17, 26.

record indicates otherwise. For example, in 2015, California rejected petitioners' investment adviser application on multiple grounds, including numerous deficiencies in the application, material misrepresentations in petitioners' Form ADV filings[3] (including falsely claiming professional certifications that Young did not have), and various violations of California law, in addition to evidence of their non-cooperation with the Commission's examination. *See* Division of Enforcement's Resp. in Opp'n to Resp'ts Br. in Supp. of Pet. for Review, Ex. A (Dec. 11, 2019), https://www.sec.gov/litigation/apdocuments/3-17352-event-126.pdf (Division Response).[4] Petitioners also do not seriously dispute the ALJ's liability findings. And it is not even clear that they have any intent to register as an investment adviser again. Thus, even if the Commission were to dismiss in light of *Jarkesy*, and that might "vindicat[e]" their constitutional objections, petitioners have not shown that it would make a significant difference in their ability "as a practical matter to work in the securities industry." Pet. 23.[5]

---

[3] Form ADV is a uniform registration form and disclosure statement that investment advisers are required to file annually. *See Amendments to Form ADV*, 75 Fed. Reg. 49,234, 49,234 n.5 (Aug. 12, 2010).

[4] California regulators concluded that "Young's lack of timely cooperation, recalcitrance to provide relevant information, omission of material facts, and outright misrepresentations to both the Department [of Business Oversight] and to the SEC reflect poorly on her honesty and integrity in an industry that demands both from its participants." Division Response, Ex. A at 6.

[5] Similarly unsubstantiated claims of harm to "*others*" with pending proceedings do not establish *petitioners'* right to mandamus relief. Pet. 23 (emphasis added).

It is equally unclear that an immediate, judicially reviewable order would give petitioners the "finality and repose" they seek. Pet. 23. Yes, they would "have the benefit" of *Jarkesy* in this Court to the extent it applies to their proceeding. Pet. 17. But any benefit may be short-lived if the Supreme Court grants the Commission's petition for certiorari in the coming months. If the Commission were to decline to dismiss the proceeding under *Jarkesy* and reject petitioners' appeal on the merits, this Court's decision on any appeal would also be subject to potential further Supreme Court review. And if the Supreme Court denies certiorari or affirms *Jarkesy*, this Court's review may never be required at all. Petitioners' general interest in finality thus does not justify an extraordinary judicial intervention now.

Finally, petitioners' allegations of bad faith are unfounded. Petitioners accuse the Commission of deliberately depriving them of their right to a jury trial (Pet. 6, 24, 26), but the exercise of authority plainly delegated by Congress is not proof of bad faith. 15 U.S.C. 80b-3, 80b-9; *see also Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977) ("Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred.").

Petitioners' assertion (Pet. 16, 17, 24) that the Commission is refusing to decide pending administrative appeals to avoid judicial scrutiny of its administrative

proceedings makes no sense. The Commission is actively seeking Supreme Court review of the same constitutional challenges petitioners advance here. *See* Pet. for Writ of Certiorari, *supra*. And the relevance of *United States v. Core Laboratories, Inc.,* 759 F.2d 480 (5th Cir. 1985) (Pet. 18, 26), to the lack of a final order here is unclear. Petitioners' administrative proceeding was commenced within the five-year limitations period of 28 U.S.C. 2462.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

/s/ Daniel E. Matro

MEGAN BARBERO
General Counsel

MICHAEL A. CONLEY
Solicitor

DOMINICK V. FREDA
Assistant General Counsel

DANIEL E. MATRO
Senior Appellate Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) 551-8248 (Matro)

May 2023

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 21(d) because it contains 4,427 words, excluding the parts exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2.

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface—Garamond, 14 point—using Microsoft Word.

/s/ *Daniel E. Matro*

May 8, 2023

Daniel E. Matro

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2023, I electronically filed the foregoing Response to the Petition for a Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which will send notice to all the parties.

/s/ *Daniel E. Matro*
Daniel E. Matro

May 8, 2023