No. 23-20179

In the United States Court of Appeals for the Fifth Circuit

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

PETITIONERS' REPLY IN SUPPORT OF THEIR PETITION FOR A WRIT OF MANDAMUS TO THE U.S. SECURITIES AND EXCHANGE COMMISSION

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PRELIMINARY STATEMENT

Petitioners Marian P. Young and Saving2Retire, LLC respectfully submit this reply in further support of their Petition for a Writ of Mandamus to the U.S. Securities and Exchange Commission ("SEC").

ARGUMENT

SEC does not dispute any of the core facts asserted in the Petition. Those facts include:

(1) that SEC deliberately avoided a jury trial by prosecuting Petitioners administratively rather than in federal court;

(2) that SEC's administrative case alleged no fraud, investor loss, or self-enrichment by Petitioners;

(3) that Petitioners' administrative case is not complicated;

(4) that SEC publicly filed its charges against Petitioners nearly seven years ago;

(5) that SEC has failed to issue a final adjudicative order in Petitioners' administrative case despite being fully briefed on final appeal since December 2019;

(6) that SEC's own rules provide that it should "ordinarily" decide administrative appeals, even in the most complicated cases, within 10 months of the completion of appellate briefing;

(7) that SEC has provided no meaningful explanation for its failure to decide Petitioners' *un*complicated administrative appeal in the more than *40 months* since the completion of appellate briefing; and

(8) that SEC has likewise refused to decide *any* similar administrative appeals currently pending before it since November 2020, all of which were fully briefed at least 23 months ago.

Yet after *years* of this willful, calculated administrative inaction, SEC now cites this Court's decision just last year in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), as the sole purported excuse for its lassitude, effectively admitting that faithful adherence to *Jarkesy* would now preclude the agency from issuing a final order that penalizes Petitioners. *See* SEC Resp. at 15-16. SEC claims that because it recently filed a petition for a writ of certiorari seeking Supreme Court review of *Jarkesy*, this Court should allow the agency to continue, indefinitely, its refusal to act on Petitioners' seven-year-old administrative case (and presumably all others like it) in the vain hope that the Supreme Court might grant certiorari on all three issues presented and—perhaps around this time next year—eventually reverse this Court on all three of those issues. *See id*.

By SEC's logic, so long as any unwelcome judicial precedent stands in the way of punishing its enforcement targets, it has unfettered discretion to hold those targets hostage—indefinitely and seriatim—to await a day when the unwelcome

precedent(s) might get overturned. (SEC would presumably claim similar discretion to withhold final decision any time Congress is considering a statutory fix that might retroactively salvage one or more of its failing cases.) In SEC's view, moreover, courts lack jurisdiction to intervene in such circumstances and should mind their own business. This Court and others have long held otherwise. *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."); *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).

SEC has things exactly backward: The *Jarkesy* decision is a compelling reason to *grant* mandamus, not to deny it. As detailed in the Petition, SEC is obliged by statute, SEC rule, and due process of law to conclude matters presented to it within a reasonable time and without undue delay—faithfully applying the law as interpreted by the courts. *See* Pet. at 24-26. That obligation is not suspended indefinitely whenever SEC disagrees with how the courts are interpreting the applicable law. To the contrary, it is the role of courts—not SEC—to "say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

Moreover, this Court decided *Jarkesy* only a year ago, so that case cannot plausibly excuse SEC's inaction on Petitioners' administrative appeal going all the

way back to late 2019, much less back to SEC's initiation of its prosecution against Petitioners nearly seven years ago.[1] Nor can *Jarkesy* plausibly explain SEC's identical, years-long refusal to decide *any* of its other similar pending administrative appeals involving litigants outside the Fifth Circuit. *See* Pet. at 14-16.

Contrary to SEC's assertion, Petitioners are hardly demanding "an immediate final order" in their administrative case. *See* SEC Resp. at 2. SEC filed its defamatory public accusations against Petitioners in July 2016—*nearly seven years ago*. SEC could and should have completed its administrative prosecution years ago (and long before *Jarkesy*), thereby allowing Petitioners to seek from this Court timely merits review of any adverse SEC final order. *See* 15 U.S.C. § 78y(a). If giving SEC an *additional* 30 days to conclude an uncomplicated matter it initiated in 2016 constitutes a demand for "immediate" agency action, we shudder to think what SEC would consider a more deliberate pace.

By any reasonable assessment, SEC's multi-year work stoppage—irrespective of *Jarkesy*—is egregious and inexcusable, especially in a simple, mundane case like Petitioners' involving alleged registration and bookkeeping infractions with no

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[1] Of the eleven extensions the SEC commissioners have granted themselves in Petitioners' case, seven occurred *before* this Court issued its *Jarkesy* decision. *See* Pet. at 11-12.

allegations of fraud, investor losses, or self-enrichment.[2] SEC procedures gave Petitioners less than a year to prepare their defense in advance of their disciplinary hearing before an administrative law judge ("ALJ"), and the hearing was completed in one partial day back in May 2017. Pet. App. 18, 71. Only two witnesses testified and only 59 exhibits were introduced (with a 60th introduced later). *Id.* The ALJ reviewed and assessed the entire evidentiary record and was able to issue a 37-page, single-spaced initial decision only five months later. Pet. App. 17- 53.

After the case was reassigned to another ALJ post-*Lucia*, and after the parties completed supplemental briefing in late May 2019, that second ALJ needed less than three months to review the entire record anew and issue a 28-page, single-spaced decision in late August 2019. Pet. App. 70-97. The parties were then able to fully brief Petitioners' appeal to SEC's commissioners by mid-December 2019, yet that appeal remains undecided nearly three and one-half years later. Pet. App. 2.

While mandamus relief in such circumstances typically directs the agency to promptly decide the delayed matter while stopping short of telling the agency *how* to decide it, this case is unusual because, as SEC appears to begrudgingly acknowledge, binding Fifth Circuit precedent effectively precludes SEC from

[2] Although SEC's response gratuitously invokes the fiduciary duties of investment advisers like Petitioners, SEC Resp. at 2, 4, 7, as well as the leading Supreme Court precedent confirming the importance of such duties, *id*. at 3, 4, 14 (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963)), SEC has never accused Petitioners of violating their fiduciary duties.

imposing any sanctions on Petitioners or collecting any penalties it might impose. Specifically, last year's *Jarkesy* decision held that SEC's administrative prosecution of enforcement targets, like Petitioners, violates their constitutional jury trial rights, 34 F.4th at 451-57; that SEC ALJs like the one who superintended and decided Petitioners' case are unconstitutionally protected from removal by the President, *id*. at 463-65; and that Congress acted unconstitutionally when it delegated to SEC the legislative power to deprive enforcement targets like Petitioners of their jury trial rights, *id*. at 459-63. And more than 35 years ago in *United States v. Core Laboratories, Inc.*, 759 F.2d 480, 482-83 (5th Cir. 1985), this Court held that 28 U.S.C. § 2462 precludes federal agencies from filing lawsuits to collect administrative penalties based on conduct that occurred more than five years before the collection lawsuit was filed.[3] These two controlling precedents—along with SEC's prolonged administrative dithering—have left the agency with no lawful path to impose or collect any penalties against Petitioners.

[3] SEC's response devotes only two sentences to *Core Laboratories*, *see* SEC Resp. at 19, and those sentences miss the central point of this Court's holding in that case. It is irrelevant whether SEC commenced its administrative prosecution of Petitioners within five years of their alleged violations. To collect any penalties SEC might administratively impose at this point, the agency would need to timely file a *new* proceeding in a federal district court to *enforce* those penalties, *see* 15 U.S.C. § 78u(e), and *Core Laboratories* squarely holds that the new proceeding must *also* be commenced within five years of the conduct on which the penalties are based. That five-year deadline expired many years ago.

Just last month, Justice Gorsuch poignantly exposed the real-life personal damage inflicted by the kind of administrative hubris, lethargy, and procedural gamesmanship that has become SEC's signature method in recent years, and Petitioners commend his concurring opinion to this Court (as well as to SEC):

> … Not many [litigants] possess the perseverance of [administrative targets] Ms. Cochran and Axon. The cost, time, and uncertainty associated with litigating a raft of opaque jurisdictional factors will deter many people from even trying to reach the court of law to which they are entitled. Nor is the loss of a day in court in favor of one before an agency a small thing. Agencies like the SEC and [Federal Trade Commission] combine the functions of investigator, prosecutor, and judge under one roof. They employ relaxed rules of procedure and evidence—rules they make for themselves.
>
> That review is available in a court of appeals after an agency completes its work hardly makes up for a day in court before an agency says it's done. When a case eventually makes its way to an appellate court, judges sometimes defer to the agency's conclusions (especially when it comes to disputed questions of fact). And how many people can afford to carry a case that far anyway? Ms. Cochran's administrative proceedings have already dragged on for *seven years*. Thanks in part to these realities, the bulk of agency cases settle. *See Tilton v. SEC*, 824 F. 3d 276, 298, n. 5 (CA2 2016) (Droney, J., dissenting) ("vast majority" of SEC cases settle); Tr. of Oral Arg. in No. 21–1239, p. 6 ("more than 90 percent" of such cases settle). Aware, too, that few can outlast or outspend the federal government, agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way.

Axon Enterprise, Inc. v. FTC, 598 U.S. 175, 215-16 (2023) (Gorsuch, J., concurring in judgment) (page proof pending publication) (emphasis in original).

CONCLUSION

Enough is enough. SEC's willful procrastination and evasion of judicial scrutiny must cease. Due process and the rule of law require judicial intervention. The petition for a writ of mandamus should be granted.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Reply complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure and Fifth Circuit local rules because it contains 1816 words, excluding the tables and certificates; 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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