

Quasi-Governmental Prosecution After *Jarkesy*

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I. INTRODUCTION

*Securities and Exchange Commission v. Jarkesy*¹—which held that Article III of the Constitution and the Seventh Amendment prohibit the Securities and Exchange Commission (“SEC”) from penalizing wrongdoers using non-jury administrative tribunals—was just the latest in a string of Supreme Court rulings that have reined in the power of administrative agencies and, in particular, agency *law enforcement* power. Among other prior rulings, the Court rejected agency efforts to evade or enlarge their statutory deadlines for commencing enforcement proceedings;² curtailed agency power to seek restitution and disgorgement from alleged wrongdoers;³ required agency adjudicators of enforcement cases and other

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1. 603 U.S. 109 (2024).

2. *Kokesh v. SEC*, 581 U.S. 455, 457, 461 (2017) (SEC cases seeking disgorgement); *Gabelli v. SEC*, 568 U.S. 442, 447–49 (2013) (SEC cases seeking civil monetary penalties).

3. *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67, 70, 73–78 (2021) (restitution); *see Liu v. SEC*, 591 U.S. 71, 84–88 (2020) (disgorgement).

important matters to be appointed by the President or by a presidentially appointed and Senate-confirmed “Head of Department;”⁴ invalidated excessive statutory restrictions on the President’s ability to remove agency officers who wield significant executive powers;⁵ and allowed agency enforcement targets to preemptively enlist federal district courts to scrutinize the structural constitutionality of agency in-house, non-jury administrative enforcement proceedings instead of forcing them to endure the entire administrative process before seeking judicial relief.⁶ Now, with *Jarkesy*, the Court has forbidden agencies to unilaterally impose monetary enforcement penalties through in-house, non-jury administrative adjudications, effectively requiring those agencies to seek such penalties only from Article III courts and juries.⁷

Thus far, these cases have challenged conventional *government* agencies subject to the Administrative Procedure Act.⁸ But what about the growing number of private, quasi-governmental regulators who now enforce federal law, many of which wield substantial executive power comparable to conventional government agencies but with far less transparency and accountability? A few prominent examples, discussed herein, include the securities industry self-regulatory organizations nominally overseen by the SEC, most notably the Financial Industry Regulatory Authority (FINRA); the Public Company Accounting Oversight Board (PCAOB), which is also nominally overseen by the SEC; and the Horseracing Integrity and Safety Authority (HISA), which is nominally overseen by the Federal Trade Commission (FTC). Congress has grown increasingly fond of empowering such nominally private corporations to investigate and punish alleged wrongdoers using enforcement processes largely modeled on those of conventional agencies. Does the Court’s recent rollback of agency executive power—in particular, the Article III and jury-trial requirements of *Jarkesy*—apply equally to these private, quasi-governmental regulators?

This article addresses that question and suggests that the answer should be yes. Part I describes the structure and executive powers of FINRA, the PCAOB, and HISA. Part II identifies several structural constitutional defects inherent in the enforcement and disciplinary processes used by these quasi-governmental regulators to investigate, prosecute, and punish alleged wrongdoers, including the unavailability of jury trials. Part III then discusses the issues raised in, and the current status of, several ongoing court cases in which litigants have challenged these structural constitutional defects.

4. *See Lucia v. SEC*, 585 U.S. 237, 241, 244–49 (2018) (addressing SEC administrative law judges); *see United States v. Arthrex*, 594 U.S. 1, 14–18 (2021) (addressing administrative patent judges assigned to the Patent Trial and Appeal Board).

5. *See Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 495–98 (2010).

6. *Axon Enter. v. FTC*, 598 U.S. 175, 180, 188–189, 195–196 (2023); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 489–91 (2010).

7. *See SEC v. Jarkesy*, 603 U.S. 109, 120–21 (2024).

8. *See* 5 U.S.C. § 551(1).

II. “THIS UNPRECEDENTED EXTRA-CONSTITUTIONAL STEW”⁹

Congress has empowered private individuals and entities to assist with governmental and quasi-governmental functions since our nation’s founding. Early examples included the prosecution of *qui tam* lawsuits,¹⁰ the building and maintenance of lighthouses,¹¹ and the collection of taxes.¹² Modern examples include the American National Red Cross,¹³ Amtrak,¹⁴ private prison operators,¹⁵ and private military contractors.¹⁶ The Congressional Research Service reported in 2011 that “[t]here are today, associated with the federal government alone, hundreds of hybrid entities that have collectively been called the ‘quasi government.’”¹⁷

Recent decades have seen the emergence of a new form of privatized government: private corporations created or empowered by Congress to regulate entire industries with little accountability to the citizenry or our elected representatives. They are empowered not only to issue binding rules that carry the force of federal law applicable to entire industries, but also to enforce those rules and related federal law and rules through investigation, prosecution, and often severe punishment of suspected violators. Moreover, these regulators often are privately funded through “fees” that resemble broad-based taxes without Congressional appropriation or oversight. Relatedly, the compensation of their leaders and staff is not limited by federal government pay scales, and they are exempt from most federal laws that are designed to ensure the transparency and accountability of conventional government regulators, such as the Freedom of Information Act, the

9. *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 713 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev’d* 561 U.S. 477 (2010).

10. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 776–77, 776 n.5 (2000) (discussing historical examples). Pertinent to the issues discussed in this article is a recent district court decision, now on appeal, holding that a *qui tam* relator was an inferior officer who lacked proper appointment by, and accountability to, the President. *See US ex rel. Clarissa Zafirov v. Florida Medical Assocs., LLC*, 751 F. Supp. 3d 1293, 1303–1304, (M.D. Fla. 2024).

11. KEVIN KOSAR, CONG. RSCH. SERV., RL33777, *PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION 2* (2006), <https://sgp.fas.org/crs/misc/RL33777.pdf> [<https://perma.cc/GY5V-HKQ9>].

12. Joseph J. Thorndike, *Historical Perspective: The Unhappy History of Private Tax Collection*, TAX NOTES (Sept. 20, 2004), <https://www.taxnotes.com/tax-history-project/historical-perspective-unhappy-history-private-tax-collection/2004/09/20/yscr?highlight=unhappy%20history> [<https://perma.cc/4Y3P-CVF7>].

13. *See Our Federal Charter: How the American Red Cross Achieved its Current Role*, AMERICAN RED CROSS, www.redcross.org/content/dam/redcross/National/history-federal-charter.pdf [<https://perma.cc/Q4TE-LGHX>].

14. *See generally Ass’n of Am. R.R.s v. Dep’t of Transp.*, 896 F.3d 539 (D.C. Cir. 2018) (final chapter in years-long litigation including a Supreme Court decision).

15. *See, e.g.*, Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 26, 2021) (ending federal use of private prisons).

16. *See* Laura A. Dickinson, *Government For Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 147–54 (2005).

17. KEVIN KOSAR, CONG. RSCH. SERV., RL30533, *THE QUASI-GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS 1* (2011), <https://sgp.fas.org/crs/misc/RL30533.pdf> [<https://perma.cc/9BFH-HMZN>] (citing Harold Seidman, *The Quasi World of the Federal Government*, BROOKINGS REV. 23–27, <https://www.jstor.org/stable/20080040?seq=1> [<https://perma.cc/2BJN-ZN7E>]).

Sunshine Act, the Privacy Act, the Paperwork Reduction Act, the Equal Access to Justice Act, and many others. And the private citizens who staff these regulators are not required to take the oath required of their governmental counterparts to “support and defend the Constitution” and “bear true faith and allegiance to the same.”¹⁸ As a result, these quasi-governmental regulators have been aptly described as “occupying the hazy no-man’s-land dividing private entities from executive agencies.”¹⁹

Three examples discussed in this paper are FINRA, which regulates a large swath of the financial industry; the PCAOB, which regulates a large swath of the auditing profession and was once described by then-Judge Kavanaugh as “this unprecedented extra-constitutional stew”;²⁰ and HISA, which regulates a large swath of the horseracing industry. Each is empowered to promulgate rules that bind entire industries, and to enforce those rules (and related federal law) through investigation, prosecution, and punishment of suspected violators. Each is overseen to some degree by a federal government agency with respect to their quasi-legislative functions (such as rulemaking), but those agencies provide no meaningful government oversight or direction when these putatively subordinate quasi-governmental regulators flex their enormous executive and pseudo-judicial powers, including the investigation, prosecution, and punishment of suspected wrongdoers. And with one notable exception discussed below with respect to HISA, these quasi-governmental regulators can prosecute and punish suspected lawbreakers without affording them the jury trial that is now required by *Jarkesy* when a conventional government agency does the same thing. Worse yet, Congress has never legislated the maximum penalties imposable by FINRA and HISA, and when it did so for the PCAOB, it set those penalty caps so astronomically high that the amounts can theoretically dwarf the penalties imposable by government agencies such as the SEC.

A. FINRA

With an annual budget of more than \$1.3 billion, funded primarily by fees collected from its member firms, FINRA is the primary “self-regulator” of the securities industry.²¹ Currently a private, nonprofit corporation organized under the laws of Delaware, FINRA boasts an organizational lineage dating back at least to the 1930s.²² FINRA was not created by statute, but it remains the only national securities association that has been recognized and registered

18. 5 U.S.C. § 3331.

19. Comment, *Alpine Securities Corp. v. Financial Industry Regulatory Authority*, 137 HARV. L. REV. 1042, 1043–44 (2024).

20. *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 713 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev’d* 561 U.S. 477 (2010).

21. *See Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1321 (D.C. Cir. 2024), *cert. denied*, 145 S. Ct. 2751 (2025) (mem.); *see also FINRA, FINRA 2024 Annual Budget Summary* 5 (2024), www.finra.org/sites/default/files/2024-06/FINRA-2024-Annual-Budget-Summary.pdf [<https://perma.cc/PQU2-672Q>].

22. *See Alpine*, 121 F.4th at 1321.

by the SEC since Congress authorized such recognition and registration in the Maloney Act of 1938.²³ Since 1983, nearly all securities brokers and dealers have been statutorily required to become members of FINRA and submit to its jurisdiction.²⁴

FINRA currently regulates more than 3,000 financial firms and their more than 600,000 “registered representatives” (i.e., stockbrokers, investment bankers, and other securities professionals).²⁵ Although FINRA is overseen to varying degrees by the SEC, none of FINRA’s leaders or employees is appointed by the SEC or anyone else in government, and FINRA is privately funded primarily through annual fees charged to its member firms.²⁶ FINRA’s regulatory functions include promulgating rules that govern and bind member firms and individuals in the securities industry, periodically examining those firms and individuals to assess compliance with FINRA rules and the securities laws, and disciplining firms and individuals who violate those rules and laws.²⁷

Since 1975, most new FINRA rules (and amendments to existing rules) must be approved by the SEC before taking effect.²⁸ Although not free from debate, FINRA has asserted, and some courts have agreed, that once its rules are approved by the SEC, they acquire the force of law on par with federal statutes and SEC rules.²⁹ Whether or not that is true, the SEC is statutorily empowered to enforce FINRA rules just like its own rules (at least when the agency sues alleged wrongdoers in federal courts), although it must first determine either that FINRA “is unable or unwilling to take appropriate action” or that SEC enforcement “is otherwise necessary or appropriate in the public interest or for the protection of

23. See Maloney Act, Pub. L. No. 75–719, 52 Stat. 1070, 1070–79 (1938) (codified as amended at 15 U.S.C. § 78o) (authorizing SEC to register national securities associations); see also *About FINRA: Our History*, FINRA, <https://www.finra.org/about/our-history> [<https://perma.cc/KUN9-ZDUG>].

24. 15 U.S.C. § 78o(b)(8); see also *Alpine*, 121 F.4th at 1321 (citing Pub. L. No. 98–38, § 3, 97 Stat. 205 (1983)); see Press Release, SEC, SEC Adopts Amendments to Exemption From National Securities Association Membership (Aug. 23, 2023), <https://www.sec.gov/newsroom/press-releases/2023-154> [<https://perma.cc/45KP-EA5D>] (narrowing the thin sliver of broker-dealer firms exempt from mandatory FINRA membership).

25. See *About FINRA: Our History*, FINRA, <https://www.finra.org/about/our-history> [<https://perma.cc/KUN9-ZDUG>]; *Media Center: Statistics*, FINRA, <https://www.finra.org/media-center/statistics#key> [<https://perma.cc/HPK8-BHJM>].

26. See FINRA, *supra* note 21, at 6; see Comment, *supra* note 19, at 1043.

27. See *Alpine*, 121 F.4th at 1321–22.

28. See 15 U.S.C. § 78s(b)(1). But see *id.* § 78(b)(3) (carving out exceptions from general requirement of SEC pre-approval).

29. See, e.g., *McDaniel v. Wells Fargo Invs., LLC*, No. 10-4916 SC, 2011 WL 2976784, at *2-3 (N.D. Cal. July 22, 2011) (Exchange Act created a system of self-regulation in which SROs are the primary regulators of securities broker-dealers and use delegated government power to promulgate Rules and enforce compliance); *Bloemendaal v. Morgan Stanley Smith Barney LLC*, No. 10-1455 DSF, 2011 WL 2161352, at *4 (C.D. Cal. May 23, 2011) (SROs have been delegated government power to enforce compliance with both the Exchange Act and ethical standards going beyond those requirements); *Empire Fin. Grp. v. FINRA*, No. 08-80534-CIV-RYSKAMP/VITUNAC, 2009 WL 10644856, at *2 (S.D. Fla. Jan. 15, 2009) (“Once approved by the SEC, FINRA rules have the status of federal law.”); FINRA, *Regulatory Notice 16-25: Forum Selection Provisions 3*, https://www.finra.org/sites/default/files/notice_other_file_ref/Regulatory-Notice-16-25.pdf [<https://perma.cc/ETY9-LSGC>].

investors.³⁰ Concomitantly, since 1975, FINRA has been statutorily empowered—indeed required—to enforce not just its own rules, but federal securities statutes and SEC rules.³¹

When FINRA suspects a violation of federal law, SEC rules, or its own rules, its enforcement department staff—comprised entirely of private citizens with no governmental status or real-time governmental oversight—can investigate the matter by demanding documents and testimony from the FINRA member firm involved and its affiliated individuals.³² These demands—the FINRA equivalent of a search warrant or subpoena—require no pre-approval by any court (or even the SEC), yet failure to comply with them is considered a stand-alone violation of FINRA rules and nearly always results in a permanent bar from the securities industry—also without any prior review or approval by a court or the SEC.³³ At the conclusion of an investigation, FINRA enforcement department staff may decline to prosecute; issue an informal, nonpublic letter of caution; negotiate a sanction by settlement; or file a formal disciplinary complaint.³⁴ In the latter event, the case often ends in a sanction by default (where the accused party fails to respond or defend itself) or by pre-hearing settlement.³⁵ Fully litigated cases, a rare occurrence, are typically decided by majority vote of a panel of three adjudicators—a FINRA employee called a hearing officer flanked by two non-employee volunteers from within the securities industry—after limited discovery, an evidentiary hearing, and some combination of pre- and/or post-hearing briefing.³⁶ There is no opportunity for a jury trial. Any appeals are then decided by FINRA’s National Adjudicatory Council (NAC), which is comprised of non-employee

30. See 15 U.S.C. § 78u(d), (f).

31. See 15 U.S.C. § 78o-3(b)(7).

32. See generally FINRA, *Regulatory Notice 09-17: Investigations and Formal Disciplinary Actions* (2009), <https://www.finra.org/sites/default/files/NoticeDocument/p118171.pdf> [<https://perma.cc/XJ5R-M3KW>]; see also Jessica Hopper, *Working on the Front Lines of Investor Protection—How an Enforcement Action Becomes an Enforcement Action*, FINRA (June 4, 2020), <https://www.finra.org/media-center/blog/working-on-the-front-lines-of-investor-protection-how-an-enforcement-action-becomes-an-enforcement-action> [<https://perma.cc/G2NH-8ATP>]. This description of FINRA’s investigative and disciplinary processes is also based on the personal knowledge and experience of the author as a Deputy Chief of FINRA’s Department of Enforcement from March 2015 through April 2018 and as a partner in the law firm King & Spalding both before and after his tenure with FINRA.

33. See FINRA Rule 8210 (2013); FINRA Rule 9552 (2015); FINRA *Sanction Guidelines*, 30 (2024), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [<https://perma.cc/57T9-FMFB>] (potential expulsion for a firm’s noncompliance); *id.* at 93 (“If the [individual] respondent did not respond in any manner, a bar is standard.”); Jessica Hopper, *Working on the Front Lines of Investor Protection—The Importance of FINRA Rule 8210*, FINRA (July 20, 2020), <https://www.finra.org/media-center/blog/working-front-lines-investor-protection-importance-finra-rule-8210> [<https://perma.cc/QDN3-6ZWZ>] (“The penalties for noncompliance are severe—most often a bar from the securities industry if someone under investigation decides to stop cooperating with FINRA.”).

34. See Hopper, *supra* note 32.

35. See Jonathan Eisenberg, *2015 FINRA Enforcement Actions*, HARV. L. FORUM ON CORP. GOVERNANCE, (Jan. 10, 2016), <https://corpgov.law.harvard.edu/2016/01/10/2015-finra-enforcement-actions> [<https://perma.cc/ARY3-T445>] (“In the aggregate, more than 90 percent of [FINRA] enforcement actions are resolved through settlements.”).

36. See FINRA Rules 9210–9269.

volunteers from within and outside the securities industry.³⁷ A decision by the NAC becomes FINRA's final decision unless FINRA's Board of Governors takes the initiative to review the matter, which is exceptionally rare for disciplinary cases.³⁸

Firms or individuals sanctioned by FINRA may then appeal to the SEC, which reviews the sanction *de novo* and may either affirm it, modify it, or set it aside.³⁹ Unless and until this appellate review process occurs, however, the SEC typically has no involvement in FINRA's investigation or disciplinary proceedings. If the SEC affirms or modifies the sanction FINRA imposed, the sanctioned respondent may then appeal to a federal appeals court, which applies a highly deferential standard to SEC and FINRA factfinding in the case—thus bypassing federal district courts and any chance for a jury trial.⁴⁰

As a practical reality, relatively few FINRA enforcement investigations result in formal disciplinary hearings, and fewer still are ever appealed to the SEC, much less to a federal appeals court. That's because, as previously noted, the vast majority of FINRA investigations end in either declinations, defaults, or settlements in which the accused violator waives the right to a hearing or appeal. Thus, although FINRA imposes sanctions against at least several hundred firms and individuals in a typical year,⁴¹ only about a couple dozen of those sanctions result from a hearing panel decision or NAC decision on the merits in a contested proceeding (as opposed to a default or settlement),⁴² no more than a handful of these contested cases are ever appealed to the SEC,⁴³ and fewer still are then appealed to a federal court. In short, in the vast majority of FINRA investigations and prosecutions, the SEC plays no discernible supervisory role whatsoever.

B. PCAOB

Like FINRA, the PCAOB is a private, nonprofit corporation that is nominally subject to SEC oversight.⁴⁴ The PCAOB was created by the Sarbanes-Oxley Act of 2002 and is empowered to regulate the accounting firms and accountants engaged to audit the financial statements of publicly traded companies and of securities

37. See *FINRA, By-Laws of the Corporation: Article V*, <https://www.finra.org/rules-guidance/rulebooks/corporate-organization/laws-corporation/printable> [https://perma.cc/JKP3-FAU6]; FINRA Rule 9311 (2021); FINRA Rule 9331 (2008).

38. See FINRA Rule 9351 (2022); Jonathan Eisenberg, *supra* note 35 (review by FINRA's Board of Governors "is exceedingly rare").

39. See 15 U.S.C. § 78s(d)(2); 17 C.F.R. § 201.420 (2025); see FINRA Rule 9370 (2008).

40. See 15 U.S.C. § 78y(a)(1)–(a)(4) (SEC factual findings, "if supported by substantial evidence, are conclusive").

41. Dan Shaw, *A 'Kinder, Gentler' FINRA — Despite Collecting \$89M in Fines*, FINANCIAL PLANNING (Mar. 14, 2024, 6:53 PM), <https://www.financial-planning.com/list/a-kinder-gentler-finra-despite-collecting-89m-in-fines> [https://perma.cc/3H26-WXUK].

42. See *FINRA, Office of Hearing Officers' Decisions and Orders*, <https://www.finra.org/rules-guidance/adjudication-decisions/office-hearing-officers-oho> [https://perma.cc/FB6K-9623].

43. See *id.*

44. See 15 U.S.C. §§ 7211, 7217.

brokers-dealers.⁴⁵ Unlike FINRA, however, the SEC, “after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury,” directly appoints the five Board Members who lead the PCAOB, including its Chair.⁴⁶ The PCAOB raises its revenue without congressional appropriation by collecting from publicly traded corporations and securities brokers-dealers an annual “accounting support fee,” a euphemism for something that more closely resembles a tax than a fee.⁴⁷ The SEC must approve the PCAOB’s budget each year, but Congress is not involved in the process or the funding.⁴⁸ The PCAOB’s SEC-approved budget for 2025 was \$400 million.⁴⁹

In many ways, the PCAOB’s regulatory functions involving the audit profession mirror FINRA’s involving the securities industry: rulemaking and standard setting;⁵⁰ periodic inspections of firms to assess compliance;⁵¹ and investigating and disciplining suspecting noncompliance.⁵² As with FINRA, most PCAOB rules have no binding effect unless and until approved by the SEC,⁵³ and any final disciplinary sanctions imposed by the PCAOB are subject to purportedly *de novo* review by the SEC.⁵⁴

Despite these superficial similarities, the PCAOB is a far different creature than FINRA for constitutional purposes—and arguably much more of a threat to civil liberties. It has considerably more of the “look and feel” of a conventional government agency, yet it is even less transparent or accountable than FINRA, which is

45. See generally 15 U.S.C. §§ 7211–7220.

46. 15 U.S.C. § 7211(e).

47. See 15 U.S.C. § 7219. Respected commentators and at least two SEC commissioners have characterized these fees as taxes. See, e.g., Commissioner Michael Piowowar, *Statement at Open Meeting on 2016 PCAOB Budget*, U.S. SEC. & EXCH. COMM’N (Mar. 14, 2016), <https://www.sec.gov/newsroom/speeches-statements/piowowar-remarks-open-meeting-pcaob-031416> [<https://perma.cc/W38X-B4AX>] (“The accounting support fee is a tax” requiring companies and broker-dealers “to pay money to the Board for the privilege of merely existing.”); Commissioner Hester M. Peirce, *Statement on PCAOB’s Ballooning Budget*, U.S. SEC. & EXCH. COMM’N (Dec. 23, 2022), <https://www.sec.gov/newsroom/speeches-statements/peirce-pcaob-budget-20221223> [<https://perma.cc/36DZ-XZSW>] (characterizing Board assessments as “a tax that now tops \$300 million”); Hans Bader and John Berlau, *The Public Company Accounting Oversight Board: An Unconstitutional Assault on Government Accountability*, COMPETITIVE ENTER. INST. 3 (Oct. 4, 2005), <https://cei.org/sites/default/files/Hans%20Bader%20-%20The%20Public%20Company%20Accounting%20Oversight%20Board.pdf> [<https://perma.cc/PZQ6-FV63>] (Board “supports itself with a tax, the accounting support fee that it levies on all public companies in the United States”); Peter J. Wallison, *Rein in the Public Company Accounting Oversight Board 2*, AM. ENTER. INST. (Feb. 2005), https://www.aei.org/wp-content/uploads/2011/10/20050124_FSOFebruary2005.pdf?x85095 [<https://perma.cc/GQK2-35WF>] (accounting support fee is “essentially the power to tax the entire economy in support of [the Board’s] regulatory activities”).

48. See 15 U.S.C. § 7219(b)–(c).

49. Press Release No. 2024-204, U.S. SEC. & EXCH. COMM’N, SEC Approves 2025 PCAOB Budget and Accounting Support Fee (Dec. 18, 2024), [https://www.sec.gov/newsroom/press-releases/2024-204#:~:text=SEC%20Approves%202025%20PCAOB%20Budget%20and%20Accounting%20Support%20Fee,-For%20Immediate%20Release&text=The%20Securities%20and%20Exchange%20Commission,PCAOB%20budget%20totals%20\\$24399.7%20million](https://www.sec.gov/newsroom/press-releases/2024-204#:~:text=SEC%20Approves%202025%20PCAOB%20Budget%20and%20Accounting%20Support%20Fee,-For%20Immediate%20Release&text=The%20Securities%20and%20Exchange%20Commission,PCAOB%20budget%20totals%20$24399.7%20million) [<https://perma.cc/7TGL-E33Z>].

50. 15 U.S.C. §§ 7213, 7218.

51. 15 U.S.C. § 7214.

52. 15 U.S.C. § 7215.

53. 15 U.S.C. § 7217(b)(2).

54. 15 U.S.C. § 7217(c).

saying a lot. For example, as previously noted, whereas FINRA formed organically rather than by statutory mandate, the PCAOB exists only because Congress created it in Sarbanes-Oxley. Moreover, while FINRA leaders are chosen by its membership of private firms without formal government involvement, PCAOB leaders are hand-picked by the government—specifically, by vote of the SEC commissioners.⁵⁵ As a result of the Supreme Court’s decision in *Free Enterprise Fund v. PCAOB*, these SEC-appointed leaders are considered “inferior” constitutional officers of the United States who can be removed at any time and for any reason by the SEC commissioners.⁵⁶ Neither the auditors who are subject to PCAOB regulation nor those who pay the lion’s share of the PCAOB’s bills—two large but distinct constituencies—play any meaningful role in selecting PCAOB leaders or staff. Moreover, because presidents are permitted to, and typically do, appoint at least three politically aligned SEC commissioners (including the uniquely powerful SEC Chair) to serve on the five-member SEC that now hires and fires PCAOB leaders at its pleasure, the PCAOB has arguably become, since *Free Enterprise Fund*, the most politically unstable and least bipartisan multi-member regulator in Washington, DC.⁵⁷

Other distinctions are also important for constitutional purposes, including the potential consequences for violating PCAOB rules as opposed to FINRA rules. Under Sarbanes-Oxley, violation of a PCAOB rule is treated “for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 . . . or the [SEC] rules and regulations issued thereunder,” and the violator “shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.”⁵⁸ This appears to mean that a person who willfully violates a PCAOB rule is subject not only to civil sanctions but also to potential criminal prosecution and incarceration.⁵⁹ Violators of FINRA rules face no such dire punishment.⁶⁰ Even the potential putatively “civil” sanctions for PCAOB rule violations are far more severe than for FINRA rule violations.⁶¹ Indeed, paradoxically, the statutory maximum civil monetary penalties for PCAOB rule violations—

55. 15 U.S.C. § 7211(e).

56. 561 U.S. 477, 509–10 (2010).

57. See Mark Maurer, *PCAOB Critic Picked for SEC Chair, Raising Potential for a Smaller Audit Watchdog*, WALL ST. J. (December 9, 2024), <https://www.wsj.com/articles/pcaob-critic-picked-for-sec-chair-raising-potential-for-a-smaller-audit-watchdog-49bf6e7e> [<https://perma.cc/U39F-CZDY>] (noting turnover of PCAOB leadership after each of the last two changes in presidential administrations); Vincent Ryan, *Gensler Ousts PCAOB Chair; Other Board Members to Follow*, CFO.COM, June 7, 2021; Jay Clayton, *Statement on Appointment of New PCAOB Board Members*, U.S. SEC. & EXCH. COMM’N (Dec. 12, 2017) available at <https://www.sec.gov/newsroom/speeches-statements/clayton-2017-12-12> [<https://perma.cc/PHV9-4SKZ>].

58. 15 U.S.C. § 7202(b)(1).

59. See 15 U.S.C. § 78ff.

60. Whereas Sarbanes-Oxley equated the consequences of PCAOB rule violations with those of SEC rule violations, 15 U.S.C. § 7202(b)(1), no statute or other provision of law similarly equates the consequences of FINRA rule violations with those of SEC rule violations.

61. Compare 15 U.S.C. § 7215(c)(4)(D) (authorizing monetary penalties up to \$15 million *per violation*) with FINRA Sanction Guidelines, www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [<https://perma.cc/592S-YEM2>].

\$1 million per violation for natural persons and \$25 million per violation for firms—are vastly higher than those the SEC can impose for violations of federal statutes and rules.⁶² By contrast, whereas no statute governs the maximum fines that FINRA can impose, in practice those fines are relatively modest in most cases, especially against individual brokers rather than firms—often below \$25,000.⁶³

Although no jury trial is available in either forum, the PCAOB's disciplinary process is otherwise materially different than FINRA's. Among other things, whereas most FINRA disciplinary cases are decided in the first instance by a panel comprised of only one FINRA employee (the hearing officer) flanked by two FINRA non-employees who are industry peers of the accused (reflecting at least some nod of obeisance to the ideal of trial by jury),⁶⁴ and on appeal by a panel comprised entirely of FINRA non-employees,⁶⁵ PCAOB cases are decided in the first instance by a single PCAOB employee (the hearing officer),⁶⁶ and on appeal by PCAOB's five SEC-appointed leaders without any outside input.⁶⁷ Moreover, whereas FINRA publicly releases its disciplinary complaints and decisions online (regardless of the outcome),⁶⁸ Sarbanes-Oxley generally requires the PCAOB to conduct both its investigations and its disciplinary proceedings behind an iron curtain of secrecy, unknown and invisible to the public or to other PCAOB disciplinary targets until the conclusion of the entire PCAOB process, which can take many years, and even then only if the process results in a final disciplinary sanction.⁶⁹ This secrecy feature—which is reminiscent of the Star Chamber and other administrative tribunals that led to the Declaration of Independence and appears to be unique among modern federal regulators—effectively shields the PCAOB disciplinary process from any meaningful public scrutiny, especially when its charges against an accountant or firm turn out to be unjustified.⁷⁰

A PCAOB enforcement target who is ultimately sanctioned by the Board after a contested hearing and internal appeal may further appeal the final Board

62. Compare 15 U.S.C. § 78u(d)(3)(b) and § 78u-2(b) (SEC maximum penalties), with *id.* § 7215(c)(4)(D)(ii). Whether the felony-size magnitude of potential PCAOB penalties should trigger the broader jury trial rights guaranteed to criminal defendants, see U.S. Const., Art. II, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury”); *id.* Amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”), is a serious question worthy of robust and urgent debate, but beyond the scope of this article.

63. See FINRA Sanction Guidelines, www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [<https://perma.cc/592S-YEM2>].

64. See FINRA Rules 9213, 9231, and 9232.

65. See FINRA By-Laws, Article V; FINRA Rules 9311 and 9331.

66. See PCAOB Rules 5200(c) and 5204(b).

67. See PCAOB Rule 5460.

68. See FINRA, *FINRA Disciplinary Actions Online*, <https://www.finra.org/rules-guidance/oversight-enforcement/finra-disciplinary-actions-online> [<https://perma.cc/39CX-X3AX>].

69. 15 U.S.C. § 7215(b)(5), (c)(2).

70. Whether this unique feature of the PCAOB enforcement process violates the due process rights of accused respondents, or the First Amendment rights of the public, is beyond the scope of this article.

sanction to the SEC,⁷¹ and then to a federal appeals court if the SEC appeal is unsuccessful,⁷² but such appeals rarely happen. As with FINRA, most PCAOB enforcement cases end in settlements (or defaults) without any involvement by the SEC, much less any court.⁷³ According to public information available on the Board's website, during the Board's first two decades since its creation, only nine of its several hundred disciplinary cases—about two percent—were appealed to the SEC.⁷⁴ Only one such appeal is currently pending before the SEC, and the last time the SEC decided such an appeal was more than six years ago, in May 2019.⁷⁵ Only two of the nine Board enforcement cases ever appealed to the SEC—that is, less than one half of one percent of all Board enforcement cases in the Board's history—have ever been subsequently reviewed by any federal court.⁷⁶

Thus, in nearly all of its hundreds of enforcement cases thus far, the Board has investigated, charged, and penalized its targets with no meaningful direction, supervision, or even after-the-fact review by either the SEC or any Article III judge.

C. HISA

HISA represents Congress's most recent experiment—and arguably its most constitutionally atrocious one—in empowering non-governmental private actors to regulate and punish fellow private citizens and businesses with little or no governmental oversight. HISA was formed as a Delaware nonprofit corporation in 2020 in anticipation of the enactment that year of the Horseracing Integrity and Safety Act.⁷⁷ The corporation's statutory remit is to regulate the thoroughbred horseracing industry with purported oversight by the FTC. It is governed by a nine-member Board of Directors, none of whom are appointed or removable by the President or any other federal official.⁷⁸ As with FINRA (and unlike the

71. 15 U.S.C. § 7217(c).

72. 15 U.S.C. § 78y(a).

73. See PCAOB, *Enforcement Actions*, <https://pcaobus.org/oversight/enforcement/enforcement-actions> [<https://perma.cc/RN82-GV9P>] (searchable public database); J. Robert Brown, *Issuer Disclosure in Settled Enforcement Actions at the PCAOB*, (Sept. 6, 2019), https://pcaobus.org/news-events/speeches/speech-detail/issuer-disclosure-in-settled-enforcement-actions-at-the-pcaob_701 [<https://perma.cc/RN82-GV9P>].

74. See *PCAOB Enforcement Actions*, *supra* note 73.

75. See *In re Reinhart*, Exchange Act Release No. 85964, Admin. Proc. File No. 3-17758 (May 29, 2019).

76. In one of the two cases to reach federal court, the D.C. Circuit ultimately set aside the Board's sanctions and the charges were dismissed, but that result came more than *nine years* after the Board initiated the case. *Laccetti v. SEC*, 885 F.3d 724 (D.C. Cir. 2018). In the other, the Ninth Circuit upheld the Board's sanctions in an unpublished order issued more than six years after the Board initiated the case. *Kabani & Co. v. SEC*, 733 F. App'x 918 (9th Cir. 2018).

77. Pub. L. No. 116–260, div. FF, title XII, 134 Stat. 3253 (2020) (codified at 15 U.S.C. § 3051 *et seq.*). It should come as little surprise that the Horseracing Integrity and Safety Act was just a tiny sliver of legislation that was quietly tucked into the very back end of a massive, 2124-page, \$2.3 trillion year-end omnibus government spending and coronavirus relief package, virtually assuring its proponents that no one would notice it.

78. See 15 U.S.C. §3052(b), (d).

PCAOB), Congress technically did not *create* HISA by statute, but the fledgling nonprofit regulator’s organic formation occurred just in time for Congress to “recognize” it “for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces,” and to mandate its membership requirements and corporate governance structure.⁷⁹ Congress initially denied the FTC the ability to effectively supervise even the rulemaking function of HISA, but it amended the relevant statutory provisions after the Fifth Circuit struck down that novel feature of the original statute as violating the long-forgotten private nondelegation doctrine.⁸⁰

Even as amended to “fix” that constitutional rulemaking defect, however, HISA’s enabling statute continues to give nearly carte blanche executive power to the private citizens who lead and run HISA, along with countless other private citizens at other nonprofit entities even further removed from FTC control or oversight. As a result—and even more so than the enforcement regimes operated by FINRA and the PCAOB—HISA’s law enforcement structure is a veritable Matryoshka doll featuring a dizzying array of unaccountable, private nonprofit actors (and at least one for-profit investigation firm) who investigate and penalize participants in the thoroughbred horseracing industry with no discernable oversight by the FTC or anyone else in the federal government.

For example, in a stark departure from the FINRA and PCAOB models, Congress empowered HISA to file charges against alleged wrongdoers not only in its own, home-court nonjudicial proceedings, but also, if it prefers, in a federal court—with or without the blessing of the FTC (or the Department of Justice).⁸¹ In another departure, Congress statutorily mandated that HISA outsource and subcontract much of its enforcement machinery to another nonprofit organization—which was expected to be the United States Anti-Doping Authority (USADA).⁸² But HISA and USADA were unable to reach agreement on the terms of a subcontract, so HISA eventually subcontracted its enforcement powers to an entity called the Horseracing Integrity and Welfare Unit (HIWU), a bespoke division of yet another nonprofit called Drug Free Sport International.⁸³ In HIWU’s press release

79. 15 U.S.C. § 3052(a).

80. See generally *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, 53 F.4th 869, 890 (5th Cir. 2022) (“*Horsemen’s I*”); *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black* (*Horsemen’s II*), 107 F.4th 415, 423-24 (5th Cir. 2024) (“*Horsemen’s II*”).

81. 15 U.S.C. § 3054(j). It does not appear that HISA has ever used this option of pursuing an enforcement case in federal court.

82. See 15 U.S.C. § 3054(e)(1).

83. See Press Release, USADA, Statement from USADA CEO Travis T. Tygart on Equine Anti-Doping and Medication Control Program Negotiations (Dec. 23, 2021), <https://www.usada.org/statement/equine-negotiations> [<https://perma.cc/HUG3-B89U>]; Press Release, HISA, HISA Announces Selection of Drug Free Sport International as Partner to Build Independent Anti-Doping and Medication Control Enforcement Agency (May 3, 2022), <https://www.hiwu.org/news/hisa-announces-selection-of-drug-free-sport-international-as-partner-to-build-independent-anti-doping-and-medication-control-enforcement-agency> [<https://perma.cc/H5S3-8JUZ>].

announcing its new role as HISA's enforcement subcontractor, HIWU noted its expectation that a private, *for-profit* investigative consulting firm called 5 Stones Intelligence—"comprised of former DEA, FBI, IRS, ATF, and NYPD Special Agents and Detectives who have led some of the largest and most successful sports investigations in history"—would "support" HIWU in performing its investigations function.⁸⁴

Moreover, as if HISA and HIWU were not themselves sufficiently insulated from government control and oversight, HIWU in turn has subcontracted much of its delegated executive power not only to the for-profit 5 Stones Intelligence, but also to two private, nongovernmental entities—the JAMS arbitration organization and something HIWU calls the Internal Adjudication Panel, which is a group of approximately 20 private citizens appointed by mutual agreement between HISA and HIWU who serve as independent contractors to both entities.⁸⁵ Worse yet, in filings before an FTC administrative law judge, HISA and HIWU each have bluntly admitted that they are powerless to second-guess the enforcement decisions of, and sanctions ordered by, these private, "independent," and unaccountable sub-contractors.⁸⁶ And at the risk of stating the obvious, there is no opportunity for a jury trial in these various tribunals. In short, the day-to-day nuts and bolts of HISA's law enforcement activity appear to be performed almost entirely by private citizens, with virtually no real-time participation or supervision by even HISA or HIWU, much less by anyone in the federal government.

According to public documents, HIWU employs a staff of more than three dozen private citizens and accounts for approximately half of HISA's FTC-approved \$80 million annual budget, which presumably includes whatever amounts HIWU pays to its various prosecutorial and adjudicative subcontractors.⁸⁷ Like FINRA and the PCAOB, HISA raises its funds without congressional appropriation from a complex array of fees assessed upon state racing commissions and, in some cases, participants in the thoroughbred horseracing industry.⁸⁸

84. See HIWU Press Release, *supra* note 83. Public information describing the role, if any, that 5 Stones is actually playing—and how much money it is being paid by HISA or HIWU—is not readily available.

85. See Press Release, HIWU, HIWU to Lead Nationwide, Uniform, and Efficient Results Management and Adjudication Processes Under HISA's ADMC Program (Feb. 28, 2023), <https://www.hiwu.org/news/hiwu-to-lead-nationwide-uniform-and-efficient-results-management-and-adjudication-processes-under-hisas-admc-program> [<https://perma.cc/H5S3-8JUZ>]; Press Release, JAMS, JAMS to Resolve Cases in the Horseracing Integrity and Safety Authority's Anti-Doping Program (March 22, 2023), <https://www.jamsadr.com/news/2023/jams-to-resolve-cases-in-the-horseracing-integrity-and-safety-authority-anti-doping-program> [<https://perma.cc/H5S3-8JUZ>]; *About the Internal Adjudication Panel*, HIWU, <https://www.hiwu.org/cases/iap> [<https://perma.cc/LU24-9HPP>].

86. See HIWU Response to Order Directing Briefing on the Question of Jurisdiction at 3-6, In re Shell, FTC Dkt. No. 9439 (filed Nov. 12, 2004); HISA Response to Order (1) Directing Briefing on Questions of Jurisdiction and (2) Staying Proceedings, at 3-8, In re Shell, FTC Dkt. No. 9439 (filed Nov. 12, 2004).

87. See *2025 Summary Budget*, HIWU, <https://bphisaweb.wpengine.com/wp-content/uploads/2024/07/HISA-2025-Proposed-Budget.pdf> [<https://perma.cc/9ZDE-WLZQ>].

88. See 15 U.S.C. § 3052(f).

HISA's budget must be approved each year by the FTC, but Congress plays no discernible role in that annual process or in HISA's funding.⁸⁹

III. UNSETTLED (AND UNSETTLING) CONSTITUTIONAL CONCERNS

Subjecting ever-increasing segments of our economy to the prosecutorial whims of unaccountable private actors is fraught with constitutional peril and presents a grave threat to civil liberties. That threat surely includes the systemic deprivation of jury trial rights condemned by *Jarkesy*, but it goes well beyond that. It also includes, among other things, the usurpation of judicial power and the relocation of that power from courts to private corporations and individuals; the absence of valid constitutional appointments and presidential removability of the pseudo-judicial hearing officers and subcontractors who adjudicate charges of wrongdoing; and the vesting of vast executive power in largely unsupervised and unaccountable private corporations and private citizens. These threats are discussed below.⁹⁰

A. Systemic Deprivation of Jury Trial Rights

As previously noted, the Supreme Court held in *SEC v. Jarkesy* that the Seventh Amendment prohibits the SEC from penalizing alleged wrongdoers in non-jury administrative enforcement proceedings.⁹¹ This holding should extend to punitive disciplinary proceedings before quasi-governmental regulators such as FINRA, the PCAOB, and HISA. These quasi-governmental regulators will likely argue that *Jarkesy* did not explicitly invalidate their own in-house, non-jury disciplinary tribunals. That is technically true, because that precise question was not before the Court. Yet it is difficult to envision how these quasi-governmental enforcers can successfully evade the same fate as the SEC.

The key holding of *Jarkesy* was that actions seeking to impose monetary penalties are “legal in nature,” and thus are “[s]uits at common law” to which the Seventh Amendment right to a jury trial attaches.⁹² Such actions are legal in nature because they seek to impose a monetary remedy that is “designed to punish or deter the wrongdoer” rather than “solely to ‘restore the status quo’”⁹³—a “prototypical common law remedy.”⁹⁴ Citing precedent from nearly two centuries ago, the Court unequivocally confirmed that “the Framers used the term ‘common law’ in the [Seventh] Amendment ‘in contradistinction to equity, and

89. See 15 U.S.C. § 3052(f)(1)(C)(iv); 16 C.F.R. §§ 1.150–1.152.

90. Several other constitutional concerns—including how these quasi-governmental regulators generate and spend their funding without congressional appropriations or oversight; their combined quasi-legislative, executive, and pseudo-judicial powers; the inherent adjudicative bias resulting from their combined powers; and the paltry procedural due process they provide to those they accuse—are beyond the scope of this article.

91. *Id.* at 120–21 (2024).

92. *Id.* at 121–22 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) and U.S. Const. amend. VII).

93. *Id.* 124 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)).

94. *Id.* at 122 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993)).

admiralty, and maritime jurisprudence,” thus guaranteeing a jury trial in “all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume.”⁹⁵

FINRA, the PCAOB, and HISA all indisputably use their in-house, non-jury tribunals to impose monetary penalties against alleged wrongdoers, and none of these punitive disciplinary proceedings plausibly fall within the jurisdiction of equity or admiralty. No less than the SEC disciplinary proceeding at issue in *Jarkesy*, these quasi-governmental penalty proceedings are legal in nature and therefore are suits at common law requiring a jury trial absent a waiver by the accused wrongdoer. And neither logic nor the *Jarkesy* decision suggests that the jury trial right depends in any way on whether the prosecutor is a governmental actor or a private actor.

Moreover, it makes no difference that quasi-governmental disciplinary proceedings often result in additional nonmonetary sanctions that bear passing resemblance to remedies in equity—such as censures, cease-and-desist orders, industry bars and suspensions, and other disqualifications. Similar nonmonetary sanctions are also typically imposed in SEC and other agency administrative enforcement proceedings; in fact, the SEC had imposed such nonmonetary sanctions in its administrative enforcement proceeding against Mr. Jarkesy,⁹⁶ and neither the Fifth Circuit nor the Supreme Court exempted those sanctions from the wholesale vacatur of the SEC’s final order in that case. Likewise, neither court hinted that the SEC could reinstate its final disciplinary order against Mr. Jarkesy on remand simply by excising and disavowing the monetary penalties it had ordered him to pay.⁹⁷

Quasi-governmental prosecutors will likely lean heavily on the Court’s discussion in *Jarkesy* about a common law fraud analogue to the securities fraud claim that the SEC had pursued in its disciplinary proceeding against Mr. Jarkesy, arguing there are no similar common law analogues to the types of claims they pursue against their own disciplinary targets. But the Court’s discussion of a common law analogue cannot salvage the quasi-governmental regulators’ tribunals. First, the Court was precise in holding that it was primarily the nature of *the relief sought* (the punitive monetary penalties), rather than the nature of the underlying cause of action (securities fraud), that rendered the SEC’s disciplinary proceeding a suit at common law within the meaning of the Seventh Amendment right to a jury trial.⁹⁸ That conclusion, the Court said, “effectively decid[ed]” that the SEC’s disciplinary proceeding “implicates the Seventh Amendment.”⁹⁹ Only

95. *Id.* at 121 (quoting *Parsons v. Bedford*, 3 Pet. 433, 446 (1830)).

96. *See In re John Thomas Cap. Mgmt. Grp. LLC*, Securities Act Rel. No. 10834, Admin. Proc. File No. 3-15255 (2020) (imposing a cease-and-desist order, disgorgement, an industry bar, and a penny-stock bar in addition to statutory monetary penalties).

97. As discussed in the next section, moreover, even if the nonmonetary nature of these other administrative sanctions casts some doubt on the need for a jury trial, it casts no doubt on the equally important need for the matter to be adjudicated in an Article III court rather than a non-judicial administrative tribunal. *See infra* notes 98-108 and accompanying text.

98. 603 U.S. 109 at 123 (noting that the remedy was more important and “all but dispositive”).

99. *Id.* at 124.

then did the Court allude to the “close relationship” between the nature of the SEC’s claims against *Jarkesy* and common law fraud claims, saying that relationship merely “confirm[ed]” the Court’s conclusion that the monetary relief sought by the agency is what triggered the right to a jury trial.¹⁰⁰

In any event, courts should have little difficulty finding common law analogues to most or all of the claims typically asserted by quasi-governmental prosecutors. For example, FINRA often asserts claims that closely resemble claims sounding in negligence, breach of fiduciary duty, fraud, deceit, misrepresentation, theft, conversion, breach of contract, and many other causes of action well known to the common law.¹⁰¹ Similarly, the PCAOB routinely asserts claims that resemble accounting negligence and malpractice, as well as “noncooperation” claims that often read like criminal obstruction-of-justice indictments.¹⁰² And HISA’s bread-and-butter disciplinary charges can readily be analogized to torts involving unfair competition, trespass to chattels, fraud, deceit, and the like, not to mention criminal charges of illegal drug use and possession. Thus, even if the prosecutorial targets of these quasi-governmental enforcers cannot point to an exact common law match for the claims asserted against them in punitive disciplinary proceedings, the *Jarkesy* Court’s allusion to a confirmatory common law analogue in that case should cause little or no diminution of their jury trial rights. After all, the Court in *Jarkesy* acknowledged that even the SEC’s claims of securities fraud in that case were different than common law fraud claims in several key respects.¹⁰³

B. *Usurpation and Relocation of Article III Judicial Power*

Beyond its jury trial holding, *Jarkesy* presents a second constitutional hurdle for quasi-governmental enforcers like FINRA, the PCAOB, and HISA. Specifically, and again citing longstanding precedent, the Court confirmed that regardless of whether the Seventh Amendment *also* guarantees a jury trial, all suits at common law must be decided by Article III courts. “The Constitution

100. *Id.* at 126 (the close relationship between securities fraud and common law fraud merely “confirms” that the SEC’s penalty proceeding is legal in nature).

101. See Jonathan Eisenberg, *supra* note 35 (common FINRA charges include “violations of rules related to anti-money laundering (‘AML’), the distribution of securities, quality of markets, reporting and recordkeeping, sales practices, and supervision,” with “FINRA’s rule violation of choice [being] the breathtakingly vague Rule 2010, which requires that members observe ‘high standards of commercial honor and just and equitable principles of trade’”).

102. See generally PCAOB 2024 Annual Report at 13 (reporting enforcement cases involving, among other things, “significant audit violations,” failing to perform appropriate [audit] procedures in cases involving financial fraud, taking on client engagements that firms cannot competently complete, and not performing sufficient audit work,” as well as cases involving “misrepresentations to the PCAOB” and violations of quality control standards), https://assets.pcaobus.org/pcaob-dev/docs/default-source/about/administration/documents/annual_reports/2024-annual-report.pdf?sfvrsn=9cfa1a56_2 [<https://perma.cc/8CCF-8S93>]; *Kabani & Co. v. SEC*, 733 F. App’x 918, 919 (9th Cir. 2018) (denying petition for review of SEC affirmance of PCAOB sanctions for obstructing investigation through “an attempted cover-up”).

103. 603 U.S. at 126 (noting several differences that, in certain respects, make securities fraud claims either narrower or broader than common law fraud claims).

prohibits Congress from ‘withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at common law.’”¹⁰⁴ Thus, “[o]nce such a suit ‘is brought within the bounds of federal jurisdiction,’ an Article III court must decide it, with a jury trial if the Seventh Amendment applies.”¹⁰⁵ Stated otherwise, under the constitutional design of tripartite government and separation of powers, the judicial power “cannot be shared with the other branches.”¹⁰⁶

FINRA, the PCAOB, and HISA indisputably are not Article III courts, and none of their leaders or staff employees are presidentially appointed, Senate-confirmed, or life-tenured like an Article III judge. Yet the Constitution vests exclusively in Article III courts the judicial power to decide cases and controversies—both in law and in equity.¹⁰⁷ Thus, even if quasi-governmental enforcers are deemed part of the executive branch of the federal government, they cannot constitutionally usurp this judicial power, and Congress cannot constitutionally relocate and share that power with those regulators any more than it could do so with the SEC.

It also cannot not help the regulators to fallaciously insist that their nonmonetary administrative sanctions are “equitable” remedies, as the SEC and others have done in the past and will no doubt continue to do.¹⁰⁸ Because Article III vests the power to decide suits in equity exclusively in federal courts, any sanction imposed by any other branch of government, by definition, cannot be an equitable remedy. Stated otherwise, the notion of executive branch regulators awarding themselves “equitable” remedies outside of an Article III court of equity is a categorical oxymoron. Moreover, these nonmonetary sanctions are typically imposed at least in part to punish and deter, and they do nothing to “restore the status quo,” so they “can make no pretense of being equitable.”¹⁰⁹

As did the SEC in *Jarkesy*, quasi-governmental enforcers will likely also argue that their non-jury disciplinary proceedings fall within the so-called “public rights exception” to Article III and the Seventh Amendment. Under that limited and oft-criticized exception, Congress may assign certain cases to agencies for adjudication without jury trials.¹¹⁰ But quasi-governmental enforcers should enjoy no more success with that argument than the SEC did in *Jarkesy*. By any fair reading of *Jarkesy*, the Court effectively emasculated the public rights exception without

104. *Id.* (quoting Murray’s Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1856)).

105. *Id.* (quoting Stern v. Marshall, 564 U.S. 462, 484 (2011)).

106. *Id.*

107. U.S. Const. art. III, §§ 1, 2.

108. *See, e.g.*, In re Grossman, Securities Act Release No. 10227, at 20–33 (Sept. 30, 2016) (holding that administratively imposed industry bars, disgorgement, accounting, and prejudgment interest are all “equitable” remedies and thus not subject to statute of limitations); Timbervest, LLC, SEC Advisers Act Release No. 4197, 2015 WL 5472520, at *15 & n.71 (Sept. 17, 2015) (similar). Curiously, even the Fifth Circuit appeared to fall for this erroneous premise in its opinion below in *Jarkesy*. *See Jarkesy v. SEC*, 34 F.4th 446, 454 (5th Cir. 2022) (accepting the premise that the SEC’s administratively imposed industry bar and disgorgement orders were “both equitable remedies”).

109. *Jarkesy*, 603 U.S. at 124 (quoting Tull v. United States, 481 U.S. 412, 422 (1987)).

110. *See generally Jarkesy*, 603 U.S. 109 at 127–32 (discussing the exception); *see also id.* at 173–75 (Sotomayor, J., dissenting) (articulating a more sweeping version of the exception).

expressly overruling it. The Court admitted that the exception “has no textual basis in the Constitution”¹¹¹ and that one of the Court’s most expansive precedents supporting the exception—*Atlas Roofing Co. v. Occupational Safety and Health Review Commission*¹¹²—was “a departure from our legal traditions” and has been widely criticized or “simply ignored” by scholars and commentators.¹¹³ At best, the Court made clear that whatever vestiges of the public rights exception remain after *Jarkesy*, they are strictly limited to cases involving revenue collection, foreign commerce, immigration, tariffs, relations with Indian tribes, and the granting of public benefits.¹¹⁴

In short, *Jarkesy* should present significant impediments for quasi-governmental enforcers like FINRA, the PCAOB, and HISA as they continue to impose punitive disciplinary sanctions in their own non-jury tribunals rather than in Article III courts with juries.

C. Unconstitutional Officer Appointments and Tenure Protections

Although the Supreme Court ultimately declined to address the issue in *Jarkesy*, the Fifth Circuit held below that the administrative law judge who supervised the SEC’s in-house prosecution of Jarkesy and his firm was unconstitutionally shielded by multiple levels of protection from removal by the President, because that kind of tenure protection impedes the President’s duty under Article II to take care that the laws enacted by Congress are faithfully executed.¹¹⁵ The Fifth Circuit later confirmed that holding in an order issued on remand from the Supreme Court in November 2024.¹¹⁶ Doubts about the constitutionality of the tenure protections enjoyed by administrative law judges have swirled ever since the Supreme Court’s 2010 holding in *Free Enterprise Fund v. PCAOB* that executive branch officers—there, the five SEC-appointed leaders of the PCAOB—cannot constitutionally be shielded by more than one layer of protection from at-will removal by the president.¹¹⁷ Those doubts intensified eight years later when the Court ruled, in *Lucia v. SEC*, that the SEC’s administrative law judges qualified as officers under the Appointments Clause of Article II and were not constitutionally appointed as such.¹¹⁸ Indeed, in his dissenting opinions in both *Free Enterprise Fund* and *Lucia*, Justice Breyer expressly noted his concern that the majority holdings in those cases, especially when read in tandem, could signal the invalidation of

111. *Id.* at 2134.

112. 430 U.S. 442 (1977).

113. 603 U.S. 109 at 138 n.4.

114. *Id.* at 127-32.

115. *Jarkesy v. SEC*, 34 F.4th 446, 463–65 (5th Cir. 2022).

116. *Jarkesy v. SEC*, No. 20-61007, ECF Doc. No. 175-1, at 2 (Order on Remand, Nov. 12, 2024).

117. 561 U.S. 477, 492, 496 (2010).

118. 585 U.S. 237, 244–49 (2018). The Appointments Clause provides in relevant part that the Congress may, “by Law,” empower the President, the courts, or “the Heads of Departments” to appoint “inferior Officers” without Senate advice and consent. U.S. Const. art. II., § 2, cl. 2. The Court held in *Free Enterprise Fund* that the five Board Members who lead the Board were properly appointed by the SEC acting as the Head of Department. 561 U.S. at 513.

the removal protections enjoyed by SEC administrative law judges.¹¹⁹ And the Solicitor General’s merits brief in *Lucia* all but conceded the point.¹²⁰

In the aftermath of the Supreme Court’s *Free Enterprise Fund* and *Lucia* decisions, no court appears to have decided whether the hearing officers and other adjudicators who superintend the disciplinary prosecutions at FINRA, the PCAOB, or HISA are also “inferior officers” who are unconstitutionally appointed and unconstitutionally protected from presidential removal. The D.C. Circuit and Fourth Circuit recently sidestepped the merits of this issue in separate FINRA-related cases. The former case, *Alpine Securities Corp. v. FINRA*, arose in the context of an appeal from the denial of a preliminary injunction, and the court cited the absence of irreparable harm as a reason to defer ruling on the merits.¹²¹ The latter case, *Black v. SEC*, was dismissed for lack of appellate jurisdiction.¹²² In the *Alpine* case, however, D.C. Circuit Judge Justin Walker opined that FINRA hearing officers were “near carbon copies of [the SEC’s] ALJs” and thus likely unconstitutionally appointed and protected from presidential removal.¹²³

Judge Walker’s analysis is persuasive and, if it ultimately prevails, should extend to other quasi-governmental regulators that use hearing officers to adjudicate their punitive enforcement cases. In general, these adjudicators are empowered to conduct proceedings in a manner very similar to the way SEC administrative law judges conduct theirs. Among other things, they have wide discretion in overseeing prehearing proceedings and the ensuing trial-like hearings; they can compel participants to testify and produce documents; they administer oaths and question witnesses themselves; they rule on evidentiary and substantive motions; and they issue decisions that can deprive liberty or property interests and that become final if not appealed.¹²⁴ And at least in the cases of FINRA and the PCAOB, the hearing officers hold continuing positions within their organizations, typically serving for many years and in some cases a decade or more.

Yet none of these hearing officers or other front-line adjudicators are appointed by the President, by any governmental officer who is appointed by the President, or by anyone else in government. And they appear to enjoy multiple layers of protection from removal by the President (if the President can remove them at all),

119. *Lucia*, 585 U.S. at 259–60 (Breyer, J., concurring in part); *Free Enter. Fund*, 561 U.S. at 542, 587 (Breyer, J. dissenting).

120. See *Lucia*, 585 U.S. at 262 (“[In the Solicitor General’s] view, the administrative law judges’ statutory removal protections violate the Constitution (as interpreted in *Free Enterprise Fund*), unless we construe those protections as giving the [SEC] substantially greater power to remove administrative law judges than it presently has.”).

121. *Alpine Secs. Corp. v. FINRA*, 121 F.4th 1314, 1332 (D.C. Cir. 2024), *cert. denied*, 145 S. Ct. 2751 (2025).

122. *Black v. SEC*, 125 F.4th 541 (4th Cir. 2025).

123. *Alpine*, No. 23-5129, 2023 WL 4703307, at *2–*3 (Walker, J., concurring in grant of injunction pending appeal) (referencing *Lucia*); see also *Alpine*, 121 F.4th at 1346–47 (Walker, J., concurring in the judgment in part and dissenting in part) (finding that FINRA hearing officers “are indistinguishable from the administrative law judges in *Lucia*”).

124. See, e.g., FINRA Rule 9235 (2021); PCAOB Rule 5200(c) (2004).

although public information regarding their tenure protections is not easy to come by. In any event, they exercise executive power without any meaningful accountability to the President or the electorate, and thus their adjudicative activities likely violate both the Appointments Clause and the Take Care clauses of the Constitution.

It should be noted that for purposes of the Appointments Clause analysis, the PCAOB is on slightly more stable ground than FINRA of HISA. First, whereas the five Board Members who lead the PCAOB are appointed by government (specifically, the SEC), the government plays no formal role in appointing even the top leaders of FINRA or HISA, much less the staff employees and contractors who conduct virtually all of the day-to-day investigative, prosecutorial, and adjudicative activities. Moreover, apparently concerned that the Supreme Court's *Lucia* decision might be extended to invalidate the appointments of PCAOB hearing officers, the SEC and PCAOB have adopted rules that now require SEC approval of any appointment or removal of a PCAOB hearing officer.¹²⁵ Whether this belated SEC approval requirement will save PCAOB hearing officers from constitutional challenge is doubtful,¹²⁶ but at least the PCAOB has paid some degree of obeisance to *Lucia*, whereas FINRA and HISA have not done even that much to protect their hearing officers and adjudicative subcontractors from constitutional challenge.

D. Unsupervised Private Investigators and Prosecutors

Although the investigative and prosecutorial systems of FINRA, the PCAOB, and HISA differ in important respects, they all share similar features that profoundly offend other requirements of Article II. For starters, to one degree or another, they all empower unaccountable private citizens to investigate and prosecute fellow private citizens, under color of federal law, using nontransparent

125. See generally Press Release, PCAOB, *Marc B. Dorfman Sworn in as the PCAOB's Chief Hearing Officer* (Apr. 8, 2019), https://pcaobus.org/news-events/news-releases/news-release-detail/marc-b-dorfman-sworn-in-as-the-pcaob-s-chief-hearing-officer_699 [<https://perma.cc/3G22-LRHA>].

126. The SEC approval requirement likely fails to comply with the Appointments Clause. First, the hearing officer appointments are still made *by the PCAOB* and are merely *approved* by the SEC as Head of Department. The SEC and PCAOB apparently believe this is sufficient based on footnoted dictum in *Free Enterprise Fund*, which in turn cited mostly dicta from several cases decided in the 1800s (while presently noting that “petitioners do not ask us to revisit” those precedents). 561 U.S. at 512 n.13. Even assuming that succession of dicta adds up to good law despite its tension with the actual text of the Appointments Clause, reliance upon remains questionable for a second reason. The Appointments Clause allows Heads of Departments to appoint inferior officers only where Congress, “by Law,” has authorized such appointments. U.S. Const. art. II, § 2, cl. 2. But nothing in Sarbanes-Oxley granted the SEC—again, the only “Head of Department” in the vicinity—any role in hiring, appointing, or firing anyone at the Board other than the Board members themselves. Equally important, nothing in Sarbanes-Oxley gives the Board the power to appoint other inferior constitutional officers—with or without SEC approval. In contrast with the SEC’s statutory power to “appoint and fix the compensation of such *officers*, attorneys, examiners, and other experts,” 15 U.S.C. § 78d(b)(1) (emphasis added), the Board’s appointment power is limited to “employees, accountants, attorneys, and other agents,” *id.* § 7211(f)(4). This absence of any statutory authorization for Board appointment of fellow inferior constitutional officers casts serious doubt on the Board’s asserted power to do so, even with SEC approval.

proceedings over which no government official, much any official appointed by the President and confirmed by the Senate, exercises any meaningful supervision or direction. That’s a problem, because investigating and prosecuting suspected lawbreakers is a quintessentially “executive” function¹²⁷ that is “typically carried out” by governmental officials under the direction and supervision of a presidentially appointed and Senate-confirmed principal officer.¹²⁸

Nearly a century ago, in *Carter v. Carter Coal Co.*, the Supreme Court cautioned that giving regulatory power to private actors, at least where those private actors may have economic self-interests affected by the matter being regulated, constitutes “legislative delegation in its most obnoxious form.”¹²⁹ More recently, in a series of cases involving the nominally private operator of the Amtrak train system and other private regulators, the D.C. Circuit has stated unequivocally that “private entities cannot wield the coercive power of government.”¹³⁰ And in a concurring opinion when one of those Amtrak-related decisions reached the Supreme Court, Justice Alito explained:

One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress “sponsor[s] corporations that it specifically designate[s] *not* to be agencies or establishments of the United States Government.”

....

When it comes to private entities . . . there is not even a fig leaf of constitutional justification. Private entities are not vested with “legislative Powers.” Art. I, § 1. Nor are they vested with the “executive Power,” Art. II, § 1, cl. 1, which belongs to the President By any measure, handing off regulatory power to a private entity is “legislative delegation in its most obnoxious form.”¹³¹

127. Heckler v. Chaney, 470 U.S. 821, 832 (1985); Buckley v. Valeo, 424 U.S. 1, 138 (1976); United States v. Nixon, 418 U.S. 683, 693 (1974).

128. *Free Enter. Fund*, 561 U.S. at 504.

129. 298 U.S. 238, 311 (1936).

130. Ass’n of Am. R.Rs. v. Dep’t of Transp., 821 F.3d 19, 37 (D.C. Cir. 2016) (“*Amtrak III*”) (citing and reaffirming relevant holding of Ass’n of Am. R.Rs. v. Dep’t of Transp., 721 F.3d 666, 670–74 (D.C. Cir. 2013) (“*Amtrak I*”). The Fifth Circuit also recently observed that “[a] cardinal constitutional principle is that federal power can be wielded only by the federal government,” and that private parties may do so “only if they are subordinate to an agency.” Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black, 53 F.4th 869, 872, 880 (5th Cir. 2022) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Curran v. Wallace*, 306 U.S. 1, 15–16 (1939); and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). “If it were otherwise—if people outside government could wield the government’s power—then the government’s promised accountability to the people would be an illusion.” *Id.* at 880 (citing THE FEDERALIST No. 51 (James Madison)).

131. Dept. of Transp. v. Ass’n of Am. R.Rs., 575 U.S. 43, 57, 62 (2015) (Alito, J., concurring) (quoting *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 390 (1995) and *Carter Coal*, 298 U.S. at 311). *Accord Texas v. Comm’r of Internal Revenue*, 142 S. Ct. 1308, 1309 (2022) (Alito, J., joined by Thomas, J. and Gorsuch, J.) (“To ensure the Government remains accountable to the public, it cannot delegate regulatory authority to a private entity”) (internal citations omitted).

Starting from this foundational principle, courts have developed what has been coined the “private nondelegation doctrine,” which three Supreme Court Justices recently signaled the need to fortify through an appropriate future case.¹³² In short, the doctrine generally forbids delegation of government power to a private actor unless the private actor operates subordinately—or merely “as an aid”—to a governmental actor and subject to that governmental actor’s “pervasive surveillance and authority.”¹³³ Cases in this area have typically focused on the participation of private actors in promulgating quasi-legislative rules that bind a particular industry rather than on the private actors’ investigation and prosecution of rule-breakers.¹³⁴ Indeed, in some cases it appears the relevant private regulator lacked any enforcement powers at all. In other cases, constitutional scrutiny of the private entity’s enforcement powers was premature because the private regulator was only a recent creation and had not yet taken steps to establish its enforcement system, much less to investigate or punish anyone.¹³⁵

In recent years, however, several cases have begun to scrutinize the degree of governmental supervision when private actors such as FINRA, the PCAOB, and HISA flex their core *executive* powers of investigation, prosecution, and punishment. In that context, these regulators—and more importantly, the private staff minions who perform nearly all of the day-to-day work—operate largely autonomously with virtually no governmental direction or supervision.¹³⁶ In theory, the final prosecutorial orders issued by each of these quasi-governmental regulators

132. *Texas v. Comm’r of Internal Revenue*, 142 S. Ct. 1308, 1308, 1309 (2022) (statement of Justice Alito, joined by Justices Thomas and Gorsuch, respecting denial of certiorari) (“To ensure the Government remains accountable to the public, it cannot delegate regulatory authority to a private entity”) (internal citations omitted).

133. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940); *see also Carter Coal*, 298 U.S. at 311 (1936); *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023), *reh’g denied*, 2023 WL 3815095 at *1 (6th Cir. May 18, 2023), *cert. docketed*, No. 23-402 (U.S. Oct. 13, 2023); *Nat’l Horsemen’s Benevolent and Protective Ass’n*, 53 F.4th at 881.

134. *See, e.g., Adkins*, 310 U.S. 381; *Carter Coal*, 298 U.S. 238; *Amtrak I*, 721 F.3d 666. For this reason, courts typically invoke the nomenclature of “nondelegation,” but that is something of a misnomer when extended to analyzing a private regulator’s exercise of *executive* power. Whereas Congress possesses legislative power under Article I of the Constitution, Congress possesses no executive power under Article II, and thus cannot “delegate” it. *See generally* Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1169–72 (2023) (urging a focus on “vesting” rather than “delegation”).

135. *See, e.g., Oklahoma*, 62 F.4th at 231–33; *Nat’l Horsemen’s Benevolent and Protective Ass’n*, 53 F.4th at 890 n.37. In one such case, the court in dictum helpfully suggested certain oversight techniques that a supervisory government agency might adopt to minimize private nondelegation concerns. For example, the court hypothesized that the agency “could issue rules protecting covered persons from overbroad subpoenas or onerous searches,” “could require that the [subordinate private regulator] provide a suspect with a full adversary proceeding . . . with free counsel,” and “could require that the [subordinate private regulator] meet a burden of production before bringing a lawsuit or preclear the decision with the [government agency].” *Oklahoma*, 62 F.4th at 231. Notably, the SEC and FTC apply none of these hypothetical oversight techniques to the investigative and prosecutorial activities of their putatively subordinate quasi-governmental regulators.

136. The five SEC-appointed private citizens who govern the PCAOB are treated as constitutional “officers,” but the PCAOB’s staff of approximately 1,000 private citizens can claim no such pretense. And as previously noted, not even the top leaders of FINRA or HISA are appointed by the SEC or any

are subject to appellate review by the same governmental body that must pre-approve its rules and standards, but any such review occurs only after all of the investigative, prosecutorial, and adjudicative activity has concluded.¹³⁷ Such after-the-fact appellate review is far too little, and comes far too late, to constitute pervasive governmental oversight and surveillance. By that point, the private actors have made countless discretionary and consequential executive decisions with literally no direction, supervision, or pre-approval from any governmental actor—such as who will be investigated; what will be investigated; what documentary evidence and testimony will be demanded, and from whom; how voluminous and burdensome those demands will be; who will be charged; what charges will be asserted; what sanctions will be demanded and imposed; and whether to negotiate a settlement before a final decision is rendered.¹³⁸

Beyond coming too late to satisfy the requirement of pervasive government surveillance, agency appellate review occurs in only a tiny sliver of the thousands of investigations, prosecutions, and adjudications conducted by these private quasi-governmental regulators each year. That's because nearly all of these investigations end prematurely through either a decision not to prosecute anyone, a settlement in which appellate review is waived, or a default.¹³⁹ As a result, the ostensible supervising agency never reviews the vast majority of the investigatory and prosecutorial work performed by its putatively subordinate private regulators. These agencies' oversight and surveillance of that work, therefore, is no more "pervasive" than that performed by appellate courts over the administrative enforcement activities of federal agencies.

Despite the foregoing realities, some courts have recently held that the prevailing model of limited and sporadic agency oversight of quasi-governmental enforcement activities is sufficient under the private nondelegation doctrine. For example, in *Oklahoma v. United States*,¹⁴⁰ the Sixth Circuit rejected a facial nondelegation challenge against HISA, although the court's analysis of that particular challenge was less than comprehensive and explicitly left the door open to a future as-applied challenge.¹⁴¹ In the court's view, the combined ability of the FTC to theoretically constrain HISA's enforcement discretion and tactics through rulemaking, and to review HISA sanctions after the fact, gave the FTC sufficient

other governmental actor; those entities are comprised entirely of private citizens with no claim to official governmental status.

137. See 15 U.S.C. § 78s(d) (governing SEC's after-the-fact review of FINRA final disciplinary sanctions); *id.* § 7217(c) (governing SEC's after-the-fact review of PCAOB final disciplinary sanctions); *id.* § 3058(c) (governing FTC after-the-fact review of HISA final disciplinary sanctions).

138. In one recent case involving HISA (discussed below), a Fifth Circuit panel coined the metaphoric pun that by the time FTC reviews a case, "the horse [is] already out of the barn." *Nat'l Horseman's Benevolent and Protective Ass'n*, 107 F.4th at 430.

139. In addition, although it does not happen often, the quasi-governmental regulator may ultimately rule in favor of the accused after a hearing on the merits, in which case the accused would have no ground to seek appellate review by the supervising agency.

140. 62 F.4th 221.

141. *Id.* at 231, 233.

control over the agency's investigative and prosecutorial functions to satisfy the nondelegation doctrine.¹⁴² The Court cited to earlier cases upholding the constitutionality of the SEC's supervision over FINRA's predecessor entity, but several of the cited cases framed the question in terms of delegated *legislative* power, and the legal analysis of the nondelegation challenge in each of the cited cases was even more cursory than that of the Sixth Circuit in *Oklahoma*. Nevertheless, the Eighth Circuit recently adopted the Sixth Circuit's reasoning in rejecting a similar facial nondelegation challenge to HISA.¹⁴³ In both cases, the challengers sought review by the Supreme Court, which granted certiorari, vacated both decisions (along with the conflicting Fifth Circuit decision discussed below), and remanded for reconsideration in light of the Court's intervening decision in a case involving the Federal Communications Commission.¹⁴⁴

In *National Horsemen's Benevolent and Protective Association v. Black*,¹⁴⁵ the Fifth Circuit rejected the approach taken by the Sixth and Eighth Circuits, thus creating a clear circuit split. In the *Horsemen's* case, the Fifth Circuit found dispositive the absence of any FTC involvement or pre-approvals in the investigative and prosecutorial stages of HISA enforcement matters, including HISA's decisions regarding "whether to investigate a covered entity, whether to subpoena its records, whether to search its premises, whether to charge it with a violation, or whether to sanction or sue it."¹⁴⁶ In the court's view, "[a] private entity that can investigate potential violations, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the say-so of the agency—does not operate under that agency's 'authority and surveillance.'"¹⁴⁷ The Court also recognized that neither the FTC's ability to "come in at the tail-end" on after-the-fact appellate review of a small number of contested HISA enforcement cases, nor the FTC's hypothetical ability to enact rules designed to insert itself more actively in HISA's investigative and disciplinary processes, were sufficient to constitute meaningful control over HISA's enforcement operations.¹⁴⁸

Proceeding in parallel with these challenges to HISA's enforcement power are at least two cases raising certain similar challenges to FINRA's enforcement powers.¹⁴⁹ Most notable is *Alpine Securities Corp. v. FINRA*,¹⁵⁰ decided by the D.C. Circuit in November 2024. On interlocutory appeal from a district court's denial of a brokerage firm's motion for a preliminary injunction to stop a disciplinary proceeding FINRA had commenced against it, a D.C. Circuit panel initially

142. *Id.* at 231.

143. *Walmsley v. FTC*, 117 F.4th 1032 (8th Cir. 2024).

144. *See Oklahoma v. United States*, 163 F.4th 294, 300–01 (6th Cir. 2025) (explaining case history and reaffirming original decision upon reconsideration).

145. 107 F.4th 415 (5th Cir. 2024).

146. *Id.* at 429.

147. *Id.* at 430.

148. *Id.* at 430–32.

149. Two other recent cases were dismissed for jurisdictional reasons without a decision on the merits. *See Black v. SEC*, 125 F.4th 541, 547 (4th Cir. 2025); *Blankenship v. FINRA*, No. 24-3003, 2024 WL 4043442, at *3 (E.D. Pa. Sep. 4, 2024).

150. 121 F.4th 1314 (D.C. Cir. 2024), *cert. denied*, 145 S. Ct. 2751 (2025).

granted an emergency injunction of the FINRA proceeding pending appeal,¹⁵¹ but after full briefing and oral argument ultimately enjoined only one limited aspect of FINRA's proceeding.

Specifically, the court held that to the extent FINRA was seeking to expel the firm from the industry—likely putting the firm out of business—using a type of “expedited” disciplinary proceeding where the expulsion would take effect before the firm could appeal the sanction to the SEC, the firm was likely to prevail on its claim that FINRA was exercising significant executive authority without adequate governmental surveillance and control, and thus violating the private nondelegation doctrine.¹⁵² Because the court also found that the firm had established all other prerequisites for injunctive relief, including irreparable harm, it directed the district court to enjoin FINRA from expelling the firm until after any appellate review of that expulsion by the SEC.¹⁵³ But the court found no likelihood of success or threat of irreparable harm in the firm's contention that even ordinary FINRA disciplinary proceedings violate the nondelegation doctrine, and it found no irreparable harm threatened by the firm's additional claim that FINRA's hearing officers are constitutional “officers” lacking lawful appointment by the President or the SEC.¹⁵⁴

D.C. Circuit Judge Justin Walker issued separate opinions in *Alpine* both at the initial emergency injunction stage, and on the merits of the appeal from the district court's denial of a preliminary injunction after briefing and argument. Concurring in the grant of emergency preliminary injunctive relief, Judge Walker focused primarily on the significant authority exercised by FINRA's hearing officers, who he noted were “near carbon copies” of the SEC administrative law judges the Supreme Court held were unconstitutionally appointed in *Lucia v. SEC*.¹⁵⁵ In his partial dissent after merits briefing and argument, however, he not only solidified his view that FINRA hearing officers lacked constitutional appointments and enjoyed excessive protection from removal by the President,¹⁵⁶ but also appeared convinced that FINRA's investigative, prosecutorial, and disciplinary activities lack the type of supervision, direction, and surveillance required by the private nondelegation doctrine.¹⁵⁷ FINRA's “panoply of enforcement powers,” he wrote, “requires no contemporaneous oversight by the SEC.”¹⁵⁸ He added that “[t]he SEC does not control FINRA's investigations, its prosecutions, or its initial adjudications,” and that “[u]ntil the SEC accepts an appeal from a final FINRA decision, FINRA wields its enforcement powers unilaterally.”¹⁵⁹

151. No. 23-5129, 2023 WL 4703307 (D.C. Cir. July 5, 2023) (per curiam); *Alpine Secs. Corp.*, 121 F.4th at 1337.

152. 121 F.4th at 1326–30.

153. *Id.* at 1330, 1337.

154. *Id.* at 1332–36.

155. No. 23-5129, 2023 WL 4703307, at *2 (D.C. Cir. July 5, 2023) (Walker, J., concurring) (referencing *Lucia v. SEC*, 138 S. Ct. 2044 (2018)).

156. 121 F.4th at 1346–47 (Walker, J., concurring in the judgment in part and dissenting in part).

157. *Id.* at 1343–46.

158. *Id.* at 1340.

159. *Id.*

In a second case, *Kim v. FINRA*, a district court denied a securities broker's motion for a temporary restraining order and preliminary injunction to stop a disciplinary proceeding FINRA was pursuing against him.¹⁶⁰ The district court first held that FINRA is not a state actor or engaged in state action for constitutional purposes because, among other things, the government did not create FINRA; the government does not appoint FINRA's leaders; FINRA is not under the direction and control of federal governmental appointees; and, most specifically, the SEC exercises no day-to-day supervision or control over FINRA's enforcement investigations or disciplinary proceedings.¹⁶¹ Although those combined observations might also suggest that FINRA, at least when performing its enforcement functions, is a private actor operating with inadequate governmental surveillance or direction under the private nondelegation doctrine, the court simultaneously rejected that argument too, finding no tension between its two holdings.¹⁶² The court reasoned that "the level of oversight required to satisfy the nondelegation doctrine is different, both quantitatively and qualitatively, from the level of permanent control required to make a nominally private corporation a state actor."¹⁶³ Fortunately for FINRA, the court concluded that "FINRA's structure and work strikes the necessary balance."¹⁶⁴

As with HISA and FINRA, there have been at least four recent court cases challenging the constitutionality of the PCAOB's enforcement structure and power, at least two of which remain pending and are now consolidated in the District of Columbia.¹⁶⁵ In each case, the plaintiff sued under a pseudonym to protect his or its true identity, consistent with the statutory secrecy provisions that govern nonpublic and nonfinal PCAOB enforcement proceedings.¹⁶⁶ In both pending cases the court has denied leave to proceed pseudonymously, and that issue is currently on appeal to the D.C. Circuit.¹⁶⁷ In one of the other cases, the PCAOB

160. See *Kim v. FINRA*, 698 F. Supp. 3d 147 (D.D.C. 2023). The plaintiff appealed the denial of his preliminary injunction motion to the D.C. Circuit but ultimately dismissed his case and the appeal after the D.C. Circuit issued its opinion in *Alpine*.

161. *Id.* at 161–65; see also *id.* at 158 ("FINRA decides whom to investigate, whom to bring charges against, what charges to bring, and what sanctions to seek. Other than serving as a level of review after a hearing, the SEC plays no active role in FINRA's enforcement proceedings." (citation omitted)).

162. *Id.* at 165–67.

163. *Id.* at 167.

164. *Id.* In his subsequent partial dissent in *Alpine*, Judge Walker characterized this purported balance as FINRA's "Goldilocks defense"—"too much like the government for Article II's strictures yet too much like the government for the private nondelegation doctrine to apply. But FINRA 'cannot have its cake and eat it too.'" 121 F.4th 1314, 1351 (Walker, J., concurring in the judgment in part and dissenting in part) (quoting *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 721 F.3d 666, 676 (D.C. Cir. 2013)).

165. Complaint for Declaratory and Injunctive Relief, *John Doe Corp. v. PCAOB*, No. 25-cv-00070, 2025 WL 304795 (D.D.C. Jan. 10, 2025) (dismissed as moot in September 2025); First Amended Complaint, *John Doe Corp. v. PCAOB*, No. 24-cv-1103, 2024 WL 4109306 (S.D. Tex. Aug 15, 2024) (dismissed as moot in January 2025); First Amended Complaint, *Doe v. PCAOB*, No. 24-cv-00254, 2025 WL 208762 (M.D. Tenn. Aug. 8, 2024) (transferred to and now pending in D.D.C.); Complaint, *Doe v. PCAOB*, No. 23-cv-0149, 2024 WL 1096546 (N.D. Tex. Jan. 19, 2023) (transferred to and now pending in D.D.C.). The author is counsel to the challengers in the latter three cases.

166. See generally 15 U.S.C. § 7215(b)(5)(A), (c)(2).

167. *Doe v. PCAOB*, No. 24-780, 2024 WL 3954189 at *2-3 (D.D.C. Aug. 2, 2024).

dropped its underlying investigation without enforcement action while the court case was pending, leading to a stipulated dismissal without prejudice.¹⁶⁸

No court has thus far issued any substantive decisions on the merits in these cases, largely due to the PCAOB's threshold venue and jurisdictional motions and the PCAOB's agreement to stay its underlying enforcement proceedings to allow the presiding courts adequate time to rule on the constitutional challenges, thus negating any need for the challengers to seek preliminary injunctive relief. Each of the cases has included claims, among several others, that the PCAOB staff assigned to investigation, prosecute, superintend, and adjudicate its enforcement proceedings are private parties that wield excessive punitive law enforcement power without meaningful direction and supervision from the executive branch of government in violation of Article II of the Constitution. In these cases, the PCAOB has admitted (indeed emphasized) that it is considered part of the government, rather than a private entity, for Constitutional purposes, arguing that this fact renders the private nondelegation doctrine categorically inapplicable.¹⁶⁹

IV. CONCLUSION

With so much post-*Jarkesy* litigation underway, we may soon get much-needed clarity on a host of unsettled questions about the extent to which *Jarkesy* and the ill-defined private nondelegation doctrine might upend the enforcement machinery of private, quasi-governmental regulators like FINRA, the PCAOB, and HISA. That clarity cannot come soon enough. Wielding the statutory imprimatur of federal law, these regulators—along with others not addressed in this paper—collectively investigate and punish thousands of private citizens and businesses each year without jury trials, without any meaningful governmental supervision of the vast majority of their enforcement activities, and with only limited and belated appellate review by government of just a tiny handful of their cases. It is bad enough that Americans are increasingly governed by rules and regulations decreed by unelected executive branch bureaucrats, rather than by laws passed by the legislative branch. This is no time for further collusion between Congress and the executive branch to shift the exercise of core *executive* powers from government actors to private actors who can routinely punish fellow citizens without jury trials and outside of our Article III courts.

168. Doe Corp. v. PCAOB, No. 24-1103, 2024 WL 5275034 at *3 (S.D. Tex. June 10, 2024).

169. See, e.g., Defendant's Rule 12(b)(6) Motion to Dismiss Plaintiff's First Amended Complaint at 20-22, Doe Corp. v. PCAOB, No. 24-cv-02443 (D.D.C. Sept. 20, 2024). This case was voluntarily dismissed before the motion was decided, after PCAOB enforcement staff notified the plaintiff's counsel that it was terminating its investigation without further action.