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Jarkesy's Potential Implications for EPA Administrative Proceedings

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On June 27, 2024, the U.S. Supreme Court decided *SEC v. Jarkesy*,[1] holding that when the Securities and Exchange Commission (SEC) alleges a defendant has violated securities antifraud provisions and seeks civil penalties, the defendant is entitled to a jury trial in federal court under the Seventh Amendment. The ruling restricts the SEC's use of its own in-house administrative tribunal with its own administrative law judges (ALJs), which the SEC has historically used to pursue antifraud claims. While the Court's ruling focuses on the SEC, the principles underlying the decision may be applied more broadly to restrict the ability of other federal agencies, including the Environmental Protection Agency (EPA), to pursue civil penalties via their own administrative proceedings.

The Court's holding. As Sidley discussed **here**, *Jarkesy* held that the SEC's use of an administrative proceeding presided over by an SEC-appointed ALJ to impose liability for civil penalties for securities fraud violated the defendant's Seventh Amendment right to a jury trial for "suits at common law."[2] The Court found that the remedy imposed by the

SEC — "monetary relief" that was "designed to punish or deter the wrongdoer" rather than "solely to restore the status quo" — was "all but dispositive" to proving the SEC proceedings were "legal in nature" and thus implicated the Seventh Amendment.[3] As such, the defendant was "entitled to a jury trial in an Article III court."[4]

The Court's discussion of administrative proceedings before other agencies. While the Court provided some insight into how its ruling might affect a range of proceedings before other agencies, *Jarkesy* did not answer that question, as the majority left open how *Jarkesy* might apply to the more than two dozen federal agencies cited by the dissent as potentially losing their statutory authority to bring administrative proceedings. The majority opinion did distinguish *Jarkesy* from cases involving true "public rights," including tariffs, immigration, pensions and other government benefits, public lands, and patents, and declined to overrule its earlier decision in *Atlas Roofing*, in which the Court had permitted the Occupational Safety and Health Administration (OSHA) to impose administrative penalties for workplace safety violations.[5] However, at the same time, the Court raised a number of questions about *Atlas Roofing*,[6] strongly implying a willingness to rethink that ruling in a future case.

Issues to consider in EPA proceedings. Without a definitive ruling on a broader application of its reasoning, the decision leaves several issues to consider for EPA proceedings.

- *Would EPA's claims fall within the Court's reasoning?* In the *Jarkesy* opinion, the Court based much of its Seventh Amendment analysis on *Tull*, a 1987 case in which the Court concluded that certain actions for civil penalties under the Clean Water Act required a jury to decide.[7] While each statute is different, many environmental statutes contain similar provisions and/or use similar structures to the Clean Water Act to achieve Congress's goals. As such, it is possible that some courts may similarly apply the Seventh Amendment to other environmental statutes. A party wishing to extend *Jarkesy* to an EPA action would argue the violation for which EPA seeks penalties "resembles" a common-law claim that does not implicate a "public right." As the majority explained: "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory."[8] For example, securities fraud — which "draw[s] upon common law fraud" — implicates the Seventh Amendment, but an OSHA claim, which Congress established to promote safe working conditions, "did not borrow its cause of action from the common law" and, therefore, does not implicate the Seventh Amendment.[9] Hence, if the EPA claim could be linked to a historical cause of action available at common law, a respondent might possibly be able to

apply *Jarkesy* to an EPA proceeding. Of course, we would expect EPA to vigorously litigate this question. Additionally, there are some EPA claims that *Jarkesy* will not affect, including, for example, proceedings that do not involve enforcement, such as permit appeals to EPA's Environmental Appeals Board.

- *Would the other holdings of the Fifth Circuit be applied to EPA proceedings?* In the proceedings below, the U.S. Court of Appeals for the Fifth Circuit had held the SEC's adjudication before an ALJ also violated (1) the nondelegation doctrine based on the SEC's unfettered discretion to choose between an administrative proceeding or federal court and (2) the Take Care Clause of Article II of the Constitution based on statutory restrictions on the removal of SEC ALJs. The Supreme Court's ruling did not reach these other two constitutional issues, leaving them open for future challenges to agency administrative proceedings, including EPA proceedings, on those grounds.
- *If EPA loses administrative authority, it could affect EPA's entire ability to obtain civil penalties under certain laws.* Importantly, some environmental statutes give the EPA *only* administrative enforcement authority with no recourse in the federal courts. For example, for the EPA to seek civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act, it must do so via administrative enforcement — that is, filing a complaint with an ALJ.[10] For these types of laws, if *Jarkesy* were applicable, it could mean EPA could not pursue civil penalty claims absent new authorization from Congress.
- *Waiving the Seventh Amendment.* If extended to EPA proceedings, *Jarkesy* would allow a party to force EPA to proceed in federal court. But for some parties, an EPA administrative adjudication may be preferred to litigating in federal court. Agency proceedings can be a less costly alternative to federal district court litigation while still providing judicial review by a federal appellate court. Indeed, regulated parties have long resolved matters with the EPA directly in administrative consent agreements, which can offer more streamlined settlements than a consent decree that necessarily involves the Department of Justice and must be approved by federal district judge. If a party prefers to resolve a matter administratively, it may be able to waive any right to a jury trial that would otherwise be required by *Jarkesy* or other constitutional principles. Parties in both civil and criminal matters often waive their right to a jury.[11] It is, however, uncertain whether *Jarkesy* has limited the ability to proceed before an ALJ if a suit is in the nature of an action at common law, because the Court stated that "adjudication by an Article III court is mandatory."[12] Whether *Jarkesy* leaves EPA unable to proceed administratively or requires more specific waivers remains to be seen.

- *Will there be retroactive application to EPA administrative enforcement proceedings?* Unlike in *Loper Bright*,[13] the Court in *Jarkesy* did not expressly address whether its holding applies retroactively. And while the retroactive effect of constitutional rulings generally is extended only to a small subset of criminal matters (e.g., "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding"),[14] the overall direction of the Supreme Court in administrative law could make lower courts more receptive to the argument.
- *Will state administrative proceedings be affected?* Finally, because many states enforce their own environmental regulations in their environmental agencies, parties may begin to question whether state administrative agencies have the authority to impose civil penalties. The Seventh Amendment right to a jury trial has not been applied to the states, but the Court's seminal case on this issue is over a century old,[15] and the Court may be willing to revisit it. In addition, many state constitutions provide rights to a jury trial similar to the U.S. Constitution, and state courts often interpret their constitutional provisions coextensively with — or as to provide even more protections than — the federal provisions.[16]

For now, the holding in *Jarkesy* applies only to SEC fraud allegations. But the Court's reasoning potentially may be extended to proceedings before other federal agencies, and the Court this term has expressed willingness to revisit principles of administrative law. Parties facing EPA administrative enforcement proceedings should consider the implications of *Jarkesy* in deciding the best course forward.

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1. *Securities and Exchange Commission v. Jarkesy*, No. 22-859 (June 27, 2024). The opinion is available **here**.
2. *Jarkesy*, slip op. at 20.
3. *Id.* at 9 (internal quotation marks omitted).
4. *Id*. at 27.
5. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977).
6. *Jarkesy*, slip op. at 22–27.
7. *Tull v. United States*, 481 U.S. 412 (1987).
8. *Jarkesy*, slip op. at 14.
9. *Id.* at 23.
10. See 7 U.S.C. § 136l(a)(1).
11. See *Sec'y, U.S. Dep't of Lab. v. Preston*, 873 F.3d 877, 878 (11th Cir. 2017) ("It is hornbook law that rights of all kinds — even constitutional ones — can be waived"); Fed. R. Civ. P. 38(d) ("A

party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent").

12. *Jarkesy*, slip op. at 14.
13. "[W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful — including the Clean Air Act holding of *Chevron* itself — are still subject to statutory stare decisis despite our change in interpretive methodology." *Loper Bright Enters. v. Raimondo*, 603 U.S. ___, No. 22-451 (June 28, 2024).
14. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004)
15. See *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 765 n.13, n.30 (2010) (citing *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916)).
16. See, e.g., *Associated Inv. Co. P'ship v. Williams Assocs. IV*, 645 A.2d 505, 514 n.2 (Conn. 1994) ("Although the seventh amendment constitutional guarantee of a right to a jury trial applies only in the federal courts[,] the similarity between the state and federal tests [is] recognized by this court"); *Andersen v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 448 P.3d 1120, 1123 (Nev. 2019) (noting that Nevada reads its constitution coextensively with the Sixth Amendment on the U.S. Constitution); *State v. Miles*, 160 A.3d 23, 29 (N.J. 2017) ("This Court has consistently interpreted the State Constitution's double-jeopardy protection as coextensive with the guarantee of the federal Constitution").

Potential Impacts on the Natural Resources Industry After Chevron Overturn

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On June 28, the Supreme Court abrogated the *Chevron*[1] doctrine that has guided courts' review of agency actions for the past 40 years. *Chevron* mandated that courts defer to an agency's reasonable interpretation of an ambiguous statute.[2] Although *Chevron* was inconsistently applied, it had significant impacts on outcomes in court. Some scholars estimate that agencies prevailed at least 25% more often when courts analyzed agency action under *Chevron*.[3] Agency success increased dramatically at *Chevron* "step two," once a court found the statute ambiguous; at that point, agencies prevailed over 90% of the time.[4] Step two is really the meat of *Chevron*. Step one, which considers whether a statute is ambiguous, already directed courts to "reject administrative constructions which are contrary to clear congressional intent."[5]

In this summer's *Loper Bright Enterprises v. Raimondo* decision, the Court overruled *Chevron*, ruling that its two-step framework that required deference to agencies' interpretation of ambiguous statutes was contrary to the Administrative Procedure Act (APA) and the constitutional structure of the courts' function.[6]

Loper Bright involved a challenge to a National Marine Fisheries Service (NMFS) rule that required fishing vessels pay a daily fee for observers who ensure fisheries restrictions are followed. The statute in question, the Magnuson-Stevens Fishery Conservation and Management Act, authorized imposition of these fees in three circumstances that did not include the Atlantic herring fishery.[7] NMFS issued a rule in 2020 to impose fees there. Both the D.C. and First Circuit Courts of Appeal relied on *Chevron* to affirm the rule. Although the Supreme Court conducted a brief overview of the facts regarding the fee, its holding was expressly limited to whether *Chevron* should be overruled. To that end, the Court did not construe the Magnuson Act, and instead remanded that analysis to the lower courts.

The Court primarily relied on the APA, which empowers courts to decide "*all* relevant questions of law arising on review of agency action."[8] It characterized the purpose of the APA as a "check" on potentially overzealous administrators.[9] The Court also examined the historic role of courts in interpreting statutes. Referring to the seminal case of *Marbury v. Madison*, the Court opined that it was well understood that courts decide the law. It concluded the APA "codifies for agency cases the unremarkable, yet elemental proposition

reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment."[10]

Loper Bright does not create a new test; rather, it establishes that when courts analyze an agency's interpretation of a statute, they must use the traditional methods of statutory construction. This generally requires an examination of the text and context of the statute, as well as Congressional intent and other relevant materials. Courts should still pay "careful attention to the judgement of the Executive Branch" but should not defer to its reasoning.[11] This reclassification of the persuasiveness of an agency's reasoning is akin to the existing doctrine of "*Skidmore* deference,"[12] under which agencies' "interpretations and opinions" on the meaning of an ambiguous statute may be persuasive, depending on the thoroughness of reasoning, strength of logic, and consistency in agency practice.

The Court acknowledged that prior decisions that rest on *Chevron* remain good law, though that does not mean that agency interpretations prior to June are on solid ground. This is magnified by the Court's ruling in another case that also modified the impact of *Loper Bright*. In *Corner Post, Inc. v. Board of Governors*, 22–1008 (U.S. Jul. 1, 2024), the Court ruled that the six-year statute of limitations for challenging final agency action begins to accrue when the action injures a party, not when the action occurs. This means that when a rule applies to a person or business for the first time, they may challenge the rule in court, even if the agency action occurred more than six years ago. Such "as-applied" challenges have long been available in the Ninth and D.C. Circuits, where much agency litigation occurs.[13] *Corner Post* applies the principle nationwide.

Together, *Loper Bright* and *Corner Post* will likely result in numerous challenges to federal rules, perhaps even some that have been previously adjudicated.

How will *Loper Bright* affect the natural resources industry?

Chevron was a foundational environmental and natural resources case. Its impacts in the courts are clear, since agency interpretations were often accepted when *Chevron* applied. These cases had substantial impacts on how businesses operated. For example, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 115 S.Ct. 2407 (1995), the Supreme Court examined a challenge to a Fish and Wildlife Service rule that defined "take" under the Endangered Species Act. Although the common meaning of "take" did not extend as far, the rule included "habitat modification or destruction" as an element of take. The *Sweet Home* petitioners depended on forest products and argued the updated definition of take had harmed them by limiting logging in certain areas designated as wildlife habitat. The Court concluded that the statutory definition was ambiguous and

acknowledged that petitioners offered strong arguments to support their contention that the rule was too broad. Nonetheless, relying on *Chevron*, the Court upheld the rule.

Loper Bright does not curtail all agency deference. First, as mentioned above, agency interpretations can still be persuasive, and likely will be given great weight.[14] Second, agencies retain the ability to interpret their own regulations; an agency's interpretation of its own ambiguous regulation will be upheld if it is "within the bounds of reasonable interpretation."[15] Third, when agency action is reviewed under the APA, matters within the agency's expertise will receive a measure of deference under the statute's "arbitrary and capricious" standard.[16]

The *Post-Loper Bright* Landscape

Moving forward, we expect courts to revisit their dockets to determine whether the end of *Chevron* necessitates further briefing or reconsideration of pending case opinions. The Supreme Court telegraphed the need to revisit opinions after *Loper Bright* when it remanded nine cases to lower courts that had relied on *Chevron*. These cases alone could have significant impacts, and businesses should track them closely.

One case helps to illustrate the potential magnitude of *Loper*. In *Foster v. USDA*, 68 F.4th 372 (8th Cir. 2023), a family farm challenged the USDA's certification of a small, shallow puddle as wetland.[17] The family farm requested review under a USDA rule that allows impacted entities to challenge wetland certification. Relying on *Chevron*, the Eighth Circuit affirmed the rule and determined that the statutory provision at issue was ambiguous and deferred to the USDA interpretation.[18] Under *Loper Bright*, the Eighth Circuit would have to determine whether the statute at issue provides for a broader right to challenge certain wetland classifications, as the family farm contended.

As courts revisit cases, *Loper Bright* provides an opportunity for businesses to reexamine their particular circumstances and determine whether a specific rule might have negative impacts that warrant a court challenge. It also provides a tool to push back on agency proposals that appear to expand beyond the scope of the agency's statutory authority.

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1. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); https://www.law.cornell.edu/supremecourt/text/467/837.
2. *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, No. 22–451, (U.S. Jun. 28, 2024), slip op. at 19; https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.
3. See Kent Barnett and Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. REV. 1, 6 (2017).

4. *Id.*
5. *Chevron*, 467 U.S. at 843 n.9.
6. *Loper Bright, s*lip op. at 7–18
7. *Loper Bright*, slip op. at 3.
8. *Loper Bright*, slip op. at 14 (quoting 5 U.S.C. § 706) (emphasis the Court's).
9. *Loper Bright*, slip op. 13 (quoting *United States v. Morton Salt Co.*, 338 U. S. 632, 644 (1950)).
10. *Loper Bright*, slip op. at 14.
11. *Loper Bright*, slip op. at 35.
12. *Loper Bright*, slip op. at 10; *Skidmore* v. *Swift & Co.*, 323 U. S. 134(1944).
13. *Wind River Min. Corp. v. United States*, 946 F. 2d 710, 715 (9th Cir. 1991); *Harris v. F.A.A.*, 353 F. 3d 1006, 1009–1010 (D.C. Cir. 2004);
14. *Loper Bright*, slip op. at 10.
15. *Kisor v. Wilkie*, 588 U.S. 558, 576 (2019) (citation and quotation marks omitted).
16. 5 U.S.C. § 706(2)(A); *see generally Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43(1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."); *Kisor*, 588 U.S. at 632 (Kavanaugh, J., concurring) (citing *State Farm*).
17. 68 F.4th 372, 375–76.
18. *Id*. at 377–78**.**

Case Summary: Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020)

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On May 1, 2024, the Ninth Circuit in *Juliana v. United States* granted defendants' petition for mandamus and directed the district court to dismiss the case without leave to re-plead. Click for Order here. The Ninth Circuit based its mandamus order on its prior opinion from 2020 that concluded that Article III courts lacked the power to redress plaintiffs' harms and hence the plaintiffs lacked standing. In that 2020 opinion, 947 F.3d 1159 (9th Cir. 2020), the Ninth Circuit agreed with plaintiffs and the district court that there was injury and causation, the first two prongs for standing. The court then analyzed the third prong for standing, the two-part redressability requirement. The Ninth Circuit concluded that the second part of the redressability prong was lacking. The court concluded that the judiciary did not have the power to supervise numerous federal agencies into the future and declare policies that are and are not appropriate to reduce CO2 emissions.

We are therefore skeptical that the first redressability prong is satisfied [that what plaintiffs sought would reduce CO2 emissions sufficiently globally]. But even assuming that it is, the plaintiffs do not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court. There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of "competing social, political, and economic forces," which must be made by the People's "elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country." . . . the plaintiffs' request for a remedial plan would subsequently require the judiciary to pass judgment on the sufficiency of the government's response to the [court's] order, which necessarily would entail a broad range of policymaking [by the federal district court sitting in Eugene, Oregon].

Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020) (citations omitted).

The court also stated that "Although the plaintiffs' invitation to get the ball rolling by simply ordering the promulgation of a plan [by the executive branch] is beguiling, it ignores that an Article III court will thereafter be required to determine whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs' right to a 'climate system capable of sustaining human life.' We doubt that any such plan can be supervised or enforced by an Article III court." *Id*. at 1173.

After remand from that 2020 decision, the district court did not dismiss, as ordered by the Ninth Circuit, but let plaintiffs' replead in 2023. The district court concluded that a U.S. Supreme Court case issued after the 2020 Ninth Circuit decision changed the law and, therefore, plaintiffs would re-plead for a claim for declaratory relief and that such a claim was within the court's powers to provide redress. *Juliana v. United States*, 2023 WL 3750334, *6-*7 (D. Or. June 1, 2023) (analyzing standing under *Uzuegbunam v. Preczewski*, ––– U.S. ––––, 141 S. Ct. 792, 209 L.Ed.2d 94 (2021)). The district court also stated that the Ninth Circuit had not decided whether the declaratory relief that plaintiffs sought failed the redressability prong, that the Ninth Circuit had addressed only plaintiffs' request for injunctive relief. *Id*. at * 6.

In an opinion in December 2023 denying in part and granting in part a subsequent motion to dismiss the new amended complaint, the District Court laid out its plan to provide redress for plaintiffs' claims. The trial would have a liability phase followed by a remedy phase in which the court would, on a going forward basis, would review and pass judgment on proposed complex executive branch plans and either veto or approve them before they were implemented. *Juliana v. United States*, 2023 WL 9023339 at *14 (D. Or. Dec. 29, 2023) (Aiken, J.).

The short Ninth Circuit May 1, 2024, order reversing that December 2023 district court opinion tied its decision to its 2020 decision. The Ninth Circuit stated that Uzuegbunam was irrelevant because it addressed damages, not declaratory relief. Order para. 4. The court also stated that in its 2020 decision it had already concluded that plaintiffs' requested declaratory relief failed because it would not redress plaintiffs' harms "'absent further court action,' which we held was unavailable." Order para. 3 (quoting *Juliana*, 947 F.3d at 1170).

This appears to be the end of the *Juliana* litigation.