

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

Rover Pipeline, LLC;
Energy Transfer LP,

Plaintiffs,

v.

Federal Energy Regulatory Commission;
Chairman Richard Glick;
Commissioner James Danly;
Commissioner Allison Clements;
Commissioner Mark C. Christie;
Commissioner Willie L. Phillips; and
Chief Administrative Law Judge Carmen A.
Cintron, in their official capacities,

Defendants.

Civil Action No. 3:22-cv-00232-S

**PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF A STAY OF
BOTH PROCEEDINGS OR NO STAY AT ALL**

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INTRODUCTION

Since the parties briefed the issue whether to stay the pending administrative law judge (ALJ) hearing at the Federal Energy Regulatory Commission (FERC), two legal developments have reinforced why reciprocal stays, at a minimum, of that ongoing FERC proceeding and this one are required. Plaintiffs already advised the Court of the Supreme Court's grant of a writ of certiorari in *Securities and Exchange Commission, et al. v. Cochran*, No. 21-1239, ___ S. Ct. ___, 2022 WL 1528373 (U.S. May 16, 2022)). Two days later, on May 18, the Fifth Circuit held in *Jarkesy v. Securities and Exchange Commission*, ___ F.4th ___, 2022 WL 1563613 (5th Cir. May 18, 2022), that in-house ALJ enforcement proceedings violate the Constitution in three separate ways. That holding applies as well to the constitutional claims here: *i.e.*, the ongoing FERC proceeding violates Article II, because FERC ALJs, like SEC ALJs, enjoy unconstitutional protection from removal; and violates the Seventh Amendment, which guarantees a jury trial for the type of violation alleged here.

The decision in *Jarkesy* establishes, through binding precedent, that the ongoing FERC ALJ proceeding that Plaintiffs seek to stay violates their constitutional rights. And other Fifth Circuit precedent establishes that a violation of constitutional rights satisfies the test for irreparable harm. Defendants have no reason—and no basis in law—to subject Plaintiffs to that unconstitutional ongoing proceeding while the Supreme Court clarifies certain issues that may at best simplify these proceedings. If, as Defendants insist, it would be a waste of resources to move forward with the proceeding in this Court before that clarity is achieved, the same is true for the unconstitutional FERC proceeding. The two pending Supreme Court cases and *Jarkesy* all compel staying both the FERC proceeding and this one. And in no event should the Court allow a stay of this proceeding without staying the unconstitutional FERC proceeding.

BACKGROUND

Plaintiffs filed this declaratory judgment action on February 1, 2022 seeking to preserve their constitutional and statutory rights to a trial in a federal district court to adjudicate FERC's allegations that Plaintiffs violated Natural Gas Act (NGA) regulations in connection with Rover's construction of a now-completed and fully operable natural gas pipeline. *See* Dkt. 26 at 3; Dkt. 1. FERC seeks to impose more than \$20 million in civil penalties for this alleged violation, *see* Dkt. 26, at 3-4, by conducting an unconstitutional in-house administrative adjudication before a FERC-badged ALJ when the NGA requires it to be brought in federal district court.

This Supplemental Memorandum addresses the effects of two recent legal developments since the parties filed briefs on the question whether to stay this proceeding and the FERC ALJ proceeding. First, as Plaintiffs informed the Court earlier this week, the Supreme Court on Monday, May 16, granted the government's unopposed petition for a writ of certiorari to review the Fifth Circuit's en banc decision in *Cochran v. U.S. Securities and Exchange Commission*, 20 F.4th 194 (5th Cir. 2021) (en banc). *See* Dkt. 30. The question presented in that case is "[w]hether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing Securities and Exchange Commission administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the administrative law judge who will conduct the proceeding."

Second, the Fifth Circuit on Wednesday, May 18, decided *Jarkesy*. 2022 WL 1563613. This case held, among other things, that "the SEC's in-house adjudication of Petitioners' case violated their Seventh Amendment right to a jury trial" and that "statutory removal restrictions on SEC ALJs violate the Take Care Clause of Article II." *See id.* at *1.

Plaintiffs file this supplemental brief to advise this Court about the *Jarkesy* decision and

briefly explain why *Jarkesy* and the grant of the writ of certiorari in *Cochran* (along with *Axon Enterprise, Inc. v. Federal Trade Commission*, No. 21-86, 142 S. Ct. 895 (2022)) strengthens Plaintiffs' likelihood of success in this matter and their showing of irreparable harm if this Court does not stay the FERC in-house proceeding.

ARGUMENT

I. The Two Recent Legal Developments Reinforce That This Court Should Stay Both Proceedings Or Stay Neither Proceeding

A. The Court Can And Should Order FERC To Stay Its In-House Proceeding

Plaintiffs explained in their memorandum in support of a stay of both proceedings or no stay at all why this Court can and should order FERC to stay its in-house ALJ proceeding. *See* Dkt. 26, at 7-15. Plaintiffs explained their substantial likelihood of success on the merits; a substantial threat of irreparable harm if the injunction is not granted; that the threatened injury outweighs any harm that the injunction might cause to the defendant; and that the injunction will not disserve the public interest. *Id.* at 8 (citing *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012)).

FERC's in-house proceeding violates several constitutional provisions, including Articles II and III and the Fifth and Seventh Amendments, for all the reasons discussed in Plaintiffs' previous filings. *See* Dkt. 26 at 10-12; Dkt. 1. Plaintiffs are substantially likely to succeed on the merits of both these and their statutory claims. Section 24 of the NGA expressly grants federal district courts "exclusive jurisdiction of violations" of the NGA and related orders, and "all suits . . . and actions" to "enforce any liability or duty" under the Act. 15 U.S.C. § 717u (emphasis added). The meaning of the statutory text is plain, and plainly supports Plaintiffs' claim. *See* Dkt. 26, at 8-10; Dkt. 1. The likelihood of success factor—"arguably the most important" of the four

factors, *Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2004)—thus strongly supports a stay of FERC’s unlawful administrative proceeding.

Plaintiffs will suffer irreparable injury without a stay because without one Plaintiffs will need to continue defending themselves in an unlawful and unconstitutional FERC ALJ proceeding. *See* Dkt. 26, at 12-14. FERC’s in-house prosecutors are currently pursuing their case. Defendants rely on a line of cases rejecting irreparable harm for enduring the expense and annoyance of litigation, Dkt. 28 at 6-7, but the harm here is a proceeding that violates Plaintiffs’ constitutional rights. As Plaintiffs have explained, “the loss of constitutional freedoms ‘for even minimal periods of time . . . unquestionably constitutes irreparable injury.’” *See* Dkt. 26 at 12 (quoting *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 618 (5th Cir. 2021)).

The balance of equities and the public interest also support a stay of both proceedings, *see* Dkt. 26, at 14-16, so the Court should stay the FERC in-house proceeding.

B. The Grant Of Supreme Court Review In *Cochran* Reinforces Why Both Proceedings Should Be Stayed

As Plaintiffs explained in their May 17 letter, *see* Dkt. 30, a decision by the Supreme Court ruling that upholds the Fifth Circuit’s *en banc* decision in *Cochran* will confirm the likelihood of Plaintiffs’ success on the merits. And even a decision reversing in *Cochran* would not bar Plaintiffs from proceeding with this action because, unlike the statutes at issue in *Cochran* or *Axon*, the NGA separately vests jurisdiction of NGA violations and all suits and actions to enforce duties and liabilities under that statute exclusively in federal district courts.

The ways in which *Cochran* support a stay of the FERC proceeding are plentiful. Plaintiff in *Cochran* sued in federal district court to halt an ongoing SEC enforcement proceeding before an ALJ. Plaintiffs here seek to stop an ongoing FERC enforcement proceeding before a FERC ALJ. The *Cochran* complaint challenges the constitutionality of the SEC in-house proceeding on

the ground that the ALJ who would conduct the hearing is improperly insulated from removal by the President in violation of Article II of the Constitution. Among other things, Plaintiffs make the same argument about the FERC ALJ, who enjoys the same protection under the same statute. 5 U.S.C. § 7521(a).

The government argues in *Cochran* that the Securities and Exchange Act requires the plaintiff there to go through the entire SEC administrative process and then raise her challenge in a petition for review from a court of appeals. Defendants make the same argument about the NGA relying on a similar provision governing review of certain FERC orders.

When the plaintiff in *Cochran* appealed to the Fifth Circuit, she moved for a stay of the SEC ALJ proceeding pending that appeal. The government opposed that motion, making many of the same arguments it makes here for not staying the FERC ALJ proceeding. No. 19-10396 (5th Cir. Aug. 26, 2019). The Fifth Circuit *granted* the stay requested in *Cochran*. No. 19-10396 (5th Cir. Sept. 24, 2019).

Defendant's arguments here, opposing a stay of the FERC ALJ proceeding, also rest on a number of cases from other circuits that are in conflict with the reasoning and holding of *Cochran*. For example, in trying to refute that Plaintiffs will suffer irreparable harm without a stay of the FERC proceeding, Defendants cite several cases that instead found the challenges were not ripe because the statute at issue required the aggrieved party to complete the administrative process and raise their challenges solely through a petition for review in a court of appeals. *See* Dkt. 28 at 7 (citing, *e.g.*, *Tilton v. SEC*, 824 F.3d 276, 286 (2d Cir. 2016); *Bennett v. SEC*, 844 F.3d 174, 184 (4th Cir. 2016)). But in *Cochran* the Fifth Circuit rejected that premise and found that the plaintiff could bring the challenge in federal district court without waiting for court-of-appeals review of a final agency order, which is what Plaintiffs seek here.

If, as Defendants argue, this Court’s resolution of this litigation would benefit by awaiting the decisions the Supreme Court will issue in *Axon* or *Cochran*, the reasoning cuts both ways. The law of this Circuit, in the form of the en banc decision in *Cochran*, supports Plaintiffs’ likelihood of success. The FERC ALJ proceeding should be stayed if this proceeding is stayed while the Court awaits greater clarity from the Supreme Court.

C. The Fifth Circuit’s Decision In *Jarkesy v. S.E.C.* Strengthens Plaintiffs’ Likelihood Of Success And Confirms The Need For A Stay In The ALJ Proceedings

On Wednesday, May 18, the Fifth Circuit issued an opinion that both strengthens Plaintiffs’ likelihood of success and confirms the need for a stay in the ALJ proceedings. *See Jarkesy*, 2022 WL 1563613.

In *Jarkesy*, the SEC brought an in-house enforcement action against a hedge fund manager and his investment advisor (together, the “*Jarkesy* petitioners”) for securities fraud. *Id.* at *1. An SEC ALJ “adjudged [the *Jarkesy* petitioners] liable and ordered various remedies, and the SEC affirmed on appeal.” *Id.* The Fifth Circuit held that “the agency proceedings below were unconstitutional” and vacated the SEC’s decision. *Id.* In doing so, it issued two constitutional holdings that strengthen Plaintiffs’ likelihood of success on their similar constitutional claims here.

First, the Fifth Circuit held that “the SEC’s in-house adjudication of [the *Jarkesy* petitioners’] case violated their Seventh Amendment right to a jury” because “the SEC’s enforcement action is akin to traditional actions at law to which the jury-trial right attaches.” *Id.* at *1, 2. The court discussed civil juries’ longstanding role “as a critical check on government power” and their central role in our legal system, *id.* at *3, and noted that “the [Supreme] Court has specifically held that . . . the Seventh Amendment jury-trial right applies to suits brought under a statute seeking civil penalties.” *Id.* (citing *Tull v. United States*, 481 U.S. 412, 418-24 (1987)). The Fifth Circuit concluded that the *Jarkesy* petitioners “had the right for a jury to adjudicate the

facts underlying any potential fraud liability that justifies” “civil penalties.” *Id.* at *6. The SEC’s in-house proceeding violated the *Jarkesy* petitioners’ “Seventh Amendment right to a jury trial” by depriving them of a jury “for the liability-determination portion of their case.”

Second, the Fifth Circuit held that “statutory removal restrictions on SEC ALJs violate . . . Article II” because they imposed “[t]wo layers of for-cause protection” that impede the presidential control of ALJs that the Constitution requires. *Id.* at *1, 11. Although “not all removal restrictions are constitutionally problematic,” “a problem arises” when both principal officers “retain for-cause protection when they act as part of an expert board” and inferior officers “retain some amount of for-cause protection from firing.” *See id.* at *11-12 (citing *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020); *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492, 496 (2010)). The Fifth Circuit held that SEC ALJs are inferior officers that are “sufficiently important” to require presidential control, based on their “considerable power over administrative case records.” *Id.* at *12. But SEC ALJs may be removed by the President only for good cause, “sufficiently insulat[ing] them from removal [such] that the President cannot take care that the laws are faithfully executed.” *Id.* at *13. The statutory removal restrictions on SEC judges thus “are unconstitutional.” *Id.*

These two holdings substantially strengthen Plaintiffs’ likelihood of success on the merits. Like the *Jarkesy* petitioners, Plaintiffs also argue that the Seventh Amendment entitles them to a jury trial in a federal district court. *See* Dkt. 1, at ¶¶ 156-64, 193-95. And like the *Jarkesy* petitioners, Plaintiffs also argue that FERC ALJs are officers with broad and substantial power, *id.* at ¶¶ 90-94, and that the procedures for removing FERC’s ALJs violate Article II, *see id.* at ¶¶ 146-55, 190-92. The Fifth Circuit’s decision thus plainly strengthens Plaintiffs’ likelihood of success on the merits, which was already strong enough to warrant a stay. *See* Dkt. 26, at 8-12.

Jarkesy also strengthens Plaintiffs’ assertion of irreparable harm. It confirms that Plaintiffs will suffer constitutional harms if forced to defend themselves in an in-house FERC proceeding without a civil jury and before an ALJ whose statutory removal restrictions are unconstitutional. These constitutional harms “unquestionably constitute[] irreparable injury.” *See BST Holdings*, 17 F.4th at 618.

D. It Remains the Case that Without A Stay Of The FERC In-House Proceeding, This Court Should Deny Defendants’ Stay Motion And Expedite Partial Summary Judgment Proceedings

As Plaintiffs previously explained, if the administrative proceeding before FERC’s ALJ moves forward, this Court should exercise its discretion to deny Defendants’ motion to stay this litigation and grant Plaintiffs’ pending motion to expedite partial summary judgment briefing on Count I of their complaint. *See* Dkt. 26, at 15-23. Decisions in *Axon* and *Cochran* will not sufficiently simplify issues or conserve judicial resources to justify a one-sided stay; a one-sided stay would prejudice Plaintiffs and permit Defendants to moot this case; and Defendants would suffer no harm by proceeding with this litigation. *See id.* at 16-23. Thus, if the FERC proceeding goes forward, Plaintiffs’ motion to expedite resolution of Count I should be granted. *Id.* at 23.

This remains true after the grant of Supreme Court review in *Cochran*. As Plaintiffs’ explained in their May 17 letter, Dkt. 30, at best *Axon* and *Cochran* may “possibly” provide “added clarity” that would assist this Court’s resolution of Plaintiffs’ claims. *See* Dkt. 30, at 2; Dkt. 26, at 15. But decisions in the government’s favor in *Axon* and *Cochran* would not resolve the NGA questions in this case, and there is thus no reason to await those decisions if this Court declines to stay the FERC in-house proceeding. *See* Dkt. 30, at 2. The Supreme Court’s certiorari grant in *Cochran* will not change that, no matter how the Supreme Court rules on the statutory question in that case.

CONCLUSION

For the reasons explained above and in Plaintiffs' other filings on this issue, *see* Dkt. 17 (Plaintiffs' Motion to Expedite); Dkt. 25 (Plaintiffs' Response to Motion to Stay); Dkt. 26 (Plaintiffs' Memorandum Regarding Stays); Dkt. 30 (Plaintiffs' letter brief regarding *Cochran*), this Court should either grant a stay of both this litigation and the FERC in-house proceeding. In no event should the Court grant a stay of this proceeding and force Plaintiffs to defend themselves in the ongoing in-house FERC proceeding.

Dated: May 19, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2022, I caused the foregoing Plaintiffs' Supplemental Brief In Support Of A Stay Of Both Proceedings Or No Stay At All to be filed with the Clerk of the U.S. District Court for the Northern District of Texas via the Court's CM/ECF system. I further certify that service was accomplished on all parties through the Court's CM/ECF system.

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