ADMINISTRATIVE LAW — STRUCTURAL CONSTITUTIONAL CHALLENGES — FOURTH CIRCUIT DECLINES TO CONSIDER CONSTITUTIONALITY OF REMOVAL PROTECTIONS BECAUSE OF LACK OF INJURY. — *K & R Contractors, LLC v. Keene*, 86 F.4th 135 (4th Cir. 2023).

Over the past decade, the Supreme Court has bolstered the presidential removal power.[1] But the Court's expansion of this power has not translated to robust remedies for the regulated parties that bring removal-protection challenges.[2] Recently, in *K & R Contractors, LLC v. Keene*,[3] the Fourth Circuit declined to consider the constitutionality of the removal protections for administrative law judges (ALJs) at the Department of Labor (DOL) because the challenging party was not entitled to a remedy regardless of the answer to the constitutional question.[4] It determined that the last-resort rule — which requires courts to resolve a case on nonconstitutional grounds, if possible, before reaching a constitutional question[5] — constrained it from deciding the merits of the removal-protection claim.[6] While the Fourth Circuit's reliance on the last-resort rule does not align with how the Supreme Court has traditionally handled presidential removal power cases, the Fourth Circuit's approach — not the Court's — should be mirrored going forward.

In February 2017, Michael Keene, a retired miner, claimed benefits under the Black Lung Benefits Act[7] (BLBA).[8] The DOL's district director issued a proposed decision that awarded benefits to Keene and ordered K & R Contractors — which operated a mine where Keene had worked — to pay those benefits.[9] K & R subsequently requested a hearing on the matter before an ALJ.[10] In June 2018, the case was assigned to ALJ Barto;[11] K & R immediately moved to reassign the claim to

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[1] *See* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1758–60 (2023).

[2] *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513 (2010).

[3] 86 F.4th 135 (4th Cir. 2023).

[4] *Id.* at 148–49.

[5] Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1025 (1994).

[6] *K & R Contractors*, 86 F.4th at 148–49.

[7] 30 U.S.C. §§ 901–944.

[8] *K & R Contractors*, 86 F.4th at 141.

[9] *Id.* A BLBA claim must first be filed with a DOL district director, who "develops the record" and determines the coal mine operator that may be held liable for the payment of benefits. *Id.* at 140. After the district director issues the proposed order, any party "may request a hearing before a DOL ALJ." *Id.* The ALJ's decision is final unless any party appeals to the Benefits Review Board, whose decisions may be reviewed "in the court of appeals for the circuit in which the claimant's injury occurred." *Id.*

[10] *Id.* at 141.

[11] Notice of Assignment, Notice of Hearing, and Prehearing Order at 1, Keene v. K & R Contractors, LLC, No. 2018-BLA-05457 (U.S. Dep't of Lab. Jan. 29, 2019), https://www.oalj.dol.gov/DECISIONS/

another ALJ,[12] alleging two constitutional violations. First, K & R relied on *Lucia v. SEC*[13] to argue that DOL ALJs had originally been appointed by the agency's staff, which violated the Appointments Clause.[14] Even though the Secretary of Labor — the head of the DOL — had ratified incumbent ALJs' appointments even before *Lucia* was decided,[15] K & R insisted that a new hearing officer was still required.[16] Second, K & R argued that the DOL ALJs were subject to unconstitutional removal protections given that they can be removed only for good cause by the members of the Merit Systems Protection Board, who, in turn, can be removed only for good cause by the President.[17]

In August 2018, ALJ Barto denied K & R's motion because his appointment had been ratified by the Secretary of Labor before he "t[ook] any substantial action at all in [the] case."[18] Then, in January 2019, the case was reassigned to ALJ Applewhite for unrelated reasons.[19] K & R filed another motion, contending that the DOL ALJs' appointments and removal protections violated the Appointments Clause because incumbent ALJs still retained competitive-service status.[20] ALJ Applewhite also denied K & R's motion, noting that she "was appointed by the

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ALJ/BLA/2018/K_and_R_CONTRACTORS__v_KEENE_MICHEAL_D_2018BLA05457_(JUN_28_2018)_192823_NOHRG_PD.PDF [https://perma.cc/M7MT-22WR]. ALJ Barto had originally been hired through the competitive service, *K & R Contractors*, 86 F.4th at 141, which meant that he had been appointed by DOL staff, *id.* at 140. The Secretary of Labor issued a letter in December 2017 that ratified ALJ Barto's appointment, *id.* at 141, though ALJ Barto remained in the competitive service after the ratification, *see id.* at 140.

[12] Motion to Cancel Hearing and Reassignment of Claim, *K & R Contractors*, No. 2018-BLA-05457 (U.S. Dep't of Lab. Jan. 29, 2019), *reprinted in* Joint Appendix at 7, 7, *K & R Contractors*, 86 F.4th 135 (No. 20-2021).

[13] 138 S. Ct. 2044 (2018). The *Lucia* Court held that SEC ALJs were "Officers of the United States" and, thus, that their appointment by SEC staff members did not comply with the Appointments Clause. *Id.* at 2049, 2055. The Appointments Clause provides that "Officers of the United States" can be appointed only by "the President, a court of law, or a head of department." *Id.* at 2051 (citing U.S. CONST. art. 2, § 2, cl. 2).

[14] Motion to Cancel Hearing and Reassignment of Claim, *supra* note 12, at 7–8.

[15] *K & R Contractors*, 86 F.4th at 141.

[16] *See* Motion to Cancel Hearing and Reassignment of Claim, *supra* note 12, at 8.

[17] *Id.* at 8–9 (citing *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in the judgment in part and dissenting in part)).

[18] Excerpt of Transcript of Hearing Before the Administrative Law Judge, Keene v. K & R Contractors, LLC, No. 2018-BLA-05457 (U.S. Dep't of Lab. Jan. 29, 2019), *as reprinted in* Joint Appendix, *supra* note 12, at 11, 12. ALJ Barto did not seem to address K & R's allegation that the ALJs' removal protections violated the Constitution.

[19] *K & R Contractors*, 86 F.4th at 142. ALJ Applewhite had transferred to the DOL from the Social Security Administration, and the Secretary of Labor had appointed her as an ALJ in October 2018. *Id.*

[20] Motion to Hold Claim in Abeyance and New Evidentiary Hearing, *K & R Contractors*, No. 2018-BLA-05457 (U.S. Dep't of Lab. Jan. 29, 2019), *reprinted in* Joint Appendix, *supra* note 12, at 17, 18–19 (pointing to a memorandum for department heads that "instructs that ALJs appointed prior to [July 10, 2018] will remain part of the competitive service and subject to the requirements of the competitive service," *id.* at 19).

Secretary of Labor . . . prior to issuing this decision and order."[21] She reviewed the record and awarded benefits to Keene under the BLBA, holding K & R liable.[22] K & R then appealed the decision to the Benefits Review Board.[23] It argued that the decision should be vacated and remanded because ALJs Barto and Applewhite "were not appointed in accordance with the Appointments Clause,"[24] and they "lacked the authority [under *Free Enterprise Fund v. Public Company Accounting Oversight Board*[25]] to adjudicate this case because the limitations on their removal violate the separation of powers."[26]

The Benefits Review Board affirmed ALJ Applewhite's decision.[27] It clarified that an agency head may permissibly appoint an executive officer through ratification[28] and that the Secretary of Labor had done so for ALJ Barto.[29] It further noted that K & R failed to show that ALJ Applewhite's appointment was not valid.[30] The Board then turned to K & R's objection that the ALJs' removal protections violated the separation of powers. It declined to address the argument because K & R "failed to adequately brief this issue."[31] The Board explained that K & R had not developed an argument for this challenge, as it had "not specified how those provisions violate the separation of powers doctrine" or how *Free Enterprise Fund* applied to the case.[32] K & R petitioned the Fourth Circuit to review the Board's decision.[33]

The Fourth Circuit denied the petition for review.[34] Writing for a unanimous panel, Judge Rushing[35] held that ALJs Barto and Applewhite had both been constitutionally appointed.[36] She determined that the Secretary of Labor had lawfully exercised his appointment

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[21] Decision and Order Granting Benefits at 2, *K & R Contractors*, No. 2018-BLA-05457 (U.S. Dep't of Lab. Jan. 29, 2019), https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2018/KEENE_MICHEAL_D_v_K_and_R_CONTRACTORS__2018BLA05457_(JAN_29_2019)_100146_CADEC_PD.PDF [https://perma.cc/2ZSZ-6C52].

[22] *Id.* at 15–16.

[23] *K & R Contractors*, 86 F.4th at 142.

[24] Brief in Support of Petition for Review, Keene v. K & R Contractors, LLC, No. 19-0242 BLA (Ben. Rev. Bd. Apr. 23, 2020), *reprinted in* Joint Appendix, *supra* note 12, at 56, 58.

[25] 561 U.S. 477 (2010) (holding that the Public Company Accounting Oversight Board's dual for-cause removal protections were unconstitutional, *id.* at 492).

[26] Brief in Support of Petition for Review, *supra* note 24, at 61.

[27] *K & R Contractors*, 2020 WL 2836153, at *4.

[28] *Id.* at *2 (citing Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364, 372 (D.C. Cir. 2017); Advanced Disposal Servs. E., Inc. v. NLRB, 820 F.3d 592, 603 (3d Cir. 2016); CFPB v. Gordon, 819 F.3d 1179, 1191 (9th Cir. 2016)).

[29] *See id.* at *2–3.

[30] *Id.* at *3.

[31] *Id.* at *3–4.

[32] *Id.* at *4.

[33] Petition for Review of an Order of the Benefits Review Board United States Department of Labor at 1, *K & R Contractors*, 86 F.4th 135 (No. 20-2021).

[34] *K & R Contractors*, 86 F.4th at 139.

[35] Judge Rushing was joined by Judges Harris and Quattlebaum.

[36] *K & R Contractors*, 86 F.4th at 150.

authority when he appointed ALJ Applewhite after she transferred to the agency, and when he ratified ALJ Barto's previous appointment as a DOL ALJ.[37] Judge Rushing further repudiated K & R's contention that "ratification by a department head cannot prospectively cure a prior unconstitutional appointment."[38] The Secretary's ratification of ALJ Barto's appointment, therefore, remedied any constitutional defect related to his original appointment through the competitive service.[39]

Judge Rushing then considered K & R's claim that DOL ALJs' removal protections unconstitutionally insulate them from presidential control.[40] Recognizing that the constitutionality of ALJs' removal protections has split the courts of appeals, Judge Rushing avoided deciding this constitutional question.[41] She relied on *Collins v. Yellen*[42] to explain that K & R was not automatically entitled to vacatur of the agency's decision if the court determined that the ALJs' removal restrictions were unconstitutional.[43] The removal restrictions, after all, did not cause any harm to K & R.[44] Rather, ALJs Barto and Applewhite had been lawfully appointed, meaning they had the lawful authority to "exercise the power of [their] office."[45] It would be one thing if the President had attempted to remove ALJ Barto or ALJ Applewhite from their positions but was thwarted by the removal restrictions.[46] In that situation, the President's inability to fire the ALJs would have clearly harmed K & R, since the ALJs should have no longer occupied their positions when adjudicating the claim.[47] Their actions after the attempted firing would have been, in a sense, ultra vires. But the ALJs' removal protections simply did not come into play here. The ALJs remained authorized to wield executive power against K & R, which meant K & R did not suffer a constitutional injury.[48] Judge Rushing thus decided that K & R would not receive its requested relief even if the removal restrictions were found to be unconstitutional and denied the petition for review.[49]

The Fourth Circuit's reliance on the last-resort rule fits uncomfortably with the Supreme Court's recent precedents. From *Free Enterprise Fund* to *Seila Law LLC v. CFPB*[50] to *Collins*, the Court has decided the

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[37] *Id.* at 143–44. Judge Rushing explained that DOL ALJs may be appointed by the "Heads of Departments," such as the Secretary of Labor, because ALJs are inferior officers. *Id.* at 143.

[38] *Id.* at 144.

[39] *Id.* The court also "reject[ed] K & R's unsupported contention that retaining incumbent ALJs in the competitive service after their valid appointment poses an Appointments Clause problem." *Id.*

[40] *Id.*

[41] *Id.* at 148–49.

[42] 141 S. Ct. 1761 (2021).

[43] *K & R Contractors*, 86 F.4th at 149.

[44] *See id.*

[45] *Id.*

[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *Id.* at 150.

[50] 140 S. Ct. 2183 (2020).

merits of separation-of-powers claims before considering appropriate remedies. It has repeatedly struck down removal protections that impeded the presidential power to remove,[51] only then offering hollow remedies to the regulated parties.[52] Although the Fourth Circuit's approach inverts the more common order of decisionmaking in such cases, it ultimately allows courts to better uphold separation of powers by limiting judicial interference with the President's own judgments about his constitutional power and the proper functioning of his branch.

The Fourth Circuit's decision to review the remedies before the merits of the constitutional question rested upon the last-resort rule: "[T]he Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."[53] This prudential rule was best articulated by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*[54] as part of the constitutional avoidance doctrine.[55] Justice Brandeis would have resisted "passing upon" the merits of the constitutional questions in *Ashwander* because of nonconstitutional considerations that could have resolved the case instead.[56] For example, Justice Brandeis pointed out that the plaintiffs had failed to demonstrate the "danger of irreparable injury" necessary for an injunction.[57] Because the plaintiffs would not have received their requested remedy regardless of the Court's decision on the merits, Justice Brandeis would have avoided needlessly sifting through the constitutional weeds.[58] The Fourth Circuit did just that in *K & R Contractors*.

The Fourth Circuit's reasoning was, therefore, entirely consistent with Justice Brandeis's concurrence in *Ashwander*. But it was not consistent with the Supreme Court's (non)application of the last-resort rule in recent removal-protection cases. Begin with *Free Enterprise Fund*.

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[51] *See* Bamzai & Prakash, *supra* note 1, at 1759.

[52] *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513 (2010).

[53] *K & R Contractors*, 86 F.4th at 148 (quoting Bond v. United States, 572 U.S. 844, 855 (2014)). The Fourth Circuit's discussion of the remedial question closely resembled an analysis of the redressability prong of standing. *See* William Baude & Samuel L. Bray, *The Supreme Court, 2022 Term — Comment: Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 158 (2023). These remedial questions are admittedly difficult to untangle from jurisdictional questions. *See generally* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006). But the Fourth Circuit's focus on remedies in *K & R Contractors* is distinguishable from the standing inquiry. K & R would have *benefited* from a favorable judicial remedy, but the Fourth Circuit determined that it was not *entitled* to such a judicial remedy. *See K & R Contractors*, 86 F.4th at 149–50. The former consideration answers the redressability question of standing, while the latter answers the remedial question.

[54] 297 U.S. 288 (1936).

[55] The constitutional avoidance doctrine reflects an understanding of "the counter-majoritarian difficulty" that arises when courts strike down legislative and executive acts. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16, 69–71 (1962); ANDREW NOLAN, CONG. RSCH. SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 1–2, 6–10, 14–16 (2014).

[56] *Ashwander*, 297 U.S. at 341 (Brandeis, J., concurring).

[57] *Id.* at 344–45.

[58] *See id.* at 341.

The Court concluded that the dual for-cause limitations transgressed the separation-of-powers principle.[59] Because the Public Company Accounting Oversight Board (PCAOB) members had been properly appointed, however, Free Enterprise Fund was "not entitled to broad injunctive relief."[60] The Court instead severed the PCAOB's removal protections from the relevant statute.[61] But severing the protections did not "invalidate any past actions of the board, enjoin the board from investigating the regulated firm, [or] require a wholly new administrative investigation."[62] Free Enterprise Fund, therefore, did not receive any meaningful relief. The Court could have — or perhaps should have — refused to consider the removal-protection challenge given that the PCAOB members' valid appointments precluded any actual remedies for Free Enterprise Fund. But it did not.

Other recent removal-protection cases show a similar trend. In *Seila Law*, the Court held that the challenged for-cause removal protection violated the separation of powers.[63] After the Court dealt with the constitutional question, it remanded the remedial question to the lower courts.[64] The Ninth Circuit decided that Seila Law was not entitled to a remedy,[65] and the law firm thus "still found itself subject to the enforcement action in question."[66] Even in *Collins* itself, the Court first addressed the merits of the removal-protection challenge, determining that the for-cause removal restriction violated the separation of powers,[67] and then remanded to the lower courts to resolve the remedial question.[68] The U.S. District Court for the Southern District of Texas ultimately ruled that the petitioners were not entitled to a remedy.[69] A striking pattern emerges: the Court has not harnessed the last-resort rule as the Fourth Circuit did in *K & R Contractors*. Especially given the serious doubts that the petitioners would obtain any relief on remand,[70] the *Collins* Court could have attempted to determine whether the challengers were entitled to relief first and only then turned to the merits of

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[59] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010).

[60] *Id.* at 513.

[61] *Id.* at 508.

[62] Kent Barnett, *To the Victor Goes the Toil — Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 485 (2014) (footnote omitted).

[63] Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020).

[64] *Id.* at 2211.

[65] CFPB v. Seila L. LLC, 984 F.3d 715, 718, 720 (9th Cir. 2020).

[66] Eli Nachmany, *Remedies and Incentives in Presidential Removal Cases*, 133 YALE L.J.F. 305, 307 (2023).

[67] Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021).

[68] *Id.* at 1789.

[69] Collins v. Lew, 642 F. Supp. 3d 577, 585 (S.D. Tex. 2022), *aff'd sub nom.* Collins v. Dep't of the Treasury, 83 F.4th 970 (5th Cir. 2023).

[70] *Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring in part and concurring in the judgment in part) (mentioning that the Fifth Circuit had already considered the remedies issue and determined that the Federal Housing Finance Agency's actions were not void).

the removal-protection challenges. But the Court instead followed the conventional order of decisionmaking — merits first, then remedies.

Although the Fourth Circuit's approach in *K & R Contractors* reflects some dissonance with the Supreme Court's recent precedents, this use of the last-resort rule is the right approach for such cases going forward. After all, the Fourth Circuit's decision remains faithful to a fundamental justification for the last-resort rule: "Separation of [p]owers and [r]espect for [o]ther [b]ranches."[71] The Fourth Circuit would not address the merits of the removal-protection claim unless K & R demonstrated that it had experienced compensable harm, which would occur if the President challenged, resisted, or expressed displeasure with the allegedly unconstitutional removal limitations of an executive official. The last-resort rule thus allows courts to give "the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority,"[72] namely the President. It calls upon the President to defend the constitutional powers of his office.

The Fourth Circuit's deference toward the President's prerogative to define the Executive's role mirrors the D.C. Circuit's reasoning when it held in *FEC v. NRA Political Victory Fund*[73] that the constitutionality of a bipartisanship requirement on the President's appointment power was not justiciable.[74] The court emphasized that it could not "determine . . . whether the *statute* actually limited the President's appointment power,"[75] as the President may have appointed the same officials even without the statutory requirement.[76] It suggested that the unconstitutionality of the requirement could be considered justiciable only if the President protested the alleged interference with his authority by violating the statute.[77] The last-resort rule similarly prohibited the Fourth Circuit from addressing the merits of the removal-protection challenge unless K & R showed that the removal limitations interfered with the President's removal decisions.[78] Without that showing, the

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[71] Kloppenberg, *supra* note 5, at 1047.

[72] *Id.* at 1047–48 (quoting Rescue Army v. Mun. Ct. of L.A., 331 U.S. 549, 571 (1947)).

[73] 6 F.3d 821 (D.C. Cir. 1993).

[74] *Id.* at 824. The D.C. Circuit did not apply constitutional avoidance because the Supreme Court had decided the constitutional status of a tribunal first when faced with similarly "unusual circumstance[s]," namely "when plaintiffs challenged the constitutional composition or character of a tribunal." *Id.* at 823 (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 859 (1986); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 56, 87 (1982) (plurality opinion)). Removal-protection cases, however, are categorically different from these "unusual circumstances." *See* Jack Ferguson, Note, *Severability and Standing Puzzles in the Law of Removal Power*, 98 NOTRE DAME L. REV. 1731, 1752 (2023) ("[I]n removal power cases, the unlawfulness of a removal clause has no bearing on the agency's actions. . . . The effect of a removal statute is between an officer and the President, but unless activated and enforced, it changes nothing about an officer's relationship with private individuals.").

[75] *NRA Political Victory Fund*, 6 F.3d at 824.

[76] *Id.* at 825.

[77] *Id.*

[78] *See K & R Contractors*, 86 F.4th at 148–49.

court could not simply assume that the President would have removed the relevant executive official if the removal restriction had not existed.

The Fourth Circuit's approach in *K & R Contractors* thus allows the courts to "shar[e] the constitutional interpretive power with other branches" and prevents undue intervention into legislative and executive action.[79] This approach admittedly raises the bar for regulated entities to present their constitutional challenges in court and "removes all incentive for individual citizens to invest the time, effort, and resources required to raise such challenges."[80] The downturn in the number of suits brought by these entities would likely leave many unconstitutional removal protections on the books. But why should we allow private parties to needlessly force courts to adjudicate difficult constitutional questions, which have the potential to disrupt the administrative state, when the President has not himself expressed concern with the executive official's actions? Why should we allow private parties to "invoke the removal power in the abstract"[81] when the President has not himself questioned the alleged attack on his authority? Unlike, for example, the Article III "guarantee of . . . adjudication by the federal judiciary of matters within the judicial power of the United States," which "serves to protect primarily personal . . . interests,"[82] the inherent Article II presidential removal power serves to protect structural interests. It protects the President from the other branches of government and, by extension, ensures that the President has complete confidence in his alter egos within the executive branch. Because the removal power safeguards not the public at large but rather the President himself, he should be charged with asserting his own constitutional powers.

The Fourth Circuit's application of the last-resort rule is particularly relevant in the current legal moment. The Court has declared war on the administrative state in recent Terms, and this Term appears to be no different. In fact, the Court will soon speak on the very question that the Fourth Circuit refused to decide — the constitutionality of ALJs' removal protections — in *SEC v. Jarkesy*.[83] *K & R Contractors* offers a better approach. The Court should first look to whether the challenging party is even entitled to remedies before entering the constitutional thicket. By doing so, the Court will demonstrate deference toward the President's own control and oversight of the executive branch and, thereby, adhere to its proper place within our constitutional structure.

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[79] Kloppenberg, *supra* note 5, at 1054.

[80] Nachmany, *supra* note 66, at 322 (quoting Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioner at 12, Calcutt v. FDIC, 143 S. Ct. 1317 (2023) (No. 22-714)).

[81] Ferguson, *supra* note 74, at 1762.

[82] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986).

[83] 143 S. Ct. 2688 (2023); *see* Petition for a Writ of Certiorari at I, *Jarkesy*, 143 S. Ct. 2688 (No. 22-859).