

# Significant Supreme Court Decisions of Last Term

Presented at CSPEN Conference by:  
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# Three Game- Changing Decisions

- *Corner Post, Inc. v. Board of Governors*, 2024 U.S. LEXIS 2885
- *Loper Bright Enterprises v. Raimondo*, 2024 U.S. LEXIS 2882 (overruling *Chevron v. NRDC*, 467 US 837 (1984))
- *SEC v. Jarkesy*, 2024 U.S. LEXIS 2847

*Corner Post v. Board of Governors*







## *Corner Post Facts*

- Corner Post, a truck stop and convenience store in North Dakota, filed suit against the Federal Reserve Board of Governors alleging the Board's interchange fee maximums it imposed on payment networks like Visa and Mastercard were too high.
- Corner Post argued that it had to pass these fees down to customers and it harmed its business.





# Federal Reserve Board's Defense

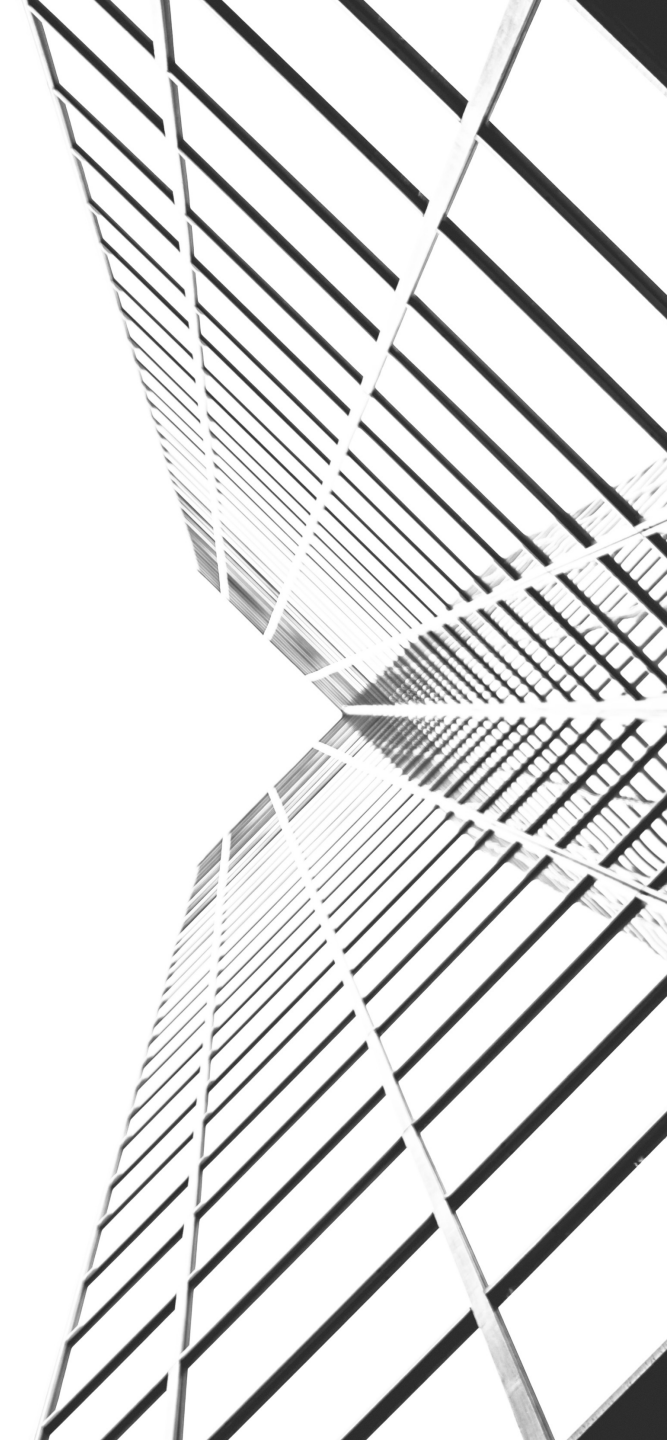
The Board argued that Corner Post's suit did not meet the 6 year statute of limitations.

Traditionally, the 6 years begins when the challenged rule was promulgated and more than 6 years had passed.

# Supreme Court's Holding in *Corner Post*

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- Appropriate start of the 6 years is not when the rule was issued (2011) **but when the injury commenced.**
- Corner Post did not open until 2018 and so the 6 years commenced in 2018 when the injury commenced.





# Ramifications of Corner Post

Regulated parties may now challenge ALL regulations regardless of their date of promulgation so long as there is a newly created plaintiff entity.



*Loper Bright Enterprises v. Raimondo*

Overturns Venerated *Chevron* Doctrine



# What is the *Chevron* Doctrine?

Based on 1984 Supreme Court  
Decision: *Chevron v. NRDC*.

A green spiral-bound notebook is shown from a top-down perspective. A light blue sticky note is placed on the notebook's cover, with the word "Doctrine" written in black cursive. A red pen with a black tip lies on the notebook to the right of the sticky note. Two paper clips, one red and one yellow, are attached to the top edge of the sticky note.

Doctrine

*Chevron v.*  
*NRDC:*  
Basic  
Elements

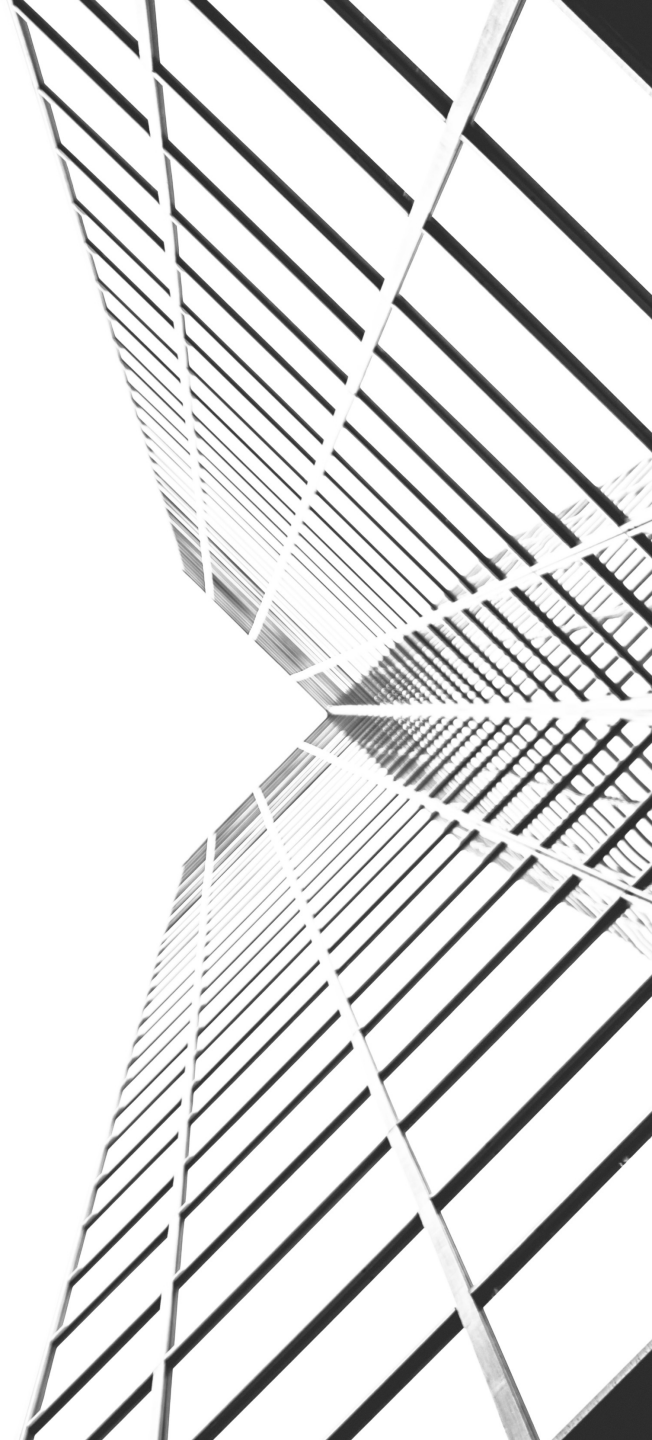
- Congress had required that polluting industry quantify its emissions from “stationary sources.”
- EPA construed term in manner that benefited industry-entire plant, rather than individual smoke stacks.
- NRDC, public interest org, sued Reagan’s EPA over its interpretation of statutory term, “stationary sources.”
- Congress did *not* define “stationary sources” in the statute.
- Supreme Court then authored a 2-step process for courts to determine the meaning of a statutory term.



# *Chevron's Two-Step Process*

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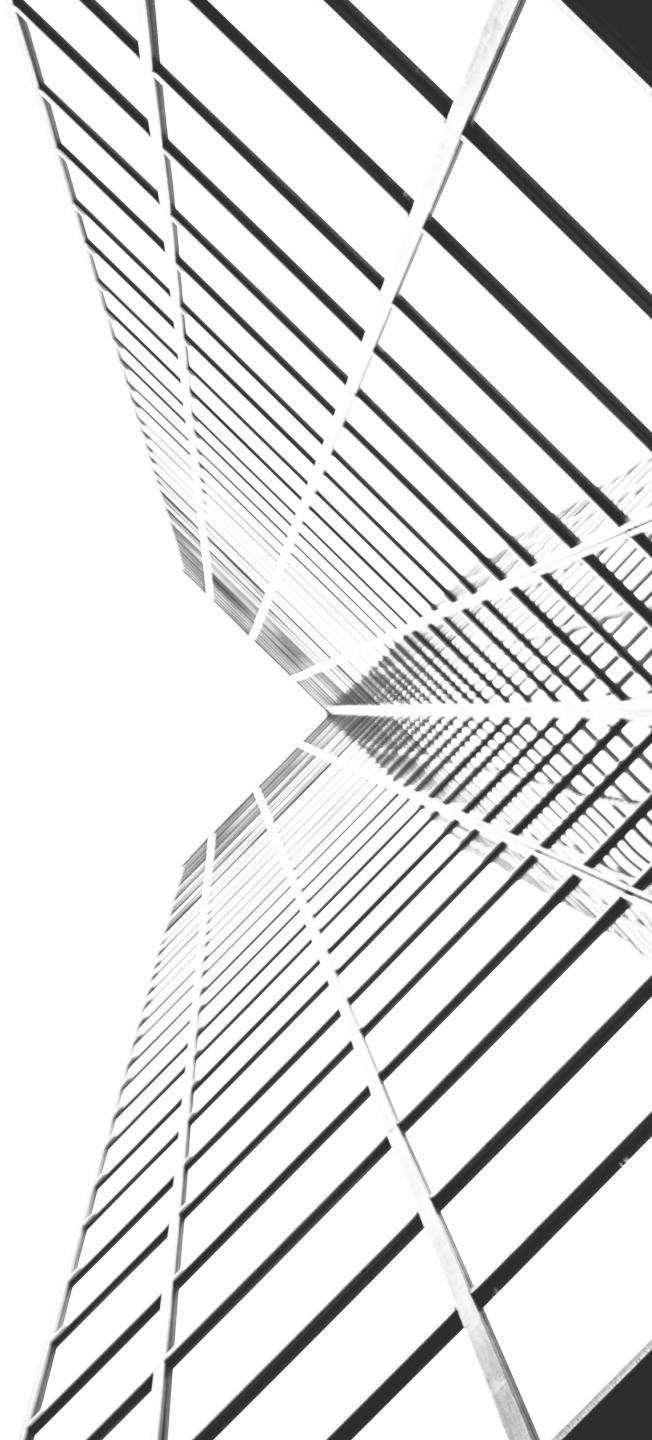
- **Step One:** Determine whether congressional intent in statutory provision is clear. **If the answer is yes**, end of inquiry and court should simply interpret statute in a manner that gives intent to Congressional intent.
- **BUT, if answer is no**, and statute is ambiguous or silent on relevant issue, court must proceed to Step 2.
- **Step Two:** Court should NOT apply its own interpretation! Instead, court must determine whether the agency's interpretation is "permissible" even if it is not the interpretation the court would've given it. If it is permissible, court **MUST** affirm (defer to) agency interpretation.
- Only if agency's interpretation is "arbitrary, capricious, or manifestly contrary to the statute," may the court reject the agency interpretation.



# Philosophy Behind *Chevron* Doctrine

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- When Congress is silent or ambiguous on statutory meaning, this means Congress intentionally delegated the administering agency to fill in the blanks.
- Consequently, courts must defer to delegated discretion of the agencies.
- Agencies are the experts on the regulated matter, not the courts.
- If courts were to get into the business of policymaking, they would be usurping the role of the executive branch and the separation of powers would be violated.



# Critical Cases Where Courts Relied on *Chevron* to Uphold ED Regulations

*Career College Association v. Riley*, 74 F.3d 1265 (D.C. Cir. 1996)

*Sistema Universitario Ana G. Mendez v. Riley*, 234 F.3d 772 (1<sup>st</sup>. Cir. 2000)

*Chauffeur's Training Sch., Inc v. Spellings*, 478 F.3d 117 (2d Cir. 2007)

*APSCU v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012)

*APSCU v. Duncan*, 640 Fed. Appx. 5) (Dc. Cir. 2016)

- Upholding the R2T4 regulations and the Five Day Rule (instructional time)
- Upholding ED's statutory authority to determine what is "legal authorization" of a State rather than deferring to the State's determination.
- Upholding ED's implicit statutory authority to conduct an administrative proceeding that assessed liability against a school for loan program violations.
- Upholding incentive compensation and misrepresentation regulations.
- Upholding gainful employment regulations

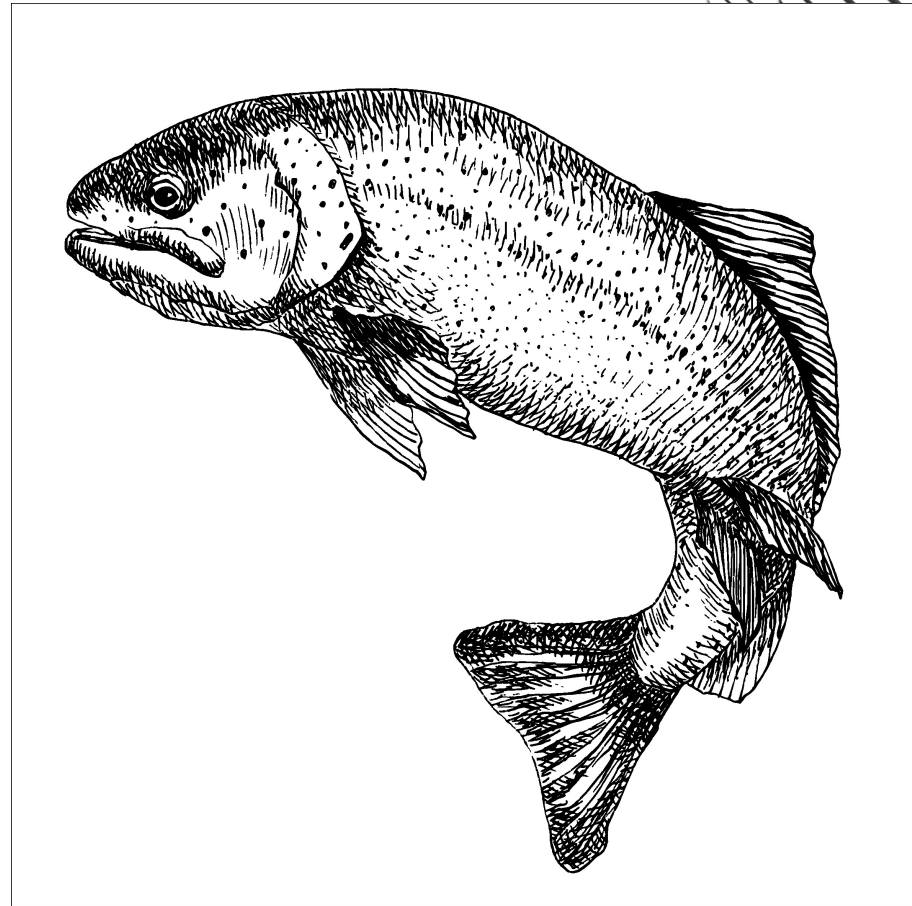




# *Loper* Facts: Something's Fishy

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- Challenge by fishing industry to regulation of National Marine Fisheries Services (NMFS) requiring private fisherman to pay for observers to be carried on board vessels to collect data necessary for conservation & management of the fishery.
- Statute, the Magnuson-Stevens Fishery Conservation and Management Act (MSA), did not apply this this mandate for Atlantic herring fisherman.
- NMFS issued a rule that required fishermen to pay for observers in cases where government funding was not available to cover the costs (~\$710/day).



## *Loper* Holding in Lower Courts

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- Applying the *Chevron* Doctrine, the lower court deferred to the NMFS interpretation of the MSA.
- The US Court of Appeals for the DC Circuit affirmed.
- Parallel case with same issue had similar ruling by US Court of Appeal for First Circuit.



# Supreme Court in *Loper* Rejects *Chevron* Deference

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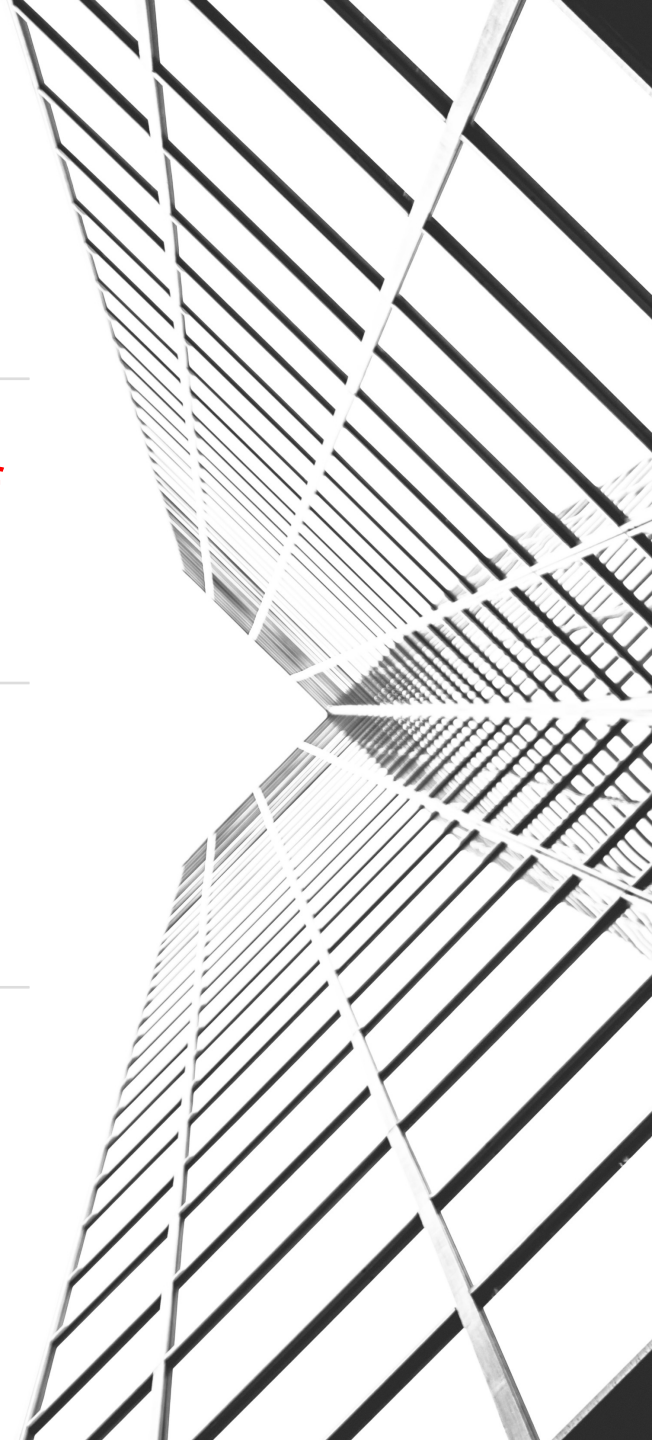
While the decisions of administrative agencies should be given “due respect,” **these decisions do NOT supersede the judgment of the courts.**

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There may be cases where an agency can show expertise and the courts may “respect” that expertise, but they are no longer required to defer to the agency interpretation.

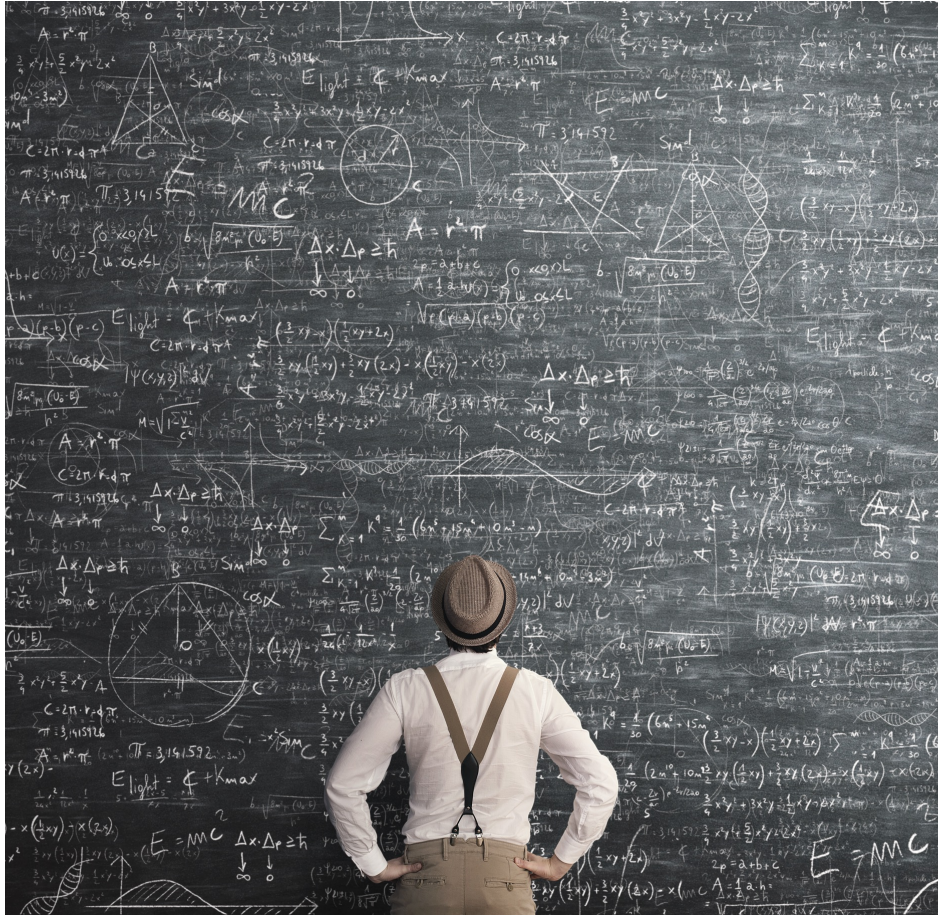
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Justice Kagan stated in her dissent that the *Loper* decision will cause a “massive shock” to the legal system and cast doubt on many settled agency constructions of statute “threatening the interests of many parties who have relied on them for years.”





# What Does *Loper* Mean for Higher Education?



- The US Department of Education may no longer rely on *Chevron* deference of its regulations.
- ED will now be required to ensure that its regulations conform more directly to statutory language.
- *Loper* opens the flood gates for challenges of ED regulations that push the four corners of statutory authority.



# Examples of How *Loper* Could be Applied in Title IV Context





# Borrower Defense

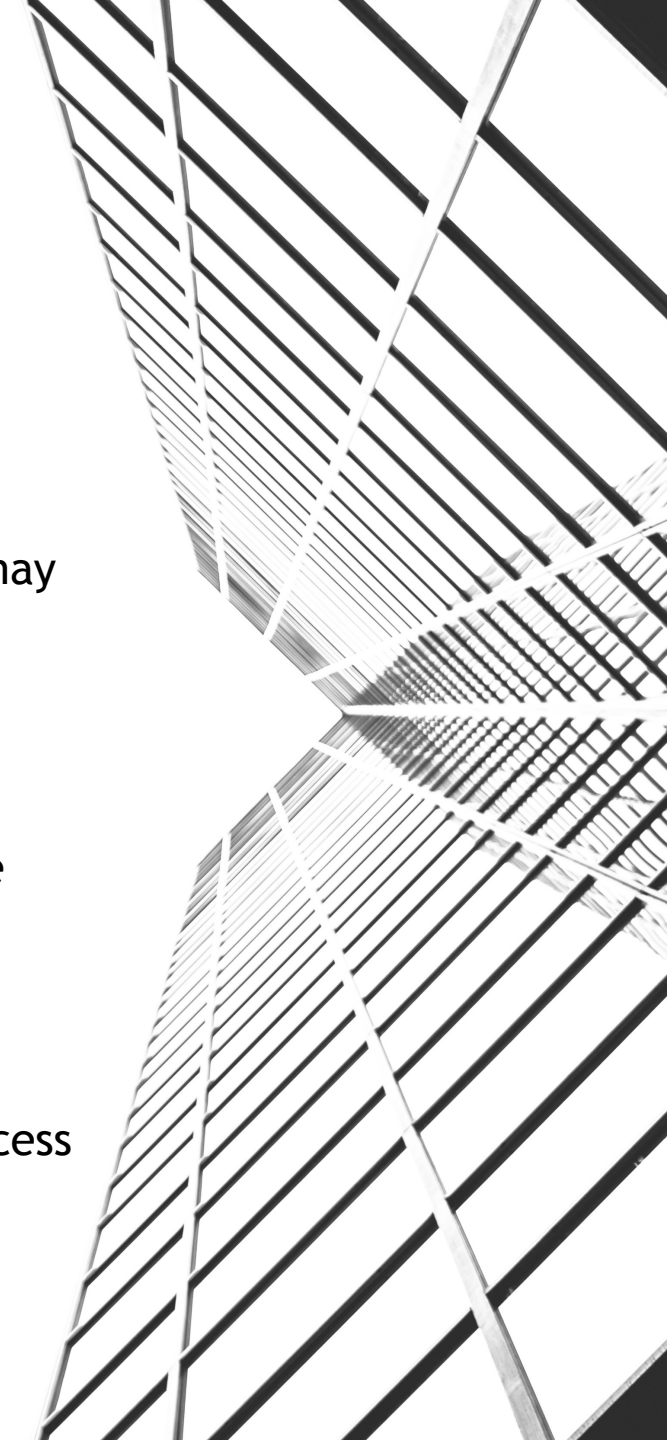
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## What the Statute Authorizes

- [T]he Secretary shall specify in regulations **which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part,**
- Except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.
- 20 U.S.C.A. § 1087e (West)

## What ED Imposes In Regulations

- Specifies acts & omissions borrowers may assert
- Permits group claims
- Allows state AGs & state regulators to bring group claim
- Establishes preponderance of evidence standard
- Creates rebuttable presumption that borrower entitled to full (rather than partial) discharge
- Provides for institutional response process
- Prohibits class action waivers & arbitration agreements





# Gainful Employment

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## “Proprietary Institution of Higher Education” and “Postsecondary Vocational Institution” Must

- Provide “an eligible program of training to prepare students for gainful employment in a recognized occupation.”

20 U.S.C. § 1002(b)

## What ED Imposes in Regulations

- Complex metrics gauging ability to service loan debt.



# Statutory Authority for Incentive Compensation

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## Statute

(20) The institution will not provide any commission, bonus, or other incentive payment **based directly or indirectly on success in securing enrollments or financial aid** to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance, except that this paragraph shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance.

20 U.S.C. § 1094(a)(20).

## Regulation

**(i)** It will not provide any commission, bonus, or other incentive payment **based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid**, to any person or entity who is engaged in any student recruitment or admission activity, or in making decisions regarding the award of title IV, HEA program funds.

34 C.F.R. § 668.14(b)



# Statutory Authority for Misrepresentation Regulations

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## Statute

- Upon determination, **after reasonable notice and opportunity for a hearing, that an eligible institution has engaged in substantial misrepresentation** of the nature of its educational program, its financial charges, or the employability of its graduates, **the Secretary may suspend or terminate the eligibility status** for any or all programs under this title of any otherwise eligible institution, in accordance with procedures specified in paragraph (1)(D) of this subsection, until the Secretary.

20 U.S.C. § 1094(c)(3)



## Regulation

- Includes representations that are
  - Misleading
  - Likelihood or tendency to mislead
- Includes omission of facts



# Right to Cure Statute

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- **(b) Special administrative rules.** In carrying out paragraphs (1) and (2) of subsection (a) and any other relevant provisions of this title, the Secretary **shall**—**(1)** establish guidelines designed to ensure uniformity of practice in the conduct of program reviews of institutions of higher education;

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- **(3)** permit the institution to correct or cure an administrative, accounting, or recordkeeping error if the error is not part of a pattern of error and there is no evidence of fraud or misconduct related to the error;

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20 USCS § 1099c-1



# Proposed Changes to R2T4

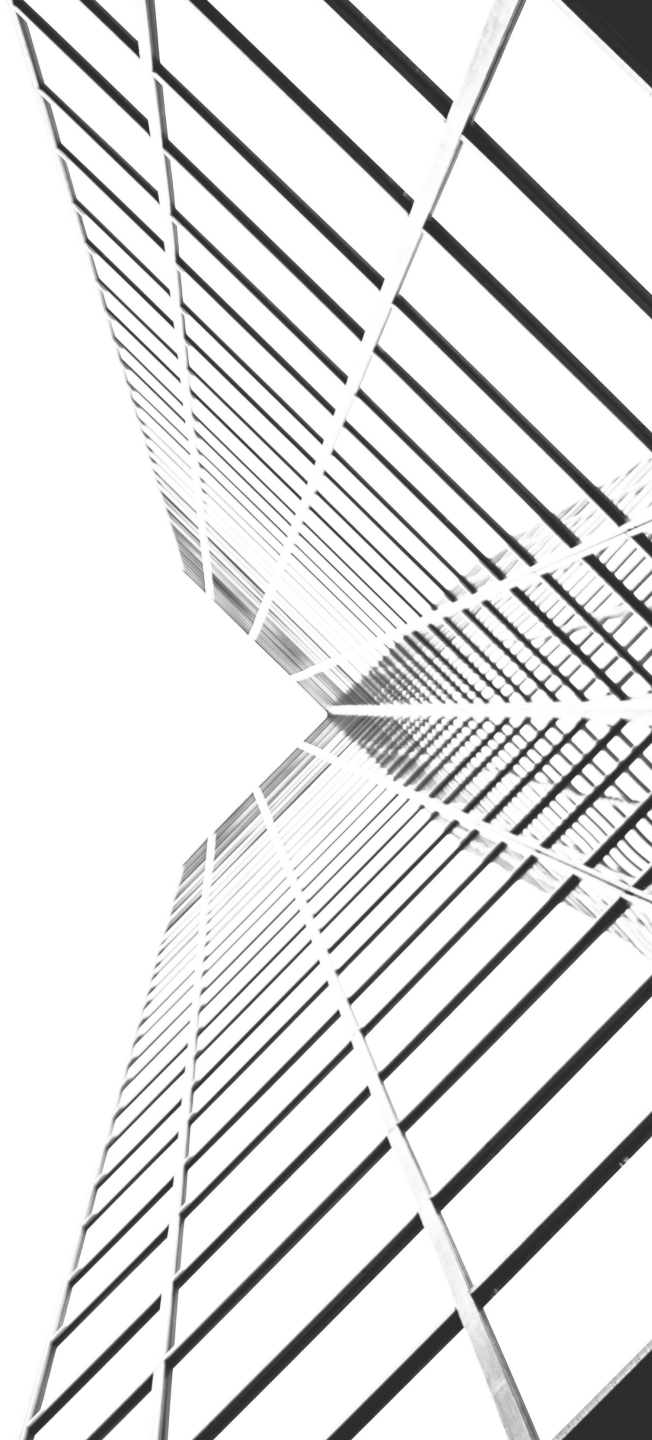


# NPRM Proposes to Require Attendance Taking for All Distance Ed Courses

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(ii) An institution **must take attendance for each course offered entirely through distance education** as defined in 34 CFR 600.2, except for dissertation research courses that are part of a doctoral program.

89 Fed. Reg. at 60,286 (proposed 34 C.F.R. § 668.22(b)(3))





# Statutory Authority for Attendance Part of R2T4

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(c) **Withdrawal date.**

(1) **In general.** In this section, the term “day the student withdrew”—

(A) is the date that the institution determines—

(i) the student began the withdrawal process prescribed by the institution;

(ii) the student otherwise provided official notification to the institution of the intent to withdraw; or

(iii) **in the case of a student who does not** begin the withdrawal process or otherwise **notify the institution** of the intent to withdraw, the date that is **the mid-point** of the payment period for which assistance under this title was disbursed or a later date documented by the institution; **or**

**(B) for institutions required to take attendance, is determined by the institution from such attendance records.**

•  
20 U.S.C. § 1091b(c) (emphasis added).



## What are the Limits to *Loper*?

- Sometimes statutes *do* confer wide authority to agency.
- Example:
  - “The Secretary is authorized—(1) to establish procedures and requirements relating to the **administrative capacities** of institutions of higher education”. 20 U.S.C. § 1099c(d).
  - Secretary may prescribe criteria “regarding ratios that demonstrate **financial responsibility.**” 20 U.S.C. § 1099c(c).
- Also, courts will still provide *Skidmore*, which allows courts to give weight to an agency’s interpretation of a statute based on its persuasiveness, expertise, and thoroughness rather than granting automatic deference.



*SEC v. Jarkesy*

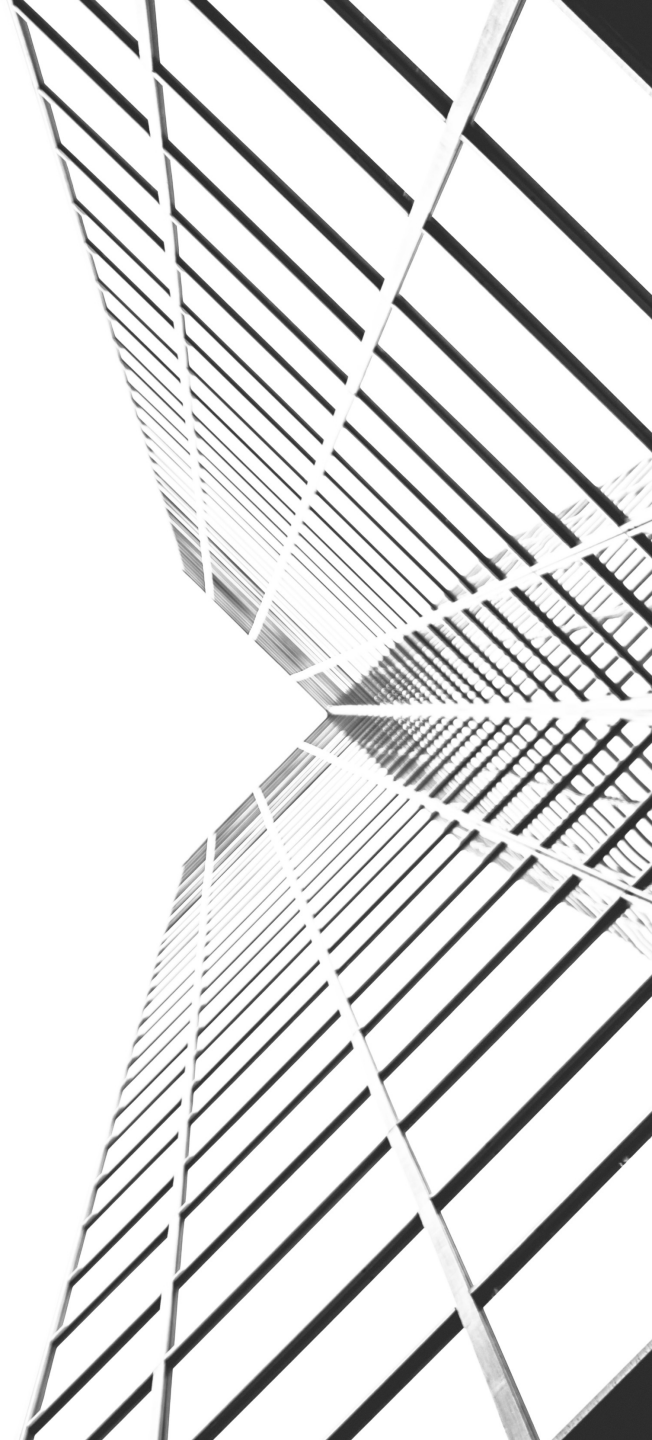




# *SEC v. Jarkey* Facts

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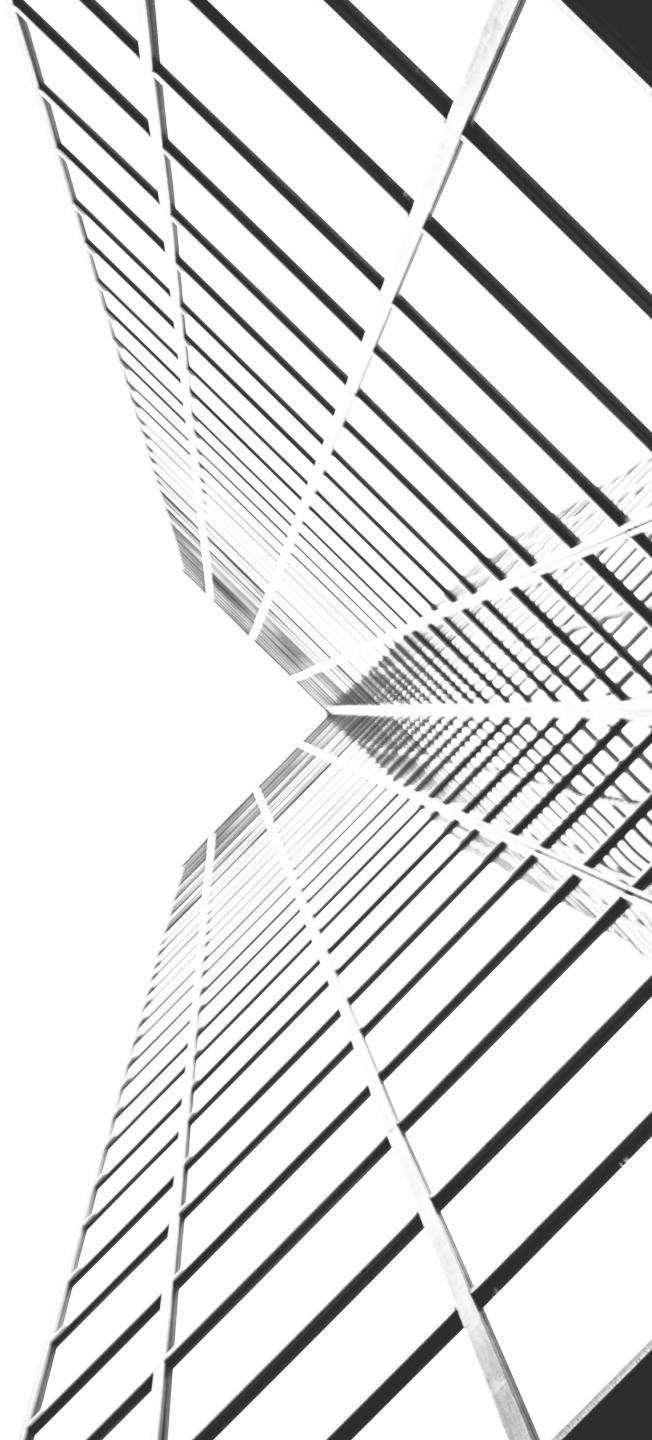
- From 2007-2010 Jarkey launched 2 investment funds and raised \$24 million
- SEC initiated enforcement action under antifraud provisions of federal securities law alleging Jarkey and its investment advisor Patriot28:
  - Misrepresented investment strategies
  - Lied about identity of funds' auditor and prime broker
  - Inflated funds' claimed value
- Under Frank Dods statute, SEC could *either* adjudicate the fraud claims itself or file an action in federal court.
- SEC opted to adjudicate itself.
- SEC's order:
  - Civil penalty of \$300,000 against Jarkey and Patriot28
  - Directed them to cease and desist committing or causing violations of the antifraud provisions,
  - Ordered Patriot28 to disgorge earnings,
  - Prohibited Jarkey from participating in the securities industry and in offerings of penny stocks.



# *Jarkesy* Holding

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- Common law claims must be heard by jury in Article III court (federal court).
- Common law claims are “all suits which are not of equity or admiralty jurisdiction.”
- The SEC’s accusation of fraud in this case is a legal (not equitable) law claim because the SEC is seeking monetary relief as punishment, not to restore status quo.
- If monetary penalties were given to investor/victims (restitution) that may have caused Supreme Court to find equitable claim. But that wasn’t the case.



*The young man knows the rules but the  
old man knows the exceptions.*

Oliver Wendell Holmes

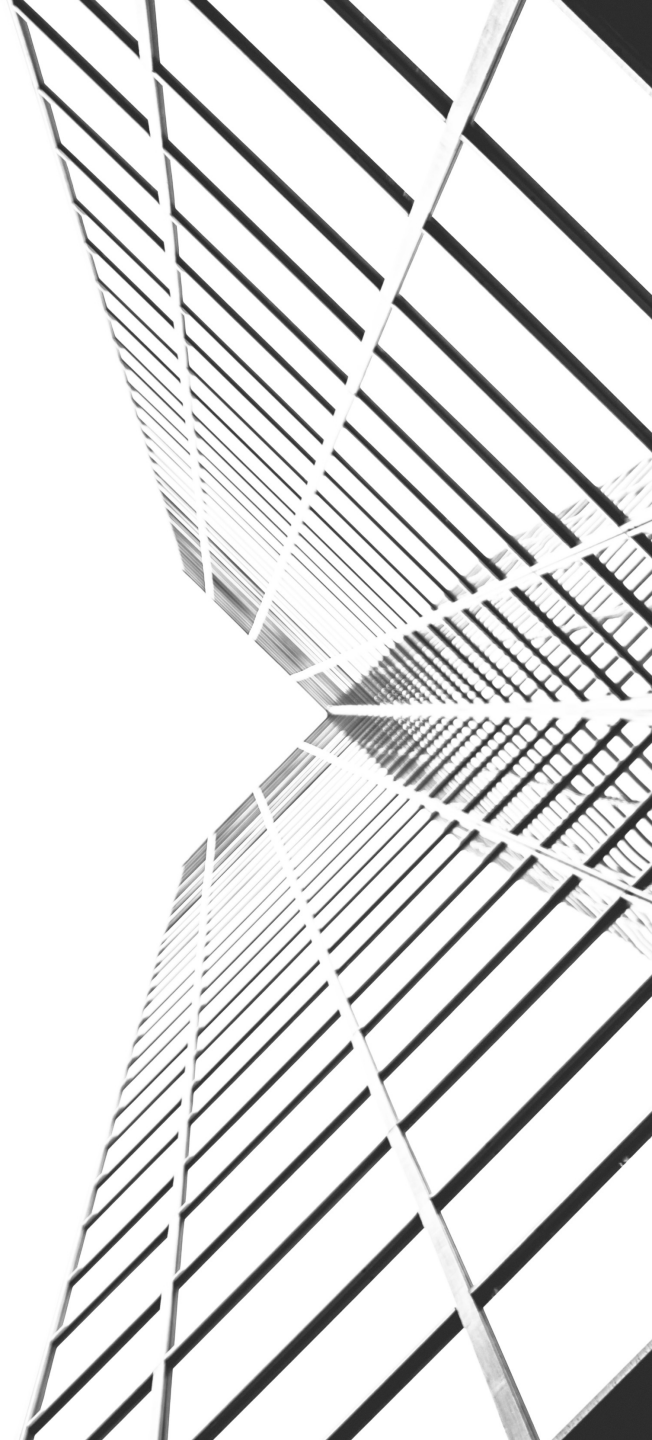




# When Does Public Rights Exception Apply?

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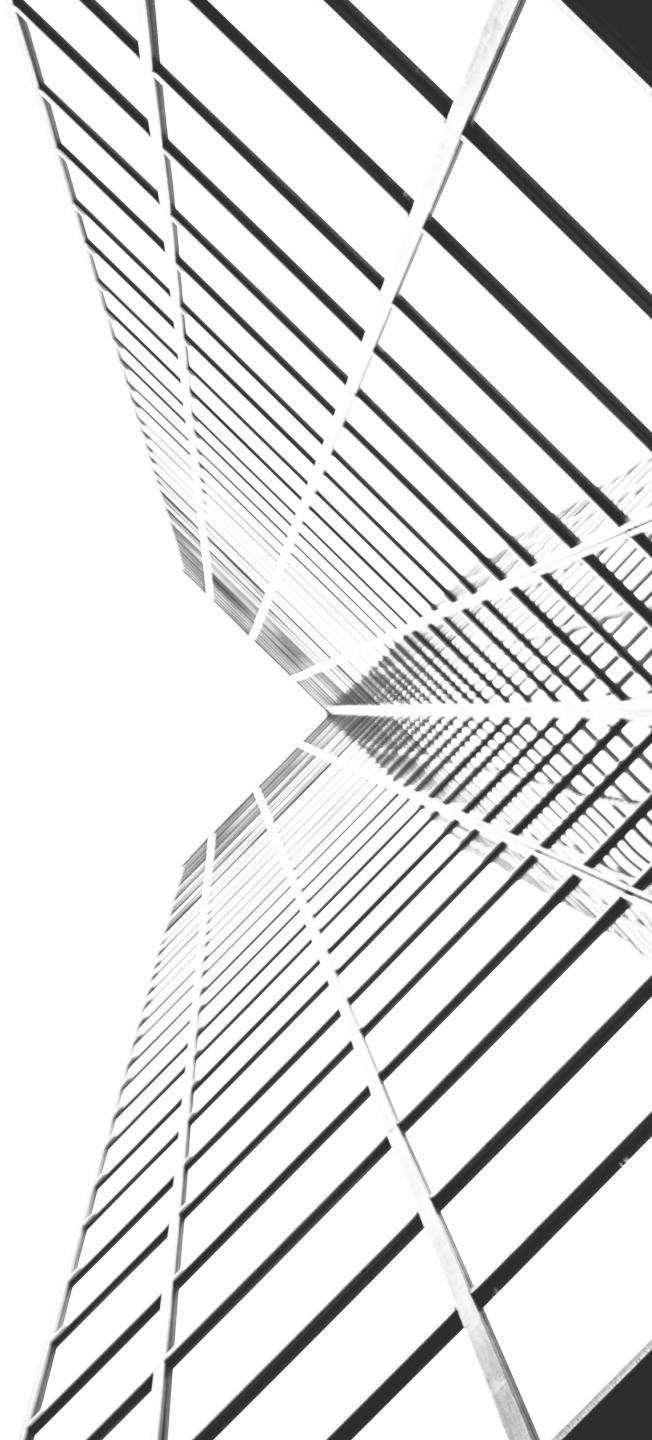
- Exception applies in cases where the issue adjudicated “historically could have been determined exclusively by [the executive and legislative] branches.”
- Examples:
  - Enforcement of payment of balances due from receivers of the customs revenue.
  - Administrative penalties for prohibited immigration
  - Assessment of tariffs on foreign goods
  - Relations with Indian tribes
  - Administration of public lands
  - Public benefits to veterans



# Will Department's Fine Actions Now Require Jury Trial?

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- So far, *Jarkesy* applies only to SEC but it could be applied to different agencies.
- The Court “has not ‘definitively explained’ the distinction between public and private rights,” and we do not claim to do so today. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2133
- Is matter “from [its] nature subject to ‘a suit at common law’” OR is it “closely intertwined” regulatory regime?
- What is clear is that accusations of fraud are likely covered by Article III and do not fall under public rights exemption.



# Which ED Regulations Cover Fraud?

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- Misrepresentation, 34 C.F.R. 668 Subpart F
- Borrower Defense:
  - 34 C.F.R. § 685.206(c) (Original-Era)
  - 34 C.F.R. § 685.222 (Obama-Era)
  - 34 C.F.R. § 685.206(e) (Trump Era)
  - 34 C.F.R. § 685.400 *et seq* (Biden Era)-**Enjoined by US Ct. of App. For 5<sup>th</sup> Cir.**





# Would Fine Actions for These Issues Trigger Right to Jury Trial?

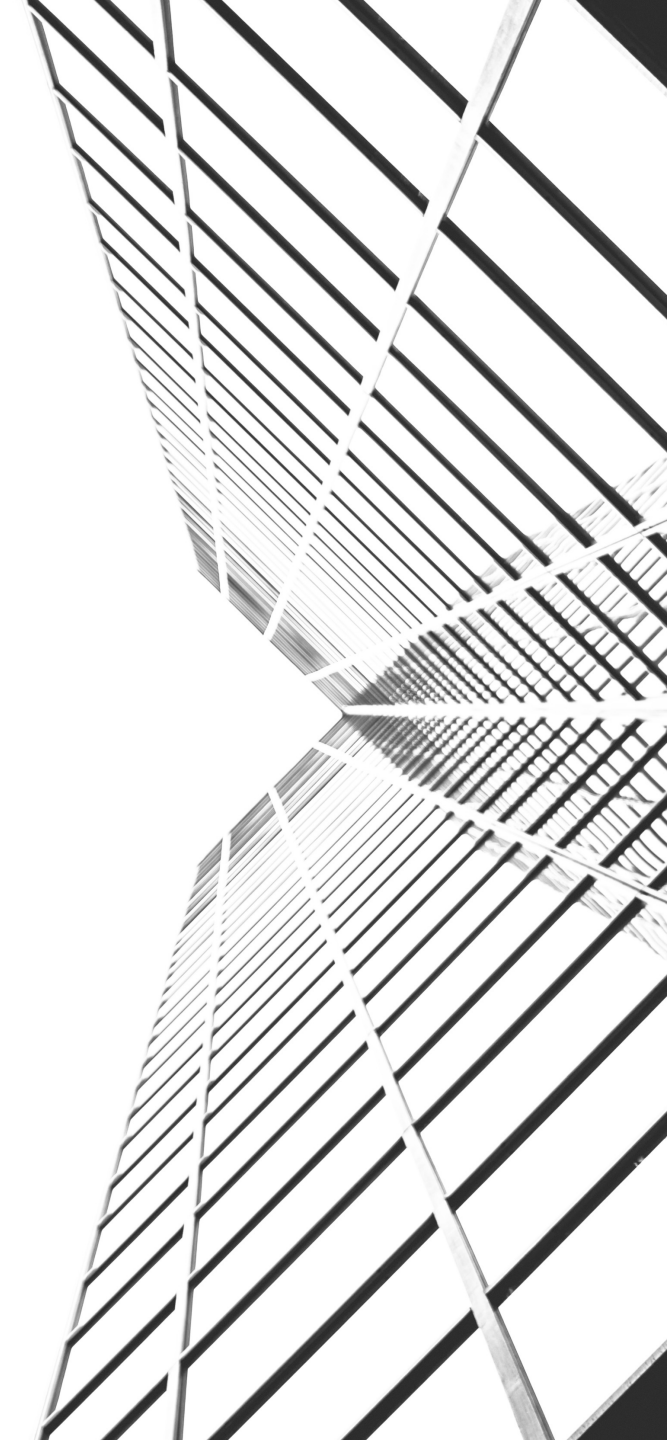
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## Finding

- IPEDS Nonsubmission
- Clery Act Violations
- Incentive Compensation
- Late Refunds
- Misrepresentation

## Jury Trial?

- Likely no
- Maybe no
- Possibly yes
- Possibly yes
- Probably yes



*The wheels of justice turn slowly, but  
they grind exceedingly fine.*

Saul Goodman, Better Call Saul



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## Lesson of *Jarkesy*

Any time institution is subject to fine action, it should have legal counsel review to see if seeking a jury trial should be sought.

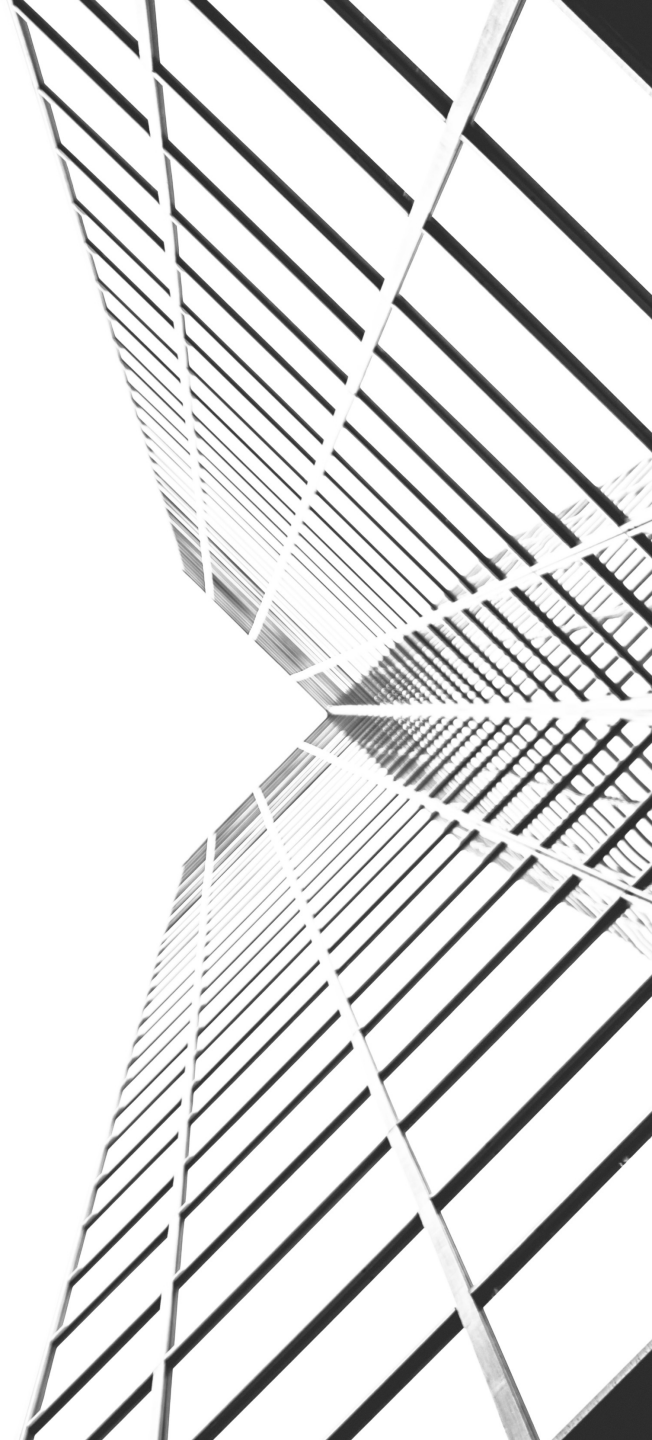




# Take Aways

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- ED will now have to tailor its regulations to more closely be tied to statutory authority.
- Complex regulations like gainful employment and borrower defense that stray significantly from the statute are more vulnerable to legal challenge.
- Courts will no longer simply defer to agency regulations that stray from the statute.
- The 6 - year statute of limitations no longer limits litigants the way it used to. New institutions may challenge longstanding regulations.
- Institutions accused of misconduct, fraud, may now be in position to seek jury trial in federal court, which could create seismic changes in administrative proceedings against schools.



*Yolanda Gallegos established her law firm, Gallegos Legal Group, over 20 years ago and has represented schools throughout the country for over 30 years. Her practice focuses on guiding postsecondary schools through critical events such as governmental and accreditor investigations, corporate expansion and downsizing, and operational adjustments required in response to regulatory changes. She is a frequent speaker and writer on a variety of regulatory topics affecting higher education including her chapter on the violence against woman act regulations, which was published by Thomson Reuters in its book, "Emerging Issues in College and University Security."*



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