No. 20-276

In The
Supreme Court of the United States

CHRISTOPHER M. GIBSON,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 1977, the Atlantic Legal Foundation is a national, nonprofit, public interest law firm whose mission is to advance the rule of law by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court of the United States, federal courts of appeals, and state supreme courts.

The jurisdictional question presented by this appeal implicates individual liberty and free enterprise, as well as the separation of powers. Contrary to the Eleventh Circuit's holding, a financial industry professional should not be required to endure, and somehow survive, the crippling costs, disruptive burdens, and reputational harms of a fully adjudicated Securities and Exchange Commission (SEC) administrative enforcement action prior to

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[1] Petitioner's and Respondents' counsel of record were provided timely notice in accordance with Supreme Court Rule 37.2(a), and have consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amicus curiae* Atlantic Legal Foundation certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

pursuing—in an Article III court—a structural constitutional challenge to the proceeding's legitimacy. Similar erroneous holdings in four additional circuits—all directly in conflict with *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 489-91 (2010)—compound the reasons why Supreme Court review of this exceptionally important and timely jurisdictional issue is essential.

The need for this Court's review is underscored by the fact that the SEC *routinely* chooses to pursue most civil enforcement actions on its home turf (rather than in district court) before its own, hand-picked, SEC administrative law judges (ALJs), whose tenure is virtually guaranteed by multilevel, good-cause, protection from removal—the same type of statutory removal protection that this Court held in *Free Enterprise Fund*, 561 U.S. at 492-514, violates the separation of powers because it conflicts with the Constitution's Executive Vesting Clause, U.S. Const. art. II, § 1, cl. 1. *See also Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). The draconian financial penalties and career-ending suspensions and debarments that the SEC imposes on *hundreds* of individuals every year—either by ratifying nearly all of its ALJs' decisions or coercing settlement agreements to which alleged securities law violators accede under duress—further illuminate the reasons why certiorari should be granted in this case. *See* Div. of Enf't, SEC, *2019 Annual Report* (2019) at 16, 19, 29 (indicating that during FY 2019, the SEC brought 661 standalone or

follow-on administrative enforcement actions against 910 respondents).[2]

This amicus brief focuses on two of the principal reasons why the Court's intervention is needed to correct five circuits' rule that when (as usual) the SEC elects to prosecute a civil enforcement action in one of its own ALJ tribunals, the alleged violator must weather a ferocious and protracted administrative storm, and suffer whatever damage in the form of monetary and other penalties the SEC ALJ inflicts, *before* pursuing a substantial, precedent-backed claim challenging SEC ALJs' constitutional legitimacy.

More specifically, this brief discusses—

(i) why SEC ALJs (and by extension, the SEC Commissioners) lack any specialized or relevant expertise or competence that would warrant impliedly stripping a district court of its statutory federal question jurisdiction to decide, in a timely manner, structural constitutional claims that are entirely collateral to the enforcement action over which an SEC ALJ is presiding; and

(ii) why meaningful judicial review of such claims cannot be obtained if an alleged securities law violator first must persevere through the same ALJ proceeding that he contends is structurally unconstitutional.

SUMMARY OF ARGUMENT

The jurisdictional issue presented by this appeal is a question of whether justice delayed is justice denied. Fueled by the Dodd-Frank Wall Street Reform and

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[2] https://www.sec.gov/files/enforcement-annual-report-2019.pdf

Consumer Protection Act of 2010, the SEC has become the most aggressive independent regulatory agency in the federal government. The Commission not only accuses hundreds of individuals and corporations of alleged securities law violations every year, but also unabashedly exercises its statutory authority to pursue such actions in administrative proceedings conducted by its own ALJs under its own SEC-friendly procedural rules. Not surprisingly, the SEC's Division of Enforcement prevails in a high percentage of these administrative enforcement actions, either through coerced settlements or ALJ decisions that the SEC Commissioners reflexively affirm.

In *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018), the Court held that SEC ALJ enforcement proceedings were structurally unconstitutional because its ALJs are federal officers who were not appointed in accordance with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The Court declined to consider, however, "whether the statutory restrictions on removing the Commission's ALJs are constitutional" under the Executive Vesting Clause, U.S. Const. art. II, § 1, cl. 1, since '[n]o court has addressed that question." *Lucia*, 138 S. Ct. at 2051 n.1. As the Petition For a Writ of Certiorari explains, the principal reason that lower courts have not addressed the question of whether SEC ALJs' multilevel, for-cause removal protection is unconstitutional is that several key circuit courts of appeals, including the Eleventh Circuit here, have held, despite the Court's closely analogous jurisdictional ruling in *Free*

Enterprise Fund, 561 U.S. at 489-91, that the SEC's administrative enforcement scheme impliedly strips district courts of their federal question jurisdiction to consider such structural constitutional claims.

This Court's intercession is needed in this case to eliminate these misplaced lower court jurisdictional roadblocks so that district courts, including the U.S. District Court for the Northern District of Georgia in this case, can address the underlying issue of whether SEC ALJs' statutory removal protection offends the separation of powers. Once freed to do so, it seems likely that district courts, based on this Court's precedents in *Free Enterprise Fund* and *Seila* Law, will conclude that SEC ALJs' multi-layer, fire-proof removal protection is unconstitutional. Stripping ALJs of that protection will help level the playing field in SEC administrative enforcement proceedings, and hopefully mitigate the bias and deter the heavy-handed conduct that respondents in SEC administrative enforcement proceedings have complained about for years. *See generally* Lucille Gauthier, Comment, *Insider Trading: The Problem with the SEC's In-House ALJs*, 67 Emory L.J. 123 (2017).[3]

Contrary to the existing court of appeals decisions, under *Free Enterprise Fund*, which applied *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), district courts have *not* been impliedly stripped of jurisdiction

[3] https://tinyurl.com/y4dqzcvx

to consider a structural constitutional claim relating to the multilevel, good-cause removal protection afforded to SEC ALJs. As in *Free Enterprise Fund*—

- such a district court suit is entirely collateral to the SEC's judicial review provision, 15 U.S.C. § 78y, which authorizes court of appeals review of final SEC orders following adjudicatory proceedings;

- the SEC's securities law expertise has no bearing on the structural constitutional issue of whether the ALJs' statutory removal protection violates the separation of powers; and

- requiring an enforcement respondent to outlast the substantial costs, enormous burdens, and professional harms of an SEC administrative enforcement proceeding, including by suffering whatever onerous penalties an SEC ALJ decides to impose, in order to pursue in an Article III court a claim that the ALJ administrative enforcement scheme is structurally unconstitutional, forecloses any possibility of *meaningful* judicial review.

ARGUMENT

Review Is Needed So That District Courts Can Exercise Their Federal Question Jurisdiction To Consider a Structural Constitutional Issue That Has Great Practical Significance

In *Free Enterprise Fund* the Court held that the text of the SEC's judicial review provision, 15 U.S.C. § 78y—which authorizes court of appeals review of "a final order of the Commission"—"does not expressly

limit the jurisdiction that other statutes confer on district courts." 561 U.S. at 489 (citing 28 U.S.C. § 1331). "Nor does it do so implicitly." *Id.* (citing *Thunder Basin*). Under *Thunder Basin*, courts must "presume that Congress *does not intend to limit jurisdiction* if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 212-13) (emphasis added).

The petitioners in *Free Enterprise Fund* were targets of a formal investigation being conducted by the SEC-appointed and supervised Public Company Accounting Oversight Board (PCAOB). *See* 561 U.S. at 484-86. While the investigation was pending, the petitioners filed a district court action challenging "the Board's existence" on structural constitutional grounds, including the PCAOB members' dual-level for-cause removal protection. *Id.* at 490. The district court determined that it had jurisdiction to consider those claims, and the D.C. Circuit affirmed. *Id.* at 488.

Rejecting the SEC's jurisdictional objections, this Court, applying *Thunder Basin's* three factors, unanimously "agree[d] . . . that the statutes providing for judicial review of Commission action did not prevent the District Court from considering petitioners' claims." *Id.* at 489. On the merits, the Court majority held that the PCAOB members' "multilevel protection from removal is contrary to

Article II's vesting of executive power in the President." *Id.* at 484.

The Court's jurisdictional holding in *Free Enterprise Fund* applies with equal force to Petitioner's closely analogous district court action here. But the Eleventh Circuit, relying on one of its earlier decisions, *Hill v. SEC*, 825 F.3d 236 (11th Cir. 2016), which misapplies *Thunder Basin*, held that "Gibson cannot bypass the SEC statutory scheme by filing a collateral action in federal district court." App. 6a.

To the contrary, the *Thunder Basin* factors *compel* the conclusion that district courts are not impliedly deprived of federal question jurisdiction to decide, while an SEC administrative enforcement proceeding is pending, whether the statutory, multilevel, good-cause removal protection afforded to SEC ALJs violates the separation of powers, and thus renders the SEC administrative enforcement scheme unconstitutional. *See* 5 U.S.C. §§ 1202(d), 7521; 5 C.F.R. § 930.211(a) (good-cause removal of ALJs).

According to the court of appeals, however, "Gibson can receive meaningful judicial review of his claims in a court of appeals . . . . Moreover, the SEC may bring its expertise to bear on Gibson's claims." App. 6a. The Eleventh Circuit, like the four other circuits that have parroted each other's opinions, *see* Pet. at 17, "has decided an important federal question in a way that conflicts with relevant decisions of this Court," including *Free Enterprise Fund* and *Thunder Basin*. Sup. Ct. R. 10(c). This deeply flawed case law, which has tremendous practical consequences for anyone who is subjected to an SEC administrative

enforcement action, warrants exercise of the Court's discretionary jurisdiction in this case.

A. The SEC possesses no special expertise that warrants delaying judicial consideration of a structural constitutional challenge to SEC administrative enforcement proceedings

Applying the *Thunder Basin* factors, the Court in *Free Enterprise Fund* found that the petitioners' "constitutional claims [were] outside the Commission's competence and expertise." 561 U.S. at 491. In contrast, in *Thunder Basin*, which involved a labor law-related administrative enforcement action brought by the Federal Mine Safety and Health Review Commission, the petitioner raised due process claims, but "its primary claims were statutory . . . and 'f[e]ll squarely within the [agency's] expertise.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 214) (alterations in original). The Court concluded in *Thunder Basin* that "exclusive review before the [Mine Safety] Commission is appropriate, since agency expertise [could] be brought to bear on the statutory questions presented." *Thunder Basin*, 510 U.S. at 215 (internal quotation marks omitted).

As in *Free Enterprise Fund*, however, Petitioner Gibson's "general challenge" to the ALJs' multilevel, good-cause removal protection "is 'collateral' to any Commission order or rules from which review may be sought." 561 U.S. at 490. Neither SEC ALJ nor SEC Commissioner "expertise is required here" to inform judicial consideration of Gibson's structural constitutional claims. *Id.* at 491. "Instead, [Gibson] asks the district court to answer a constitutional question that courts are well positioned to address."

Cochran v. SEC, 2020 U.S. App. LEXIS 25525, *27 (5th Cir. Aug. 11, 2020) (Haynes, J., dissenting in part); *see also Tilton v. SEC*, 824 F.3d 276, 297 (2d Cir. 2016) (Droney, J. dissenting) (Appointments Clause challenge to SEC ALJs) ("I see no difference in the application of this [outside the agency's expertise] factor here to the SEC and its application to the SEC in *Free Enterprise*. I would find that this factor also weighs strongly in favor of jurisdiction.").

In its opinion below, the Eleventh Circuit, citing *Hill v. SEC* as controlling authority, asserted that "the SEC may bring its expertise to bear on Gibson's claims because it will necessarily have to decide threshold issues, such as whether Gibson has violated the securities laws or whether the statute of limitations has expired." App. 6a. This contention conflicts with *Thunder Basin* (which the Eleventh Circuit's cursory per curiam opinion does not cite) and simply is incorrect. The *actual* threshold issue raised by Petitioner in this case is whether the SEC ALJ proceeding is structurally unconstitutional. The SEC's securities law expertise has no bearing on this question. And of course, if a district court holds that the proceeding is unconstitutional, there will be no need for an ALJ to consider the statute of limitations or the merits of the SEC's enforcement allegations.

The Eleventh Circuit in *Hill*, and other circuits' similar opinions on the jurisdictional question presented here, read too much into the discussion of the "agency expertise" factor set forth in *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012). The *Elgin* petitioners were former federal employees who were terminated because they failed to register for the

military draft. They filed a putative class action in district court seeking affirmative relief in the form of reinstatement and back pay, and to support their employment law action, argued that the registration requirement unconstitutionally discriminated on the basis of sex. This Court affirmed dismissal of the suit, holding that the Civil Service Reform Act (CSRA) provided an exclusive administrative remedy for the petitioners' wrongful termination claims.

The *Elgin* majority explained that "petitioners' constitutional claims are the vehicle by which they seek to reverse the [employment] removal decisions, to return to federal employment, and to receive the compensation they would have earned . . . . A challenge to [employment] removal is precisely the type of personnel action regularly adjudicated by the MSPB [Merit Systems Protection Board] and the Federal Circuit within the CSRA scheme." *Elgin*, 567 U.S. at 22. In this case-specific, affirmative-relief context the Court indicated that "the MSPB's expertise can . . . be 'brought to bear' on employee appeals that challenge the constitutionality of a statute," such as to "threshold questions *that may accompany* a constitutional claim [and] obviate the need to address the constitutional challenge." *Id.* at 22-23 (emphasis added).

Contrary to the Second Circuit's majority opinion in *Tilton*, which the Eleventh Circuit echoed in *Hill*, *Elgin* does not "adopt[] a broader conception of agency expertise in the jurisdictional context" than the Court articulated in *Thunder Basin*. *Tilton*, 824 F.3d at 289. Nor does *Elgin* undermine a reading of "the jurisdictional portion of *Free Enterprise Fund* [that]

seems to open the door for a plaintiff to gain access to federal district courts by raising broad constitutional challenges to the authority of the agency where those challenges (1) do not depend on the truth or falsity of the agency's factual allegations against the plaintiff and (2) the plaintiff's claims do not implicate the agency's expertise." *Bebo v. SEC*, 799 F.3d 765, 770 (7th Cir. 2015).

More specifically, *Elgin* does not hold that a constitutional claim is within an agency's expertise merely if the agency can resolve "accompanying, potentially dispositive issues in the same proceeding." *Tilton*, 824 F.3d at 289; *see also Hill*, 825 F.3d at 1250 (asserting that agency expertise can be brought to bear on a constitutional claim by deciding the merits of an underlying substantive claim). In his *Tilton* dissent Circuit Judge Droney disagreed that "this *Thunder Basin* factor has been changed by *Elgin*." *Tilton*, 824 F.3d at 297 (Droney, J., dissenting). He explained that "[t]o read *Elgin* as broadly as the majority does would mean that as long as a proceeding is ongoing, the 'outside the agency's expertise factor' *must* weigh against jurisdiction—because any time a proceeding has commenced, there is of course some possibility that a plaintiff may prevail on the merits." *Id.* at 296.

Further, Justice Alito's dissenting opinion in *Elgin*, joined by Justices Ginsburg and Kagan, explains that

> [t]he problem with the majority's reasoning is that petitioners' constitutional claims are a far cry from the type of claim Congress intended to channel through the Board. The Board's mission is to adjudicate fact-specific

> employment disputes within the existing statutory framework. By contrast, petitioners argue that one key provision of that framework is facially unconstitutional.

Elgin, 567 U.S. at 24 (Alito, J., dissenting).

Similarly, the question of whether SEC ALJs' multilevel removal protection violates the separation of powers bears no resemblance to the types of fact-specific securities law compliance issues that Congress intended the SEC, through its ALJs, to adjudicate. Issues such as whether the statute of limitations bars SEC's action, or whether SEC's securities law allegations have merit, do not "accompany" Petitioner's entirely collateral, structural constitutional claim. Petitioner's "facial constitutional arguments are entirely outside the [SEC's] power to decide, and they do not remotely implicate the [SEC's] administrative expertise." *Id.* at 28-29.

Indeed, "[a]dministrative agencies typically do not adjudicate facial constitutional challenges to the laws that they administer." *Id.* at 29. "Such challenges not only lie outside the realm of special agency expertise, but they are also wholly collateral to other types of claims that the agency is empowered to consider." *Id.* at 29-30; *see also Thunder Basin*, 510 U.S. at 215 ("[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.") (internal quotation marks omitted).

Even though "[t]his rule is not mandatory," *id.*, there is no suggestion in the extensive list of ALJs'

enumerated powers set forth in the Administrative Procedure Act, 5 U.S.C. § 556(c), or in the SEC's implementing Rules of Practice, 17 C.F.R. § 201.111, that Congress intended ALJs, who are primarily triers of fact, to opine on collateral constitutional claims, such as the structural constitutional claims that Petitioner wishes to pursue in district court. *See generally* OPM, Qualification Standard for Administrative Law Judge Positions ("ALJs serve as independent impartial triers of fact . . . ."); [4] SEC, Office of Admin. Law Judges (ALJs "conduct public hearings in a manner similar to federal bench trials"). [5]

In short, Petitioner's structural constitutional claims are outside the SEC's "competence and expertise." *Free Enterprise Fund*, 561 U.S. at 491.

B. Judicial review cannot be meaningful if it must be delayed until completion of the administrative enforcement proceeding claimed to be structurally unconstitutional

Free Enterprise Fund is the most pertinent example of where the respondent in an administrative proceeding "if not allowed to pursue constitutional] claims in the District Court . . . would not, as a practical matter, be able to obtain meaningful judicial review." *Thunder Basin*, 510 U.S. at 213 (internal quotation marks omitted).

The *Free Enterprise Fund* petitioners' structural constitutional challenge to the PCAOB implicated the same SEC judicial review provision, 15 U.S.C. § 78y,

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[4] https://tinyurl.com/h7663sa (last visited Sept. 23, 2020).

[5] https://tinyurl.com/y5db7bpx (last visited Sept. 23, 2020).

at issue here. Citing *Thunder Basin*, the Court explained that it did "not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory," which, for example, would have required the petitioners to incur an SEC-affirmed PCAOB sanction and then initiate court of appeals review under § 78y. *Free Enterprise Fund*, 561 U.S. at 490. Squarely rejecting this approach, the Court explained that the petitioners would suffer "severe punishment should [their] challenge fail . . . we do not consider this a 'meaningful' avenue of relief." *Id.* at 490-91.

It is difficult to imagine a more relevant Supreme Court precedent. The SEC-appointed members of the PCAOB are analogous to SEC-appointed ALJs. The Sword of Damocles that an SEC ALJ already has hung over Petitioner's head here for his alleged securities law violations is a professionally ruinous, multi-year ban from the securities industry and payment of a substantial sum. *See* Pet. at 12. Coupled with the reputational harm and emotional distress that this years-long, still-pending administrative proceeding continues to inflict on Petitioner, *see id.*, the Court should allow him to obtain meaningful judicial review of his structural constitutional claim *now* by reversing the Eleventh Circuit and requiring the district to exercise its federal question jurisdiction.

The court of appeals panel, however, disposed of the "meaningful judicial review" factor in a single conclusory sentence, merely asserting that "Gibson can obtain meaningful judicial review of his claims in a court of appeals." App. 6a. The panel's reliance on the Eleventh Circuit's earlier decision in *Hill v. SEC*

as controlling precedent again was misplaced. Unlike the situation here, the "respondents' alleged pre-review injury [was] speculative at best" in *Hill*, 825 F.3d at 1247, where district court orders preliminarily enjoined SEC administrative enforcement proceedings.

Moreover, *Hill*'s assertion that "respondents' constitutional challenges are essentially objections to forthcoming Commission orders [that] fall within the fairly discernable scope of § 78y's review procedures," *id.* at 1243, entirely misses *Free Enterprise Fund*'s point that having to await a § 78y court of appeals proceeding to obtain judicial review of a structural constitutional claim forecloses any *meaningful* judicial review. Along the same lines, *Hill* erroneously equates foreclosing meaningful judicial review of structural constitutional claims with the absence of irreparable injury attendant to participating in an allegedly unlawful (but not unconstitutional) administrative proceeding. *Id.* at 1245 (citing *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980)).

In *Cochran v. SEC*, where the plaintiff filed a district court injunctive action based on the same removal-related constitutional claim that Petitioner seeks to pursue in this case, Circuit Judge Haynes "disagree[d] with the majority opinion's conclusion that Cochran's removal claim is the type over which Congress intended to limit [district court] jurisdiction." 2020 U.S. App. LEXIS 25525, at *20 (Haynes, J., dissenting in part). In particular, Judge Haynes "conclude[d] that precluding district court jurisdiction *would likely foreclose all meaningful*

judicial review," including because Cochran would have to "continue to participate in an adjudicative system that well may be constitutionally illegitimate depending on the determination of the removal claim." *Id.* at *23 (emphasis added). Judge Haynes further stated, "I do not think that the law requires Cochran to be subjected to an adjudicative process in front of an officer who may not have constitutional authority to decide her case." *Id.* at *25.

Similarly, in *Tilton v. SEC*, Circuit Judge Droney's dissenting opinion explains that "[f]orcing the appellants to await a final Commission order before they may assert their constitutional claim in a federal court means that by the time the day for judicial review comes, they will already have suffered the injury that they are attempting to prevent. . . . *while there may be review, it cannot be considered truly 'meaningful'* at that point." *Tilton*, 824 F.3d at 298 (Droney, J., dissenting) (emphasis added). "[W]e need look no further than *Free Enterprise* itself to understand that being forced to undergo an allegedly unconstitutional proceeding may play into the analysis of whether judicial review is 'meaningful.'" *Id.* at 299.

Certiorari should be granted here because continuing to preclude district court review of Petitioner's structural constitutional claim would foreclose all meaningful judicial review.

C. The jurisdictional issue is important

Even a brief reading of the SEC Division of Enforcement's 2019 Annual Report, *supra*, reflects the Commission's highly aggressive pursuit of alleged

securities law violators. Without distinguishing between administrative and district court enforcement actions, the Report boasts that during FY 2019, the SEC brought 862 enforcement actions, and obtained more than $4.3 billion in disgorgements and penalties. Annual Report at 9. In addition, the SEC obtained almost 600 bars or suspensions against market participants. *Id.* As the Petition indicates, during FY 2019 the SEC elected to bring almost 77% of its enforcement actions before its own ALJs. *See* Pet. at 5. All this despite what the Report describes as "significant headwinds" caused by "adverse Supreme Court decisions," including *Lucia.* Annual Report at 1.

Amicus curiae Atlantic Legal Foundation supports enforcement of the nation's securities laws. But the SEC's tenacious pursuit of alleged violators heightens the need for an administrative adjudicatory process that not only is fair, but also constitutionally sound. This is particularly important because administrative enforcement proceedings conducted in the SEC's home court decidedly tilt in the Commission's favor. "An ALJ assigned to hear an SEC enforcement action has extensive powers . . . ." *Lucia*, 138 S. Ct. at 2049. Further, under the SEC's Rules of Practice, 17 C.F.R. Part 201, the respondent in an SEC ALJ proceeding is not afforded many of the due process protections that they would receive as a defendant in an SEC enforcement action brought in district court. *See Hill*, 825 F.3d at 1238 (noting that the Federal Rules of Civil Procedure and Evidence do not apply, discovery is limited, and there is no right to a jury trial). Indeed, the Petition notes that according to a study, the SEC

won more than 90% of the cases it brought before its own ALJs between October 2010 and March 2015, compared to a markedly lower percentage in district court. *See* Pet. at 5; *see also* Lucille Gauthier, *supra*, 67 Emory L.J. at 142 ("[T]he success rates of the SEC before individual ALJs and other evidence suggest that the ALJs are biased.").

Seila Law, Lucia, and *Free Enterprise Fund* demonstrate that structural constitutional issues, including those that undermine the credibility and impartiality of the SEC's adjudicatory scheme, warrant this Court's review. In light of the Court's opinions in these cases, the structural constitutional questions of whether SEC ALJs' multilevel removal protection violates the separation of powers also clearly warrants this Court's attention. *See* Linda D. Jellum, "*You're Fired!" Why the ALJ Multi-Track Removal Provisions Violate the Constitution and Possible Fixes*, 26 Geo. Mason L. Rev. 705, 707 (2019) ("[I]t is only a matter of time before this [ALJ] removal issue reaches the Supreme Court . . . .").[6] Moreover, the Court's eventual holding on the ALJ removal issue "has the potential to affect all ALJs" who enjoy good-cause removal protection under 5 U.S.C. § 7521. *Id.*

But district court jurisdiction-stripping decisions such as the Eleventh Circuit's opinion below—coupled with the fact that "the vast majority of all SEC administrative proceedings end in settlements rather than actual decisions," *Tilton*, 824 F.3d at 298 n.5) (Droney, J., dissenting)—have seriously impeded development of lower court case law on the merits of

[6] Available at https://tinyurl.com/y3plmkyc.

this important constitutional question, which affects hundreds of individuals and companies targeted by the SEC with administrative enforcement actions each year. *See Lucia*, 138 S. Ct. at 2051 n.1 ("No court has addressed that [ALJ removal] question, and we ordinarily await thorough lower court opinions to guide our analysis of the merits") (internal quotation marks omitted). The Court should now clear the way for meaningful, district court consideration of the SEC ALJ removal issue by granting review in this case.

CONCLUSION

The Court should grant the Petition For a Writ of Certiorari.

Respectfully submitted,

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