No. 20-276

IN THE

Supreme Court of the United States

CHRISTOPHER M. GIBSON,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, *ET AL.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. One of those ideas is how the separation of powers is vital to protect liberty. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF believes that judicially-created barriers to timely and meaningful Article III review of agency actions are inconsistent with the separation of powers and the text, structure, and history of the U.S. Constitution. Such barriers wrongly place a thumb on the scale in favor of the nation's most powerful litigant, the federal government. Due process and fairness demand that those facing *ultra vires* or unconstitutional agency enforcement actions should not have to face years of potentially ruinous costs just to have their day in an Article III court.

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[1] All parties consented to the filing of this brief after receiving timely notice. No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

It cannot be the law that an agency can do whatever it wants for as long as it wants to a business or individual—no matter how *ultra vires*, abusive, or unconstitutional—without being subject to review by an Article III court unless and until that abusive process ends. Were that the case, agency enforcement action would supplant the jurisdiction of Article III courts even in cases of constitutional questions, presenting a clear violation of the separation of powers. That proposition is particularly true with respect to so-called "independent" agencies, where even the political branches cannot meaningfully intervene, leaving agencies wholly unaccountable to any of the three branches until any opportunity for meaningful redress has been extinguished.

Any handwringing about administrative or judicial efficiency, or purported administrative expertise, as justifying this abdication of the judicial role—particularly as to constitutional questions and statutory interpretation—must yield in the face of citizens' basic right to be free from extralegal administrative proceedings. To be sure, respondents may not, as a matter of course, bypass the administrative process and march straight into federal court to challenge the substance of an investigation in the garden-variety case, particularly to the extent fact-bound determinations are involved. But courts must retain jurisdiction, in the Article III sense, to act as a necessary safety valve for meritorious *ultra vires* and constitutional claims—particularly *structural* constitutional claims that go to the very legality of the process, as is the case here.

Until recently, Article III courts have done just this—defending their own jurisdiction—under narrow circumstances. Indeed, as recently as 2019 a district court stayed an FTC administrative enforcement proceeding in a case involving a claim that the FTC's prosecution was *ultra vires* because the respondent was immune from suit. But several U.S. Courts of Appeals' decisions—two over dissents—have sanctioned the abdication of the judicial role by barring jurisdiction over meritorious constitutional claims while agency adjudications are underway.

Courts dismissing case-by-case meritless attempts to enjoin administrative enforcement actions for a failure to state a claim upon which relief can be granted is one thing. But the Courts of Appeals have crafted a rule prohibiting district courts from even looking at a complaint to determine jurisdiction because they lack the *power* do to so. The abdication of the judicial role at issue in this and other recent decisions appears to be driven by policy considerations relating to administrative and judicial efficiency and an assumption that most attempts to seek relief from ongoing administrative enforcement actions are either frivolous or stalling tactics.

The Court should grant the Petition to correct the Circuits' error and reaffirm the fundamental precept that the liberty interests protected by the separation of powers and the rule of law transcend any perceived benefits flowing from regulatory efficiency.

ARGUMENT

I. THIS COURT'S REVIEW IS NECESSARY TO CORRECT THE GROWING DIVERGENCE IN CIRCUITS' APPLICATION OF THIS COURT'S PRECEDENT.

As Petitioner explains, *see* Pet. 19–31, *certiorari* is warranted because the decision below, as well as those of four other Circuits, squarely conflicts with *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010). Review is necessary to correct the Circuits' newly minted expansion of the scope and effect of three other Supreme Court decisions: *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), and *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980).

The stakes of this case are high and radiate beyond the SEC and the constitutional claims at issue here. The Circuits' erroneous expansion of *Thunder Basin* appears to be highly contagious, spreading to other agencies' unconstitutional actions to bar meaningful review. *See*, *e.g.*, *Bank of La. v. FDIC,* 919 F.3d 916 (5th Cir. 2019) (applying *Thunder Basin* to FDIC judicial review scheme). This, in turn, creates a toxic feedback loop, compounding the effects of this error. *See, e.g.*, *Cochran v. SEC*, No. 19-10396, 2020 U.S. App. LEXIS 25525, at *2–3 (5th Cir. Aug. 11, 2020) ("Bound by *Bank of Louisiana* . . . , we hold that the statutory review scheme is the exclusive path for asserting a constitutional challenge to SEC proceedings."). This Court alone can fix the problem.

A. The U.S. Courts of Appeals' Newly Minted Jurisdiction-Stripping Breaks with Historical Practice.

Until recently, it was settled law in the U.S. Courts of Appeals—including the Eleventh Circuit[2]—that federal district courts have Article III jurisdiction to enjoin administrative enforcement actions under two narrow circumstances: where agency action is (1) patently unconstitutional or egregiously *ultra vires*; and (2) causing severe hardship.[3] *See, e.g.*, *American Gen. Ins. Co. v. FTC,* 496 F.2d 197, 200 (5th Cir. 1974) (jurisdiction over "gross and egregious" errors); *Coca-Cola Co. v. FTC*, 475 F.2d 299, 303 (5th Cir. 1973) (jurisdiction over nonfrivolous constitutional claims); *Sterling Drug, Inc. v. Weinberger*, 509 F.2d 1236, 1239 (2d Cir. 1975) (recognizing possibility of *Leedom* jurisdiction); *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979) (same); *Borden, Inc. v. FTC*, 495 F.2d 785, 786–87 (7th Cir. 1974).

A long line of district court precedent was in accord, recognizing the courts' jurisdiction in these

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[2] As recently as 2014, the Eleventh Circuit acknowledged that the extent to which district courts have jurisdiction over constitutional, *ultra vires*, and APA claims was an issue of first impression. *See LabMD, Inc. v. FTC*, No. 13-15267, 2014 U.S. App. LEXIS 9802, at *2–3 (11th Cir. Feb. 18, 2014).

[3] Underscoring the broad importance of the question presented by Petitioner, the FTC Act's judicial review scheme—like many other federal agencies—is materially indistinguishable from that of the SEC. *Compare* 15 U.S.C. § 45, *with* 15 U.S.C. § 78y.

circumstances—at least until recently.[4] In fact, in 2019, a district court enjoined an *ultra vires* FTC enforcement action. *See La. Real Estate Appraisers Bd. v. FTC*, No. 19-00214, 2019 U.S. Dist. LEXIS 126165, at *11–12 (M.D. La. July 29, 2019) (granting stay); *La. Real Estate Appraisers Bd. v. FTC*, No. 19-00214, 2020 U.S. Dist. LEXIS 23116, at *7 (M.D. La. Feb. 7, 2020) (denying FTC motion to dismiss).

To be sure, these decisions set a high bar for Article III jurisdiction. And, accordingly, the respondent-plaintiffs rarely prevailed. But the courts did not wholly disavow their own power under Article III to exert jurisdiction in extraordinary circumstances, reach the merits of the dispute, and enjoin the administrative action when appropriate.

This approach makes sense. As U.S. District Court Judge Jed Rakoff has explained in finding jurisdiction over an equal-protection clause challenge to an SEC enforcement action, frivolous claims can be screened

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[4] *E.g., Gupta v. SEC,* 796 F. Supp. 2d 503, 513-14 (S.D.N.Y. 2011); *E.I. du Pont de Nemours & Co. v. FTC*, 488 F. Supp. 747, 751 (D. Del. 1980); *Coca-Cola v. FTC*, 342 F. Supp. 670, 676-77 (N.D. Ga. 1972); *Boise Cascade Co. v. FTC*, 498 F. Supp. 772, 777 (D. Del. 1980); *Standard Oil. v. FTC*, 475 F. Supp. 1261, 1282 (N.D. Ind. 1979); *Exxon v. FTC*, 411 F. Supp. 1362, 1369-70 (D. Del. 1976); *Times Mirror v. FTC*, No. 78-3422, 1979 U.S. Dist. LEXIS 11738, at *9-10 (C.D. Cal. 1979); *Horizon Co. v. FTC*, No. 76-2031, 1976 U.S. Dist. LEXIS 12222, at *14 & n.19 (D.D.C. 1976); *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 144 (S.D. N.Y. 1966); *GMC v. FTC*, No. C77-706, 1977 U.S. Dist. LEXIS 13095, at *13-14 (N.D. Ohio 1978); *Pepsico v. FTC*, 343 F. Supp. 396, 399 (S.D. N.Y. 1972).

out at the motion to dismiss stage: "To be sure, it would not be prudent to allow every subject of an SEC enforcement action who alleges 'bad faith' and 'selective prosecution' to be able to create a diversion by bringing a parallel action in federal district court." *Gupta v. SEC*, 796 F. Supp. 2d 503, 514 (S.D.N.Y. 2011). He continued that "such diversionary tactics can be quickly disposed of in the ordinary case through dismissal for failure to plead a plausible claim." *Id.* And respondent-plaintiffs cannot derail or postpone ongoing administrative proceedings unless they can show, among other things, that they are "likely to succeed on the merits" of their claims—a required showing for an injunction. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

Under this framework, district courts could perform their Article III duties and be a critical safety valve where an agency is violating a respondent's constitutional rights or exceeding its statutory authority. *Cf. Elgin*, 567 U.S. at 35 (Alito, J., joined by Ginsburg and Kagan, JJ., dissenting) ("The presumptive power of the federal courts to hear constitutional challenges is well established.").

In that subset of cases, a district court can enjoin the agency action. On the other hand, district courts could quickly dispose of the mine run of fact-bound or other garden-variety pre-exhaustion complaints without undue waste of judicial resources—and without any interference with the administrative proceedings. The high bar for relief would also disincentivize frivolous filings. But at the least, the district court would necessarily look at the *merits* of the constitutional or non-statutory *ultra vires* claims before dismissing them. For it is one thing to dismiss

for failure to state a claim under Rule 12(b)(6), and quite another to dismiss under Rule 12(b)(1) for lack of jurisdiction to even decide the issue.

But over the past five or so years, and over two powerful dissents and against the backdrop of numerous lower courts reaching contrary conclusions, five Circuit Courts—largely citing each other—have jettisoned the traditional approach to challenges to ongoing administrative proceedings by relying on an expansive reading of *Thunder Basin* and related authorities.[5] *See* Pet. 16–17 & n.4 (listing district court and appellate decisions). This newly minted Circuit jurisprudence has produced a bright-line rule, which holds that no judicial review of agency enforcement action is available while the action is pending even where the complaint alleges constitutional violations or *ultra vires* agency action. The inevitable result is that an agency may do whatever it wants for however long it wants with *no* Article III Court having the power to do anything about it under any circumstances. *See generally* Adam M. Katz, Note, *Eventual Judicial Review,* 118 Colum. L. Rev. 1139 (2018). Elimination of judicial review clears the field because the political branches cannot intercede against "independent" agencies—free-

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[5] In fact, another expansion of Supreme Court precedent into materially different statutory schemes is currently pending before this Court. *See FTC v. Credit Bureau Ctr., LLC,* 937 F.3d 764, 775–86 (7th Cir. 2019) (discussing how this Court's precedent interpreting the Emergency Price Control Act was imported by the Circuits into the FTC Act), *cert. granted* No. 19-508 Vide 19-825 (U.S. July 9, 2020).

floating bodies untethered to the U.S. Constitution and unaccountable to any branch of government.

That cannot be the law. And it isn't. *See Free Enter. Fund*, 561 U.S. at 489–91; *Bell v. Hood,* 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]").

B. Federal District Courts Have Article III Jurisdiction to Adjudicate Collateral Constitutional and *Ultra Vires* Challenges to Administrative Enforcement Actions.

To fully understand the import of the Circuits' abdication of the judicial role in curtailing the administrative state's worst constitutional abuses requires first addressing why federal district courts have jurisdiction over claims during the pendency of administrative proceedings. Simply put, federal courts have express federal-question jurisdiction. This jurisdiction has not been negated by any legislatively-created exception and cannot be undermined by presuming challenges to enforcement actions are frivolous or by expanding caselaw to flip the strong presumption of judicial review on its head.

Section 1331 states that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; *see also id.* § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus[.]"). The Declaratory Judgment Act empowers courts to issue

declaratory and injunctive relief.[6] *See* 28 U.S.C. §§ 2201, 2202.

To be sure, the Constitution makes clear that Congress has authority under the Exceptions Clause to statutorily limit the subject-matter jurisdiction of federal courts. *See* U.S. Const. Art. III, § 2; *see also* 5 U.S.C. § 703. But as this Court has recently and repeatedly reiterated, if Congress wants to do that, it must clearly say so. "Jurisdiction . . . is a word of many, too many, meanings." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) (cleaned up). And courts "ha[ve] sometimes been profligate in [their] use of the term." *Id.* "[J]urisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties[.]" *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 274 (1994) (cleaned up). "[A] rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (cleaned up).

Given the drastic consequences that flow from treating a statutory requirement as jurisdictional, this Court has made clear that courts should not do so lightly. *See Gonzalez v. Thaler,* 565 U.S. 134 (2012). Thus, "[a] rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.'" *Id.* at 141–42 (quoting *Arbaugh*, 546 U.S. at 515). "But if 'Congress

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[6] In addition, under the All Writs Act, courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as *non*jurisdictional.'" *Id.* at 142 (quoting *Arbaugh*, 546 U.S. at 516) (emphasis added)). This Court has "adopted a readily administrable bright line for determining whether to classify a statutory limitation as jurisdictional. . . . [A]bsent . . . a clear statement" by Congress that a statute bars the courthouse doors, "courts should treat the restriction as nonjurisdictional in character." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (cleaned up).

Congress did not do so here. The SEC's judicial review provision creates only a limited exception to the general rule of district-court jurisdiction by providing jurisdiction in the Courts of Appeals when a petition for review of a final Commission order is filed in a U.S. Court of Appeals, "which *becomes exclusive* on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part." 15 U.S.C. § 78y(a)(3) (emphasis added); *cf.* 15 U.S.C. § 45(d) (the analogous FTC Act provision). No other straight-to-the-Court-of-Appeals process is provided to transfer jurisdiction away from the district court; and no other exception to the ordinary state of affairs should be inferred. "The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)." Antonin Scalia & Bryan Garner, Reading Law 107 (2012). This means that unless and until the Commission issues a final Order, the respondent files a petition for review in a Court of Appeals, and the record is filed in *that* court, the district courts retain general federal-question jurisdiction. If Congress wanted to divest district

courts of jurisdiction under all circumstances before then, it would have clearly said so.

As a federal district court explained with respect to the FTC Act's analogous judicial review scheme:

> Section 45(d) does not grant to courts of appeals any jurisdiction exclusive or otherwise . . . until a cease and desist order has issued. Consequently, that section cannot be interpreted to deprive this Court of jurisdiction to review any orders issued or actions taken by the FTC when a cease and desist order has not yet been issued.

E. I. Du Pont de Nemours & Co. v. FTC, 488 F. Supp. 747, 750 (D. Del. 1980) (rejecting FTC's "argument, which questions the very power of the Court to hear this case"); *see also LabMD*, 2014 U.S. App. LEXIS 9802, at *1–3 (no jurisdiction over petition for review filed directly in U.S. Court of Appeals before issuance of final cease-and-desist order). At *all* times an Article III court has the *power* to rein in the agency. During the pendency of proceedings, district courts may exercise jurisdiction in appropriate cases; and only once the Commission finds liability and issues a final Order against respondent does exclusive jurisdiction transfer to a U.S. Court of Appeals. That approach makes sense, is consistent with the text, and is congruent with precedent and other statutes.

The Court has previously explained how the judicial review provision at issue here works *with* other statutes not against them: "[T]he text does not expressly limit the jurisdiction that other statutes

confer on district courts. Nor does it do so implicitly." *Free Enter. Fund*, 561 U.S. at 489 (citing 28 U.S.C. §§ 1331, 2201); *see also* 5 U.S.C. § 703. Thus, as here, "[t]o permit those subject to SEC enforcement actions to challenge administrative proceedings in the district courts on the basis of constitutional challenges that have nothing to do with the expertise of the SEC or with factual matters relevant to their own particular circumstances would seem consistent with that Congressional intent." *Tilton v. SEC*, 824 F.3d 276, 299 n.6 (2d Cir. 2016) (Droney, J., dissenting).

Similarly, the APA's "final agency action" requirement does not bar the courthouse doors because it is not a "jurisdictional" statute. The APA "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano v. Sanders*, 430 U.S. 99, 107 (1977); *Oryszak v. Sullivan*, 576 F.3d 522, 524 (D.C. Cir. 2009) ("The jurisdiction of the district court did not depend upon the APA, which is not a jurisdiction-conferring statute.") (cleaned up). Instead, "what its judicial review provisions do provide is a limited cause of action for parties adversely affected by agency action." *Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006) (citing 5 U.S.C. §§ 701–06). "Jurisdiction to review agency action under the APA is found in 28 U.S.C. § 1331." *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 n.47 (1979). And as relevant here, 5 U.S.C. § 702 waives the sovereign immunity for all "agency actions," *see Trudeau*, 456 F.3d at 187, including administrative complaints, as this Court has held, *see Standard Oil*, 449 U.S. at 238 n.7. Thus, rather than addressing whether the court has jurisdiction to hear the case, the APA provides the means for the litigants

to get into court—these are different matters entirely, as Rules 12(b)(1) and 12(b)(6) illustrate.

Here, there is no dispute that the SEC's sovereign immunity has been waived because the SEC chose to file an administrative complaint against Petitioner,[7] thus removing one potential impediment to review. Petitioner raised claims arising under the U.S. Constitution and federal law, which are within the scope of district courts' general federal-question jurisdiction, and which as this Court observed, is neither expressly nor implicitly limited by 15 U.S.C. § 78y. *See Free Enter. Fund*, 561 U.S. at 489. Thus, the district court had "jurisdiction" in the true Article III sense to adjudicate this case consistent with its "virtually unflagging" obligation to decide cases within its jurisdiction. *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 126 (2014).

To the extent Petitioner's Appointments Clause and separation-of-powers claims lack merit (they don't[8]), dismissal of those claims under Rule 12(b)(6) for failure to state a claim would be appropriate. Similarly, for certain *types* of claims raised under the APA, the absence of "final agency action" could be fatal under Rule 12(b)(6), *see Haines v. Fed. Motor Carrier Safety Admin*., 814 F.3d 417, 424 (6th Cir.

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[7] "Sovereign immunity is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

[8] *See Lucia v. SEC,* 138 S. Ct. 2044 (2018); *Free Enter. Fund*, 561 U.S. 477; *Collins v. Mnuchin*, 938 F.3d 553, 588 (5th Cir. 2019) (en banc), *cert. granted*, Nos. 19-422 & 19-563 (U.S. July 9, 2020).

2016), absent an applicable exception to the APA's general exhaustion requirements.[9]

But application of those rules is not at issue in a case like this one where Petitioner raised structural constitutional claims. The same would hold true with respect to other constitutional claims,[10] as well as *ultra vires* claims subject to non-statutory review under *Leedom* and related authorities. These types of claims are not subject to the APA's "final agency action" requirement and thus cannot be excluded on those grounds. *See Bowen v. Michigan Acad. of Family Physicians,* 476 U.S. 667, 678–82 (1986) (review of constitutional claims absent clear statement to contrary); *Leedom v. Kyne,* 358 U.S. 184, 188–91 (1958) (non-statutory *ultra vires* review); *American Sch. of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 108, 110 (1902) (same); *Nat. Parks Cons. Assoc. v. Norton*, 324 F.3d 1229, 1240-41 (11th Cir. 2003) (jurisdiction over constitutional claims even absent "final agency action"). Nor does the SEC Act purport to condition *jurisdiction* on exhaustion of administrative remedies. *See* 15 U.S.C. § 78y.

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[9] The SEC's judicial-review statute does not require issue exhaustion even with respect to *final* Commission Orders subject to review in U.S. Courts of Appeals where "there was reasonable ground for failure to do so[.]" 15 U.S.C. § 78y(c)(1).

[10] *See Free Enter. Fund*, 561 U.S. at 491 n.2 ("If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so.").

But the Circuits' newly minted expansion of *Thunder Basin* erects an insurmountable bright-line barrier to Article III review of unconstitutional administrative enforcement actions. This judicially-created barrier irreconcilably conflicts with this Court's precedent, while ignoring the plain language of the applicable review statute.

This type of error is pernicious, self-replicating, and should not be allowed to stand. The Court should grant review here to clarify that *Thunder Basin* does not require the federal judiciary to look away from rogue administrative action that violates individuals' federal constitutional rights. After all, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). And courts should not weaponize *Thunder Basin* to abdicate jurisdiction simply because a particular case or controversy raises uncomfortable constitutional questions. *Cf. Lexmark*, 572 U.S. at 126.

Thunder Basin is not an open-ended docket-management tool. *Cf. Cochran*, 2020 U.S. App. LEXIS 25525, at *17–20. Judge Rakoff hit the nail on the head, foreshadowing the Circuits' expansion of *Thunder Basin* and bringing into stark relief an underlying rationale of their new bright-line rule: "A fear of abuse by litigants in other cases should never deter a federal court from its unfailing duty to provide a forum for vindication of constitutional protections to those who can make a substantial showing that they have indeed been denied their rights." *Gupta*, 796 F. Supp. 2d at 514. Such should be the case here.

As this Court has long stressed, there is a strong presumption of judicial review of administrative actions at a meaningful time in a meaningful manner, which may only be rebutted by clear and convincing evidence that *Congress*—not the courts—intended to preclude review. *See Bowen*, 476 U.S. at 670–71 (noting "strong presumption" of "judicial review of administrative action" that can only be rebutted by "clear and convincing" evidence); *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016); *Sackett v. EPA*, 566 U.S. 120, 130 (2012). There is no such evidence here, as this Court has found. *See Free Enter. Fund*, 561 U.S. at 489. That should end the matter.

This Court should not "require plaintiffs to bet the farm" as a condition precedent to obtaining judicial review. *See id.* at 490–91. But that is exactly what is at stake. "Given that the vast majority of all SEC administrative proceedings end in settlements rather than in actual decisions, it might well be that choosing to litigate is, in fact, equivalent to 'betting the farm.'" *Tilton*, 824 F.3d at 298 n.5 (Droney, J., dissenting).[11]

The SEC Act and similar statutory review schemes should not be interpreted to "enable the strong-

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[11] Judge Droney's observation also holds true for similarly structured administrative bodies. *See* Joshua D. Wright, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority*, (Feb. 26, 2015) ("[F]irms typically will prefer to settle . . . rather than to go through lengthy and costly litigation in which they are both shooting at a moving target and have the chips stacked against them."), http://bit.ly/2c3FSYZ.

arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the . . . [agency's] jurisdiction." *Sackett*, 566 U.S. at 130–31. "[A]t least at some point, even the temporary subjection of a party to a Potemkin jurisdiction so mocks the party's rights as to render end-of-the-line correction inadequate." *United States v. Microsoft Corp.*, 147 F.3d 935, 954 (D.C. Cir. 1998).

If the SEC removal scheme is unconstitutional, it is unconstitutional. Let the chips fall where they may. But it is no answer to bob and weave to duck the merits of that question, whether out of solicitude to the administrative state or otherwise. Forcing Petitioner through a protracted (and expensive) unconstitutional administrative process "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." *Tilton*, 824 F.3d at 298 (Droney, J., dissenting). This is particularly unfair where, as here, the agency not only lacks relevant expertise but has *already decided the issue* on the merits against Petitioner, and thus further administrative consideration would serve no purpose.[12]

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[12] In the SEC's opposition to Petitioner's preliminary injunction motion in the district court, the agency rejected his structural constitutional argument. *See* Defs.' Resp. in Opp'n to Pl.'s Prelim.

That is not the only irreparable harm at issue—even accepting the dubious proposition that the "expense and disruption of . . . protracted adjudicatory proceedings" is merely "part of the social burden of living under government[.]" *See Standard Oil*, 449 U.S. at 244. *But cf. Odebrecht Constr. v. Sec'y, Fla. DOT,* 715 F.3d 1268, 1289 (11th Cir. 2013). Time and again, courts have held reputational harm, adverse publicity, and loss of good will are irreparable harm.[13] This state of affairs should not be allowed to continue.

C. *Thunder Basin*, *Elgin*, and *Standard Oil* Do Not Bar the Courthouse Doors.

The Circuits' recently erected barrier to judicial review during ongoing administrative enforcement actions is rooted in a fundamental misinterpretation and expansion of this Court's precedents in *Thunder Basin*, *Elgin*, and *Standard Oil*.[14] The Court should correct this erroneous expansion, as these cases do not support, let alone compel, the Circuits' new approach.

Inj. Mot., *Gibson v. SEC.*, Case 19-01014, at 16–22 (N.D. Ga., filed Mar. 22, 2019). More recently, the Commission issued an opinion rejecting this identical argument. *See* Op. of Comm'n, *In re John Thomas Capital Mgmt. Grp. LLC*, No. 3-15255, at 42–44 (Sept. 4, 2020) https://bit.ly/3hnpDq1.

[13] *See, e.g.*, *Ferrero v. Assoc. Materials, Inc.,* 923 F.2d 1441, 1449 (11th Cir. 1991) (loss of customers and goodwill); *Housworth v. Glisson*, 485 F. Supp. 29, 35–36 (N.D. Ga. 1978).

[14] *Cf. Credit Bureau*, 937 F.3d at 775–86.

i. ***Thunder Basin***

Thunder Basin was decided in 1994, and its applicability here is doubtful in light of *Arbaugh*, *Free Enterprise Fund*, and *Sackett*. But more directly, the Circuits have misapplied *Thunder Basin* by erroneously importing it into review schemes like the SEC's, which operate differently from the Mine Act at issue in that case. To begin with, "the Mine Act did not create the forum selection provision which the SEC enjoys here[.]" *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1303 (N.D. Ga. 2015). And unlike the SEC Act, the Mine Act's history shows that Congress specifically intended to *narrow* the scope of district court review. *See Thunder Basin*, 510 U.S. at 209–11 & n.15 (noting Congress amended the Mine Act to eliminate district court review and finding "the legislative history and these amendments to be persuasive evidence that Congress intended to" preclude judicial review).

In addition, unlike here, *Thunder Basin* primarily involved statutory claims, which were resolved *within* the applicable statutory framework. Nevertheless, the Court reached the merits of the constitutional due process claim and did not eschew jurisdiction simply because other claims were statutory. *See id.* at 219 (Scalia, J., concurring in part and concurring in the judgment) (noting "constitutional claim disposed of in Part IV, which is rejected not on preclusion grounds but on the merits"); *Elgin*, 567 U.S. at 31–32 (Alito, J., dissenting). Because the Court reached the merits of this constitutional claim, it necessarily follows that the Court had jurisdiction over it. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83 (1998) (court

must address issues of jurisdiction before reaching merits). Perhaps for this reason "since *Thunder Basin*, other courts have held that the Mine Act does not preclude all constitutional claims from district court jurisdiction." *Ironridge*, 146 F. Supp. 3d at 1303 n.5 (citing *Elk Run Coal Co. v. Dep't of Labor*, 804 F. Supp. 2d 8, 19 (D.D.C. 2011) (finding the Mine Act did not preclude "broad constitutional challenges" from district court jurisdiction, and stating *Thunder Basin* supported such a finding)). It would be perverse to read the exercise of jurisdiction over the constitutional claim in *Thunder Basin* as somehow *precluding* jurisdiction over constitutional claims in cases relating to other statutes that do not include the Mine Act's intentional narrowing of judicial review.

ii. ***Elgin***

The application of *Elgin* to preclude judicial review of collateral issues presents the same error as shoehorning this case under *Thunder Basin*. Indeed, *Elgin* underscores why statutory review schemes, like the SEC's, do not bar district court review of substantial constitutional and *ultra vires* claims.[15] As in *Thunder Basin*, but unlike here, Congress intentionally *narrowed* the scope of district court jurisdiction when it enacted the Civil Service Reform Act ("CSRA"), the statute at issue in *Elgin*. *See* 567 U.S. at 13–14. And unlike the SEC Act, the CSRA

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[15] *See also Elgin*, 567 U.S. at 25 (Alito, J., dissenting) ("Because I doubt that Congress intended to channel petitioners' constitutional claims into an administrative tribunal that is powerless to decide them, I respectfully dissent.").

governs a different type of litigation: employment disputes brought by federal employees against federal agencies. *See United States v. Fausto*, 484 U.S. 439, 443–47 (1988). That is a different animal from inhouse enforcement proceedings brought by administrative agencies *against* private citizens seeking civil penalties, disgorgement, industry bans, gag orders, injunctions on business activity, and other severely punitive relief.

The CRSA, by contrast, appears to have been enacted to *replace* the prior system where federal employees would seek review of administrative decisions regarding employment disputes in "district courts through the various forms of action traditionally used for so-called nonstatutory review of agency action[.]" *Id.* at 444 (cleaned up). Unlike here, part of the *raison d'etre* of the CSRA was to bar federal employees from bringing lawsuits in federal court. As should be obvious, that was not Congress's intent in granting the SEC power to bring inhouse administrative enforcement actions.

iii. ***Standard Oil***

As explained above, *Standard Oil*, if anything, shows that the district court should have reached the merits of Petitioner's claims, confirming that issuance of an administrative complaint is an "agency action" that waives sovereign immunity. *See* 449 U.S. at 238 n.7. But that is all. *Standard Oil did* not address the issue of jurisdiction, instead solely addressing the APA's general requirement of "final agency action" to state a claim on which relief may be granted under the APA. *See id.* at 244. That hurdle does not apply in

cases claiming constitutional violations or *ultra vires* agency action.

To the extent that *dicta* in *Standard Oil can* be used to support the proposition that no irreparable harm flows from the disruption and litigation expense caused by protracted administrative enforcement proceedings, *see id.*, and thus the federal judiciary is *powerless* under *all* circumstances to review administrative agency enforcement proceedings (it does not), that decision should be narrowed or abandoned.

CONCLUSION

For these reasons, and those described by the Petitioner, this Court should grant the Petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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