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 GEORGE R. JARKESY, JR. AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

In 1875, Congress empowered federal district courts to adjudicate all "actions arising under the Constitution." 28 U.S.C. § 1331. Several decades later, the Securities Exchange Act granted federal circuit courts jurisdiction over claims by persons "aggrieved by a final order of the [Securities and Exchange] Commission." 15 U.S.C. § 78y(a)(1). The question presented is whether Section 78y implicitly repeals Section 1331 with respect to constitutional challenges to SEC enforcement proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules

Regulations

Administrative Proceedings

Other Authorities

INTEREST OF *AMICUS CURIAE*

George R. Jarkesy, Jr. is an investment professional who had an unblemished record spanning nearly two decades.[1] He is not, and for decades has not been, required to register with the Securities and Exchange Commission. Nevertheless, in 2013, Mr. Jarkesy found himself in the crosshairs of the SEC's "'bold and unrelenting'" enforcement tactics. Mary Jo White, SEC Chair, *A New Model for SEC Enforcement* (Nov. 18, 2016), tinyurl.com/ul7njec. Like hundreds of other Americans each year, Mr. Jarkesy was forced to defend himself against an SEC enforcement action not in a neutral federal court but before the SEC's in-house tribunal, *see In re John Thomas Capital Mgmt. Grp. LLC*, 2013 WL 1180836 (Mar. 22, 2013), a forum in which, for decades, "the SEC [has] always seem[ed] to win," John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 Yale L.J. 1875, 1887 (1992). As two administrative law judges have themselves observed, SEC proceedings are "system[atically]" "slanted against defendants." Office of Inspector General, Report of Investigation, Case No. 15-ALJ-0482-1, at 20 (2016), tinyurl.com/y9xjr7fr.

Mr. Jarkesy challenged the constitutionality of the SEC proceeding in federal district court, invoking the statutory conferral of jurisdiction over "all civil actions arising under the Constitution." 28 U.S.C. § 1331. But the district court held that 15 U.S.C.

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[1] All parties received notice of and have consented to the filing of this brief. *Amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

§ 78y(a)(1), which provides a cause of action for persons "aggrieved by a final order of the Commission," implicitly "strip[ped]" the court of ordinary federal-question jurisdiction over Mr. Jarkesy's claims. *Jarkesy* v. *SEC*, 48 F. Supp. 3d 32, 38, 40 (D.D.C. 2014). The D.C. Circuit affirmed, reasoning that Mr. Jarkesy "eventually" could obtain judicial review "when (and if)" the SEC ruled against him. *Jarkesy* v. *SEC*, 803 F.3d 9, 12, 19 (D.C. Cir. 2015).

But the D.C. Circuit said that *five years ago*, and only last month did the SEC finally rule in Mr. Jarkesy's case (in favor of itself). *See In re John Thomas Capital Mgmt. Grp. LLC*, 2020 WL 5291417 (Sept. 4, 2020). Thus, for 2,723 days—from March 2013 to September 2020—the SEC subjected Mr. Jarkesy to the "'here-and-now' injury" of being forced to defend himself against an unconstitutional administrative proceeding. *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2196 (2020). And thus, for 2,723 days, Mr. Jarkesy has suffered. He has been unemployable in his chosen profession; his bank and brokerage accounts have been closed; interest rates on remaining loans have skyrocketed; and assets held by the partnership that was the subject of the SEC's action have been decimated—all while the SEC has dragged his reputation through the mud, and left it there. For years.

This is not the outcome Congress intended, nor one the Constitution permits. The federal courts sit to resolve constitutional disputes between citizens and the government—not to avoid them. And, unfortunately, Mr. Jarkesy's case is "hardly unique." *Jarkesy*, 803 F.3d at 29. Mr. Jarkesy therefore re-

spectfully urges this Court to grant certiorari and afford Petitioner (and others like him) the one thing Mr. Jarkesy sought these many years: his day in court.

SUMMARY OF ARGUMENT

For a time, federal courts were quick to read statutes as "implying" legal rules absent from the text but perceived as sensible policy. This Court has long since renounced that "freewheeling approach." *Hernandez* v. *Mesa*, 140 S. Ct. 735, 751 (2020) (Thomas, J., concurring). But as this case illustrates, the courts of appeals have not always followed this Court's lead. Relying on vague and ahistorical speculation about congressional purpose, the lower courts have interpreted a provision of the securities laws, 15 U.S.C. § 78y, as partially repealing the federal-question jurisdiction granted by Congress, 28 U.S.C. § 1331, for certain constitutional claims against the Securities and Exchange Commission. Section 78y, however, neither says nor implies anything of the sort.

To support their policy-focused approach, the lower courts have invoked *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), where this Court identified certain factors for determining whether Congress intended to strip jurisdiction when the ordinary tools of interpretation yield no answer. But read in statutory and historical context, Section 78y's text cannot be understood to leave its relationship with Section 1331 to judicial conjecture. The most obvious textual evidence that Section 78y does not affect Section 1331 is that the two statutes concern distinct subject matter. Moreover, when Congress enacted the Exchange Act in 1934, it was well established that federal district courts could issue injunctions in equity to protect constitutional rights. For that reason, when Congress intended to strip district courts of their jurisdiction to

enjoin administrative proceedings, it said so explicitly and clearly. Yet Section 78y contains none of that jurisdiction-stripping language. To the contrary, the Exchange Act provides that its "rights and remedies" "shall be *in addition to*," not in replacement of, "any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. § 78bb(a)(2) (emphasis added). Section 78y's "additional remedy" was simply designed to assure clarity about the framework for challenges to SEC orders—not to "cut down more traditional channels of review." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 142 (1967).

If the decision below is allowed to stand, the hundreds of Americans who are compelled each year to defend themselves in SEC administrative proceedings will have no meaningful opportunity to contest in federal court the constitutionality of the SEC's proceedings. As the then-top enforcement official at the SEC has openly bragged, the mere "threat[ ] [of] administrative proceedings" is enough to coerce settlement in the "'vast majority of [the SEC's] cases.'" *Tilton* v. *SEC*, 824 F.3d 276, 298 n.5 (2d Cir. 2016) (Droney, J., dissenting) (quoting SEC's then-Director of Enforcement). For obvious reason: the procedural unfairness built into the SEC's proceedings imposes a crushing burden on defendants, who are generally unemployable for the duration of the proceedings, and must exhaust all of their resources as they wait for their day in federal court. In Mr. Jarkesy's case—which the SEC purported to "expedite"—those burdens accumulated over *seven years*. Americans should not have to wait in line for the better part of a decade before courts adjudicate their constitutional disputes with the government.

ARGUMENT

I. THE DECISION BELOW DISREGARDS FUNDAMENTAL PRINCIPLES OF STATUTORY INTERPRETATION.

At bottom, this case presents a pure question of statutory interpretation: whether Section 78y divests federal district courts of jurisdiction to adjudicate an individual's claim that he is being forced to defend himself in an unconstitutional administrative tribunal. All agree that "the text" of Section 78y "does not expressly limit" the federal-question jurisdiction granted to federal district courts by 28 U.S.C. § 1331. *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010). Yet six courts of appeals have held, over vigorous dissent, that Section 78y *implicitly* strips district courts of Section 1331 jurisdiction. *Compare Cochran* v. *SEC*, 969 F.3d 507, 510 (5th Cir. 2020), *Bennett* v. *SEC*, 844 F.3d 174, 188 (4th Cir. 2016), *Hill* v. *SEC*, 825 F.3d 1236, 1241 (11th Cir. 2016), *Tilton* v. *SEC*, 824 F.3d 276, 291 (2d Cir. 2016), *Jarkesy* v. *SEC*, 803 F.3d 9, 16 (D.C. Cir. 2015), *and Bebo* v. *SEC*, 799 F.3d 765, 767 (7th Cir. 2015), *with Cochran*, 969 F.3d at 519 (Haynes, J., dissenting), *and Tilton*, 824 F.3d at 292 (Droney, J., dissenting).

One would expect a careful parsing of text to precede such a determination of partial repeal by implication. After all, "repeals by implication" are "not favored." *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982). That is particularly true for jurisdictional statutes, because the federal courts have a "virtually unflagging" "obligation" to "hear and decide cases within [their] jurisdiction." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quotation marks omitted); *see also Cohens* v.

Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). Courts therefore "restrict access to judicial review" "only upon a showing of 'clear and convincing evidence'" of a jurisdictional limit. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967); *see also Bd. of Governors of Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (when Congress intends to strip jurisdiction, it does so "clearly and directly"). But the circuits have given Section 78y's text only cursory consideration—with no mention at all of statutory and historical context—before turning to the factors identified in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994).

In Mr. Jarkesy's case, for example, the D.C. Circuit reasoned that the "'policy behind'" Section 78y was to "consolidate all of each respondent's issues before one court for review"—no matter what those "issues" might be—"after an adverse Commission order" is entered. *Jarkesy*, 803 F.3d at 29–30. The court did not trace that purported policy objective to any statutory text or even legislative history that could reflect contemporaneous understanding. Instead, the court cited its own "good sense," *id.* at 29, and a 1979 D.C. Circuit opinion that itself relied on the panel's "imagin[ation]" of what Congress's "policy" goals may have been in enacting a different statute, *City of Rochester* v. *Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979).

This mode of analysis contravenes this Court's repeated admonition that "[t]he best evidence of congressional intent . . . is the statutory text that Congress enacted." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 392 n.4 (2013) (Sotomayor, J., dissenting) (citing

W. Va. Univ. Hosps., Inc. v. *Casey*, 499 U.S. 83, 98 (1991)). And it disregards *Thunder Basin* itself, which explained that a post-enforcement review provision "do[es] not restrict judicial review" unless the text "displays" a "'fairly discernible' intent" to limit jurisdiction. *Free Enter. Fund*, 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 207). When "'all of the traditional tools of construction'" are applied, *Shular* v. *United States*, 140 S. Ct. 779, 788 (2020) (Kavanaugh, J., concurring), it is clear that—as this Court already held once, *see* Pet. 19–20—"the text" of "§ 78y" does not "implicitly" "limit the jurisdiction" of federal district courts, *Free Enter. Fund*, 561 U.S. at 489.

First, the circuits have erred by reading Section 78y as an implied partial repeal of Section 1331 because the two provisions cover distinct subject matter. Partial repeal is implied only when (1) "'provisions in the two acts are in irreconcilable conflict,'" or (2) "'the later act covers the whole subject of the earlier one and is clearly intended as a substitute.'" *Kremer*, 456 U.S. at 468. In "'either case,'" "'the intention of the legislature to repeal must be clear and manifest.'" *Id.* And a reading of implied partial repeal must be avoided "whenever possible." *Id.*

Sections 1331 and 78y do not conflict and do not concern wholly overlapping subject matter. Whereas Section 1331 concerns claims "arising under the Constitution, laws, or treaties of the United States," Section 78y concerns "final order[s] of the [SEC]." This case illustrates the distinction: at issue is not a legal or factual finding of the SEC but whether Petitioner must defend himself before a tribunal that, he maintains, is unlawful "under the Constitution." 28 U.S.C. § 1331. If Petitioner settles, or wins at the SEC—or

otherwise is never "aggrieved by a final order of the Commission," 15 U.S.C. § 78y—he nonetheless will have suffered irreparable, legally cognizable injury. *See Free Enter. Fund*, 561 U.S. at 513 (regulated persons are "entitled to declaratory relief" to ensure that the "standards to which they are subject will be enforced only by a constitutional agency"); *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976) (upholding district court's pre-enforcement jurisdiction because a court's post-enforcement decision "would not answer [the litigant's] constitutional challenge"). There is no indication—let alone one that is clear and manifest—that Congress intended Section 78y to partially repeal Section 1331.

Second, it is "[t]elling" that "Congress has shown that it knows exactly how to specify" jurisdictional exclusivity but "has done nothing like that" in Section 78y. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1617 (2018). In the Exchange Act itself, for example, Congress expressly precluded state-court jurisdiction by making federal jurisdiction "exclusive." Securities Exchange Act of 1934, ch. 404, § 27, 48 Stat. 881, 902 (codified as amended at 15 U.S.C. § 78aa(a)). Just one year later, in the National Labor Relations Act, Congress established a process for reviewing agency orders essentially identical to Section 78y, *compare* NLRA, ch. 372, § 10(f), 49 Stat. 449, 455 (1935), *with* Securities Exchange Act § 25(a), 48 Stat. at 901–02, but *also* provided that the agency's power to prevent unfair labor practices "shall be exclusive, and shall not be affected by any other means of adjustment or prevention," NLRA § 10(a), 49 Stat. at 453. That express language, which Congress omitted from the Exchange Act, plainly deprived district courts of "jurisdiction to enjoin [agency] hearings." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938). And

for just one more example, in the Revenue Act of 1928—another statutory scheme with built-in court of appeals review, *see Phillips* v. *Comm'r*, 283 U.S. 589, 598 (1931)—Congress likewise expressly stripped district courts of jurisdiction by providing that "[n]o suit shall be maintained in any court for the purpose of restraining the assessment or collection" of certain taxes. Revenue Act of 1928, ch. 852, § 604, 45 Stat. 791, 873 (1928).

"Unlike" the many "statutes in which Congress unequivocally stated that [agency] jurisdiction . . . is exclusive," and that district courts have no role to play, Section 78y "contains no language that expressly confines jurisdiction . . . or ousts [district] courts of their presumptive jurisdiction." *Yellow Freight Sys., Inc.* v. *Donnelly*, 494 U.S. 820, 823 (1990). The "omission of any such provision is strong, and arguably sufficient evidence that Congress had no such intent." *Id.*; *see also Rotkiske* v. *Klemm*, 140 S. Ct. 355, 361 (2019) ("Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.").

Indeed, the Exchange Act's text expressly points in the *opposite* direction by stating that the "rights and remedies" the Act provides "shall be *in addition to* any and all other rights and remedies that may exist at law or in equity." Securities Exchange Act § 28(a), 48 Stat. at 903 (codified as amended at 15 U.S.C. § 78bb(a)(2)) (emphasis added); *see also Abbott Labs.*, 387 U.S. at 144 (finding that a nearly identical provision in the Food, Drug, and Cosmetic Act "strongly buttressed" the conclusion that Congress did not intend to strip jurisdiction). Among those preex-

isting rights was the ability to challenge constitutional violations in federal court under 28 U.S.C. § 1331. *Free Enter. Fund*, 561 U.S. at 491 n.2.

Third, the circuits' reading "ignores the legal landscape at the time of [Section 78y's] enactment" in 1934. *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1475 (2018); *see also Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2074 (2018) (statutory meaning is "fixed at the time of enactment"). At that time, it was well settled that a constitutional challenge was a matter for courts and not agencies. *See*, *e.g.*, *Eng'rs Pub. Serv. Co.* v. *SEC*, 138 F.2d 936, 952 (D.C. Cir. 1943) (agency may not "consider questions of constitutionality"); *Panitz* v. *District of Columbia*, 112 F.2d 39, 42 & n.16 (D.C. Cir. 1940) (collecting pre-1934 sources); *Free Enter. Fund*, 561 U.S. at 491 n.2 (the Constitution provides a "'private right of action'" to bring "separation-of-powers" and other constitutional claims in federal court (citing *Bell* v. *Hood*, 327 U.S. 678, 684 (1946))).

In contrast, "the scope of judicial review of administrative decisions" was at the time "unclear." *Abbott Labs.*, 387 U.S. at 142. Some believed that an individual could "'test the legality of [an agency] order'" by suing the agency for injunctive relief "'under the general equity powers of the court.'" *Id.* at 143. But in 1934 "the Administrative Procedure Act had not yet been enacted," and "it was argued" that "factual matter[s]," for example, were "not reviewable in equity" absent a "special statutory review procedure." *Id.* at 142–43.

In light of this uncertainty, Section 78y established a clear cause of action and framework for challenges to SEC orders. Anyone "aggrieved" by a "final" SEC order could sue in federal court. 15 U.S.C.

§ 78y(a)(1). Factual matters would be reviewable under a "substantial evidence" standard. *Id.* § 78y(a)(4). And venue would no longer be limited to the District of Columbia, but would extend to the plaintiff's residence or place of business. *Id.* § 78y(a)(1); *see also Abbott Labs.*, 387 U.S. at 144 (discussing similar decision to "provide broader venue" in Food, Drug, and Cosmetic Act). Section 78y, then, was "simply intended to assure adequate judicial review of [SEC] decisions" by offering "an additional remedy." *Abbott Labs.*, 387 U.S. at 142, 144. It "does not manifest a congressional purpose to eliminate judicial review of *other* kinds" of challenges to agency action, *id.* at 144 (emphasis added), including the "established practice . . . of federal courts to issue injunctions to protect rights safeguarded by the Constitution," *Free Enter. Fund*, 561 U.S. at 491 n.2 (quoting *Bell*, 327 U.S. at 684).

Taken together, these many textual indicators clearly establish that Congress did *not* intend for Section 78y to do more than what it says it does. And Section 78y clearly does *not* say that it ousts courts of the general federal-question jurisdiction conferred by Section 1331. The Court should grant certiorari to remind lower courts that when interpreting Section 78y, they should "'ask only what the statute means.'" *Epic Sys. Corp.*, 138 S. Ct. at 1631.

II. INDIVIDUAL RIGHTS SHOULD NOT BE SUBORDINATED TO ADMINISTRATIVE CONVENIENCE.

The importance of the question presented cannot be overstated. The SEC's then-top enforcement official has boasted that he has been able to coerce settlements in the "vast majority of [the agency's] cases" by "threaten[ing] administrative proceedings." *Tilton* v. *SEC*, 824 F.3d 276, 298 n.5 (2d Cir. 2016) (Droney, J.,

dissenting) (quoting then-head of SEC Division of Enforcement); *see also* Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, Law360 (June 11, 2014), tinyurl.com/y2msouwu (quoting then-head of SEC Division of Enforcement bragging that "we have threatened administrative proceedings, it was something we told the other side we were going to do and they settled"); Comments of Andrew N. Vollmer on Office of Mgmt. & Budget Request for Information, OMB-2019-0006, at 4 (Mar. 9, 2020), tinyurl.com/y5qcknzx (former SEC Deputy General Counsel answering whether administrative enforcement "proceedings coerce settlements": "Yes they do").

The SEC owes its success in obtaining settlements partly to the fact that there are, at minimum, serious constitutional questions regarding the fairness of the SEC's administrative tribunals. Yet, in the decision below, the court of appeals held that the traditional forum for "'preventing entities from acting unconstitutionally'"—a federal district court—is entirely unavailable. *Free Enter. Fund*, 561 U.S. at 491 n.2. And worse still, the court concluded that *any* judicial review, in any forum, must await the conclusion of the very proceedings that are coercing the "vast majority" of defendants to settle in the first place—ensuring that virtually no judicial review is had, and the cycle continues unabated. *Tilton*, 824 F.3d at 298 n.5 (Droney, J., dissenting). The decision below is a massive threat to individual liberty.

A. Make no mistake: If the decision below is allowed to stand, the hundreds of Americans who are compelled each year to defend themselves in SEC administrative proceedings will have no meaningful opportunity to contest the constitutionality of those proceedings. The crushing process of litigating against

the SEC—at the SEC—combined with the downside risk of receiving the SEC's severe penalties will force nearly all defendants to settle before their case reaches an Article III court.

1. The SEC's proceedings are so "slanted against defendants" (as two current ALJs put it) that almost no one has the time, resources, and energy needed to fight it out to the end. Office of Inspector General, Report of Investigation, Case No. 15-ALJ-0482-1, at 20 (2016), tinyurl.com/y9xjr7fr. The SEC does not merely enjoy a "home-court advantage" in its proceedings. Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J. (May 6, 2015), tinyurl.com/y44yqfwm. In sports, a neutral arbiter applies neutral rules to home and road team alike. At the SEC, by contrast, the home team runs the show. There is no jury—or similar "problems," as a former Director of Enforcement put it—to check the prosecution. Yin Wilczek, *SEC to Pursue More Insider Trading Cases in Administrative Forum, Director Says*, Bloomberg BNA (June 13, 2014), perma.cc/7TTW-V2Z4. To the contrary, the government decides unilaterally—and without statutory guidelines—to dispense with the "problems" associated with federal court in favor of a forum where it hand-picks its own referees. And it exerts substantial institutional pressure on those referees to (in the words of a former ALJ) place the "'burden'" on "'the people who were accused'" to "'show that they didn't do what the agency said they did.'" Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, Wall St. J. (Oct. 21, 2014), tinyurl.com/yb6dgtzb; *see also* Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, Wall St. J. (Nov. 22, 2015), tinyurl.com/yatob4qx (reporting ALJ's warning to "defendants during settlement discussions . . . [that] he had *never* ruled against the

agency's enforcement division" (emphasis added)); *id.* (reporting Chief ALJ's refusal to dismiss proceedings because that would "look[] like I am saying to these presidential appointee commissioners, I am reversing you," and "they don't like that").

And the rules change depending whether the SEC or the defendant has the ball. Take time limits, for example. These are rigid and rapid, *see* 17 C.F.R. § 201.360(a)(2)(ii)—until they are not. When the *defendant* asks for a continuance because, for instance, he was in a traffic accident, *In re J.S. Oliver Capital Mgmt. LP*, 2014 WL 10937777, at *1 (Jan. 3, 2014), or "has a serious medical condition," *In re Edward M. Daspin*, Admin. Proc. Rulings Release No. 3041, at 3 (Aug. 14, 2015), tinyurl.com/yd4p4jof, or just received a document dump from the Division of Enforcement that is "larger than the entire printed Library of Congress," *In re Harding Advisory LLC*, 2014 WL 10937716, at *2 (Jan. 24, 2014), the SEC invariably denies the motion. But when the *Commission's* ALJ seeks an extension of time because he is busy, for example, the SEC invariably grants the motion. *See*, *e.g.*, *In re Harding Advisory LLC*, 2014 WL 4160053 (Aug. 21, 2014); *In re J.S. Oliver Capital Mgmt., LP*, 2014 WL 2965407 (July 2, 2014). As far as counsel is aware, the SEC has never denied an ALJ's request for an extension of time. When the SEC's officers ask, the "'public interest'" in granting "'additional time'" always outweighs the "timely and efficient" adjudication of the matter. *In re ZPR Inv. Mgmt., Inc.*, 2014 WL 459797, at *1 (Feb. 5, 2014); *see also* Ed Beeson, *SEC Admin Court Appeals Languish Under White*, Law360 (July 24, 2015), tinyurl.com/ybx539yb.

The procedural unfairness of SEC administrative proceedings infects the entire process from start to

finish. According to one former SEC chairman, the "protections that our civil justice system affords litigants" to "protect [their] reputation[s], livelihood[s], and property" are simply "denied to *every* litigant in an [SEC] administrative proceeding." Chris Cox, The Growing Use of SEC Administrative Proceedings 3–4 (May 13, 2015), tinyurl.com/yyusqwh2 (emphasis added). Equal discovery opportunities are, for example, nonexistent. The Commission's virtually limitless ability to take testimony and issue subpoenas during its multi-year investigations, *see*, *e.g.*, 15 U.S.C. § 78u(b), contrasted with the limited discovery rights afforded to defendants, *see*, *e.g.*, 17 C.F.R. § 201.233(a) (limiting depositions to three or five, far below the ten depositions allowed, at a minimum, in federal court, *see* Fed. R. Civ. P. 30(a)(2)(A)(i), and the unlimited depositions allowed during the Commission's investigation), is the hallmark of unfairness. *See*, *e.g.*, Center for Capital Markets Competitiveness, Examining U.S. Securities and Exchange Commission Enforcement 15 (July 2015), tinyurl.com/o4ovhsy ("The lack of pre-hearing discovery adversely affects the respondent rather than the SEC staff. That is because the staff has been able to compile its evidentiary record, including sworn depositions, through its investigation process. . . . The respondents in an administrative proceeding have no comparable opportunity.").

The evidentiary standards compound the problem. Not only is the Commission at an advantage in *collecting* evidence, it is at an advantage in *admitting* that evidence too. Hearsay, for example, is freely admitted in administrative trials, even though such evidence would never "be allowed into evidence in federal district court," *In re Marshall E. Melton*, 2000 WL 898566, at *5 (July 7, 2000), and for good reason:

"'Hearsay testimony is presumptively unreliable'" because the defendant "'has no opportunity to cross-examine and test the declarant's truthfulness under oath before the factfinder,'" as the defendant would in a district court, *SEC* v. *Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1328 (N.D. Ala. 2003) (refusing to consider SEC's hearsay evidence).

SEC proceedings also take years, which adds to the pressure to settle. *See* Vollmer, *supra*, at 4 (former SEC Deputy General Counsel explaining that defendants "settle because their business, job, or personal relationships will not survive sustained adverse publicity repeating the SEC's allegations over and over during the long life of litigation"). Mr. Jarkesy, for example, has been fighting for *seven years* and still has not has his day in court, even though the SEC "expedited" his case. *In re John Thomas Capital Mgmt. Grp. LLC*, 2015 WL 728006, at *2 (Feb. 20, 2015); *see also* Beeson, *SEC Admin Court Appeals Languish Under White*, *supra*. Throughout this extended process, the costs keep piling on. There are substantial legal fees, of course. But that is only part of the injury inflicted by the proceeding itself. For the duration of an SEC administrative proceeding, the target of that proceeding is generally unemployable. His chosen profession is out of the question. *See*, *e.g.*, FINRA Rule 1014(a)(3)(C) (judging an application for membership based, in part, on whether an "Associated Person is the subject of a pending . . . regulatory action or investigation by the SEC"). And starting his own firm, of any type, is generally impossible as well; given the pending enforcement action, no lender will want to lend, especially at a reasonable cost. Self-funding is not an option either, as Mr. Jarkesy learned, because banks and brokerage firms close the accounts of anyone on the wrong side of the "v." in an SEC proceeding,

whether the accounts are relevant to the action or (in Mr. Jarkesy's case) not.

It is one thing to litigate on a tight deadline, or to lose a motion here and there, or even to lose one's employment, especially if judicial review is right around the corner. But it is "something else" entirely "to be subjected to this combination over a period of . . . years," by public officials who seem "bent on making life difficult." *Wilkie* v. *Robbins*, 551 U.S. 537, 555 (2007). Put together, these imbalances frequently are outcome-determinative: in one twelve-month period, for example, the SEC won "all" contested cases before its ALJs, but only 61 percent of cases before federal district courts. Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, *supra*.

2. The downside risk of contesting the SEC's charges compounds the pressure to throw in the towel. Consider Mr. Jarkesy's case. The SEC slapped him with civil penalties of $300,000 and disgorgement of $684,935. *In re John Thomas Capital Mgmt. Grp. LLC*, 2020 WL 5291417, at *2 (Sept. 4, 2020). And it issued various lifetime bans, *id.*—the "'securities industry equivalent of capital punishment,'" *Saad* v. *SEC*, 873 F.3d 297, 306 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

This downside risk, coupled with the crushing costs and delays associated with litigating at the SEC, frequently makes it "economically prudent to settle" and abandon even a "meritorious defense." *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702, 1708 & n.2 (2017). Even those with obviously meritorious cases wave the white flag. *See* Vollmer, *supra*, at 4 (former SEC Deputy General Counsel admitting that "[m]any SEC cases lack merit, but the defendants settle"). In a 2016 case, for example, a defendant settled after the

SEC alleged retaliation against a whistleblower who had reported securities fraud to *a superior*, *see* SEC Press Release 16-270 (Dec. 20, 2016), 2016 WL 7367640, even though the pertinent statutory provision protects only those who provide information "to *the Commission*," 15 U.S.C. § 78u-6(a)(6) (emphasis added). Soon after (in a case between private parties), this Court unanimously held that a "plain-text reading of the statute" precluded such internal-whistleblower charges. *Digital Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 779, 782 (2018).

It is thus no wonder that when the SEC "threaten[s] administrative proceedings"—when it tells the defendants "it [is] something . . . [it is] going to do"—"they settle[ ]," Mahoney, *supra—98 percent* of the time, Luis A. Aguilar, Comm'r, SEC, A Stronger Enforcement Program to Enhance Investor Protection (Oct. 25, 2013), tinyurl.com/y2ms5843. And the SEC then "get[s] the remedies that [it] want[s]," Mahoney, *supra* (quoting then-Director of Enforcement), without needing to litigate the merits.

3. Because nearly all SEC proceedings settle, the underlying constitutional violations have been left securely in place—and there are many of those. The SEC's administrative process is in "tension" with "Article III of the Constitution," the "Due Process Clause of the Fifth Amendment," and the "Seventh Amendment right to a jury trial in civil cases." *Lorenzo* v. *SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *aff'd*, 139 S. Ct. 1094 (2019). And the circuits' interpretation of Section 78y raises a "'serious constitutional question'" of its own. *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986). Where a statutory scheme for judicial review is so "onerous and impracticable" as to "intimidate [a]

company and its officers from resorting to the courts" to resolve a colorable constitutional claim, the "result is the same as if the law . . . prohibited [a] company from seeking judicial" review at all. *Ex parte Young*, 209 U.S. 123, 147 (1908). And the Constitution requires *some* opportunity for meaningful judicial review of an alleged constitutional violation. *See*, *e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (warning of "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"). These issues warrant this Court's immediate attention and correction.

B. Only this Court can open the courthouse doors for the hundreds of Americans each year who find themselves on the SEC's home court, being squeezed to settle. The courts of appeals are marching in the wrong direction by forcing defendants to wait until the administrative proceeding has been concluded to challenge the constitutionality of the proceeding itself. And the SEC has long done its part to keep Congress out of the loop: each settlement comes with a lifetime gag order barring the defendant from "creating" (or even "permitting to be created")—*even to Congress*—so much as "an impression" that the SEC shook him down without an adequate "fact[ual]" basis. 17 C.F.R. § 202.5(e); *see* SEC Mem. in. Opp. to Mot. for Relief from J. at 23, *SEC* v. *Allaire*, No. 1:03-cv-4087 (S.D.N.Y. June 18, 2019), ECF No. 31 (explaining that defendants who have settled with the SEC may "petition appropriate government bodies" only "so long as" they do "not deny the [SEC's] allegations" (quotation marks omitted)).

* * * * *

Despite great personal cost, Mr. Jarkesy has been able to withstand the intense pressure to settle because he has been lucky enough to find success in other professions. But few SEC defendants are so fortunate. Virtually none of them have a real choice but to settle, leaving the constitutional infirmities of the SEC's one-sided process unaddressed. And this injustice is a creation of the courts—a relic of a time when judges read their own policy judgments into the white spaces of the U.S. Code. It need not continue. This Court should reaffirm that those days are gone, and the lower courts must simply apply the law as written.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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